

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

**ROBSON XAVIER GOMES, DARWIN
ALIESKY CUESTA-ROJAS and JOSÉ
NOLBERTO TACURI-TACURI**, on
behalf of themselves and all those similarly
situated,

Petitioners-Plaintiffs,

v.

CHAD WOLF, Acting Secretary of
Department of Homeland Security,

MARCOS CHARLES, Immigration and
Customs Enforcement, Enforcement and
Removal Operations, Acting Field Office
Director,

CHRISTOPHER BRACKETT,
Superintendent of the Strafford County
Department of Corrections,

Respondents-Defendants.

Civil Action No. 1:20-cv-453-LM

**NOTICE OF MOTION AND EMERGENCY MOTION FOR EXPEDITED BAIL
HEARINGS FOR PLAINTIFFS AND ALL PUTATIVE CLASS MEMBERS**

PLEASE TAKE NOTICE THAT, as soon as they may be heard, Plaintiffs-Petitioners (“Plaintiffs”) will, and hereby do move this Court, pursuant to the Court’s inherent power to grant bail pending a merits determination on their habeas petition, for an order scheduling expedited bail hearings on behalf of themselves and the putative class of civil immigration detainees now held by Respondents-Defendants at Strafford County House of Corrections (“SCDOC”). Plaintiffs note that the Court has issued a Scheduling Order which sets forth a bail application procedure for Plaintiff Robson Xavier Gomes only. *See* ECF No. 2. An expedited process is required in light of

the recent joinder of Plaintiff Darwin Aliesky Cuesta-Rojas and Plaintiff Jose Nolberto Tacuri-Tacur, *see* ECF No. 5, for whom no scheduling order has yet been ordered, and the contemporaneously filed motion for class certification which seeks certification of a class of approximately 62 civil immigration detainees now held at SCDOC. As grounds for this Motion, Plaintiffs rely on and incorporate fully the memorandum of law in support of the motion.

Respectfully Submitted,

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Date: April 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2020, I electronically filed the foregoing document with the United States District Court for the District of New Hampshire by using the CM/ECF system. I certify that the parties or their counsel of record registered as ECF Filers will be served by the CM/ECF system, and paper copies will be sent to those indicated as non-registered participants, if any.

/s/ Nathan P. Warecki

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Superintendent of the Strafford County
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Respondents-Defendants.

Civil Action No. 1:20-cv-00453-LM

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONER-PLAINTIFFS'
EMERGENCY MOTION FOR EXPEDITED BAIL HEARINGS
FOR PLAINTIFFS AND ALL PUTATIVE CLASS MEMBERS**

*(Counsel for Petitioners-Plaintiffs listed on
signature page)*

April 20, 2020

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Plaintiffs-Petitioners (“Plaintiffs”) on behalf of themselves and a putative class of approximately 62 other individuals—all civil immigration detainees held by Respondents-Defendants (“Defendants”) at the Strafford County Department of Corrections (“SCDOC”) under the authority of Immigration and Customs Enforcement (“ICE”)—respectfully submit this memorandum of law in support of their motion for expedited bail hearings for Plaintiffs and all putative class members (“Instant Motion”).

PRELIMINARY STATEMENT

In a matter of weeks, and as of the date of this filing, the COVID-19 pandemic has infected more than 690,714 people in the United States, resulting in the deaths of 35,443 people.¹ In order to combat this unprecedented threat to public health, the CDC has recommended that individuals maintain a distance from other people of at least six feet at all times, use face coverings whenever in public places, and frequently wash hands or use hand sanitizer.² Because those held in confinement are not able to comply with these Centers for Disease Control and Prevention (“CDC”) guidelines—and in recognition of the mortal danger that COVID-19 poses to detainees—jails and prisons in this State³ and across the country have reduced the population of those in criminal custody. *See* Declaration of Dr. Dora Schriro (“Schriro Decl.”), attached hereto as “Exhibit H” to the Petitioner-Plaintiff’s Motion for Preliminary Injunction and Motion for Expedited Discovery, ¶¶ 49-52.⁴

¹ Ctrs. for Disease Control and Prevention, *Cases in U.S.* (case counts as of Apr. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

² Ctrs. for Disease Control and Prevention, *How to Protect Yourself & Others* (Apr. 19, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/index.html>.

³ Mary McIntyre, *N.H. Correctional Facilities Release Inmates To Prevent Spread Of COVID-19*, NHPR (Apr. 1, 2020), <https://www.nhpr.org/post/nh-correctional-facilities-release-inmates-prevent-spread-covid-19#stream/0>.

⁴ References herein to “Ex.” refer either to the exhibits appended the Declaration to the Declaration of Nathan P. Warecki (“Warecki Decl.”) in Support of the First Amended Petition (Exhibits A through G) or the exhibits

Federal courts across the country also have recognized the serious threat that COVID-19 poses to incarcerated individuals.⁵ Of note, on April 8, 2020, the Honorable William G. Young of the U.S. District Court for the District of Massachusetts granted class certification for a class of civil immigration detainees who have been detained in conditions substantially similar to the detention conditions the putative class faces at SCDOC. *See Savino v. Souza*, No. 20-cv-10617, 2020 WL 1703844 (D. Mass. Apr. 8, 2020). In certifying the class, which included “all detainees” housed at the facility in question, Judge Young noted that the court was following “the light of reason and the expert advice of the CDC in aiming to reduce the population in the detention facilities so that all those who remain (including staff) may be better protected.” *Id.* at *9.

Despite the movement within the criminal justice system to change existing practices in response to the current national health crisis, Defendants are either unwilling or unable to implement social distancing among civil immigration detainees held at SCDOC and, therefore, have not taken critical and urgent steps to safeguard the class members’ health and to prevent the spread of COVID-19.

This Court’s urgent intervention is needed to remedy the ongoing constitutional violations that the current conditions at SCDOC impose on Plaintiffs and the putative class they seek to represent. Through this motion, Plaintiffs respectfully request that this Court use its inherent power to release *habeas* petitioners pending determination on the merits to construct a streamlined, expedited process for the consideration of bail applications submitted by Plaintiffs and each member of the putative class. Such an approach will allow this Court to assess the individual

appended to the Petitioner-Plaintiffs’ Motion for Preliminary Injunction and Motion for Expedited Discovery (H through J).

⁵ *See* First Amended Petition for Writ of Habeas Corpus (“Petition”), dated Apr. 17, 2020, ECF No. 5, ¶ 5 (collecting cases).

circumstances of all detainees currently held at SCDOC and craft appropriate conditions of release pending resolution on the merits. Expedited bail hearings, in conjunction with the contemporaneously requested injunction to cease transfer of more civil immigration detainees from other facilities to SCDOC and for expedited discovery, would allow this Court to stabilize the civil immigration detainee population at SCDOC and begin the process of reducing that population to a level that does not violate the Plaintiffs' and the putative class members' constitutional rights.

BACKGROUND

I. COVID-19 Poses a Grave Risk of Infection, Illness, and Death.

COVID-19 is a global pandemic of which the United States currently is the epicenter. *See* Schriro Decl. ¶¶ 14, 53. Within New Hampshire, 1,342 people have been confirmed to have contracted COVID-19, 192 of whom (14%) have required hospitalization, and 38 have died.⁶

The COVID-19 disease is caused by a novel virus with no cure, no vaccine, and no known immunity. *See* Declaration of Dr. Marc Stern ("Stern Decl."), Ex. A, ¶ 3. While nearly everyone appears to be at risk of infection, the effects of the virus are particularly serious for certain populations, including people over 50 and those with a variety of medical conditions, including lung and heart disease, hypertension, and immunocompromised conditions. *Id.* ¶ 5; Declaration of Dr. Jonathan Louis Golob ("Golob Decl."), Ex. B, ¶ 3.⁷ Vulnerable people who are infected with COVID-19 can experience severe respiratory illness, which may require ventilator assistance for respiration and intensive care support. Stern Decl. ¶ 6. While the elderly and those with serious

⁶ State of New Hampshire, *Novel Coronavirus 2019 (COVID-19)* (data updated as of Apr. 18, 2020, at 9:00 a.m.), <https://www.nh.gov/covid19/>.

⁷ Ctrs. for Disease Control and Prevention, *People Who Are at Higher Risk for Severe Illness* (Apr. 19, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

conditions are most at risk of serious infection, or death, “it is becoming clear that younger individuals are not protected from severe complications requiring hospitalization and placement in intensive care[.]” *Id.* ¶ 5.

The incubation period—the time between infection and the development of symptoms—typically is five days. Golob Decl. ¶ 6. Importantly, “[i]t is believed that people can transmit the virus without being symptomatic and, indeed, that a significant amount of transmission may be from people who are infected but asymptomatic or pre-symptomatic.” Stern Decl. ¶ 4. Because COVID-19 infections may not be apparent, the only way to control the virus “is to use preventative strategies, including social distancing.” *Id.* ¶ 3.

II. Detained Individuals Face a Substantial Risk of Contracting COVID-19.

Congregate environments in which people live in close proximity present an atmosphere where infectious diseases that are transmitted via the air are more likely to spread. *Id.* ¶ 8. Therefore, “to the extent that detainees are housed in close quarters, unable to maintain a six-foot distance from others, and sharing or touching objects used by others, the risks of spread are greatly, if not exponentially, increased” *Id.* Indeed, Dr. Marc Stern who recently served as Assistant Secretary for Health Care at the Washington State Department of Corrections explains that:

[Detention centers] are not closed systems. Staff, new detainees, attorneys, and inanimate objects – all potential vectors for virus – are introduced into the system every day. Thus, despite the government’s best efforts to follow preventive guidelines, the introduction of virus into the detention center is almost inevitable. Moreover, because staff and some visitors travel each day from the facilities back to their homes, when infection develops in the facility, there is also significant risk that the infection will be transmitted to the family and friends of the staff and visitors.

Id. at ¶ 11. To take just one recent example of how quickly COVID-19 can spread through a detention facility, the Rikers Island jail complex in New York City saw a transmission rate that

was over seven times the rate seen in the city as a whole, as the disease spread from one case to over 200 in the matter of only 12 days. Golob Decl. ¶ 12.; *see generally* Petition ¶ 65.

Defendants understand both the problems posed the COVID-19 pandemic and the solutions needed to combat the spread in their detention facilities. *See generally* Schriro Decl. ICE reports 124 confirmed cases of COVID-19 among civil immigration detainees in its custody and 30 cases among ICE employees at its facilities in the United States.⁸ ICE publicly acknowledges the need for social distancing and claims to be following other recommendations of public health officials, including the CDC, to implement certain protocols, such as hygiene and handwashing, screening, risk mitigation, and quarantine to stop COVID-19 in its detention facilities.⁹ However, as John Sandweg, a former Acting Director of ICE, observes:

ICE currently detains over 35,000 detainees across the country. ICE detention centers are extremely susceptible to outbreaks of infectious diseases [P]reventing the coronavirus from being introduced into these facilities is impossible. The design of these facilities requires inmates to remain in close contact with one another—the opposite of the social distancing now recommended for stopping [its] spread. . . .

Declaration of John Sandweg (“Sandweg Decl.”), Ex. G, ¶ 5. Accordingly, and in Mr. Sandweg’s view, “the most effective way to [reduce the risk of a detention center outbreak] is to drastically reduce the number of people it is currently holding.” *Id.* at ¶ 8. Further, Mr. Sandweg believes that “ICE has the operational capacity to quickly and drastically reduce the population of civil immigration detainees while still protecting public health as much as possible.” *Id.* at ¶ 9.

⁸ Immigration and Customs Enforcement, *ICE Guidance on COVID-19* (updated Apr. 17, 2020, 6:00 p.m.), <https://www.ice.gov/coronavirus> (click on “Confirmed Cases” tab).

⁹ *Id.* (last visited Apr. 16, 2020) (click on “Overview & FAQs” tab, click on “Detention” and then scroll to “How does ICE mitigate the spread of COVID-19 within its detention facilities” and “How are ICE detention facilities engaging in social distancing”) (emphasis added).

Mr. Sandweg’s assessment aligns with that of Dr. Dora Schriro, a corrections expert who has held numerous executive-level positions in federal, state, and local governments, including as founding Director of the ICE Office of Detention Policy and Planning, and who has submitted a declaration in support of the Instant Motion. *See* Schriro Decl. ¶¶ 1-12. Of particular importance, it is Dr. Schriro’s opinion that: (i) “the plans that ICE has put forth are insufficient to protect he detained population, detention staff, and the public at-large” from the spread of COVID-19, Schriro Decl. ¶ 16; and (ii) “alternatives to detention can be used effectively and safely to ensure that immigrant detainees are not subjected to unnecessary risk from COVID-19 while ensuring public safety and appearance for court hearings[.]” *id.* ¶ 43. For these reasons, among others, Dr. Schriro recommends to ICE that:

Individuals with medical vulnerability to COVID-19 face irreparable harm if they continue to be detained and are unlikely to pose significant flight or public safety threats if they were released under conditions consistent with objective assessment of risk. The government ... should release as many of these vulnerable individuals as possible, as quickly as possible, with only those conditions that are necessary to ensure participation in court proceedings or other appointments.

Given the severity of COVID-19 and the rapidly escalating rate of infection and death in the United States, as well as the increased risks in facilities housing ICE detainees, ... any other individual deemed likely to comply on appropriate conditions of supervision where necessary [should] be released immediately, to protect themselves, other detainees, correctional and medical staff, and the general public....

Id. ¶¶ 53-54.

III. Conditions in SCDOC Pose a Considerable Risk to the Health of Detainees and to Public Health at Large.

Despite ICE’s public statements with respect to COVID-19, detainees at SCDOC are subject to living conditions that violate the recommendations of infectious disease experts across the globe, and, as a result, they are more susceptible to contracting the deadly virus. *See id.* ¶ 24. As reported by SangYeob Kim, an immigration staff attorney at the American Civil Liberties Union of New

Hampshire who has represented dozens of noncitizens detained at SCDOC for various proceedings, as of April 17, 2020, there are approximately 62 civil immigration detainees present who are housed in units alongside other individuals detained or jailed for other reasons. Affidavit of SangYeob Kim (“Kim Aff.”), Ex. C, ¶ 5. In most units at SCDOC, each detainee shares with another detainee a small cell outfitted with a bunkbed. *Id.* at ¶¶ 9, 11, 13. At least one unit (Unit J) has an “open” setup with multiple bunkbeds on two floors without any cells. *Id.* at 15.

Neither setup is conducive to social distancing. Kim Aff. ¶¶ 9, 12, 15. In the small cell setup, social distancing only can be maintained if everyone was confined to their cells, but even then, “social distancing for cells with two detainees can hardly be maintained within the cell. Further, when the unit is not under lockdown, detainees come out to the common area without any possibility of maintaining social distancing.” *Id.* at ¶ 9; *see id.* at 12. In the open setup, social distancing is impossible both because each bunkbed is less than six feet from another bed, and because detainees can freely move around their floor at their discretion at any time and detainees from one floor can visit the other when the unit is not on lockdown. *Id.* at ¶ 15.

The experiences of Plaintiffs reinforce Mr. Kim’s observations of SCDOC. Two of the three named Plaintiffs are confined to Unit J with the open set up. Plaintiff Darwin Aliesky Cuesta-Rojas, reports that he is confined with 16 immigration detainees and more than 20 additional individuals either indicted for federal crimes or awaiting sentencing. *See* Affidavit of Darwin Aliesky Cuesta-Rojas (“Cuesta-Rojas Aff.”), Ex. D, ¶¶ 3-4. Both he and another Plaintiff, José Nolberto Tacuri-Tacuri, report that there is no social distancing policy in place and, given that bunk beds are roughly three feet apart, no separation is possible. *Id.* ¶¶ 4, 6; Affidavit of José Nolberto Tacuri-Tacuri (“Tacuri-Tacuri Aff.”), Ex. E, ¶ 4. Both Mr. Cuesta-Rojas and Mr. Tacuri-Tacuri report that

inmates continue to eat in close proximity to one another—three or four to a table. Cuesta-Rojas Aff. ¶ 6; Tacuri-Tacuri Aff. ¶¶ 5-6.

Plaintiff Robson Xavier Gomes is housed in Unit G. Affidavit of Robson Xavier Gomes (“Gomes Aff.”), Ex. F, ¶ 2. He reports that he shares a cell with another incarcerated person and they cannot arrange their beds so that they are at least six feet apart. *Id.* ¶¶ 3, 6. Mr. Gomes shares a toilet, showers, and other communal spaces, with other inmates. *Id.* ¶¶ 3-5, 8. Mr. Gomes reports that food is delivered to him by other incarcerated persons, none of whom wear facemasks or gloves. Other than lockdown, there is no social distancing policy enforced in Unit G. *Id.* ¶ 8.

Plaintiffs’ inability to practice social distancing is exacerbated by the fact that SCDOC is not a closed system. Indeed, Plaintiffs report that they routinely are exposed to new detainees and other individuals, *see* Tacuri-Tacuri Aff. ¶ 7; Cuesta-Rojas Aff. ¶¶ 7-8; Gomes Aff., ¶ 10, including detainees who have been outside the closed system for appearances in immigration court, Affidavit of John S. Burlock, Ex. I, ¶¶ 3-5, or the ICE field office in Burlington, Massachusetts, *see* Affidavit of Pedro Gonzalez Cuarca, Ex. J, ¶¶ 8-9. Defendants have also begun to transfer detainees from the Bristol County House of Corrections (“BCHOC”) to SCDOC. *See Savino v. Souza*, No. 20-cv-10617 (D. Mass. Apr. 15, 2020), ECF No. 87. Mr. Cuesta-Rojas notes that one of the new detainees that recently arrived came from New York—the epicenter of the COVID-19 outbreak—but that no steps were taken to isolate the detainee. Cuesta-Rojas Aff. ¶ 9. Moreover, according to Plaintiffs, SCDOC does not appear to have taken other preventative measures—besides social distancing—to stop the potential for spreading the disease, by for example, equipping detainees with protective gear or cleaning supplies. *See* Tacuri-Tacuri Aff. ¶ 10, Cuesta-Rojas Aff. ¶ 6.

Finally, and importantly, SCDOC does not appear to have taken steps to protect its most vulnerable detainees. For example, although Mr. Tacuri-Tacuri suffers from asthma, he continues

to be exposed to new inmates, Tacuri-Tacuri Aff. ¶¶ 7, 9, and reports that he has recently had difficulty breathing, and even coughed up blood, but has not received a medication that has alleviated his condition, *id.* at ¶ 9. Mr. Gomes suffers from hypertension and has a heart arrhythmia. Gomes Aff. ¶ 12. These medical conditions elevate these Plaintiffs’ risk for developing a life threatening condition from a COVID-19 infection. Golob Decl., ¶ 3.

ARGUMENT

A district court entertaining a petition for habeas corpus has inherent power to release the petitioner pending determination of the merits. *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972) (per curiam). “Such authority may be exercised in the case of ‘a health emergency,’ where the petitioner has also demonstrated a likelihood of success on the merits.” *Id.*; *see also Mapp v. Reno*, 241 F.3d 221, 223 (2d Cir. 2001) (“the federal courts have the same inherent authority to admit habeas petitioners to bail in the immigration context as they do in criminal habeas case.”); *Savino*, 2020 WL 1703844, at *9-10. A court considering bail for a habeas petitioner “must inquire into whether ‘the habeas petition raises substantial claims and whether extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective.’” *Id.*, at *8 (citing *Mapp*, 241 F.3d at 230) (internal quotations omitted).

I. Plaintiffs Have Already Demonstrated a Likelihood of Success on the Merits¹⁰

In conjunction with their motion for a preliminary injunction to halt the placement of new civil immigration detainees at SCDOC until all public health protocols designed to prevent the transmission of COVID-19 are implemented, Plaintiffs have already demonstrated a likelihood of success on their substantive due process claim. In short, Defendants “know[] of” the identified risk

¹⁰ For the purposes of this motion, Plaintiffs have demonstrated a likelihood of success of bail on behalf of themselves and, therefore, a likelihood of success for each member of the putative class. *See, e.g.,* Pls.’ Mem. in Support of Preliminary Inj. pp 9-14. In the context of each individual bail hearing, however, the lesser “substantial claims” test applies. *See Savino*, 2020 WL 1703844, at *9, n. 11.

posed by COVID-19 in the jailhouse setting but, in failing to reduce the civil immigration detainee population at SCDOC so as to allow for effective social distancing, and, in fact, increase the risk of infection with COVID-19 by transferring new detainees into the facility, has disregarded that imminent risk to detainee health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The constitutional deficiencies of Defendants’ decisions to continuing detaining Plaintiffs and the putative class are even more pronounced because Plaintiffs are civil immigration detainees and, therefore, constitutional scrutiny of their conditions of confinement are more exacting than in the criminal context. *See, e.g., Santana v. Collazo*, 714 F.2d 1172, 1180 (1st Cir. 1983) (“[B]ecause the state has no legitimate interest [in] punishment, the conditions of ... confinement of [civil detainees] are subject to more exacting scrutiny than conditions imposed on convicted criminals.”).

The record is replete with evidence showing the breadth of the COVID-19 pandemic, the inadequate response by government officials, courts, and ICE to combat its spread (particularly in light of inadequate testing and the lack of a cure), and the special problems faced by correctional facilities given their populations live in congregate environments. In light of the present conditions at SCDOC that are unlikely to change in an appreciable way, the fact that those conditions are not reasonably related to a legitimate, non punitive government interest, and the Defendants’ deliberate indifference to the dangers those condition pose to the Plaintiffs’ and putative class members’ health, this Court should join those described above in finding that Plaintiffs are likely to succeed in prevailing on the merits of their Fifth Amendment claim.

II. The Elevated Risks of Contracting COVID-19 While Detained at SCDOC Constitute an Extraordinary Circumstance Which Justifies Bail

Having established a likelihood of success on the merits of their claims and, by extension, the claims of the putative class of other civil immigration detainees held at SCDOC, the remaining inquiry is whether “extraordinary circumstances” exist which justify immediate release. *See*

Woodcock, 470 F.2d at 94; *Mapp*, 241 F.3d at 230. “Severe health issues” are “the prototypical ... case of extraordinary circumstances that justify release pending adjudication of habeas.” *Coronel v. Decker*, No. 20-CV-2472 (AJN), 2020 WL 1487274, at *9 (S.D.N.Y. Mar. 27, 2020) (collecting cases). Where continued detention would exacerbate and prolong severe health and safety risks, the Court may order that a “[p]etitioner be released from ICE custody *pending* the [merits of the case], subject to such reasonable conditions of supervision as may be imposed by the Department of Homeland Security and/or ICE.” *Arana v. Barr*, No. 1:19-cv-07924-PGG-DCF, 2020 WL 1502039, at *9 (S.D.N.Y. Mar. 27, 2020) (emphasis added), *report and recommendation adopted in part, rejected in part*, No. 19 CIV. 7924 (PGG), 2020 WL 1659713, at *8 (S.D.N.Y. Apr. 3, 2020) (requiring defendants to produce petitioner for a bond hearing before an immigration judge in four days or release him on his own recognizance that day).

Given the exigencies posed by the COVID-19 pandemic, federal courts across the country have ordered the immediate release of individuals in ICE custody, pending adjudication of the habeas petition. *See Savino v. Souza*, 20-cv-10617-WGY (D. Mass Apr. 4, 2020), ECF No. 44 (ordering release of three individuals in immigration detention subject to appropriate conditions and setting a briefing schedule to consider release of another fifty individuals); *id.* ECF No. 55 (ordering release of eight more immigration detainees); *Avendaño Hernandez v. Decker*, No. 20-CV-1589 (JPO), 2020 WL 1547459, at *2-4 (S.D.N.Y. Apr. 1, 2020); *Jimenez v. Wolf*, 18-cv-10225-MLW (D. Mass. Mar. 26, 2020), ECF No. 507 (ordering immediate release of individual detained by ICE with electronic monitoring); *Arana*, 2020 WL 1502039, at *9 (ordering immediate release of an individual detained pursuant to § 1226(c) pending a bond hearing); *Jovel v. Decker*, No. 20-CV-0308 (GBD)(SN), 2020 WL 1502038, at *10 (S.D.N.Y. Mar. 24, 2020), *report and recommendation adopted*, No. 20CIV308GBDSN, 2020 WL 1539282 (S.D.N.Y. Mar. 31, 2020)

(ordering immediate release of an individual detained under § 1226(c) while removal proceedings are underway or until he receives a bond hearing); *Coronel*, 2020 WL 1487274, at *9 (ordering immediate release from ICE custody of petitioners); *Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *6 (C.D. Cal. Mar. 27, 2020) (ordering immediate release of two individuals detained in ICE custody); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *7 (S.D.N.Y. Mar. 26, 2020) (ordering immediate release of ten individuals in immigration detention on their own recognizance, including two individuals detained pursuant to § 1226(c)); *Thakker v. Doll*, No. 1:20-cv-00480, 2020 WL 1671563, at *10 (M.D. Pa. Mar. 31, 2020) (ordering immediate release of eleven individuals in immigration detention on their own recognizance).

In *Savino*, the District of Massachusetts has used the court's inherent authority to conduct bail hearings for at least some of the putative class of civil immigration detainees held at BCHOC irrespective of preexisting health conditions and prior to class certification. *Savino*, 2020 WL 1703844, at *3-4 (reciting the procedural history of the case and noting that nine members of the first provisionally certified subclass—detainees with no criminal record and no pending criminal charges—had been released on bail). Pursuant to its streamlined, expedited procedure for bail applications, Judge Young conducted close to 50 individual bail hearings for provisionally certified subclass members at a rate of ten per day beginning on April 7, 2020.

More recently, the *Savino* court dispensed with its subclasses and certified a single class consisting of all civil immigration detainees held at BCHOC. *Id.*, at *8. In doing so, Judge Young explicitly overruled the defendants' objection that "the various detainees are not 'similarly situated' because they 'are of different ages and all present different levels of health at this time.'"

Id. at * 6. Judge Young observed:

Since COVID-19 is highly contagious and the quarters are close, the Detainees' chances of infection are great. Once infected, taking hospitalization as a marker of

“serious harm,” it is apparent that even the young and otherwise healthy detainees face a “substantial risk” (between five and ten percent) of such harm.

Id. at * 7. Thus, the “severe health issues” which will likely constitute the “extraordinary circumstances” for most of the putative class members’ bail applications are not limited to preexisting medical conditions. In the context of the COVID-19 pandemic, the existence of the virus itself, and the imminent risk of harm that virus poses in congregate environments, is what calls for release on bail. This same reasoning applies in equal force to the Plaintiffs and the putative class members now held at SCDOC.

III. The Bail Hearing Process

An expedited bail application procedure is necessary because proceeding on an individual basis will not adequately safeguard the putative class members’ constitutional rights. As Plaintiffs’ have substantially demonstrated, the COVID-19 pandemic poses an unprecedented and imminent threat to the health and safety of the civil immigration detainees held at SCDOC. Requiring each member of the putative class (approximately 62 civil immigration detainees in total) to prepare and file individual habeas petitions *and* bail applications wastes precious time and resources. This “nightmarish” scenario will not abate until the population of civil immigration detainees at SCDOC is reduced to a level that permits appropriate social distancing. These “extraordinary circumstances” not only call for bail of the Plaintiffs pending a decision on the merits of their habeas cases, they also mandate that the Court adopt a more nimble approach to the bail applications which the vast majority of the putative class must file to remedy their constitutionally deficient conditions of confinement.¹¹ An individualized process will also put severe strain on the

¹¹ This is not to say that the existing procedure as set forth in the Court’s April 15, 2020 Scheduling Order, *see* ECF No. 2—which requires Defendants to initially indicate whether they oppose Mr. Gomes’ bail by April 22, 2020 and then file an answer by April 29, 2020—is not normally appropriate.

Court—which itself is weathering the public health emergency through by closing the courtroom and changing its operating procedures to slow the spread of COVID-19. *See* Petition ¶ 40.

Although *Savino* procedure required “individualized determinations, on an expedited basis.” *Savino*, 2020 WL 1703844, at *9, Plaintiffs submit that the bail hearing process should be subject to a few bright line rules which will help the Court grant bail so as to facilitate the constitutionally deficient conditions of confinement confronting the civil immigration detainees at SCDOC ensure that Defendants are able to implement appropriate social distancing at SCDOC.

First, it is the Defendants, not the Plaintiffs, who are in possession of information which will identify the members of the putative class and allow the Court to contextualize each individual bail application filed by each putative class member in relation to the others. With that in mind, Plaintiffs have requested expedited discovery through the contemporaneously-filed motion for expedited discovery. The Court should order Defendants to provide that information immediately so that the putative class members may be identified and the facts material to the class-wide bail application process are known.

Second, in keeping with the Court’s April 15, 2020 Scheduling Order, *see* ECF No. 2, Defendants should first identify any putative class members for whom they oppose granting bail and offer justification for such refusal, including if the Plaintiff or class member has a violent criminal record and if the Defendant disputes that the petitioner has a preexisting medical condition that renders him particularly vulnerable to COVID-19.

Third, the Court should apply the more lenient *Mapp* test to the putative class members’ individual bail applications. In the context of an incarcerated person seeking bail pursuant to a pending habeas petition, the First Circuit has said that the petitioner must demonstrate a “clear case” on the law and facts or a “likelihood of success of the merits”—i.e. that extraordinary

circumstances necessitate the bail remedy pending a merits decision on the habeas petition. *See Glynn v. Donnelly*, 470 F.2d 95, 98 (1st Cir. 1972); *Woodcock*, 470 F.2d at 94. But unlike a person convicted of a crime and serving his or her sentence, civil immigration detainees are not subject to punitive detention and so the policy justification for applying this elevated standard fades away. In cases similar to this, courts generally only require “...(apart from the presence of extraordinary circumstances) that the petitioner raise ‘substantial claims’ and not prove a likelihood of success on the merits.” *See Savino*, 2020 WL 1703844, at *9, n. 11 (citing *Jimenez v. Wolf*, 18-cv-10225-MLW (D. Mass. Mar. 26, 2020), ECF No. 507-1) (rejecting the “clear case” text in the context of bail application of civil immigration detainees and holding that “the *Mapp* test or something similar or perhaps less is appropriate”). This loosened standard should also apply to the expedited bail hearings conducted by the Court for each of the Plaintiffs and putative class members.

CONCLUSION

For the foregoing reasons, and in conjunction with the contemporaneously requested injunction, Plaintiffs respectfully request that the Court implement a streamlined, expedited process for the consideration of their and each class member’s bail pending a final determination on this class *habeas* petition.

Respectfully Submitted,

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Date: April 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2020, I electronically filed the foregoing document with the United States District Court for the District of New Hampshire by using the CM/ECF system. I certify that the parties or their counsel of record registered as ECF Filers will be served by the CM/ECF system, and paper copies will be sent to those indicated as non-registered participants, if any.

/s/ Nathan P. Warecki