UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MARIA ALEJANDRA CELIMEN SAVINO, *et al*., Petitioners-Plaintiffs, v. STEVEN J. SOUZA, Superintendent of Bristol County House of Corrections, in his Official Capacity, Respondent-Defendant.	Case No. 1:20-cv-10617-WGY

REPLY TO RESPONDENT-DEFENDANT'S OPPOSITION TO MOTION FOR A TEMPORARY RESTRAINING ORDER[1]

[1] Due to the limitations on ability to file sealed documents arising out of the COVID-19 pandemic and the expedited nature of this filing, exhibits with Personal Identifying Information have been provided to the Court *in camera*, via email Clerk Gaudet.

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INTRODUCTION

Petitioners-Plaintiffs ("Plaintiffs") are civil immigration detainees held by Respondent-Defendant ("Defendant") at the Bristol County House of Corrections and C. Carlos Carreiro Immigration Detention Center (collectively, "Bristol Facilities"), who respectfully seek emergency relief from this Court on behalf of themselves and the Putative Class—including humanitarian release and an injunction restricting admissions of new immigration detainees—because they are at imminent risk of contracting COVID-19. In the hearing in this matter on Monday, Plaintiffs and Defendant agreed that this Court has the jurisdiction and authority to order the release of persons held in the Bristol Facilities.

Since Monday's hearing, Defendant has provided data to the Court confirming that more than two-thirds of the 147 putative class members have never been convicted of any crime of violence; more than one-third have never been convicted of any crime *at all*; and approximately one-third have medical conditions that Defendant acknowledges may make them specially vulnerable to COVID-19. In addition, Plaintiffs have been able to independently gather individualized information on approximately 80 putative class members, primarily through their immigration defense attorneys, relatives, and community organizations, indicating that almost no class members are subject to a presently executable removal order; nearly all have a residence at which they could self-quarantine and shelter-in-place if ordered released by this Court; and those without a personal residence have been offered alternative residential placements by local faith leaders sufficient to ensure that no putative class members ordered released would be without a home or ability to shelter-in-place safely.

At the same time, public health conditions have only worsened. The number of cases in Massachusetts – what Defendant's Opposition correctly terms a "hot spot" for the virus – has

tripled just in the days since this lawsuit was filed, and the number of deaths has more than doubled. The virus has spread in correctional, immigration detention, and veterans' facilities across the country. Recognizing the mounting gravity of this public health crisis, numerous additional courts have granted release to people in both civil and criminal detention. Two days ago, for instance, one district court ordered the release of ten civil immigration detainees held under various statutory authorities, with removal proceedings in differing postures, and with diverse criminal histories, stating "should we fail to afford relief to Petitioners we will be a party to an unconscionable and possibly barbaric result." *See Thakker v. Doll*, 1:20-cv-480-JEJ (M.D. Pa. March 31, 2020).

Plaintiffs submit this Reply to address: (1) additional facts about the putative class and conditions of detention; (2) a potential "opt in" procedure of the type the Court suggested at the March 30, 2020 hearing; and (3) an affirmation of the legal propriety of immediate, class-wide humanitarian relief and release in this context.

FACTS

I. Facts regarding members of the putative class

Defendants have provided a list of 147 people in detention at Bristol County, along with a cover letter to the Court. Defendant witheld medical information was redacted from the version provided to Plaintiffs' counsel, but several aspects are immediately clear, even according to Defendant's partial disclosure:

- At least 111 individuals have never been convicted of a crime of violence and at least 56 have never been convicted of any crime at all.[2]
- Of the 31 individuals Defendant identified as having final orders of removal, only 3 have scheduled removal dates.

[2] Of the 36 persons who appear to have been convicted of a crime of violence, Defendant did not provide information sufficient for Plaintiffs to determine which of these, if any, occurred in the last five years. Plaintiffs' own inquiry demonstrates that a number of these convictions were, in fact, older than five years.

- "[A]pproximately 30% of the ICE detainees at BCHOC have some type of underlying condition which could *potentially* make them more susceptible to adverse health effects from COVID-19 if they are exposed to the virus." *See* Letter from Thomas Kanwit dated April 1, 2020 (emphasis in original).

Plaintiffs have also independently compiled significant information regarding the putative class members at issue here. *See* Plaintiffs' Spreadsheet of Class Member Data (submitted via email to Clerk Gaudet). Of the 147 people held in civil-immigration detention at Bristol, Plaintiffs have gathered individualized information about 80 of them, revealing the following:

1) All are individuals in civil, not criminal, detention.
2) At least 38 have serious medical issues such as heart conditions; diabetes; liver and kidney disease; and lung and respiratory conditions, including bronchitis and asthma. These individuals are particularly vulnerable to COVID-19. This implies a far higher percentage (47.5 v. 30%) of medically vulnerable persons than the data provided by Defendant.
3) Almost all have a secure housing option if admitted to bail and subject to post-release quarantine or shelter-in-place orders, and faith-based organizations have offered to provide shelter for the remainder.

Plaintiffs continue to collect individualized information regarding putative class members.[3]

II. Facts regarding the conditions of confinement at Bristol County.

Defendants' Opposition is premised in large part on the idea that, because Bristol County Facilities have not yet had a confirmed case of COVID-19, this demonstrates that conditions are reasonably safe. As medical experts have repeatedly warned, however, that is an inappropriate and life-threatening approach to combat the spread of the virus. Reply Declaration of Gregg Gonsalves ¶¶ 14-15; ECF No. 12-2 Declaration of Allen S. Keller ¶¶ 14-15 ("Immigration detention staff, as well as contractors and vendors, are at risk of unknowingly spreading COVID-19 infection that was acquired in the community."); *see also* Alan S. Keller & Benjamin D.

[3] Plaintiffs have achieved these efforts despite not being provided by Defendants with telephone access to putative class members. *See* Oren Sellstrom Decl. ¶¶ 4-8

Wagner, *COVID-19 and immigration detention in the USA: time to act*, THE LANCET (Mar. 31, 2020). Current practice and policy at the Bristol Facilities has not included the testing of pre-symptomatic people. There is no question that people can be infected and contagious while not yet exhibiting symptoms. Reply Declaration of Gregg Gonsalves ¶ 9 ("Notably, up to 60% of infections may be 'covert' and not amenable to the screening measures described in the ICE memo."). There is also no question that if a person in detention contracts COVID-19, that the spread in a congregate facility like Bristol County would be rapid and severe. *Id.* ¶ 5-6, 20, 27. Yet, despite this, Bristol Facilities have not tested any detainee; have continued to allow new entrants into the facility without testing or quarantine procedures; and have even allowed symptomatic guards to enter the unit.[4] To Plaintiffs' knowledge, there is still no current prohibition on admitting new people to detention or to transferring detainees out, policies which may lead to the spread of COVID-19 in Bristol, or from Bristol to other facilities.

Moreover, there are a number of critical facts regarding the danger of confinement in the Bristol Facilities that Defendant does not even purport to deny. For instance, there is no dispute that people in detention are unable to practice social distancing. Bristol County is a congregate facility where people are in a confined space, in close contact with each other on a regular basis, the paradigmatic setting warned against by medical professionals. Sheriff Hodgson, in his declaration does not dispute reports that people in detention at Bristol County sleep in beds that are approximately 3 feet apart. ECF No. 12-5, Declaration of Cesar Francisco Vargas Vasquez ("Vasquez Decl.") ¶ 8; ECF No. 12-4, Declaration of Carlos Menjivar-Rojas ("Menjivar-Rojas Decl.") ¶ 3.[5] Nor does Defendant dispute the statements in Plaintiffs' complaint and the

[4] Sheriff Hodgson states in his declaration that new admits are given a medical screening, but there is no evidence that this is in any way sufficient to test for or protect against COVID-19.

[5] A Massachusetts state inspection report in November 2019 found that the Bristol Facilities violated state health regulations since there was inadequate space in dorm sleeping areas. *See* Letter from Massachusetts Executive

accompanying declarations that food trays are passed through at least 3 or 4 sets of hands before reaching the person that consumes the food. ECF No. 12-3, Declaration of Ira Alkalay ¶ 5. Following the filing of this lawsuit, the Facilities have now apparently begun having individuals take their food trays back to their beds to eat – seemingly a stopgap measure to allow Defendant to deny there is congregate eating, but one that does not remove the problem of food consumption in close proximity to others. Declaration of Victor Sanchez-Lopez ("Sanchez-Lopez Decl.") ¶ 10.

Moreover, contrary to Defendant's claims, the evidence shows that the sanitary conditions at Bristol County are sub-par and have all but ensured that COVID-19 will quickly once present. *See* Praschan Decl. ¶9; *see also* Gartland Decl. ¶16. When this suit was filed, it is undisputed that multiple showers and urinals were non-functional. ECF No. 12-3, Alkalay Decl. ¶ 7; Sanchez-Lopez Decl. ¶¶ 16-17. This decreases the opportunities for people in detention to practice personal hygiene and ensure that the facilities available are used by more people and are less clean. Additionally, it remains undisputed that the Bristol County facilities "watered down" soap used by those in detention. ECF No. 12-4, Menjivar-Rojas Decl. ¶ 7; ECF No. 12-5, Vasquez Decl. ¶ 11.

Defendant assets that there is thorough cleaning of the Facilities, but there is strong evidence to the contrary. Cleaning of cells and common areas is irregular and cleaning work is often performed by those in detention, without access to proper cleaning supplies. ECF No. 12-3, Alkalay Decl. ¶ 8. One detained individual who helps clean the bathroom explained that he had only watered-down soap and hot water to clean with. ECF No. 12-4, Menjivar-Rojas Decl. ¶¶ 8-9. Supplies for cleaning personal areas are insufficient. *Id.*; Alkalay Decl. ¶ 8; Declaration of

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Office of Health and Human Services, Facility Inspection of Dartmouth I.C.E. Facility (Nov. 13, 2019) https://www.mass.gov/doc/bristol-county-ice-facility-north-dartmouth-october-22-2019/download.

Annie Gonzalez Milliken ("Milliken Decl.") ¶ 7. Detainees have repeatedly asked in vain for improved cleaning supplies, including bleach and other disinfectants. Sanchez-Lopez Decl. ¶¶ 7-8, 18. Correctional officers and nurses frequently do not wear protective gear either, heightening the risk of spread. ECF No. 12-5, Vasquez Decl. ¶ 18; ECF. No. 12-4, Menjivar-Rojas Decl. ¶ 10.

Defendant claims that Bristol County House of Corrections ("BCHOC") has "instituted strict protocols to keep inmates, detainees, and staff safe, and take all prudent measures to prevent exposure to the COVID-19 virus." ECF. No. 26, at 4. Yet, some of these "strict protocols" are inconsistent with public health guidelines. For example, the CDC has advised that symptoms generally start two to *fourteen* days after exposure. Reply Declaration of Gregg Gonsalves ("Gonsalves Reply Decl.") ¶ 8. As such, individuals (detainees and employees alike) could easily be infected and spreading the virus to others before showing the symptoms for which Bristol says it tests. *Id.* Notably, up to 60% of infections may be "covert" and not amenable to the screening measures described in the ICE memo. ECF. No. 26-2, at 4. In fact, other congregate facilities such as state prisons across the United States have similar procedures in place and have not been able to prevent outbreaks of COVID-19, which can be transmitted through asymptomatic or mild infections not detected through syndromic surveillance. Gonsalves Reply Decl. ¶ 9. Furthermore, it is not just influenza-like symptoms that BCHOC needs to be screening for. *Id.* ¶ 10. Studies have shown that the initial symptoms can be gastrointestinal in nature, such as diarrhea or abdominal pain, rather than cough or fever. *Id.* If this is missed, infection may spread before it is recognized as COVID-19. *Id.*

BCHOC's cleaning and logistics protocols are inadequate to prevent the spread of the virus. ECF. No. 26-2, at 2; ECF. No. 26-1, at 2-4. New declarations from medical professionals

who have visited the Bristol Facilities to assess their patients attest that under the extant conditions at BCHOC, those with underlying medical conditions cannot be "adequately protected from the virus that causes COVID-19." Declaration of Dr. Nathan Praschan ("Praschan Decl."), ¶ 8; Declaration of Matthew Gartland ("Gartland Decl."), ¶ 16. Those protocols are inadequate to prevent transmission of COVID-19 unless *all* detainees and staff have universal access to Personal Protective Equipment, including N-95 respirators, face shields, and gloves. Gonsalves Reply Decl. ¶ 12. The mere availability of hand sanitizer and daily cleaning of high-touch surfaces are unlikely to reduce the droplet-borne transmission of the virus, as high-traffic areas are constantly exposed to new contamination. *Id.* While instructing individuals to use sanitizer and refrain from touching their eyes, nose, or mouth is helpful for those only occasionally exposing themselves to infection (such as an individual who only leaves home to go to the grocery store), these prevention techniques are less effective when there is constant exposure, as in BCHOC. *Id.*

Defendant claims that detainees are best kept at Bristol because "at present no inmate, detainee or staff member has tested positive for COVID-19." ECF. No. 26, at 1. Yet this assertion says nothing about whether BCHOC has been exposed to the virus unless every individual who enters the facility has tested negative. Moreover, for this claim be meaningful, those who have exited and re-entered the facility would need to be re-tested and confirmed to be negative after each exit. Gonsalves Reply Decl. ¶ 15.

Finally, Defendant claims that releasing Plaintiffs will "place themselves and their communities at great risk of contracting COVID-19[.]" ECF. No. 26-1, at 5. On the contrary, it is allowing ICE facilities to act as "institutional amplifiers" that enhances community risk, as outbreaks inside congregate facilities often spill over to communities through transmission to

facility staff and officials, as has been seen with tuberculosis. Gonsalves Reply Decl. ¶ 5. The number of people inside BCHOC and the number of daily contacts between these individuals in detention are far greater than what would be experienced in a home setting. Thus, placing Plaintiffs into homes of family, friends, or sponsors is far safer than leaving them in custody of ICE. *Id.* ¶ 6.

Other changes that Defendant touts cannot overcome the fundamental problems cited above. For example, Defendant emphasizes the limitation and screening of visitors, yet that has readily been determined by other courts to be insufficient to address the current public health crisis where people continue living in close quarters congregate environments. *See Castillo v. Barr*, 20-cv-605 (TJH) (C.D.Cal. Mar. 27, 2020).

III. Facts regarding named plaintiffs

In an effort to rebut the claim that named Plaintiffs should be among those released from Bristol Facilities to prevent their illness or death from COVID-19, Defendant attempts to portray both as somehow dangerous to the community. These arguments are not relevant to the determination of whether a constitutional violation is occurring at Bristol County, and at any rate do not demonstrate that either is a danger to the community. See *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). Moreover, civil immigration detention is required, by definition, to be non-punitive. Defendant lacks authority to use its detention authority to punish named Plaintiffs or anyone else in its custody.

Regarding named Plaintiff Celimen Savino, Defendant stresses that she has a final order of removal and numerous arrests. But Defendant fails to advise the Court that this order is not presently executable as her country of origin is Venezuela, a country with which the United States no longer maintains diplomatic relations, and to which US carriers do not carry people.

See Henriquez Decl. Ex. E. Furthermore, those with final order of removal are regularly released from confinement pending removal. Nothing in 1231(a) prevents the release of Ms. Savino, *see* 8 U.S.C. § 1231(a), and many people who were detained under 1231(a) have been released from custody in recent cases involving COVID-19. See *infra* at 15 (listing recent cases). Defendant also lists Ms. Savino's arrests and arraignments, while failing to note her lack of convictions and successful completion of pre-trial probation. *See* Henriquez Decl. Ex. B. The choice to arrest or arraign an individual is not evidence of guilt of a crime and should not be considered in determining fitness to return to the community in these circumstances. Finally, Defendant ignores the grave risk that COVID-19 poses to Ms. Savino, a woman hospitalized for severe asthma. *See* Henriquez Decl. Ex. A.

Regarding Plaintiff Medeiros Neves, Defendant notes only that he has a single conviction for Operating Under the Influence (OUI). They make no claims about his dangerousness to the community other than to note that he was once denied bond. A non-violent conviction for which the detainee has already paid his debt to society as deemed by the criminal justice system is not in any way indicative of dangerousness to the community.

IV. Facts Regarding Plan for Release of Plaintiffs and Putative Class Members

Plaintiffs' counsel established contact with 80 putative class members either directly, through their immigration attorneys, family members, or well-established community groups. *See* Plaintiffs' Spreadsheet of Class Member Data (submitted via email to Clerk Gaudet). As Counsel learned through these contacts, many class members have homes to which they could return or move to upon release, where they would be supported in taking any necessary public health precautions and complying with conditions of release. *Id.; see also* Declaration of Jane

Rocamora. For putative class members who Plaintiffs' counsel was unable to establish contact with or did not indicate a specific location to which they would return, Plaintiffs' counsel secured the assurance of 24 individuals and a faith-based organization located within the District of Massachusetts to provide housing and other material support to up to 49 class members upon release. Decl. of Rev. Elizabeth Nguyen ¶ 7. These generous individuals and community organizations cited their faith, moral, and personal commitments to supporting those in need, *id.,* Ex. A, and provided assurance that they would support anyone in their care to comply with public health precautions and conditions of release. *Id* ¶ 8. These community supports are facilitated by the Boston Immigration Justice Accompaniment Network, a community organization with experience offering housing and hospitality to over 60 individuals leaving immigration detention in the past three years. *Id.* ¶ 5.

POTENTIAL OPT-IN PROCEDURE

At the March 30, 2020 hearing, the Court proposed that Plaintiffs might prepare a form of "opt in" Notice to facilitate relief in this matter. Plaintiffs have done so, along with a Consent to Join form that typically accompanies such opt-in Notices. *See* Sellstrom Decl. Exs. C and D. Although Plaintiffs understood that the Court was not indicating that any such Notice should be disseminated at this point, in the event the Court were to deny the motion for class certification, Plaintiffs agree that the "opt in" process referenced by the Court could work well in the context of this case and the need for expedited relief, and would be consistent with the requirements of Federal Rule of Civil Procedure 23. See *Newberg on Class Actions* § 4:30 (5th ed. 2013) ("[A] court may issue a preliminary injunction in class suits prior to a ruling on the merits."); *see also Mullins v. Cole*, 218 F. Supp. 3d 488 (S.D.W. Va. 2016) (considering harms to putative

class as a whole in awarding preliminary injunction prior to class certification).")." *J.O.P. v. D.H.S.,* 409 F.Supp. 3d 367, 376 (D. Md. 2019)(same); *Rodriguez v. Providence Community Corrections*, 155 F. Supp. 3d 758, 766 (M.D. Tenn. 2015)(rejecting argument that class-wide injunctive relief is inappropriate pre-certification and finding "preliminary injunctive relief… is well-suited to class wide application.").

Plaintiffs are prepared to address these further points at the April 2, 2020 hearing.

ARGUMENT

I. The Court has the power to release all detainees and is not limited by the statute under which they are detained.

As Defendant agreed through counsel at the hearing on Monday, this Court has the power to order the release of the Named Plaintiffs and putative class members. *See Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (courts may grant *habeas* relief and "as law and justice require."); *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir 2001) (holding "the federal courts have inherent authority to admit to bail individuals properly within their jurisdiction," including immigration detainees seeking a writ of habeas corpus); *Coronel v. Decker,* 20-cv-2472 (AJN) (S.D.N.Y. Mar. 27, 2020) (ordering release of immigration detainees).

Contrary to Defendant's contention, *see* Opp Brf. at 17, *habeas* is an appropriate form of relief in cases involving conditions of confinement, particularly where the safety of the detainee is best served by release. *United States v. DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006). The "D.C. Circuit, the Second Circuit, the Third Circuit, the Fourth Circuit, and the Sixth Circuit firmly stand in the camp of allowing conditions-of-confinement claims to be brought in the habeas corpus context." *United States v. Martinez Hernandez*, No. CR 15-075 (GAG/BJM), 2017 WL 10927084, at *4 (D.P.R. Jan. 18, 2017), report and recommendation adopted (Mar. 7, 2017);

Aamer v. Obama, 742F.3d 1023 (D.C. Cir. 2014); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005); *Hernandez v. Wolf*, 20-cv-00617-TJH-KS, ECF. No. 17 (C.D. Cal. April 1, 2020) (holding COVID-19 conditions claim may be brought on habeas and ordering release of immigration detainee). Exercising the Court's broad *habeas* power is warranted and necessary in this case, where the lives of those detained at Bristol county are at risk and where release is the only meaningful relief to that harm.

II. The Court is not limited in granting release by statute of detention nor personal history of the individual

The Court has broad authority to order the release of those in federal custody. *See supra*. at 14. This authority is not limited by the statutory authority under which an individual is detained. In fact, in evaluating release because of the threat of COVID-19, and in other contexts, courts have released those detained under 1226(a), 1226(c) (mandatory detention), and 1231(a) (removal order). *See e.g. Hernandez* (C.D. Cal.) (ordering release of petitioner with a criminal history consisting of at least 8 convictions detained pursuant to 1226(c)); *Castillo v. Barr,* 20-cv-605 (TJH)(AFM) slip op. at 7 (C.D. Cal. Mar. 27, 2020) **(**release of two petitioners both detained under 1226(a)); *Coronel v. Decker*, 20-cv-2472 (AJN) slip op. at 17 (S.D.N.Y. Mar. 27, 2020) (release of four petitioners detained under 1226(a)); *Basank v. Decker*, 20-cv-2518 (AT) slip op. at 14 (S.D.N.Y. Mar. 26, 2020) (release of 10 detainees, at least 2 two petitioners mandatorily detained under 1226(c) finding "…courts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c). Thus, Respondents have failed to justify Petitioners' continued detention in unsafe conditions."). *Ronal Umana Jovel v. Decker*, 12-cv-308 (GBD), slip op. at 2 (S.D.N.Y. Mar. 26, 2020) (1226(c)); *Arana v. Barr*, No. 1:19-cv-07924-PGG-DCF, slip op. at 18 (S.D.N.Y. March 27, 2020) (report and recommendation ordering immediate release of an individual detained pursuant to 1226(c) pending a bond

hearing); *Jimenez v. Wolf*, 18-10225-MLW (D. Mass. Mar. 26, 2020) (ordering release of individual with final order of removal).

III. Plaintiffs' should be granted a Preliminary Injunction

All four preliminary injunction factors overwhelming favor Plaintiffs here, and none of Defendant's arguments provide legal or factual grounds to the contrary.

Defendant asserts that Plaintiffs and those detained at Bristol County will not suffer irreparable harm because the harm alleged is "predictive or speculative" and cannot be relieved by preliminary injunction. *See* Opp. Br. at 20-21. This is both factually and legally incorrect.

As a factual matter, there can be no question that Plaintiffs would be irreparably harmed if they remain in immigration detention and, as a result, contract COVID-19. The COVID-19 virus is virulent, dangerous, and leads to serious medical complications and possible death. Gonsalves Decl., ¶ 5. While this virus can be contracted by all, *Id.*, ¶¶ 5, 7, this is harm is particularly acute for those with preexisting medical conditions. *Id.* ¶¶ 4, 7. As Plaintiffs demonstrate *supra* at 6, they are so far aware of people in detention with medical conditions that make them highly vulnerable to COVID-19. *See* Plaintiffs' Spreadsheet (submitted via email to Clerk Gaudet). Medical consensus is clear: COVID-19 is dangerous and deadly and those in congregate facilities without the ability to "social distance" or adequate sanitation are extremely susceptible to infection. Because of the close confinement conditions in Bristol County Immigration Detention Facilities, if one Plaintiff or detained person were to contract the virus, it is highly likely that it would spread to all Plaintiffs, subjecting them to the serious harm this illness would cause. *See* Keller Decl., ¶ 13. This harm is immediate, concrete, and far from speculative.

As a legal matter, Defendants propose that it is necessary to wait until one person in detention has contracted COVID-19 before injunctive relief is appropriate. This is dangerous and incorrect. The Supreme Court has been clear that enjoining future harm against those in detention is "not a novel proposition." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). The *Helling* Court further stated that "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.* There is such an unsafe, and life-threatening condition in Bristol County, where those in detention are at high risk of contracting and suffering injury from COVID-19. That this harm is irreparable, is bolstered by the wave of cases around the country where irreparable harm has been found and preliminary relief has been granted in near identical circumstances. *See Basank v. Decker*, No. 1:20-cv-02518-AT (S.D.N.Y. Mar. 26, 2020)*; see also Castillo v. Barr*, 20-cv-605 (TJH) (C.D. Cal. Mar. 27, 2020) (holding "Civil detainees must be protected by the Government. Petitioners have not been protected. They are not kept at least 6 feet apart from others at all times. They have been put into a situation where they are forced to touch surfaces touched by other detainees, such as with common sinks, toilets and showers. Moreover, the Government cannot deny the fact that the risk of infection in immigration detention facilities – and jails – is particularly high if an asymptomatic guard, or other employee, enters a facility. While social visits have been discontinued at [the facility], the rotation of guards and other staff continues.").

As such, the imminent infection, illness, and death that Plaintiffs face constitutes a legally cognizable irreparable harm that this injunctive relief from this Court can help relieve. Nor is "express intent" to punish people in Bristol County Immigration Detention Facilities needed to establish a Fifth Amendment violation, as Defendant suggests. Opp. Br. 15-16. Plaintiffs need

only establish that Defendant failed to provide for the "reasonable safety" of Plaintiffs in order to establish a violation. *DeShaney v. Winnebago County Dept. of Soc. Servs*., 489 U.S. 189, 199-200 (1989); *see Castillo v. Barr*, No. 5:20-cv-00605, ECF 32 (C.D. Cal. Mar. 27, 2020). Even in the Eighth Amendment context, it is not solely through express intent but also through deliberate indifference that violations arise. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (holding that "[a] prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment."). Deliberate indifference is not express intent, and "… is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* at 835. Civil detainees enjoy even greater protection beyond that of the Eight Amendment as they cannot be subject to punitive detention. *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982). As such, surely a violation for the civil detainees here, has been well established.

Recently, the Court in *Basank v. Decker*, in a decision to release a number of people from detention stated the standard as one where "immigration detainees can establish a due process violation for unconstitutional conditions of confinement by showing that a government official "knew, or should have known" of a condition that "posed an excessive risk to health," and failed to take appropriate action. *Basank v. Decker*, No. 1:20-cv-02518-AT (S.D.N.Y. Mar. 26, 2020); *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) ("A plaintiff can prove deliberate indifference by showing that the defendant official recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to the plaintiff's health or safety." (internal quotation marks, citation, and alterations omitted))." The *Basank* Court went on to say "the risk of contracting

COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious. It can no longer be denied that Petitioners, who suffer from underlying illnesses, are caught in the midst of a rapidly-unfolding public health crisis." *Basank* at 14. The same is true here. Here, where there is a clear and obvious public health crisis; where public health experts, courts, district attorneys and sheriffs elsewhere have all released people from custody because of the acknowledged link between close confinement and the spread of COVID-19; where those in Bristol's custody have continued to complain about conditions of confinement related to the outbreak of the pandemic; and where Defendant has taken no effective steps in remedy the active crisis, there is clear deliberate indifference. The Defendant knows of the dangerous condition and has not taken the only step available to ameliorate it – release.

Defendant also claims that Plaintiffs have not demonstrated that the "restriction or condition…is not reasonably related to a legitimate governmental objective." Opp. Br. at 16. Plaintiffs need not meet this standard as they have already well established that Defendant's constitutes prohibited deliberate indifference that amounts to a violation of the Fifth Amendment.

For these reasons Plaintiffs have well established a Fifth Amendment Violation and are likely to succeed on the merits of that claim.[6]

As the overwhelming majority of courts to consider this issue have concluded, the balance of equities tips "sharply" in favor of Plaintiffs. *Fraihat v. Wolf*, 20-cv-00590, slip op. at *11 (C.D. Cal. Mar. 30, 2020) (holding civil immigration detainee faces "irreparable harm to his constitutional rights and health" and that comparatively, there is "no harm to the Government when a court prevents the Government from engaging in unlawful practices"); *accord Thakker v.*

[6] Defendant's arguments regarding the Rehabilitation Act are without merit, yet are inappropriate to address here Plaintiffs' moved for a Temporary Restraining Order solely on their Fifth Amendment claims.

Doll, No. 1:20-cv-480 slip op. at *23 (M.D. Pa. Mar. 31, 2020) (observing that, in comparison to "irreparable harm" faced by group of civil immigration detainees, the potential harm to the government is "limited," given Petitioners' awareness of "grave consequences" for failure to appear at future immigration proceedings and "low" risk of absconding during period of "restricted . . . travel"); *Basank v. Decker*, No. 1:20-cv-02518-AT, ECF 11 at *14 (S.D.N.Y. Mar. 26, 2020) (finding potential harm to government "limited," as Petitioners' incentive to appear at immigration hearing are "sufficient to protect whatever interest Respondents may have in ensuring that Petitioners appear at future hearings and remain subject to the immigration laws"; fact Petitioners are mandatorily detained pursuant to 8 U.S.C. § 1226(c) insufficient to justify "continued detention in unsafe conditions.").

Courts have reached these conclusions even where civil immigration detainees have criminal records, noting that a prior criminal record is but "limited evidence" of dangerousness to the community and is insufficient to justify continued detention in light of the "rapidly-evolving public health crisis" created by COVID-19. *Coronel v. Decker*, No. 1:30-cv-02472, ECF 26 at *17 (S.D.N.Y. Mar. 27, 2020) (plaintiffs detained pursuant to § 1226(a) had "relatively limited criminal histories" for disorderly conduct and menacing); *accord Castillo v. Barr*, No. 5:20-cv-00605, ECF 32 (C.D. Cal. Mar. 27, 2020) (observing that while both petitioners have committed criminal offenses, they completed their sentences and remain "civil detainees entitled to more considerate treatment than criminal detainees."). Notably, in *Thakker,* the court ordered release of 12 petitioners of whom numerous had previous bond hearings denied, and at least 2 had executable final orders where ICE was trying to get travel documents to deport them. *Thakker v. Doll,* No. 1:20-cv-480 (M.D. Pa. Mar. 31, 2020)*,* ECF No. 35, Gov't Brief in Opp. pp. 25-27.

Moreover, there are mechanisms available to the government to ensure Plaintiffs' appearances at future immigration proceedings short of detention at BCHOC. For example, other courts have fashioned conditions of release aimed at both precluding plaintiffs from absconding from the United States and protecting public health, including but not limited to:

- release into the custody of a family member with a residence within the court's jurisdiction, electronic monitoring, and 24-hour home confinement except for emergency medical appointments. *See, e.g.*, *Calderon Jimenez v. Wolf*, No. 18-10225-MLW (D. Mass. Mar. 26, 2020) (Transcript of Order);

- release to shelter-in-place with conditions, including not to leave the residence "except obtain medical care," not to violate any laws, and agree to monitoring, *Fraihat*, 20-CV-00590 slip op. at *12-*13.

- release civil detainees on own recognizance and enroll them in Intensive Supervision Appearance Program subject to conditions to violate no laws or ordinances, surrender for removal if ordered, apprise ICE of address changes, and agree to electronic monitoring. *Coronel v. Decker*, No. 1:20-cv-02472-AJN, ECF 28 at *1 (S.D.N.Y. Mar. 27, 2020)

Similarly, the emergency injunctive relief that Plaintiffs' seek is "absolutely in the public's best interest," as the country at large has a "critical interest in preventing the further spread of the coronavirus." *Fraihat*, 20-CV-00590 slip op. at *11. An outbreak at BCHOC would endanger not only Plaintiffs, but correctional staff, residents of Bristol County, residents of the Commonwealth, and "our nation as a whole." *Id.* at *11-*12. With state of emergencies declared by local, state, and national governments, there is no higher public interest than stopping the spread of this pandemic and promoting public health. *Thakker*, No. 1:20-cv-480 slip op. at *23.

IV. The class-wide relief should be granted because the putative class meets the requirements of rule 23(b)(2) and class relief is not barred by § 1252(f) in this case.

In their response to Plaintiffs' Motion for Temporary Restraining Order, Defendant asserts that Congress has "prohibited the resolution of immigration habeas petition's (*sic*) like this through actions" pursuant to 8 U.S.C. § 1252(f)(1). Opp. Brf. at 9. This is false. § 1252(f)

does not divest district courts of jurisdiction to provide either class-wide declaratory relief or class-wide injunctive relief to this Plaintiff class.[7]

In *Nielsen v. Preap*, 139 S.Ct. 954 (2019), the three Justice plurality, joined by three dissenting Justices, made clear that, notwithstanding § 1252(f)(1), the District Court "had jurisdiction to entertain the plaintiffs' request for declaratory relief" in class action habeas corpus lawsuit challenging mandatory detention without bond. *Id*. at 962. Chief Judge Saris of this court has similarly concluded that § 1252(f)(1) "does not prohibit issuance of class-wide declaratory relief." *Calderon Jimenez v. Nielsen*, 399 F.Supp.3d 1, 2 (D. Mass. 2018); *see also Reid v. Donelan*, 2018 WL 5269992 at *6 (D. Mass. Oct. 23, 2018) (same); *Brito v. Barr*, 415 F. Supp.3d 258, 269 (D.Mass. 2019) (same).

Similarly, a number of courts—within the context of challenges to the Department of Homeland Security—have been clear that where plaintiffs are requesting that a court does not seek to "enjoin the operation" of a statute, but instead, to "enjoin conduct . . . not authorized by the statutes," § 1252(f)(1) is "not implicated," such that injunctive relief can issue. *O.A. v. Trump*, 404 F.Supp.3d 109, 159 (D.D.C. 2019) (holding court had jurisdiction to certify class of asylum seekers seeking injunctive relief against federal proclamation barring granting of asylum to aliens who entered the U.S. from Mexico outside a designated port of entry and noting that "even if Plaintiffs did seek to enjoin the operation of removal proceedings, Defendants' reliance

[7] Section 1252(f) also does not preclude injunctive relief because the provision limits the Court's authority to grant relief only for persons *not* presently in removal proceedings: "[N]o court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter . . . other than with respect to the application of such provisions to an individual alien *against whom proceedings under such part have been initiated*." 8 U.S.C. § 1252(f)(1) (emphasis added). Most putative class members are in removal proceedings. *See Padilla v. ICE*, 2020 WL 1482393, at *12 (9th Cir. Mar. 27, 2020) ("Here, where the class is composed of individual noncitizens, each of whom is in removal proceedings and facing an immediate violation of their rights, and where the district court has jurisdiction over each individual member of that class, class-wide injunctive relief is consistent with that congressional intent"). In addition, no statute can limit this Court's *habeas corpus* jurisdiction pursuant to the Suspension Clause of the Constitution. *See* Complaint, ¶ 44.

on § 1252(f) would fail."); *Brito v. Barr*, 415 F. Supp.3d at 270-71; *accord Diaz v. Hott, 297* F.Supp.3d 618, 627–28 (E.D. Va. 2018) (concluding that the prohibition against class certification under 8 U.S.C. § 1252(f)(1) "is limited to injunctions against the operation of the relevant [statutory] provisions" and not "an injunction requiring [the government] to comply with the terms of the [statute]").

To that end, where, as here, Plaintiffs seek to enjoin Defendant from holding them in unconstitutional conditions of confinement—in other words, from unquestionably engaging in conduct "not authorized" by the immigration statutes—there is no bar to the ordering of injunctive relief. *O.A.*, 404 F.Supp.3d at 159. Plaintiffs are not inhibiting the orderly implementation of the law. Nor do they seek an end-round of their immigration proceedings. Instead, Plaintiffs are requesting only that this Court "require the government to comply" with the laws governing civil immigration detention, which demands unyielding conformity with the provisions of the Due Process Clause of the Fifth Amendment and the Rehabilitation Act. *See Ramirez v. ICE*, 338 F.Supp.3d 1, 49 (D.D.C., 2018) ("Conforming to the practice of other courts, this Court concludes that class certification is not precluded where, as here, an injunction 'will only require the government to comply' with the statute in question, not to restrain it.").

In short, Defendant's argument is unsupported by the weight of law and practice. As federal courts around the country have made clear, § 1252(f)(1) does not strip this Court of jurisdiction to certify this class.

CONCLUSION

Because of the grave concerns for the health and safety of the detainees in Bristol Facilities, this Court should order the immediate release of the Named Plaintiffs and putative

class members, or in the alternative, order the release of putative class members who meet certain conditions determined by the Court and opt in to this action.

April 2, 2020

Respectfully Submitted,

/s/Oren Nimni

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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) and paper copies will be sent to those indicated as non-registered participants.

Dated: April 2, 2020 */s/ Oren Nimni*