

**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. 20-cv-453-LM

**FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28
U.S.C. 2241 AND CLASS COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF**

INTRODUCTION

1. This case presents a request for immediate relief on behalf of a putative class of over 60 highly vulnerable Petitioner-Plaintiffs (“Plaintiffs”)—civil immigration detainees held by Respondents-Defendants (“Defendants”) at the Strafford County Department of Corrections in Dover, New Hampshire (hereinafter “SCDOC”)—who are at imminent risk of contracting COVID-19, the lethal disease that is sweeping the globe and thrives on the unsafe, congregate conditions in which Plaintiffs are being held.

2. The coronavirus that causes COVID-19—has produced an unprecedented global pandemic. In only a few months, at least 2,182,000 people worldwide have been diagnosed with COVID-19 and more than 147,000 have died.¹ The United States is now the epicenter of the outbreak. The projections for those who contract the virus and those who succumb to the illness are startling and grave. In the absence of widespread preventative measures such as social distancing, in mid-March, the Centers for Disease Control and Prevention (“CDC”) indicated a worst-case scenario of between 160 million and 210 million Americans contracting the disease. Based on mortality data and current hospital capacity, the number of deaths under the CDC’s worst-case estimate ranged from 200,000 to as many as 1.7 million. The CDC projected that as many as 21 million people might need hospitalization, a daunting figure in a nation with just about 925,000 hospital beds.²

3. The only effective means of preventing the spread of COVID-19 is social distancing—where people remain at least six feet apart from each other. But conditions at SCDOC render that impossible. In one unit—Unit J—people sleep on bunk beds in crowded cells or dormitories only two to three feet apart. They eat meals at packed tables or they must wait together to receive food. They use communal bathrooms. They have no access to personal protective equipment. New detainees continue to be transferred to SCDOC from other detention facilities,

¹ John Hopkins University, Coronavirus Resource Center , <https://coronavirus.jhu.edu/map.html> (last visited Apr. 17, 2020); World Health Organization, *Coronavirus Disease 2019 (COVID-19) Situation Report* (Apr. 17, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200416-sitrep-87-covid-19.pdf?sfvrsn=9523115a_2.

² Sheri Fink, “Worst-Case Estimates for U.S. Coronavirus Deaths,” *The New York Times* (Mar. 18, 2020), <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

increasing the risk of infection. The federal government’s own medical subject matter experts have described this as a “tinderbox scenario.”³

4. Recognizing the urgency of the pandemic, courts, government officials, and medical professionals realize that the only way to protect incarcerated or detained populations and the public health from COVID-19 is to reduce those populations so that social distancing is possible. Such releases not only protect the people from transmission of the virus that causes COVID-19, they also contribute to greater risk mitigation for all people either working at or confined to a prison, jail, or detention center, and reduce the burden on the surrounding region’s limited hospitals and health care infrastructure, as they lessen the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

5. Several recent court rulings have explained the health risks to incarcerated people, guards, and the outside community at large that would be caused by a COVID-19 outbreak in correctional facilities, and have ordered relief on that basis. *See, e.g., Savino v. Souza*, No. 1:20-cv-10617-WGY, 2020 WL 1703844, at *1 (D. Mass. Apr. 8, 2020) (allowing class certification and implementing an individualized process to consider each class member’s request for release on bail); *United States v. French*, No. 12-cr-00160, 2020 WL 1539926 (D. Me. Mar. 31, 2020) (granting prisoners’ emergency motion for release pending appeal, concluding “that the COVID19 crisis presents an ‘exceptional reason’ under Section 3145(c) for immediate release”); *Jimenez v. Wolf*, No. 18-10225-MLW (D. Mass. Mar. 26, 2020) (ordering release of immigrant detainee in the midst of the COVID-19 pandemic and noting that “being in a jail enhances risk” and that in jail “social distancing is difficult or impossible”); *Castillo v. Barr*, No. 20-cv-00605, 2020 WL

³ Letter from Scott A. Allen, MD and Josiah Rich, MD, MPH to Congressional Committee Chairpersons 6, (Mar. 19, 2020), available at <https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf> (emphasis in original).

1502864, at *5 (C.D. Cal. Mar. 27, 2020) (“Under the Due Process Clause, a civil detainee cannot be subject to the current conditions of confinement at Adelanto.”); *Coronel v. Decker*, No. 20-cv-2472 (S.D.N.Y. Mar. 27, 2020) (finding “likelihood of success on the[] claim the Government’s actions constitute deliberate indifference to Petitioners’ medical needs” and on procedural due process claim); *Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020) (finding likelihood of success, granting TRO, and ordering immediate release on recognizance of petitioners); *United States v. Stephens*, No. 15-cr-95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (ordering the release of inmate in Federal Bureau of Prisons custody due, in part, to risk posed by COVID-19 in the facility); *People ex rel. Stoughton on behalf of Little et al. v. Brann*, Index No. 260154/2020 (Bronx Sup. Ct. Mar. 25, 2020) (ordering immediate release of 106 petitioners held at Rikers on non-criminal technical parole violation who are older or have underlying medical conditions); *United States v. Stephens*, No. 15-cr-95-AJN, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (ordering the release of inmate in Federal Bureau of Prisons custody due, in part, to risk posed by COVID-19 in the facility); *In the Matter of the Extradition of Alejandro Toledo Manrique*, Case No. 19-mj-71055, 2020 WL 1307109, at *1 (N. D. Cal. March 19, 2020) (ordering change to conditions of bail for an individual to postpone incarceration, in part in light of risk of vulnerability to the coronavirus); *see also Rivera-Medrano v. Wolf*, No. 20-cv-194-JD (D.N.H. Mar. 27, 2020), ECF No. 14 (DiClerico, J.) (granting motion to expedite consideration of bond habeas corpus action brought by detained immigrant because of COVID-19; concluding that, “[a]ssuming that a health emergency exists or will exist in the jail, the court will consider her petition on an expedited basis”).

6. The *Savino* case is especially analogous to the circumstances faced by the class in this case. There, just last week, the District of Massachusetts allowed certification a class of civil

immigrant detainees held at two detention centers in Bristol County, Massachusetts, recognizing that a systemic remedy was necessary “*in order to protect everyone* [in the facility] from the impending threat of mass contagion.” See *Savino v. Sousa*, No. 20-cv-10617-WGY, 2020 WL 1703844, at *7-10 (D. Mass. Apr. 8, 2020), (Young, J.) (emphasis added). Citing to the court’s inherent power to grant bail to habeas petitioners pending a merits determination, Judge Young issued an order requiring a reduction of the population of those detention centers on an expedited, individualized basis. *Id.* at *9. This is precisely what Plaintiffs request in this case.

6. Despite the directives from the CDC and the extraordinary measures being taken by government officials to ensure social distancing, and as a result of the lack of testing for the coronavirus that causes COVID-19, Defendants are unable to adequately protect their most vulnerable populations—civil immigration detainees—from the imminent risk of infection.

7. Plaintiffs and the proposed class members are not being detained pursuant to a criminal conviction. Rather, they are in civil immigration detention either pending the completion of their immigration proceedings or awaiting execution of a final order of removal from the United States. Immigration and Customs Enforcement (“ICE”) has significant discretion to release immigration detainees, *see, e.g.*, 8 U.S.C. §§ 1182(d)(5), 1225(b), 1226(a) and 1231, and has a long-standing practice of releasing for humanitarian reasons even those whose detention has been mandated under particular immigration detention statutes, *see* 8 U.S.C. § 1226(c). ICE also regularly uses alternatives to physical detention to maintain custody and control over non-citizens, such as supervised release, electronic ankle monitors, home confinement, and telephonic monitoring.

8. Plaintiffs, who cannot be lawfully subjected to any form of punitive detention, are at risk. The Defendants’ failure or inability to implement social distancing endangers the lives of

those Defendants have chosen to detain. Inevitably, one guard, inmate, or detainee at SCDOC will contract the coronavirus that causes COVID-19—if they have not already—and its spread throughout the facility’s population will be impossible to contain.

9. Defendants cannot justify continuing to subject Plaintiffs to extraordinary risk of illness and death without any legitimate government objective, particularly in light of the alternatives available to them to maintain custody and control over Plaintiffs. The danger posed by Plaintiffs’ detention during the current outbreak of COVID-19 is “so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.” *Helling v. McKinney*, 509 U.S. 25, 36 (1993). In short, the Due Process Clause of the Fifth Amendment requires the government “to refrain at least from treating a pretrial detainee with deliberate indifference to a substantial risk of serious harm to health.” *Savino*, 2020 WL 1703844, at *6 (citing *Coscia v. Town of Pembroke*, 659 F.3d 37, 39 (1st Cir. 2011)). Defendants have failed to satisfy this constitutional guarantee. Plaintiffs bring this action on behalf of themselves and all other immigration detainees at SCDOC to remedy grave violations of their constitutional rights that imminently threaten them with serious illness and death.

10. Unless this Court intervenes to order the release of the Plaintiffs, they, along with many other detained individuals and outside communities, will face dramatically increased chances of contracting COVID-19, becoming seriously ill, and dying.

PARTIES

11. Plaintiff Robson Xavier Gomes is a 45-year-old citizen of Brazil. Mr. Gomes is a civil immigration detainee at SCDOC and has been held there since June 11, 2019. Mr. Gomes is not subject to a final order of removal: his applications for relief from removal are currently being reviewed by the Board of Immigration Appeals. Mr. Gomes suffers from high blood pressure,

heart arrhythmia (for which a pacemaker is recommended) and chronic back pain. He is at high risk for severe illness, exacerbated by the imminent risk of exposure to COVID-19, due to the inability to practice social distancing while at SCDOC.

12. Plaintiff Darwin Aliesky Cuesta-Rojas is a 31-year-old citizen of Cuba. Mr. Cuesta-Rojas is a civil immigration detainee at SCDOC whose removal from the United States has been temporarily stayed by the First Circuit Court of Appeals. He, like all other civil immigration detainees at SCDOC, is imminently at risk of exposure to COVID-19 due to the inability to practice social distancing while at SCDOC.

13. Plaintiff José Nolberto Tacuri-Tacuri⁴ is a 38-year-old citizen of Ecuador. Mr. Tacuri-Tacuri is a civil immigration detainee at SCDOC whose removal from the United States is currently stayed by the First Circuit Court of Appeals. Mr. Tacuri-Tacuri suffers from asthma, a condition for which he is prescribed medication. He is at high risk for severe illness, exacerbated by the imminent risk of exposure to COVID-19, due to the inability to practice social distancing while at SCDOC.

14. Defendant Chad Wolf is the Acting Secretary of the United States Department of Homeland Security. In this capacity, he has responsibility for the administration of immigration laws pursuant to 8 U.S.C. § 1103(a), has authority over ICE and its field offices, and has authority to order the release of Plaintiffs. At all times relevant to this Complaint, Mr. Wolf was acting within the scope and course of his position as the Acting Secretary for DHS. Mr. Wolf is sued in his official capacity.

⁴ Mr. Tacuri-Tacuri is the petitioner in a pending *habeas* action captioned *Tacuri-Tacuri v. Strafford Cty. Dep't of Corrections et al.*, No. 1:20-cv-00407-PB (D.N.H.). That action, recently transferred to this Court from the District of Massachusetts (Saris, J.), raises substantially different questions of law as the instant Petition.

15. Defendant Marcos Charles is the Acting Field Office Director of Boston Field Office of Enforcement and Removal Operations (“ERO”) within ICE, a federal law enforcement agency within the Department of Homeland Security. ERO is a division of ICE that manages and oversees the immigration detention system. In his capacity as Field Office Director for ERO, Defendant Charles exercises control over and is a custodian of civil immigration detainees at SCDOC, including Plaintiffs and other putative class members. At all times relevant to this Complaint, Mr. Charles was acting within the scope and course of his employment with ICE. Mr. Charles is sued in his official capacity.

16. Defendant Christopher Brackett is the Superintendent of the SCDOC, where the Plaintiffs and all putative class members are detained. He is sued in his official capacity.

JURISDICTION AND VENUE

17. Jurisdiction is proper and relief is available pursuant to 28 U.S.C. §§ 1331 (federal question), 1346 (original jurisdiction), 2201-02 (declaratory relief), and § 2241 (habeas corpus jurisdiction), and Article 1, Section 9, clause 2 of the United States Constitution (the Suspension Clause). This Court has the power in equity to issue declaratory and injunctive relief for violations of the Constitution by federal officials. *See Ex Parte Young*, 209 U.S. 123 (1907); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (applying *Ex Parte Young* principle to federal government officials). The United States has waived sovereign immunity for this action for declaratory and injunctive relief against one of its agencies and that agency’s officers are sued in their official capacities. *See* 5 U.S.C. § 702.

18. Venue in the District Court for the District of New Hampshire is proper under 28 U.S.C. § 1391 because at least one Defendant resides in this District, Plaintiffs are currently detained at SCDOC within this District, and a substantial part of the event giving rise to the claims

in this action took place in this District. Venue is also proper under 28 U.S.C. § 2243 because the immediate custodian of all the Plaintiffs resides in this District.

FACTS

The COVID-19 Pandemic is Spreading Quickly and Poses Grave Risk of Serious Illness and Death

19. The outbreak of COVID-19 has reached pandemic status.
20. The risks and consequences of COVID-19 cannot be understated. In the United States alone, 605,390 cases of infection have been reported and 24,582 people have died.⁵
21. The disease itself does not discriminate between the old and young. People of all ages, with and without preexisting conditions, have died.
22. Just prior to this filing there were 28,163 reported cases in Massachusetts⁶ including persons confined or working in correctional institutions.
23. Just prior to this filing there were 1,139 reported cases in New Hampshire.⁷
24. COVID-19 is easily transmitted and the numbers of confirmed cases and deaths are expected to continue to grow exponentially. *See* Declaration of Dr. Marc Stern (“Stern Decl.”), Exhibit A to the Declaration of Nathan P. Warecki (“Warecki Decl.”) in Support of the Instant Motion, ¶ 2, 4.⁸ ; Declaration of Dr. Jonathan Louis Golob (“Golob Decl.”), Ex. B, ¶ 2.

⁵ Ctrs. for Disease Control and Prevention, *Cases in U.S.* (Apr. 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁶ Commonwealth of Massachusetts, *COVID-19 Cases, Quarantine, and Monitoring Error! Hyperlink reference not valid.* (last visited Apr. 14, 2020).

⁷ State of New Hampshire, *Novel Coronavirus 2019 (COVID-19)*, <https://www.nh.gov/covid19/> (last visited Apr. 15, 2020).

⁸ Any reference herein to “Ex.” refers to the Warecki Declaration.

25. All human beings share an equal risk of contracting and, upon contraction, transmitting the virus that causes COVID-19. Any adult who contracts the virus may experience life-threatening symptoms and death. *See* Golob Decl., ¶¶ 4-5, 8, 14.

26. New information regarding COVID-19 risk factors is released daily by public health authorities. Beyond the extreme risks to all, the categories of individuals who may have conditions or characteristics that predispose them to complications from COVID-19 are growing—and not fully identified by medical experts.

27. COVID-19 can severely damage lung tissue, which requires an extensive period of hospitalization and rehabilitation, and in some cases, can cause a permanent loss of respiratory capacity. More is learned each passing day about the extent of permanent injury that may be caused by COVID-19. *See* Golob Decl., ¶¶ 9, 14.

28. COVID-19 may also target the heart muscle, causing a medical condition called myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and the ability to work. *See id.*

29. People of all ages and medical backgrounds who have experienced serious cases of COVID-19 describe painful symptoms, including vomiting, severe diarrhea, relentless shivering, and suffocating shortness of breath.

30. Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury. *See id.*

31. These complications can manifest at an alarming pace. Individuals can show the first symptoms of COVID-19 infection in as little as two days after exposure, and their condition can seriously deteriorate in five days or sooner.

32. People can also spread the coronavirus which causes COVID-19, but may be asymptomatic, making testing or seclusion of only those who are symptomatic an ineffective solution. *See id.*, ¶ 6.

33. Most people who develop serious illness will need advanced support. This level of supportive care requires highly specialized equipment that is in limited supply, even in non-detention settings, and an entire team of dedicated medical care providers. *See id.*, ¶ 8.

34. People who experience serious cases of COVID-19 who do not die should expect a prolonged recovery, including the need for extensive rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity.

35. There is no vaccine against COVID-19, no cure or FDA-approved treatment for COVID-19, nor is there any known medication to prevent or treat infection. *See Golob Decl.*, ¶ 10; *Stern Decl.*, ¶ 3.

36. The CDC advises that the coronavirus which causes COVID-19 is thought to spread mainly from person to person, between people who are in close contact with one another (within about 6 feet), and through respiratory droplets produced when someone speaks, coughs, or sneezes, including by touch of shared surfaces.⁹

37. The only known effective measures to reduce the risk for vulnerable people from illness, injury or death from COVID-19 are to prevent them from being infected by the virus in the

⁹ Ctrs. for Disease Control and Prevention, *Coronavirus (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/index.html> (last visited Apr. 16, 2020).

first place, and to limit community spread. Social distancing or remaining physically separated from known or potentially infected individuals, and vigilant sanitation and hygiene, including repeatedly and thoroughly hand washing with soap and water, are the only known effective measures for protecting people from COVID-19. Golob Decl., ¶ 10; Stern Decl., ¶¶ 8-11.

38. CDC projections initially indicated that over 200 million people in the United States could be infected with the coronavirus which causes COVID-19 without effective public health intervention, with as many as 1.7 million deaths in the most severe projections.¹⁰

39. In response to this pandemic, states have taken extraordinary and unprecedented measures to ensure that people practice “social distancing” in order to halt the spread of COVID-19. For example, on March 13, 2020 New Hampshire Governor Chris Sununu declared a state of emergency, announcing aggressive recommendations to curb the spread of COVID-19 and finding the importance of taking steps to address the potentially disastrous impacts of the disease on the health, safety, and security of the public.¹¹ On March 13, 2020 President Donald J. Trump announced a national state of emergency in response to the disease’s outbreak.¹² On March 15, 2020, Governor Sununu closed schools until April 3, 2020.¹³ On March 27, 2020, Governor Sununu extended this closure until May 4, 2020¹⁴, and on April 16 he announced that schools are

¹⁰ Fink, *supra* note 2; see Golob Decl., ¶ 11.

¹¹ Governor of New Hampshire, *Exec. Order 2020-04* (Mar. 13, 2020), <https://www.governor.nh.gov/news-media/orders-2020/documents/2020-04.pdf>.

¹² Proclamation No. 9994, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15337 (Mar. 13, 2020), available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

¹³ Governor of New Hampshire, *Emergency Order No. 1* (Mar. 15, 2020), <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-1.pdf>.

¹⁴ Governor of New Hampshire, *Emergency Order No. 19* (Mar. 27, 2020), <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-19.pdf>.

to be closed for the rest of the school year.¹⁵ On March 16, 2020, Governor Sununu banned on-premise consumption of food or drinks at bars and restaurants, and limited all gatherings to 50 individuals.¹⁶ On March 23, 2020, gatherings were limited to ten individuals.¹⁷ On March 26, 2020, Governor Sununu issued an emergency order closing all nonessential businesses and urging everyone to remain in their homes as much as possible and to only leave home for fresh air or exercise or for outdoor recreation provided that “social distancing protocols” are observed.¹⁸ Appropriately, none of these measures in New Hampshire have been limited to only those who are medically vulnerable.

40. Similarly, this Court has acknowledged that “the threat to public health and safety presented by the COVID-19 pandemic has become more widely understood” and that “it now appears to be accepted in the medical community that COVID-19 may be spread by persons who are asymptomatic and . . . there are recent incidents of community-based transmission of the virus in this district.”¹⁹ Thus, the Court has issued multiple orders designed to slow the spread of COVID-19, including closing the federal courthouse with limited exceptions.²⁰ On April 15, 2020,

¹⁵ Matt Berg, “N.H. Governor Closes public schools for remainder of school year,” *The Boston Globe* (Apr. 16, 2020), <https://www.bostonglobe.com/2020/04/16/metro/nh-governor-closes-public-schools-remainder-school-year/>.

¹⁶ Governor of New Hampshire, Emergency Order No. 2 (Mar. 16, 2020), **Error! Hyperlink reference not valid.**

¹⁷ Governor of New Hampshire, Emergency Order No. 16 (Mar. 23, 2020), <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-16.pdf>.

¹⁸ Governor of New Hampshire, Emergency Order No. 17 (Mar. 26, 2020), <https://www.governor.nh.gov/news-media/emergency-orders/documents/emergency-order-17-1.pdf>.

¹⁹ District of New Hampshire, Standing Order 20-5 (Mar. 20, 2020), *available at* <http://www.nhd.uscourts.gov/pdf/ADM%201%2020-5.pdf>.

²⁰ *Id.*

this Court extended its closure until June 1, 2020.²¹ Similarly, this Court's actions are not limited to those who are medically vulnerable.

41. Recent data appears to show that social distancing is working to slow the spread of the coronavirus which causes COVID-19 and, accordingly, projections as to the scope of the pandemic have lessened. However, public health experts warn that an ease of social distancing preventative measures will likely result in a resurgence of COVID-19 infections and a return to more ominous projections as to the pandemic's toll.²²

**People Detained at SCDOC are at an Elevated Risk of
COVID-19 Transmission, Infection and Illness.**

42. Immigration detention facilities are congregate environments, places where people live and sleep in close proximity. *See, e.g.*, Stern Decl., ¶¶ 8-11; Golob Decl., ¶¶ 12-13.

43. There are approximately 62 noncitizens currently held at SCDOC as civil immigration detainees. *See* Affidavit of SangYeob Kim ("Kim Aff."), Ex. C, ¶ 5.

44. Civil immigration detainees are housed in SCDOC in one of five units: Units A, B, G, H, and J. *See id.*, ¶¶ 4-5, 9, 11-12; Affidavit of Darwin Aliesky Cuesta-Rojas ("Cuesta-Rojas Aff."), Ex. D, ¶¶ 3-4; Affidavit of José Nolberto Tacuri-Tacuri ("Tacuri-Tacuri Aff."), Ex. E, ¶ 4; Affidavit of Robson Xavier Gomes ("Gomes Aff."), Ex. F, ¶ 2.

45. Units A and B are used to house female noncitizens in civil immigration detention. Unit A houses female noncitizens who either lack criminal convictions or who are low-security classification. Unit B houses other female noncitizens. Female general population inmates or pretrial detainees (i.e. persons who are not in civil immigration detention) are also housed in Units

²¹ District of New Hampshire, Standing Order 20-15 (April 15, 2020), *available at* <http://www.nhd.uscourts.gov/pdf/ADM%201%2020-15.pdf>.

²² Dr. Benjamin P. Chan, N.H. Division of Public Health Services, *COVID-19 The Future of the Epidemic in NH* (Apr. 9, 2020), <https://www.governor.nh.gov/news-media/press-2020/documents/covid-current.pdf>.

A and B. Units A and B consist of eight small cells for two people and a common space with tables.

46. Units G and H are used to house male noncitizens in civil immigration detention who have criminal convictions. Male general population inmates or pretrial detainees (i.e. person who are not in civil immigration detention) are also house in Units G and H. There are about 72 people in each of Units G and H.

47. Both Units G and H have two floors. Each floor is surrounded by small cells. The cells, 18 on each floor and 36 in all, are typically each occupied by two people. The first floor has a common area where detainees can watch television, exercise, eat, and do laundry. The second floor consists of an interior balcony providing access to the cells and is open in the middle. There are six bathrooms in total—three on each floor—and they are shared.

48. In light of the current pandemic, Units G and H is on lockdown 22 hours a day. During this lockdown, only six cells (three on each floor) are open at any given time. Those cells are open for one hour. Once those cells are closed, another six cells are opened. During the open period, people are permitted to exit their cells and use the common area. Two hours per day, all people in Units G and H can move freely about the units, sharing bathrooms, communal spaces, and tables. If a person's open period coincides with mealtime, they can eat in the common area. If it does not, the person must bring their food back to their cell to eat.

49. Unit J consists of two separate floors. Unlike the other units, each floor of Unit J is a big open space without cells. Bunk beds are arranged on the floor no more than two to three feet apart and detainees share bathroom facilities. When Unit J is on lockdown, the detainees from one floor are not allowed to access the other floor. But there is no meaningful restriction upon the movement of people on the floor they are housed on. The first floor of Unit J is used to house

noncitizen civil immigration detainees only who either lack a criminal conviction or are low-security classification. The other floor of Unit J is used to house persons detained by federal authorities who have been indicted for federal crimes or are awaiting sentencing.

50. New detainees continue to be transferred into the units from other facilities. For example, a new detainee was placed on Unit H on April 11, 2020, presumably from another facility. Kim Aff., ¶ 14. Two to three new people per week arrive in Unit J but they are not separated or quarantined. *See Tacuri-Tacuri Aff.*, ¶ 7; *Cuesta-Rojas Aff.*, ¶ 8; *Gomes Aff.*, ¶ 10. ICE has recently noticed its intent to transfer detainees from facilities at the Bristol County House of Corrections in North Dartmouth, Massachusetts to SCDOC.²³

51. Mr. Tacuri-Tacuri and Mr. Cuesta-Rojas are housed in Unit J. Mr. Tacuri-Tacuri suffers from asthma. Mr. Tacuri-Tacuri's and Mr. Cuesta-Rojas' beds are only two to three feet from the next, they eat with other detainees, other detainees are allowed access to his floor and their sleeping area, they share bathrooms, they have not been provided with any personal protective equipment, neither they nor their fellow detainees have been tested for COVID-19, and it is not possible for them to maintain a six-foot buffer between himself and other detainees. *See Tacuri-Tacuri Aff.*, ¶¶ 3-6, 10; *Cuesta Rojas Aff.*, ¶¶ 3-7.

52. Mr. Gomes is housed in Unit G. He suffers from hypertension and has a heart arrhythmia. Mr. Gomes' shares a cell with another incarcerated person and they cannot arrange their beds so that they are at least six feet apart. Mr. Gomes also shares a toilet in the cell. Mr. Gomes shares showers with other incarcerated persons. No disinfectant appears to be used to clean the showers. He shares the communal space in Unit G with 20-30 other people. He shares a

²³ *See Savino v. Souza*, No. 1:20-cv-10617-WGY (D. Mass. Apr. 15, 2020), ECF No. 87 (Defendants noticing their intent to transfer a class member in that case from Bristol County House of Corrections to the SCDOC).

microwave and digital tablets with other incarcerated persons. 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. *See* Gomes Aff., ¶¶ 3-9.

53. The remaining civil immigration detainees class members are housed in Units A, B, G, H, and J (possibly other units too) at SCDOC. Their confinement conditions are the tinderbox, that once sparked will engulf the facility.

**Defendants' Responses to COVID-19 Are Inadequate and
Will Not Protect Plaintiffs**

54. Infectious diseases that are communicated by air or touch are more likely to spread in these confined settings and crowded environments. *See, e.g.*, Stern Decl., ¶¶ 8-11. This presents an imminent danger for the spread of COVID-19 to Plaintiffs.

55. The conditions of immigration detention facilities pose a heightened public health risk for the spread of COVID-19 that is even greater than non-carceral institutions. Immigration detention facilities have even greater risk of infectious spread because of overcrowding, the high proportion of vulnerable people detained, limited access to hygiene products, and scant medical resources. People live in close quarters and cannot achieve the social distancing needed to effectively prevent the spread of COVID-19. Plaintiffs will find it impossible to maintain the recommended distance of 6 feet from others. They must also share or touch objects used by others.

56. Defendants' are well aware of public health guidelines and the need to implement and facilitate social distancing to combat the COVID-19 pandemic. For example, SCDOC is reported to have implemented "strict screening and intake procedures for inmates and staff"²⁴ and has "the ability to isolate individual units should the need arise." SCDOC employees—but not

²⁴ Whether these screening and intake procedures also apply to civil immigration detainees housed at SCDOC but subject to ICE custody is not presently known.

prisoners or detainees—are provided with “cloth face masks to reduce the potential for people without symptoms transmitting the virus to inmates.” But, despite these precautions, and given the potential for those infected with the coronavirus which causes COVID-19 to be asymptomatic, Defendant Brackett rightly states “[t]here’s always a concern . . . [a]nybody who comes in we don’t know about, there’s always a concern.”²⁵

57. ICE has established a webpage entitled “ICE Guidance on COVID-19” at the URL <https://www.ice.gov/coronavirus>. The “Overview and FAQs” section of the webpage acknowledges the need for social distancing and contains generalized statements which reflect public health guidance with respect to social distancing, hygiene and handwashing, screening, risk mitigation, and quarantine. Added to the difficulties is that testing is not widely used and/or available at ICE facilities and, accordingly, ICE is essentially blind with respect to the scope of the epidemic amongst the civil immigration detainee population. In light of these conditions, ICE acknowledged that it must “*reduce the population of all detention facilities to 70 percent or less to increase social distancing*.”²⁶

58. Former ICE official echo these concerns and have called for aggressive measures to combat the spread of COVID-19 in ICE detention facilities. As explained by Former Acting Director of ICE, John Sandweg:

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 facilitates requires inmates to remain in close contact with one another—the opposite of

²⁵ Kyle Stucker, “Isolation in isolation: Inmates, jails face new challenges due to COVID-19,” *Fosters.com* (Apr. 4, 2020), <https://www.fosters.com/news/20200404/isolation-in-isolation-inmates-jails-face-new-challenges-due-to-covid-19>.

²⁶ Immigration and Customs Enforcement, *ICE Guidance on COVID-19*, <https://www.ice.gov/coronavirus> (last visited Apr. 17, 2020) (click on “Overview & FAQs” tab and scroll to “How are ICE detention facilities engaging in social distancing” (emphasis added)).

the social distancing now recommended for stopping [its] spread....

Declaration of John Sandweg (“Sandweg Decl.”), Ex. G, ¶ 6. 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.

59. Despite ICE’s acknowledgement of both the problem and the solution, there is substantial evidence that ICE’s COVID-19 protocols are not being followed in detention centers throughout the country, including SCDOC, and that ICE is otherwise failing to provide an adequate response, which exacerbates the risk of harm to Plaintiffs. Defendants continue to crowd SCDOC such that social distancing is impossible to maintain and have failed to either release or sequester civil immigration detainees to allow for social distancing and permit those with at-risk health conditions to be isolated from others.

60. Most notably, as of April 17, 2020, ICE has confirmed that there are 105 confirmed cases of COVID-19 among civil immigration detainees in at least 25 facilities, and 25 confirmed cases among ICE employees at 7 facilities throughout the United States.²⁷ These reported numbers do not include third-party contractors (such as SCDOC employees) who have been infected, as ICE does not publicly report those numbers. Yet, Defendants are continuing to introduce new civil immigration detainees into SCDOC from other facilities and house civil immigration detainees with the general population and with persons in federal criminal custody.

²⁷ *Id.* (last visited Apr. 17, 2020) (click on “Confirmed Cases” tab).

61. On March 19, 2020, two medical subject matter experts for the Department of Homeland Security’s Office of Civil Rights and Civil Liberties blew the whistle to Congress, writing “regarding the need to implement immediate social distancing to reduce the likelihood of exposure to detainees, facility personnel, and the general public, ***it is essential to consider releasing all detainees who do not pose an immediate risk to public safety.***” The experts expressed concern that “the track record of ICE facilities implementing [early screening, testing, isolation and quarantine] protocols historically has been inconsistent.” Moreover, even if ICE was consistently taking these precautions, the DHS experts have explained that they “won’t be enough” without rapidly “releas[ing] those who do not pose an immediate danger to public safety.”²⁸ Defendants stubbornly refuse to heed the advice of public health experts, including their own.

62. Evidence further establishes that these serious defects are far from anomalous, but rather systemic in nature. Indeed, according to Dr. Marc Stern, a correctional health expert, the risk of contracting the coronavirus which causes COVID-19 is elevated by the inherent conditions created in congregate environments, the confinement conditions at SCDOC, unavailability of testing for the coronavirus, transmission of COVID-19 by people who are asymptomatic or pre-symptomatic, transfer of new detainees into civil immigration detainee populations, arrival and departure of staff, and the ineffectiveness of other preventative measures, besides social distancing, in these conditions. Dr. Marc Stern notes that detention facilities have the characteristics of “landlocked cruise ships”—except that the risk is elevated because they are, unlike cruise ships, not closed systems. *See Stern Decl.*, ¶¶ 8-11.

63. Importantly, the COVID-19 pandemic—and ICE’s unreasonable response to it—will significantly strain the subpar medical facilities available to SCDOC’s civil immigration

²⁸ Allen and Rich, *supra* note 3, at 5 (emphasis in original).

detainees. Long before the COVID-19 outbreak, numerous reports (including by DHS itself) have identified serious and substantial flaws in ICE's medical care system. For example, a 2017 OIG report that assessed care at certain ICE facilities identified "long waits for the provision of medical care[.]"²⁹ Other reports echo these alarming findings about substandard medical care in ICE facilities.³⁰

64. These elevated risks are not borne solely by detainees and SCDOC's staff. Dr. Stern notes that if and when the virus becomes prevalent in the SCDOC and other county jails, the community hospitals that serve the facilities "also likely will quickly become overwhelmed with a high concentration of very sick and possibly dying people who require intensive care." As Dr. Stern has observed, "hospitals inundated with very ill patients from the prisons will lack the space, staff and equipment to serve the larger community." Stern Decl., ¶ 12. This problem is particularly acute in smaller communities, such as Dover, New Hampshire, where the detention facility is located. Surrounding communities will be unable to provide adequate medical treatment to infected persons.

65. As Dr. Stern further explains, by the time the facility reports a confirmed case, it likely will be too late given the unique nature of correctional facilities. Outbreaks can spiral out of

²⁹ Off. of Inspector Gen., Off. of Homeland Sec., OIG-18-32: Concerns About ICE Detainee Treatment and Care at Detention Facilities, at 7 (Dec. 11, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>.

³⁰ See, e.g., U.S. Gov't Accountability Off. GAO-16-23: Additional Actions Needed to Strengthen Mgmt. and Oversight of Detainee Med. Care (Feb. 2016), <https://www.gao.gov/assets/680/675484.pdf>; Human Rts. Watch, Am. Civil Liberties Union, Nat'l Immigr. Just. Ctr. & Det. Watch Network, Code Red: The Fatal Consequences of Dangerously Substandard Med. Care in Immigr. Det., at 15, 19, 25, 46 (June 2018), available at <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration>; Human Rts. First, Prisons and Punishment: Immigr. Det. in Cal., at 10-13 (Jan. 2019), [https://www.humanrightsfirst.org/sites/default/files/%20Prisons and Punishment.pdf](https://www.humanrightsfirst.org/sites/default/files/%20Prisons%20and%20Punishment.pdf); J. David McSwane, ICE Has Repeatedly Failed to Contain Contagious Diseases, Our Analysis Shows. It's a Danger to the Pub., PROPUBLICA (Mar. 20, 2020), available at <https://www.propublica.org/article/ice-has-repeatedly-failed-to-contain-contagious-diseases-our-analysis-shows-its-a-danger-to-the-public> (analysis of DDRs demonstrates that ICE facilities have "long histories of mishandling infectious diseases that can rapidly spread outside their walls.").

control. *See* Stern Decl., ¶ 16. For example, the rate of infection in Cook County Jail in Illinois is higher than most anywhere else in the country, with more than 500 people having tested positive so far as of April 13, 2020. Detention residents make up nearly two-thirds of the diagnosed cases, and three have died from apparent complications.³¹ As of April 13, 2020, New York City's jail system had 319 residents and 573 staff members with confirmed COVID-19 cases. Two residents have died from the disease.³² As of April 17, 2020, a total of 473 residents and 279 staff in federal prisons across the United States have fallen ill with the virus. Sixteen federal prison residents have died from the virus.³³ At Bellamy Fields, a non carceral assisted living facility also located in Dover, New Hampshire, the congregate environment has led to confirmed cases of COVID-19 for 12 residents and eight staff members.³⁴ As Dr. Stern notes, many facility residents—including those who are not medically vulnerable—are far safer in their respective communities than in a correctional facility where social distancing is difficult or impossible. *See* Stern Decl., ¶¶ 16-18.

The Only Way to Reduce the Risk of A COVID-19 Outbreak at SCDOC is to Immediately Reduce the Population at the Facility by Release.

66. Risk mitigation is the only known strategy that can protect people from COVID-19 and Defendants, through actions and statements, have demonstrated that they are unwilling and unable to implement meaningful risk mitigation measures. Accordingly, both ICE and public

³¹ Cheryl Corley, "The COVID-19 Struggle in Chicago's Cook County Jail," *NPR* (Apr. 13, 2020), <https://www.npr.org/2020/04/13/833440047/the-covid-19-struggle-in-chicagos-cook-county-jail>.

³² Reuven Blau, "Second Rikers Island Inmate Dies of COVID-19 After Failed Bid to Spring Him," *The City* (Apr. 13, 2020), <https://thecity.nyc/2020/04/second-rikers-inmate-dies-of-covid-after-freedom-bid-fails.html>.

³³ *See* Bureau of Prisons, *COVID-19 Coronavirus*, <https://www.bop.gov/coronavirus/> (last visited Apr. 17, 2020). BOP is emptying at least some of its facilities in light of the threat posed by COVID-19. *See, e.g.*, Benjamin Weiser and William K. Rashbaum, "Michael Cohen Is Among Prisoners to Be Released Because of the Virus," *The New York Times* (Apr. 17, 2020), https://www.nytimes.com/2020/04/17/nyregion/michael-cohen-release-prison-otisville-virus.html?campaign_id=60&emc=edit_na_20200417&instance_id=0&nl=breaking-news&ref=cta®i_id=57298689&segment_id=25392&user_id=ddaa5e19147bc43b7ea1382dc2b096c4.

³⁴ Kyle Stucker, "Coronavirus Outbreak Hits Dover Assisted Living Facility," *Fosters.com* (Apr. 16, 2020), <https://www.fosters.com/news/20200416/coronavirus-outbreak-hits-dover-assisted-living-facility>.

health experts with experience in immigration detention and correctional settings have recommended that detention centers immediately reduce their populations.

67. CDC guidelines acknowledge that correctional and detention facilities create a “heightened potential for COVID-19 to spread once introduced” and interim guidance offers a triage list of steps such facilities can take to try and mitigate the spread of COVID-19 when social distancing guidelines are not otherwise possible due to space restrictions.³⁵ As Dr. Stern notes, none of those steps are a suitable replacement for the only known and effective means of halting the pandemic—social distancing.

68. State public officials emphasize that social distancing is having at least some effect upon the spread of COVID-19. According to New Hampshire’s State Epidemiologist, Dr. Benjamin P. Chan, “early data shows that New Hampshire’s “community mitigation” strategy “appears to be controlling the spread of COVID-19.” Community mitigation includes social distancing as well as cancellation of mass gatherings, remote work and school arrangements, and staying home—none of which are possible at SCDOC absent the release of at least some civil immigration detainees or other remedial measures ordered by this Court.³⁶

69. Furthermore, the routine practice of transferring immigrant detainees from one facility to another, throughout the nationwide immigration detention network and without widespread testing for the virus that causes COVID-19, makes the likelihood of COVID-19 spread

³⁵ Ctrs. for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#issued>; see also ICE, Enforcement and Removal Operations, *COVID-19 Pandemic Response Requirements* (Apr. 10, 2020), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf> (copying, in some places *verbatim*, the CDC guidance on correctional and detention facilities).

³⁶ Chan, *supra* note 22.

and infection even more likely. Given such conditions and practices, one would be hard-pressed to think of a more effective means for the spread of COVID-19 than immigration detention.

70. Plaintiffs do not seek release free of any supervision. ICE has a range of highly effective tools at its disposal to ensure that individuals report for court hearings and other appointments (once the pandemic subsides and it is safe to maintain large numbers of individuals in custody). For example, ICE's conditional supervision program, called ISAP (Intensive Supervision Appearance Program), relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants.

**The Defendants' Failure to Adequately Protect Plaintiffs and Other
Civil Immigration Detainees at SCDOC from the COVID-19 Pandemic Violates Their
Constitutional Due Process Rights**

71. Defendants have an affirmative duty to provide conditions of reasonable health and safety for detention. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being”). As a result, Defendants must provide those in its custody with “food, clothing, shelter, medical care, and reasonable safety.” *Id.* at 200.

72. The United States Supreme Court has explicitly recognized that the risk of contracting a communicable disease may constitute such an “unsafe, life-threatening condition” that threatens “reasonable safety.” *Helling*, 509 U.S. at 33 (quoting *DeShaney*, 489 U.S. at 200). Accordingly, “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Id.*

73. Defendants' failure or inability to facilitate social distancing at SCDOC, to mix civil immigration detainee and general populate inmates at SCDOC, and to permit the continued transfer of detainees from other facilities to SCDOC violates Plaintiffs' due process rights. Given the ample and pervasive evidence supporting the need for social distancing to battle the COVID-19 pandemic, Defendants' failure to decrease (indeed, increase) the civil immigration detainee population at SCDOC and implement adequate distancing constitutes deliberate indifference to this critical safety concern. Defendants are aware of, have acknowledge, and have acted in reckless disregard for the serious risks that COVID-19 poses to Plaintiffs.

74. Stopping the transfer of civil immigration detainees to SCDOC, a significant reduction in the civil immigration detainee population of SCDOC, and sequestration of those remaining detainees from others are the only means to ensure compliance with Plaintiffs' due process rights.

75. Defendants have no legitimate or compelling interest in maintaining or increasing the civil immigration detainee population at SCDOC. ICE has a myriad of options—other than physical incarceration—to achieve its non-punitive purpose of ensuring Plaintiffs' attendance to immigration court proceedings and compliance with removal and other custodial orders.

Class Action and Representative Habeas Allegations

76. Plaintiffs bring this action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of themselves and a class of similarly situated individuals.

77. Plaintiffs seek to represent a class of all individuals held in civil immigration detention at SCDOC.

78. The proposed class satisfies all four prongs of Rule 23(a).

79. Rule 23(a)(1) is satisfied because the members of the proposed class are so numerous that joinder of all members is impracticable. Upon information and belief, there are

approximately 60 noncitizens currently detained at SCDOC. The numerosity requirement imposes only a “low threshold,” *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009), such that “a class size of forty or more will generally suffice in the First Circuit.” *Reid v. Donelan*, 297 F.R.D. at 189.

80. Joinder is also impracticable because class members are detained and largely unrepresented, limiting their ability to bring individual litigation.

81. The proposed class meets the commonality requirements of Rule 23(a)(2). Whether current conditions at SCDOC, including the failure to implement social distancing in the face of the COVID-19 pandemic, comply with the Fifth Amendment presents common questions of fact and law.

82. The proposed class meets the typicality requirements of Rule 23(a)(3) because the representative Plaintiffs’ claims are typical of the claims of their class. Plaintiffs are currently civil immigration detainees at SCDOC, who are exposed to the current conditions of detention, and subject to infection, illness, and death from COVID-19, were the coronavirus that causes it to spread.

83. The proposed class meets the adequacy requirements of Rule 23(a)(4). Plaintiffs have the requisite personal interest in the outcome of this action and have no interests adverse to the interests of the proposed class.

84. Additionally, the proposed class is represented by pro bono counsel from the American Civil Liberties Union of New Hampshire, American Civil Liberties Union, Nixon Peabody LLP, Whatley Kallas LLP, Hinckley Allen & Snyder LLP, and Shaheen and Gordon, PA. Plaintiffs’ counsel has extensive experience litigating class action lawsuits and other complex cases in federal court, including civil rights lawsuits and petitions for habeas corpus on behalf of detained immigrants.

85. The members of the class are readily ascertainable through Defendants' records.

86. Finally, the proposed class satisfies Rule 23(b)(2). Defendants have acted or refused to act on grounds generally applicable to the class by detaining class members without social distancing in the face of the COVID-19 pandemic. Thus, final injunctive and declaratory relief is appropriate for the class as a whole.

87. Alternatively, Plaintiff seek certification of the proposed class as a representative habeas class. *See United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974). Plaintiffs seek a writ of *habeas corpus* to remedy their and the class members' unconstitutional detention in life-threatening conditions at SCDOC.

CLAIM FOR RELIEF

Violation of Fifth Amendment Right to Due Process (Unlawful Punishment; Freedom from Cruel Treatment and Conditions of Confinement)

88. Plaintiffs reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

89. The Fifth Amendment requires the federal government to maintain conditions of reasonable health and safety for people in its custody. The government violates this requirement when it fails to provide for their basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety.

90. The federal government also violates the Fifth Amendment when it subjects anyone in its custody to cruel treatment, and when it subjects civil detainees to conditions of confinement that amount to punishment.

91. By detaining Plaintiffs at SCDOC during the global COVID-19 pandemic without implementing social distancing, Defendants are failing to ensure Plaintiffs' reasonable safety, exposing

them to a risk of infection from the virus that causes COVID-19—for which there is no vaccine, known treatment, or cure—and thus violating their rights under the Fifth Amendment.

92. Defendants continue to admit new ICE detainees to SCDOC, in reckless disregard of and deliberate indifference to the dangerous conditions there and the inability of SCDOC to provide minimal protection against COVID-19.

93. Alternatives are available that would preserve and protect both Plaintiffs' health and well-being and that of the broader community. Release either on personal recognizance or subject to monitoring or supervision would cause no burden on Defendants and would place Plaintiffs at substantially lower risk of contracting COVID-19, with all of its attendant threats to health and life.

94. Defendants are subjecting Plaintiffs to detention conditions that violate Plaintiffs' right to reasonable safety in government custody and, accordingly, Defendants' ongoing detention of Plaintiffs is in violation of the Due Process Clause of the Fifth Amendment.

PRAYER FOR RELIEF

Plaintiffs respectfully request this Court to:

A. Certify the Plaintiffs and all similarly situated civil immigration detainees held at SCDOC as a class and appoint named Plaintiffs as class representatives and the undersigned as class counsel;

B. Declare that conditions of confinement for all noncitizen civil detainees held at SCDOC are currently unconstitutional under the Due Process Clause of the Fifth Amendment because such conditions do not permit social distancing as necessary to minimize the risk of infection posed by the COVID-19 pandemic;

C. Issue a Writ of Habeas Corpus on behalf of the Plaintiffs and all putative class members and order their immediate release or placement in community-based alternatives to detention such as conditional release, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause;

D. Issue injunctive relief ordering the immediate release of Plaintiffs and all putative class members with appropriate precautionary measures such that the population of civil immigration detainees may be reduced to a level that permits adequate social distancing or, in the alternative, establish a process for reviewing bail applications for the Plaintiffs and all putative class members.

E. Immediately order Defendants to implement public health guidance and protocols designed to achieve social distancing and prevent the transmission of the coronavirus that causes COVID-19;

F. Prohibit the transfer of any additional civil immigration detainees to SCDOC until all public health protocols designed to prevent the transmission of COVID-19 have been implemented and only to levels that permit adequate social distancing;

G. Award Plaintiffs their costs and reasonable attorneys' fees in this action under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and

H. Grant such further relief as the Court deems just and appropriate.

Respectfully Submitted,

PETITIONERS/PLAINTIFFS

By and through their attorneys affiliated with the
American Civil Liberties Union of New Hampshire
Foundation and Nixon Peabody LLP,

/s/ Nathan P. Warecki

David A. Vicinanza (N.H. Bar No. 9403)

W. Scott O'Connell (N.H. Bar No. 9070)

W. Daniel Deane (N.H. Bar No. 18700)

Nathan P. Warecki (N.H. Bar No. 20503)

Michael E. Strauss (N.H. Bar No. 266717)

NIXON PEABODY LLP

900 Elm Street, 14th Floor

Manchester, NH 03101

(603) 628-4000

dvicinanzo@nixonpeabody.com

soconnell@nixonpeabody.com

ddeane@nixonpeabody.com

nwarecki@nixonpeabody.com

mstrauss@nixonpeabody.com

Marx Calderon (*pro hac vice* forthcoming)

Colin Missett (*pro hac vice* forthcoming)

NIXON PEABODY LLP

Exchange Place

53 State Street

Boston, MA 02109-2835

(617) 345-1000

mcalderson@nixonpeabody.com

cmissett@nixonpeabody.com

Ronald Abramson (N.H. Bar No. 9936)
Emily White (N.H. Bar No. 269110)
SHAHEEN & GORDON P.A.
180 Bridge Street
Manchester, NH 03104
(603) 792-8472
rabramson@shaheengordon.com
ewhite@shaheengordon.com

Henry C. Quillen (N.H. Bar No. 265420)
WHATLEY KALLAS LLP
159 Middle Street, Suite 2C
Portsmouth, NH 03801
(603) 294-1591
hquillen@whatleykallas.com

Gilles R. Bissonnette (N.H. Bar No. 265393)
Henry Klementowicz (N.H. Bar No. 21177)
AMERICAN CIVIL LIBERTIES UNION OF NEW
HAMPSHIRE
NEW HAMPSHIRE IMMIGRANTS' RIGHTS PROJECT
18 Low Avenue
Concord, NH 03301
(603) 333-2081
gilles@aclu-nh.org
henry@aclu-nh.org

Michael K.T. Tan (*pro hac vice* forthcoming)
Omar C. Jadwat (*pro hac vice* forthcoming)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600
mtan@aclu.org
ojadwat@aclu.org

David C. Fathi (*pro hac vice* forthcoming)*
Eunice H. Cho (*pro hac vice* forthcoming)*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
NATIONAL PRISON PROJECT
915 15th St. N.W., 7th Floor
Washington, DC 20005
(202) 548-6616

dfathi@aclu.org
echo@aclu.org

Laurel M. Gilbert (*pro hac vice* forthcoming)
HINCKLEY ALLEN & SNYDER LLP
28 State Street
Boston, MA 02109-1775
(617) 378-4160
lgilbert@hinckleyallen.com

John P. Newman (N.H. Bar No. 8820)
NEWMAN LAW OFFICE, PLLC
15 High Street
Manchester, NH 03101
(603) 935-5603
john@newmanlawnh.com

*Not admitted in D.C.; practice limited to federal courts

Date: April 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 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