UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARIA ALEJANDRA CELIMEN SAVINO and JULIO CESAR MEDEIROS NEVES,	)	
Petitioners-Plaintiffs,	)	**20-cv-10617 WGY**
v.	)	
THOMAS HODGSON, et al.,	)	
Respondents-Defendants.	)	

OPPOSITION TO MOTION FOR A TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

The Bristol County House of Correction ("BCHOC") has enacted numerous safety measures aimed at mitigating the risk that inmates, detainees, and staff contract COVID-19. To date, no inmate, detainee, or staff member at BCHOC has tested positive. The conditions at BCHOC bear no resemblance to the claims Plaintiffs make in their filings. Plaintiffs, in their petition/complaint and their subsequent motion for temporary restraining order,[1] seek immediate release of all immigration detainees at BCHOC, as well as an order prohibiting further detention of immigration detainees at BCHOC indefinitely. Plaintiffs have not met their burden of proof in seeking extraordinary relief, nor have they established that a class of all BCHOC immigration

[1] As of this date, Defendants have not been properly served with the pleadings in this case. Counsel for the United States received the motion for temporary restraining order (the "TRO") mid-day Saturday, March 28, 2020, via email from the court, with a hearing on the TRO scheduled the following Monday at 11:00 a.m. In addition, Plaintiffs supplemented an already-voluminous record just before noon on Sunday, March 29, 2020. Defendants respectfully request, as appropriate, an opportunity to amend their response in light of the truncated response time, which would be a challenge for counsel and the agencies even in normal work conditions.

detainees, both current and future, should be certified.

First, Plaintiffs do not have a cognizable injury, much less an irreparable one. As is shown in the attached declaration of Bristol County Sheriff Thomas Hodgson, BCHOC has taken extensive steps to limit the threat of COVID-19 to all at the facility. Second, habeas relief is inappropriate for Plaintiffs' conditions of confinement claims, which must be brought under the Civil Rights Statute. Finally, Plaintiffs' request for a TRO should be denied because their constitutional claims lack merit and the balance of equities and public interest tilt against granting a temporary restraining order.

I. FACTS[2]

The named Plaintiffs in this case are detained at BCHOC. Plaintiff Celimen Savino has a final order of removal. She presents a risk to the community because she has at least nine arraignments in Massachusetts since 2008 as a result of eleven arrests, including seven arrests for aggravated assault and multiple arrests for violating the restraining order initiated against her by her husband. She threatened him repeatedly with violence. Plaintiff Medeiros Neves has an OUI conviction BCHOC houses the majority of its immigration detainees in a building separate from the main campus, and to which the general inmate population has no access. Only detainees who have been classified by ICE as high risk, typically based upon violent behavior (and not in any way related to COVID-19), are housed with non-immigration pre-trial inmates, but this is not in the general population. The high-risk detainees are in a modular facility ("2 East") on the main campus. While it is theoretically possible that one of these high-risk detainees could be re-classified to a lower risk category, and be moved to the separate ICE

[2] All facts stated herein are taken from the Affidavit of Sheriff Thomas M. Hodgson, attached hereto as Exhibit A, unless stated otherwise.

detention building, it has not happened to the knowledge of Bristol County Sheriff's Office since the outbreak of COVID-19. If such a transfer did occur, the transferee would be medically screened prior to the move.

Moreover, ICE has taken numerous steps to respond to this rapidly-moving health crisis. *See, e.g.,* the publicly available ICE Guidance on COVID-19, available at https://www.ice.gov/coronavirus (viewed March 29, 2020), as well as Exhibit 2 hereto (March 27, 2020 Memorandum for Wardens and Superintendents on COVID-19, regarding some of the measures ICE has taken to mitigate risk of COVID-19 infection.

As stated in the attached Affidavit of Sheriff Thomas Hodgson, the health care of inmates and detainees at BCHOC is now, and since 2009 has been, administered by Correctional Psychiatric Services, Inc. ("CPS") under the direct supervision of Jose Veliz, M.D and Medical Director Nicholas Rencricca, MD, who have combined correctional experience of over 50 years. CPS medical personnel are continually on site 24/7 at both of the BCHOC facilities to address, manage, and treat any and all medical issues arising from the inmate/detainee population. Medical issues that require the attention of medical specialists or hospitalization are immediately transported to such facilities. Bristol County is fortunate to have access to three well respected hospitals in the area, St. Luke's Hospital, Charlton Memorial Hospital, and Morton Hospital, all within a few minutes distance by transport or ambulance. CPS has relationships with specialty local community providers, many of which are located nearby on Faunce Corner Road, to address any conditions requiring a specialist, *i.e.*, eye care, orthopedic, imaging, dermatology, OBGYN, Oncology, Neurology, ENT, and many more specialists, who are utilized on a routine basis. Specialty clinics at the Shattuck Hospital are also utilized when needed. BCHOC has successfully managed inmates with kidney failure, cancer, infectious disease issues, and inmates

with chronic illnesses. In addition, BCHOC has the ability to utilize tele-health with community providers as well as CPS onsite providers.

The Bristol County Sheriff's Office ("BCSO") is currently, and has been for many years, certified by the following nationally recognized entities: American Corrections Association, National Commission for Corrections Health Care, and also certified as in compliance with the federal Prison Rape Elimination Act (PREA) protocols.

With the onset of COVID-19 in the United States, in conjunction and consultation with the Massachusetts Department of Public Health, the CDC and other public health agencies and correctional institutions, CPS and the BCHOC have instituted strict protocols to keep inmates, detainees, and staff safe, and take all prudent measures to prevent exposure to the COVID-19 virus.

Since February, the following measures have been undertaken:

a. All inmate/detainee visitation, with the sole exception of attorney and clergy visitation, has been cancelled until further notice. Prior to the COVID-19 crisis, all inmate/detainee visitations, with the exception of attorney visits, had been non-contact.

b. All feeding is done inside the housing or cells and inmates do not congregate for meals in the main dining hall. Outside recreation is done as usual daily except that it is now done on split schedule to prevent close inmate-to- inmate contact.

c. All housing units are sanitized no less than three times per day. Fresh air is constantly circulated by opening windows and utilizing handler/vents throughout the day.

d. Volunteer assisted programs have been suspended but program material continue to be available to those incarcerated.

e. Attorneys and clergy, who visit as well as all BCHOC staff, are medically screened prior to entrance by questions relating to COVID-19 symptoms and by body temperature assessment.

f. Inmates who are admitted to custody are medically screened by CPS staff prior to being admitted to the general population with the intake area and holding cells being continually sanitized. Protocol requires that any admission suspected of

having contracted COVID-19 is provided a PPE mask, placed in isolation for 14 days and continually monitored for symptoms and followed continually by CPS medical personnel as well as the Mental Health Department.

g. During the crisis all detainees are permitted two free telephone calls per week added to their regular allotment.

h. Medical pass and normal sick call procedures continue to run as normal with added scrutiny of both CPS medial staff and correction officers on alert for any prisoner experiencing or complaining of symptoms consistent with COVID-19 illness. In conjunction with community standards, Providers in the Health Services Unit are seeing inmates with emergent issues only in order to minimize the possibility of contamination and spread of the disease and to provide containment. Medical continues to evaluate and adjust its operations in conjunction with circumstances as they arise and with the guidance provided by CDC and DPH.

i. CPS medical personnel at the BCHOC consist of nursing staff composed of RNs and LPNs 24/7. At least two nurse practitioners are on site Monday-Friday. The Medial Director of the BCHOC is Dr. Rencricca is available 24/7 by telehealth. Outside medical providers are on call 24/7 if needed and medical assistants are on site 40 hours per week. Mental Health clinicians are on call 24/7 and all mental health evaluations and sick slips are current.

j. Sick slips that are submitted either by ICE detainees or other prisoners are seen within 24 hours by either a nurse or mental health clinician depending on the circumstances. Since the COVID-19 emergency sick slips are picked up twice per day for medical triage. Medical has identified all inmates/detainees who are at high risk, i.e. older than 60 years and/or have chronic conditions making them more susceptible to COVID-19. Inmates/detainees are seen immediately if they either present with symptoms or ask to be seen believing they have symptoms.

k. All inmate treatment and educational programs, mental health services including evaluations, assessments and therapies, detoxification, behavioral modification programs and therapies for acute and chronic illnesses are carried on as normal with the exception of groups meeting and utilizing the social distance precautions.

l. All inmates and detainees who have chronic illnesses which would make them immune-compromised or who are over sixty years of age are being specially monitored by officers and health personnel for the development of any symptoms consistent with COVID-19. CPS is continually monitoring the on-site situation and developing emergency plans for cohorting high risk inmates.

m. Staff and inmates have been educated as to proper sanitary procedure, including repeated hand washing, and social distancing and hand sanitizers as well as soap and water are readily available to all inmates and staff.

n. For those inmates nearing end of sentence, an extensive Re-entry program

continues to operate normally insuring that each inmate scheduled for release into the community has in place proper housing and the continuity of medical care.

o. Normal schedules are maintained with the bail magistrates and unless ordered by the court, appearances with courts are performed via video-conferencing and telephone. Prior to every proceeding a prisoner is afforded telephone access to his or her attorney. Some regional lock-up and pre-trial detainees have been released by the courts either on personal recognizance or on GPS bracelets. Additionally, when the district attorney and the defendant's counsel have agreed on a disposition, the courts have undertaken the practice of faxing a "disposition form" to the BCHOC and the defendant is able to undergo a colloquy with the court by tele-conferencing, sign the form at the BCHOC and often be released on the spot.

The BCHOC currently houses 148 ICE detainees, 8 of whom are female. Of those, 92 detainees are housed in a separate ICE detention facility on campus and the rest (including females) are housed with pre-trial detainees in specific housing units as per ICE guidelines. The housing areas for all ICE detainees are cleansed with disinfectant cleaners every shift which include Virex and 409/Lysol. Also a hydrostatic spray cleaner is used at least once per day on the third shift by prison staff and in high traffic areas more frequently. Hand sanitizer units are outside the doors of each unit and detainees are permitted gloves and cleaner if they want to do extra cleaning in their own cells and bunks. BCHOC ICE detainees do not come from the outside but rather from other ICE facilities so quarantine is not recommended. BCHOC had one instance, however, where 16 detainees were brought in to the facility and the transporting deputy from New Hampshire reported symptoms after she left the facility. After the BCHOC received word of the possible issue with that deputy, it quarantined all 16 in single cells, masked them, and had medical staff see them daily and tested their temperature for several days and had medical staff continue to monitor them until the deputy's test came back negative.

In addition to the physical separation of ICE detainees from the general inmate population, BCHOC has taken numerous other steps to limit the risk of contamination from the outside. For example, attorney visits for ICE detainees in the ICE detention are non-contact and

are only by request.

The BCSO did not receive what the Plaintiffs describe as "letter #1," which appears to have gone directly to the media, but it did receive "letter #2." Staff addressed the concerns expressed in the letter by holding a unit meeting with all detainees to discuss their concerns. Maintenance concerns were also addressed and one more outside recreation period was added to allow more room for social distancing. BCHOC also opened outside doors to permit more ventilation and added more cycling of the air handlers. All memos from the Sheriff concerning restrictions and pre-screenings and attorney visits and regular visits were translated into Spanish and Portuguese. Thus, it is inaccurate to claim, as Plaintiffs do, that numerous requests regarding COVID-19 have been ignored or that the institution has not been responsive. The initiation of BCHOC's COVOID-19 preventative measures have been well received by the inmate population, who have expressed their understanding as to the measures taken and have been cooperative. *See* Exhibit 1 hereto.

Moreover, the two officers about whom the Plaintiffs expressed concern regarding possible symptoms of COVID-19 did call out sick for several days but did not have the COVID-19 virus and have since returned to full duty.

At present no inmate, detainee or staff member has tested positive for COVID-19. BCHOC's medical provider has stated that the facility currently has, on hand, the appropriate personal protective equipment, and other equipment to meet the needs to combat COVID-19 and protect health care workers and other staff.

Contrary to the allegations contained in the Plaintiff's Petition and expert affidavits, the BCHOC penal facilities are not over-capacity nor have they been running over capacity for several years. The BCHOC facilities were certified for a capacity of 1638 persons and as of

March 24, 2020, the population is 931, which translates into 57% capacity. While the percentage of capacity for ICE detainees in the segregated units is somewhat higher, it remains well below capacity.

II. ARGUMENT

A. Temporary Restraining Orders Are an Extraordinary Remedy

"It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (internal quotations omitted); *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 22 (2008); *Peoples Federal Savings Bank v. People's United Bank*, 672 F. 2d 1, 8-9 (1st Cir. 2012)(preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right).

The standard for issuing a temporary restraining order is essentially the same as that for a preliminary injunction. *See Largess v. Supreme Judicial Court for State of Massachusetts*, 317 F. Supp. 2d 77, 81 (D. Mass. 2004).

In moving for a temporary restraining order or a preliminary injunction plaintiffs "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Id.* (setting out the standard four-part test); *Equal Employment Opportunity Comm'n, v. Astra USA, Inc.*, 94 F.3d 738, 742 (1st Cir. 1996)(burden of proof in a temporary restraining order or preliminary injunction motion is on the moving party). Thus, the Plaintiffs must meet all four requirements of the traditional test.

Courts are generally disinclined to issue mandatory preliminary injunctions unless the facts and law are clearly in favor of the moving party. *See Northeastern University v. BAE*

Systems Information and Electronic Systems Integration, Inc., Civil Action No. 13-12497-NMG, 2013 WL 6210646 at *7 (D. Mass. Nov. 27, 2017) *citing L.L. Bean v. Bank of America*, 630 F. Supp. 2d 83, 89 (D. Me. 2009). The likelihood of success on merits is the *sine qua non* of such motions. *Jean v. Massachusetts State Police*, 492 F. 3d 24, 26 (1st Cir. 2007).

In a situation where a movant seeks to require action of the nonmoving party, in alteration of the status quo, rather than maintenance of it, courts have held the moving party to a more rigorous standard. *See Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 151 (1st Cir. 1998). A mandatory preliminary injunction "disturbs rather than preserves the status quo" by affirmatively mandating action by the non-moving party. *See Lewis v. General Electric Co*., 37 F. Supp. 2d 55, 62 (D. Mass. 1999).

B. <u>There Is No Class that May Be Certified</u>

Plaintiffs purport to represent a class of people similarly situated. The class is all persons detained for immigration purposes now, or forever after, at BCHOC. *See* TRO Memorandum at p. 5. As an initial matter, Congress has prohibited the resolution of immigration habeas petition's like this through actions. *See* 8 U.S.C. 1252(f)(1).

This Court lacks jurisdiction to enjoin the normal operation of 8 U.S.C. § 1226(c). The text of 8 U.S.C. § 1252(f) makes this plain: "Regardless of the nature of the action or claim . . . no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings . . . have been initiated." The Supreme Court has instructed that the provision is a bar on "classwide injunctive relief against the operation of §§ 1221-1231" with a carve out that applies to "individual cases." *Reno v. Am. Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999) (emphasis added). The Court in

Jennings v. Rodriguez, indicated that section 1252(f)(1) would apply to constitutional claims like those raised by Plaintiffs because they seek to enjoin the ordinary application of section 1226(c) as unconstitutional. *See* No. 15-1204, --- U.S. ---, 138 S. Ct. 830, 852 (recognizing that the Ninth Circuit had found that section 1252(f)(1) did not bar its jurisdiction over the statutory claims but concluding that "[t]his reasoning does not seem to apply to an order granting relief on constitutional grounds"). This provision is entitled "limit on injunctive relief," and it unquestionably prohibits class-based injunctions while preserving individual access to a habeas writ and all forms of equitable relief.[3]

In considering *Jennings* on remand from the Supreme Court, the Ninth Circuit raised the same concern as in *Reid* regarding the nature of relief, and directed that "[t]he district court must also consider whether a declaration that the detention statutes are unconstitutional because they contain no process for seeking bail is an injunction or restraint on the operation of the detention statutes. 8 U.S.C. § 1252(f)(1)." *Rodriguez*, 909 F.3d at 256 n.1. The Supreme Court adopted this rationale in *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982), where it held that the Tax Injunction Act barred both declaratory and injunctive relief "because there is little practical difference between injunctive and declaratory relief"; thus, the court would be "hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief … while permitting them to seek another, thereby defeating the principle purpose of the [Act.]." *See also Samuels v. Mackell*, 401 U.S. 66, 72 (1971) (declaratory as well as injunctive relief was barred where "the declaratory relief alone has virtually the same practical impact as a formal injunction would"). The Sixth Circuit recently echoed this sentiment, stating

[3] For these and other reasons, Judge Saris's denying defendants' motion to decertify the class and grating summary judgment in *Reid v. Donelan*, Case No. 3:13-cv-30125-PBS, are now on appeal to the First Circuit Court of Appeals.

it was "skeptical" that "Petitioners would prevail" on whether § 1252(f)(1) bars declaratory relief. *Hamama v. Adducci*, 912 F.3d 869, 880 n.8 (6th Cir. 2018). It stated that, while "[i]t is true that 'declaratory relief will not always be the functional equivalent of injunctive relief,' … in this case, it is the functional equivalent." *Id*. (citing *Alli v. Decker*, 650 F.3d 1007, 1014 (3d Cir. 2011)). "The practical effect of a grant of declaratory relief as to Petitioners' detention would be a class-wide injunction against the detention provisions, which is barred by § 1252(f)(1)." *Id*.[4]

Additionally, Plaintiffs cannot meet their burden "of establishing the elements necessary for class certification: the four requirements of 23(a) and one of the several requirements of 23(b).'" *Abla v. Brinker Rest. Corp*., 279 F.R.D. 51, 55 (D. Mass. 2011) (quoting *In re Relafen Antitrust Litig*., 218 F.R.D. 337, 341 (D. Mass. 2003)).

[4] The Sixth Circuit's prior decision in *Hamama v. Adducci*, 912 F.3d 869, 878–79 (6th Cir. 2018), is also instructive: "Nevertheless, we find that 8 U.S.C. § 1252(f)(1) bars the district court from entering class-wide injunctive relief for the detention-based claims. In our view, *Reno* [525 U.S. 471] unambiguously strips federal courts of jurisdiction to enter class-wide injunctive relief for the detention-based claims. Petitioners disagree and raise three objections. We are not alone in our interpretation of § 1252(f)(1). Other courts, following *Reno*'s guidance, have determined that they do not have jurisdiction under § 1252(f)(1) to issue class-based injunctive relief against the removal and detention statute," *citing Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999); *Pimentel v. Holder*, 2011 WL 1496756, at *2 (D.N.J. Apr. 18, 2011); *Belgrave v. Greene*, 2000 WL 35526417, at *4 (D. Colo. Dec. 5, 2000) (explaining that § 1252(f)(1) does not bar detainees from seeking habeas relief from detention, but it does "require[ ] that those challenges be brought on a case-by-case basis"). The Sixth Circuit continued: "Second, the claim that "the district court was not enjoining or restraining the statutes" is implausible on its face. The district court, among other things, ordered release of detainees held "for six months or more, unless a bond hearing for any such detainee is conducted"; created out of thin air a requirement for bond hearings that does not exist in the statute; and adopted new standards that the government must meet at the bond hearings ("shall release ... unless the immigration judge finds, by clear and convincing evidence, that the detainee is either a flight risk or a public safety risk"). If these limitations on what the government can and cannot do under the removal and detention provisions are not "restraints," it is not at all clear what would qualify as a restraint. The district court did not have jurisdiction to enter class-wide injunctive relief on Petitioners' detention-based claims." *Id.*, at 879-880.

While Plaintiffs claim to have underlying conditions that make them more susceptible to COVID-19, there is nothing in Plaintiffs' briefs to show that all the class members are similarly situated. The ICE detainees are of different ages and all present different levels of health at this time. Indeed, the named Plaintiffs say they are "particularly vulnerable" because of their medical conditions. TRO Memorandum at p. 17. Nonetheless, in a thin attempt to try and position differently situated class member, Plaintiffs make a speculative and broad claim that detention is stressful, stress makes one more susceptible to illness, therefore all class members have an underlying medical condition that justifies immediate release.[5]

Moreover, ICE estimates that at least one-third of the ICE detainees at BCHOC may be subject to statutorily-mandated detention. Such mandatory detention could stem from an alien charged as an arriving alien to the United States, an alien's criminal conviction record, or from accrual of a final order of removal issued by an immigration judge or the Board of Immigration Appeals. Plaintiffs have not addressed how a single class could address the different underlying circumstances that brought the detainees into ICE custody. Further, each detainee presents a different risk of flight and/or public safety threat if released. Each one was or will in the near future have received an individualized detention determination by an immigration judge, unless subject to mandatory detention. *See* 8 U.S.C. § 1226(a). Unless the alien received a bond order for which he has not fulfilled, immigration judges have determined that the detainees should

[5] *See generally Francisco M. v. Decker*, D. N.J. March 25, 2020, Civil Action No. 20-2176 (CCC)(unpub.), where the district court denied a detainee's request for immediate relief based on a fear of the coronavirus ("Petitioner's alleged depression, a perhaps natural result of being detained even where that detention is entirely lawful, likewise is not the sort of serious medical issue which the Third Circuit has found to warrant bail for state prisoners who are seeking habeas relief. *Hadden* therefore does not stand for the proposition that Petitioner should be immediately released even assuming arguendo it applies to immigration detainees, a finding this Court does not and need not make."), *citing Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986).

continue to be detained as they represent public safety or flight risks if released. The proposed class lacks uniformity and the Plaintiffs are not representative of the proposed class members.[6]

C. Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits

1. Success on the Merits Is a Threshold Determination.

Likelihood of success on the merits is a threshold issue. *See United States v. Weikert*, 504 F.3d 1, 5 (1st Cir.2007) ("[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.") (quoting *New Comm Wireless Servs., Inc. v. SprintCom, Inc*., 287 F.3d 1, 9 (1st Cir.2002)). Plaintiffs' constitutional and statutory claims are unlikely to succeed on the merits.

The Supreme Court has made clear that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005); *see also Appiah v. United States INS*, 202 F.3d 704, 709 (4th Cir. 2000) ("Because suspension of deportation is discretionary, it does not create a protectable liberty or property interest.").

2. Plaintiffs Lack Article III Standing

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The "irreducible constitutional minimum of standing" contains three requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and

[6] For example, named plaintiff Celimen Savino has a final order of removal and is, therefore, detained pursuant to 8 U.S.C. 1231. Her habeas corpus petition seeking a new bond hearing was recently denied on that ground by Judge Saris; *see* case number 20-10259-PBS.

particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. Second, the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the Court." *Id*. Third, it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." *Id*. at 560-61 (internal citations omitted). Plaintiffs do not raise a cognizable injury, nor is the alleged injury redressable by this Court.

Plaintiffs' allege that Defendants' ongoing detention of Plaintiffs violates the Due Process Clause" under the Fifth Amendment because "they risk serious illness and death if infected with COVID-19. Named Plaintiffs allege that because of their pre-existing medical conditions, they bear an elevated risk of serious, adverse outcomes if they contract COVID-19. However, Plaintiffs' assertion that detention per se poses an increased risk of health complications or death from COVID-19 is purely speculative. Moreover, Bristol County has expended extensive resources and efforts to address the very issues that Plaintiffs have identified. And, as noted again, there are no cases of COVID-19 at the BCHOC.

To establish injury in fact, a plaintiff must show that he or she suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (*quoting Lujan*, 504 U.S. at 560. Injury in fact is a "constitutional requirement" and is the "[f]irst and foremost" of standing's three elements. Id. at 1547-48 (*quoting Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 103 (1998)). To be "particularized" the injury "must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'" *Spokeo, Inc*., 136 S. Ct. at 1548. A "concrete" injury must be "'de facto'; that is, it

must actually exist[,]" that is, it must be "real," and not "abstract." *Id.* While "the risk of real harm" may, in some circumstances, be sufficiently concrete, "imminence . . . cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes -- that the injury is 'certainly impending,'" *Lujan*, 504 U.S. at 568; *see Andrews v. Cervantes*, 493 F.3d 1047, 1056 (9th Cir. 2007) ("The common definition of 'imminent,' however, does not refer only to events that are already taking place, but to those events ready to take place or hanging threateningly over one's head.").

Plaintiffs' alleged harm—that their detention increases their risk of COVID-19—is speculative. Plaintiffs have not alleged that COVID-19 has spread to the BCHOC facility. Even assuming the "crowded conditions" Plaintiffs allege, crowding in and of itself does not cause COVID-19 infection if none in the group has contracted COVID-19. Plaintiffs' claims of future injury are hypothetical, and Plaintiffs are not entitled to immediate release from detention based on a conjectural injury that they have not suffered. An injunction is "unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged [] -- a 'likelihood of substantial and immediate irreparable injury.'" *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Moreover, even if COVID-19 were introduced to BCHOC, Plaintiffs have not alleged—nor could they allege—that Defendants are unprepared to respond to that contingency, particularly in light of the known facts concerning ICE's response to the challenges posed by COVID-19 and BCHOC's efforts as outlined in Exhibit 1.

3. Plaintiffs Have Not Established a Fifth Amendment Violation.

To evaluate the constitutionality of a pretrial detention condition under the Fifth Amendment, a district court must determine whether those conditions "amount to punishment of

the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Kingsley v. Hendrickson*, ––– U.S. ––––, 135 S. Ct. 2466, 2473-74 (2015). Punishment may be shown through express intent or a restriction or condition that is not "reasonably related to a legitimate governmental objective." *Bell*, 441 U.S. at 539.

First, Plaintiffs do not present allegations or evidence to show Defendants have an "express intent" to punish Plaintiffs. Second, preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective. See *Jennings v. Rodriguez*, ––– U.S. ––––, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).[7] Third, Plaintiffs' current confinement does not appear excessive in relation to that objective. Plaintiffs do not cite to authority, and the counsel is aware of none, under which the fact of detention itself becomes an "excessive" condition solely due to the risk of a communicable disease outbreak—even one as serious as COVID-19.

Plaintiffs' cited authority addresses the exposure of inmates or detainees to *existing* conditions within the facility at issue. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 682-83 (1978) (mingling of inmates with infectious diseases with others); *Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974) (same); *Helling v. McKinney*, 509 U.S. 25 at 33, 35, (1993) (placement of inmate with emphysema in a cell with a cellmate who smoked often). Here, there is no evidence that anyone at BCHOC has COVID-19, and Plaintiffs do not address the measures Defendants have taken and are taking to prevent such a spread from occurring. (*See* Exhibit 1 *passim*)(detailing measures to prevent the spread of COVID-19, including suspending social visitation, assessing

[7] Plaintiffs cite *Zadvydas* for the proposition that indefinite detention is disfavored, but that aspect of the Supreme Court's decision is not implicated in this case.

detainees for fever and respiratory illness, isolating detainees with COVID-19-compatible symptoms, and instructing detainees on hand washing and hygiene). Finally, even if Plaintiffs could show a Fifth Amendment violation, Plaintiffs provide no authority under which such a violation would justify *immediate release*, as opposed to injunctive relief that would leave Plaintiffs detained while ameliorating any alleged violative conditions within the facility. *See, e.g., Seifert v. Spaulding*, No. 18-11600-MGM, 2018 WL 7285967, at *2 (D. Mass. Sept. 11, 2018), report and recommendation adopted, No. CV 18-11600-MGM, 2019 WL 538253 (D. Mass. Feb. 11, 2019) ("Even where a prisoner claims that his only hope of obtaining adequate medical treatment is through release, a court cannot order release as a remedy for conditions of confinement that violate the Eighth Amendment violation."), (citing *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005) ("If an inmate established that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option."), and *Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990) (even where a prisoner proves mistreatment in prison that amounts to cruel and unusual punishment, "relief of an Eighth Amendment violation does not include release from confinement"). Thus, the court should conclude that Plaintiffs fail to meet their burden of clearly showing that they are likely to succeed on the merits of their claims. *See, e.g., Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1304557, at *2–3 (W.D. Wash. Mar. 19, 2020); *Francisco M. v. Decker*, D. N.J. March 25, 2020, Civil Action No. 20-2176 (CCC)(unpub.); *Sacal-Micha* (S.D.Tex.)(full cite forthcoming).

As stated in his affidavit, during the twenty-three years that Thomas M. Hodgson has been Sheriff, the BCHOC has safely and efficiently managed several pandemics including the H1N1 and SARS viruses as well as the HIV and Hepatitis C explosion in the community.

4. Plaintiffs Have Not Established a Likelihood of Success under the Rehabilitation Act.

Plaintiffs claim that not only are they disabled, but that the entire immigration detainee population at BCHOC is disabled within the meaning of the Rehabilitation Act. As is separately argued regarding class certification, this is highly unlikely and certainly has not been demonstrated.

The Rehabilitation Act prohibits federal agencies from discriminating against people with disabilities. 29 U.S.C. § 794(b)(2)(B). Section 504 of the Act provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Plaintiffs have the burden of showing that Defendants violated Section 504 of the Rehabilitation Act. To prevail on Rehabilitation Act case, a plaintiff must establish that he is a qualified individual with a disability, that he was denied a benefit of the prison's services or otherwise discriminated against, and that the denial of services or discrimination was by reason of his disability. *See Phelps v. Carr*, Civil Action No. 07-cv-40245, 2010 WL 3895461 at *3 (D. Mass. Sept. 30, 2010). *See also Buchanan v. Maine*, 469 F.3d 158, 170-71 (1st Cir. 2006); *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010) (plaintiff must show that: "(1) [they] needed the accommodation to enjoy meaningful access to benefits, (2) the government was on notice that [they] needed the accommodation but did not provide it, and (3) there was a specific reasonable accommodation available.").

Plaintiffs have failed to show, first, that they are disabled. The term "disability" is a term of art under the Rehabilitation Act. It does not mean, as Plaintiffs imply, that anyone who is subject to stress or potential mental health issues is disabled. As stated by the First Circuit in

McDonough v. Donahoe, 673 F.3d 41, 46–47 (1st Cir. 2012):

> To qualify as "disabled" under the Rehabilitation Act's first disability definition, we apply a three-part analysis. First, the plaintiff must establish that she suffers from an impairment. Next, the plaintiff must show that the impairment affects a major life activity, and third, that the impairment substantially limits the major life activity. The phrases 'substantially limits' and 'major life activities' must be strictly interpreted 'to create a demanding standard for qualifying as disabled.'

Second, Plaintiffs have failed to show that Defendants denied Plaintiffs a reasonable accommodation that they needed. Indeed, Plaintiffs would have this Court assume that Celimen Savino is disabled, under the statute, by her asthma and that the refusal to release her immediately is a denial of a reasonable accommodation. Similarly, but even more remotely, Plaintiff Medeiros Neves claims he is disabled by his anxiety and depression. Simply put, that is not how the Rehabilitation Act works. Plaintiffs must establish that they in fact have a statutory disability, that it prevents them from accessing services at BCHOC, and that there is no reasonable accommodation which would allow such access except for immediate release. Both named Plaintiffs fail to show that they needed an accommodation, that Defendants were on notice that they required an accommodation but failed to provide one, and that the requested accommodation would have been available and reasonable.

Contrary to Plaintiffs' argument, Defendants are not able to determine whether an individual has a disability or requires an accommodation unless they have notice that the individual has a disability or needs an accommodation.[8] Moreover, prison administrators

[8] Under the detention standards that apply to various immigration detention facilities, Defendants have screening procedures to identify medical and mental health impairments and any requisite reasonable accommodations that comply with federal law, including the Rehabilitation Act. *See* Immigration and Customs Enforcement, Detention Standards, https://www.ice.gov/detention-standards/2019 (last visited Feb. 7, 2020); *see, e.g.*, Immigration Customs and Enforcement, Performance-Based National Detention Standards 2011 (rev. 2016),

"should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1974). Here, because Plaintiffs have not set forth the requisite allegations in their Complaint, they have failed to state a claim under the Rehabilitation Act and are unlikely to succeed on the merits.

D. Plaintiffs Have Not Demonstrated They Will Suffer Irreparable Harm

As stated in *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1304557, at *2–3 (W.D. Wash. Mar. 19, 2020):

> Plaintiffs do not show that "irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22. The "possibility" of harm is insufficient to warrant the extraordinary relief of a TRO. See id. There is no evidence of an outbreak at the detention center or that Defendants' precautionary measures are inadequate to contain such an outbreak or properly provide medical care should it occur. Accordingly, the court concludes that Plaintiffs fail to meet their burden of clearly showing that irreparable harm is likely in the absence of an injunction.

The Supreme Court's "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. Conclusory or speculative allegations are not enough to establish a likelihood of irreparable harm. *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc*., 736 F.3d 1239, 1250

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https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf.; *see also* Immigration Customs and Enforcement, National Detention Standards For Non-Dedicated Facilities (rev. 2019), https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf. *See also* Exhibit 1 hereto regarding the specific steps taken at BCHOC.

(9th Cir. 2013); *see also Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."); *Am. Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (finding irreparable harm not established by statements that "are conclusory and without sufficient support in facts").

As stated above, Plaintiffs allege that only release from BCHOC into Massachusetts, one of the hot spots of the American COVID-19 crisis, will spare them the heightened risk of adverse consequences from COVID-19 due to their pre-existing conditions. This is not only speculative, but it is unlikely. Plaintiffs do not explain how they will suffer irreparable harm in the absence of an order requiring their release, given that Plaintiffs' existing medical care would be interrupted if not ended as a consequence of their release. If Plaintiffs continue to receive adequate medical care and shelter from COVID-19 in immigration detention, their harm is non-existent much less irreparable, and misstate the actual conditions and measures implemented at the facility.

E. Plaintiffs Have Failed to Address the Impact on the Public

In the immigration context, the Supreme Court has consistently upheld the constitutionality of detention, citing the Government's legitimate interest in protecting the public and preventing aliens from absconding into the United States and never appearing for their removal proceedings or interfering with the effectuation of their lawfully issued final orders of removal. *See Jennings v. Rodriguez*, 138 S. Ct. 830,836 (2018); *Demore*, 538 U.S. at 520-22; *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). Nor is detention pending removal an "excessive" means of achieving those interests. The Supreme Court for over a century has affirmed detention as a "constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523 (listing cases).

Plaintiffs make an artificial and distorted false choice by arguing that the Court must choose between immediate release of Plaintiffs, and all others similarly situated, or stand by idly while they all contract COVID-19. Plaintiffs fail to address the impact such release would have on the public's interests.

There is potential adverse impact on society if a TRO is granted. First, granting a TRO for the putative class without examining the facts of each individual class member's underlying health issues, if any, or their propensity for violence and/or flight, would potentially release persons who in some cases Congress has prohibited from release. It would also result in the release of persons who do not require release and/or who pose a risk of harm and/or flight. A deliberative procedure, before an Immigration Judge typically, has resulted in a determination that the class members must be detained. Where such a determination was not made, it was likely because the INA mandated the detainees detention – for example, if the individual has obtained certain criminal convictions, detention is mandated under 8 U.S.C. § 1226(c), or if the individual has a final order of removal, detention is required for a period of at least 90 days under 8 U.S.C. § 1231(a)(2) to allow ICE to effectuate the removal order. Disrupting the statutory scheme would adversely impact society by releasing individuals with significant criminal records and would cast aside lawfully issued orders by Immigration Judges and the Board of Immigration Appeals. Creating a precedent that all incarcerated individuals could use to demand release without any individual analysis of their circumstances would certainly adversely impact society. And that is precisely what the breadth of Plaintiffs' claims could do.

F. <u>The Balance of the Equities Favors Defendants</u>

It is well-settled that the public interest in enforcement of United States immigration laws is significant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *Blackie's*

House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant."); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) ("There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permit[s] and prolong[s] a continuing violation of United States law." (internal marks omitted)).

In keeping with their reductionist approach, Plaintiffs give short shift to this portion of the test for issuing emergency relief. In essence, they appear to posit that nothing could justify exposing Plaintiffs to the near-certain risk of contracting COVID-19. As stated, the risk has not been shown to be greater than that facing Plaintiffs if they are in the general population. Plaintiffs' speculation notwithstanding, at the present time there are no confirmed cases of COVID-19 in the inmate, detainee or prison staff population at BCHOC.

Plaintiffs rely on two propositions, one which is certainly true and the other very much unproven. First, Plaintiffs state that the COVID-19 virus poses significant risk. This is true, but it does not apply specially to Plaintiffs or the purported class. Second, Plaintiffs claim that they will surely get infected with COVID-19 if they remain detained (and, implicitly, that they will not get infected if released). As argued above, this is a doubtful conclusion.

What Plaintiffs do not address is Defendants' interests in keeping them detained. First among these is that both of the named Plaintiffs were found by a judge to pose a significant risk to the community if they were released. Plaintiff Celimen Savino has at least nine arraignments in Massachusetts since 2008 as a result of eleven arrests, including seven arrests for aggravated assault and multiple arrests for violating the restraining order initiated against her by her husband. *See* Exhibit 3 hereto. She threatened him repeatedly with violence. *Id.* She admitted

that she has anger management and control issues during her bond hearing by an immigration judge. *Id.* She has been ordered removed from the United States by an immigration judge and the Board of Immigration Appeals affirmed this removal order. *Id.* This is not a person that can be expected to comply with any conditions of release, since she has repeatedly violated restraining orders and faces removal to her home country if her petition for review is unsuccessful.

Named Plaintiff Medeiros Neves refused to comply with officers' orders to put his vehicle in park and get out of his car when they encountered him in an obviously inebriated state. *See* Exhibit 4 hereto. Instead, he placed the transmission in reverse and as a consequence, the car rolled onto one of the officer's legs. *Id.* He resisted arrest once out of the car. *Id.* An immigration judge found that Medeiros Neves posed too great a risk to the community to be released on bond. The Defendants have an interest, and society at large has an interest, in protecting the community from immigration detainees, such as both named Plaintiffs, who pose a risk of violence to the community.

Moreover, as argued above, Celimen Savino and many other ICE detainees are in detention awaiting effectuation of their final orders of removal after their immigration cases were heard by immigration judges and the Board of Immigration Appeals.[9] There is a strong policy interest in maintaining the structure put in place by Congress for dealing with persons subject to removal from this country. Congress has expressed in clear terms that the courts are not to interfere with final orders of removal. See 8 U.S.C. §§ 1252(d), (e). Even if this Court had the power to do so, and it does not absent a finding that the statute is unconstitutional, carving out a

[9] ICE estimates that approximately one-third of all current BCHOC immigration detainees are subject to mandatory statutory detention.

COVID-19 exception to the INA would impinge on society's interest in an orderly application of its laws as well as according respect to a co-equal branch of government's determination in making those laws. It is often said that bad facts make for bad law. The COVID-19 pandemic certainly constitutes "bad," or very challenging, facts. We should not lose sight of the principle that we are a nation of laws, even if in challenging times.

Moreover, Plaintiffs' alleged injury—a heightened risk for serious consequences from COVID-19—is not redressable by release. "Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.). For purposes of standing, a plaintiff's injury is redressable where there is "a 'substantial likelihood' that the requested relief will remedy the alleged injury." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (citation omitted). Plaintiffs' desired relief—release from detention—will not ameliorate or diminish their claimed heightened risk of injury or death resulting from COVID-19, nor can a court order requiring release prevent Plaintiffs from contracting COVID-19.

Notably, Plaintiffs do not explain how release from BCHOC, a facility without a single confirmed case of COVID-19, into the greater Boston area, one of the "hot spots" of America's COVID-19 crisis, will reduce their risk of injury or death.

Plaintiffs' petition for habeas relief seeking immediate release is inappropriate in the context of a conditions of confinement claim. "[T]he writ of habeas corpus is limited to attacks upon the legality or duration of confinement." *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979). In *Crawford*, the Ninth Circuit held that "release from confinement" was not the appropriate remedy to address the petitioner's claims "alleg[ing] that the terms and conditions of [petitioner's] incarceration constitute[d] cruel and unusual punishment" and "violated his due

process rights." Id. at 891-92. Such a claim must be brought as a civil rights claim, *Dohner v. Seifert*, 5 F.3d 535 (9th Cir. 1993), that if proven, would be remedied by "a judicially mandated change in conditions and/or an award of damages." *Crawford*, 599 F.2d at 892.

Thus, because Plaintiffs do not assert any illegality or impermissible duration of confinement, Plaintiffs' petition for habeas relief seeking immediate release is inappropriate in the context of their conditions of confinement claim.

IV. CONCLUSION

The risk presented to all aspects of our society by the COVID-19 virus is very serious. ICE and the Bristol County Sheriff's Office are taking the risk very seriously. The relief sought by Plaintiffs is not the right response.

For all the foregoing reasons, the Defendants respectfully request that the motion for a temporary restraining order and for class certification be denied. In light of the extremely short time period in which the Defendants have had to respond, they request an opportunity to further brief the issues should the Court be inclined to do anything other than deny the motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Thomas E. Kanwit
Thomas E. Kanwit

Dated: February 30, 2020