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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

No. 1:20-cv-10617-WGY

MARIA ALEJANDRA CELIMEN SAVINO, and all those
similarly situated,
Petitioners,

v.

THOMAS M. HODGSON, et al
Respondents.

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

Preliminary Injunction

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Thursday, May 7, 2020

REPORTER: RICHARD H. ROMANOW, RPR
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1 P R O C E E D I N G S

2 (Begins, 10:00 a.m.)

3 THE COURT: Good morning counsel and thank you for
4 attending on this session of the court. This is a
5 public video zoom hearing, it's hosted by Courtroom
6 Deputy Clerk, Jennifer Gaudet. I also have on the line
7 our Official Court Reporter, Rich Romanow, and law
8 clerks. Because this is a public hearing, it is open to
9 the press and public.

10 Should any members of the press or public be
11 present virtually, I remind you to keep your screen
12 muted and have in mind that the rules of court remain in
13 full force and effect, there is to be no retransmission,
14 broadcasting, taping, of these proceedings.

15 With that said, we're ready to go, and I will ask
16 counsel to identify themselves for the record. Counsel.

17 MR. SELLSTROM: Good morning, your Honor, Oren
18 Sellstrom from Lawyers For Civil Rights on behalf of the
19 plaintiffs, and my co-counsel will introduce themselves
20 as well.

21 THE COURT: Fine.

22 MR. WISHNIE: Good morning, your Honor, Michael
23 Wishnie for the plaintiffs.

24 THE COURT: Good morning to both of you.

25 MS. PIROZZOLO: Good morning, your Honor, this is

1 Lisa Pirozzolo and John Butts from Wilmer Hale, also for
2 the plaintiffs.

3 THE COURT: And good morning to you.

4 All right. And for the government?

5 MR. KANWIT: Good morning, your Honor, Thomas
6 Kanwit on behalf of the defendants.

7 THE COURT: And good morning to you.

8 I will say that I have read all of the materials
9 submitted and the various affidavits. I believe I'm
10 ready for argument. I said I would pose two questions.
11 Events have overtaken the question that I had in mind
12 for Mr. Sellstrom, but without launching into your
13 argument, Mr. Kanwit, can you give me a rundown, as I
14 said I would ask, on the -- as follows, the total number
15 of detainees presently in the facility, and I mean
16 physically in the facility, and where are they by day or
17 other identifying, um, description, and also, since
18 mention has been made of people in the hospital, are
19 there members of the class in the hospital or elsewhere,
20 being held elsewhere for other reasons? Could you give
21 me that rundown starting with the total.

22 MR. KANWIT: Thank you, your Honor.

23 The total number of detainees is 81 -- I'm sorry,
24 is 82. There's two that the Court has ordered
25 transferred, so we expect the number will go down to 80.

1 But as of yesterday the number was 82.

2 In ICE-A, there are 12 male detainees. All of the
3 male detainees that had been in ICE-B, and that number
4 was 26, have now been moved out of the ICE-B, owing to
5 its destruction and the security issues involved with
6 the incident. Those 26 have been relocated as follows.
7 16 are in single cells in Unit EE. 4 are in single
8 cells in Unit ED. And 6 are in double-occupancy cells
9 in Unit EC.

10 In addition, your Honor, there are 38 male
11 immigration detainees in 2 East. There had formerly
12 been nonimmigration detainees, criminal pretrial
13 detainees in 2 East. I am informed currently there are
14 0 criminal pretrial detainees in 2 East. And so the
15 total --

16 THE COURT: How many did you say -- excuse me.
17 How many did you say detainees were in 2 East?

18 MR. KANWIT: 38, your Honor.

19 THE COURT: Thank you.

20 MR. KANWIT: In EA there is 1 female detainee,
21 that's also a single-cell situation, and in EB there are
22 5 female detainees, and I'm informed those are
23 single-cell as well. Those numbers add up to 50 -- I'm
24 sorry, 82, your Honor. And as the Court probably
25 recalls, we started with 148 detainees.

1 THE COURT: Thank you. All right, I think that
2 answers my question.

3 I think that I would be benefitted -- you'll
4 understand now I've read the briefs, I think I
5 understand the arguments. Even as we speak the law is
6 developing -- the pertinent law is developing in this
7 area and I have tried, as much as I can, to stay on top
8 of it, I've certainly read everything that's been
9 submitted, my law clerks have been unfailingly helpful,
10 and I'm prepared for argument. So the burden,
11 Mr. Sellstrom, is on the petitioners and I will hear
12 you.

13 What preliminary injunction -- and that's what I'm
14 thinking of here, what preliminary injunction ought I
15 enter and why, having in mind the agreed-upon framework
16 you all address? And I'll hear you.

17 MR. SELLSTROM: Thank you, your Honor.

18 To start with the first question, we do believe
19 that a preliminary injunction is necessary and fully
20 supported by the record before your Honor, a preliminary
21 injunction that would further reduce the population
22 density in the facility and importantly that would
23 ensure that there are no new admitees to the facility as
24 well.

25 As your Honor has -- has astutely known throughout

1 the litigation, the issue of the population density is
2 absolutely critical to the safety of the detainees. So
3 that is our primary focus is to ensure that that number
4 continues to come down to a level at which people can
5 adequately and safely socially distance. So that would
6 have two components, the reduction in the population and
7 an injunction to stop further admitees to the facility.

8 In addition, your Honor, what we have put into the
9 record in now overwhelming detail is that there are a
10 number of conditions that also need to be rectified
11 through a preliminary injunction that will allow not
12 only the social distancing that the CDC has said is
13 critical to stopping this pandemic, but that would also
14 put in place the type of sanitary measures that the CDC
15 has also said are critical. That --

16 THE COURT: Well let me raise two points on that.
17 First -- and I highlighted this in my order, this is a
18 habeas class action, conditions of confinement are not
19 usually part of such litigation, they are -- Judge
20 Kelley most recently spoke to it, they are a different
21 type of civil action. I've spoken to it in **Kane v Winn**.
22 And other courts have done the like. And so while
23 that's possible, I think that's a difficult aspect of
24 your request here, I'll tell you candidly.

25 But I'm searching, since it's injunctive relief

1 that you want, what is your benchmark in -- in terms of
2 requirements, regulations by ICE, or comparable
3 regulations in the Bureau of Prisons? I candidly --
4 though, yes, there's affidavits and the like in the
5 record, but at this state of these proceedings I have
6 difficulty in seeing how I -- seeing my way here clear
7 to enter some detailed conditions of confinement order,
8 if indeed that's within the jurisdiction. I have that
9 problem. Go ahead.

10 MR. SELLSTROM: Thank you, your Honor, and if I
11 could address those points.

12 We have, in our papers and in our briefing,
13 focused on release, this is a habeas case and so that
14 has been our primary focus. We believe, because
15 defendants cannot safely hold the individuals, they
16 cannot be held at all, and so release is the appropriate
17 remedy, and that is what we have focused on in, um, both
18 the efforts to reduce the population, but also an
19 injunction that would stop the defendants from re --
20 from increasing the population density, as we have
21 pointed out in our papers they are fully prepared to do,
22 without any type of limitation. So that is --

23 THE COURT: And forgive me for interrupting, but
24 -- and maybe we're talking about a different subject,
25 but when you talk release now, that's complicated,

1 surely as you recognize it, by the fact that you've got
2 a detainee who's tested positive. So in the past when
3 I've ordered people released, I, um, have not undertaken
4 or required some sort of protocol to be sure that I was
5 not loosing on the public at large a carrier.

6 Indeed my last order, as it happened, related to
7 two female detainees and that was on the premise that
8 they are separately confined and had no contact with the
9 fellow that's tested positive. Well one has tested
10 positive now, um, not just him, but obviously all the
11 people with whom he's been in contact, both guards and
12 fellow detainees, and others.

13 How are we going to ensure -- if indeed any more
14 were to be released, how are we going to ensure the
15 safety of the public?

16 MR. SELLSTROM: Thank you, your Honor, and we
17 appreciate that question and that public health
18 perspective because that is the way we are approaching
19 the matter as well. And certainly other courts that
20 have confronted this situation have ordered release
21 particularly for individuals who have tested positive,
22 with the idea being that in order to prevent the kind of
23 further spread and contagion within the facility that we
24 are also concerned about, that, um, release for
25 individuals who have tested positive is a critical

1 measure for that.

2 Now we do think certainly that testing could be an
3 appropriate condition of release for others as well,
4 that is something that as your Honor has said has not
5 been a condition of relief -- of release, but is
6 something that, um, we would fully support. It should
7 not certainly hold up release, but if that were to be a
8 condition that people were tested as part of the release
9 conditions, release package, that is certainly something
10 that we would support, because people want that
11 information, people want to be tested, they want that
12 information. And from the public health perspective, of
13 course it's critical. And that is something that, if
14 your Honor were so inclined, plaintiffs would fully
15 support.

16 THE COURT: Thank you. Go ahead.

17 MR. SELLSTROM: So we do, um -- to get back to
18 your Honor's question on the habeas relief, that it has
19 been the focus of our -- of our complaint and our
20 request for relief, but as your Honor points out,
21 habeas, um, actions can include also discussion and
22 relief on conditions of confinement. That is not the
23 typical way, as your Honor has said in the **Kane** case and
24 as other courts have said, but it is not something that
25 is barred by the law.

1 This is certainly a case where the issues of
2 release and the issues of conditions that remain for
3 those who are not released are very intricately tied up
4 together, and it is for that reason that we believe that
5 while relief under habeas is the primary objective and
6 the primary focus, that the Court does retain the
7 ability, and we believe it's fully supported by the
8 record, to enjoin not only increases in the population,
9 but also that there are conditions inside the facility
10 for those that remain that ensure their reasonable
11 safety.

12 We do believe the record is fully sufficient to
13 allow that type of order today. There are a lot of
14 declarations that we have put forth that say very
15 clearly what the enormous gaps are in the safety that is
16 being provided for our clients. And on the other side
17 the issue is essentially that defendants have said we
18 have protocols in place. There's -- it's on paper.
19 Well it's not even on paper, it's something that they
20 are saying that they should be doing. But the fact is
21 it's not being done.

22 There's not adequate soap in the facilities to
23 allow that kind of sanitizing that the CDC says is
24 critical. There are not the type of conditions in terms
25 of the congregate sleeping that is still underway that

1 the CDC says is, um, antithetical to the proper public
2 health guidance.

3 So we believe, certainly for those who remain,
4 that the kind of congregate living that we have seen,
5 that still exists. There are, you know, 38 individuals
6 now in 2 East as of yesterday apparently, those are 38
7 individuals who are in tiny cells, 10 feet by 30 feet,
8 with bunk beds, doubled, tripled up, sharing bathrooms
9 that are not properly sanitized and that have to handle
10 that type of capacity on a daily basis.

11 So we believe that that is both something that can
12 be rectified through release in part by decreasing that
13 density to ensure that there are not individuals that
14 continue to be, um, in that kind of congregate sleeping
15 arrangement, and that there is full support for
16 conditions release as well.

17 If I could get back to one threshold issue, your
18 Honor, I think it's important -- and this has come up in
19 defendants' papers, to talk about the standard and the
20 legal standard that applies here.

21 The government has said that the standard is
22 deliberate indifference. We disagree with that. It's
23 very clear from the Supreme Court, from the First
24 Circuit, and from this court, that this is not an Eighth
25 Amendment case, this is a class not of criminal inmates,

1 these are, as your Honor has said, civil immigration
2 detainees. And so the standard is not the Eighth
3 Amendment standard, the standard is the Fifth Amendment.

4 THE COURT: But isn't -- well, first of all, I
5 agree with that, this is not an Eighth Amendment
6 standard, it is a Fifth Amendment, but I come into the
7 hearing, I will tell you, thinking that the standard is
8 deliberate indifference to a substantial risk of harm --
9 of serious harm to health. I thought that's the
10 standard you had to meet. Why is that wrong?

11 MR. SELLSTROM: That is the Eighth Amendment
12 standard, your Honor, and it is certainly the case that
13 courts, in analyzing the Fifth Amendment, often look to
14 that standard, um, because -- and courts are very
15 careful to frame it to say that that is at least what
16 civil detainees are entitled to. Because it is the case
17 that if we show -- which we believe we have, that there
18 is deliberate indifference, that we are entitled to
19 relief under that standard. But that is not the
20 standard for the Fifth Amendment.

21 The Fifth Amendment standard, coming out of the
22 **DeShaney** case that your Honor cited in the class
23 certification opinion, is one of, um -- that the
24 government must provide reasonable safety. The idea
25 that if the government -- again for civil detainees, is

1 removing the liberty from those individuals to provide
2 for themselves, that the government is required to
3 provide a level of reasonable safety.

4 Your Honor went on, in the class certification
5 opinion, to further explicate that in the context of his
6 case to say "The question is whether the government is
7 taking reasonable steps to identify those detainees who
8 may be released in order to protect everyone from the
9 impending threat of mass contagion." That we believe is
10 absolutely correct, that is the standard, and there is
11 no way on this record in which the defendant has met
12 that.

13 They have not taken steps to identify any
14 individual that they think could be released, not even
15 for the medically-vulnerable individuals of which there
16 remains many in the individuals that are still being
17 detained and they're under advisement with the Court.
18 This is something that even ICE's own guidance says is
19 supposed to happen. That because of the extraordinary
20 times we are living in, what needs to happen is for a
21 defendant to take a hard look at who is being held and
22 whether alternatives to detention are possible for any
23 of those individuals. And it is quite clear -- it was
24 clear before this lawsuit, but it's certainly become
25 crystal clear during the pendency of this lawsuit, that

1 that is not something that defendants are doing.

2 It's not that they have taken -- that they have
3 not taken reasonable steps, it's that they've taken no
4 steps at all. They do not view alternatives to
5 detention as any kind of option that they are willing to
6 entertain. Day after day they have come before this
7 Court, when individuals are up for review for bail, and
8 said no, no one should be released, absolutely not for
9 that person, not for this person, not for that person --
10 a blanket statement that there is no need to reduce
11 density and that there is no need to look for
12 alternatives to detention. That, according to your
13 Honor's own class-certification order, violates the
14 Fifth Amendment right that our clients have to
15 reasonable safety when there are alternatives that can
16 work, that are working, that keep the people still
17 within the control of ICE but allow them to safely
18 quarantine at home, and the defendant refuses to do the
19 type of steps that are required. And that is a Fifth
20 Amendment violation.

21 And the other point that I would make in
22 particular, because this is a preliminary injunction
23 hearing, is the significant concern that plaintiffs have
24 that without an order from this Court, the population of
25 that facility is going to go back up to 148 people in

1 very short order. That is something that was clear
2 already from the outset, but it's become much more clear
3 through discovery. Is that defendants -- to a person in
4 their deposition said, "We believe we were providing
5 reasonable safety when we were packed in at 148
6 detainees, we don't believe that we needed to release
7 anybody, and if we could, we would go back up to that
8 level." That is what is going to happen absent an order
9 from this Court. And so we do think that a preliminary
10 injunction on that basis is absolutely required, your
11 Honor.

12 THE COURT: Thank you. That's very helpful.

13 Mr. Kanwit, I'll hear you.

14 (Silence.)

15 THE COURT: Mr. Kanwit?

16 MR. KANWIT: Can you hear me, your Honor?

17 THE COURT: I can hear you now, yes. Go ahead.

18 MR. KANWIT: I lost you. I apologize. I lost the
19 zoom connection. Nothing seems to go smoothly.

20 THE COURT: Well I recognize you, Mr. Kanwit, and,
21 um, despite the fact that your visage is not displayed,
22 I recognize you and I'm eager to hear you. Go ahead.

23 MR. KANWIT: Thank you, your Honor.

24 Responding to the last point first. This claim
25 that the numbers are going to go up, Mr. Sellstrom is

1 being a bit misleading, because the deponents are all
2 people from Bristol County and they all said in their
3 testimony to Superintendent Steven Souza and, um, the
4 Sheriff, Thomas Hodgson, is that they don't make the
5 decisions about whether a detainee is released or
6 admitted, and so, um, the notion that they are going to
7 control the numbers is just factually wrong. And nobody
8 from ICE was deposed. There is no evidence in the
9 record that the numbers are going to go back up.

10 THE COURT: Of course there's no evidence that
11 they're not. The -- but go ahead with your argument.

12 A question I have is, um, Mr. Sellstrom differs
13 with what I thought the standard was, and I stated it,
14 "deliberate indifference to a substantial risk of
15 serious harm to health." I take it you think that is
16 the standard before -- and it's essential, before I can
17 issue any preliminary injunction?

18 MR. KANWIT: Absolutely, your Honor. And I'm
19 having a little trouble. Can you hear me again?

20 THE COURT: I can and now I can see you as well.

21 MR. KANWIT: Thank you. I apologize for the
22 technical issues.

23 THE COURT: Go ahead.

24 MR. KANWIT: I do think that we do have to look at
25 the, um, preliminary injunction test and I don't think

1 we should jump through all the four hoops too quickly, I
2 think if we focus particularly on the reasonable
3 likelihood of success on the merits, I don't think
4 plaintiffs have a reasonable likelihood of success.

5 I think that the courts do treat Fifth Amendment
6 claims in the detention setting as essentially, um, an
7 Eighth Amendment claim and deliberate indifference is
8 the standard, and there's no question that they cannot
9 prove deliberate indifference under the circumstances.

10 We submitted to the Court the **Swain** case from the
11 Eleventh Circuit, it's a very strong analysis, very
12 detailed and well-thought out, and we submitted other
13 law, all of which come to the same point, which is that
14 if the defendants, the prison officials are taking steps
15 to guard against a risk or a condition, then deliberate
16 indifference can't be shown. It's not a question of are
17 they perfect or can they absolutely prevent an adverse
18 outcome, the question is are they effective --

19 THE COURT: Even if I agreed with that,
20 Mr. Kanwit, and that -- there's no controlling law in
21 the First Circuit, but let's say I agreed with that, I
22 came to the hearing, I want you to know, thinking that
23 was the standard. The briefs, as submitted by the
24 petitioners, they say that the fact of resisting or
25 failing to analyze the release of people, the lack of

1 testing, contact tracing, they say that that can amount
2 to deliberate indifference. Perhaps you could address
3 that?

4 MR. KANWIT: Well, it's not, your Honor. It's not
5 a question of -- deliberate indifference doesn't come
6 from whether we do everything they can imagine we ought
7 to possibly do. For example, one of the questions
8 during the depositions was "Are you doing antigen
9 tests?" Well nobody's doing antigen tests. And in fact
10 Governor Baker said it's not reliable.

11 So it's not question of do we do everything they
12 can conceive of asking us to do, the question is are
13 steps being taken to try to minimize this risk? And
14 Bristol County is in compliance with the CDC guidelines
15 for correctional institutions.

16 THE COURT: Again I'm no expert here, but I -- I
17 am trying hard to be technically competent.

18 What do you think of the NAAT test, the Polymerase
19 Chain Reaction test, the PCR test? The FDA has approved
20 those tests to demonstrate a person who is a carrier.
21 One would think that that type of test would be
22 worthwhile here?

23 MR. KANWIT: I'm not technically familiar with the
24 test, your Honor. But it's not a question of whether a
25 test is worthwhile or not, the question really is can

1 the plaintiffs show that Bristol County officials have
2 been recklessly indifferent to the risk of coronavirus
3 infection? And the affidavits that have been put before
4 you from defendants showed clearly that they are not.

5 They instituted very effective roll call which
6 follows the CDC guidelines for correctional
7 institutions, which follows the Mass Department of
8 Public Health guidance, they've issued that, they've
9 screening everybody who comes in, they're sanitizing --
10 and by the way, we have not had a chance -- because I
11 think something like 15 declarations were submitted
12 yesterday afternoon while I was in the midst of trying
13 to finalize my briefing, we haven't had a chance to
14 respond to those. But I can represent to the Court,
15 with 100 percent certainty, that Bristol County would
16 dispute all of the allegations regarding the conditions
17 within the jail. And I say that as a -- as a, um,
18 member of the bar, as an officer of the court, that that
19 is going to be Bristol County's position in a
20 declaration under oath.

21 But even if the conditions are as bad as they say,
22 the Court could -- and I'm not saying it would be
23 justified, but it could consider saying, "Okay, let's
24 make sure every detainee has two bars of soap, every
25 detainee has a bottle of spray disinfectant." Release

1 is not the solution. It's not required.

2 Plaintiffs have been claiming all along that --

3 THE COURT: Wait a minute. Believe me, I am
4 always gratified by your willingness to argue
5 practically. I have concerns, and I expressed them to
6 Mr. Sellstrom, whether in this action as petitioners
7 have framed it, that I have jurisdiction on this record
8 to say anything like that? That's a condition of
9 confinement. And possibly that's so. But certainly the
10 great weight of the law -- um, in a habeas case, by and
11 large it's an in-out determination. And here -- and
12 Mr. Sellstrom recognizes that and he's not arguing that
13 everyone should be released. But he has argued that the
14 numbers should be reduced.

15 So you're not conceding, are you, that I could --
16 and I know you don't agree with it, but even that I
17 could issue an order about personal protective gear or
18 sanitation requirements? I have doubts whether I could
19 even issue such an order.

20 MR. KANWIT: As do I, your Honor.

21 THE COURT: All right.

22 MR. KANWIT: What I am suggesting, because, um, I
23 think on the law it's very clear that conditions of
24 confinement can't be addressed in habeas. We think that
25 there are significant limits in the structure of this

1 case to the Court's authority to issue, um, wide,
2 class-wide relief. We've expressed that. The Court has
3 disagreed. We respect the Court's opinion, but there
4 are very large legal and structural obstacles for the
5 kind of relief that the plaintiffs seek.

6 The point I was making was really if we are in the
7 realm of what kind of -- what should be done and not in
8 the realm of legal analysis, which is very adequately
9 expressed in the brief, then the only point I'm making
10 is that regardless of whether the Court has authority or
11 not, there are steps that can be taken short of release.

12 We don't agree that the Court should be addressing
13 conditions of confinement, we don't think the Court
14 needs to release additional defendants, but as we've
15 made clear in our brief, there's first a step-by-step
16 analysis of whether a preliminary injunction is
17 appropriate. We think it's not. We think the
18 plaintiffs' case is particularly vulnerable on the Fifth
19 Amendment slash Eighth Amendment analysis, the
20 deliberate indifference part. But we also are trying to
21 make the point in a broader sense because we're all
22 humans here and we understand that the coronavirus
23 pandemic is something that absolutely has to be taken
24 seriously and the health of not only the detainees, but
25 the guards, the detainees' families, all have to be

1 considered.

2 So we're also, apart from the structural legal
3 argument, making some points about, um, the current
4 status at Bristol County, the extensive steps that have
5 been taken to try to keep coronavirus from coming in and
6 to prevent its widespread dissemination, if it does come
7 in, and part of that is there's been -- I think it's now
8 a 45 percent reduction in the population.

9 So, um, Mr. Sellstrom has said he supports further
10 reduction, but every chance they've had, they have
11 declined to say what the level is that would be safe.
12 All they have said is --

13 THE COURT: But they say -- try this out, because
14 this resonates with the Court. What about an order of
15 the Court that no one else should be, um -- especially
16 now that one person has tested positive, that no one
17 else should be admitted to the facility for -- not in
18 all the future, but a preliminary injunction with limits
19 until such time period, what about such a restriction
20 that we'll keep it at the 80 that it's at now? And I'm
21 not saying that it couldn't go lower. But suppose I
22 were to enter such an order, what's your position on
23 that?

24 MR. KANWIT: Um, your Honor, I don't think the
25 order would be justified because I don't think they've

1 met the standard for a preliminary injunction.

2 THE COURT: All right.

3 MR. KANWIT: But you've heard me about that, I'm
4 not going to keep beating that.

5 In terms of sort of practical options, because
6 there's a legal problem with a preliminary injunction, I
7 would be much more inclined if the Court gave me time to
8 go to ICE and ask them what is their intention as to
9 further detainees, um, at Bristol County? I'm not
10 saying that they would support this, I'm not saying it
11 would be legally justified, but I am saying that in the
12 abstract, in a hypothetical, it would be better for
13 defendants to have the opportunity to consider whether
14 they would voluntarily agree to keep the numbers
15 relatively the same.

16 Now I don't think it would be practical to have it
17 be exactly the same, population up or down by say 2 to 5
18 would probably be much more realistic because, for
19 example, a detainee -- a criminal inmate could serve his
20 or her sentence and be released to ICE without any
21 warning to ICE and they've got to put that person
22 someplace, and they're already at Bristol County. And
23 so it's far safer for everybody if they remain at
24 Bristol County.

25 Now I'm not agreeing that that should be an order,

1 I'm suggesting that it might be something ICE would
2 consider. But I have to consult with my client.

3 THE COURT: Thank you.

4 All right. Anything further to be said? I've
5 read all your materials.

6 MR. KANWIT: Your Honor, briefly, and I know
7 Mr. Sellstrom probably wants an opportunity to speak
8 after I've spoken, and I certainly respect that.

9 There are a couple of things. First, in terms of
10 the declaration, if the Court's going to take this under
11 advisement, as I would expect it will, we would like at
12 least until, um, midday tomorrow to submit a declaration
13 -- it would likely be from the Superintendent Steven
14 Souza, but possibly to some people who spend more time
15 in the unit, to rebut the declarations that we submitted
16 yesterday. We haven't had an opportunity to do that. I
17 would like to do that.

18 And second, we hope that the Court will address
19 the motion to compel discovery because one of the points
20 we made, um, I think fairly forcefully, at least I was
21 passionate about it, as the Court knows I get, um, is
22 that in a broad sense, stepping back and taking the
23 bird's-eye view, what is happening in this case, at
24 least from plaintiffs' side, is they are comparing a
25 fictionalized version of the conditions of release to a

1 fictionalized version of the conditions at Bristol
2 County. Plaintiffs think their version of the
3 conditions in Bristol County are true and accurate and
4 we disagree with that. We certainly don't have anything
5 like the particularity, um, regarding the places where
6 the detainees are spending their time, that we do for
7 Bristol County, and we think that's very important,
8 because otherwise we're assuming they are going to be
9 relatively safe -- not absolutely safe, but relatively
10 safe from Covid-19 upon release and relatively unsafe if
11 they remain at Bristol County, and we don't think that's
12 accurate.

13 Now just this morning, because that's when it was
14 received by me, we submitted to the Court an article in
15 which Governor Cuomo was quoted as saying he was shocked
16 by the hospitals' statistics in New York which showed
17 that 66 percent of the coronavirus admissions in New
18 York hospitals were people who had been staying at home
19 and only 1 percent of the admissions were from people
20 who had been incarcerated. And that suggests, as we
21 have been saying all along, that the risk is much larger
22 for released detainees than it is at Bristol County and
23 it's certainly much larger than plaintiffs have
24 admitted.

25 Thank you, your Honor.

1 THE COURT: Thank you.

2 MR. SELLSTROM: Can I be heard, your Honor?

3 THE COURT: Actually, Mr. Sellstrom, I don't think
4 it's necessary. I've read all the materials and there
5 will be a chance to submit further briefing and
6 materials.

7 I have tried to stay up with all your submissions
8 and I have been analyzing the matter with an eye towards
9 acting today, and I am greatly helped by the briefs that
10 you have submitted and on both sides your effective oral
11 argument, but as I've said as this case has developed,
12 the exigencies of the case are not furthered by the
13 Court staying its hand, and to the extent the Court can
14 see its way clear, um, I do conceive that it's my duty
15 to act.

16 And so not expecting that this will be the Court's
17 final action -- this is after all a motion for a
18 preliminary injunction, what I'm going to do is enter an
19 order, explain the basis for that order, and tell you
20 where we're going to go from here, because there are
21 various matters which I am taking under advisement. And
22 so here's the order.

23 The Court concludes that on the record before it a
24 preliminary injunction is fully warranted in the
25 following respects, and the injunction, a preliminary

1 injunction that the Court enters today, applies to, um,
2 all the defendants before the Court, the ICE defendants
3 and the Bristol County defendants before the Court,
4 their agents, servants, employees, and all persons
5 acting in concert with them. The order is in two
6 paragraphs.

7 First, the Court requires, as soon as reasonably
8 possible, that all the detainees and all the staff
9 having any contact with these detainees be tested. Now
10 the test, the Court will be satisfied with this
11 FDA-approved PCR test -- that stands for "Polymerase
12 Chain Reaction" test, a form of NAAT test which the
13 Court believes, um, accurately tests for whether a
14 person is then carrying the coronavirus.

15 I require that everyone be tested, from the
16 Sheriff on down, anyone in the facility, food service,
17 medical facility, guards, everyone be afforded a test at
18 no cost to them and certainly all the detainees be
19 afforded a defendant at no cost to them.

20 Publicly there has been a lot said in the
21 executive that these tests are available and anyone who
22 wants one can have one. Practically I'm not clear on
23 that. So the order is as soon as reasonably possible.

24 Two considerations in this order. If costs are
25 involved in securing an adequate test, as the Court has

1 described it, ICE will bear those expenses.

2 Second, these tests, as the Court understands it,
3 are minimally invasive. Anyone may decline a test. The
4 employees of the sheriff's office and ICE employees are
5 technically not before the Court, so they are to be
6 offered a test, as the detainees are to be offered a
7 test, but anyone may decline it. However, anyone who
8 declines an adequate test, as the Court has described
9 it, shall be presumed to be carrying the Covid-19 virus
10 and shall be dealt with accordingly. That's the first
11 requirement.

12 The second requirement. There will be no --
13 forthwith there will be no new admitees to this
14 detention facility. None. The government has described
15 and at least its total tally, tallies to the person with
16 the spreadsheet that I am maintaining, and I have no
17 reason to doubt -- and I praise Mr. Kanwit for his
18 candor and forthrightness and I do here again today. I
19 have no doubt that the detainees, as he describes them,
20 are where he says they are. No one else is to be
21 admitted.

22 So if there's people in the hospital, they've got
23 to be housed elsewhere. If there's people who have been
24 removed with the eye towards deportation but it turns
25 out they cannot be deported, they're not to be returned.

1 If there are people in the Bristol House of Corrections
2 serving sentences against whom a detainer has been
3 lodged by ICE, they may not be transferred into the
4 detention facility in that house of correction. No one
5 is to be transferred in.

6 Now let's be clear. That emphatically does not
7 mean that ICE cannot transfer people out, it can, these
8 people are being held in civil detention awaiting
9 deportation, they may be removed for the purpose of
10 deportation. Some, ICE may come to believe, should be
11 released on bail, and I leave it to ICE itself to follow
12 an appropriate protocol to ensure the health, not only
13 of the individual but of the population, in releasing
14 other people, if ICE is releasing them on bail
15 themselves. That's perfectly appropriate. I just
16 require that no one be placed in that facility.

17 Now, these preliminary injunctions are limited in
18 duration, they are limited to the latter of the
19 following two events, which the Court picks as
20 bright-line events.

21 Should the Judicial Conference of the United
22 States suspend the authority it has exercised under the
23 Cares Act to hold these video conference proceedings and
24 enable the courts to work remotely, when the judicial
25 conference revokes that authority, that's one

1 bright-line point.

2 The second bright-line point is at the time that
3 the Supreme Judicial Court of Massachusetts revokes its
4 present order, um, setting up this rebuttable
5 presumption of release for those arrested in the
6 Commonwealth of Massachusetts, that's the second point.
7 I choose that state reference point because, as we can
8 see, conditions throughout the United States vary and,
9 um, I would prefer to have both the national and a local
10 reference point. When the latter of these two points
11 are reached, both these orders dissolve of their own --
12 of their own test, that's how I've described it.
13 Naturally the parties may at any time seek modification.

14 I am gravely disturbed -- but again I will say and
15 the government, Mr. Kanwit, is right to point out that
16 they have not had an adequate time to respond, I am
17 gravely concerned about the allegations -- and I take
18 them as allegations, as to the sanitation facilities
19 available in this, um, detention facility. The Court
20 takes no action on that today. The Court intends to
21 write up the order that it has delivered, but the order
22 takes effect today forthwith. The transcript of these
23 proceedings constitutes the order. But the sanitation I
24 do take under advisement and reserve my right to issue
25 other and further preliminary orders should the

1 interests of justice require.

2 I have expressed myself as much as I need to. I
3 will make one reference point that you all might wish to
4 consider.

5 In another context, but a few days ago, I had to
6 consider a claim for compassionate release out of
7 Devens, the case is **United States vs. Kelleem**,
8 K-E-L-L-E-M. In that case there were submissions as to
9 what's being done in Devens. I commend that to you. It
10 seems they are doing a great deal at Devens.

11 Now that's the order. Let me rough out for you --
12 and it is only to rough out, the analysis that
13 undergirds that order.

14 The test for a preliminary injunction is a
15 four-part test, the first two parts of the test are the
16 most significant. I start -- the second part is the
17 standard and I'll get to the standard, but I start here
18 with the danger to the petitioners of irreparable
19 injury. That danger is real. That danger is imminent.
20 Whatever may be said about containing this outbreak, we
21 now have numerous guards, 11 I believe at last count,
22 and we have 1 detainee who are positive for Covid-19.

23 The Court, on the incontrovertible record, finds
24 that Covid-19 is significantly more contagious than the
25 flu by an exponential number, that there is no vaccine,

1 there is no effective treatment other than palliative
2 care. While it appears that the virus affects certain
3 groups of people more than others, the virus is no
4 respector of persons, neither age nor gender. It is a
5 true plague with which we are grappling. I expressed
6 myself when I certified the class and I stand with that
7 analysis.

8 The test -- I differ with the petitioners and
9 while I fully recognize that the -- that this is an
10 action that arises under the constitutional guarantees
11 of the Fifth Amendment, not the Eighth Amendment, the
12 test does the -- the appropriate test, it seems to this
13 Court, to be that the authorities -- there's a
14 reasonable likelihood that it will be found that the
15 authorities have displayed deliberate indifference to a
16 substantial risk of serious harm to the health of this
17 class of detainees. This Court finds that the
18 petitioners have made out that case. Here's why.

19 I recognize -- I fully recognize that this Court
20 has not engaged in a full evidentiary hearing. Yes,
21 while I have read every submission and I invite further
22 submissions as we go along, I have not held an
23 evidentiary hearing, for obvious reasons. But I have
24 presided over this case since its inception and the
25 following points seem clear to the Court, such that the

1 Court is enabled to make that determination of
2 deliberate indifference.

3 First, while the Court credits the defendants with
4 taking the temperature of people who access the
5 facility, testing is and has been -- since this Court
6 got responsibility for this case, testing, widespread
7 testing has been the call of the scientific evidence and
8 until May 1 this Court discerns no testing, no testing
9 at all offered to the detainees.

10 Second, it was not long into the case before it
11 was thought that a nurse might have Covid-19, and then a
12 guard did have Covid-19, and now many guards have it.
13 Not a word has been said or nor have I read a word about
14 the obvious contact tracing of those individuals who
15 tested positive, with whom their co-workers or which
16 detainees, what they, um, what did they do there, what
17 sort of contact testing has there been? The record is
18 silent.

19 And then lastly, and, um, I fully respect the
20 government's right to advance its cause in court, but I
21 do find that, um, the petitioners are correct that
22 notwithstanding the extraordinary dangers posed by this
23 Covid-19 virus, there has been no willingness on the
24 part of the government to proactively engage in
25 releasing individuals, at least so far as the briefing

1 goes. I recognize that some have been released on bond,
2 I recognize that, but the confluence of those three
3 factors establishes to this Court's satisfaction the
4 deliberate indifference that, given the substantial risk
5 of serious harm to health, warrants a preliminary
6 injunction.

7 Third, what's the equity on the government's side?
8 There's nothing in the record here that says that other
9 places of detention cannot be found for those people
10 whom the government wishes to take into custody, it
11 appears not to be embarrassed by, um, in its efforts to
12 seize people awaiting deportation, and nothing in this
13 Court's injunctions prevents the government from
14 deporting any of the members of this class. So, um, the
15 injunctions the Court has today imposed on the
16 government really imposed no burden on the government
17 other than, and it's a justified burden, um, proactively
18 and vigorously seeking out and bearing the costs of an
19 adequate FDA test to see who, of the detainees and those
20 involved with the detainees, are now carrying Covid-19.

21 Lastly, if the Court must consider the public
22 interest, um, the public interest here primarily -- and
23 all parties would agree, primarily the public interest
24 here, um, resides in containing the Covid-19 outbreak at
25 this detention facility and it cannot be referred to in

1 any other way, the guards are testing positive, a
2 detainee has tested positive, and these people are in
3 close proximity. So that is not the overriding
4 consideration, but surely that is the -- a primary, um,
5 expression of the public interest and this Court so
6 prioritizes it.

7 There are of course other aspects of the public
8 interest and this Court does not set policy, that is for
9 the legislative branch of government. This Court's
10 injunction in no way interferes with the deportation of
11 individuals. Congress quite rightly has set up a
12 procedure that some would call "labyrinthine" to ensure
13 the rights of individuals whom the executive seeks to
14 deport, since that carries with it potential sanctions
15 that are both practical and criminal. And as I've said
16 already, I'm not interfering with the rights of the
17 government to deport any of the class members.

18 Because it takes a significant amount of due
19 process before an individual is, um, deported,
20 necessarily there are delays and Congress -- and this is
21 a bipartisan statement, congresses of the majorities of
22 both political parties and congresses with
23 overwhelmingly bipartisan majorities have sanctioned the
24 incarceration of those people awaiting deportation.
25 This Court recognizes that as a -- as a public policy.

1 The Court also recognizes that the executive who
2 must carry out, under the Constitution, taking care that
3 the laws be faithfully enforced, Congress, its laws do
4 not take into account the coronavirus. The Cares Act,
5 and I have tried to scrutinize it with some care, it
6 seems -- though it appropriated a great deal of money to
7 the Department of Justice, it seems not to have taken
8 into account the situation of immigrant detainees in any
9 particular way. Public policy also inheres in the
10 executive and the executive has, um, taken steps to
11 recognize the coronavirus. Attorney General Barr has
12 issued regulations dealing with the -- with those people
13 held in the Bureau of Prisons. The, um -- ICE has
14 revamped its regulations in part having in mind the, um,
15 existence of the coronavirus and the threat that it
16 poses. And these are all expressions of the public
17 policy to which this Court must recognize. And I do
18 recognize it.

19 At the same time it's clear that the executive has
20 a responsibility not only inward, that is to secure the
21 custody of individuals whom it deems a threat, but also
22 outward, it has a responsibility to the community as a
23 whole, to the public in which a detention facility is
24 placed. Probably the best analysis this Court finds,
25 and it's controlling on this Court, is ***United States vs.***

1 **Volungas**, 595 F.3d, Page 1 -- or it starts at 1, Page 8,
2 and that's a First Circuit decision from 2010. And I
3 conclude that the limited preliminary injunctions the
4 Court has entered today deal with those realities and
5 fairly take into account the expressed public policy as
6 declared by the Congress and as implemented by the
7 executive.

8 Having said that, there's one other thing that
9 it's incumbent upon me to say as a judicial officer. I
10 am acutely aware of my responsibility in -- on an
11 individualized basis for taking the extraordinary
12 remedy, and it is an extraordinary remedy, of admitting
13 a number of people properly held in custody -- now that
14 they have this class action habeas petition, of
15 admitting them to bail. I'm not the only judge who has
16 done it throughout the United States. But I take my
17 responsibility very seriously. I know all my colleagues
18 do. And I recognize that the sample size is
19 extraordinarily small. And I further recognize that
20 this case has only been going for weeks, not months.
21 I've acted, I hope, with appropriate speed. But I'm
22 struck by something, and I will say it.

23 I'm struck by the number of people that are -- or
24 when I came to review these individuals as individuals,
25 where the crimes, at least in the experience of this

1 judge, were not major, were not those crimes that I
2 usually see, um, as exhibiting a real chance of
3 continued violence. I recognize I've released on bail
4 people who have pending charges, but in every case the
5 local authorities have been notified and in no case, so
6 far as this Court is aware, have the local authorities
7 taken those individuals into custody. And at least so
8 far as this Court is aware -- and I know I will be
9 forced to eat my words here, but as we sit here today I
10 am unaware of any of the individuals I have released who
11 have violated the conditions of their bail. And that
12 suggests to me that the policies which I recognize and
13 which I must uphold may well be misguided. We may well
14 be holding in custody, um, tens of thousands of
15 individuals whom we might be equally able to supervise
16 were they at liberty and their liberty confined to a
17 known place of residence. But that's not for me to say.
18 I simply observe the record in this case. Of course no
19 one would be more gratified than I if each of the
20 individuals I have released on bail, and should I
21 release any more on bail, if they continue to observe
22 the very strict conditions of bail. I pray that that is
23 so.

24 All right. Questions? No further argument.
25 That's the best the Court can do today. There will be a

1 written decision. I reserve my rights to make
2 alterations or amendments.

3 But is what I've said clear? Mr. Sellstrom, is it
4 clear?

5 MR. SELLSTROM: Yes, your Honor, it's clear.

6 THE COURT: Very well.

7 Mr. Kanwit, is it clear?

8 MR. KANWIT: It is, your Honor. I don't have any
9 idea about the practical implications of instituting the
10 widespread testing that you're talking about, I know you
11 said it needs to be done as soon as possible. I just --
12 I just don't know how else to respond to that because
13 it's such a novel idea for us. And --

14 THE COURT: That's an adequate response. I do
15 trust your good faith as an officer of this court and,
16 um, I would like -- I guess I haven't said this, but I'm
17 not going to now start altering my order, but I would
18 like periodic updates about what's being done in that
19 regard. And I -- as I have throughout, I accept your
20 good faith. That's the order. Now I do have another
21 hearing, so I think we're ready to adjourn.

22 We'll stand in recess.

23 MR. KANWIT: Thank you, your Honor.

24 (Ends, 11:10 a.m.)

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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes
before Judge William G. Young, on Thursday, May 7, 2020,
to the best of my skill and ability.

/s/ Richard H. Romanow 05-11-20

RICHARD H. ROMANOW Date