UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-21553-Civ-COOKE/GOODMAN

PATRICK GAYLE, *et al.*,

Petitioners-Plaintiffs, on behalf of themselves and those similarly situated,

v.

MICHAEL W. MEADE, *et al.*,

Respondents-Defendants.
_____/

PETITIONERS-PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

The Court should deny Defendants' Motion for Reconsideration because the Court's decision to impose the Court's preliminary injunction was well justified on June 6, and the only thing that has changed is that ICE's interceding conduct has confirmed a preliminary injunction is more justified today.

Indeed, the sole basis for Defendants' Motion—the Eleventh Circuit's decision on the merits in *Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020) (*Swain II*)—is not a material new development and the opinion breaks no new ground. *Swain II* rests on the same legal foundation that the Eleventh Circuit applied on May 5—**a full month before** this Court entered its preliminary injunction—in *Swain v. Junior*, 958 F.3d 1081 (11th Cir. 2020) (*Swain I*). Yet, Respondents seek reconsideration based on their assertion that *Swain II* is a watershed new decision without even acknowledging *Swain I*. And they certainly do not identify any material change in the analysis **between** *Swain I* and *Swain II*. Alas, Respondents cannot identify any material difference because they previously used *Swain I* to make all of the arguments they are making now.

In this respect, *Swain II* does not change the outcome here for the same reason that *Swain I* did not bar an injunction in the first place. The Court applied the standard set forth in *Swain I* and *Swain II*—that is, a longstanding standard that dates back to at least 1994. And the Court has already ruled that that settled standard is met on the robust record here. That

another decision reiterated the same standard does not require the Court to re-conduct the analysis it has already conducted. Moreover, the Motion for Reconsideration ignores entirely Petitioners' *Accardi* claim—a claim unavailable to the *Swain* plaintiffs, as they are in state custody.

And at any rate, reconsideration would not help Respondents here. The record the Court had before it when it issued its injunction more than meets the standard set forth in *Swain II*—again, the Court already applied that standard and found an injunction proper. If anything, the record developed since June 6 includes more evidence of ICE's deliberate indifference—including ICE's deliberate violation of the CDC Guidelines and this Court's order prohibiting cohorting of people with confirmed COVID-positive tests with people who have not tested positive, even after this Court explicitly ordered ICE to stop doing that. And at least one person in ICE custody may have died as a result.

The Court should accordingly deny reconsideration.

ARGUMENT

A. Respondents have not shown any Ground for reconsideration

1. The Court has already applied the standard Respondents rely upon.

Respondents' Motion rests on the erroneous premise that the "Eleventh Circuit's intervening decision in *Swain v. Junior [II]*, established the standard for a showing of deliberate indifference," warranting reconsideration under Federal Rule of Civil Procedure 59(e). [ECF 195 at 1, 7-8.] That is simply not true. Reconsideration under Rule 59(e) is an "extraordinary remedy to be employed sparingly." *Porto Venezia Condominium Ass'n, Inc. v. WB Ft. Lauderdale, LLC*, 926 F. Supp. 2d 1330,1332 (S.D. Fla. 2013) (citation omitted).

Although an "intervening change in controlling law" might warrant reconsideration, *see Young Apartments, Inc. v. Town of Jupiter*, No. 05-80765-CIV-RYSKAMP/VITUNAC, 2007 WL 1490933, at *1 (S.D. Fla. May 21, 2007), the Eleventh Circuit's *Swain II* decision did not work any change in controlling law. Rather, *Swain II* simply reiterated well-established, binding precedent that had long been set forth by the Supreme Court and the Eleventh Circuit. Most of the portions of *Swain II* that Respondents quote come directly out of opinions dating back decades [*see* ECF 195 at 8-10]:

- "To establish a deliberate-indifference claim, a plaintiff must make both an objective and a subjective showing." *Swain II*, 961 F.3d 1276, 1285 (11th Cir. 2020) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)), *cited in* ECF 195 at 8.
- "Under the objective component, the plaintiff must demonstrate 'a substantial risk of serious harm.'" *Swain II*, 961 F.3d at 1285 (quoting *Farmer*, 511 U.S. at 834), *cited in* ECF 195 at 9.
- "Under the subjective component, the plaintiff must prove 'the defendants' deliberate indifference' to that risk of harm by making three sub-showings: '(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence." *Swain II*, 961 F.3d at 1285 (quoting *Lane v. Philbin*, 835 F.3d 1302, 1308 (11th Cir. 2016)), *cited in* ECF 195 at 9.
- "Ordinary malpractice or simple negligence won't do; instead, the plaintiff must show 'subjective recklessness as used in the criminal law.'" *Swain II*, 961 F.3d at 1285-86 (quoting *Farmer*, 511 U.S. at 839-40), *cited in* ECF 195 at 9.
- "[T]he fundamental question in any deliberate-indifference case is whether the defendants exhibited 'a sufficiently culpable state of mind.'" *Swain II*, 961 F.3d at 1287 (quoting *Farmer*, 511 U.S. at 834), *cited in* ECF 195 at 10.

That is, Respondents' assertion that *Swain II* "established the standard for a showing of deliberate indifference" is just wrong. [*See* ECF 195 at 1.] Indeed, the Eleventh Circuit in *Swain II* was careful to make clear that its decision rested on principles that the Eleventh Circuit ("we") "(echoing the Supreme Court) ha[d] been at pains to emphasize" for years. *Swain II*, 961 F.3d at 1288 (citing Supreme Court and Eleventh Circuit precedents).

The Eleventh Circuit's June 15 decision in *Swain II* did not even break new ground from *Swain I*—a decision issued on May 5, a full month before this Court entered its preliminary injunction. In *Swain I*, the court stayed the district court's preliminary injunction on the grounds that the plaintiffs there were not likely to succeed on the merits of their deliberate indifference claim. *See* 958 F.3d at 1085. And in doing so, the Eleventh Circuit set forth the precise standard that Respondents claim was novel to *Swain II*:

Motion for Reconsideration [ECF 195]	**May 5, 2020 *Swain I* Decision**
"The subjective showing requires plaintiffs to establish: '(1) subjective knowledge of a risk of serious harm; (2) *disregard of that risk*; (3) by conduct that is *more than mere negligence*.'" [ECF 195 at 9 (quoting *Swain II*, 961 F.3d at 1285) (emphasis supplied by Respondents).]	"A prison official acts with deliberate indifference when he '**knows of and disregards** an excessive risk to inmate health or safety.'" *Swain I*, 958 F.3d at 1089 (quoting *Farmer*, 511 U.S. at 837) (emphasis added).
"But the *Swain* Court held that 'ordinary malpractice or simple negligence won't suffice for a showing of reckless disregard of risk. Rather 'the plaintiff must show **subjective recklessness as used in the criminal law**.'" [ECF 195 at 9 (quoting *Swain II*, 961 F.3d at 1285-86) (emphasis added).]	"Deliberate indifference requires the defendant to have a subjective state of mind more blameworthy than negligence, **closer to criminal recklessness**." *Swain I*, 958 F.3d at 1089 (internal quotation marks and citation omitted) (emphasis added).
"Thus, even if the risked harm in question actually occurs, the Eleventh Circuit held that as **reasonable precautions were taken**, there may be no liability." [ECF 195 at 9 (citing *Swain II*, 961 F.3d at 1285-86) (emphasis added).]	"A prison official may escape liability for known risks if he **responded reasonably to the risk**, even if the harm ultimately was not averted." *Swain I*, 958 F.3d at 1089 (internal quotation marks and alteration omitted) (emphasis added).

Indeed, the very points Respondents now claim are "intervening law" have already been ventilated by the Court—and, were even raised in the context of addressing *Swain I*. The Court granted the preliminary injunction after extensive briefings, hearings, and witness testimony. The things raised and resolved in the same Omnibus Order that granted the preliminary injunction included Petitioners' request for class certification. And the

Magistrate's May 29 Amended Report and Recommendations on class certification contains an entire section devoted to the *Swain I* decision, examining *Swain I*'s discussion of the "deliberate indifference element" and its potential impact on the merits of Petitioners' claims. [ECF 123 at 26 (internal quotation marks omitted).] That is, the Magistrate placed before the Court the **precise** points of law that Respondents claim were previously unestablished. [*Compare* ECF 123 at 26 ("The *Swain [I]* Court noted that the deliberate indifference element requires a prison official to have a subjective 'state of mind **more blameworthy than negligence**.'" (emphasis added)), *with* ECF 195 at 9 ("[T]he *Swain [II]* Court held that 'ordinary malpractice or **simple negligence won't' suffice** for a showing of reckless disregard of risk." (emphasis added)).]

The May 29 Amended Report and Recommendation on class certification even addressed the precise factual points Respondents make here. The Amended Report and Recommendations discussed potential similarities between "the specific conditions at the three federal detention centers and the County Metro West facility" (noting they were not "established to be identical"), as well as possible similarities between the measures in the *Swain* preliminary injunction and in the temporary restraining order issued by this Court. [ECF 123 at 27.] The Court therefore already had the ability to compare the facts here to those in *Swain* to evaluate whether, as Respondents content, the "factual scenario in *Swain* [was] nearly identical to those [sic] here." [ECF 195 at 9.]

For their part, Respondents actually used *Swain I* to make the same arguments to the Court that they make here. For instance, Respondents now contend that *Swain II* "set the standard for establishing a claim of deliberate indifference," which includes a subjective component requiring "plaintiffs to establish: (1) subjective knowledge of a risk of serious harm; (2) *disregard of that risk*; and (3) by conduct that is *more than mere negligence*." [ECF 195 at 9 (emphases in original).] But on June 3, Respondents used *Swain I* to make this precise argument:

> As explained in *Swain v. Junior [I]*, Case No. 20-11622,*10 (11th Cir. 2020) (citing *Farmer v. Brennan*, 511 U.S. 825, 846, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), a challenge to the conditions of confinement has **two components: objective and subjective**.
>
> To satisfy the objective component, the plaintiff must show that the challenged conditions were extreme and presented an unreasonable risk of serious damage

> to his or her future health or safety. *Id.* To satisfy the subjective component, the plaintiff must show that the official acted with deliberate indifference by **disregarding an excessive risk** to detainee health or safety. *Id.* at *10-*11. This standard requires the official to have **a subjective state of mind closer to criminal recklessness**." *Id.* at 11.

[ECF 143 at 4 (emphasis added).]

More to the point, this Court applied the very standard Respondents advance here in granting the preliminary injunction. Pulling from longstanding case law, this Court explained that, "[t]o prove deliberate indifference in violation of Eighth Amendment, a detainee must satisfy three burdens": (1) "the detainee must satisfy the objective component by showing that she had a serious medical need"; (2) "the detainee must satisfy the subjective component by showing that ICE officials acted with deliberate indifference to the serious medical need"; and (3) "the detainee must show that the injury was caused by ICE's wrongful conduct." [ECF 158 at 28-29.] The Court then dutifully set forth the **precise** analysis Respondents contend first appeared in *Swain II*. [*Id.* at 29.] And carefully applying that legal standard to the extensive factual record that demonstrates ICE's deliberate indifference, the Court concluded Petitioners had shown a likelihood of success on the merits. [*Id.* at 29-33.]

In short, the foundational argument for Respondents' Motion for Reconsideration—that *Swain II* broke new ground—is demonstrably false. And Respondents tellingly do not even acknowledge *Swain I*, let alone explain what legal innovation they think *Swain II* worked over *Swain I* and all of the prior decisions applying the deliberate-indifference standard. Their Motion for Reconsideration is not simply meritless; it exists in an alternative reality.

In truth, there has been no change in the law. Respondents have simply contravened the Eleventh Circuit's admonition that Rule 59(e) is not a vehicle "to relitigate older matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Respondents' abuse of Rule 59(e) is reason enough to deny their Motion for Reconsideration.

2. Respondents do not challenge the Court's *Accardi* analysis, which suffices to support the preliminary injunction.

The Court can also deny the Motion for Reconsideration because Respondents ignore the Court's finding of a likelihood of success on Petitioners' *Accardi* claim. [*See* ECF 158 at 27, 33.] The Court's *Accardi* determination serves as an independent basis for the grant of the

preliminary injunction, and Respondents' failure to challenge that determination also precludes reconsideration of the Court's preliminary injunction order.[1]

Respondents are not correct that "deliberate indifference served as **the** basis on which this Court ordered its preliminary injunction." [ECF 195 at 1 (emphasis added).] To be sure, Petitioners' preliminary showing of deliberate indifference with respect to their claims under the Fifth and Eighth Amendments was **one way** they demonstrated a likelihood of success on the merits. [*See* ECF 158 at 27.] But Petitioners **also** showed that Respondents violated their obligation to follow applicable agency regulations under *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266, 268 (1954). [*See* ECF 1 at 92; ECF 158 at 27.] Thus, to undo the preliminary injunction, Respondents would have to show that **each** of the legal grounds on which this Court found a likelihood of success on the merits was overruled by *Swain II.* But Respondents have not even argued that there is anything infirm about the Court's *Accardi* ruling. This, alone, justifies denying Respondents' Motion.

In fact, this Court analyzed the factual record in detail and concluded that Petitioners presented sufficient evidence to show a likelihood of success on their *Accardi* claim. [ECF 158 at 33.] The Court noted that the Center for Disease Control ("CDC") had issued Guidelines "stat[ing] that that practice of cohorting should be utilized only if there are no available options," guidance that is consistent with ICE's COVID-19 April 10, 2020 Pandemic Response Requirements ("PRR"). [ECF 158 at 10, 32.] Far from following that the CDC Guidelines, ICE "flagrantly flout[ed]" them by "group[ing] asymptomatic detainees together," including the "entire detainee population" of 320 people at Glades. [ECF 158 at 32.] Furthermore, the Court determined that ICE had failed to "meaningful[ly] utilize its 'Alternatives to Detention Program'" as a means of reducing the population—conduct that "flies in the face of directives from Attorney Gen. William Barr to the Federal Bureau of

[1] Having failed to seek reconsideration of the *Accardi* claim in their openion motion (filed on the last day of Rule 59(e)'s 28-day deadline," Respondents are now barred from seeking reconsideration of the Court's adjudication of the *Accardi* claim. *Ranahan v. Berryhill*, No. 17-14134-CVI-MARRA, 2018 WL 4409975, at *1 (S.D. Fla. Aug. 27, 2018) ("Even if the Court were to ignore this violation of the Local Rule, Plaintiff has failed to file timely the reconsideration motion pursuant to Rule 59(e). Rule 59(e) requires that a motion to alter or amend a judgment must be filed no later than 28 days after entry of the judgment."). Because they failed to timely seek reconsideration of the Court's *Accardi* ruling, Respondents are barred from seeking reconsideration of that portion of the Court's analysis.

Prisons urging the prioritization of home confinement." [ECF 158 at 32-33.] Moreover, ICE's own Pandemic Response Requirements ("PRR") mandate that ICE implement social distancing and provide detainees with hygiene products and masks. [*See* ECF 158 at 33.] But the Court found Petitioner' testimony and sworn declarations regarding ICE's failure to fully "comply with its own directives or CDC Guidelines" "[c]redible." [*Id.*]

The *Accardi* claim alone supports the Court's preliminary injunction. And Respondents' failure to seek reconsideration of the Court's ruling on that claim is a sufficient, independent ground for denying Respondents' Motion

3. Respondents ignore the egregious facts the Court found showing ICE's deliberate indifference.

In seeking to liken this case to *Swain II*, Respondents also overlook the facts this Court already found that demonstrated ICE's deliberate indifference under the same standard that the Eleventh Circuit applied in *Swain I* and *Swain II*.

As the Court is aware, this is not a case like *Swain* where the district court "bracketed any factual disputes" and based its finding of deliberate indifference on two determinations: "(1) the fact that COVID-19 was continuing to spread at Metro West and (2) the impossibility of achieving adequate social distancing." *Swain II*, 961 F.3d at 1286. Rather, the Court here dug deeply into the factual record that it had before it and concluded that the evidence—including ICE's demonstrated, persistent failure to follow its own rules—showed its deliberate indifference to Petitioners' risk of contracting COVID-19. For example, the Court explained that ICE was already bound by the CDC Guidelines and the PRR, which detail both the narrow circumstances in which ICE is permitted to conduct transfers during the COVID-19 pandemic and also the methods that ICE is required to use to minimize the spread of COVID-19 during the transfer process. [ECF 158 at 29-30.] And yet, the sworn testimony before the Court (both declarations and live testimony) established that ICE was failing to "consistently evaluate detainees for COVID-19 before transferring them to other detention centers," and that ICE was also not "provid[ing] protective masks," soap, hand sanitizers, and other necessary hygiene products during the transfer process. [*Id.* at 30.] The Court explained this evidence showed that ICE was openly disregarding its binding obligations, and that that open disregard amounted to deliberate indifference. [*See id.* at 30-32.]

The Court also determined (based on ICE's own admissions) that ICE had been "flagrantly flout[ing] its own rules on [cohorting] and group[ing] asymptomatic detainees together." [*Id.* at 32.] Additional evidence of Respondents' deliberate indifference included (1) ICE's failure to use its "Alternatives to Detention Program" to safely reduce the number of detainees at its facilities; and (2) ICE's inability to fully comply with directives about maintaining social distancing among detainees and providing a sufficient amount of masks, hygienic products, and protective equipment. [*Id.* at 33.] Thus, in addition to supporting an *Accardi* claim, ICE's persistent refusal to follow its own mandatory guidelines for preventing the spread of COVID-19 showed that ICE was deliberately indifferent to Petitioners' health: ICE knew the rules it was supposed to follow, but it inexplicably refused to follow them.

And in this respect, it is notable that the Court did not hastily enter a preliminary injunction on a sparse record. Rather than entering an immediate preliminary injunction, the Court began with the intermediate step of issuing a temporary restraining order on April 30. [ECF 106.] It then allowed the parties to develop the factual record over the next five weeks. During that time, the Court received additional evidence, heard live testimony, and conducted **three** hearings. It thus did not **assume** that the risk of infection alone equaled deliberate indifference. *Cf. Swain II*, 961 F.3d at 1286. Instead, it built and examined a robust record of ICE's conduct and how that conduct evolved (or, more specifically, how it failed to evolve) over time. And based on a concrete record that painted a "grim picture" of ICE's persistent lack of effort to protect Petitioners, the Court found that ICE continued to "flagrantly flout[] its own rules." [*See* ECF 158 at 32-34.] That record and this Court's findings make this case nothing like *Swain II*.

Respondents' Motion for Reconsideration ignores this Court's careful examination of the factual record, as well as its detailed factual findings. And that record—a record that ICE crafted through its own deliberate indifference—takes this case outside of *Swain*, which is why *Swain I* did not preclude a preliminary injunction. *Swain II* does not preclude an injunction for the same reason.

Respondents have identified no basis for reconsideration, and the Court should deny their Motion.

B. The preliminary injunction is even more justified on the current record.

Of course, even if the Court granted reconsideration, it would still have to determine whether the injunction was nonetheless justified under this allegedly new standard. And, in

fact, the only material developments since June 6 would further support entering an injunction.

As explained above, the facts the Court had before it on June 6 more than justified its injunction—which is why the Court entered an injunction under the very standard set forth in *Swain II* (and *Swain I*, for that matter). Respondents have done nothing to undermine those facts—so, they still justify the injunction.

But the Court now has an even more robust record before it of ICE's deliberately indifferent conduct. After the Court specifically ordered on June 6 that ICE not cohort people with confirmed COVID-positive tests along with people who had not been confirmed to have COVID-19, [ECF 158 at 40], ICE persisted in doing exactly that at the Glades facility, which had a raging COVID-19 outbreak. [*See* ECF 163 at 1-2 (citing declarations).] Indeed, ICE ultimately admitted at a hearing on Petitioners' motion to compel compliance with the preliminary injunction that it had decided on its own to group together pods of people at the Glades facility that included both people who had tested positive for COVID-19 and people who had not tested positive and who were asymptomatic—an admitted, direct violation of this Court's preliminary injunction (not to mention the binding CDC Guidelines). This persistent refusal to follow the rules—even a binding Order of this Court—confirms that ICE is deliberately indifferent to Petitioners' health.

Sadly, ICE's deliberate indifference appears to have cost one Class Member his life. ICE reports that on July 12, a Class Member who was transferred into Glades on June 15 and tested positive for COVID-19 on July 2 (seventeen days later) died in ICE custody. [*See* Ex. A (ICE July 13, 2020 Press Release).] While ICE has, to date, not identified this gentleman's cause of death, this tragedy drives home the substantial stakes at issue in ICE's persistent refusal to undertake the basic steps it is required to take to protect Petitioners from the risk of COVID-19 infection.

Thus, if the Court were to truly reconsider whether to enter a preliminary injunction on the current record, a preliminary injunction would be even more warranted now.

CONCLUSION

The Court should deny Respondents' Motion.

Date: July 20, 2020

Respectfully Submitted,

/s/ Scott M. Edson
Scott M. Edson, Esq.
Florida Bar No. 17258

Gregory P. Copeland*
Sarah T. Gillman*
RAPID DEFENSE NETWORK
11 Broadway, Suite 615
New York, NY 10004
Tel.: (212) 843-0910
Fax: (212) 257-7033
gregory@defensenetwork.org
sarah@defensenetwork.org
**Appearing Pro Hac Vice*

Scott M. Edson, Esq.
Florida Bar No. 17258
KING & SPALDING LLP
1700 Pennsylvania Avenue NW, STE 200
Washington, DC 20006-4707
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
sedson@kslaw.com

Rebecca Sharpless
Florida Bar No. 0131024
Romy Lerner
Florida Bar No. 116713
UNIVERSITY OF MIAMI SCHOOL OF LAW - IMMIGRATION CLINIC
1311 Miller Drive Suite, E-273
Coral Gables, Florida 33146
Tel: (305) 284-3576
Fax: (305) 284-6092
rsharpless@law.miami.edu

Kathryn S. Lehman
Florida Bar No.: 95642
Chad A. Peterson
Florida Bar No.: 91585
KING & SPALDING LLP
1180 Peachtree Street, N.E.
Atlanta, GA 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100
klehman@kslaw.com
cpeterson@kslaw.com

Paul R. Chavez
FL Bar No. 1021395
SOUTHERN POVERTY LAW CENTER
2 S. Biscayne Blvd., Ste. 3200
Miami, FL 33101
Tel: (305) 537-0577
paul.chavez@splcenter.org

Mark Andrew Prada
Fla. Bar No. 91997
Anthony Richard Dominguez
Fla. Bar No. 1002234
PRADA URIZAR, PLLC
3191 Coral Way, Suite 500
Miami, FL 33145
Tel.: (786) 703-2061
Fax: (786) 708-9508
mprada@pradaurizar.com
adominguez@pradaurizar.com

Lisa Lehner
Florida Bar No. 382191
AMERICANS FOR IMMIGRANT JUSTICE
5355 NW 36 Street, Suite 2201
Miami, FL 33166
Tel: (305) 573-1106 Ext. 1020
Fax: (305) 576-6273
Llehner@aijustice.org

Andrea Montavon McKillip
Florida Bar No. 56401
LEGAL AID SERVICE OF BROWARD COUNTY, INC.
491 North State Road 7
Plantation, Florida 33317
Tel. (954) 736-2493
Fax (954) 736-2484
amontavon@legalaid.org

Counsel for Petitioners-Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all counsel of record.

/s/ Scott M. Edson
Scott M. Edson, Esq.
Florida Bar No. 17258
KING & SPALDING LLP
1700 Pennsylvania Avenue NW, STE 200
Washington, DC 20006-4707
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
sedson@kslaw.com

Attorney for Petitioners-Plaintiffs