UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARIA ALEJANDRA CELIMEN SAVINO, JULIO CESAR MEDEIROS NEVES, and all those similarly situated, Petitioners,	)	
v.	)	CIVIL ACTION NO. 20-10617-WGY
STEVEN J. SOUZA, Superintendent of Bristol County House of Corrections in his official capacity, Respondent.	)	

YOUNG, D.J. April 8, 2020

MEMORANDUM & ORDER

I. INTRODUCTION

This habeas petition reflects the petitioners' dire personal circumstances and legal grievances. Yet it also speaks to the shared anxieties of a world brought to its knees by the pandemic of the novel coronavirus, dubbed COVID-19. It reaches the Court at an especially grim moment.[1] The petitioners are civil immigration detainees who say they are held in tight quarters and unable to keep safe distance from others who may --

[1] See Sarah Westwood, Surgeon General: This Week Will Be Like a 'Pearl Harbor' and '9/11' Moment, CNN (Apr. 5, 2020 1:25 pm), https://www.cnn.com/2020/04/05/politics/jerome-adams-coronavirus/index.html.

and with time, inevitably will -- carry the highly contagious virus. They demand release or implementation of social distancing and other hygienic practices recommended by infectious disease experts.

Pending before this Court are their petition for a writ of habeas corpus, their motion for class certification, and their motion for a preliminary injunction. The Court is not yet ready to rule on the underlying habeas petition or the motion for a preliminary injunction. Rather, the Court ALLOWS the motion for class certification, with slight modification, and takes this opportunity to explain its reasoning with respect to bail. For the health and safety of the petitioners -- as well as the other inmates, staff, and the public –- the Court will expeditiously consider bail for appropriate detainees.

A. Factual Background

The named petitioners are two of approximately 148 individuals (the "Detainees") detained by Immigration and Customs Enforcement ("ICE") on civil immigration charges and held at the Bristol County House of Corrections ("BCHOC") in North Dartmouth, Massachusetts. Pet. Writ Habeas Corpus ("Pet.") ¶ 1, ECF No. 1; Opp'n Mot. TRO ("Opp'n"), Ex. A, Aff. Sheriff Thomas H. Hodgson ("Hodgson Aff.") ¶ 6(o), ECF No. 26-1.[2]

[2] Though Sheriff Hodgson's affidavit, dated March 29, 2020, states that there are 148 ICE detainees in the BCHOC, the

The Detainees are held in two on-site facilities: ninety-two are in a separate ICE facility called the C. Carlos Carreiro Immigration Detention Center ("Carreiro"), and the rest are housed in a portion of the BHCOC called "Unit B" together with non-immigration pre-trial detainees. Id.; Pet. ¶ 1; Opp'n 2.[3]

Since February, the respondent ("the government") asserts, the medical team and administration of BCHOC "have instituted strict protocols to keep inmates, detainees and staff safe and take all prudent measures to prevent exposure to the COVID- 19 infection." Hogdson Aff. ¶ 5. Entrance into the facilities by outsiders is now generally prohibited; attorneys, clergy, and staff are "medically screened prior to entrance by questions relating to COVID-19 symptoms and by body temperature assessment." Id. ¶ 6(a)-(d). Inmates and detainees who are over 60-years-old or are immuno-compromised "are being specially monitored." Id. ¶ 6(k). In addition:

> All housing units are sanitized no less than three times per day. Fresh air is constantly circulated by opening windows and utilizing handler/vents throughout the day. All feeding is done inside the housing or

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government provided the Court (in a submission dated April 1, 2020) with a list of 147 names received from ICE that it represented as a complete roster of ICE detainees at BCHOC. The Court expects that this discrepancy be cleared up quickly.

[3] The government explains that "[o]nly detainees who have been classified by ICE as high risk, typically based upon violent behavior (and not in any way related to COVID-19), are housed with non-immigration pre-trial inmates, but this is not in the general population." Opp'n 2.

> cells and inmates do not congregate for meals in the main dining hall. Outside recreation is done as usual daily except that it is now done on split schedule to prevent close inmate-to-inmate contact.

Id. ¶ 6(f). According to BCHOC's medical director, Dr. Nicholas J. Rencricca, "we are doing all that we can to reduce the risk of a COVID-19 outbreak within BCHOC." Aff. Nicholas J. Rencricca, MD, PhD ¶ 24. As of April 8, 2020, "there have been no inmates or immigration detainees who have presented with, or have tested positive for, COVID-19" at BCHOC, though one "unit intake nurse tested positive for COVID-19" and she last showed up to work on March 24. Decl. Debra Jezard ¶ 8; Def.'s Input Apr. 8 List 1, ECF No. 58.

The Detainees dispute much of this. They allege, for instance, that "BCHOC facilities lack adequate soap, toilet paper, and medical resources and infrastructure to address the spread of infectious disease or to treat people most vulnerable to illness." Pet. ¶ 70. They also state that "[h]ygiene is . . . unavailable and unavailing under the[ir] conditions," id. ¶ 6, and that they "are unaware of any meaningful safety measures enacted by Defendants since the inception of this crisis," id. ¶ 28. Their "confinement conditions are a tinderbox," the Detainees warn, "that once sparked will engulf the facility." Id. ¶ 29. Yet there are important aspects of the Detainees'

allegations that are substantially undisputed. Chief among these is the challenge of social distancing in BCHOC.

The Centers for Disease Control and Prevention ("CDC") states that "COVID-19 spreads mainly among people who are in close contact (within about 6 feet) for a prolonged period," and therefore recommends that everyone practice "social distancing" -- even among those with no symptoms, since the virus can be spread by asymptomatic people. CDC, Social Distancing, Quarantine, and Isolation (reviewed Apr. 4, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last accessed Apr. 6, 2020). The CDC thus advises that everyone "[s]tay at least 6 feet (2 meters) from other people." Id. The CDC has issued guidance specifically for prisons and detention centers that beat the same drum. CDC, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, at 4 (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf ("Although social distancing is challenging to practice in correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19."); id. ("Social distancing is the practice of increasing the space between individuals and decreasing the frequency of contact to reduce

the risk of spreading a disease (ideally to maintain at least 6 feet between all individuals, even those who are asymptomatic).").

The Detainees assert that they "find it impossible to maintain the recommended distance of 6 feet from others" and they "must also share or touch objects used by others." Pet. ¶ 67. They specifically allege that their beds "are situated only 3 feet apart" and that "[m]eals are inadequate and eaten in close quarters." Pet. ¶ 68. Indeed, the government has provided the Court with photos of the sleeping quarters in the facility and this appears to be an accurate description.[4] In one unit the "cell size" is listed as 30 feet by 10 feet (300 square feet), and the photo shows three bunk beds (sleeping six people) lining the wall. Other images supplied include a photo labeled "Bunk Area" that shows a large room packed with rows of bunk beds. None appears to enjoy anything close to six feet of isolation. One of the named petitioners, Mr. Neves, avers that he "is being held in the same room as 49 other people," that his "bed is too close to other people," and that he is "not able to

[4] The government protests that "not every bed is filled and the minimal distance is believed to be between ends, not the long sides of beds." Def.'s Suppl. Br. 9 n.6, ECF No. 41. The CDC's guidelines are concerned with people, not furniture, so the Court does not see what bearing the government's distinction (whether the beds are measured from their length or width) has upon the safety of the Detainees.

engage in 'social distancing.'" TRO Mem., Ex. 8, Decl. Julio Cesar Medeiros Neves ¶¶ 4-6, ECF No. 12-8.

The COVID-19 global pandemic threatens all of us. Yet "[t]he combination of a dense and highly transient detained population presents unique challenges for ICE efforts to mitigate the risk of infection and transmission." Opp'n, Ex. 2, Memorandum from Enrique M. Lucero, ICE, to Detention Wardens & Superintendents 1 (Mar. 27, 2020), ECF No. 26-2. As the Supreme Judicial Court of Massachusetts recently explained in reference to statewide correctional facilities, including BCHOC, "correctional institutions face unique difficulties in keeping their populations safe during this pandemic." Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court, No. SJC-12926, 2020 WL 1659939, at *3 (Mass. Apr. 3, 2020). Indeed, BCHOC's medical director acknowledged the obvious fact "that a prison setting poses particular challenges from an infectious disease standpoint," while asserting that "the risk of infection is tempered by the degree of control we have over access to the facility." Renricca Aff. ¶ 21.

The Detainees have provided affidavits from two physicians who have recently visited Detainees on site. Dr. Nathan Praschan of Massachusetts General Hospital states that "[t]he best-known methods of preventing infectious spread," such as "social distancing, frequent hand washing, and sanitation of

surfaces . . . are unavailable to . . . [these] detainees, who sleep, eat, and recreate in extremely close quarters and do not have access to basic hygienic supplies." Decl. Dr. Nathan Praschan ¶ 9. Dr. Matthew Gartland of Brigham and Women's Hospital avers that "based on my own experience visiting Bristol County House of Corrections, I do not believe that . . . [these] detainees, can be adequately protected from the virus that causes COVID-19. This is based on a lack of private sinks or showers and inadequate hand soap supplies, and hand sanitizers, as well as inadequate allowance for social distancing, screening for symptoms and exposure to the virus, testing of individuals with symptoms, and appropriate quarantine and isolation facilities." Decl. Dr. Matthew Gartland ¶ 16.

B. Procedural History

The Detainees filed a habeas petition as a putative class action in this Court on March 27, 2020. Pet. The petition asserts two claims: (1) violation of due process as a result of confinement in conditions "that include the imminent risk of contracting COVID-19," id. ¶¶ 98-105; and (2) violation of section 504 of the Rehabilitation Act for failure to provide reasonable accommodations, in the form of protection against COVID-19, to Detainees with medical conditions, id. ¶¶ 105-116.

On the same day, the Detainees filed a motion for a temporary restraining order ("TRO"), ECF No. 11, and a motion

for class certification, ECF No. 13. As these motions refer only to the due process claim, the Detainees do not seek a TRO or class certification for their claim under the Rehabilitation Act. See Mem. Supp. Mot. Temporary Restraining Order ("TRO Mem."), ECF No. 12; Mem. Supp. Pls.' Mot. Class Cert. ("Class Cert. Mem."), ECF No. 14; Reply Resp.-Def.'s Opp'n Mot. TRO ("Pet'rs' Reply") 16 n.6. The Government has opposed both motions. See Opp'n; Def.'s Suppl. Br., ECF No. 41.

The Court held an initial hearing on March 30, 2020, converting the motion for a TRO into a motion for a preliminary injunction.[5] ECF No. 27. At the next hearing, on April 2, 2020, the Court provisionally certified five subclasses and took the other matters under advisement. Electronic Clerk's Notes, ECF No. 36; see Order, ECF No. 38 (listing twelve members of first subclass). The following day, the Court held another hearing at which it was informed that the Government voluntarily agreed to release six members of the first subclass. The Court deemed the case moot as to those individuals, ordered release on bail under certain conditions for three other members of the subclass,[6] and

[5] All hearings in this matter have been held remotely by video conference in light of the danger posed by COVID-19.

[6] The bail order was as follows:

> The Court grants bail to Henry Urbina Rivas, Robson Maria-De Oliveira, and Jervis Vernon pending resolution of the habeas corpus petition, upon all

either denied bail without prejudice or continued the matter for the rest of the subclass. Order, ECF No. 44. The Court notified the parties that it would consider bail for fifty additional detainees, id. ¶ 6, and later set a schedule for considering those fifty individual bail applications at a rate of ten per day beginning on April 7, 2020. Order, ECF No. 46. It has since ordered bail for several more Detainees. See ECF Nos. 54-55.

> bail conditions deemed appropriate and imposed by ICE, and the following additional terms and conditions as to each of them: (a) release only to an acceptable custodian; (b) such custodian will pick the releasee up outside the facility by car; (c) releasee will be taken from the facility to the place of residence previously identified to ICE (ICE shall notify the state and local law enforcement authorities about their presence and the[] details of their bail status); (d) releasees are to be fully quarantined for 14 days from date leaving facility to the residence; (e) during and after the 14-day quarantine, releasees will remain under house arrest, without electronic monitoring, and shall not . . . leave the residence for any reason save to attend immigration proceedings or attend to their own medical needs should those needs be so severe that they have to go to a doctor's office or hospital (in which case they shall notify ICE as soon as practicable of their medical necessity); (f) releasees are not to be arrested by ICE officers unless: (i) upon probable cause a warrant is issued by a United States Magistrate Judge or United States District Judge that they have violated any terms of their bail, or (ii) there is a final order of removal making them presently removable from the United States within two weeks. The Court may, sua sponte or on motion of the parties, modify or revoke the bail provided herein.

Order ¶ 2, ECF No. 44.

II. ANALYSIS

This opinion tackles three issues. First, the Court rejects the government's argument that the Detainees lack Article III standing because their risk of injury is too speculative. Next, the Court certifies a general class of Detainees for their due process claim of deliberate indifference to a substantial risk of serious harm. Though there are indeed pertinent and meaningful distinctions among the various Detainees, there is a common question of unconstitutional overcrowding that binds the class together. Nor, contrary to the government's assertion, is there a statutory bar to class certification in this case. Finally, the Court explains its rulings and authority in ordering bail for certain Detainees.

A. Article III Standing

To satisfy constitutional standing in federal court, a habeas petitioner (like other litigants) "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Spencer v. Kemna, 523 U.S. 1, 7 (1998) (quoting Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990)). The government argues the Detainees' "claims of future injury are hypothetical" and "conjectural" because "crowding in and of itself does not cause COVID-19 infection if none in the group has contracted COVID-19." Opp'n 15.

The Court disagrees. The Supreme Court has 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." Department of Commerce v. New York, 139 S. Ct. 2551, 2565 (2019) (quoting Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014)). In this moment of worldwide peril from a highly contagious pathogen, the government cannot credibly argue that the Detainees face no "substantial risk" of harm (if not "certainly impending") from being confined in close quarters in defiance of the sound medical advice that all other segments of society now scrupulously observe.[7] See TRO Mem., Ex. 1, Decl. Alan S. Keller, M.D. ¶ 10, ECF No. 12-1 ("[T]he risk of COVID-19 infection and spread in immigration detention facilities,

[7] Amazingly, the government appears to make this argument. At the April 2 hearing, the government emphasized that no Detainee or inmate in BCHOC has yet tested positive for COVID-19 and argued that "if the Court starts from the position that the Court's goal here is to reduce the concentration of inmates it has jumped past the presence, or non-presence, of the virus to an assumption that the virus is present and therefore we're going to do everything we can to increase social distancing." In a later filing the government reiterated the point: "It is ICE's position, for the record, that release of none of the listed individuals is required for either their safety or the safety of the remaining civil detainee population at BCHOC." Defs.' Input Regarding Apr. 7 List 1, ECF No. 50. Yet the government's quarrel is not with the Court but with the vigorous recommendations of infectious disease experts worldwide, including in the federal government, to maximize social distancing.

including Bristol County, is extremely high."). This risk of injury is traceable to the government's act of confining the Detainees in close quarters and would of course be redressable by a judicial order of release or other ameliorative relief.

Accordingly, the Court rules that the Detainees easily meet Article III's standing requirements.

B. Class Certification

The Detainees moved to certify the following proposed class: "All civil immigration detainees who are now or will be held by Respondents-Defendants at the Bristol County House of Corrections (BCHOC) and the C. Carlos Carreiro Immigration Detention Center ("Carreiro") in North Dartmouth, Massachusetts." Class Cert. Mem. 9. At the hearing on April 2, 2020, the Court declined to certify the class as proposed but provisionally certified five subclasses. Electronic Clerk's Notes, ECF No. 36.[8] The Court does not now revisit that

[8] The Court described the five provisionally certified subclasses as follows:

Group 1: Detainees with no criminal record and no pending criminal charges.

Group 2: Detainees with medical conditions recognized under the CDC guidelines as heightening their risk of harm from COVID-19 and who have minor, non-violent criminal records or minor, non-violent criminal charges pending.

Group 3: Detainees without the medical conditions of Group 2 but who likewise have minor criminal records or minor, primarily non-violent criminal charges pending.

Group 4: Detainees with pending criminal charges against them for violent crimes, either in the United States or abroad.

provisional ruling.[9] Yet it does, for the reasons given below, now certify the general class as proposed by the Detainees, albeit excluding those not yet in custody.

1. Bar on Classwide Injunction in Immigration Matters

The government first argues that the proposed class cannot be certified because 8 U.S.C. § 1252(f)(1) bars courts (other than the Supreme Court) from enjoining or restraining the "operation" of immigration enforcements actions except in their application to "an individual alien against whom proceedings under such chapter have been initiated." Opp'n 9. The government cites dicta from Reno v. American Arab Anti-Discrimination Comm. indicating that classwide injunctive relief

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Group 5: Detainees with criminal convictions for violent crimes, either in the United States or abroad.

[9] The government argues, without citation to authority, that "Rule 23(c)(5) requires that there be a class first before subclasses are created." Def.'s Suppl. Br. 8. The Court has found only one judicial opinion seemingly endorsing that view, Sprague v. General Motors Corp., 133 F.3d 388, 399 n.9 (6th Cir. 1998) (en banc), while the Eleventh Circuit disagrees, Klay v. Humana, Inc., 382 F.3d 1241, 1261–62 (11th Cir. 2004). See 3 William B. Rubenstein, Newberg on Class Actions § 7:29 n.1 (5th ed. 2019) (citing circuit split); Scott Dodson, Subclassing, 27 Cardozo L. Rev. 2351, 2389 (2006) (concluding that "the best interpretation" of Fed. R. Civ. P. 23 allows subclasses to be certified in the absence of a valid general class). The First Circuit recently suggested that "[t]he commonality standard might also be satisfied in some cases by certifying subclasses." Parent/Professional Advocacy League v. City of Springfield, 934 F.3d 13, 29 n.15 (1st Cir. 2019) (citing Mark C. Weber, IDEA Class Actions After Wal-Mart v. Dukes, 45 U. Tol. L. Rev. 471, 498-500 (2014)). In any case, because the Court now certifies the general class, the question is academic.

is simply not available in immigration cases. 525 U.S. 471, 481-82 (1999) (describing § 1252(f) as "prohibit[ing] federal courts from granting classwide injunctive relief against the operation of [8 U.S.C.] §§ 1221–1231"). Thus, the government appears to argue, the Court cannot certify this class now because it will not later be able to provide classwide relief.

Yet section 1252(f) says nothing about declaratory relief, which the Detainees expressly request here in addition to injunctive relief. Pet. 24. Accordingly, this provision does not bar declaratory relief and therefore poses no obstacle to class certification. See Reid v. Donelan, 390 F. Supp. 3d 201, 226 (D. Mass. 2019) (Saris, C.J.); Rodriguez v. Marin, 909 F.3d 252, 256 (9th Cir. 2018); Alli v. Decker, 650 F.3d 1007, 1014 (3d Cir. 2011). Seeking to avoid this conclusion, the government cites a Sixth Circuit decision for the proposition that declaratory relief may be the "functional equivalent" of a prohibited classwide injunction. Opp'n 11 (quoting Hamama v. Adducci, 912 F.3d 869, 880 n.8 (6th Cir. 2018)). The Sixth Circuit opinion was issued after three Justices argued to the contrary in Jennings v. Rodriguez, 138 S. Ct. 830, 876 (2018) (Breyer, J., dissenting), but before three other Justices agreed, see Nielsen v. Preap, 139 S. Ct. 954, 962 (2019) (plurality opinion). With six Justices of the current Supreme Court now on record stating that section 1252(f) does not bar

declaratory relief, and because that is the better reading of the statute, the Court adheres to that view. See Reid, 390 F. Supp. 3d at 226; Reid v. Donelan, No. 13-30125-PBS, 2018 WL 5269992, at *7-8 (D. Mass. Oct. 23, 2018) (Saris, C.J.).

This is not to suggest that injunctive relief will be categorically unavailable in this case. See Marin, 909 F.3d at 256 (allowing a classwide injunction when all members of the class were individuals against whom detention proceedings had been initiated, in accordance with the exception contained in section 1252(f)(1)). Nor does the Court intimate that it will eventually provide any relief at all, since it has not yet reached the merits. At this class certification stage, it is enough to establish that the Court could provide a classwide remedy in the form of a declaratory judgment or injunctive relief. Having established that, the Court rejects the government's argument that section 1252(f) precludes class certification.

2. The Requirements of Rule 23

"To obtain class certification, the plaintiff must establish the four elements of [Fed. R. Civ. P.] 23(a) and one of several elements of Rule 23(b)." Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)). Rule 23(a) permits class certification only if:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In addition to establishing these four elements, the Detainees must satisfy one of Rule 23(b)'s categories. The Detainees rely on Rule 23(b)(2), Class Cert. Mem. 16-17, which permits class certification when "the party opposing the class has 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).

Since numerosity and adequacy appear well-founded, the government challenges only the commonality and typicality of the proposed class. Opp'n 13 ("The proposed class lacks uniformity and the Plaintiffs are not representative of the proposed class members."). Though commonality and typicality are distinct elements under Rule 23(a), the Supreme Court has repeatedly recognized that they "tend to merge." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011) (quoting General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982)). Indeed, the government attacks both commonality and typicality with the same set of arguments. The gist of the government's contention on

this score is that the various detainees are not "similarly situated" because they "are of different ages and all present different levels of health at this time." Opp'n 12. Furthermore, the government points out that some detainees are subject to statutorily mandated detention while others are not, and that "each detainee presents a different risk of flight and/or public safety threat if released." Id. Accordingly, the Court treats commonality and typicality together.

To establish commonality under Rule 23(a)(2), one common question is enough. Wal-Mart, 564 U.S. at 359. "A question is common if it is 'capable of classwide resolution -- which means that 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.'" Parent/Professional Advocacy League v. City of Springfield, 934 F.3d 13, 28 (1st Cir. 2019) (quoting Wal-Mart, 564 U.S. at 350). It is not critical whether common "questions" are raised; the decisive factor is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Id. (quoting Wal-Mart, 564 U.S. at 350).

The Detainees frame the common question as follows: "Whether the conditions of confinement at Bristol County Immigration Detention Facilities, under the current conditions and in light of the COVID-19 pandemic, render class members'

confinement a punishment that violates constitutional standards." Class Cert. Mem. 18-19. Here, as is typical in the Rule 23 commonality inquiry, "proof of commonality necessarily overlaps with [the Detainees'] merits contention." Wal-Mart, 564 U.S. at 352. Accordingly, the Court now discusses the merits of the Detainees' constitutional claim, but only to the extent necessary to decide the class certification question. See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 466 (2013) ("Merits questions may be considered to the extent -- but only to the extent -- that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

When the government "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 Due Process Clause." DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989). The due process guarantee of the Constitution obliges the government "to refrain at least from treating a pretrial detainee with deliberate indifference to a substantial risk of serious harm to health." Coscia v. Town of Pembroke, 659 F.3d 37, 39 (1st Cir. 2011) (citing City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983) & Farmer v. Brennan, 511

U.S. 825, 835 (1994)). "Proof of deliberate indifference requires a showing of greater culpability than negligence but less than a purpose to do harm," id. (citing Farmer, 511 U.S. at 835), "and it may consist of showing a conscious failure to provide medical services where they would be reasonably appropriate," id. (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). "To show such a 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." Leite v. Bergeron, 911 F.3d 47, 52-53 (1st Cir. 2018) (quoting Zingg v. Groblewski, 907 F.3d 630, 635 (1st Cir. 2018) (further citation and internal quotation marks omitted). "This standard, requiring an actual, subjective appreciation of risk, has been likened to the standard for determining criminal recklessness." Id. at 53 (quoting Giroux v. Somerset Cty., 178 F.3d 28, 32 (1st Cir. 1999)). Courts generally apply the same standard for civil immigration detainees as for pre-trial detainees. See E. D. v. Sharkey, 928 F.3d 299, 306-07 (3d Cir. 2019) (stating that "the legal rights of an immigration detainee [are] analogous to those of a pretrial detainee" and collecting cases of other circuits).

With this legal background in mind, it is understandable why the government highlights the differences among the Detainees. For example, it may be easier for Detainees who are

at heightened risk of harm from COVID-19 to prove the "substantial risk of serious harm" prong of the inquiry than it will be for healthier Detainees who lack special risk factors. Detainees with a serious criminal background might have a tougher time demonstrating that the government could "have easily prevented that harm" by releasing them on bond, for instance. Indeed, these very considerations guided the Court in provisionally certifying five separate subclasses.

Upon reflection, however, the 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." Farmer, 511 U.S. at 847. Crucial to the Court's determination is the troubling fact that even perfectly healthy detainees are seriously threatened by COVID-19. To be sure, the harm of a COVID-19 infection will generally be more serious for some petitioners than for others. Yet it cannot be denied that the virus is gravely dangerous to all of us.

Consider recent data from the CDC. In a sample of COVID-19 patients aged 19 and older with no underlying health conditions

or risk factors, approximately 7.2-7.8% were hospitalized without requiring admission to the Intensive Care Unit ("ICU"), and an additional 2.2-2.4% were hospitalized in the ICU, totaling 9.6-10.4%. If the pool is restricted to patients between the ages of 19 and 64, all with no underlying health conditions reported, approximately 6.2-6.7% were hospitalized without admission to the ICU, and an additional 1.8-2.0% required the ICU, for a total hospitalization rate of 8-8.7%. The rates of hospitalization and ICU admittance are significantly higher for those with underlying health conditions.[10] Since COVID-19 is highly contagious and the quarters are close, the Detainees' chances of infection are great. Once infected, taking hospitalization as a marker of "serious harm," it is apparent that even the young and otherwise healthy detainees face a "substantial risk" (between five and ten percent) of such harm.

Likewise, the "deliberate indifference" part of the inquiry, which asks whether the government "disregards th[e]

[10] See Nancy Chow et al., CDC COVID-19 Response Team, Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 — United States, February 12–March 28, 2020, 69 Morbidity & Mortality Weekly Report 382, 382-84 (Apr. 3, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6913e2-H.pdf. It must be emphasized that this data is partial and preliminary. See id. at 384-85 (listing six limitations on the report's findings).

risk by failing to take reasonable measures to abate it," Farmer, 511 U.S. at 847, is apt to generate a common answer for the entire class of Detainees. The question is not so much whether any particular Detainee should be released -- a matter as to which the various individuals are surely differently situated. Rather, the question is whether the government is taking reasonable steps to identify those Detainees who may be released in order to protect everyone from the impending threat of mass contagion. Nor does it matter how the density of Detainees is reduced. Transfer to less crowded facility, deportation, release on bond, or simply declining to contest lawful residence -- any of these methods would effectively minimize the concentration of people in the facility. This affords the government greater flexibility and minimizes the differences among the various Detainees.

The case law supports a finding of commonality for class claims against dangerous detention conditions, even when some detainees are more at risk than others. For example, the Ninth Circuit affirmed class certification for an Eighth Amendment challenge to inmate medical care policies, explaining that "although a presently existing risk may ultimately result in different future harm for different inmates -- ranging from no harm at all to death -- every inmate suffers exactly the same constitutional injury when he is exposed to a single statewide

[department of corrections] policy or practice that creates a substantial risk of serious harm." Parsons v. Ryan, 754 F.3d 657, 678 (9th Cir. 2014). Similarly, the Fifth Circuit affirmed class certification of all prisoners in an overheated prison, despite the variations in health and risk among prisoners, because the prison authority's "heat-mitigation measures . . . were ineffective to reduce the risk of serious harm to a constitutionally permissible level for any inmate, including the healthy inmates." Yates v. Collier, 868 F.3d 354, 363 (5th Cir. 2017). Here, too, even the otherwise healthy Detainees face a substantial risk of serious harm from COVID-19. The commonality analysis of Parsons and Yates is persuasive and has been approvingly cited by the First Circuit. See Parent/Professional, 934 F.3d at 28 n.14. Accordingly, the Court rules that the commonality and typicality prongs of the Rule 23(a) analysis are satisfied.

Before certifying the class, the Court pauses to consider the uniformity of remedy required by Rule 23(b)(2). See Wal-Mart, 564 U.S. at 360 (holding that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant."). Thus, the Court may certify the class

only if it would be entitled to an "indivisible" remedy. Id. The Court concludes that a uniform remedy would be possible in this case, whether in the form of declaratory relief or (depending on the proper reading of 8 U.S.C. § 1252(f), as alluded to above) an injunction ordering the government to reduce crowding of Detainees. Cf. Brown v. Plata, 563 U.S. 493, 502 (2011) (affirming classwide injunction of "court-mandated population limit" in state prisons to remedy Eighth Amendment violations due to "severe and pervasive overcrowding").

Thus, the requirements of Rule 23 are met and the Court certifies the general class as proposed by the Detainees, with one caveat: The Court declines to include those who "will be held," Class Cert. Mem. 9, but are not yet in custody. Although the government has not declared that it will not admit more detainees to BCHOC during this health crisis, it has agreed to notify the Court before doing so. Tr. Hr'g 25, ECF No. 48. The Court sees no need to include possible future detainees in this class. Moreover, since the situation is rapidly evolving and future detainees may well be subject to different confinement conditions than those now obtaining, it may be that the named representative cannot "fairly and adequately protect the interests" of those future detainees. Fed. R. Civ. P. 23(a)(4); cf. Amchem, 521 U.S. at 625-26 (holding that differences between

currently injured and not-yet-injured members of proposed class defeated adequacy requirement).

C. The Court's Inherent Authority to Order Bail

The Court now turns to explain its decision to order bail for several Detainees and to consider bail applications for others. The First Circuit has explained "that a district court entertaining a petition for habeas corpus has inherent power to release the petitioner pending determination of the merits." Woodcock v. Donnelly, 470 F.2d 93, 94 (1st Cir. 1972) (per curiam). Such authority may be exercised in the case of "a health emergency," where the petitioner has also demonstrated a likelihood of success on the merits. Id. For example, Woodcock approvingly cited Johnston v. Marsh, in which the Third Circuit affirmed the decision of the district court granting bail to a habeas petitioner who, "as an advanced diabetic, was, under conditions of confinement, rapidly progressing toward total blindness." 227 F.2d 528, 529-32 (3d Cir. 1955). In Mapp v. Reno, the Second Circuit held that "the federal courts have the same inherent authority to admit habeas petitioners to bail in the immigration context as they do in criminal habeas case." 241 F.3d 221, 223 (2d Cir. 2001). A court considering bail for a habeas petitioner "must inquire into whether 'the habeas petition raise[s] substantial claims and [whether] extraordinary circumstances exist[] that make the grant of bail necessary to

make the habeas remedy effective.'" Id. at 230 (alterations in original) (quoting Iuteri v. Nardoza, 662 F.2d 159, 161 (2d Cir. 1981)).

Other courts, including another session of this Court, have recently relied on Mapp to order bail for habeas petitioners who were civil immigration detainees at risk due to the COVID-19 pandemic. See Avendaño Hernandez v. Decker, No. 20-CV-1589 (JPO), 2020 WL 1547459, at *2-4 (S.D.N.Y. Apr. 1, 2020); Jimenez v. Wolf, Civ. A. No. 18-10225-MLW, Memorandum & Order ("Jimenez Order"), ECF No. 507 (D. Mass. Mar. 26, 2020) (Wolf, J.). As expressed during the hearing on April 3, the Court follows these precedents in construing its authority to order bail for habeas petitioners under the reigning "exceptional circumstances," Glynn v. Donnelly, 470 F.2d 95, 98 (1972), of this nightmarish pandemic. Like Judge Wolf in Jiminez and Judge Oetken in Hernandez, this Court ruled that bail was appropriate for some Detainees on the basis of Mapp and its First Circuit analogues.[11]

[11] The First Circuit in Glynn stated that bail should not be ordered without "a clear case" on both the law and the facts, and that "Merely to find that there is a substantial question is far from enough," 470 F.2d at 98, and Woodcock indicated that a finding of likelihood of success on the merits may be needed, 470 F.2d at 94. This contrasts with Mapp, which required only (apart from the presence of extraordinary circumstances) that the petitioner raise "substantial claims." 241 F.3d at 230. Yet, as Judge Wolf observed, the First Circuit cases were dealing with a state prisoner convicted of a crime and for that reason insisted upon a higher standard, see Glynn, 470 F.2d at 98, whereas here "the Mapp test or something similar or perhaps

Additionally, the Court follows the light of reason and the expert advice of the CDC in aiming to reduce the population in the detention facilities so that all those who remain (including staff) may be better protected. In this respect, the Supreme Judicial Court of Massachusetts has articulated sound principles: "[T]he situation is urgent and unprecedented, and . . . a reduction in the number of people who are held in custody is necessary," but "the process of reduction requires individualized determinations, on an expedited basis, and, in order to achieve the fastest possible reduction, should focus first on those who are detained pretrial who have not been charged with committing violent crimes." Committee for Pub. Counsel Servs., 2020 WL 1659939, at *9.[12] The Court will proceed in a similar fashion in diligently entertaining bail applications while the petitions for habeas corpus are pending.

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less is appropriate." Jimenez Order, Ex. 1, at 1-2, ECF No. 507-1. This Court agrees, though it makes little difference because the Detainees released on bail would also satisfy a more exacting standard.

[12] With respect to federal prisons, Congress responded to the pandemic by expressly authorizing the Bureau of Prisons to exceed the statutory maximum period of home confinement if the Attorney General makes a finding of "emergency conditions," CARES Act, Pub. L. No. 116-136, § 12003(b)(2) (2020), and the Attorney General has now found such an emergency. See Memorandum of Attorney General William Barr to Director of Bureau of Prisons (Apr. 3, 2020), https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000.

III. CONCLUSION

The motion for class certification is ALLOWED. The Court now certifies the following class: "All civil immigration detainees who are now held by Respondents-Defendants at the Bristol County House of Corrections and the C. Carlos Carreiro Immigration Detention Center in North Dartmouth, Massachusetts." The named petitioners in this action, Maria Alejandra Celimen Savino and Julio Cesar Medeiros Neves, are appointed class representatives.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE