UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

Petitioners-Plaintiffs,

v.

CHAD WOLF, Acting Secretary, Department of Homeland Security,

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

CHRISTOPHER BRACKETT, Superintendent of Strafford County Department of Corrections,

Respondents-Defendants.

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

PETITIONERS' CONSOLIDATED (I) OBJECTION TO RESPONDENTS' MOTION TO DISMISS PETITION FOR HABEAS CORPUS (DN 128), (II) REPLY TO RESPONDENTS' OBJECTION TO MOTION FOR CLASS CERTIFICATION (DN 129), AND (III) REPLY TO RESPONDENTS' OBJECTION TO MOTION FOR INJUNCTIVE RELIEF (DN 130)

Petitioners, on behalf of a class of similarly-situated civil immigration detainees held at the Strafford County Department of Corrections ("SCDOC"), file this consolidated (i) objection to the Federal Respondents' (hereinafter referred to as "Respondents") motion to dismiss the Amended Petition, *see* DN 128, (ii) reply to Respondents' objection to Petitioners' motion for class certification, *see* DN 129, and (iii) reply to Respondents' objection to Petitioners' motion for preliminary injunction, *see* DN 130. For the reasons set forth herein, the Court should deny Respondents' motion to dismiss because Petitioners have standing and have plausibly pleaded a due process claim which the Court has already determined is likely to (at least partially) succeed on the merits. The Court should also grant Petitioners' motion for a preliminary injunction because the requested injunction is necessary to alleviate the unreasonable risks that follow transfers of persons and detainees into SCDOC either without testing or from facilities with known COVID-19 cases. Finally, the Court should grant Petitioners' motion for class certification because class relief is warranted under Rule 23 of the Federal Rules of Civil Procedure.

ARGUMENT

I. PETITIONERS HAVE PLAUSIBLY STATED A HABEAS CLAIM.

A. Petitioners Have Standing.

Respondents' first argument appeals to the limited jurisdiction of this court imposed by Article III of the Constitution—specifically the requirement of standing. "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly… alleged facts demonstrating each element [for Article III standing]." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). In the context of Respondents' Rule 12(b)(6) motion, "the trial court… must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A plaintiff has standing if he or she "(1) suffered an injury fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be

redressed by a favorable judicial decision." *Id.* Respondents argue that Petitioners have failed to plead sufficient facts of either an injury or one that is "traceable" to them. They are wrong on both counts.

The first of these arguments—that Petitioners' fear of contracting the coronavirus is too speculative to constitute an injury-in-fact—miscasts the constitutional rights Petitioners seek to vindicate. The harm which Petitioners complain of in this lawsuit is not, as Respondents say, being or becoming seriously ill from COVID-19. Rather, the constitutional harm flows from "the risks created by Respondents' detention of Petitioners" within the context of this crisis. *Prieto Refunjol v. Adducci*, No. 2:20-CV-2099, 2020 WL 2487119, at *19 (S.D. Ohio May 14, 2020); *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993) (recognizing that the risk of contracting a communicable disease may constitute such an "unsafe, life-threatening condition" that threatens "reasonable safety"); *Hutto v. Finney*, 437 U.S. 678, 682-83, 687 (1978) (risk of exposing inmates to communicable diseases such as hepatitis and venereal disease violates the Eighth Amendment); *DeGidio v. Pung*, 920 F.2d 525, 526, 533 (8th Cir. 1990) (inadequate screening and control procedures in response to tuberculosis outbreak violated the Eighth Amendment); *Fofana v. Albence*, No. 20-10869, 2020 WL 1873307, at *8 (E.D. Mich. Apr. 15, 2020) ("The Constitution does not require that Petitioners be seriously ill from COVID-19, or that they await the introduction and spread of COVID-19 in their detention facility before they may assert their Fifth Amendment rights."). *Helling* and its progeny do not permit Respondents to duck this lawsuit simply because the risks Petitioners complain of have not yet manifested in the form of severe illness or death. *See* 509 U.S. at 33 ("It 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. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a

tragic event."). The risks themselves constitute the injury-in-fact granting Petitioners standing to bring this civil action.

The second argument made by Respondents—that Petitioners' fear of contracting COVID-19 is not "fairly traceable" to them because they neither created nor promoted the COVID-19 pandemic—is equally unpersuasive. Petitioners seek redress for the risk of contracting the coronavirus within a detention facility they are only in because Respondents put them there. Respondents essentially asks the Court to ignore their sole responsibility for custodial determinations and placements. Respondents also gloss over the many other tools available to Immigration and Customs Enforcement ("ICE") to ensure attendance at court hearings and compliance with removal orders—the only permissible purpose of civil immigration detention. *See, e.g.*, DN 5 at ¶¶ 70, 93. It smacks of absurdity that Respondents would publicly acknowledge the elevated risks within ICE detention facilities for contracting the coronavirus and purport to do something about it, *see id.* at ¶¶ 56-57, 59, 61, 66-67, yet argue that Petitioners have no standing to hold them accountable if they do not live up to their policies. *See Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *8 (D. Md. Apr. 3, 2020) (citing *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause)).

Although noticeably absent from Respondents' briefing, the *Savino* court resolved the standing question in favor of petitioners. *See Savino v. Souza*, __ F. Supp. 3d __, 2020 WL 1703844, at *4 (D. Mass. Apr. 8, 2020) ("*Savino I*"). There, making the very same argument made

by these Respondents, the government asserted that the petitioners lacked standing because the petitioners' fear of contracting the coronavirus were not traceable to respondents. *Id.* ("[C]rowding in and of itself does not cause COVID-19.") Dispensing with that argument, the *Savino I* Court observed that the Supreme Court has specifically held that "future injuries may support standing if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Id.* (citing *Dep't of Commerce*, __ U.S. __, 139 S. Ct. 2551, 2565 (2019)). From that premise, the *Savino* Court found standing because, as is relevant here, the civil immigration detainee petitioners were "confined in close quarters in defiance of the sound medical advice that all other segments of society now scrupulously observe" and the "risk of injury is traceable to the government's acts of confining the Detainees in close quarters." *Id.*; *see also Prieto Refunjol*, 2020 WL 2487119, at *18 ("[A]ll individuals in detention are at heightened risk of infection. The level of risk that is constitutionally acceptable will change depending on whether an individual is in a high-risk group. But that is a merits question, not a standing one.").

Respondents' standing argument has only weakened now that the coronavirus has been found in SCDOC. Following the Court's May 14, 2020 order and as of the date of this filing, three people at the facility (one employee and two civil immigration detainees) have tested positive for COVID-19. DN 156 at 7-8. At least one of these infected people was transferred "from a facility with known cases of COVID-19 [and] was not tested prior to being transferred to SCDOC." DN 156 at 7; *see Savino v. Souza*, No. CV-20-10617-WGY, 2020 WL 2404923, at *11 (D. Mass. May 12, 2020) (*Savino II*) (ordering testing for all civil immigration detainees who are transferred out of the Bristol County House of Correction to other ICE detention facilities). The risk of contracting COVID-19 while in civil immigration detention at SCDOC is undoubtedly greater now. In this preliminary posture, Petitioners have standing to assert their due process claim.

B. The Habeas Remedy Is Available to Petitioners Because They Seek Release from Physical Custody, Not Merely a Change of Conditions at SCDOC.

Respondents next advocate for dismissal on the basis that the Amended Petition is an impermissible vehicle for habeas. Respondents rely upon a recent decision from the District of Colorado where the habeas petition sought remedy for respondents' "failure to protect [petitioner] from the virus that causes COVID-19." *Aguayo v. Martinez*, No. 120CV00825DDDKMT, 2020 WL 2395638, at *2 (D. Colo. May 12, 2020) (citing *Basri v. Barr*, No. 1:20-cv-00940-DDD, slip op. at 3-11 (D. Colo. May 11, 2020)). The *Aguayo* Court relied upon Tenth Circuit precedent to dismiss petitioners' habeas claim. The law of the Tenth Circuit holds that "a prisoner who challenges the fact or duration of confinement and *seeks immediate release or a shortened period of confinement*, must do so through an application for habeas corpus [and] … a prisoner who challenges the conditions of his confinement must do so through a civil rights action." *Aguayo*, 2020 WL 2395638, at *2 (quoting *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012)) (emphasis added). *Aguayo* is immaterial to this case for at least two reasons. First, habeas is the proper vehicle for challenging what is essentially overcrowding at SCDOC given the specific guidelines promulgated by public health officials and ICE in the face of the COVID-19 pandemic. *See Savino II*, 2020 WL 2404923, at *3 n. 5. Second, the Amended Petition clearly seeks release as a remedy.

Respondents argue that habeas is an improper vehicle for detainees to challenge their conditions of confinement. But the decisions they cite—including the Supreme Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475 and the Third Circuit's decision in *Leamer v. Fauver*, 288 F.3d 532 (3d Cir. 2002)—do not preclude habeas as a means to challenge conditions of confinement. Instead, *Preiser* and *Leamer* address only whether prisoners could use 42 U.S.C. § 1983 to challenge the issues that traditionally lie at the "heart" of habeas: "the fact or length of

confinement." *See Preiser*, 411 U.S. at 500; *Leamer*, 288 F.3d at 540-41. In fact, *Preiser* expressly noted that, "[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal." *Preiser*, 411 U.S. at 499; *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862-63 (2017) (leaving open "the question whether [prisoners] might be able to challenge their conditions of confinement."); *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) ("we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement").

The other out-of-circuit cases to which Respondents cite are similarly unavailing. *See* DN 128-1 at 10. Notably, the petitioners in those cases were not civil immigration detainees; rather, they were persons either indicted for or convicted of criminal conduct who sought relief from prison conditions rather than release from confinement as their remedy. And, in several cases not cited by Respondents, courts have held that federal prisoners may lodge "a habeas attack on the conditions of confinement" under 42 U.S.C. § 2241. *See, e.g., Ali v. Gibson*, 572 F.2d 971, 975 n.8 (3d Cir. 1978), *superseded by statute on other grounds as stated in Callwood v. Enos*, 230 F.3d 627, 633 (3d Cir. 2000) ("[A] habeas attack on the conditions of confinement" can be brought "in extreme cases."); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242 n¶ (3d Cir. 2005) (rejecting proposition that a prisoner's challenge to conditions of confinement must fall outside of habeas); *see also Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (concluding that Section 2241 is available to challenge a federal detainee's conditions of confinement); *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001) (same); *Miller v. United States*, 564 F.2d 103, 106 (1st Cir. 1977) (same). Indeed, as Judge Posner remarked in *Robinson v. Sherrod* (one of the cases to which Respondents' cite), while the habeas remedy may not be available to "a federal inmate …

complaining about lack of medical care," it is available if the conditions have "even an indirect effect on the duration of punishment." 631 F.3d 839, 840 (7th Cir. 2011) (citing *Bell v. Wolfish*, 441 U.S. 520, 526 n. 6 (1979)). Thus, this case presents a habeas claim left open to Petitioners.

Despite Respondents' argument to the contrary, the First Circuit has never held that civil immigration detainees are prohibited from filing a habeas petition to challenge confinement conditions. *See Savino II*, 2020 WL 2404923, at *3 n. 5 ("The Court need not decide whether this is indeed the law in the First Circuit, and if so whether that rule applies to detainees in federal custody"). Respondents cite to *Kane v. Winn*, 319 F. Supp. 2d 162 (D. Mass. 2004), an opinion authored by Judge Young prior to *Savino*, for the proposition that "[c]ourts within this Circuit agree" with *Aguayo*'s logic. Not so. In fact, Judge Young explicitly cited *Kane* in the *Savino* case, yet observed that habeas relief may be available to federal detainees (as opposed to state prisoners) who seek judicial intervention to remedy conditions within a correctional facility through means other than release. *See* 2020 WL 2404923, at *3 n. 5; *compare Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873-74 (1st Cir. 2010) (prisoners' challenge to conditions of state confinement must be brought under 42 U.S.C. § 1983, not habeas), *with United States v. DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006) ("If the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available."), *and Brennan v. Cunningham*, 813 F.2d 1, 4 (1st Cir. 1987).

In the end, Respondents' argument is academic because the Amended Petition presents a tried-and-true habeas claim seeking release in light of these extraordinary circumstances. DN 5 at 28-29. Similar arguments made before many different courts across the country have led to the

release of hundreds[1] of civil immigration detainees under 28 U.S.C. § 2241 from ICE detention facilities. *See, e.g.*, *Ruderman v. Kolitwenzew*, No. 20-CV-2082, 2020 WL 2449758, at *8 (C.D. Ill. May 12, 2020); *Martinez-Brooks v. Carvajal*, No. 3:20-cv-00569 (MPS), 2020 WL 2405350, at *22 (D. Conn. May 12, 2020); *Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 2059848, at *2-3 (N.D. Cal. Apr. 29, 2020); *Vazquez Barrera v. Wolf*, No. 4:20-cv-1241, 2020 WL 1904497, at *3-4 (S.D. Tex. Apr. 17, 2020); *Faihat v. ICE*, No. EDCV191546JBGSHKX, 2020 WL 1932570, at *24 (C.D. Cal. Apr. 20, 2020); *Bent v. Barr*, No. 19-cv-06123, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020); *Ortuno v. Jennings*, No. 20-CV-02064-MMC, 2020 WL 1701724, at *2 (N.D. Cal. Apr. 8, 2020); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *2-3 (E.D. Mich. Apr. 5, 2020) *Coreas v. Bounds*, No. TDC-20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020); *Castillo v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *1 (C.D. Cal. Mar. 27, 2020).

Petitioners' requests for alternative relief—which Respondents apparently interpret as seeking the Court's assistance in "continually oversee[ing] the operations of prisons" by and through habeas—are not fatal to the habeas remedy. DN 128-1 at 16. Petitioners have invoked the Court's inherent equitable powers, as well as its federal question, original, and declaratory judgment jurisdiction, for those purposes. DN 5 ¶ 17. Indeed, as Judge Young recently observed in *Savino*, "a cause of action for equitable relief relating to [petitioners'] conditions of confinement is available wholly part from habeas." *Id.* (citing *Brown v. Plata*, 563 U.S. 493, 538 (2011) ("Once invoked, the scope of a district court's equitable powers ... is broad, for breadth and flexibility are

[1] As of May 21, 2020, the ICE website reports that 372 civil immigration detainees have been released from physical custody as a result of court orders and for reasons relating to the COVID-19 pandemic. In a display of petulance, ICE then stokes unwarranted fear in the public by falsely claiming that the released detainees "do not necessarily undergo the same public safety, flight risk, and/or medical analysis" as ICE's own discretionary releases and "have extensive criminal histories and pose a potential public safety threat." Immigration and Customs Enforcement, *ICE Guidance on COVID-19*, https://www.ice.gov/coronavirus (last visited May 26, 2020) (click on "Judicial Releases" tab).

inherent in equitable remedies.")). Thus, the Court does not need to even consider Respondents' invitation for dismissal to find a plausible claim for habeas relief. *See Savino II*, 2020 WL 2404923, at *3 (sidestepping the habeas question because petitioners filed "a habeas petition… and a complaint seeking declaratory and injunctive relief").

C. The Court Has Already Found That Respondents Were Deliberately Indifferent or Objectively Unreasonable to Petitioners Health and Safety

Respondents' next argument is that the Court should dismiss the Amended Petition pursuant to Rule 12(b)(6) because Petitioners have not plausibly stated a Fifth Amendment due process claim for imminent risk of contracting COVID-19. Respondents do not cite a single paragraph or exhibit of the Amended Petition in support of their motion—which is odd given the Rule 12(b)(6) paradigm. Rather, Respondents' fallback position appears to be that, under either the deliberate indifference or objectively unreasonable test[2], they have done at least something to "prevent and contain any potential outbreak" and that is all that due process requires. DN 128-1 at 19. But Respondents' argument is unavailing. First, due to the procedural posture of their motion, it is unclear what uncited "proactive measures" Respondents believe have discharged their constitutional obligations. Second, the Court has already adjudged the conditions of confinement at SCDOC to be constitutionally deficient and has determined that SCDOC's "nascent" efforts to combat the spread of COVID-19 to be insufficient. *See* DN 123 at 55-56. Either ground is cause for the Court to deny Respondents' motion.

The oft-stated rule, applicable as much to habeas petitions as to other civil actions, is that "to survive a motion under Rule 12(b)(6), the complaint must state sufficient facts to support a plausible claim for relief." *Griffin v. Warden, New Hampshire State Prison*, No. 16-CV-382-JD,

[2] For the reasons set forth in Petitioners' notice of supplemental authority, DN 44, and the Court's own May 14, 2020 order, DN 123, the objectively unreasonable test applies to Petitioners' claims.

2017 WL 3822021, at *1 (D.N.H. Aug. 30, 2017). The corollary to this rule is that well-pleaded facts are accepted as true, and reasonable inferences must be resolved in Petitioners' favor. *See id.*; *Carvell v. Reilly*, No. 14-CV-5-PB, 2015 WL 631995, at *2 (D.N.H. Feb. 13, 2015). To be sure, the Court may take notice of other materials either in the public record or susceptible to judicial notice if they are raised. *See Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008). But Respondents do not bolster their motion with references to any section of the Amended Petition, and their citations to the record consist solely of two declarations which are dated April 25, 2020, *see* DN 30 and 31. Assuming without conceding that these declarations are even properly before the Court in the context of Respondents' Rule 12(b)(6) motion, it is unclear what "measures to prevent and contain any potential outbreak … such as cohorting and modified lockdowns, social distancing, increased sanitation measures" Respondents have taken to satisfy their constitutional burden. DN 128-1 at 13. For example, although SCDOC's administrators may have taken the threat of COVID-19 seriously, those efforts have, *see infra*, fallen demonstrably short of reasonableness at least in the case of medically vulnerable detainees. In addition, according to the materials cited by Respondents, ICE itself has done little more than circulate policies to SCDOC in response to the COVID-19 pandemic. *Compare* DN 30 (Declaration of Assistant Field Office Director Alan Greenbaum), *with* DN 31 (Declaration of Superintendent Christopher Bracket). On their face, therefore, the materials to which Respondents cite do not render Petitioners' claims implausible. In fact, based on this record, it is likely there is at least a genuine issue of material fact which would preclude Respondents from succeeding at summary judgment.

In any event, Respondents' argument for dismissal is stale given the Court's May 14, 2020 order and continued developments at SCDOC since April 25, 2020. *See* DN 123 and 156. In the case of high-risk individuals at SCDOC, the Court has unambiguously determined that Petitioners

have a substantial constitutional claim in light of their confinement conditions. DN 123 at 37, 44-45. In arriving at that conclusion, the Court observed:

> To be sure, the record demonstrates that respondents have taken measures to reduce the risk of COVD-19's introduction and transmission at the SCDOC, steps that this court commended in its May 1 ruling from the bench and in written orders in this case. However, these measures still do not allow vulnerable inmates to socially distance and 'do nothing to alleviate the specific, serious, and unmet medical needs of' high risk detainees.

Id. at 42 (emphasis in original). Respondents did not and have not supplemented their motion with any arguments or materials to bolster it in light of the Court's May 14, 2020 order. Because the issue of constitutional liability has already been decided against Respondents on a preliminary basis with respect to high-risk detainees, the blanket motion to dismiss should be denied.

With respect to detainees who are not high-risk due to medical conditions, Petitioners have at least a plausible claim of either deliberate indifference or objective unreasonableness. As the Court concluded on May 14, 2020 (more than two weeks after the declarations which Respondents cite to) "there are many vectors and paths through which COVID-19 could be introduced and spread quickly through the facility." *Id.* at 52. In the absence of COVID-19 within the facility, the Court was inclined to give Respondents' until May 29, 2020 to implement its "nascent" efforts to mitigate the risk of infection and "consider… additional protective measures." *Id.* at 55-56. Since then, conditions for civil immigration detainees at SCDOC have deteriorated. *See, e.g.*, DN 156. The civil immigration detainee population remains between 60 and 70 because detainees who have been released or transferred out to other ICE detention facilities have been replaced with either newly detained persons or transferees from other ICE facilities. Transferees continue to arrive at SCDOC from facilities where there are known cases of COVID-19 and/or without widespread testing. Two detainees and one staff person at SCDOC have tested positive for coronavirus. Respondents cannot or will not test the remaining detainees (although they appear to have infested

significant resources to test staff). Untrained incarcerated persons clean the facility. Staff continues to cycle in and out of multiple housing units within SCDOC. And, finally, the mitigation strategy employed by SCDOC has reached its effective limits because both negative pressure cells are occupied and quarantine housing is near capacity (at least for single occupancy). In many ways, the situation at SCDOC remains substantially similar to the situation as of April 4, 2020, when, in the absence of testing, Superintendent Brackett stated that "[a]nybody who comes in we don't know about, there's always a concern [for the transmission of COVID-19). *See* DN 5 ¶ 56. If the constitutionality of Petitioners' confinement conditions was a "close call" just two weeks ago, recent developments have only escalated the risks. *Id.* at 55; *see e.g. Zepeda Rivas*, 2020 WL 2059848, at *1; *Sallaj v. U.S. Immigration & Customs Enf't*, No. CV 20-167-JJM-LDA, 2020 WL 1975819, at *3 (D.R.I. Apr. 24, 2020) ("Although the Respondents have asserted that the Wyatt has taken measures to mitigate the risk of Covid-19 spreading, its ability to do so is diminishing. There are now six confirmed positive cases at the Wyatt."); *Savino I*, 2020 WL 1703844, at *7. Petitioners have plausibly stated a claim, and Respondents' motion to dismiss must be denied.

As part of their argument, Respondents advocate for a presumption against deliberate indifference in the context of Petitioners' due process claim. They miscast the due process rights Petitioners seek to vindicate to a constitutional "guarantee [for] a clean bill of health," and they liken the remedy of release (so as to permit social distancing within SCDOC) to a "difference of medical opinion." DN at 14-15. In doing so, Respondents attempt to invoke an evidentiary presumption against deliberate indifference. DN at 13 (citing *Pearson v. Prison Health Service*, 850 F.3d 526, 535 (3d Cir. 2017) and *Moore v. Luffey*, 767 F. App'x 335, 341 (3d Cir. 2019)). There are at least three issues with this argument—all of which render the presumption inapplicable. First, the adequacy of care cases to which Respondents cite are not analogous to

Petitioners' health and safety and punitive conditions claims.[3] *Pearson*, for instance, addressed whether expert testimony was necessary at trial "to establish deliberate indifference … where, as laymen, the jury would not be … [able] to determine that the particular treatment or diagnosis fell below a professional standard of care." 850 F.3d at 535. Here, Petitioners do not state the constitutional equivalent of a medical malpractice case. Second, the constitutional rights at issue here are not so meandering as a claim based upon a botched surgical procedure. Petitioners' claims revolve the relatively straightforward issue as to whether Respondents have heeded the government's own well-known and ubiquitous recommendations for combatting the spread of COVID-19. Third, unlike the battle of the experts contemplated at trial in *Pearson*, there is little disagreement here as to either the severity of the "tinderbox scenario" confronting Respondents or the steps which must be taken to mitigate the risk of contracting the novel coronavirus. *Compare* DN ¶¶ 56-57, 59, 61, 66-67, with DN 7-2 ("Shriro Decl.) ¶¶ 24-41. At their core, Petitioners' due process claims are based upon Respondents' acknowledgement, on the one hand, of the risks of contracting the coronavirus encountered by ***all*** civil immigration detainees at SCDOC yet, on the other hand, failure to follow their own policies. The presumption Respondents appeal to is not an elixir which will cure its constitutional failings, particularly at the pleadings stage.

D. Petitioners' Confinement is Punitive in Light of the Risks of Contracting COVID-19 While Detained at SCDOC

Respondents' final argument with respect to their Rule 12(b)(6) motion is that Petitioners fail to plead a due process claim based upon punitive conditions of their civil confinement.

[3] It bears repeating that the constitutional harm Petitioners complain of revolves around the imminent risk of contracting the coronavirus—a risk created by Respondents' decision to detain them. It may be that some or all of the Petitioners and class members will have adequacy of care claims now that COVID-19 has been detected in the facility. For example, given SCDOC's limited medical resources and facilities, one can easily imagine a disagreement between a detainee and Respondents as to whether the detainee should be hospitalized. In that context, though only at the merits phase, the presumption Respondents promote may have some applicability. But, here, the presumption does not apply and is merely a red hearing.

Respondents are wrong. Petitioners have adequately pled—and, indeed, have subsequently demonstrated with evidence at the May 1, 2020 hearing—that the conditions of their confinement are punitive.

Civil detainees who challenge the putative conditions of their confinement are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)) (stating, in the context of involuntary civil commitment, that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause" and "that right is not extinguished by lawful confinement")). These protections are at least as robust as those of the Eighth Amendment because, "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine [civil detainees]—who may not be punished at all—in unsafe conditions." *Id.*; *see also Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (pretrial detainees "retain at least those constitutional rights that … are enjoyed by convicted prisoners"); DN 123 at 28 (citing *Youngberg*).

Accordingly, individuals who have been civilly detained "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 321-22; *see also Davis v. Rennie*, 264 F.3d 86, 99 (1st Cir. 2001) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. Davis was in the state's custody because of mental illness, not culpable conduct, and the trial court's decision to reject the 'shocks the conscience' standard is consistent with this distinction."). Restrictive conditions can be presumptively punitive where they are "employed to achieve objectives that could be accomplished in so many alternative and less harsh

methods." *Jones v. Blanas*, 393 F.3d 918, 934 (9th Cir. 2004) (citing *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1484 (9th Cir. 1993)); *see also Fraihat v. United States Immigration & Customs Enf't*, No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932570, at *25 (C.D. Cal. Apr. 20, 2020).

During a pandemic such as this, it is punitive for Respondents to fail to create an environment where civil immigration detainees—who are comingled at SCDOC with criminal detainees for 22 hours per day in either barracks-style housing or in 13-by-7-foot cells—can engage in social distancing and otherwise avoid their risk of infection amid the COVID-19 pandemic. As this Court correctly explained earlier this month:

> The facility is not completely isolated from outside sources of infection, some inmates may choose to disregard protective measures, those who want to distance themselves cannot due to the size and layout of cells, and alcohol-based hand-sanitizer is not available due to the possibility of intentional ingestion and misuse. It is undisputed that it is virtually impossible under the current conditions for inmates to practice social distancing.

DN 123 at 22. Further demonstrating the punitive nature of the detention, as noted *supra* at page 12, Respondents have failed to implement effective measures to mitigate against the risk of COVID-19 despite having actual knowledge of these conditions and the necessary remedy. Though objective unreasonableness should be the standard in this case post-*Kingsley*, even if this Court concludes that the standard here is a subjective one, these allegations are more than sufficient at the pleadings stage. *See Leite v. Bergeron*, 911 F.3d 47, 52 (1st Cir. 2018) (To show the defendant had a culpable state of mind, the plaintiff "must provide evidence that the defendant had actual knowledge of impending harm, easily preventable, and yet failed to take the steps that would have easily prevented that harm."). Simply put, as properly alleged, Respondents knew about these conditions and have failed to act. *See* DN 5 ¶¶ 9, 73, 92 ("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[d], and have acted in reckless disregard for the serious risks that COVID-19 poses to Plaintiffs.").

In the face of these known infirmities, Respondents have, in most instances, steadfastly resisted alternatives to detention and opposed voluntary release or bail for those detainees who are medically vulnerable. While the legitimate purpose advanced by immigration detention is to secure attendance at hearings and to ensure the safety of the community, *see Zadvydas v. Davis*, 533 U.S. 678, 699 (2001), [4] this purpose can be achieved through means that are far less harsh than detention. For example, as explained in the Amended Petition, Respondents can voluntarily release on conditions those detainees who are neither a flight risk nor a danger. *See* DN 5 ¶ 70 ("ICE has a range of highly effective tools at its disposal to ensure that individuals report for court hearings and other appointments," including "electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants"). Respondents can also issue summonses to those they seek to remove without the need for detention.[5] Respondents say nothing of these other tools in their toolbox to prevent absconding or protecting the community. Indeed, as one court has explained:

> However, attendance at hearings cannot be secured reliably when the detainee has, is at risk of having, or is at risk of infecting court staff with a deadly infectious disease with no known cure. Participation in immigration proceedings is not possible for those who are sick or dying, and is impossible for those who are dead. Another purpose of detention, public safety, is not advanced by delay. Plaintiffs establish that public safety as a whole is seriously diminished by facility outbreaks, which further tax community health resources.

[4] Respondents claim that the purpose of detention is to facilitate removal, but not all of the civil immigration detainees at SCDOC have final orders of removal.

[5] Nonetheless, and despite the dangers posed to detainees in the midst of this pandemic, Respondents have elected to detain immigrants—like Waldemar Kaminski—who pose no danger or risk of flight and who could just as easily have been issued a summons without being abruptly arrested and taken away from their families.

> As a result, Defendants' inactions are likely "arbitrary or purposeless," and are excessive given the nature and purpose civil detention. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

See Fraihat, 2020 WL 1932570, at *26 (some citations omitted); *see also Castillo*, 2020 WL 1502864, at *5 (citing *Youngberg*) ("The risk that Petitioners, here, will flee, given the current global pandemic, is very low, and reasonable conditions can be fashioned to ensure their future appearance at deportation proceedings …. Petitioners are not criminal detainees, they are civil detainees entitled to more considerate treatment than criminal detainees. Civil detainees must be protected by the Government. Petitioners have not been protected. They are not kept at least 6 feet apart from others at all times. They have been put into a situation where they are forced to touch surfaces touched by other detainees, such as with common sinks, toilets and showers."). The same is true in this case as adequately alleged in the Amended Petition.

Further, developments in this case have proved the existence of viable and less harsh alternatives to confinement that will accomplish the purpose of detention. Since the filing of this lawsuit, the Court has released eight medically vulnerable detainees on conditions following 13 bail hearings, and Respondents have voluntarily released approximately 11 other detainees. Respondents have also yet to offer a non-punitive justification for their failure to meaningfully track and identify those civil immigration detainees at SCDOC who are medically vulnerable. This failure has occurred despite the April 4, 2020 ERO Directive stating that Field Office Directors should identify high-risk cases and review them "to determine whether continued detention remains appropriate in light of the COVID-19 pandemic." *See also Fraihat*, 2020 WL 1932570, at *26 ("Defendants only weakly argue a legitimate, non-punitive justification for their month-long failure to meaningfully track medical vulnerabilities and to issue more than proposals."). Petitioner continue to do this work for Respondents in the context of this litigation, *see* DN 123 at, 40-41, and it seems apparent that Respondents would not have—despite the April 4, 2020 ERO

directive—released these approximately 19 detainees but for this lawsuit and this Court's intervention.[6]

For all of these reasons, Respondents' Rule 12(b)(6) motion must be denied in its entirety.

II. THE REQUESTED PRELIMINARY INJUNCTION MUST ISSUE TO PREVENT IRREPARABLE HARM TO PETITIONERS AND CLASS MEMBERS WHO HAVE BEEN AND WILL CONTINUE TO BE EXPOSED TO COVID-19.

As recent events have proven, ICE's continual transfers of new detainees to SCDOC have exposed Petitioners to COVID-19. This exposure violates Petitioners' due process rights because it creates an unacceptably high risk of contracting a potentially deadly disease. While prohibiting new transfers to SCDOC is a serious remedy, it is required under the circumstances because "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown*, 563 U.S. at 511. This Court's equitable power to protect detainees from COVID-19 is "is broad, for breadth and flexibility are inherent in equitable remedies." *Hutto*, 437 U.S. at 687 n.9 (1978) (internal quotation marks omitted). Even in the context of prison litigation, a district court may limit the number of prisoners in a prison system, though doing so will necessarily require the prison system to release convicted prisoners, not admit new prisoners, or both. *See Brown*, 563 U.S. at 530–38.

[6] It appears that the protective actions taken by comparable prison and jail administrators with respect to criminal detainees have been more favorable than the actions taken by Respondents. For example, the federal Bureau of Prisons ("BOP") has issued a more decisive and urgent call to action. *See* Memorandum from Att'y Gen. William Bar to Director of BOP (April 3, 2020), https://www.bop.gov/coronavirus/docs/ bop_memo_home_confinement_april3.pdf. The Attorney General directed BOP to prioritize the use of home confinement, noting "[w]e have to move with dispatch ... to move vulnerable inmates out of these institutions." *Id.* at 1. The Memorandum commands the Director of BOP to "IMMEDIATELY MAXIMIZE" appropriate transfers to home confinement, and goes so far as to authorize transfer to home confinement where electronic monitoring is not available. *Id*. at 1-2. In contrast, the ERO Directive arguably fails to communicate the same sense of urgency. *See also Fraihat*, 2020 WL 1932570, at *25 ("the Docket Review Guidelines ask FODs to 'please' make individualized determinations as to release, and arguably fails to communicate the same sense of urgency or concern"). Though there is a debate about how effective this BOP policy has become, about 3,050 federal criminal inmates have been moved to home confinement as of May 21, 2020. *See* Ian MacDougall, *Bill Barr Promised to Release Prisoners Threatened by Coronavirus—Even as the Feds Secretly Made it Harder for Them to Get Out*, Propublica.org (May 26, 2020), https://www.propublica.org/article/bill-barr-promised-to-release-prisoners-threatened-by-coronavirus-even-as-the-feds-secretly-made-it-harder-for-them-to-get-out.

Because COVID-19 has entered SCDOC—and will presumably continue to enter SCDOC through new detainee transfers—it is well within the Court's power to enjoin those transfers until Respondents can implement proper social distancing and hygiene practices. "In fashioning a remedy, the District Court ha[s] ample authority to go beyond earlier orders and to address each element contributing to [a constitutional] violation." *Hutto*, 437 U.S. at 687. Among those elements is the way the virus can enter SCDOC: through detainee transfers, or through staff and visitors. Visitation has been severely limited, and there is no way to run a jail without staff, but the Court can and should eliminate the danger to Petitioners from detainee transfers. Exposing Petitioners to the risk of contracting COVID-19 is an unconstitutional, irreparable harm, and Respondents have not shown that their need to transfer new detainees to SCDOC is so important that it justifies a dangerous violation of the Constitution.

A. Petitioners Are Likely to Succeed on Their Claim that Confinement Under Conditions Inconsistent with Social Distancing Guidelines is Unconstitutional.

It is well settled that "[t]he Eighth Amendment protects an inmate from being held in conditions that cause both current and future harm." DN 123 at 29–30 (citing *Helling*, 509 U.S. 25 (1993)). "The Constitution offers a remedy even if an inmate does not allege 'that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.'" *Id.* (quoting *Helling*). COVID-19 is more than a "possible infection"; it has raced through jails and prisons, *id.* at 9–13, and SCDOC has reported two infected detainees, *see* DN 159.

Despite the binding precedent of *Helling*, Respondents argue that the risk of an outbreak of COVID-19 cannot violate the Constitution, at least when there are no reported cases at a facility. *See* DN 130-1 at 23. In support, they cite two outlier cases that have denied constitutional claims

arising from facilities free of COVID-19. *Id.* (citing *Dawson v. Asher*, 2020 WL 1704324 (W.D. Wash. Apr. 8, 2020); *Sacal-Micha v. Longoria*, 2020 WL 1518861 (S.D. Tex. Mar. 27, 2020)). This Court, however, has taken the opposite view, at least with respect to high-risk detainees. *See* DN 123 at 36–37; *see also Bent v. Barr*, 2020 WL 1812850, at *3 (collecting cases rejecting arguments against standing of detainees in facilities without a confirmed case of COVID-19). In any event, it is no longer true that there are no cases of COVID-19 at SCDOC. Events have quickly proven correct this Court's prediction that "it is likely only a matter of time before the jail sees its first case." *See* DN 123 at 1. When a facility already has COVID-19 inside its walls, courts have almost always found the conditions of confinement unconstitutional, *e.g.*, *Prieto Refunjo*, 2020 WL 2487119, at *18; *Carranza v. Reams*, No. 20-cv-00977-PAB, 2020 WL 2320174, at *10 (D. Colo. May 11, 2020); *Sallaj*, 2020 WL 1975819, at *3; *Basank v. Decker*, No. 20-cv-2518 (AT), 2020 WL 1481503, at *3–4 (S.D.N.Y. Mar. 26, 2020), and even for detainees without the most prominent risk factors for complications from COVID-19, *e.g.*, *Savino I*, 2020 WL 1703844, at *8–10 (ordering bail hearings for all detainees, regardless of underlying medical conditions); *Savino II*, 2020 WL 2404923, at *7–10 (finding a likelihood of success on the detainees' due process claim); *Zepeda Rivas*, 2020 WL 2059848, at *2–3 (finding an "exceedingly strong" likelihood of success on the merits, and ordering bail hearings regardless of underlying medical conditions, even without evidence of COVID-19 in the facility at issue).

B. The Petitioners Have Demonstrated Irreparable Harm.

The government argues that "it is speculative at best to assume that a ban on the transfer of additional individuals to SCDOC will spare Petitioners from contracting the virus." *See* DN 130 at 24. Of course, Petitioners are not asking for a constitutional guarantee that they will not contract COVID-19. *See supra*. But they are entitled to an assurance that Respondents will take the necessary steps to ensure their safety. *See* DN 123 at 27–28 (discussing the government's

obligation to ensure the safety of detainees). The federal government itself (through the Centers for Disease Control and Prevention) has acknowledged that "'transfer of incarcerated/detained persons between facilities and systems' and 'admitting new entrants' [are] examples of 'many opportunities for COVID-19 to be introduced into a correctional or detention facility.'" *Savino II*, 2020 WL 2404923, at *6 (quoting CDC, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities at 2 (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf). In at least two facilities, ICE voluntarily ceased incoming transfers due to COVID-19, and may have relied on that fact to argue that that the government was not deliberately indifferent to the health and safety of detainees. *See Coreas*, 2020 WL 16634133, at *11. It is far from speculative to believe that COVID-19 will enter a jail through an infected detainee; rather, it is common sense.

That common sense was borne out just over one week ago, when SCDOC's first detainee who tested positive for COVID-19 was transferred to the facility on May 14, 2020 from the Bristol County House of Correction—a jail with one confirmed case of an immigration detainee having COVID-19[7] and eight confirmed cases of state jail detainees having COVID-19.[8] As to SCDOC's second confirmed COVID-19 case, that detainee—who has diabetes and is medically vulnerable—also arrived at the facility on May 14, 2020 following an arrest by the Torrington, Connecticut police department. Before his test results were obtained, he could have exposed five other SCDOC detainees, who are now in quarantine themselves. With a disease that spreads as quickly as COVID-19, it is a short jump from "speculative" to "definitive." That jump has been made at SCDOC. Continuing to allow new detainees to enter the facility creates an ongoing risk that this

[7] Immigration and Customs Enforcement, *ICE Guidance on COVID-19*, https://www.ice.gov/coronavirus (last visited May 26, 2020) (click on "Confirmed Cases" tab).
[8] Mary Serreze, *Eight Bristol County Inmates Test Positive for COVID-19*, WBSM.com (May 13, 2020), https://wbsm.com/eight-bristol-county-inmates-test-positive-for-covid-19/.

will happen again.[9] *Zepeda Rivas*, 2020 WL 2059848, at *3 ("[T]he plaintiffs have demonstrated a strong likelihood of irreparable harm to the class. Although ICE notes that it has discovered no cases of Covid-19 at the two facilities, this is not especially comforting given that only two detainees have been tested. Moreover, people are regularly being transported from facilities with COVID-19 cases to Mesa Verde or Yuba County.") (footnotes omitted).

Even for detainees without risk factors, the consequences of infection can be dire, as the Court recently noted: "A study from the CDC showed that even in patients between ages 19-64 with no underlying health conditions, the total hospitalization rate was 8-8.7%. In a different CDC study of hospitalized COVID-19 patients, 26% had no high-risk factors—of that subpopulation, 23% received ICU care and 5% died." DN 123 at 50 (footnotes omitted). To put it more bluntly, COVID-19 hospitalizes and kills otherwise healthy people in substantial numbers. It is not speculative for a detainee to fear irreparable harm in an environment where social distancing protocols cannot be followed.

C. Prohibiting the Transfer of New Detainees is in the Public Interest.

For the "public interest" prong of their analysis, Respondents rely on "the public interest in enforcement of United States' immigration laws." DN 130-1 at 25. An interest in enforcing the law, however, cannot justify a constitutional violation. As the Supreme Court explained,

> If government fails to fulfill this obligation [to provide for prisoners' basic needs], the courts have a responsibility to remedy the resulting Eighth Amendment violation. *See Hutto v. Finney*, 437 U.S. 678, 687, n. 9, 98 S. Ct. 2565, 57 L.Ed.2d 522 (1978). … Courts nevertheless must not shrink from their obligation to "enforce the constitutional rights of all 'persons,' including prisoners." *Cruz v. Beto*, 405 U.S. 319, 321, 92 S. Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam). Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

[9] Even if new detainees are quarantined together for a period of time after arriving at SCDOC, they are still in danger of contracting COVID from each other.

Brown, 563 U.S. at 511. While there is a public interest in law enforcement, "'public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.'" *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013); *see Gonzalez v. Wright*, No. 09-cv-234-JD, 2009 WL 2982792, at *3 (D.N.H. Sept. 10, 2009) ("The public interest is well-served by assuring that citizens who are incarcerated are assured the right to challenge their criminal cases and convictions and to petition the courts for redress when their rights are violated. There is no public interest served by failing to provide a constitutionally adequate law library, or access to adequate legal materials and resources, to inmates."). The public also has an interest in COVID-19 not spreading throughout the community. *See* DN 123 at 1–2 ("And, once the virus is inside the jail, not only are detainees and inmates at great risk due to the nature of the virus and the close quarters of the jail, but the community of Dover could be at risk should large numbers of detainees or inmates need hospital care."); *Savino II*, 2020 WL 2404923, at *11 ("Were the government to loose an uncontainable viral outbreak from within its detention centers, it would betray its duty to the public, not just to the detainees.") (emphasis in original).

Even if serious impairment of Respondents' ability to enforce the immigration laws could somehow justify an ongoing constitutional violation, Respondents have not established that such an impairment exists. According to Respondents, prohibiting transfers to SCDOC "would have a significant impact on ICE's orderly operations, resulting in its inability to effectively enforce immigration law," and "would dramatically impact ICE detention facility operations and inter-governmental service agreements with state and local governments." DN 130-1 at 25–26. There is no evidence whatsoever for either assertion. Respondents have had nearly four weeks to marshal their evidence, and they have not produced even a declaration explaining why the closure of one facility to new detainees, out of the more than 200 facilities that ICE maintains, would have the

dire consequences they assert. Without any evidence, Respondents cannot show that sending new detainees to SCDOC, some of whom are likely to have COVID-19, is in the public interest.

Given the manifest public interest in preventing the spread of COVID-19 from facility to facility and into the community at large, it is not surprising that other courts have granted similar injunctions. The Central District of California, for example, had enjoined the government from transferring new detainees to the ICE facility at Adelanto. *Hernandez Roman v. Wolf*, No. 5:20-cv-00768, 2020 WL 2404923, at *11. 1 (C.D. Cal. Apr. 23, 2020). Although the injunction was stayed pending appeal, *see Roman v. Wolf*, No. 20-55436, 2020 WL 2188048, at *1 (9th Cir. May 5, 2020), the district court entered extensive findings of fact supporting its decision, including a criticism of the "cohorting" method that SCDOC employs in its "quarantine" units. *Hernandez Roman*, 2020 WL 1952656, at *4; DN 123 at 20-21. More recently, District of Massachusetts enjoined the government from transferring new detainees to the Bristol County House of Correction on account of the presence of COVID-19 within the facility. *Savino II*, 2020 WL 2404923, at *11. As it has also failed to do here, in *Savino* the government put "no evidence in the record suggesting that ICE has nowhere else to put new detainees other than" the detention center at issue. *Id.* at 10 n.20.

All in all, Petitioners are likely to prevail on their claim that their conditions of confinement are unconstitutional, they will suffer irreparable harm if an injunction is not granted, and an injunction is in the public interest. The Court "may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown*, 563 U.S. at 511. It should enjoin transfers of new ICE detainees to SCDOC.

III. CLASS RELIEF FOR CIVIL IMMIGRATION DETAINEES AT SCDOC WHOSE DUE PROCESS RIGHTS HAVE BEEN INFRINGED IS WARRANTED.

Respondents object to certification of the class of civil immigration detainees held at SCDOC. Rule 23(a) sets forth four requirements applicable to all class actions: numerosity, commonality, typicality, and adequacy of representation. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); Fed. R. Civ. P. 23(a). Respondents do not challenge numerosity or whether Petitioners and their counsel will fairly and adequately protect the interests of the class. However, Respondents do contest commonality and typicality. As explained below, Petitioners have easily demonstrated these required elements.

A. Petitioners Have Established Commonality Required Under Rule 23(a)(2).

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). As the Supreme Court stated in *Wal-Mart Stores, Inc. v. Dukes*, commonality "requires the plaintiff to demonstrate that the class members have 'suffered the same injury.'" 564 U.S. 338, 350 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The focus of this inquiry is whether the claims "depend upon a common contention" that is "capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* The Court added: "What matters to class certification is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Courts within the First Circuit have not hesitated to find commonality where appropriate following *Walmart*, including in the immigration context. *See, e.g., Savino I*, 2020 WL 1703844, at *8) (certifying class of civil immigration detainees at Bristol County House of Correction); *Brito*

v. Barr, 395 F. Supp. 3d 135, 147 (D. Mass. 2019) (with respect to immigration detainees held under 8 U.S.C. § 1226, stating that "[t]he class presents multiple common legal questions that are central to each member's claims and do not require any individualized analysis: Does due process require that the Government bear the burden of proof at a bond hearing?"); *Gordon v. Johnson*, 300 F.R.D. 28, 30 (D. Mass. 2014) (certifying class of immigration detainees detained under 8 U.S.C. § 1226(c)); *Reid v. Donelan*, 297 F.R.D. 185, 189-91 (D. Mass. 2014) (same); *Kenneth R. v. Hassan*, 293 F.R.D. 254, 267 (D.N.H. 2013) ("The plaintiffs have also shown that common questions susceptible to common answers are present. For instance, whether there is a systemic deficiency in the availability of community-based services, and whether that deficiency follows from the State's policies and practices, are questions central to plaintiffs' theory of the case."); *Doe v. Commissioner*, No. 18-cv-1039-JD, 2020 DNH 073, 2020 U.S. Dist. LEXIS 78387, at *13 (D.N.H. May 4, 2020) (commonality satisfied where "[t]he result of [the] policy and practice, as alleged, is that the named plaintiffs and the proposed class have been and will continue to be detained for days and even weeks without due process protection").

In this case, the question of commonality is straightforward, as Petitioners seek to correct the constitutional violations arising out of the conditions of confinement at SCDOC being experienced by all civil immigration detainees at the facility amid the current COVID-19 pandemic. Again, as the evidence at the May 1, 2020 hearing demonstrated—and as this Court subsequently concluded in its May 14, 2020 order:

> [S]tructural and operational issues make infection control practices challenging. The facility is not completely isolated from outside sources of infection, some inmates may choose to disregard protective measures, those who want to distance themselves cannot due to the size and layout of cells, and alcohol-based hand-sanitizer is not available due to the possibility of intentional ingestion and misuse. It is undisputed that it is virtually impossible under the current conditions for inmates to practice social distancing….

> …. The conditions of confinement do not allow for social distancing within cells, inmates interact in common spaces, employees move throughout the facility working on multiple units, and attorneys and clergy continue to enter the facility without established social distancing procedures.

DN 123 at 22, 52. These conditions of confinement are shared by ***all*** civil immigration detainees at the facility, and "the determination of [this common contention's] truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. As this Court correctly noted in its order provisionally certifying this class:

> Petitioners claim that respondents have subjected the putative class to the same injury: policies and practices (or the lack thereof) that put their health at substantial risk of harm by inhibiting their ability to practice social distancing during the COVID-19 pandemic. Petitioners' deliberate indifference claim thus presents at least two common questions: whether each respondent had actual knowledge of the impending harm or risk posed to the putative class by COVID-19; and whether each respondent failed to take steps that would have easily prevented the harm to detainees.

DN 50 at 7.

The differences among class members raised by Respondents are immaterial to the two common questions that this Court identified, and other courts have rejected the argument that similar differences are material amid the COVID-19 pandemic. *See e.g.*, *Savino I*, 2020 WL 1703844, at *7 ("[T]he Court determines that the admittedly significant variation among the Detainees does not defeat commonality or typicality. At bottom, a common question of law and fact in this case is whether the government must modify the conditions of confinement—or, failing that, release a critical mass of Detainees—such that social distancing will be possible and all those held in the facility will not face a constitutionally violative 'substantial risk of serious harm.'"); *Fraihat*, 2020 WL 1932570, at *18 ("Plaintiffs present the Court with shared factual and legal issues more than adequate to support a finding of commonality. Stated in general terms, the common question driving this case is whether Defendants' system-wide response—or the lack of

one—to COVID-19 violates Plaintiffs' rights. One shared factual question is therefore what, if any, nationwide measures ICE has taken in response to COVID-19 to protect the health of vulnerable immigration detainees and whether those measures are legally sufficient."); *Wilson v. Williams*, No. 4:20-cv-00794, 2020 WL 1940882, at *7 (N.D. Ohio Apr. 22, 2020) (same).

Respondents make several arguments against commonality, each of which fails. First, Respondents claim that commonality does not exist because "Petitioners have different levels of risk for serious illness." DN 129-1 at 31. They add: "Petitioners are overwhelmingly young, but there are individuals among them who are at greater risk of serious illness under the CDC standards." *Id.* But this argument ignores Petitioners' claim that the constitutional violation in question applies to *all* detainees, regardless of medical vulnerability, because *all* detainees are unable to engage in appropriate social distancing at SCDOC and therefore are at serious risk of COVID-19. DN 5 ¶¶ 42, 55, 91; *see, e.g. Zepeda Rivas*, 2020 WL 2059848, at *1; *Savino I*, 2020 WL 1703844, at *7. While Respondents may believe that there is no constitutional violation as to the continued detention of those who are not medically vulnerable, this is a question reserved for the merits of this lawsuit. As the Supreme Court has explained, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). Here, Respondents are "venturing into issues that are properly addressed at trial, in the context of its [defenses], but which are not particularly relevant to the class certification inquiry." *Kenneth R.*, 293 F.R.D. at 269 (rejecting State of New Hampshire's effort to rebut commonality by addressing merits of claim); *see also Glazer v. Whirlpool Corp.*, 722 F.3d 838, 851–52 (6th Cir. 2013) (quoting *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 811 (7th Cir. 2012) ("[D]istrict courts may not 'turn the class certification proceedings into a dress rehearsal for the trial on the merits.'")).

Second, Respondents state that "conditions of confinement have varied significantly over time." *See* DN 129-1 at 31. This argument also fails because, even if the conditions have changed at SCDOC over time, these conditions are nonetheless uniformly applied to the class as a whole while they are confined.

Third, Respondents argue that commonality does not exist because "some petitioners have been detained under statutes, such as 8 U.S.C § 1226(c), requiring mandatory detention for aliens who have committed certain criminal offenses, and others under § 1231(a)(2), requiring mandatory detention during the 90-day removal period after a final order of removal is entered." *See* DN 129-1 at 32. This distinction has no bearing on Petitioners' due process claim and the bail hearing remedy they seek. Again, Petitioners' due process claim applies to ***all*** civil immigration detainees confined at SCDOC regardless of the detention authority, the length of the detainee's detention, and whether the detainee has a final order of removal. As courts have repeatedly held amid the COVID-19 pandemic, the very type of due process violation alleged in this case applies even to those detainees subject to mandatory detention. *See, e.g., Jovel v. Decker*, No. 20 Civ. 308 (GBD) (SN), 2020 WL 1467397, at *1 (S.D.N.Y. Mar. 26, 2020) ("This Court disagrees with the Government's claim that *Mapp* does not apply in § 1226(c) mandatory detention cases, such as the present …. The Court in *Mapp* did not consider whether its decision was limited with regard to individuals held under § 1226(c). When a habeas corpus petition raises concerns under *Mapp*, this Court must consider whether the 'petition raise[s] substantial claims and [whether] extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective.'"); *Basank*, 2020 WL 1481503, at *14 (release of 10 detainees, at least 2 two petitioners mandatorily detained under 1226(c) finding "…courts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c)); *Valenzuela Arias v.*

Decker, No. 20 Civ. 2802 (AT), 2020 WL 2306565, at *11 (S.D.N.Y. May 8, 2020) (same); *Kaur v. United States Dep't of Homeland Sec.*, No. 2:20-cv-03172-ODW (MRWx), 2020 U.S. Dist. LEXIS 71228, at *7 n.1 (C.D. Cal. Apr. 22, 2020) (same); *Coronel v. Decker*, 20-cv-2472 (AJN), 2020 WL 1487274, at *10 (S.D.N.Y. Mar. 27, 2020) (release of four petitioners detained under 1226(a)); *Castillo*, 2020 WL 1502864, at *5 (release of two petitioners both detained under 1226(a)); *Jimenez v. Wolf*, 18-10225-MLW, 2020 U.S. Dist. LEXIS 54280 (D. Mass. Mar. 26, 2020) (ordering release of individual with final order of removal).

Lastly, Respondents claim that "[s]ome petitioners have final orders of removal that can be promptly executed by ICE, making them a significant flight risk upon release, while others are in early stages of immigration proceedings or have a stay of removal." DN 129-1 at 32. Respondents add: "[C]lass members differ with regard to the degree of dangerousness based on their criminal history and disciplinary record – from those with no criminal history, to those with recent, serious, violent offenses." *Id.* This argument fails because the remedy sought in this case is not global release, but rather bail hearings for class members. The Class's constitutional claim that the conditions at SCDOC amid the COVID-19 pandemic create a constitutional violation—thereby entitling all class members to bail hearings—is distinct from the question of whether each class member would be successful in securing release after the bail hearing based on his or her individual circumstances. In other words, Respondents' argument misunderstands Petitioners' constitutional claim and incorrectly conflates the unconstitutional conditions of confinement at SCDOC that apply uniformly to *all* civil immigration detainees—thereby entitling *all* such detainees to bail hearings as a remedy—with the bail hearings themselves that obviously require individualized assessments of dangerousness and risk of flight. The fact that some of these detainees, after their bail hearings, will be granted release, while others may not, is beside the

point. *See, e.g.*, *Wilson*, 2020 WL 1940882, at *7 (finding commonality despite government's claim that members of the class "have different crimes, sentences, outdates, disciplinary histories, ages, medical histories, proximities to infected inmates, availability of a home landing spot, likelihoods of transmitting the virus to someone at home detention, likelihoods of violation or recidivism, and dangers to the community"); *Reid*, 297 F.R.D. at 189-91 (though the government argued that commonality did not exist because "[m]embers of the proposed [seeking bail hearings after 6 months of prolonged detention] class have committed significantly different crimes, ranging from those involving moral turpitude to acts of terrorism" and "the dispositions of the potential class members' criminal cases may vary," holding that "the distinctions Defendants highlight, particularly the varied criminal histories across the class, are irrelevant to the court's ruling on the issue of class certification").

B. The Class Representatives Are Typical of the Class.

Respondents suggest that Rule 23(a)(3) requires that class members be identical in every aspect—e.g., that the considerations of each detainee's bail hearings be the same. No such standard exists. Rather, Rule 23(a)(3) simply requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).

"The typicality analysis is designed to ensure that class representatives, in pursuing their own interests, concurrently will advance those of the class." *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 27 (D. Me. 2013). The claims of class representatives "are 'typical' when their claims 'arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and . . . are based on the same legal theory.'" *See Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009); *accord Rapuano v. Trs. of Dartmouth Coll.*, 2020 U.S. Dist. LEXIS 14634, 2020 WL 475630, at *7 (D.N.H. Jan. 29, 2020).

The typicality requirement is satisfied if the class representative's claims are not likely to "be subject to unique defenses that would divert attention from the common claims of the class," and where the court need not "make highly fact-specific or individualized determinations in order to establish a defendant's liability to each class member." *In re Tyco Int'l, Ltd. Multidistrict Litig*., 2007 DNH 75, 2007 WL 1703067, at *2 (D.N.H. 2007) (quoting *In re Bank of Boston Corp. Sec. Litig.*, 762 F. Supp. 1525, 1532 (D. Mass. 1991)); *Collazo v. Calderon*, 212 F.R.D. 437, 443 (D.P.R. 2002)). Typicality "should be determined *with reference to the defendant's actions*, not with respect to particularized defenses it might have against certain class members." *In re Neurontin Mktg. & Sale Practices Litig*., 244 F.R.D. 89, 106 (D. Mass. 2007) (emphasis added) (quoting *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996)).

As with commonality, this typicality standard is easily met in this case. Here, again, this Court need not make highly fact-specific or individualized determinations in order to establish Respondents' liability to each class member, as the alleged unconstitutional conditions of confinement at issue amid the COVID-19 pandemic apply to *all* civil immigration detainees. Thus, *all* civil immigration detainees are entitled to the remedy of a bail hearing. This Court was correct when it concluded as follows:

> The named petitioners' claims here are typical of the class. They arise from the same course of conduct: respondents' facility-wide actions or inactions that have allegedly failed to make living conditions at SCDOC safe during the COVID-19 pandemic. And their claims are all based on the legal theory that respondents have violated their Fifth Amendment Due Process rights, either by being deliberately indifferent to the substantial risk of harm created by the virus, or by subjecting them to punishment. Although the impact each class member may experience from respondents' alleged failings may differ, respondents' alleged systemwide failure to implement adequate health and safety measures applies equally across the class.

DN 50 at 9. Respondents argue that typicality does not exist because "the information adduced at the bail hearings makes clear in each case, a highly individualized assessment is required." DN

129-1 at 34. But, once again, Respondents' argument conflates the unconstitutional conditions of confinement at SCDOC that apply uniformly to *all* civil immigration detainees—thereby entitling *all* such detainees to bail hearings as a remedy—with the bail hearings themselves that require individualized assessments.

In sum, an action like this one seeking relief as to an entire group is "the classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2)." *Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977), *aff'd in pertinent part sub nom. Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *see also Doe*, 2020 U.S. Dist. LEXIS 78387, at *13 (granting motion for class certification where, "[a]s alleged, the named plaintiffs and the proposed class members have been and will be subjected to the same policy and practice by the Commissioner" concerning the failure to provide due process to those being involuntarily detained in hospital emergency rooms on the suspicion that they are a danger to themselves or others as a result of a mental illness); *Silva v. Nat'l Telewire Corp.*, 2000 DNH 197, 2000 WL 1480269, at *2 (D.N.H. Sept. 22, 2000) (granting motion for class certification where "the plaintiff's and the class's claims arise from the defendant having sent the same debt collection letters resulting in the same alleged violations of the [Fair Debt Collection Practices] Act"). Indeed, appellate courts have consistently held that Rule 23(b)(2) requires that the defendant act in a manner generally applicable to the class, not that every class member suffer the same injury at the same time. *See, e.g., Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998). As the unconstitutional conditions at SCDOC apply to all civil immigration detainees in the facility, this is a textbook case in which Respondents have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

CONCLUSION

For all of these reasons, Petitioners request that the Court deny Respondents' motion to dismiss, DN 128, and grant Petitioners' motions for preliminary injunction, DN 7, and class certification and appointment of class counsel, DN 14.

Respectfully submitted,

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