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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JACINTO VICTOR ALVAREZ, JOSEPH  
BRODERICK, MARLENE CANO, JOSE  
CRESPO-VENEGAS, NOE  
GONZALEZ-SOTO, VICTOR LARA-  
SOTO, RACQUEL RAMCHARAN,  
GEORGE RIDLEY, MICHAEL JAMIL  
SMITH, LEOPOLDO SZURGOT, JANE  
DOE, *on behalf of themselves and those  
similarly situated,*

Plaintiffs-Petitioners,

v.

CHRISTOPHER J. LAROSE, Senior  
Warden, Otay Mesa Detention Center, *et  
al.,*

Defendants-Respondents.

Case No.: 3:20-cv-00782-DMS-AHG

**ORDER RESOLVING JOINT  
MOTION FOR DETERMINATION  
OF RULE 34 SITE INSPECTION  
DISCOVERY DISPUTE, GRANTING  
IN PART AND DENYING IN PART  
PLAINTIFFS' MOTION FOR A  
RULE 34 SITE INSPECTION**

**[ECF No. 89]**

1 Before the Court is the parties' Joint Motion for Determination of Rule 34 Site  
2 Inspection Discovery Dispute (the "Joint Motion"). ECF No. 89. For the reasons that  
3 follow, the Court **GRANTS IN PART** Petitioners' request to conduct a Rule 34 site  
4 inspection. However, the Court will impose greater restrictions on the site inspection than  
5 those requested by Petitioners. Therefore, the motion will be **DENIED IN PART**.

## 6 **I. BACKGROUND**

7 On September 1, 2020, the parties contacted the Court seeking intervention in a  
8 discovery dispute. Specifically, Petitioners ask that their correctional healthcare expert be  
9 permitted to conduct an expedited on-site inspection of the Otay Mesa Detention Center  
10 ("OMDC") pursuant to Fed. R. Civ. P. 34(a)(2), to assess OMDC's compliance with CDC  
11 guidelines designed to minimize the spread of COVID-19. ECF No. 89 at 3. Plaintiffs ask  
12 that the inspection include both a physical inspection of all areas of the OMDC facility, as  
13 well as discussions with staff and detainees in USMS custody at the OMDC. *Id.* Plaintiffs  
14 intend to use the information gleaned from such an inspection to determine whether it is  
15 appropriate to file a motion for a preliminary injunction, based on their conditions-of-  
16 confinement claims, seeking conditions reforms to bring OMDC into compliance with the  
17 CDC regulations. *Id.*

18 Respondents oppose the request on several grounds, including: (1) the District Court  
19 has twice ruled that the Prisoner Litigation Reform Act ("PLRA") deprives it of authority  
20 to issue an injunction in this action; (2) Petitioners have failed to meet the "good cause"  
21 standard for obtaining expedited discovery prior to a Rule 26(f) conference; and (3) habeas  
22 petitioners are not entitled to discovery in general, and Petitioners have failed to meet the  
23 separate "good cause" standard for allowing discovery in habeas cases. *Id.* at 13.

24 The Court held a Telephonic Discovery Conference on the dispute on  
25 September 1, 2020, and set an expedited briefing schedule for a joint motion regarding the  
26 dispute. ECF Nos. 86, 87. The Joint Motion followed on September 10, 2020. ECF No. 89.

## 27 **II. LEGAL STANDARDS**

28 The scope of permissible discovery is dictated by Rule 26 of the Federal Rules of

1 Civil Procedure, which permits parties to “obtain discovery regarding any nonprivileged  
 2 matter that is relevant to any party’s claim or defense and proportional to the needs of the  
 3 case[.]” Fed. R. Civ. P. 26(b)(1). Under Rule 34, a party may serve on any other party a  
 4 request within the scope of Rule 26(b) “to permit entry onto designated land or other  
 5 property possessed or controlled by the responding party, so that the requesting party may  
 6 inspect, measure, survey, photograph, test, or sample the property or any designated object  
 7 or operation on it.” Fed. R. Civ. P. 34(a)(2). Petitioners’ request to inspect OMDC falls  
 8 under this provision.

9 Pursuant to Rule 26(d) of the Federal Rules of Civil Procedure, a party typically may  
 10 not seek discovery prior to the parties’ Rule 26(f) conference, “except in a proceeding  
 11 exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules,  
 12 by stipulation, or by court order.” Fed. R. Civ. P. 26(d)(1).<sup>1</sup> “In the Ninth Circuit, courts  
 13 use the ‘good cause’ standard to determine whether discovery should be allowed to proceed  
 14 prior to a Rule 26(f) conference.” *Rovio Entm’t Ltd. v. Royal Plush Toys, Inc.*, 907 F. Supp.  
 15 2d 1086, 1099 (N.D. Cal. 2012). “Good cause exists ‘where the need for expedited  
 16 discovery, in consideration of the administration of justice, outweighs the prejudice to the  
 17 responding party.’” *In re Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160,  
 18 1179 (C.D. Cal. 2008) (quoting *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273,  
 19 276 (N.D. Cal. 2002)).

20 In determining whether a party has shown good cause to grant expedited discovery,  
 21 courts “commonly” consider such non-exhaustive factors as:

- 22 (1) whether a preliminary injunction is pending; (2) the breadth of the  
 23 discovery requests; (3) the purpose for requesting the expedited discovery; (4)  
 24 the burden on the defendants to comply with the requests; and (5) how far in  
 25 advance of the typical discovery process the request was made.

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26 <sup>1</sup> Habeas proceedings are exempted from initial disclosure under Rule 26(a)(1)(B)(iii),  
 27 which brings into question whether the case law addressing when “good cause” is shown  
 28 for early discovery is even applicable here, pursuant to Rule 26(d)(1). However, because  
 both parties apply and argue the typical “good cause” standard governing expedited  
 discovery, the Court will address their arguments using this standard.

1 *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1067 (C.D. Cal. 2009) (quoting  
 2 *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D.  
 3 4, 6 (D.D.C. 2006)). *See also Synopsys, Inc. v. AzurEngine Techs., Inc.*, 401 F. Supp. 3d  
 4 1068, 1076-77 (S.D. Cal. 2019) (applying the same factors).

5 Even outside the context of expedited discovery, discovery is not a matter of right  
 6 in habeas corpus cases in general. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). *See also*  
 7 *Miranda v. Nielsen*, No. CV098065PCTPGRECV, 2009 WL 10678167, at \*4 (D. Ariz.  
 8 Aug. 28, 2009). However, under Rule 6(a) of the Rules Governing 2254 Cases in the United  
 9 States District Courts (“Habeas Rules”),<sup>2</sup> a court may permit a habeas petitioner to conduct  
 10 discovery for good cause. *See Bracy*, 520 U.S. at 904, 908-909 (applying the “good cause”  
 11 standard of Rule 6(a) to determine whether to grant a habeas petitioner’s request for  
 12 discovery); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997) (citing Rule 6(a) for the  
 13 proposition that “discovery is available to habeas petitioners at the discretion of the district  
 14 court judge for good cause shown.”).

15 “[W]here specific allegations before the court show reason to believe that the  
 16 petitioner may, if the facts are fully developed, be able to demonstrate that he is confined  
 17 illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary  
 18 facilities and procedures for an adequate inquiry.” *Harris v. Nelson*, 394 U.S. 286, 300  
 19 (1969). In other words, “[a]s long as the petitioner’s claims ‘do not appear purely  
 20 speculative or without any basis in the record,’ she is ‘entitled’ to discovery under [Habeas]  
 21 Rule 6.” *Miranda*, 2009 WL 10678167, at \*4 (quoting *McDaniel v. District Court*, 127  
 22 F.3d 886, 888 (9th Cir. 1997)).

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26 <sup>2</sup> These Rules are applicable to cases brought under 28 U.S.C. § 2241 as well. *See Habeas*  
 27 *Rule 1(b)*. *See also Miranda*, 2009 WL 10678167, at \*4 (applying Rule 6(a) in a § 2241  
 28 case); *Rockett v. Lepe*, No. 1:20-CV-00945-JDP, 2020 WL 4003585, at \*2 (E.D. Cal.  
 July 15, 2020), *report and recommendation adopted*, 2020 WL 5371409 (E.D. Cal. Sept.  
 8, 2020) (same).

1           **III. DISCUSSION**

2           **A. The Court’s previous rulings do not establish that the Court lacks**  
3           **authority to issue injunctive relief to address Petitioners’ conditions of**  
4           **confinement**

5           Respondents first argue that Petitioners’ request for a Rule 34 site inspection of  
6 OMDC should be denied, because the District Court “has already ruled—on two separate  
7 occasions—that it has no authority to issue any injunction relating to the conditions of  
8 Petitioners’ confinement.” ECF No. 89 at 17. In particular, Respondents point to the  
9 Court’s May 9, 2020 Order Denying Petitioners’ Motion for Temporary Restraining Order  
10 (ECF No. 46) and the Court’s June 7, 2020 Order Denying Petitioners’ Motion for  
11 Preliminary Injunction (ECF No. 81). Based on these denials, Respondents contend the  
12 discovery sought is not “proportional to the needs of the case” under Fed. R. Civ. P.  
13 26(b)(1), because any inspection of OMDC would be “pointless” and would not “suddenly  
14 vest this Court . . . with authority to issue an injunction.” ECF No. 89 at 17-18.

15           Respondents’ characterization of the Court’s prior orders as determinations “that it  
16 has no authority to issue any injunction relating to the conditions of Petitioners’  
17 confinement” is clumsy at best and intentionally misleading at worst. The Court previously  
18 ruled that, pursuant to the PLRA at 18 U.S.C. § 3626(a)(3)(A), it lacks authority to issue a  
19 Temporary Restraining Order or Preliminary Injunction in this matter that would operate  
20 as a *prisoner release order*. See ECF No. 81 at 5-10; ECF No. 46 at 7-9.

21           Specifically, in denying Petitioners’ previous motions for a TRO and a preliminary  
22 injunction, the Court applied the following provision of the PLRA to find it lacked  
23 authority to grant the relief requested:

24           In any civil action with respect to prison conditions, no court shall enter  
25 a prisoner release order unless--

26           (i) a court has previously entered an order for less intrusive relief that  
27 has failed to remedy the deprivation of the Federal right sought to be remedied  
28 through the prisoner release order; and

              (ii) the defendant has had a reasonable amount of time to comply with  
the previous court orders.

1 18 U.S.C. § 3626(a)(3)(A).

2       Additionally, the Court noted that pursuant to §§ 3626(a)(3)(B) and (E) of the PLRA,  
3 “a prisoner release order shall be entered only by a three-judge court[.]” and even then  
4 “only if the court finds by clear and convincing evidence that (i) crowding is the primary  
5 cause of the violation of a Federal right; and (ii) no other relief will remedy the violation  
6 of the Federal right.” *See* ECF No. 46 at 8; ECF No. 81 at 10. Therefore, because Petitioners  
7 were requesting release as the remedy for their conditions-of-confinement claim, the Court  
8 found that “[t]he substance of their claim and form of relief fall squarely within the purview  
9 of a ‘prisoner release order’ under the PLRA” and that the Court could thus not grant the  
10 requested relief. ECF No. 46 at 9. *See also* ECF No. 81 at 10 (applying the same provisions  
11 to find that the Court could not order the requested relief of “impos[ing] a reduction of the  
12 prison population at OMDC as the first step in addressing the facility’s COVID-19  
13 outbreak . . . without first following the PLRA’s requirements.”).

14       However, the Court made no broad ruling that the PLRA divests the Court of  
15 authority to grant any kind of injunction in this matter, much less that it lacks authority to  
16 issue an injunction “relating to the conditions of Petitioners’ confinement,” as Respondents  
17 argue. The substance of Petitioners’ claim (challenging their conditions of confinement)  
18 was only one piece of the Court’s rationale in its prior rulings; the relief requested (a  
19 prisoner release order) was the other.

20       But Petitioners’ prayer for relief extends beyond their request for release—they also  
21 seek relief in the form of a plan outlining “[s]pecific mitigation efforts, in line with CDC  
22 guidelines to prevent, to the degree possible, contraction of COVID-19 by all Class  
23 Members not immediately released” as well as a declaratory judgment “that the conditions  
24 under which Defendants have confined Plaintiffs and OMDC class members violate the  
25 Due Process Clause of the Fifth Amendment with respect to both the Pretrial and Post-  
26 Conviction Classes, and the Eighth Amendment’s prohibition against cruel and unusual  
27 punishment with respect to the Post-Conviction Class[.]” ECF No. 1 at 39-40. Therefore,  
28 Petitioners are correct in stating that their petition seeks both habeas relief in the form of

1 release of the medically vulnerable, “as well as [] reasonable mitigation efforts—*i.e.*,  
 2 conditions reforms—for those left behind in light of the COVID-19 pandemic.” ECF No.  
 3 89 at 4. The Court has not issued any ruling on its authority to grant injunctive relief to  
 4 address conditions of confinement by way of less intrusive relief than a release order.  
 5 Moreover, the PLRA specifically affirms the Court’s authority to issue such relief:

6           In any civil action with respect to prison conditions, to the extent  
 7 otherwise authorized by law, the court may enter a temporary restraining order  
 8 or an order for preliminary injunctive relief. Preliminary injunctive relief must  
 9 be narrowly drawn, extend no further than necessary to correct the harm the  
 10 court finds requires preliminary relief, and be the least intrusive means  
 11 necessary to correct that harm. . . .

12 18 U.S.C. § 3626(a)(2).

13           Although a § 1983 or *Bivens* action is typically the appropriate vehicle for  
 14 incarcerated plaintiffs to seek relief addressing conditions of confinement, *see Badea v.*  
 15 *Cox*, 931 F.2d 573, 574 (9th Cir. 1991); *Alcala v. Rios*, 434 F. App’x 668, 669-70 (9th Cir.  
 16 2011), the District Court has already ruled in this case that “Plaintiffs may bring either kind  
 17 of challenge—‘fact or duration of confinement’ or conditions of confinement—in a habeas  
 18 proceeding.” ECF No. 81 at 6 n.1 (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862-63 (2017)  
 19 and *Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016)). *See also* ECF No. 46 at 5 (also  
 20 quoting *Ziglar*, 137 S. Ct. at 1862-63 in the Order Denying Plaintiffs’ Motion for  
 21 Temporary Restraining Order, for the proposition that the Supreme Court left open the  
 22 question whether detainees “might be able to challenge their confinement conditions via a  
 23 petition for writ of habeas corpus.”). *See also Durel B. v. Decker*, No. CV 20-3430 (KM),  
 24 2020 WL 1922140, at \*5 (D.N.J. Apr. 21, 2020) (“Federal courts, however, have seemingly  
 25 condoned challenges to conditions of confinement raised through a habeas petition.”)  
 26 (collecting cases).

27           Indeed, in its rulings on both motions, the District Court signaled that injunctive  
 28 relief aimed at changing the conditions of Petitioners’ confinement (rather than granting  
 release based on those conditions) would be the only kind of injunctive relief it *could* grant.

1 *See, e.g.*, ECF No. 46 at 7-8 (disagreeing with Petitioners’ assertion “that there are no set  
2 of conditions at OMDC that would be constitutionally sufficient under the Fifth  
3 Amendment[,]” but noting its lack of authority to issue any order “that has the purpose or  
4 effect of reducing or limiting the prison population, or that directs the release from [] a  
5 prison” pursuant to the PLRA); ECF No. 81 at 8-9 (emphasizing that the specific remedy  
6 Petitioners sought in their preliminary injunction motion was “the *release* of a *large*  
7 number of prisoners[,]” as barred by the PLRA, and thus distinguishing the relief sought  
8 here from relief granted in other cases relied on by Petitioners); *id.* at 10 (explaining that  
9 the PLRA limitations “ensure that the ‘last resort remedy’ of a population limit is not  
10 imposed ‘as a first step’” and noting that Petitioners “are requesting the Court do just that—  
11 impose a reduction of the prison population at OMDC as the first step in addressing the  
12 facility’s COVID-19 outbreak. The Court, however, ***cannot order such relief without first***  
13 ***following the PLRA’s requirements.***”) (emphasis added) (citation omitted). As noted  
14 above, one such requirement of the PLRA is that, before a prisoner release order can be  
15 entered by a three-judge court, a court must have “previously entered an order for less  
16 intrusive relief that has failed to remedy the deprivation of the Federal right sought to be  
17 remedied.” 18 U.S.C. § 3626(a)(3)(A)(i).

18 Thus, the Court’s previous denials of Petitioners’ motions for a temporary  
19 restraining order and preliminary injunction do not bear out Respondents’ argument that  
20 any future motion for injunctive relief relating to the conditions of Petitioners’  
21 confinement—but ***not*** seeking release as a remedy—would be doomed to fail. *See, e.g.*,  
22 *Wilson v. Ponce*, No. CV204451MWFMRWX, 2020 WL 5118066, at \*2-\*5 (C.D. Cal.  
23 July 14, 2020) (differentiating habeas petitioners’ request for relief involving maximizing  
24 transfers to home confinement, which the court found was barred by the PLRA as a prisoner  
25 release order, from the petitioners’ request for “an order requiring improvement of  
26 conditions” at their facility of confinement, because “[a]n order requiring Respondents to  
27 improve the conditions of [the facility] to mitigate the threat of COVID-19 does not have  
28 the purpose or effect of reducing or limiting the prison population or direct the release of



1 prisoners from prison.”). If anything, the Court’s prior orders expressly leave open the door  
2 for Petitioners to request less intrusive relief such as “a motion for a preliminary injunction  
3 seeking specific conditions reforms necessary to bring [OMDC] into compliance with CDC  
4 guidelines and constitutional guarantees,” as Petitioners assert they are considering in the  
5 Joint Motion. ECF No. 89 at 3. *See* ECF No. 81 at 12 (explaining in the order denying  
6 Petitioners’ preliminary injunction motion that “[i]t does not logically follow from the  
7 Court’s conclusion, however, that all is well. Plaintiffs’ allegations and declarations raise  
8 important concerns that must be continually addressed by Defendants” and quoting Justice  
9 Sotomayor’s recent observation in *Valentine v. Collier*, 140 S. Ct. 1598, 1601 (2020)  
10 (mem.) (joined by Ginsburg, J.) that “. . . a society’s worth can be judged by taking stock  
11 of its prisons. That is all the truer in this pandemic, where inmates everywhere have been  
12 rendered vulnerable and often powerless to protect themselves from harm.”).  
13 Consequently, the Court finds Respondents’ first argument for denying the site inspection  
14 unavailing.

15 **B. Petitioners have met the “good cause” standard for expedited**  
16 **discovery**

17 Respondents next argue that Petitioners have not met the “good cause” standard for  
18 expedited discovery in general. Under that standard, the Court must consider whether the  
19 need for expedited discovery, in consideration of the administration of justice, outweighs  
20 the prejudice to the responding party. *Countrywide*, 542 F. Supp. 2d at 1179; *Semitool*, 208  
21 F.R.D. at 276.

22 The Court finds the standard is met here. Petitioners have provided evidence, in the  
23 form of declarations from OMDC detainees, indicating that OMDC is not complying with  
24 CDC guidelines regarding COVID-19. *See* ECF Nos. 90-2, 90-3, 90-4. For example,  
25 Petitioners provide a Declaration from OMDC detainee Danielle Castagne, stating that she  
26 tested positive for COVID-19 on July 10, 2020 upon intake and again on July 16, 2020,  
27  
28

1 but that she was moved from “medical”<sup>3</sup> to administrative segregation after only six days,  
 2 and that she had a cellmate in administrative segregation who did not have a positive test.  
 3 ECF No. 90-2, Castagne Decl. ¶¶ 2-3, 5-8. If true, OMDC’s practice is not in compliance  
 4 with CDC guidelines advising 10 days of medical isolation (among other requirements)  
 5 before a person meets the standard for recovery. Moreover, even when in “medical,” Ms.  
 6 Castagne was given recreational time in the same yard as two other women in “medical”  
 7 who were quarantining, but who did not have a positive test, indicating that OMDC may  
 8 be cohorting detainees who are COVID-19 positive with those who are merely quarantined  
 9 (but without positive tests), which also goes against CDC guidelines. *Id.* ¶ 6; *see also* ECF  
 10 No. 90-10 at 4 (recommending medical isolation of individuals with confirmed cases to  
 11 prevent contact with others); 6 (recommending that detention facilities ensure *separate*  
 12 physical locations to isolate individuals with confirmed COVID-19, individuals with  
 13 suspected COVID-19, and quarantined individuals who had close contacts with those with  
 14 confirmed or suspected COVID-19). Ms. Castagne further asserts that, after her second  
 15 positive test on July 16, she was moved back to “medical” for only three days before being  
 16 returned to the general population in B-pod. Castagne Decl. ¶ 10. Again, if true, OMDC  
 17 would be out of compliance with CDC guidelines.

18 Respondents have also provided declarations from Chief Deputy U.S. Marshal Keith  
 19 Johnson and OMDC Warden C. LaRose, detailing the measures that OMDC has taken to  
 20 reduce the spread of COVID-19. ECF Nos. 90-7 (“Johnson Decl.”), 90-11 (“LaRose  
 21 Decl.”). In many instances, these declarations conflict with those provided by Petitioners.  
 22 For example, Mr. Johnson states that detainees with positive COVID-19 tests are kept in  
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24  
 25 <sup>3</sup> CDC guidelines recommend medical isolation of any person with a positive COVID-19  
 26 test in a detention facility. Medical isolation entails isolation from all other detainees. It is  
 27 unclear from Ms. Castagne’s Declaration whether “medical” refers to medical isolation,  
 28 or whether she was held with other detainees while in “medical.” And as discussed in  
 more detail *infra*, the Declaration of U.S. Chief Deputy Marshal Johnson provided by  
 Respondents indicates that placement of inmates who test positive for COVID-19 in the  
 medical unit does not entail isolation from other inmates without positive tests.

1 the medical unit and isolated from the general population until they meet certain standards  
 2 for recovery, including that at least 14 days have passed since the first positive test. ECF  
 3 No. 90-11, Johnson Decl. ¶ 6. Mr. LaRose also states that OMDC maintains separate  
 4 housing for detainees suspected of COVID-19 infection and those who are confirmed  
 5 positive. LaRose Decl. ¶ 139. These statements are not consistent with Ms. Castagne’s  
 6 description of her experience.<sup>4</sup>

7 Respondents contend that the declarations of the OMDC detainees should be  
 8 disregarded by the Court as “vague anecdotal evidence,” and emphasize that the detainees  
 9 “face serious federal charges[,]” in contrast to the detailed declarations they provided from  
 10

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11  
 12 <sup>4</sup> These examples of conflicts between the Petitioners’ declarations and Respondents’  
 13 declarations are not exhaustive; there are numerous other examples of conflicts between  
 14 the protocols outlined in Respondents’ declarations and the reports of the inmate declarants  
 15 regarding which protocols are adhered to. *Compare, e.g.*, ECF No. 90-3, Declaration of  
 16 Billie Jo Reynolds ¶ 6 (stating that she was held in the same rooms as people quarantining  
 17 for COVID-19 when placed in the medical unit for reasons unrelated to COVID-19); ¶ 8  
 18 (stating that everyone in administrative segregation had to share soap, and that many people  
 19 placed in administrative segregation were not there for disciplinary issues but were instead  
 20 quarantining); ¶ 11 (stating that, while working as a cleaner, she has had to use dirty rags  
 21 to clean the common spaces, and that she was only given disposable, single-use masks  
 22 “about three times since I’ve been here even though I’ve asked for additional masks several  
 23 times”); *and* ECF No. 90-4, Declaration of Joseph Broderick ¶ 4 (stating that at the  
 24 mandatory weekly town hall meetings, “everyone sits together at the tables in the dayroom  
 25 and there is no social distancing possible”); ¶ 11 (stating that staff does not always give  
 26 him a new mask when requested) *with* ECF No. 90-7, LaRose Decl. ¶ 49 (stating that  
 27 COVID-19 positive and exposed detainees may not intermix with general population  
 28 detainees that have not been tested); ¶¶ 30-31 (stating that OMDC’s COVID-19 Response  
 protocols “meet or exceed” ICE’s Pandemic Response Requirements, which require  
 facilities to, *inter alia*, “[e]stablish practices to monitor, cohort, quarantine, and isolate sick  
 detainees from well detainees”); ¶ 72 (stating that replacement masks are provided upon  
 request); ¶ 83 (stating that detainees are not required to forgo social distancing  
 recommendations to attend town hall meetings); ¶¶ 102-103 (stating that any detainee may  
 readily obtain personal bar soap); ¶¶ 97 – 109 (describing “enhanced sanitation practices”  
 in the facility, including deep cleaning processes with extra disinfection performed on  
 “high touch” areas, and the provision of disinfectants to detainees to clean their living  
 areas).

1 their representatives. ECF No. 89 at 18-19. Respondents detail Petitioners’ criminal  
2 charges in a footnote. *Id.* at 18 n.53. It is unclear how the nature of the charges faced by  
3 Petitioners is at all relevant to the issue at hand, or why Respondents would provide this  
4 information other than to suggest that Petitioners’ firsthand accounts of their conditions of  
5 confinement cannot be credible because they are accused criminals. The Court does not  
6 agree, and declines to give Petitioners’ declarations any less weight for that reason. Rather,  
7 the Court finds persuasive the reasoning of another district court faced with a similar  
8 request for a Rule 34 site inspection in a case involving a constitutional challenge to the  
9 conditions of confinement at a detention facility during the COVID-19 pandemic. *See*  
10 *Chunn v. Edge*, No. 20-CV-1590 (RPK), 2020 WL 1872523 (E.D.N.Y. Apr. 15, 2020).  
11 There, the respondent suggested “that a site inspection is not necessary because two of the  
12 named petitioners are housed at the [detention facility] and can therefore describe the  
13 conditions at the facility to their expert.” *Id.* at \*2. However, the Court found that “firsthand  
14 observation of conditions” at the facility “is likely to yield information that could not be  
15 readily obtained through secondhand accounts[,]” and thus concluded that a site inspection  
16 was appropriate. *Id.* This reasoning applies with extra force here, where Respondents  
17 contend that the accounts of the inmates currently housed at OMDC should be disregarded  
18 altogether.

19 Moreover, even if the Court credited *only* Respondents’ declarations, they show a  
20 departure from CDC guidelines as well. As an example, the CDC guidelines require  
21 facilities to “[e]nsure that **separate** physical locations (dedicated housing areas and  
22 bathrooms) have been identified to 1) isolate individuals with confirmed COVID-19  
23 (individually or cohorted), 2) isolate individuals with suspected COVID-19 (individually  
24 – do not cohort), and 3) quarantine close contacts of those with confirmed or suspected  
25 COVID-19 (ideally individually; cohorted if necessary).” ECF No. 90-10 at 6. But Mr.  
26 Johnson’s declaration indicates only that individuals with confirmed COVID-19 are  
27 “isolated from the *general population*” in the medical unit, not that they are isolated from  
28 individuals with suspected COVID-19 or quarantined individuals who are close contacts

1 of those with confirmed or suspected COVID-19. Johnson Decl. ¶ 6 (emphasis added).  
2 Mr. LaRose’s declaration similarly states that “COVID-19 positive and exposed detainees  
3 may participate in recreation activities but may not intermix with general population  
4 detainees that have not been tested[,]” LaRose Decl. ¶ 49, which is at odds with CDC  
5 guidelines directing that facilities “should make every possible effort to individually  
6 quarantine cases of confirmed COVID-19, and close contacts of individuals with  
7 confirmed, or suspected COVID-19” and stating that cohorting multiple quarantined closed  
8 contacts “should only be practiced if there are no other available options.” ECF No. 90-10  
9 at 20. Additionally, it is unclear from Respondents’ Declarations whether all new inmates  
10 who are automatically quarantined for 14 days upon intake are housed with everyone else  
11 in the medical unit, regardless of whether they are in the medical unit due to a positive test  
12 or due to exposure, which would also violate CDC guidelines. *See id.* (advising detention  
13 facilities to avoid mixing individuals quarantined due to exposure with those undergoing  
14 routine intake quarantine).

15 As a third example, CDC guidelines dictate that there should be signs throughout the  
16 facility, as well as verbal communication on a regular basis to all persons in the facility, to  
17 “[w]ear face coverings, unless PPE is indicated.” *Id.* at 7. “[W]earing cloth face coverings  
18 (if able), and social distancing are critical in preventing further transmission.” *Id.* at 9.  
19 Therefore, facilities should “[e]ncourage all staff and incarcerated/detained persons to wear  
20 a cloth face covering as much as safely possible. . . . Because many individuals with  
21 COVID-19 do not have symptoms, it is important for everyone to wear cloth face coverings  
22 in order to protect each other[.]” *Id.* at 10. Further, CDC guidelines regarding management  
23 strategies for staff state that staff should be provided “clear information [] about the  
24 presence of COVID-19 within the facility, and the need to enforce use of **universal cloth**  
25 **face coverings** (unless contraindicated)[.]” *Id.* at 22. However, Respondents’ own photos  
26 from within OMDC show that the signage regarding cloth face coverings for both staff and  
27 inmates do not encourage mask use. Instead, the signs directed at inmates state: “You will  
28 soon be provided with a cloth or surgical paper face mask **which you may voluntarily wear**

1 inside the facility” and “*You have the option* to immediately begin wearing a cloth or paper  
 2 mask provided to you by CoreCivic.” ECF No. 90-9 at 17 (emphasis added). Similarly, the  
 3 signs directed at staff state: “You will soon be provided with a cloth or surgical paper face  
 4 mask *which you may voluntarily use* during the course of your work duties for CoreCivic.”  
 5 *Id.* at 29. In contrast to signage actively encouraging, e.g., hand-washing and covering  
 6 one’s mouth and nose to cough, nothing on the signage regarding masks *encourages*  
 7 anyone to wear a mask or face covering or explains the importance of wearing them.  
 8 *Compare id.* at 17, 29 with *id.* at 33-35.<sup>5</sup> Indeed, Mr. LaRose confirms that use of masks  
 9 by OMDC staff is only required “if working in the protective cohort or quarantine pods.”  
 10 ECF No. 90-7 ¶ 69.

11 As a fourth example, Mr. Johnson’s declaration outlines the “standards for recovery”  
 12 applied to inmates with positive COVID-19 tests, which include: (1) at least 3 days have  
 13 passed since the resolution of fever without the use of fever-reducing medications and  
 14 improvement in respiratory symptoms; (2) at least 7 days have passed since symptoms first  
 15 appeared; *and* (3) a minimum of 14 days have passed since the first specimen was collected  
 16 resulting in a positive test. Johnson Decl. ¶ 6. However, current CDC guidelines direct that  
 17 individuals with positive tests may discontinue medical isolation when (1) at least 10 days  
 18

19  
 20 <sup>5</sup> Both signs provide “answers to common questions regarding use of these masks[,]” but  
 21 the questions involve how to wear the mask, whether it is permitted to keep the mask on at  
 22 all times, what to do if the mask is damaged, and how long one can continue to wear a  
 23 mask (the answer to the last question notes that “permission [to wear a mask] may be  
 24 revoked at the discretion of CoreCivic if necessary in order to comply with applicable state  
 25 or federal orders, partner directives, to ensure the orderly operation of CoreCivic  
 26 institutions, or to promote the health and safety of inmates and staff.”). ECF No. 90-9 at  
 27 17, 29. Indeed, one of the “common questions” on the sign directed at inmates is “When  
 28 Shouldn’t I Wear a Mask?” and the answer provided is: “Don’t wear a mask if it impairs  
 your ability to breathe, fogs up your eye glasses, or impairs your vision.” *Id.* at 17.  
 However, CDC guidelines state that masks are only contraindicated for anyone who has  
 trouble breathing, or is unconscious, incapacitated, younger than 2 years of age or  
 otherwise unable to remove the mask without assistance. *See, e.g.*, ECF No. 90-10 at 4, 11,  
 17, 21. Not one of the common questions or answers on either sign involves the benefits  
 of wearing a mask, let alone encourages mask use.

1 (not 7) have passed since symptom onset; (2) at least 24 hours have passed since resolution  
2 of fever without the use of fever-reducing medications; and (3) other symptoms (not only  
3 respiratory symptoms) have improved. *See* Discontinuation of Isolation for Persons with  
4 COVID-19 Not in Healthcare Settings, Centers for Disease Control and Prevention (July  
5 20, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-](https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html)  
6 [patients.html](https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html) (cross-referenced in the CDC’s Interim Guidance on Management of  
7 Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, attached  
8 as Ex. 2 to the LaRose Decl., ECF No. 90-10 at 17).

9 In sum, the conflicting declarations provided by Petitioners and Respondents  
10 establish good cause for a site inspection to obtain objective evidence of the conditions of  
11 confinement at the OMDC. *See Chunn*, 2020 WL 1872523, at \*1 (“Visiting the [detention  
12 facility] is the best way for petitioners’ expert to gain an accurate understanding of the  
13 conditions there. And petitioners’ expert can be expected to produce a report and testimony  
14 that is more useful to the Court if the expert observes conditions at the facility firsthand.”).  
15 And, even if the Court disregarded Petitioners’ declarations as Respondents urge, the  
16 declarations they provide also give rise to questions about OMDC’s compliance with CDC  
17 guidelines sufficient to warrant a site inspection.

18 In reaching this conclusion, the Court has first considered whether Petitioners’ need  
19 for the requested discovery outweighs the prejudice to the responding party. *Countrywide*,  
20 542 F. Supp. 2d at 1179; *Semitool*, 208 F.R.D. at 276. Respondents contend the request is  
21 burdensome because “[g]iving an undefined number of people unrestricted access to the  
22 entire facility for an unlimited time would undoubtedly disrupt Respondents’ mission and  
23 operations.” ECF No. 89 at 20. However, this characterization of Petitioners’ request is  
24 simply inaccurate. Petitioners’ Proposed Order states: “The inspection will start at a time  
25 agreed to by the parties and will last for five hours from when the participants have passed  
26 through security, with additional time added for any delays.” ECF No. 90-5 ¶ 1. Although  
27 it is true that the proposed order builds in possible additional time to account for “delays,”  
28 it is clear that Petitioners are generally requesting a five-hour inspection, not one that is

1 “unlimited” in time. The Court also rejects Respondents’ contention that Petitioners ask  
2 for access to OMDC by “an undefined number of people.” Petitioners specifically ask for  
3 access to the facility by (1) a correctional healthcare expert to be selected by Petitioners,  
4 (2) a Spanish-speaking interpreter provided by Petitioners, and (3) a minimal number of  
5 other personnel necessary to guide Petitioners’ expert through the facility. *Id.* ¶ 2.  
6 Presumably, the third category of persons to attend the inspection would include only  
7 persons *selected by Respondents* for the purpose of guiding Petitioners’ expert and  
8 interpreter through the facility. Therefore, to the extent the request involves access by “an  
9 undefined number of people,” the number is only undefined to the extent that Petitioners  
10 did not ask the Court to impose a specific limit on the number of people that Respondents  
11 may select from among their personnel to guide Petitioners’ expert through OMDC.  
12 Petitioners only ask for access by two authorized individuals that they have selected.

13 Further, Respondents do not explain how the requested 5-hour inspection would  
14 “disrupt [their] mission and operations,” and the Court agrees with Petitioners that the  
15 requested inspection is no more burdensome than the standard contract compliance  
16 inspections and monitoring conducted by the USMS, the unannounced USMS inspections  
17 that OMDC is already subject to, or the San Diego County Department of Environmental  
18 Health’s inspection of the OMDC that took place on April 21, 2020, including an  
19 evaluation of social distancing and sanitation protocols and health and hygiene practices.  
20 *See* ECF No. 71-29, Declaration of Chief Deputy United States Marshal Keith Johnson  
21 ¶ 4; ECF No. 90-7, LaRose Decl. ¶ 121. Respondents do not address how or why the  
22 requested inspection, which is proposed to take place “on a mutually agreed date” and to  
23 “start at a time agreed to by the parties[.]” would be any more likely to disrupt  
24 Respondents’ mission and operations than these other inspections, particularly those that  
25 are unannounced. Under such circumstances, the Court cannot find that, in consideration  
26 of the administration of justice, the asserted burden on Respondents outweighs the need for  
27 the requested discovery. *Semitool*, 208 F.R.D. at 276. *See also Chunn*, 2020 WL 1872523,  
28 at \*1 (explaining that the respondent facility failed to show that an inspection would be



1 burdensome where “site inspections have been conducted at the [facility] on at least several  
2 occasions in recent years, without any evident disruption of operations” and where  
3 “respondent has not identified aspects of the facility’s COVID-19 protocols that make an  
4 inspection impracticable.”).

5 Respondents also argue that they would be “burdened with the difficult task of  
6 safeguarding the inspection team from the inmates, and of trying to ensure that the  
7 inspectors themselves do not re-introduce COVID-19 into the housing units.” ECF No. 89  
8 at 20. Notably, Petitioners do propose that all persons involved in the inspection “shall be  
9 provided with or permitted to wear their own full personal protective equipment to safely  
10 enable the inspection.” ECF No. 90-5 ¶ 5. Nonetheless, the Court agrees with Respondents  
11 that additional safeguards are necessary, and will address that issue further in its discussion  
12 below regarding the scope of the proposed inspection.

13 As noted above, the non-exhaustive list of factors commonly applied by courts when  
14 evaluating whether to grant early discovery are: (1) whether a preliminary injunction is  
15 pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the  
16 expedited discovery; (4) the burden on the defendants to comply with the requests; and  
17 (5) how far in advance of the typical discovery process the request was made. *Am.*  
18 *LegalNet*, 673 F. Supp. 2d at 1067. The Court’s analysis has thus far touched on the third  
19 and fourth factors, and finds they weigh in favor of Petitioners for the reasons already  
20 explained. The Court will now address the first factor. The second factor will be discussed  
21 in greater detail in Section III.D *infra*. As for the third factor—how far in advance of the  
22 typical discovery process the request was made—the Court finds it is not applicable here,  
23 because discovery is not typically permitted as a matter of right in any habeas case. The  
24 Court will thus also discuss the standard for allowing discovery in habeas cases separately  
25 in Section III.C *infra*.

26 Here, Petitioners assert that based on the information obtained through a Rule 34 site  
27 inspection, they “will determine whether it is appropriate to file a motion for a preliminary  
28 injunction seeking specific conditions reforms necessary to bring Otay Mesa into

1 compliance with CDC guidelines and constitutional guarantees, or seek other appropriate  
2 relief from this Court.” ECF No. 89 at 3. Although there is not currently a preliminary  
3 injunction motion pending, the Court agrees with the authority relied on by Petitioners that  
4 “expedited discovery may be justified to allow a plaintiff to determine whether to seek an  
5 early injunction.” *NobelBiz, Inc. v. Wesson*, No. 14CV0832 W JLB, 2014 WL 1588715, at  
6 \*1 (S.D. Cal. Apr. 18, 2014) (citing *Interserve, Inc. v. Fusion Garage PTE, Ltd.*, 2010 WL  
7 143665, at \*2 (N.D. Cal. 2010) (“Expedited discovery will allow plaintiff to determine  
8 whether to seek an early injunction”). *See also Bona Fide Conglomerate, Inc. v.*  
9 *SourceAmerica*, No. 14-CV-0751-GPC (DHB), 2014 WL 12515242, at \*2 (S.D. Cal. Nov.  
10 7, 2014) (finding this factor weighed in favor of the party seeking expedited discovery,  
11 even though there was not a motion for preliminary injunction pending, because the  
12 requesting party “indicates that it may seek an injunction once it has an opportunity to  
13 review” the discovery, and therefore the requested discovery was “relevant to whether an  
14 injunction should be sought.”).

15 In *NobelBiz*, this court found expedited discovery was justified in part because  
16 “expedited discovery would allow the Court to address any request for preliminary  
17 injunctive relief at the outset of the case, thereby providing a measure of clarity to the  
18 parties early in the proceeding and facilitating effective case management[,]” but limited  
19 the requested discovery to ensure it was appropriately restrained in breadth and scope.  
20 2014 WL 1588715, at \*2. Despite the different procedural posture of the present case, the  
21 Court finds the same reasoning persuasive here. Although Petitioners have already tried  
22 and failed twice to obtain preliminary relief at the outset of the case, as explained in detail  
23 above, Petitioners have not yet tried their hand at seeking injunctive relief related to their  
24 claims seeking a plan that outlines “[s]pecific mitigation efforts, in line with CDC  
25 guidelines to prevent, to the degree possible, contraction of COVID-19 by all Class  
26 Members not immediately released” as well as a declaratory judgment that the conditions  
27 of Petitioners’ confinement violate the Fifth and Eighth Amendments. ECF No. 1 at 39-40.  
28 Petitioners explain that the expert inspection will aid them in determining whether to seek

1 an early injunction regarding potential conditions reforms at OMDC, or, instead, whether  
2 to forgo seeking a preliminary injunction altogether. ECF No. 89 at 8-9. The evidence  
3 before the Court produced by both sides is sufficient to establish the need for a limited Rule  
4 34 site inspection to develop the record further in relation to these claims. And, if the expert  
5 inspection establishes that the conditions at the OMDC are constitutionally sufficient, it  
6 will have effectively “provid[ed] a measure of clarity to the parties” and saved both sides  
7 time and resources that might otherwise be wasted on a preliminary injunction motion  
8 directed at conditions reforms that are unnecessary, thus facilitating effective case  
9 management. *NobelBiz*, 2014 WL 1588715, at \*2. *See also Chunn*, 2020 WL 187523, at \*1  
10 (finding that an expert’s report and testimony based on a firsthand site inspection is the  
11 “best way” to gain an accurate understanding of the site conditions, and “more useful to  
12 the Court” than secondhand accounts).

13 Therefore, the Court finds that any burden on Respondents is outweighed by the  
14 need for objective discovery regarding the conditions of confinement at OMDC, for the  
15 purpose of gathering evidence in support of a potential motion for injunctive relief seeking  
16 conditions reforms.<sup>6</sup> Consequently, Respondents have shown good cause for expedited  
17

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18  
19 <sup>6</sup> The currently low number of known positive COVID-19 cases at OMDC does not alter  
20 the Court’s analysis. The CDC guidelines governing detention facilities are intended to be  
21 preventative measures, and other courts have found that merely putting pretrial detainees  
22 *at risk of* COVID-19 infection by failing to implement CDC guidelines amounts to  
23 punishment without due process in violation of the Constitution (at least with respect to  
24 medically vulnerable detainees). *See, e.g., Cristian A.R. v. Decker*, No. CV 20-3600, \_\_\_ F.  
25 Supp. 3d \_\_\_, 2020 WL 2092616, at \*12 (D.N.J. Apr. 12, 2020) (“By failing to implement  
26 the CDC’s instructions for the most vulnerable individuals, and by detaining those persons  
27 in a jail setting during a rapidly accelerating COVID-19 pandemic without providing them  
28 with adequate means to follow hygiene and other health protocols, Respondents have  
placed Petitioners at a *substantially enhanced risk* for severe illness or death. . . .  
Accordingly, the Court is satisfied Petitioners have demonstrated that Respondents’  
conduct amounts to punishment under the Due Process Clause.”) (emphasis added); *Durel*,  
2020 WL 1922140, at \*8 (. . . the circumstances presented here amount to punishment.  
While Respondents have undertaken significant measures to try and prevent COVID-19  
from further spreading throughout the facility, those measures appear insufficient to protect

1 discovery.

2 **C. Petitioners have met the separate “good cause” standard for obtaining**  
 3 **discovery in a habeas case**

4 Under Rule 6(a) of the Habeas Rules, a district court, at its discretion, may permit a  
 5 habeas petitioner to conduct discovery for “good cause.” *See Bracy*, 520 U.S. at 904, 908-  
 6 909; *Jones*, 114 F.3d at 1009. Although Respondents correctly note that courts should not  
 7 permit habeas petitioners to use discovery “for fishing expeditions to investigate mere  
 8 speculation[,]” *Calderon v. U.S. Dist. Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1106  
 9 (9th Cir. 1996), the good cause standard is met if Petitioners’ claims do not appear purely  
 10 speculative or without any basis in the record. *Miranda*, 2009 WL 10678167, at \*4.

11 Respondents’ arguments that the Rule 34 site inspection is just such a fishing  
 12 expedition is unavailing. Again, the anticipated preliminary injunction motion at hand  
 13 involves Petitioners’ claims seeking conditions reforms, not those seeking a prisoner  
 14 release order. To oppose the request, Respondents rely in part on case law concerning  
 15

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16  
 17 Petitioner whose allegedly compromised immune system puts him at greater risk of severe  
 18 illness if he were to contract COVID-19. . . . Petitioner alleges an inability to adhere CDC  
 19 guidance on how to protect himself from contracting COVID-19”); *Thakker v. Doll*, No.  
 20 1:20-CV-480, 2020 WL 1671563, at \*5, \*8 (M.D. Pa. Mar. 31, 2020) (explaining that “the  
 21 nature of ICE detention facilities makes them uniquely vulnerable to the rapid spread of  
 22 highly contagious diseases like COVID-10[,]” noting that two medical experts for DHS  
 23 warned Congress that the current ICE detention environment is a “tinderbox[,]” and  
 24 discussing “high-risk conditions” that could lead to “disastrous” consequences “in the case  
 25 of a COVID-19 outbreak[,]” ultimately leading to the conclusion that, considering “the  
 26 grave consequences **that will result from an outbreak of COVID-19**, particularly to the  
 27 high-risk Petitioners in this case, we cannot countenance physical detention in such tightly-  
 28 confined, unhygienic spaces.”) (emphasis added). *Cf. United States v. Stephens*, 447 F.  
 Supp. 3d 63, 65 (S.D.N.Y. 2020) (reconsidering a defendant’s bail conditions in part  
 because “[a]lthough there is not yet a known outbreak among the jail and prison  
 populations, inmates may be at a heightened risk of contracting COVID-19 should an  
 outbreak develop.”). Again, the undersigned expresses no opinion on the merits of  
 Petitioners’ conditions-of-confinement claims, but they do not necessarily hinge on  
 whether there is a **current** COVID-19 outbreak at OMDC.

1 criminal defendants seeking discovery under Federal Rule of Criminal Procedure  
2 16(a)(1)(C) to argue that, to obtain discovery, “a defendant must present facts which would  
3 tend to show that the Government is in possession of information helpful to the defense.”  
4 ECF No. 89 at 21 (quoting *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990)).  
5 However, Rule 16 of the Federal Rules of Criminal Procedure is clearly inapposite in a  
6 habeas case, in which Rule 6(a) (and the related case law explaining what constitutes “good  
7 cause” under Rule 6(a)) governs the Court’s analysis.

8 The Court has already explained in detail why the declarations provided by  
9 Petitioners (as well as other evidence supplied by Respondents) are sufficient to establish  
10 that Petitioners “may, if the facts are fully developed, be able to demonstrate  
11 . . . that [they are] entitled to relief[,]” as necessary to show good cause for discovery in a  
12 habeas case. *Harris*, 394 U.S. at 300. Both sides have produced declarations that tend to  
13 show OMDC may not be acting in compliance with the relevant CDC guidelines regarding  
14 how to respond to the COVID-19 crisis in detention facilities. It is not for the undersigned  
15 to evaluate the merits of the case; however, the bar for permitting discovery in a habeas  
16 case is low. Regardless of whether such potential deviations from CDC guidelines rise to  
17 the level of constitutional violations, Petitioners have shown that their conditions-of-  
18 confinement claims (and related remedy of conditions reforms) are not purely speculative,  
19 and have some basis in the record. Accordingly, the good cause standard for discovery in  
20 habeas cases is met, and Petitioners’ request for expedited discovery in the form of a  
21 Rule 34 site inspection of OMDC is **GRANTED**.

22 **D. Appropriate scope of Petitioners’ requested on-site inspection**

23 The breadth of the expedited discovery Petitioners request is relatively narrow. A  
24 Rule 34 site inspection of OMDC is directly related to Petitioners’ claims for relief  
25 unrelated to their release request—their conditions reforms claims—on which they are  
26 considering seeking injunctive relief. Petitioners seek only a five-hour site inspection of  
27 OMDC to obtain information regarding whether the conditions of the USMS detainees’  
28 confinement are consistent with CDC guidelines and the Constitution. However, the Court

1 agrees with Respondents that the scope of the site inspection should be narrowed further  
2 in some respects, to tailor it more carefully to the prospective relief at issue and to ensure  
3 the safety of the OMDC inmates.

4 First, the Court agrees that the Proposed Order does not sufficiently ensure that the  
5 requested site inspection will not itself violate CDC guidelines and safety protocols at  
6 OMDC. Therefore, the Court **ORDERS** that all participants in the site inspection must  
7 wear appropriate personal protective equipment, including gloves and surgical masks or  
8 N-95 masks. Petitioners' expert shall be permitted to speak in confidence to detainees at  
9 OMDC who are willing to speak to him, but he must maintain at least six feet of distance  
10 between himself and any inmate he interviews. Any interviewee must also use a face mask  
11 during the interview. Counsel for Respondents and Petitioners are **ORDERED** to meet and  
12 confer to try to agree to a protocol to make such an arrangement feasible without creating  
13 health or security concerns (i.e., to determine whether the interviews can take place without  
14 removing the inmates from their cells). If necessary for security purposes, the Court will  
15 consider permitting an OMDC staff member to be present during the expert's interviews  
16 of inmates. If the parties cannot agree to appropriate safety protocols, they should provide  
17 a brief status report to the Court at [efile\\_goddard@casd.uscourts.gov](mailto:efile_goddard@casd.uscourts.gov) no later than  
18 **September 23, 2020** outlining each side's proposed interview protocols. Each side's  
19 proposal shall be limited to three pages. However, Respondents should not use this  
20 opportunity as a chance to seek reconsideration of the Court's decision to allow Petitioners'  
21 expert to interview detainees generally.

22 Second, the Court agrees with Respondents that Petitioners' request to speak with  
23 criminal detainees confidentially without the consent of their defense counsel "raises  
24 serious attorney-client privilege issues." ECF No. 89 at 20 n.62. Accordingly, counsel for  
25 Petitioners are **ORDERED** to meet and confer with the Federal Defenders to determine  
26 whether they consent to interviews of Federal Defenders' clients regarding conditions of  
27 confinement at OMDC. Any detainee represented by another attorney may not be  
28 interviewed without consent of his or her counsel. *See, e.g., Chunn*, 2020 WL 1872523, at

1 \*2 (noting that the Attorney-in-Charge of the Federal Defenders for the Eastern District of  
2 New York consented to interviews of the Federal Defenders' clients during the site  
3 inspection).

4 Third, the Court rejects Petitioners' request for their expert to speak with OMDC  
5 staff confidentially and outside the hearing of the accompanying individuals assigned by  
6 Respondents. If Petitioners wish for their expert to speak to OMDC staff, one attorney for  
7 Respondents shall be permitted to attend the site inspection and may be present for any  
8 interviews of staff members by Petitioners' expert.

9 As for the scope of access, the Court finds that Petitioners have shown good cause  
10 for a site inspection of all areas listed in their Proposed Order, other than classroom areas  
11 and the commissary, which are not discussed in Petitioners' portion of the motion or in the  
12 declarations at issue.

#### 13 **IV. CONCLUSION**

14 Based on the foregoing, Petitioners' request for Rule 34 site inspection of the Otay  
15 Mesa Detention Center is **GRANTED IN PART** and **DENIED IN PART**.

16 It is hereby **ORDERED** as follows:

17 1. **Date and timing of Inspection.** Defendants shall permit an expedited  
18 Rule 34(a) inspection of Otay Mesa Detention Center ("Otay Mesa"), which will occur on  
19 a mutually agreed date **within twenty-one days** of the date of this Order. The inspection  
20 will start at a time agreed to by the parties and will last for five hours from when the  
21 participants have passed through security, with additional time (not to exceed thirty  
22 minutes) added for any delays.

23 2. **Authorized Individuals.** The following persons may attend the inspection:

- 24 (i) A correctional healthcare expert to be selected by Petitioners (at  
25 Petitioners' expense);  
26 (ii) A Spanish-speaking interpreter provided by the Petitioners; and  
27 (iii) A minimal number of other personnel necessary to guide Petitioners'  
28 expert through the facility, as determined and selected by Respondents.

1           3.     **Scope of Inspection.** Petitioners' expert and the other authorized individuals  
2 will be permitted to inspect the following areas of the Otay Mesa facility:

- 3           (i)     Communal areas and cells in all housing pods, including those used for  
4                 administrative segregation and punitive segregation;
- 5           (ii)    Dining and kitchen areas;
- 6           (iii)   The medical unit's treatment rooms, common areas, communal  
7                 sleeping bays, and medical isolation cells;
- 8           (iv)    All recreational areas;
- 9           (v)     All laundry facilities;
- 10          (vi)   All communal shower/bathroom facilities;
- 11          (vii)  The ingress/egress staff and visitor screening areas and attorney visit  
12                 areas; and
- 13          (viii) Areas where cleaning supplies and personal protective equipment are  
14                 maintained.

15           During the inspection, and subject to the consent of criminal defense counsel for any  
16 such persons, Petitioners' expert will be permitted to speak with persons detained in USMS  
17 custody who are willing to speak to Petitioners' expert in confidence and outside the  
18 hearing of the accompanying individuals assigned by Respondents, if feasible to do so  
19 safely.

20           Counsel for Petitioners are **ORDERED** to meet and confer with the Federal  
21 Defenders to determine whether they consent to interviews of Federal Defenders' clients  
22 regarding conditions of confinement at OMDC. No person in USMS custody and facing  
23 criminal charges may be interviewed by Petitioners' expert without the consent of his or  
24 her criminal defense counsel.

25           Counsel for Respondents and Petitioners are **ORDERED** to meet and confer to try  
26 to agree to a protocol to make confidential interviews of inmates feasible without creating  
27 health or security concerns. If the parties cannot agree to appropriate safety protocols for  
28 the interviews, they should provide a brief status report to the Court at



1 efile\_goddard@casd.uscourts.gov no later than **September 23, 2020** outlining each side's  
2 proposed interview protocols. Each side's proposal shall be limited to three pages.

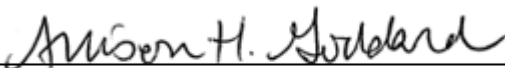
3 Petitioners' expert will also be permitted to speak to OMDC staff members, but these  
4 conversations shall not be confidential. If Petitioners wish for their expert to speak to  
5 OMDC staff, one attorney for Respondents shall be permitted to attend the site inspection  
6 and may be present for any interviews of staff members by Petitioners' expert.

7 4. **Equipment.** Petitioners' expert may bring cameras, cell phones, writing  
8 implements, and any other equipment required to conduct the site visit. No photographs,  
9 videos, or audio recordings of detained persons shall be taken without their express  
10 consent.

11 5. **Personal Protective Equipment and Safety Precautions.** Petitioners' expert  
12 and all accompanying authorized individuals are *required* to wear full personal protective  
13 equipment to safely enable the inspection, including gloves and a surgical mask or N-95  
14 mask. All persons present for the site inspection must ensure six feet of social distancing  
15 from all detainees within the facility at all times. Petitioners' expert may not be closer than  
16 six feet from any interviewee.

17 **IT IS SO ORDERED.**

18  
19 Dated: September 18, 2020

20   
21 \_\_\_\_\_  
22 Honorable Allison H. Goddard  
23 United States Magistrate Judge  
24  
25  
26  
27  
28