

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:20-cv-10617-WGY

4  
5 MARIA ALEJANDRA CELIMEN SAVINO, et al  
6 Petitioners,

7 v.

8 THOMAS M. HODGSON, et al  
9 Respondents.

10 No. 1:20-cv-10644-WGY

11 DARCY G. McMENAMIN, et al  
12 Petitioners,

13 v.

14 STEVEN J. SOUZA, et al,  
15 Respondents.

16 \*\*\*\*\*

17 For Continued Video (Zoom) TRO Hearing Before:  
18 Judge William G. Young

19 United States District Court  
20 District of Massachusetts (Boston)  
21 One Courthouse Way  
22 Boston, Massachusetts 02210  
23 Thursday, April 9, 2020

24 \*\*\*\*\*

25 REPORTER: RICHARD H. ROMANOW, RPR  
Official Court Reporter  
United States District Court  
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1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE CLERK: Now hearing Civil Matter 20-10617,  
4 Savino, et al vs. Hodgson, and 20-10644, McMEnamin vs.  
5 Souza, et al.

6 THE COURT: Good afternoon, counsel, and thank you  
7 for attending on this session of the court. This video  
8 teleconference session is hosted by our Official Court  
9 Reporter, Jennifer Gaudet, the proceedings are  
10 transcribed by -- no, I misspoke, it's hosted by our  
11 Courtroom Clerk, Jennifer Gaudet, and it's transcribed  
12 by our Official Court Reporter, Richard Romanow. Also  
13 on the line are -- excuse me, certain of my law clerks,  
14 the proceeding is open to the press and the public, they  
15 are reminded to "Please keep your phones muted," and  
16 also the rules of court about rebroadcast or taping  
17 remain in full force and effect and those rules  
18 permit -- those rules prohibit those activities.

19 Would counsel who are present -- and I know that  
20 not all can be seen by video, but it's not a problem.  
21 Counsel who are present -- and I want to start in the  
22 McMEnamin case, so we'll have counsel in that case  
23 identify themselves first and then the counsel in the  
24 Savino case.

25 In the McMEnamin case.

1 MR. McFADDEN: Good afternoon, your Honor, Dan  
2 McFadden on behalf of the petitioners, Mr. McMenamin and  
3 Mr. Portillo, in that case.

4 THE COURT: Thank you.

5 MS. CHURCH: Good afternoon, your Honor, Susan  
6 Church on behalf of the petitioner's office.

7 (Interruption by Court Reporter.)

8 THE COURT: Ms. Church, identify yourself again  
9 please.

10 MS. CHURCH: Susan B. Church on behalf of Gerardo  
11 Portillo in that matter.

12 THE COURT: And you are welcome.

13 And for the government?

14 MR. FARQUHAR: Ray Farquhar, your Honor, for the  
15 government. Good afternoon, your Honor.

16 THE COURT: Thank you.

17 All right. And in the Souza case -- in the Savino  
18 case?

19 MR. SELLSTROM: Your Honor --

20 (Static sounds.)

21 (Interruption by Court Reporter.)

22 THE COURT: Mr. Sellstrom, I recognize you on the  
23 screen and we're having the same problem as we had the  
24 last time. The last time, what did you do, you dialed  
25 in again and it was better?

1 MR. SELLSTROM: I'll try that, your Honor.

2 THE COURT: Why don't you try that again. We'll  
3 wait.

4 (Pause.)

5 (Dials in again.)

6 MR. SELLSTROM: Is the audio any better, your  
7 Honor?

8 THE COURT: The audio is better and why don't you  
9 just start again and introduce yourself.

10 MR. SELLSTROM: Good afternoon, your Honor, Oren  
11 Sellstrom from Lawyers for Civil Rights on behalf of the  
12 plaintiffs, and with me is Michael Wishnie from the Yale  
13 Law School Legal Services Office, also for the  
14 plaintiffs.

15 THE COURT: And he is welcome.

16 And for the government?

17 MR. KANWIT: Good afternoon, your Honor, Thomas  
18 Kanwit on behalf of defendants.

19 THE COURT: Well good afternoon.

20 Now I said I wanted to start with the McMenammin  
21 case and actually, um, we'll start -- since there are  
22 two particular petitioners in that case, my first  
23 question -- and there's no pride of place here, but my  
24 first question goes to you, Ms. Church.

25 I understand, and as you represent Mr. Portillo, I

1 understand you just filed a petition before Judge Saris  
2 raising some of these issues. Please believe that I  
3 raise that not in any critical or normative sense, I'm  
4 just trying to keep track of what's going on.

5 So would you apprise the Court of what pleadings  
6 and in what case or cases, other than the case before  
7 me, you have filed recently?

8 MS. CHURCH: Yes, your Honor.

9 Mr. Portillo, in addition to the claims presented  
10 here, based on Covid-19, also have claims based on Judge  
11 Saris's decision under Reed in that he's been detained  
12 pursuant to an unconstitutional bond hearing for more  
13 than a year. So we didn't want to kind of muddy up the  
14 record here by adding an extra claim here that was far  
15 outside the class action lawsuit and our original  
16 petition. And it's, um -- they are just tending to  
17 raise his reclaims that he's entitled to.

18 THE COURT: But I understand he's part of the Reed  
19 class. Did you file anything in that case very  
20 recently?

21 MS. CHURCH: I filed a separate habeas petition  
22 for him on Monday, yes.

23 THE COURT: Well that's what I'm talking about.  
24 And that's before Judge Saris?

25 MS. CHURCH: Yes, but that has a much longer

1 briefing schedule, your Honor, um, then what's happening  
2 in this case. I think the government's not even  
3 required to respond until April 10th on that case.

4 THE COURT: I appreciate that, and that answers my  
5 question.

6 All right. Since you're here and you're all here  
7 on the line, Mr. Farquhar, or Mr. McFadden, I take it  
8 that the proposal that the government made with respect  
9 to Mr. McMenamin and Mr. Portillo was unacceptable, is  
10 that right?

11 MR. McFADDEN: Yes, your Honor, that is correct  
12 and we filed a response, um, to your order on Monday  
13 explaining the basis for why it is unacceptable.

14 THE COURT: So you did, and I do understand. All  
15 right.

16 Now in that case -- and this is why I started  
17 here, in that case the Court, um -- these are two  
18 individual habeas petitions, the Court denies the  
19 petition of Darcy McMenamin and denies the habeas  
20 petition. Given his criminal history, it's unlikely  
21 however the class action resolves, that I would reach  
22 him for a bail hearing, and, um, I see no other ground  
23 for action in his favor.

24 As to Mr. Portillo, the matter is continued  
25 without further argument this afternoon. I want to take

1 a look at these other papers. But the matter is  
2 certainly viable and he is a member of the class here.  
3 But no action will be taken as to Mr. Portillo today.

4 Let me explain, um, to this extent, Mr. McFadden.  
5 I'm trying to take final action with respect to  
6 Mr. McMenamin because I believe in a direct and proper  
7 legal outcome, but in all candor it gives you a final  
8 judgment from which you can appeal, so the Court of  
9 Appeals may see what I'm doing if they wish. So that's  
10 the action with respect to those cases.

11 Now let's turn to the Savino and v. Souza case.  
12 And my first question though -- and we're going to have  
13 some argument this afternoon, but my first question goes  
14 to Mr. Kanwit.

15 Mr. Kanwit, you informed the Court that you were  
16 giving notice that one of the members of the class was  
17 being removed to Stratford, New Hampshire because you --  
18 and I certainly accept this in full good faith, you have  
19 reason to deport him within two weeks from his removal.  
20 Could you tell me again, since I only have one screen  
21 up, what's the name of that person?

22 MR. KANWIT: Um, I'm going to have to pull up the  
23 notice because we also, um, last night, or rather early  
24 this morning, gave the Court notice of, I believe, four  
25 additional individuals.



1           THE COURT: Well why don't you, during the course  
2 of -- during the course of our discussion, why don't you  
3 locate that. It's not necessary now. But at least the  
4 notice previously given, um, because I surely presume  
5 your good faith and this is not simply a -- some gambit  
6 to get this person or these persons out from under this  
7 Court's scrutiny and it does remove them from the  
8 Bristol County House of Correction -- you will  
9 understand, once you give me the names here this  
10 afternoon, that, um -- it's never been the Court's  
11 intention to interfere any further than necessary on the  
12 basis of constitutional rights with the operations of  
13 ICE, that as to them, unless there be some other stay  
14 entered by some other judge, the blanket stay entered by  
15 this Court, with your notification, is satisfied, and  
16 those people, once you give me their names, may be so  
17 moved upon the representation that they are in fact  
18 truthfully going to be deported within the next two  
19 weeks.

20           The next matter I want to take up is your  
21 application for a modification of bail and, um, actually  
22 the -- your application for a modification of bail, um,  
23 causes me to at least point out something that bares on  
24 the issue, and it's this.

25           In your briefing papers -- and I do not criticize

1     them, I take responsibility for everything this court  
2     does, but the government, ICE, has expressed  
3     dissatisfaction that I am releasing people who, in the  
4     government's view, present a -- I'm releasing on bail  
5     people who, in the government's view, present a danger  
6     to the community. I welcome your detailed briefing on  
7     that and you can be assured that I take it into account.

8             I simply point this out. Unless any of these  
9     detainees presently have charges against them, each one  
10    of them, were they a citizen of the United States, would  
11    be at liberty and they could come and go as they see  
12    fit. Whatever the past record of arrest and  
13    convictions, they have done their time, they are not on  
14    probation, they are not under the supervision of any  
15    other court, and they -- were they citizens, would be  
16    free to come and go.

17            Now, some of these people, at least upon the  
18    record that I have seen, have charges pending against  
19    them. If I have not made it clear, let me make it clear  
20    now. Once you know that -- if we go on the course that  
21    I am following now where I'm picking the groups of  
22    people to be considered for release for bail under my  
23    inherent habeas power, once you know whom I'm  
24    considering, if any of those people have any pending  
25    charges in any court, of course you need not wait till I

1 act, you may at once give notice to the property  
2 authorities. If it were Massachusetts, the jurisdiction  
3 with which I am most familiar, if the local authority,  
4 the local District Attorney, truly considered that the  
5 individual was a danger to the community, he could lodge  
6 a detainer, presuming that such detainer was in accord  
7 with the most recent decision of the supreme judicial  
8 court of Massachusetts, who recognizes -- recognizing  
9 the same issue of this Covid-19 pandemic, has  
10 established a procedure for releasing as many people as  
11 safely can be released. I simply state that.

12 Having stated that, let's go to the one aspect  
13 that the government, ICE, does ask for and that is the  
14 right, not dealt with in the terms of release of those  
15 that I've admitted bail, the right to put people at its  
16 expense and with its personnel on electronic monitoring.  
17 While I don't contemplate that anyone not already  
18 released would be called back to have an electronic  
19 monitor put on them, their locations are all known, and  
20 that seems to me to be, if ICE wants to undertake that,  
21 a suitable addition to the bail requirements at ICE's  
22 discretion. I do not require electronic monitoring. If  
23 ICE wants to put on electronic monitoring about any of  
24 the individuals I have or shall order released, I  
25 propose to allow that.

1           Mr. Sellstrom, you haven't been heard on that,  
2           though you have earlier said that you had no objection  
3           to ICE requirements. I don't think I want to add that  
4           without consulting you. So what do you say to that?

5           MR. SELLSTROM: We have no objection to that, your  
6           Honor.

7           THE COURT: Very well. Then we'll understand  
8           that, as requested by the government, should, at ICE's  
9           discretion, it wish to place any of the individuals  
10          released or to be released, um, on electronic  
11          monitoring, it may do so, it just may not call them back  
12          to the facility to have them monitored -- or call them  
13          anywhere, it has to go to where they are now in  
14          quarantine and put the electronic monitoring on.

15          No questions about that, Mr. Kanwit, that's what  
16          you asked for, right?

17          MR. KANWIT: That's correct, your Honor. Thank  
18          you.

19          THE COURT: Very well. So it's modified in that  
20          respect.

21          I think I'm now ready for the matter on which I  
22          want argument and, um, my mind is very much open on  
23          this. I'll speak first only to be as candid and to tell  
24          you what's going through my mind before you argue.

25          The government -- again nothing I say is normative

1 here, I'm simply reciting the facts. The government, as  
2 we have gone on day by day, has found fault with certain  
3 of the actions taken by this Court and that is of course  
4 their right and that's fine. And it's clear, though the  
5 government has reserved all its rights here, that the  
6 government -- it seeks in some cases to revisit action  
7 the Court has taken because it is likewise clear that  
8 the government would, um, prioritize these -- the  
9 release of these individuals in a different order than  
10 as it is worked out or has worked out thus far.

11 Now this Court has no, um, no inherent -- though  
12 I'm trying in good faith to apply the principles that I  
13 have already disclosed, I'm not the master of these 147  
14 -- these 147 detainees, the government, and I dare say  
15 petitioners' counsel, knows far more about them than I  
16 do. So it occurs to me that if we could work out or if  
17 I could work out, um, a level of occupancy of that  
18 facility that would, in the Court's view, provide  
19 adequate protection -- and I am thinking of social  
20 distancing for the people in the facility from an  
21 outbreak, and I'm fully cognizant that thus far there  
22 has been no outbreak within the facility and it's fair  
23 to say that that's due in no small measure to the, um,  
24 significant efforts of Sheriff Hodgson and his dedicated  
25 staff, um, and nothing I've done must be taken as

1 critical, simply it is this Court's view and this  
2 Court's view of the constitutional requirement that the  
3 population there, in view of this pandemic, has to be  
4 reduced.

5 Now things that I have looked at and thought of,  
6 just so you know, that there's a very recent, um, in the  
7 online edition of the "New England Journal of Medicine,"  
8 certainly a respected journal, there's an article that  
9 deals directly with the -- the title I don't have in  
10 front of me, but in essence it's "Flattening the curve  
11 for people who are incarcerated," and I've read it, it's  
12 helpful, it talks about the fact of trying to have  
13 social distancing in a penal institution -- and I  
14 recognize that this is a detention facility, not a penal  
15 institution, but people are kept in custody there, that  
16 the term they use is "challenging." Well so it is. I  
17 understand that.

18 I've also, in the "Times," there's a chilling  
19 article about a Covid-19 outbreak in the Cook County  
20 Jail. Thus far, um, through the good efforts of many  
21 people other than me, that's been prevented here in  
22 Bristol County. Believe me, I seek only to assist in  
23 that effort without putting the community at risk.

24 So, um -- and I've also -- again this isn't  
25 critical, but I understand, Mr. Sellstrom, why as class

1 counsel you can't argue that some people should remain  
2 but the remainder should be admitted to bail, because  
3 you can't choose among your class, but at the same time  
4 I don't know -- you're not taking the responsibility,  
5 the responsibility is ultimately mine. And as I've said  
6 from the beginning, and I've looked at -- I believe I've  
7 read everything submitted.

8 So I have -- you've submitted an affidavit, again  
9 from a skilled and knowledgeable physician, and his  
10 conclusion is "Well there's no number of people in there  
11 that can be made safe." Well with all respect I  
12 understand that, I can't render any area of the district  
13 safe, I don't have that ability, nor sadly do physicians  
14 and public health professionals. It appears they are  
15 all doing the very best they can.

16 Now, Mr. Kanwit, on ICE's behalf I'm not -- I  
17 don't want you to argue against yourself except in a way  
18 you're doing it and it's inefficient, you -- you -- I  
19 say "Release these 10" or I say "I'm considering these  
20 10," and you say, "Well certainly don't release these 6  
21 out of those 10." Well that's prioritizing it, only the  
22 priorities are inefficient, it's only against the 10  
23 that I'm considering, not a list of how you'd rank the  
24 147, 148.

25 Now I take responsibility for what I do, I've

1 denied Mr. McMenamin and I know he has serious health  
2 problems. So the government could have put in a list of  
3 50 and the government could have put in a list of 50 in  
4 some sort of order, and absent strong reasons not to  
5 follow it, the likelihood is I would.

6 So, um, having now researched the law, you've seen  
7 my memorandum, I believe I have the power, in an  
8 appropriate circumstance -- having the power doesn't  
9 mean it should be exercised, but I have the power to  
10 say, "Well X number of people is about the best we can  
11 do in these circumstances, get the population down to  
12 that number within Y number of days."

13 Now the Court has the power to do that. Should  
14 the Court do that and leave it to ICE to, um, sort it  
15 out or would you prefer the current procedure? And  
16 logically I would start with Mr. Sellstrom, but since --  
17 but in this, um, this time I think I ought to hear from  
18 ICE and then we'll hear Mr. Sellstrom's response and  
19 then of course I want to know what number of people.

20 Mr. Kanwit.

21 MR. KANWIT: Thank you, your Honor.

22 Your Honor, you've raised really a very large  
23 number of points and I'm not going to be able to get to  
24 all of them. But, um, you know starting with "Why  
25 didn't the government put together a list of 50?" The



1 Court set this process up. As the Court is well aware,  
2 you started with the categorization of the detainees  
3 into five categories and indicated that for those with  
4 more significant criminal histories or criminal  
5 convictions, we'd be unlikely to order their release.  
6 Had it be left up solely to Thomas Kanwit, the  
7 government would have put forward a list of 50 that were  
8 prioritized. I can't put that list together myself, my  
9 client in this case didn't want to, I don't know why, I  
10 think it would have been helpful, but they didn't. The  
11 Court gave us a choice, either we put forward a list or  
12 the Court puts forward a list, and we have to accept, if  
13 we didn't put forward a list, the Court's  
14 prioritization.

15 We have absolutely no insight whatsoever into the  
16 Court's methodology for prioritizing or not  
17 prioritizing, what we do know, and we've made this clear  
18 in our briefs, is that the people that are coming up are  
19 a lot of people with significant criminal histories.

20 Now the Court has suggested in the -- in today's  
21 remarks, that if these people were citizens, they would  
22 not be detained for past crimes. That frankly is not  
23 what the issue is and is not what I think we ought to be  
24 talking about. Because certainly an immigration judge  
25 has every right, under precedent and ICE's own

1 regulations, to consider criminal history as part of  
2 evidence of danger to the community and risk of flight.  
3 And in fact --

4 THE COURT: Mr. Kanwit -- Mr. Kanwit, no one  
5 questions that, no one questions that at all. I'm not  
6 sitting in review of the actions of an immigrations  
7 hearing officer, my actions are based entirely on the  
8 imminent threat posed by this Covid-19 pandemic.

9 What about my question? And my question is --

10 MR. KANWIT: Well, your Honor --

11 THE COURT: -- would you prefer a different  
12 procedure, now that we've gone under this procedure for  
13 four days?

14 MR. KANWIT: And I'll get to that. But, your  
15 Honor, you did actually question the issue about prior  
16 criminal history and whether it's relevant or not.  
17 There's no way we're going to be able to participate in  
18 a process that doesn't take into account the  
19 dangerousness -- the relative dangerousness or risk of  
20 flight of the detainees.

21 Now if we're starting with a third approach,  
22 abandoning the five categories, abandoning the list of  
23 50, and picking a number at which, um, we can't -- we  
24 need to get down to, a target number for population  
25 density, um, and we should submit a list of people we

1 think ought to be the ones released to reach that  
2 number, without having consulted with my client, I  
3 expect that we would be very much on board with that.  
4 It obviously depends a lot on where the number is. We  
5 think, based on what we submitted today, that there's a  
6 good chance that the number does not have to be much  
7 lower than what it is now.

8 And as I think the Court is aware, at the last  
9 minute right before the hearing, we submitted through  
10 e-mail a request that the hearing be postponed because  
11 we were convinced that, try as hard as we could, we were  
12 not getting in front of the Court all of the relevant  
13 materials.

14 For example, we had two videos of the ICE A and  
15 ICE B detention areas, I don't know if the Court's had a  
16 chance to look at those. We have some additional  
17 schematics, I know the Court hasn't seen those because  
18 we haven't submitted them. All we've gotten on the  
19 record are two declarations and what the Court has in  
20 camera, which frankly I think both the Court and the  
21 defendants could agree is not by itself sufficient.

22 So if we're trying to reach a number, I would say  
23 that the present population minus something like 10  
24 percent or 20 percent ought to be adequate because, as  
25 of right now as I understand it, in ICE A and ICE B,

1 they are very close. In one of the units they're able  
2 to have only alternative rows of bunks filled and in the  
3 other unit they're very close to that. I think Unit A  
4 has 30 or 33 detainees and Unit B has 40-some. This is  
5 in our submissions. And my colleague, Mike Sady, has  
6 more information on that than I do, he took the lead on  
7 that part. But the number is not 100 and it's certainly  
8 not below 100. And we think adequate social distancing  
9 can be practiced right now, um, and with slight  
10 modification absolutely can be practiced.

11 There are a couple of issues about that, your  
12 Honor. The first is will the detainees in fact practice  
13 social distancing? Nobody can guarantee that, and I  
14 would submit that while that's something to take note  
15 of, it's not anything that anybody's going to be able to  
16 address. Even if they're all released, they might not  
17 practice social distancing wherever they go to.

18 The other thing, your Honor, I think that's very  
19 important to consider here is that the outside experts  
20 who say Covid-19 is really really really dangerous and  
21 the risk of an outbreak running through an institution  
22 is great are not necessarily wrong, but they're also not  
23 speaking with experience about Bristol County House of  
24 Corrections.

25 And your Honor referred to two articles -- and I

1 don't know if the Court's taking judicial notice of  
2 them, um, and it sounded like --

3 THE COURT: I'm not.

4 MR. KANWIT: Okay.

5 THE COURT: I'm not. I was -- and I don't think  
6 you can take judicial notice of the facts set forth in  
7 some news report or even a journal as good as the "New  
8 England Journal of Medicine." We're operating, and we  
9 must, operate rapidly. I thought it was fair to tell  
10 you the things I had read recently, that's it, nothing  
11 more than that. I'm entitled to certainly follow the  
12 developments as well as I can. So I'm not taking  
13 judicial notice of them and I can't make findings based  
14 thereon nor do I think I can.

15 MR. KANWIT: Well that's fine, your Honor. What I  
16 was going to suggest is it might be very relevant and  
17 very helpful in a general sense -- I have not reviewed  
18 them yet, I saw the headline for the Cook County  
19 situation and I certainly respect the "New England  
20 Journal of Medicine." My point is that these general  
21 statements, whether they're in a "New York Times"  
22 article, a medical journal, or coming from plaintiffs'  
23 experts, are just that, they're very general statements,  
24 and I think the Court already recognizes that. In  
25 contrast, we have declarations of people within Bristol

1 County who say that appropriate CDC compliance, social  
2 distancing, can be achieved right now without further  
3 reduction.

4 So I think, you know, perhaps some reasonable  
5 additional reduction, um, to make sure that, for  
6 instance, every other row of beds in Unit B, um, is  
7 empty might be appropriate, but I think you've got  
8 specific declarations saying that social distancing can  
9 happen given the space and the population density.  
10 Right now at Bristol County and on the other side you've  
11 got a very general statement of people who do not know  
12 the situation on the ground. And I thank the Court and  
13 the plaintiff for listening.

14 THE COURT: Let me ask you some specific questions  
15 that I think maybe you can answer and naturally I'll  
16 review anything you submit.

17 How many cells are there there?

18 MR. KANWIT: Um, I don't have that off the top of  
19 my head. Um, there are -- for example, for the women,  
20 the female detainees, um, in Unit EB, they are  
21 single-housed in cells, there's enough cells for each  
22 woman to be in her own cell. In ICE A and B, your  
23 Honor, as the videos would show you, the sleeping  
24 arrangements are large, very very large dormitory-styled  
25 rooms, they're not individual cells.

1 THE COURT: No one's in cells?

2 MR. KANWIT: No one's in cells in A and B.

3 There are some high-risk, um, civil ICE detainees  
4 who are housed with pretrial detainees, criminal  
5 detainees, and I believe that they are housed in cells  
6 and that's described in the Souza declaration. But  
7 that's a very small percentage of the total detainee  
8 population in Bristol County. The bulk of the detainee  
9 population are housed in Units A and B of the Correa  
10 center and those units do not have separate cells.

11 THE COURT: Thank you. And -- but one last  
12 question on cells.

13 Those who are considered dangerous and are housed  
14 in cells with other criminally-accused individuals, are  
15 they in single cells alone?

16 MR. KANWIT: I don't believe so, your Honor, but  
17 the cells are large enough so that they could stay 6  
18 feet away from each other.

19 THE COURT: I see. Well -- and, um, all right,  
20 someone's going to tell me how many cells there were,  
21 but maybe that's not important because only these few  
22 are housed in cells.

23 What are the dimensions of A and B? I seem to  
24 remember that from one of the schematics. Has anyone  
25 got that off the top of their head?

1 MR. KANWIT: It depends, Judge, what you're  
2 talking about, your Honor.

3 THE COURT: Well the dimensions where you say  
4 they're housed dormitory-style. And they're on bunk  
5 beds, aren't they?

6 MR. KANWIT: They are on bunk beds, your Honor.

7 THE COURT: Yeah.

8 MR. KANWIT: Those rooms, um, and I don't remember  
9 off the top of my head, and I don't know if Mike Sady is  
10 able to comment, and I can pull up the declaration and  
11 it's all in Mr. Souza's declaration, but those rooms are  
12 big, and that's one of the reasons why I wanted to be  
13 sure the Court had a chance to review those videos. The  
14 videos that are -- and the link is in the e-mail I sent  
15 to Ms. Gaudet and to opposing counsel, show those rooms  
16 very clearly.

17 THE COURT: Yeah. I -- he's apprised me of the  
18 fact that they came in very shortly before the hearing.  
19 In candor I haven't looked at them and I have to. Well  
20 this is very helpful.

21 And now, Mr. Sady, unless you want to say  
22 anything, I think I should turn to Mr. Sellstrom.

23 MR. SADY: Well if it will help the Court, your  
24 Honor, um, Unit A and B are identical, they mirror each  
25 other, and the approximate area where the bunk beds are



1 -- it's about 1625 square feet, 28 feet by 58 feet. The  
2 whole general area where the tables are, at the end of  
3 those rows of beds, is close to, um, 4800 square feet.  
4 So it's a rather large area, your Honor.

5 THE COURT: But the bunking arrangements are 1625  
6 square feet for each?

7 MR. SADY: Correct, yes.

8 THE COURT: Thank you.

9 MR. SADY: Approximately.

10 THE COURT: Yeah, I understand. Thank you.

11 Mr. Sellstrom, I find that helpful. What do you  
12 have to say?

13 MR. SELLSTROM: Yes. And is my audio okay?

14 THE COURT: It is okay.

15 MR. SELLSTROM: Good. Okay. Thank you, your  
16 Honor. And let me say thank you initially for the  
17 Court's continuing, um, to expedite this matter, it's  
18 much appreciated by the class, particularly those who  
19 have been released obviously, but the sense of relief  
20 from them and their loved ones upon getting out of this  
21 danger is really palpable, and we appreciate your  
22 Honor's speed in that regard.

23 We've certainly seen that this process that your  
24 Honor has come up with for individualized consideration  
25 is certainly a workable one. It's working well. I

1 think there are 20 individuals, um, now that we have  
2 briefed before your Honor, and in addition to our named  
3 plaintiff, Ms. Savino, who has also been individually  
4 briefed, and so our hope is that as your Honor continues  
5 the process of looking at what this, um, you know  
6 possible level might be, that those individualized  
7 reviews continue because of the urgency of the  
8 situation. And so that is our hope on that process  
9 question.

10 Turning now to the, um, the big issue that your  
11 Honor is interested in about whether there is some level  
12 that can be reached, um, we certainly vehemently  
13 disagree with the assertion from Attorney Kanwit that we  
14 are anywhere close to that level. I believe that at the  
15 first hearing when your Honor said that you'd be going  
16 by groups of 10, Mr. Kanwit said that, you know, that's  
17 a drop in the bucket, that's not going to make any  
18 difference, and that's something that we certainly agree  
19 with. Certainly for the individuals it made a world of  
20 difference, but for those left inside, we are not  
21 anywhere close to the level that could be considered  
22 reasonably safe in this environment.

23 We're obviously somewhat limited today in what we  
24 can say. We've received no discovery from the  
25 government on this. We, like your Honor, have just

1 recently received the video and the declarations. We'd  
2 like the opportunity to be able to, you know, review  
3 those and give further briefing to your Honor on that.  
4 But there are certain things that are already quite  
5 clear from what we know and from what we've seen. And I  
6 think in particular the Gartland, Dr. Gartland's  
7 declaration that we submitted with our initial briefing,  
8 and then again shortly before this hearing, is relevant  
9 to that.

10 Dr. Gartland, as your Honor knows, is a doctor  
11 with Brigham & Women's Hospital, but importantly he has  
12 also been to the Bristol facility on a number of  
13 occasions this year, so he is quite familiar, not only  
14 from a medical perspective, but also from a fact-witness  
15 perspective, of knowing what it is like to be in those  
16 facilities. And he analyzes it from that public health  
17 perspective on a couple of different dimensions.

18 He starts with what we know to be the case about  
19 the virus itself, two salient points that he raises.  
20 One, is that it is highly transmittable, and this is  
21 something that we all know but are learning more about  
22 each day, this is something that it is transmitted by --  
23 through the air, it's not something that's transmitted  
24 in more difficult measures like through blood. Just  
25 since this case has been filed, the CDC has now started

1 telling us all to wear masks when we go outside. So we  
2 know this is something that is highly transmittable and  
3 Dr. Gartland makes that clear in his declaration.

4 He goes on to talk about the key critical aspect  
5 of the fact that many people can be and are asymptomatic  
6 and yet still carry this virus. The idea that before  
7 people become sick, anywhere from 2 to 14 days, they may  
8 be contagious and some people may never develop  
9 symptoms, and yet be passing the virus along, that is a  
10 source of significant concern and danger and something  
11 that frankly is missing from all of the defendants'  
12 papers and arguments in this case.

13 THE COURT: But you see -- I interrupt only to say  
14 I assure you, Mr. Sellstrom, I've read these, and your  
15 argument, though presented in your usual candor and  
16 forcefulness, um, isn't telling me anything that I hear  
17 from many public sources about this extraordinarily  
18 contagious disease. I know that. I don't think I  
19 have -- let me start this way.

20 The best defense that I can offer to the situation  
21 is a reduction in population that will allow for more  
22 social distancing. I haven't got anything else. And  
23 while, yes, there are various sanitary things, even  
24 though there are disputed things -- we haven't had an  
25 evidentiary hearing here, and so that's why I've latched

1 onto social distancing. And Mr. Kanwit's right, you  
2 know there's limits to, um, what I can expect of these  
3 detainees, and I'm not imagining it, Sheriff Hodgson is,  
4 and he appears to be doing an okay job. I've got the  
5 crudest, um, way to try to ameliorate the situation for  
6 everyone, both detainees, staff, and at the same time  
7 protect the community.

8 So, um, I understand what a terribly contagious  
9 disease it is. But what other than social -- well I  
10 want to get my social distancing taken care of first.  
11 How about that?

12 MR. SELLSTROM: Yes, thank you, your Honor, let me  
13 address that. And again I think the expert declarations  
14 that we've submitted speak to this directly. And they  
15 really delve into what your Honor is doing, what do we  
16 mean by social distancing and what are all the different  
17 components of that?

18 Certainly it starts with the sleeping  
19 arrangements. As your Honor has noted and as we've just  
20 seen the videos, these are by and large the bulk of the  
21 class members are sleeping in these bunks that are right  
22 next to each other and with individuals right on top of  
23 each other. As our expert declarations say, that is  
24 highly, um, problematic from the perspective of  
25 transmitting this virus. So it starts with the beds.

1 But it by no means ends there.

2 You're talking about social distancing, um, you're  
3 talking about, one, being able to keep that distance of  
4 6 feet apart at a minimum both day and night. So, yes,  
5 it's the sleeping arrangements. But also the daytime  
6 when people are in these congregate environments during  
7 the day. And it's particularly around meal time as well  
8 that this is problematic, sitting at congregational tables  
9 and eating, that is a primary source of potential  
10 transmission when you've got that kind of congregate  
11 environment.

12 And so you've got shared facilities, shared  
13 bathrooms, shared sinks, shared showers, all of which  
14 are key to -- you know, for all of us to maintain that  
15 hygiene, and yet in this situation it is all shared  
16 surfaces where we know that the virus can live. And so  
17 social distancing is not just being apart when you're  
18 sleeping, it's during the day, it's minimizing those  
19 shared surfaces.

20 I want to come back to the meal issue because this  
21 is something that we've heard from our class members  
22 just this morning when we are asking them about  
23 conditions in real-time what is going on. The real  
24 concern about food preparation, how is food being  
25 prepared? How is food being then given to be eaten?

1 And this is clearly a very problematic area where you're  
2 talking about literally, you know, hands going to mouth,  
3 that kind of transmission that happens, where you've got  
4 class members themselves who are doing the food service,  
5 you've got trays that are passed among multiple people  
6 before they get to the individual who is to consume the  
7 meal, all of those, as our experts, including those who  
8 have been in the facility, say is highly problematic.  
9 And when we're talking about social distancing, all of  
10 those types of things need to be thought of, not just  
11 the physical dimensions.

12 You've also got staff coming in and out of the  
13 facility, as they must, on a daily basis, but that is  
14 another issue where social distancing in a congregate  
15 environment like this is highly problematic, when that  
16 kind of back and forth is happening. It's our  
17 understanding that the staff is now getting hazard pay,  
18 as a matter of fact, from the Sheriff because for the  
19 staff members it is recognized that this is a  
20 highly-dangerous environment.

21 The two medical declarations that were submitted  
22 in the earlier stages of the briefing -- both of those  
23 medical professionals are not working at the facility,  
24 they're doing telehealth and telemedicine, which we  
25 certainly understand is, particularly in this current

1 pandemic environment, maybe a necessity. But that  
2 really goes to our point, which is that it's equally  
3 dangerous for the individuals who continue to be in that  
4 situation for all of those reasons. And that is why our  
5 experts, including those who know this facility, say  
6 that this environment is unsafe, that the only way is to  
7 continue the path that your Honor is on, this expedited  
8 way of making sure that folks who do not need to be  
9 there, who can be safe to release, with all the  
10 precautions that your Honor has put in place and all of  
11 the precautions that ICE has put in place to monitor  
12 individuals, but not to have them remain in this  
13 environment that is inherently unsafe.

14 THE COURT: But what I hear you say -- and I say  
15 this with respect, Mr. Sellstrom, you know if taken to  
16 its logical conclusion, then we ought be moving everyone  
17 out of nursing homes, um, we ought be moving them out of  
18 retirement communities where the things that you say are  
19 -- happen throughout the community generally, that is to  
20 say, um, food service people are recognized today as  
21 among the most necessary of our community supports and  
22 we recognize that they run special risks.

23 I said at the beginning, I'm not disposed to  
24 simply say we must close this facility down because  
25 there is a Covid-19 pandemic. If -- and I adhere to



1 that, which is not in any way to slight the very real  
2 concerns that you are raising. But with fewer people  
3 you can eat in shifts, you can, um, take steps with  
4 respect to the food handlers about how many people touch  
5 the food. In any situation where food is going to be  
6 prepared for a significant number of people and  
7 throughout society there are, um, very significant  
8 issues in that regard.

9 We hear daily about the efforts made by  
10 restaurantors, and I praise them, to provide meals for  
11 first responders and the like, all of that raises these  
12 same issues that the virus could be transferred from the  
13 people who are handling that food. The same is true in  
14 every supermarket and we see the restrictions there.

15 So what I get from what you say, and I -- I take  
16 it very seriously, you're pointing to -- and here's what  
17 I get. It's difficult to see how bunk beds can satisfy  
18 any CDC standard. There are other matters and you talk  
19 about the wash rooms that are present, the lavatories  
20 that are present, the, um -- and you've made this point  
21 about food service and food handling, all of that is  
22 true. But on this record, um, the Court sees no basis  
23 for micromanaging the facility beyond assuring, um,  
24 basic constitutional rights.

25 With that said, you're comfortable with the

1 present approach and you would have me see, um, or you  
2 would have me continue that approach and entertain as we  
3 go along the systemic arguments of the parties. Should  
4 I come to tighten it up and be denying releases, you  
5 would be arguing that I haven't taken into account these  
6 factors, and to the extent I continue releases, we can  
7 expect Mr. Kanwit to be arguing that I've already  
8 achieved everything I could achieve.

9 Have I pretty much got the argument correctly from  
10 your point of view, Mr. Sellstrom?

11 MR. SELLSTROM: Yes, your Honor. But let me, if I  
12 could, respond to a couple of questions that were  
13 embedded in your Honor's, um, statements there.

14 I think that analogy to nursing homes is perhaps  
15 imperfect in some respects in that -- first of all,  
16 nursing homes do not have this kind of congregate  
17 dormitory-style sleeping arrangement that Bristol County  
18 does and a number of other differences. But I think  
19 more to the point is the issue that there are other  
20 reasons why people are in nursing homes, um, they are,  
21 you know, receiving care there that they need to be  
22 there for. But that's not the case here.

23 For individuals who are there, they, um -- there's  
24 no need for them to be there, as your Honor has  
25 recognized in ordering release for numerous individuals,

1 these are individuals who have family members on the  
2 outside who want to welcome them home -- are welcoming  
3 them home. There are family members who say "We can  
4 social distance where we are on the outside of this  
5 facility." And so in that respect the nursing home  
6 analogy is not exact in our view.

7 And with the additional point that of course what  
8 we see is that in nursing homes and places like that,  
9 even though they've got differences and are allowing for  
10 more social distancing than Bristol County facilities,  
11 those are precisely the kind of places where we see the  
12 most dangerous and most concerning outbreaks where the  
13 virus, once it is there, spreads like wild fire. And so  
14 places like nursing homes or cruise ships, or all of  
15 these places that actually have more social distancing  
16 than is possible in Bristol County facilities, are some  
17 of the places that are most problematic.

18 And of course with the idea that now we know that  
19 there are staff members at Bristol County who have  
20 tested positive, you know that just hastens the concern  
21 that people are still in this quite dangerous  
22 environment when there is really no need for that,  
23 particularly in the extraordinary and unprecedented  
24 conditions of this pandemic that we are living in now.

25 THE COURT: Thank you.

1           Now, Mr. Kanwit, have you had time to get me the  
2 names of the people to which, um, you are giving notice  
3 that you're moving them with the representation -- and  
4 were I to find that you're just shifting them out of  
5 this class and out of the Court's jurisdiction to put  
6 them somewhere else where they will simply languish, I  
7 would take that much amiss. I don't -- I don't suggest  
8 that at all. I'm relying on your complete good faith  
9 here. But it will not due to find out later that the  
10 people have not in fact been deported within about a  
11 two-weeks time.

12           Now who are these people?

13           MR. KANWIT: One is Nita, N-I-T-A, Alexandru-  
14 Nicusor. The last name is hyphenated.

15           THE COURT: Thank you.

16           MR. KANWIT: And the last name is spelled  
17 N-I-C-U-S-O-R.

18           THE COURT: Thank you.

19           MR. KANWIT: And, um, the five that we just gave  
20 notice of yesterday are Ricardo Ortega Vasquez, Jose Del  
21 Rosario Fernandez --

22           THE COURT: You've got to go a little slower  
23 because I'm literally copying it down. I've got  
24 Vasquez.

25           MR. KANWIT: Oh, sorry, your Honor.

1 THE COURT: That's all right.

2 MR. KANWIT: I can also e-mail Ms. Gaudet and she  
3 can send it on to you.

4 THE COURT: Why don't we do it that way. And we  
5 will understand that as to those people --

6 And you are making that representation that I'm  
7 insisting on, Mr. Kanwit, as an officer of the court?

8 MR. KANWIT: Let's be clear. I don't have any  
9 personal information about the arrangements. ICE has  
10 represented to me that these people are being  
11 transferred and are going to be removed imminently.

12 THE COURT: Um, that means to me two weeks.

13 MR. KANWIT: I understand what it means to you,  
14 your Honor, all I can do is make sure that ICE  
15 understands that, which I think they do, and if they're  
16 unable to do so, we'll inform the Court. These things  
17 don't always go exactly the way ICE plans it because in  
18 part there's another country on the other side of it,  
19 but my understanding is that ICE has a good faith belief  
20 that these people, um, can be removed within the next  
21 two weeks, otherwise they wouldn't have given me those  
22 names.

23 THE COURT: Then -- and I appreciate both your  
24 caution and your candor. So let my order be clear.

25 I -- unless there be a stay in place from some

1 other judge, a blanket stay, which this Court has  
2 imposed, is lifted as to the individuals whose names  
3 you're going to e-mail to Ms. Gaudet, they may be  
4 removed from this facility and sent to the place of  
5 deportation.

6 The Court understands and believes that ICE  
7 understands that they are going to be removed physically  
8 from the United States within the next two weeks.  
9 Should they not be removed, one, a report must be made  
10 to the Court -- and it is clear, these are habeas  
11 petitions -- petitioners, their habeas petitions are  
12 alive -- are viable even though physically they have  
13 been moved outside the district, that is to say this  
14 Court remains empowered both to grant the writ of habeas  
15 corpus, should it be appropriate, or to admit people to  
16 bail, should that be appropriate, or to deny the writ.  
17 The cases are alive wherever the people are.

18 You understand that?

19 MR. KANWIT: Well actually, your Honor, I must  
20 respectfully disagree. I think under ***Padilla*** and its  
21 progeny, only if the Court makes an actual finding that  
22 a habeas corpus petitioner has been moved so as  
23 purposefully to defeat a court's jurisdiction can the  
24 Court exercise jurisdiction over a petitioner who is not  
25 lodged within the jurisdiction. I think I'm going to

1 have to respectfully disagree on that.

2 THE COURT: You can say what you wish. But you  
3 understand what I've said?

4 MR. KANWIT: I do understand the Court's view of  
5 that.

6 THE COURT: Very well. So the -- as to the ones,  
7 the names that you give to Ms. Gaudet, the stay entered  
8 by this Court is lifted on the terms I've just  
9 described. Thank you very much.

10 Okay, um, this has been very helpful. I will take  
11 the matter under advisement. I am prepared to rule on a  
12 few other matters.

13 I should say, since the government, um, is most  
14 taken with this idea of some level at which the Court  
15 would, um, let ICE get to and stop at that level,  
16 considering individual petitions, um, ICE may make  
17 formal -- you know you may brief that and ask for that  
18 and you may suggest a level, a range, you may make such  
19 representations as you want. But until that happens,  
20 we'll proceed as we have.

21 Now, since the, um, submissions by the government  
22 have not been timely filed these last two days, the  
23 Court has been slowed down, but I can make -- I have had  
24 the chance individually to review each of the following,  
25 um, petitions to be admitted to bail on the terms, as I

1 today modified them, and I will rule as follows.

2 The Court has before it a motion for  
3 reconsideration of Schneider Paul. The motion for  
4 reconsideration is denied. Gabriel Castillo Malpita is  
5 ordered admitted to bail.

6 The 10 individuals -- notwithstanding the  
7 government's objection, the 10 individuals listed to be  
8 considered yesterday, um, Wednesday the 8th of April,  
9 all of them are ordered released. So in any -- on these  
10 same conditions of bail as the Court's just modified.

11 As to the ones available on Thursday -- well not  
12 available, the ones that the Court listed for Thursday,  
13 the following four individuals are ordered released, um,  
14 the remainder the Court keeps under advisement.

15 And the ones to be released are, um, Ramirez  
16 Maldonato -- Renfree, first name. Rojas Carvallos,  
17 Juan, first name. Vasquez Vasquez, Obid, first name.  
18 And Gutierrez DeLeon, Carlos, first name. The remainder  
19 the Court takes under advisement.

20 I think that takes care of what I wanted to  
21 address this afternoon. The issue of whether it's  
22 advisable to enter a more general order setting an  
23 acceptable level or setting a level with perhaps some  
24 modifications yet to come, I leave to the briefing of  
25 the parties.



1           One final suggestion. This may not be in point,  
2 but I see we're setting up field hospitals throughout  
3 the Commonwealth. Now a field hospital is a finite  
4 item, it can be configured into various locations and  
5 that's why I guess it's desirable as a public health  
6 facility, but field hospitals are uniform, and I would  
7 be interested, if it's pertinent, to understand what  
8 area is available to a patient in a field hospital.  
9 Obviously those are extreme situations, but surely some  
10 thought has been given to the area for each patient,  
11 lest contagion spread even more rapidly. I am not  
12 skilled in this area, I simply throw that out. I wonder  
13 what area is available to a patient in a field hospital.

14           I thought, for instance, that the hospital ship  
15 that was anchored in New York, originally the idea was  
16 that it would not accept Covid-19 patients and the  
17 reason for that of course is that it confines space,  
18 that it was never set up for that, but since the need is  
19 so pressing, I understand it's been converted.  
20 Converted how to best safeguard the patients and the  
21 crew?

22           None of these analogs -- and of course  
23 Mr. Sellstrom is right, none of these analogs are  
24 perfect, we have no perfect analog. We are fortunate --  
25 and I want to say this. We are fortunate that through

1 the dedicated efforts of the personnel and the staff at  
2 the Bristol County House of Correction, that we do not  
3 yet have an outbreak there. Now this obviously is not  
4 criticism of petitioners who, in the main thus far I  
5 have vindicated, or sought to vindicate, protecting the  
6 community, have vindicated the rights of their clients.

7 Very well. Unless there's questions, um, we'll  
8 recess.

9 MR. SELLSTROM: Your Honor --

10 MR. KANWIT: Your Honor, may I ask a question?

11 THE COURT: Well Mr. Sellstrom first, then  
12 Mr. Kanwit.

13 Mr. Sellstrom.

14 MR. SELLSTROM: Thank you, your Honor.

15 Is there a time at which you would like the  
16 briefing on this issue?

17 THE COURT: I work on this day by day and really  
18 I've left it now that we're going to follow the same  
19 schedule, um, and the laboring oar is on the government.  
20 Should the government -- and I want to see what they've  
21 just filed, um, within the 15 minutes before the  
22 hearing, that I haven't seen. Once I've seen that, if I  
23 want some further hearing, fine. But once the  
24 government files a brief, if they choose to -- now I've  
25 ordered more people released now and we'll see what

1 level that gets us to, and maybe that changes the  
2 equation. We'll see. But as soon as they file a brief,  
3 you are welcome to respond. And you don't have to wait  
4 for it so long as you give them notice. Anything you  
5 file, I'll read.

6 MR. SELLSTROM: Thank you, your Honor.

7 THE COURT: I'm proceeding as I have heretofore  
8 and I can -- and I intend to continue unless I give  
9 notice I'm going to change.

10 Mr. Kanwit?

11 MR. KANWIT: Thank you, your Honor.

12 MR. SELLSTROM: Oh, excuse me, can I ask one more  
13 question, your Honor?

14 THE COURT: Of course you may.

15 MR. SELLSTROM: Thank you, Judge.

16 I wanted to just raise again the, um, issue of the  
17 individualized application of our named plaintiff,  
18 Ms. Savino.

19 THE COURT: I have it under advisement.

20 MR. SELLSTROM: Thank you, your Honor.

21 THE COURT: All right.

22 Mr. Kanwit.

23 MR. KANWIT: Yes, thank you, your Honor.

24 This is a small point but, you know, I -- we've  
25 all been working under great pressure and great time

1 constraints and I understand why the Court has held our  
2 feet to the fire and I respect that, but I want to make  
3 sure I'm clear because the Court said the filing of the  
4 submissions by the government the last couple of days  
5 have not been timely.

6 I understood that the deadline for our input on  
7 the list of 10 is 9:00 a.m. Am I wrong about that?

8 THE COURT: No, that's correct, it's 9:00 a.m. It  
9 was that I was talking to and nothing else.

10 MR. KANWIT: Okay. Yeah, yesterday we were a  
11 little bit after 9:00, today we were at 9:00. So I  
12 don't think we've been consistently late on those  
13 filings. Of course if the Court has a different  
14 perception, I apologize. But I don't think we have  
15 been.

16 THE COURT: Mr. Kanwit, I stand corrected in this  
17 sense. Because we're working from remote locations, in  
18 order for them to be before me in a fashion that I can  
19 in fact read them, they have to pass through the Clerk.  
20 All of us are working very hard. But your understanding  
21 of what I require as to the specific 10, that's correct.

22 Now what's being filed with respect to my  
23 suggestions that maybe we ought to change our  
24 methodology, I have no quarrel with any of that, and I  
25 was the one who raised that and I'm grateful for the

1 help that I'm receiving.

2 Anything else?

3 MR. KANWIT: No, thank you, your Honor.

4 THE COURT: Thank you.

5 I thank you all. We'll stand in recess.

6 MR. SELLSTROM: Thank you, your Honor.

7 (Ends, 3:20 p.m.)

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9 C E R T I F I C A T E

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11 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,  
12 do hereby certify that the foregoing record is a true  
13 and accurate transcription of my stenographic notes  
14 before Judge William G. Young, on Thursday, April 9,  
15 2020, to the best of my skill and ability.

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19 /s/ Richard H. Romanow 05-05-20

20 \_\_\_\_\_  
RICHARD H. ROMANOW Date

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