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 PRELIMINARY INJUNCTION

I. INTRODUCTION

In this litigation, Plaintiffs sought, and obtained, certification of a class of all civil immigration detainees housed at the Bristol County House of Corrections ("BCHOC"). Plaintiffs claim that their Fifth Amendment rights have been violated by the conditions at BCHOC, and, particularly, the threat of infection with the coronavirus commonly called COVID-19. Plaintiffs have made it clear that the only form of relief acceptable to them is release from detention.

At issue presently is Plaintiffs' motion for a preliminary injunction. Because an injunction would potentially grant the full relief sought, the Court has indicated that the present motion will address the merits of the case. At its core, this case is about whether BCHOC has been deliberately indifferent to the risk of infection such that Plaintiffs' Fifth Amendment rights have been violated. While Plaintiffs seek to litigate as if the sole question is whether they are at risk for a COVID-19 infection if they remain detained, that alone is an insufficient basis for a preliminary injunction under their Fifth Amendment claim. This is manifestly *not* a case about

how best to manage the daily affairs at BCHOC. This case must start from, and be determined in accordance with, the cause of action pleaded by Plaintiffs, which is the Fifth Amendment.[1] Plaintiffs cannot meet their burden for a preliminary injunction.[2]

II. PROCEDURAL HISTORY

In approximately six weeks, over 150 docket entries have been received in this case. The Court is familiar with the twists and turns of the case, but is referred to the summary of the procedural history of the case attached as an exhibit hereto. The Court has certified a class, admitted a number of detainees to bond under conditions, and now takes up the temporary restraining order/preliminary injunction motion which, as the Court and parties agree, will effectively be a decision on the full merits (apart from the Rehabilitation Act claim, which remains undeveloped).

III. FACTS

A. Current Situation at BCHOC

Despite the dire predictions by Plaintiffs that they were under imminent threat of widespread infection and likely death, for five weeks since the petition and motions were filed there was not a single case of coronavirus confirmed among the inmate or detainee population at BCHOC. The first positive test was received on Monday, May 4, 2020. *See* Letter to Court, submitted in camera, May 5, 2020. While Plaintiffs will portray that as the sky is falling, it is actually a remarkable achievement by the BCHOC staff given the number of coronavirus cases

[1] As the Court has recognized, Plaintiffs' Rehabilitation Act claim is not a basis they rely on in the motion for a temporary restraining order (which has been converted by the Court to a preliminary injunction motion). *See* Opinion and Order, dkt. # 64.

[2] In addition to this Memorandum, the Defendants also rely on, and ask the Court to consider as if incorporated herein, docket entries 26, 35, 41 and 83, along with the exhibits thereto.

in Massachusetts and their rise during the same time period.[3] During the month of April, Massachusetts went from 8,966 cases of confirmed coronavirus (representing .13 % of the Commonwealth's population) to 69,087 (1% of the 6,893,000 residents), an almost eight-fold increase.[4] During the same period, BCHOC remained at zero confirmed cases. Even with the one positive test on May 4, 2020, that is still around one-tenth of one percent of the detainee population at BCHOC. In other words, the frequency of coronavirus in the population of the Commonwealth at large is approximately ten times as great as in BCHOC.[5]

B. BCHOC Has Taken Extensive Measures

The extensive precautions taken at BCHOC to prevent the introduction of COVID-19 into BCHOC, and to limit its spread if introduced, were largely set out in prior briefing. *See* Defendants' Opposition to Motion for a Temporary Restraining Order and Supplemental Brief, docket ## 26 & 41. Since those briefs were submitted at the beginning of April, some important additional steps have been taken.

First, all persons entering BCHOC are screened for elevated temperature prior to entering the facility. Anyone with an elevated temperature is turned away. Those conducting the

[3] In the immediate aftermath of the one positive test, BCHOC sought to test all remaining detainees from the same unit, Unit B. 19 additional detainees agreed to be tested and their results came back negative. *See* Declaration of Steven Souza, attached hereto as Exhibit 1. Six of the detainees have refused to be tested. *Id.*

[4] Massachusetts state government website at https://www.mass.gov/info-details/covid-19-response-reporting (information through May 4, 2020, last accessed May 5, 2020). April 2, 2020 data taken from the same website but accessed on April 2, 2020.

[5] While it is true that these numbers only represent *confirmed* cases, and that widespread testing has not been made available, this is as equally applicable outside the institution as inside. Thus, the comparison remains relevant to the comparative risk of BCHOC versus the wider community. *See* section IV. A. *infra.*

screening are in personal protective equipment. *See* Declaration (attached as exhibit 2 to dkt. # 83) and deposition of Nelly Floriano.

Second, all BCHOC staff inside the facility are required to wear masks at all times while in the facility. *Id.*

Third, all detainees have been provided with face masks and are required to wear them at all times unless they are eating or lying in their beds. *Id.*; *see also* deposition of Steven Souza, May 1, 2020.

Fourth, meals are distributed directly to the detainees in covered, sanitized containers. Detainees are no longer gathering for meals. *Id.*

As stated in the previously submitted affidavits and declarations (Sheriff Thomas Hodgson, Dr. Nicholas Rencricca, Medical Director, Director of Clinical Services Debra Jezard, ICE Nursing Supervisor Nelly Floriano and Superintendent Steven Souza (multiple declarations), extensive precautions were already in place to minimize the risk to detainees at BCHOC. *See* dkt. # 26, Exhibit 1; dkt. #35; dkt. # 83, Exhibits 1 & 2. BCHOC, through its medical services contractor Correctional Psychiatric Services, Inc. ("CPS"), developed Medical Guidance for dealing with the coronavirus threat; *see* docket # 35 and 83 and exhibits thereto. The Medical Guidance was informed by, and comports with, the national guidance from the Centers for Disease Control ("CDC") as well as the Massachusetts Department of Public Health ("DPH"). *See* affidavits of Dr. Rencricca and Debra Jezard, dkt. # 35.

Moreover, despite the inflammatory and inaccurate claims of Plaintiffs and their experts, BCHOC ICE detainees do not come from all over the country, nor are there frequent transfers into or out of BCHOC ICE units.[6] Any transferee who is not coming from BCHOC criminal

[6] "Furthermore, the routine practice of transferring immigrant detainees from one

incarceration is screened prior to housing within the ICE units. If there are any signs or symptoms of illness, or if any of the standard questions provoke concern, the transferee is quarantined for fourteen days in accordance with CDC protocol.[7]

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. Screening of all staff prior to entry is required. All staff are required to wear masks when in the facility. Any staff member who feels ill must not enter the facility and must be medically cleared before returning to work. Thus, while several staff members have tested positive, up until May the virus was apparently kept out of BCHOC. Moreover, the higher incidence of BCHOC positive tests for coronavirus among staff members than among detainees underscores that the risk of contracting the COVID-19 virus is greater outside BCHOC than inside.

C. <u>A Sufficient Population Reduction Has Occurred</u>

At the outset of this litigation, there were 148 ICE detainees at BCHOC. There are presently 82.[8] That represents a 45% reduction. In some of the units, the reduction has been even higher, as a percentage.[9] Plaintiffs maintain that there is no safe level of population at

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facility to another, throughout the nationwide immigration detention network, makes the likelihood of COVID-19 spread and infection even more likely." Complaint, ¶ 81. This does not happen, at least, not into or out of BCHOC. *See* Notices of Transfer to the Court.

[7] A transferee from within BCHOC is similarly screened if symptomatic. *See* Exhibits to dkt. # 26 & 35.

[8] The Court has ordered the release of two additional individuals, so there will be 80 detainees. Dkt. # 147.

[9] As the Court is aware, because ICE B was rendered uninhabitable by the ICE detainees, the 26 have been relocated. 20 of the 26 are now housed in single cells and 6 are housed in double cells. *See* Declaration of Steven Souza, Ex. 1 hereto.

BCHOC. They steadfastly refuse to even consider what a safe level of detainees might be or any alternatives to release.

But the Court may not disregard the safety of the community into which the detainees will be released. It is unavoidably confronted with the question of what is the level at which social distancing is sufficiently practicable, such that the risk to the remaining detainees is balanced against the risk to the community of releasing violent individuals. Put another way, this is not simply a case of bail review for 148 individuals. Under the law, Plaintiffs must demonstrate that additional releases are required *such that* the Plaintiffs would prevail on their claim that ICE is deliberately indifferent to the risk of infection if no other steps are taken. *See* section III A *infra*.

Plaintiffs have suggested in their opposition to Defendants' Motion to Stay Further Releases that social distancing cannot occur because the aisles between the bunk beds is only four feet wide.[10] However, the CDC guidance for correctional facilities (as opposed to the general public guidance) recognizes that a six foot distance may not be practically achievable at all times, and thus additional precautions such as the use of masks is recommended. *See* Centers for Disease Control Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, attached hereto as Exhibit 2. The question is not whether the detainees will be guaranteed to be six feet away from all other humans at every moment. The question is can the practice of social distancing, tailored to existing constraints, be reasonably achieved assuming the detainees choose to be compliant and if additional steps, such

[10] Plaintiffs appear to be suggesting that there are two detainees within a single bed; *see* ECF 91-6, Declaration of Jen Shin and Accompanying Exhibits. There are not; at most, there is one detainee on a top bunk and another on a bottom bunk, but with their heads at opposite ends.

as masks and disinfecting, can augment social distancing. Thus, for example, Plaintiffs' experts opine (without having ever seen the inside of BCHOC) that detainees would be within six feet of each other in the bathroom. It is true that this is possible, just as it is equally true that a released detainee could be within six feet of a person who is infected while at home. It is not true that the detainees *must* be within six feet of each other in the bathroom. *See* First Declaration of Steven Souza, Exhibit 1 to dkt. # 83.

As further grounds, Defendants urge the Court to review their Motion to Stay, docket # 82 and the exhibits thereto. That motion goes into the physical setting of the detention areas in great detail.[11] The Court is also directed to the videos previously submitted via email to the Courtroom Clerk, Ms. Gaudet.

D. <u>Many of the Detainees Are Dangerous</u>

The Court has been presented with the criminal history and flight concerns regarding all 148 original detainees plus several transferees.[12] There is a range of degree of dangerousness

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[11] On April 7, 2020, the Court entered an order which stated in part "The Court inquires whether given the number of cells and the common areas in the detention facility there is some number of detainees who might occupy the facility and yet be adequately spaced?" Docket # 55. In response to the Court's inquiry regarding whether there was a level of population reduction which would render the conditions relatively safe for the remaining detainees, Defendants submitted two declarations on Thursday, April 9, 2020. One was from Superintendent Steven Souza of BCHOC. That declaration went through the areas where detainees are held at BCHOC in painstaking detail, providing both dimensions and the current number of detainees housed in each. The second declaration was from Nelly Floriano, the Nursing Supervisor for ICE detainees at BCHOC. Ms. Floriano reviewed the prevention and treatment practices at the facility and stated that she was confident that the detainee population is sufficiently low so as to allow adequate social distancing (separation of six feet or more) to be practiced in all of the detainee units. Declaration of Nelly Floriano, ¶¶ 7 & 9. Unlike Plaintiffs' experts, most of whom have *never* been inside BCHOC, and those that have did not have access to all the detainee areas, Ms. Floriano is in the units on a regular basis, although she has not been inside the bathrooms in the male units.

[12] *See* dkts. 50, 52, 56, 58, 65, 67, 74, 75, 78, 79, 80, 81, 84, 85, 88, 89, 92, 94, 100, 102, 104, 105, 110, 111, 115, 116, 130, and 131.

among the detainees that can be determined from their records. One detainee was convicted of rape in Brazil; many others have been convicted of spousal abuse. Even more have pending charges involving violence.

Within days of the lawsuit being filed, the detainees in ICE B, which is a higher risk group than ICE A, barricaded themselves in the Unit and refused to let Bristol staff enter. This is the group that made numerous false representations regarding the conditions at Bristol to the press that led to the lawsuit being filed. The same group, last Friday, May 1, 2020, engaged in what amounted to a totally lawless riot. During the course of the riot, detainees ripped sinks off the walls and smashed them. They broke windows. They barricaded doors and refused to admit prison personnel. They smashed holes in the walls and broke toilets. They rendered Unit B uninhabitable. *See* Souza declaration, Ex. 1, *passim.*

This supposedly arose because one of the detainees reported flu-like symptoms and was told he would be taken to the medical unit for testing and then placed in isolation, in accordance with the facility's COVID-19 medical guidance. *Id.* An additional group of detainees claimed symptoms and were told they, too, would be taken out of the unit for testing and isolation. *Id.* They refused. *Id.* When Sheriff Hodgson entered the unit to try to talk the detainees down from their confrontational stance, one of the detainees threw a chair at the Sheriff and injured him. *Id.* BCHOC staff eventually regained control of the Unit with the involvement of the Special Operations Unit of Bristol County Sheriff's Office. *Id.*

One of the detainees claimed his shoulder was hurt during the riot. *Id.* He had been observed during the riot with a metal bar or pipe, possibly an assistance grab rail from the bathroom, concealed up his sleeve.[13]

In response to the news, received yesterday, that this detainee tested positive for COVID-19, Plaintiffs have urged the Court to immediately release more detainees. This is a puzzling response insofar as Plaintiffs have assumed all along that one of the detainees would test positive at some point and argued for a population reduction to minimize the risk of transfer. Defendants believe that sufficient reduction has already taken place, as ordered by the Court based on its acceptance of Plaintiffs' premise that the virus would eventually find its way into the detainee population. Because the Court has already reduced the detainee population in anticipation of a positive case of COVID-19, the fact that a single case has been confirmed does not mean that the Court should take additional drastic steps – particularly since almost one-third of the current detainees have confirmed their violent and lawless propensity in last Friday's disturbance.[14]

IV. THE APPLICABLE LAW

A. <u>The Standard on Preliminary Injunctions</u>

1. Preliminary injunctions generally: Courts disfavor preliminary injunctions that "exhibit any of three characteristics: (1) it mandates action (rather than prohibiting it), (2) it

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[13] This detainee, and two others who did not suffer physical injuries but who complained of anxiety and chest pain, were separately taken to the hospital. One of the detainees (the detainee who complained about his shoulder) had a temperature of 99 and was tested for COVID-19, which was positive.

[14] Plaintiffs took umbrage with Defendants informing the Court of the facts of the Unit B riot after Defendants successfully argued that the riot should not be a topic in Sheriff Hodgson's deposition. The relevance of the riot to Defendants' position that detainees who are violent should not be released is clear. The relevance of the violent behavior of detainees, and the response thereto by BCSO, is highly attenuated to Plaintiffs' claim that the detainees are at risk of coronavirus infection.

changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win." *Mrs. Fields Franchising, LLC v. MFGPC,* 941 F.3d 1221, 1232 (10th Cir. 2019). All three characteristics apply here.

"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 burden on Plaintiffs is not merely to show that there is a risk of infection if they remain detained. Their burden is to prove to the Court that they meet *all* the elements of the standard four-part test, and that includes a likelihood of winning on the merits of their legal claims. This cannot be overemphasized—it is not enough to show that continued detention carries a risk of infection. Plaintiffs must show that the risk of infection and Defendants' actions or inaction regarding that risk ***amounts to deliberate indifference*** to their medical needs. Nothing less will satisfy their burden of showing a likelihood of success on the merits of their Fifth Amendment claim.[15]

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[15] Because Plaintiffs are not likely to win on the merits of their Fifth Amendment claim, the Court's determination of bail for individual class members does not meet the requirements of *Woodcock v. Donnelly,* 470 F.2d 93, 94 (1st Cir. 1972) (per curiam). While this Court suggested that this requirement was not absolute, Defendants believe the *Woodcock* approach to be sound. Moreover, unlike the present case, there was no issue in *Mapp v. Reno* (also relied upon by this Court), 241 F.3d 221, 228–29 (2d Cir. 2001), as to whether Congress had expressly limited federal judicial power to grant bail to aliens because ICE [then "INS"] had withdrawn its claim that mandatory detention applied. The Defendants in this case maintain that mandatory detention *does* apply to many of the class members. Therefore, under *Mapp's* reasoning, bail is **not** available for all class members and the Court may wish to reconsider its interpretation of *Mapp* accordingly.

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 generally do not 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).

2. Irreparable harm cannot be assumed: On the facts of this case, Plaintiffs have not shown that there is irreparable harm to class members if they remain detained. It is not enough to speculate that continued detention will lead to widespread infection. The fact that the

coronavirus is spreading rapidly in Massachusetts does not mean that it will do so within BCHOC. The fact that there have been no confirmed cases of COVID-19 until this month underscores this point. 20 of 26 detainees in ICE B have now been tested; only the original test taken at the hospital has been positive. *See* Declaration of Steven Souza, attached hereto as Exhibit 1, at ¶ 9. The other nineteen tests came back negative today. *Id.* Every step that can be taken to reduce the risk to the ICE B detainees has already been taken. They were quarantined and medically monitored. All but six are in single-person cells, while the six are in two-person cells.[16] None of the 26 are in a general detainee population. *Id.*

Irreparable harm cannot be assumed from the fact of the pandemic alone. It must also be shown that the risk of infection is, essentially, unavoidable in detention and almost certainly avoidable in home confinement. The failure to fully evaluate these two situations with anything approaching an equal degree of rigor is addressed more fully below.

3. Plaintiffs are unlikely to succeed on the merits: 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.

This prong of the four-part test for preliminary injunctive relief is often assumed away by the courts. It should not be. As is argued below in detail, Plaintiffs do not have evidence that

[16] It is worth noting that the inability of BCHOC to house all of the former ICE B detainees in single person cells is a direct consequence of their destroying Unit B.

ICE or BCHOC are deliberately indifferent to their medical needs. A difference in opinion about the risk of infection does not come close to meeting the applicable precedents on this point.

4. The balance of the equities favors Defendants: 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)).

Plaintiffs appear to assume that the risk of contracting COVID-19 outweighs all other considerations. The Court, in particular, has opined as to the unprecedented nature of the pandemic. *See* dkt. ## 64 & 86. But what must be weighed is the actual risk to detainees of detention **at BCHOC** (as opposed to some theoretical amalgamation of facilities imagined by Plaintiffs' experts) in light of the extensive steps taken versus the risk of harm to the community of releasing persons with a known propensity for violence, drunk driving, and the like along with risk of flight and of not allowing ICE to conduct its business without undue interference. That is what must be balanced here. Defendants maintain that the balance favors no further releases of detainees.[17]

[17] Even if the balance of the equities favors Plaintiffs, which Defendants deny, that alone is not sufficient for the Court to grant a preliminary injunction. Plaintiffs must still establish a likelihood of success on the legal merits of their Fifth Amendment claim, which they cannot do.

5. The public will be adversely impacted by excessive releases of individuals:

This point has been adequately argued, in both the prior briefs and through the submissions to the Court for the daily lists of detainees being considered for bail. *See* note 9, *supra*. It is essentially the same challenge the Court faces any time it is considering detention. How bad the person is, and what the risk is that they will misbehave, possibly violently, if released is an important consideration. Clearly, the criminal history presented to the Court for many of the as-yet unreleased detainees as well as the recent riot and assault on Sheriff Hodgson establish that there are real risks to the community of further releases. Moreover, the public has an interest in ICE being allowed to do its job without undue interference in the manner, and in accordance with the statutes, proscribed by Congress -- which includes mandatory detention for many of the detainees pre-removal. As stated in *Barco v. Price*:

> The public interest in enforcement of immigration laws is significant and so is the public interest in being protected from those who present a risk of danger. Releasing Plaintiffs would be contrary to public interest. Accordingly, the Court finds that Plaintiffs have failed to show that the injunction would not adversely affect the public interest.

Barco v. Price, -- F. Supp. 3d --, 2020 WL 2099890 (D.N.M. May 1, 2020)(involving an immigration detainee's claim for release owing to COVID-19), copy attached hereto as Exhibit 4.[18]

[18] "There can be no doubt that, with respect to immigration and deportation, federal judicial power is singularly constrained. See U.S. Const. art. I, § 8, cl. 4; *see also, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."),*" Mapp v. Reno*, 241 F.3d 221, 227 (2d Cir. 2001).

B. The Fifth Amendment Has Not Been Violated

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). So is protecting the community and complying with congressional directives. Third, Plaintiffs' current confinement does not appear excessive in relation to those objectives.

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). As set forth in the exhibits to Defendants' prior filings, (dkt. #26 Exhibit 1; #35 Exhibits 1 & 2; # 83 Exhibits 1 & 2), BCHOC is not mingling inmates who are known to have infectious disease with uninfected individuals; in fact, they are taking steps to try to prevent that.

The analysis of a Fifth Amendment claim for civil detainees often borrows on the more extensive canon of Eighth Amendment prisoner cases. *See, e.g., Swain v. Junior*, __ F.3d ___ (11th Cir. May 5, 2020, case # 20-11622)(copy attached). In the *Swain* case, the Eleventh Circuit stayed the district court's preliminary injunction in an immigration detainee case very similar to the present case. The Eleventh Circuit stated:

> The defendants are likely to prevail on appeal because the district court likely committed errors of law in granting the preliminary injunction. In conducting its deliberate indifference inquiry, the district court incorrectly collapsed the subjective and objective components. The district court treated the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk. In doing so, it likely violated the admonition that resultant harm does not establish a liable state of mind. *See Farmer*, 511 U.S. at 844. The district also likely erred by treating Metro West's inability to "achieve meaningful social distancing" as evincing a reckless state of mind. Although the district court acknowledged that social distancing was "impossible" and "cannot be achieved absent an additional reduction in Metro West's population or some other measure to achieve meaningful social distancing," it concluded that this failure made it likely that the plaintiffs would establish the subjective component of their claim. But the inability to take a positive action likely does not constitute "a state of mind more blameworthy than negligence." *Id*. at 835.
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> The defendants are also likely to succeed on appeal because the plaintiffs offered little evidence to suggest that the defendants were deliberately indifferent. Indeed, the evidence supports that the defendants are taking the risk of COVID-19 seriously.

Swain, at 10-11 (copy attached hereto as Exhibit 3). Defendants submit that taking the same path as the district court did in the Southern District of Florida, which the Eleventh Circuit found problematic, would be a mistake. *See* the Court's Memorandum and Order, dkt. # 54.

First Circuit precedent is in accord with the Eleventh Circuit's opinion in *Swain.* "[P]rison officials ... cannot be deliberately indifferent if they responded reasonably to the risk, even if the harm ultimately was not avoided," *Leavitt v. Corr. Med. Servs., Inc*., 645 F.3d 484, 503-04 (1st

Cir. 2011); *Burrell v. Hampshire Cty*., 307 F.3d 1, 8 (1st Cir. 2002)(*citing Farmer*, 511 U.S. at 844). If under the totality of the circumstances as understood by prison officials at the time, the defendants took reasonable measures to avert potential harm, then they cannot be found to have been deliberately indifferent. *Id.* Such is the case here: BCHOC has taken extensive precautions to minimize the risk of a coronavirus outbreak. As stated in *Sacal-Michal*:

> The Court recognizes that the COVID-19 pandemic presents an extraordinary and unique public-health risk to society, as evidenced by the unprecedented protective measures that local, state, and national governmental authorities have implemented to stem the spread of the virus. And it is possible that despite ICE's best efforts, Sacal may be exposed and contract the virus. Moreover, Sacal's age and medical condition render him particularly vulnerable to serious complications from the virus. But the fact that ICE may be unable to implement the measures that would be required to fully guarantee Sacal's safety does not amount to a violation of his constitutional rights and does not warrant his release. Sacal has not demonstrated his likelihood of proving that ICE has failed to take reasonable measures to guarantee his safety.

Sacal-Michal v. Longoria, (S.D. Tx. March 27, 2020)(copy previously submitted).

Plaintiffs cite *Helling v. McKinney*, 509 U.S. 25, 36 (1993), for the proposition that involuntary exposure of a prison inmate to a hazard (in that case environmental tobacco smoke or "ETS") can form the basis of a claim for relief under the Eighth Amendment), but that case required deliberate indifference to the health risk, which has not remotely been shown here. As the Supreme Court said in *McKinney*:

> [S]uch claims require proof of a subjective component, and that where the claim alleges inhumane conditions of confinement or failure to attend to a prisoner's medical needs, the standard for that state of mind is the "deliberate indifference" standard of *Estelle v. Gamble*, 429 U.S. 97 (1976).
>
> On remand, the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct, which may have changed considerably since the judgment of the Court of Appeals.

Id.[19] At bottom, Plaintiffs in this case cannot establish the subjective factor of deliberate indifference regardless of how the Court weighs the objective factors. Deliberate indifference "defines a narrow band of conduct in this setting." *Feeney v. Corr. Med. Servs., Inc.*, 464 F.3d 158, 162 (1st Cir. 2006)(affirming this session's grant of summary judgment to defendants). The medical care provided must have been "so inadequate as to shock the conscience." *Id.* (quoting *Torraco v. Maloney*, 923 F.2d 231, 235 (1st Cir. 1991)).[20] *See also Whitley v. Albers*, 475 U.S. 312, 319 (1986) ("It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause."); *Battista v. Clarke*, 645 F.3d 449, 454 (1st Cir.2011) ("[S]o long as the balancing judgments are within the realm of reason and made in good faith, the officials' actions are not 'deliberate indifference.'").[21]

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[19] Even if Plaintiffs could show a Fifth or Eighth 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); *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005); *Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990).

[20] "Immigration detainees' constitutional claims status is akin to that of pretrial detainees. Pretrial detainees are protected under the Due Process Clause rather than the Eighth Amendment; however, the standard to be applied is the same as that used in Eight Amendment cases." Under the Eighth Amendment standard, a detainee must prove that defendants' withholding of essential health care amounted to 'deliberate indifference to a serious medical need.' Mere substandard care, malpractice, negligence, inadvertent failure to provide care, and disagreement as to the appropriate course of treatment is insufficient to prove a constitutional violation." *Doan v. Bergeron*, No. 15-CV-11725-IT, 2016 WL 5346935, at *4 (D. Mass. Sept. 23, 2016) *citing Burrell v. Hampshire Ctv.*, 307 F.3d 1, 7 (1st Cir. 2002) and *Ruiz-Rosa v. Rullan*, 485 F.3d 150, 156 (1st Cir. 2007)) (other citations and quotation marks omitted).

[21] In language that is applicable to this case, the court in *Sacal-Michal* stated that Plaintiff was unlikely to prove that ICE acted with deliberate indifference with respect to Sacal's health. "In other words, Sacal has not demonstrated that the conditions in which ICE maintains him in

C. Habeas Corpus Relief Is Extraordinary and Circumscribed

1. Conditions of confinement are not cognizable in a habeas petition:

Plaintiffs are seeking to address *conditions* of their confinement, not just the fact of or duration thereof: "Plaintiffs and members of the proposed class seek a writ of habeas corpus to remedy their unconstitutional detention in life-threatening *conditions* at Bristol County Immigration Detention Facilities." Complaint, ¶ 93 (emphasis supplied).

In a thoughtful opinion, Magistrate Judge Page Kelley reviewed this issue:

> Jenkins appears to be challenging the conditions of his confinement. This claim should be brought through a civil rights action pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that an individual aggrieved by a federal official's violation of his constitutional rights can bring an action for monetary relief). *See Kane v. Winn*, 319 F. Supp. 2d 162, 213 (D. Mass. 2004) ("Although a habeas corpus petition is the appropriate means to challenge the fact or duration of incarceration, actions challenging the conditions of confinement reside more in the heartland of civil actions under 42 U.S.C. § 1983 (for state prisoners), *Bivens*, 403 U.S. 388, 91 S. Ct. 1999 (for federal prisoners), or some other non-habeas doctrine or statute."). … Here, petitioner's complaints about the dangers he is facing do not challenge the length of his confinement.

Jenkins v. Spaulding, 2019 WL 1228093 (D. Mass. Feb. 22, 2020), Civil Action No. 19-10078-MPK.[22]

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custody arise to the level of a constitutional violation. In addition, Sacal has not demonstrated a substantial likelihood of success on his fundamental argument—i.e., that the detention facility is incapable of protecting him from contracting COVID-19 or providing appropriate medical attention should he be infected. For these propositions, Sacal offers only conclusory arguments based on general articles regarding the highly-contagious nature of COVID-19 and its impact on the elderly and individuals with certain underlying medical conditions."

[22] The First Circuit has said that where a prisoner seeks relief from conditions of confinement that would result in a reduction of his sentence, he should bring a habeas claim, and

And, as this Court has stated in *Kane v. Winn*, 319 F. Supp. 2d 162, 213-15 (D. Mass. 2004):

> Although a habeas corpus petition is the appropriate means to challenge the "fact or duration" of incarceration, actions challenging the conditions of confinement reside more in the heartland of civil actions under 42 U.S.C. § 1983 (for state prisoners), *Bivens*, 403 U.S. 388, 91 S.Ct. 1999 (for federal prisoners), or some other non-habeas doctrine or statute. *See Heck v. Humphrey*, 512 U.S. 477, 481–83, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488–90, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973)). Various courts in this Circuit and elsewhere have dismissed habeas petitions (or individual claims contained therein) that challenged conditions of confinement rather than the fact or duration of confinement. *See, e.g., Melham v. Farquharson*, Civ. A. No. 03–10721–DPW, 2003 WL 21397987, at *1 n. 1 (D. Mass. June 17, 2003) (Woodlock, J.) (declining to address a habeas petitioner's claims insofar as they related to conditions of confinement); *Do Vale v. I.N.S.*, Nos. 01–216–ML, 01–507–ML, 2002 WL 1455347, at *9 (D.R.I. June 25, 2002) (dismissing such claims); *Barnes v. I.N.S.*, Civ. No. 01–48–PC, 2001 WL 1006077, at *7 (D.Me. Aug.30, 2001) (recommending a similar disposition); *Kamara v. Farquharson*, 2 F.Supp.2d 81, 89 (D.Mass.1998) (Saris, J.) (dismissing such claims).
>
> For most conditions of confinement claims, however, and particularly for those involving inadequate medical treatment, courts usually hold that habeas relief is not available. *See, e.g., Lee v. Winston*, 717 F.2d 888, 893 (4th Cir.1983); *United States v. Sisneros*, 599 F.2d 946, 947 (10th Cir.1979); *Crawford v. Bell*, 599 F.2d 890, 891–92 (9th Cir.1979). *But cf. Albers v. Ralston*, 665 F.2d 812, 815 (8th Cir.1981) (noting that a habeas action will lie to challenge conditions of confinement where substantial constitutional violations were alleged).

Id.

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where he seeks relief from conditions of confinement that would not reduce his sentence, he should bring a civil rights claim. *See Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873-74 (1st Cir. 2010).

To similar effect is a decision handed down last Friday, *Barco v. Price*, _ F. Supp. 3d __ 2020 WL 2099890 (D.N.M. May 1, 2020)(Exhibit 4 hereto). In *Barco*, plaintiffs made the same challenges to their immigration confinement based on the threat of COVID-19 as have been made in this case. The district court determined that plaintiffs were unlikely to prevail on the merits of their preliminary injunction motion because "the Court finds that Plaintiffs are challenging the conditions of their detention, as opposed to its fact or duration, which is not appropriate under 28 U.S.C. § 2241." *Id.* Moreover, the court found that plaintiffs had not demonstrated that they had conditions that put them at a higher risk or that the conditions of confinement were not rationally related to the legitimate purpose of preventing aliens from absconding and ensuring that they appear for removal proceedings, citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 520-22 (2003); and *Zadvydas*, 533 U.S. at 690–91.

Regarding the irreparable harm prong of the preliminary injunction test, the district court stated:

> In essence, Plaintiffs are asking the Court to order their immediate release from Otero based on the possibility that they may suffer irreparable harm from COVID-19 should they contract it while detained there. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] 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." *Winter*, 555 U.S. at 22. Accordingly, the Court finds that Plaintiffs have not shown that they will suffer irreparable harm unless the injunction is issued.
>
> Even if the Court were to order Plaintiffs' immediate release, the Court cannot make the finding that they would not face the risk of contracting COVID-19 outside of Otero, when comparing the United States 1,031,659 COVID-19 cases to Otero County's 5 COVID-19 cases.

Id.

In *Sacal-Michal v. Longoria*, (S.D. Tx. March 27, 2020)(copy previously submitted), the court rejected a civil immigration detainee's request to be released in light of his health issues and COVID-19. The court noted that a habeas petition can address the fact or duration of detention, but that "allegations that challenge rules, customs, and procedures affecting conditions of confinement are properly brought in civil rights actions." *Id., citing Schipke v. Van Buren*, 239 F. App'x 85, 85–86 (5th Cir. 2007). The court concluded that plaintiff was challenging the conditions of his confinement.[23]

> Sacal alleges that Respondents cannot prevent the COVID-19 virus from infecting the detention center where he is detained. … He contends that he will be exposed to COVID-19 via the medical staff or other detainees. And he alleges that because of his failing health, "[c]ontinued detention . . . presents a clear and present danger to his fundamental right to life." Sacal effectively alleges that ICE's inability to isolate him successfully, the movement of individuals within the detention facility, and the absence of adequate testing to identify carriers of the virus, all render it a certainty that he will contract the illness if maintained in custody. Those factors focus on the conditions of his confinement. A detention facility's protocols for isolating individuals, controlling the movement of its staff and detainees, and providing medical care are part and parcel of the conditions in which the facility maintains custody over detainees.

Id. A detainee can establish a constitutional violation based on inadequate conditions of his confinement. But to do so, he must demonstrate that the officials acted with deliberate indifference to his medical needs or his safety. *See* section B above.

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[23] *Accord Muhammad v. Close*, 540 U.S. 749, 750 (2004) "Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus; requests for relief turning on circumstances of confinement may be presented in a § 1983 action," *cited in Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016).

Presently, there is no legal basis to justify an alien's release based solely on COVID-19. *See Dawson v. Asher*, 2020 WL 1304557 (W.D. Wash. March 19, 2020). The *Dawson* court ruled that appropriate relief would be to order the agency to ameliorate any alleged violative conditions within the facility.

Outside of the immigration arena, courts have found that the threat of COVID-19 is not sufficient to justify release. For example, the court in *U.S. v. Jones* found that health risks are not the sole determinant of whether detention is appropriate, and every decision must include an individualized assessment of the existing standards for release eligibility. *See U.S. v. Jones*, 2020 WL 1323109, (D. Md. March 20, 2020).[24]

In *United States v. Martin*, United States District Court, D. Maryland, Southern Division, March 17, 2020 (2020 WL 1274857), the court stated:

> Finally, while the record confirms that Martin has disclosed that he suffers from asthma, high blood pressure, and diabetes, this alone is insufficient to rebut the proffer by the Government that the correctional and medical staff at CDC are implementing precautionary and monitoring practices sufficient to protect detainees from exposure to the COVID-19 virus. For all the above reasons, I reach the same conclusion as Chief Magistrate Judge Gesner. Martin has failed to rebut the presumption of detention, and the Government has established by clear and convincing evidence that he must continue to be detained for the protection of the community. Therefore, his appeal is DENIED.

In *United States of America v. Teon Jefferson*, United States District Court, D. Md. March 23, 2020 (2020 WL 1332011), the court rejected the plaintiff's contention that his asthma

[24] However, a separate court ruled that COVID-19 could establish changed circumstance to permit a redetermination of a defendant's bail based on new flight risk factors arising out of COVID-19. *See U.S. v. Stephens*, 2020 --- F. Supp.3d.---, 2020 WL 1295155 (S.D.N.Y. March 19, 2020). This is, of course, very different than court-ordered release.

constituted an unacceptable health risk that should result in release to home confinement with location monitoring. The court noted that no third-party custodian had been identified and that location monitoring is a particularly scarce. resource under the current conditions. *Id.*

In another COVID-19 release case, *United States v. Hamilton*, (E.D.N.Y. March 20, 2020), 2020 WL 1323036, the court rejected the plaintiff's argument that in light of his advanced age and medical conditions, the ongoing COVID-19 pandemic constitutes "another compelling reason" to permit his temporary release under 18 U.S.C. 3142(i)(4). According to the court:

> While the court is mindful of Mr. Hamilton's concerns, it does not believe that the COVID-19 outbreak—at this point in time—constitutes a sufficiently compelling reason to justify release under the circumstances of this case. Mr. Hamilton does appear to fall within a higher-risk cohort should he contract COVID-19; however, he does not suffer from any pre-existing respiratory issues and his medical conditions appear to have been well managed over the course of the past fourteen months of incarceration. Further, and perhaps most importantly, as of this writing, there have been no reported incidents of COVID-19 within MDC, and the Bureau of Prisons is taking system-wide precautions to mitigate the possibility of infection within its facilities. As such, given the risks that Mr. Hamilton's release would pose, the court concludes that the possibility of an outbreak at MDC is not a "compelling circumstance" justifying his release.

Id.

United States v. Gileno, (D. Conn. March 19, 2020), 2020 WL 1307108, is to similar effect: "The Court takes judicial notice of the fact that public health recommendations are rapidly changing. But at this time the Court cannot assume that the Bureau of Prisons will be unable to manage the outbreak or adequately treat Mr. Gileno should it emerge at his correctional facility while he is still incarcerated." *Id. Accord Nikolic v. Decker*, (S.D.N.Y. March 19, 2020),

2020 WL 1304398 (in a case not subject to the restrictions of 8 U.S.C. § 1252(f), court noted that a federal court should grant bail to a habeas petitioner only in unusual cases).

2. Class-wide relief remains inappropriate: Although the Court has certified the class of all immigration detainees who were held at BCHOC at the outset of the litigation, the Defendants believe that the Court should reconsider its decision now that it has experienced in detail just how varied the situation is for every detainee. There is a lack of commonality among the class members such that the Court has had to make individual determinations. Most importantly, there is no class-wide relief available unless the Court is willing to order release of all detainees – which it should not do in light of the violent, criminal propensity of many class members.

In addition to the obvious differences in the criminal records of the detainees, the individuals also vary greatly on a number of other factors. For example, risk of flight, medical conditions, situations for home release, and many other potentially relevant variables. Thus, there is no commonality of the purported class members which is *required* for class certification. *Walker v. Osterman Propane LLC*, 411 F. Supp. 3d 100, 108 (D. Mass. 2019).

Although the Court has decided otherwise for purposes of class certification, Defendants maintain that the Court lacks jurisdiction to enjoin the normal operation of 8 U.S.C. § 1226(c).[25] 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*

[25] Defendants recognize that district courts have authority to issue a writ of habeas corpus to address constitutional wrongs in individual cases. That is not what the Court has proposed, and, more importantly, it is not what Plaintiffs have sought. It is not for the Court to recast Plaintiffs' theory of recovery (i.e., the broadest class possible) nor the legal basis upon which it stands.

v. Am. Arab Anti-Discrimination Comm., 525 U.S. 471, 481-82 (1999) (emphasis added).[26] While this Court labels this as dicta, *see* dkt. # 64 at 15-16, in *Jennings v. Rodriguez*, the Court 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.[27] The Sixth Circuit recently echoed this sentiment, stating 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." *Hamama v. Adducci*, 912 F.3d 869, 880 n.8 (6th Cir. 2018) (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*.

The Sixth Circuit also stated, "[n]evertheless, 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

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[26] In *Hamama*, the Sixth Circuit rejected petitioners' argument that this exception means that § 1252(f)(1) did not apply to class members in immigration proceedings. *Hamama*, 912 F.3d 869, 877-78 (6th Cir. 2018).

[27] Notably, Plaintiffs' motion seeks injunctive relief, not declaratory relief, so even assuming § 1252(f)(1) would not bar the declaratory relief they seek in their complaint, it still bars the relief at issue presently before this Court. See TRO Mot. dkt. # 11 (requesting "release of plaintiffs and similarly situated detainees," "implementation" of guidance and protocols, "ceasing placing new detainees" in the facilities).

view, *Reno* [525 U.S. 471] unambiguously strips federal courts of jurisdiction to enter class-wide injunctive relief for the detention-based claims." *Id.* 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.

3. Plaintiffs Lack Article III Standing

Although the Court has previously rejected Defendants' argument on standing in the context of class certification, Defendants believe it should be revisited in the preliminary injunction context. "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 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, the claimed injury is not caused by Defendants nor is the alleged injury redressable by this Court. Put another way, the risk of infection is not a result of what Defendants have done, are doing or have failed to do. The risk is a consequence of a world-wide pandemic. In addition, whether Plaintiffs will contract COVID-19 is entirely conjectural. As noted, there has been only one confirmed case at BCHOC in the last six weeks. Bristol County has expended extensive resources and efforts to address the very issues that Plaintiffs have identified.

IV. Plaintiffs' False Dichotomy

A. <u>Release of All Detainees Is Not Required</u>

Plaintiffs have steadfastly refused to suggest any level of detainee reduction that would be safe. Nor have they offered suggestions as to what further steps ought to be taken at BCHOC to reduce their risk of infection. Indeed, although they are highly critical of what steps have been taken, see Memorandum in Support of Preliminary Injunction motion at pp. 14-16, the only suggestions they make is (i) release all detainees; and (ii) (implied) conduct more testing. *Id.* Finally, they have opposed transfers of BCHOC detainees to other facilities. This reinforces that their goal all along has been to secure release without regard to any other considerations such as the safety of the community. Even now, with most or all of Unit B having engaged in wanton destruction of the facility as well as violence against Sheriff Hodgson, Plaintiffs continue to seek immediate release of detainees without any consideration of what unit the detainees are held in, what the living arrangements are and what the current detainee population is.[28]

[28] As just one of a multitude of examples of Plaintiffs' approach that complete release is the only solution, their expert Keller assumes, *without ever having visited BCHOC*, that there is nothing other than release that could reduce the risk of infection. This Court has indicated that

It is important to review what we are trying to achieve. What the parties, the Court and the Defendants are seeking is to minimize is the risk of the detainees (and, presumably, BCHOC staff and detainees' family) getting infected with COVID-19. There are a number of ways in which that can be done. None of the possible steps is exclusive. There is no single right way to do this and there is no way to achieve absolute protection from the virus. The CDC Guidance for correctional institutions does not suggest that release, or even a six-foot social distancing, is the only option to increase facility safety. *See* Ex. 2, *passim.*

Plaintiffs have painted an unrealistic, black and white picture in which the *only* effective means of protection is the release of all detainees.[29] This is flawed in both logic and pragmatics. First, there is no guarantee that the detainees will not encounter COVID-19 upon release. *See* section 3 *infra*. Second, the risk of contracting COVID-19 if class members remain detained is also not certain. In the six weeks since this case was filed, only one case of coronavirus has been confirmed in the detainee or inmate population. That stands in stark contrast to the doomsday predictions of Plaintiffs and their experts, and to the spread of the virus in the community at large.

BCHOC is not like the world at large. This is because BCHOC is able to control who comes into its facility, where they go, and what steps are taken to screen such individuals. Social

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population reduction may be achieved by means other than release: "Nor does it matter how the density of Detainees is reduced. Transfer to less crowded facility, deportation, release on bond, or simply declining to contest lawful residence -- any of these methods would effectively minimize the concentration of people in the facility. This affords the government greater flexibility and minimizes the differences among the various Detainees." Opinion, dkt. # 64 at p. 23.

[29] "The only way to effectively inhibit the spread of COVID-19 and to protect Plaintiffs and others is to immediately release Plaintiffs." Complaint, ¶ 30.

interaction, the primary focus of the social distancing recommendations, is much more limited at BCHOC than in the outside world. Perhaps more importantly, there is virtually no information available regarding the conditions where the detainees who have been released are living, or where the others would live. Thus, it is far too simple to contrast the exaggerated danger of BCHOC with the equally exaggerated safety of release. So it is by no means clear that release is a panacea.[30]

B. Plaintiffs Exaggerate Conditions in BCHOC

Plaintiffs have overstated the risk of COVID-19 infection within BCHOC. In the Complaint at ¶ 3, they claimed "that the dangerous conditions in the Bristol County Immigration Detention Facilities where Plaintiffs are confined will imminently result in the uncontrolled spread of COVID-19 and the likely death of many detainees including Plaintiffs." This claim was made on March 27, 2020, almost six weeks ago. And there is a single confirmed case as of now. That is hardly an imminent spread as a consequence of "confinement conditions [that] are a tinderbox, that once sparked will engulf the facility." *Id.*, ¶ 29.

Moreover, Plaintiffs have made numerous claims that are simply untrue. This is not just a "he said/she said" situation. There are real facts, and the Court must determine them. For example, the claims that the detainees are "without adequate soap, toilet paper, and other daily necessities" (Complaint, ¶ 3; ¶ 70); and that BCHOC "admit[s] new detainees without COVID-

[30] Plaintiffs say "Most people who develop serious illness will need advanced support. This level of supportive care requires highly specialized equipment that is in limited supply, even in non-detention settings, and an entire team of dedicated medical care providers." Complaint, ¶ 56. There is no evidence that any detainee has access to such care outside BCHOC, and, indeed there is good reason to think it is not as the immigrant population is generally uninsured. A detainee requiring advanced care would be transported from BCHOC and ICE would pay for his or her care; *see generally* affidavit of Sheriff Hodgson submitted with the Opposition to the TRO Motion, dkt. # 26, Ex. 1.

19 testing or screening [and] den[ies] access to testing and medical care for Plaintiffs and other detainees" (*id.*), are absolutely wrong. Throughout the litigation, and before, there was always adequate soap and toilet paper. Medical care and testing, including screening, has been continuously available. *See, e.g.*, Declarations of Dr. Nicholas Rencricca and Debra Jezard, dkt. #35.

There have also been cleaning supplies on hand including disinfectant; *see* Complaint, ¶ 21. Defendants are not "introducing daily new detainees in with the general population without any mandatory quarantine period." Complaint, ¶ 26; *see, e.g.* dkts. 87 & 109. And the assertion that "Plaintiffs are unaware of any meaningful safety measures enacted by Defendants since the inception of this crisis," Complaint, ¶ 28, is clearly a statement of how unfamiliar Plaintiffs are with the actual management of BCHOC.

Two additional claims made in the Complaint are worth noting:

> The [ICE] protocols also do not address: imminent shortages of medical supplies and staffing or education of detained people and staff about the virus, amongst other critical issues.
>
> Further, there is substantial evidence that ICE's COVID-19 protocols are not being followed in detention centers throughout the country, including Bristol County Immigration Detention Facilities.

Complaint, ¶¶ 76 & 77. There has been no evidence developed in the case to date that there is a shortage of medical supplies at BCHOC or that the staff and detainees have not been educated about the risks of the virus. The opposite has been shown in Defendants' filings, including the declarations and exhibits thereto. Nor is there any evidence that BCHOC has not been following ICE's COVID-19 guidance. Moreover, much of expert opinion offered by Plaintiffs is by persons who have either never been to BCHOC or who only had limited entry to BCHOC, and

who therefore make generalized statements about correctional facilities in the abstract and not in particular about BCHOC. *See, e.g.,* Declarations of Dr. Keller and Gartland.

C. Plaintiffs Understate the Risk Outside of BCHOC

"No one and no place is immune from COVID-19 infection, illness, and death," Complaint, ¶ 14. This applies equally to the locations to which detainees have been, or will be, released—about which we know virtually nothing. An article cited by Plaintiffs' expert Keller (dkt. 94-1) states:

> In addition, **our findings suggest that home isolation of persons with suspected COVID-19 might not be a good control strategy.** Family members usually do not have personal protective equipment and lack professional training, which easily leads to familial cluster infections. During the outbreak, the government of China strove to the fullest extent possible to isolate all patients with suspected COVID-19 by actions such as constructing mobile cabin hospitals in Wuhan, which ensured that all patients with suspected disease were cared for by professional medical staff and that virus transmission was effectively cut off. As of the end of March, the SARS-COV-2 epidemic in China had been well controlled.[31]

Here is what Plaintiffs have argued is relevant to a decision regarding the risk of continued detention:

1. Who is coming into the ICE detention facility;
2. What screening has been done of these people:
3. What are the dimensions of all the spaces in which the detainees are housed;
4. How many people live in the facility;
5. What cleaning supplies are available;
6. How often is the facility cleaned and with what substances;

[31] Zhen-Dong Guo, et al. "Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan, China, 2020" (https://wwwnc.cdc.gov/eid/article/26/7/20-0885_article, last accessed 5/4/20)(emphasis supplied)(citing Rui Huang, et al., A family cluster of SARS-CoV-2 infection involving 11 patients in Nanjing, China, published in The Lancet Infectious Diseases, vol.20, issue 5,May 2020, Pages 534-535 (available at https://www.sciencedirect. com/science/article/pii/S147330992030147X?via%3Dihub, last accessed 5/4/20).

> 7. Who is preparing meals and what steps are taken to ensure there is no contamination of the food, from when it is brought into the facility to when it is served;
> 8. What is the sleeping arrangement for each person;
> 9. How wide are the halls and spaces through which residents must pass;
> 10. What testing has been done of the residents for the virus;
> 11. What are the protocols for preventing the virus's spread;
> 12. Has anyone living there tested positive for the virus;
> 13. Has anyone that any of the residents been in contact with tested positive; and
> 14 What was done if anyone tested positive?

The list could be much longer based on the arguments made by Plaintiffs, the discovery they have promulgated, the questions emailed to defense counsel, and the topics raised at the three depositions. Yet, when Defendants asked essentially the same questions of Plaintiffs, they refused to answer.[32] In response to interrogatories seeking information regarding the conditions outside of BCHOC, plaintiffs said:

> This litigation concerns whether the practices and conditions of confinement at the Bristol County House of Correction and Facilities (BCHOC) violate Petitioners' constitutional and statutory rights. The information requested in Respondent's Interrogatory No. 1 exclusively pertains to details about the lives and livelihoods of class members who are no longer in custody at BCHOC and their co-habitants. The requested information bears no relationship to whether the practices or conditions at BCHOC violate Plaintiff class members' constitutional or statutory rights nor any applicable defense to those allegations.

In response to an interrogatory seeking information as to whether any released detainee has experienced flu-like symptoms or been tested for COVID-19 after release, Plaintiffs refused to answer. When asked if any family member living with the released detainee had experienced

[32] Defendants are filing a motion to compel compliance with their discovery requests. In the motion, Defendants will explain how lead counsel for Plaintiffs assured defense counsel that responses were coming, then waited until just before midnight on Monday, May 4, 2020 to serve responses that contained **no** responsive information whatsoever to the interrogatories and only documents that had been previously filed with the Court in response to the document requests. This made it effectively impossible for defense counsel to file a motion to compel and get responses on a timely basis for the May 7, 2020 hearing.

symptoms or been tested, Plaintiffs stonewalled. When asked if anyone in a household in which Plaintiffs proposed an inmate be released to had tested positive or exhibited symptoms, Plaintiffs again objected and provided no information. If the risk of infection is worth considering at BCHOC, then the relative risk of infection upon release must also be considered. Absent information regarding the conditions in the locations where the released detainees are to live, Plaintiffs are asking the Court to *assume* that the conditions are safer. That is insufficient to meet *their* burden of proof to show that the benefits of the relief sought outweigh the harm (not to mention that it does not establish deliberate indifference as required).

For example, the Court has no idea whether one person or twenty people live at any proposed or existing release location. The Court does not know how many people there go out and work everyday. The Court has no idea about what anyone living there is doing to prevent infection. The Court is in the dark as to whether anyone living there has tested positive for COVID-19 or exhibited symptoms. As Plaintiffs have repeatedly asserted, someone can be infected and be asymptomatic, so the protocols for maintaining social distance and hygiene are essential. But we know absolutely nothing about that for any of the released detainees or the remaining detainees for whom release is sought. And that is just a partial list of the facts that Plaintiffs assert are key for the Court's determination of the safety of detention but which they claim are wholly irrelevant to a release decision.

It is true that home quarantined individuals have the *potential* to exercise greater control over who they come into contact with *if* they choose to comply with Governor Baker's recommendation that they stay at home. This is not, at least not yet, a mandatory order. And the Court's order that the released detainees must stay at home only applies to the detainees and not to anyone else living in the residence. Even families that chose to comply typically have

someone going out to buy food, and many households have one or more people that are working outside the home still. In addition, it is likely that some families of released detainees will have fewer resources and diminished access to social services as a consequence of the pandemic. This puts additional economic pressure on them to continue working outside the home.

As stated above, Massachusetts has experienced an almost eight-fold increase in cases. The Court and the government have very little means of knowing, much less controlling, the extent to which the detainees *and their families* practice appropriate precautions against the virus. While the Court has ordered house arrest, the Court neither has authority over, nor insight into, the behavior of those around the detainees. Thus, the risk of the detainees contracting COVID-19 upon release is far from zero.

CONCLUSION

While the current pandemic may be unprecedented in our lifetimes, courts have dealt with challenges to the conditions of detention before, and there is a well-established legal path. That path requires Plaintiffs to prove, among other things, a likelihood of establishing that Defendants have been deliberately indifferent to the risk of infection and detainees' medical needs. They have not, and cannot, meet their burden. This Court must not let bad facts lead it to bad law. The Court has reduced the immigration detainee population density at the Bristol County House of Corrections through individualized bond determinations. No further relief is necessary nor warranted under the law.

Respectfully submitted,

ANDREW E. LELLING,
United States Attorney

By: */s/ Thomas E. Kanwit*
Thomas E. Kanwit
Michael Sady
Assistant U.S. Attorneys
U.S. Attorney's Office
John J. Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3100
thomas.kanwit@usdoj.gov
michael.sady@usdoj.gov

May 6, 2020

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

Dated: May 6, 2020