

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

**OSCAR YANES, GAGIK MKRTCHIAN,
and WENDELL RAFAEL BAEZ LOPEZ,**
on behalf of themselves and all those
similarly situated,

Petitioners-Plaintiffs,

v.

CHAD WOLF, Acting Secretary, U.S.
Department of Homeland Security;
MATTHEW T. ALBENCE, Acting
Director, U.S. Immigration and Customs
Enforcement; **TODD LYONS**, Acting
Field Office Director, U.S. Immigration and
Customs Enforcement; **DANIEL W.
MARTIN**, Warden, Donald W. Wyatt
Detention Facility; and **CENTRAL
FALLS DETENTION FACILITY
CORPORATION**,

Respondents-Defendants.

Civil Action No. 1:20-cv-00216

**CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF
PETITIONERS-PLAINTIFFS' EMERGENCY MOTIONS FOR
(1) EXPEDITED BAIL HEARINGS AND FOR EXPEDITED DISCOVERY AND OTHER
MEASURES TO FACILITATE EXPEDITED BAIL HEARINGS; AND
(2) PRELIMINARY INJUNCTION PROHIBITING ADMISSIONS AND TRANSFERS**

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

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INTRODUCTION

Petitioners-Plaintiffs (“Petitioners”)—civil immigration detainees held by Respondents-Defendants (“Respondents”) at the Donald W. Wyatt Detention Facility (“Wyatt”) under the authority of U.S. Immigration and Customs Enforcement (“ICE”)—submit this memorandum of law in support of their emergency motion for expedited bail hearings for the release of Petitioners and putative class members and for measures to facilitate expedited bail hearings, including expedited discovery.

Petitioners seek emergency relief from this Court to alleviate the imminent risk of contracting COVID-19 arising from their detention at Wyatt. Wyatt is a site of a substantial and fast-growing COVID-19 outbreak. As of May 14, 2020, 38 Wyatt detainees and 10 Wyatt staff members have tested positive for COVID-19. That number is more than double the cases Wyatt had reported just four days earlier. There can be no question that continued detention of the Petitioners at Wyatt poses a threat to their lives. As the Centers for Disease Control and Prevention (“CDC”) and the State of Rhode Island have recognized, the only effective means of preventing the spread of COVID-19 is social distancing, where people remain at least six feet apart from each other. Conditions at Wyatt render social distancing impossible.

Petitioners’ detention at Wyatt violates the Due Process Clause of the Fifth Amendment. “[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). For civil detainees like Petitioners, the Due Process Clause imposes a standard of “objective reasonableness” to assess the validity of conditions of confinement. *See Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2472-73 (2015). Under that standard, conditions of confinement violate the Constitution if, “from an objective viewpoint,” the conditions are “not

rationality related to a legitimate governmental objective or that it [was] excessive in relation to that purpose.” *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 70 (1st Cir. 2016) (quoting *Kingsley*, 135 S. Ct. at 2473-74).

As recognized by Chief Judge McConnell in *Sallaj v. ICE*, C.A. No. 20-167-JJM-LDA, 2020 WL 1975819 (D.R.I. Apr. 24, 2020), “[b]ecause it is highly contagious with a relatively high mortality rate, the spread of Covid-19 in a closed facility, such as an immigration detention center, would be devastating.” *Id.* at *2 (citation omitted). Further “spread of Covid-19 in [Wyatt] would be disastrous for the health and safety of those living and working there, as well as the burden it would cause on valuable medical resources.” *Id.* at *4. Petitioners here, like the Petitioner in *Sallaj*, have “a likelihood of success on the merits of [their] Fifth Amendment claim because continuing to hold [them] in civil detention at Wyatt, where COVID-19 is present, could expose [them] to an unnecessary substantial risk of serious harm to [their] health.” *Id.* at 3.

For the reasons already recognized in *Sallaj*, the disease’s continued spread poses an unreasonable risk to the health and lives of *all* civil immigration detainees held in Wyatt—both “older people” and those with “pre-existing [medical] conditions,” and “young people without preexisting conditions.” *See id.* at *2. To prevent “devastating” consequences, *id.*, relief is necessary “to reduce the population in the detention facilit[y] so that all those who remain (including staff) may be better protected.” *See Savino v. Souza*, --- F. Supp. 3d ----, 2020 WL 1703844, at *1, 9 (D. Mass. Apr. 8, 2020) (“*Savino I*”) (certifying class and implementing an individualized bail process for the release of immigration detainees at two facilities in Bristol County, Massachusetts, to prevent widespread infection with COVID-19).

In *Sallaj*, the Court concluded that, “[a]lthough 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.” *Sallaj*, 2020 WL 1975819, at *3. That was more than three weeks ago, when “[t]here [were] six confirmed positive cases at Wyatt.” *Id.* The number of reported positive tests among Wyatt detainees has now exploded to 38, in addition to 10 self-reported confirmed cases among Wyatt staff. *See In re Donald W. Wyatt Detention Facility*, No. 1:20-mc-00004-JJM (“*In re Wyatt*”), Dkt. Case No. 1:20-mc-00004-JJM (“*In re Wyatt*”), Dkt. No. 11 (Status Report (D.R.I. May 14, 2020)) at 1. At the same time, social distancing remains impossible at Wyatt. Many immigration detainees at Wyatt continue to be housed with cellmates in small cells measuring approximately five feet by nine feet. All of them eat meals as a group in a common area at small shared tables less than three feet across or they must wait together to receive food. They share communal showers and telephones that are not disinfected between uses. Correctional officers and other Wyatt staff rotate regularly in and out of the facility, each potentially carrying additional infection from the outside world or other parts of the facility.

Petitioners and the putative class they seek to represent are entitled to immediate relief from these unconstitutional dangers.¹ In the present motion, Petitioners seek three forms of relief. *First*, Petitioners request an order from this Court adopting a streamlined, expedited process for the consideration of each class member’s bail pending a final determination on this class habeas petition, modeled on the process already successfully implemented in this Circuit by Judge Young in the District of Massachusetts in *Savino* and by Judge McCafferty of the District of New Hampshire, *see Gomes v. Acting Sec’y, U.S. Dep’t of Homeland Security*, Civil No. 20-cv-453-LM, (D.N.H.), 2020 WL 2113642 (D.N.H. May 4, 2020), as well as by Judge Chhabria of the Northern District of California, *see Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL

¹ To effectively facilitate the relief that the Constitution demands, Petitioners have separately filed a motion for class certification. As the memorandum in support of that motion demonstrates, the requirements of Federal Rules of Civil Procedure 23(a) and (b) are amply met by the proposed class of civil immigration detainees held by Respondents at Wyatt.

2059848 (N.D. Cal. Apr. 29, 2020). These expedited bail hearings—which rely on the district court’s “inherent authority to admit habeas petitioners to bail in the immigration context,” *Mapp v. Reno*, 241 F.3d 221, 223 (2d Cir. 2001)—provide an established mechanism that these courts have employed to release immigration detainees to address unconstitutional dangers of COVID-19 infection posed by their congregate confinement. *See Savino I*, 2020 WL 1703844, at *8.

Second, in addition to granting expedited bail hearings, Petitioners request the Court to adopt measures to facilitate the expedited bail process, including (1) expedited discovery; (2) the adoption of an order to ensure adequate access by class members to class counsel; and (3) requiring Respondents to identify individual class members for whom they oppose release on bail and explain the precise reason(s) for their opposition. These measures will allow Petitioners and Respondents to effectively and efficiently manage the process of mitigating Petitioners’ continued exposure to COVID-19 and risk of personal harm.

Third, the Court should grant Petitioners’ request for a preliminary injunction (1) prohibiting Respondents from transferring Petitioners—or any putative class members—to custody outside this Court’s jurisdiction while this action is pending, and (2) prohibiting Respondents from transferring new or additional civil immigration detainees to Wyatt while this action is pending. This request is narrowly tailored, will prevent irreparable harm from occurring to Petitioners in the face of their valid claim under the Fifth Amendment, and benefits both Petitioners’ and the public’s best interests.

BACKGROUND

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

In the United States alone, more than 1.46 million cases of COVID-19 have been confirmed

to date and at least 88,709 people have died from the disease as of May 17, 2020.² People of all ages, with and without preexisting conditions, have died from COVID-19. In Rhode Island, there have been more than 12,600 confirmed COVID-19 cases, and at least 499 people have died from the disease.³

Rhode Island continues to see new cases reported each day, and the state has the eighth-highest rate of confirmed cases per 100,000 people in the country. Dkt. No. 1-4, Declaration of Joseph J. Amon (“Amon Decl.”), ¶ 6. The state has “widespread” community transmission, and further increases in cases will strain Rhode Island’s limited medical infrastructure. *Id.* ¶¶ 32.a, 49. Even though the rate of newly confirmed cases appears to have slowed, there are likely at least another 18 to 24 months of significant COVID-19 activity,” including second and third waves of increased transmission. *Id.* ¶ 19.

The SARS-CoV-2 virus that causes COVID-19 is easily transmitted. *See* Dkt. No. 1-5, Declaration of Dr. Jonathan Louis Golob (“Golob Decl.”), ¶ 2. All human beings share an equal risk of contracting and thereafter transmitting the virus. Any adult who contracts the virus may experience life-threatening symptoms and death. *Id.* ¶¶ 4-5, 8, 14. And new information regarding COVID-19 risk factors is continually being released. Beyond the grave baseline risk the virus poses to all people, the list of conditions and characteristics that predispose some to especially severe complications is growing. Even those who survive COVID-19 are likely to suffer long-term damage to their health. *Id.* ¶ 9. COVID-19 can severely damage lung tissue, which requires an extensive period of hospitalization and rehabilitation, and in some cases, can cause a permanent loss of respiratory capacity. More is learned each passing day about the extent of permanent injury

² CDC, *Cases in the U.S.* (last updated May 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

³Rhode Island Department of Health, *Rhode Island COVID-19 Response Data*, (last updated May 17, 2020), <https://health.ri.gov/data/covid-19/>.

that may be caused by COVID-19. *Id.* ¶¶ 9, 14.

As recognized in *Sallaj*, “while older people with pre-existing conditions are the most vulnerable [to COVID-19], young people without preexisting conditions have become severely ill because of Covid-19, which, in some cases, has led to death.” *Sallaj*, 2020 WL 1975819, at *1. Indeed, a CDC report issued on April 29 “provid[ing] valuable clinical data on a large cohort of hospitalized [COVID-19] patients” found that “[a]mong hospitalized patients, 26% lacked high-risk factors for severe COVID-19”—such as old age or underlying medical conditions—“and 5% of those patients died.”⁴ This indicates “that SARS-CoV-2 infection can cause significant morbidity in relatively young persons without severe underlying medical conditions.”⁵ In other words, “*all adults, regardless of underlying conditions or age, are at risk for serious COVID-19-associated illness.*”⁶

People of all ages and medical backgrounds who have experienced serious cases of COVID-19 describe painful symptoms, including vomiting, severe diarrhea, relentless shivering, and suffocating shortness of breath. Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury. Golob Decl. ¶¶ 9, 14. These complications can manifest at an alarming pace. Individuals can show the first symptoms of COVID-19 infection in as little as two days after exposure, and their condition can seriously deteriorate in five days or sooner. *Id.* ¶ 6.

The need for care, including intensive care, is much higher for COVID-19 than for

⁴ CDC Morbidity & Mortality Weekly Report, *Characteristics & Clinical Outcomes of Adult Patients Hospitalized with COVID-19—Georgia, March 2020*, 69 MMWR 554, 548-49, (May 8, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e1-H.pdf>.

⁵ *Id.* at 548.

⁶ *Id.* at 550 (emphasis added).

influenza, and the fatality rate is about ten times higher than severe seasonal influenza. *Id.* ¶ 4. For people in high risk populations, the fatality rate is about 15% —or one in seven people. *Id.* Those who survive serious cases of COVID-19 should expect a prolonged and difficult recovery. *Id.* ¶ 9.

There is no cure or vaccine for COVID-19, and no medication to prevent or treat infection. *Id.* ¶ 10; Amon Decl. ¶ 7. The only known effective measure to reduce the risk of illness and death is to prevent people from being infected in the first place through social distancing. Golob Decl. ¶ 10; Amon Decl. ¶ 14. “[W]hile hand washing and disinfecting surfaces is advisable, the main strategy for limiting disease transmission is social distancing[,] and . . . for such distancing to be effective[,] it must occur before individuals display symptoms.” Amon Decl. ¶ 14 (emphasis omitted).

II. People Detained at Wyatt Face Extremely Heightened Risk of COVID-19 Infection.

Wyatt, like other detention facilities, is a congregate environment, where people live in close proximity. *See, e.g.*, Amon Decl. ¶ 22.; Golob Decl. ¶¶ 12-13; Dkt. No. 1-6, Declaration of Dr. Dora Schriro (“Schriro Decl.”), ¶ 13. As of May 14, Wyatt reports that there are 71 civil immigration detainees currently held at Wyatt. *See* Status Report (May 14, 2020) at 1, *In re Wyatt*, Dkt. No. 11. Until recently, civil immigration detainees were housed at Wyatt in two of its 12 housing units or “pods”: J-1 pod and J-2 pod. According to Wyatt, however, J-1 has been converted into “the Facility’s primary quarantine pod.” *See id.* at 8.

It is impossible for ICE detainees to maintain social distancing at Wyatt. Petitioners are housed in J-2, where the 5-foot by 9-foot cells are generally shared by two detainees. Petitioners eat and recreate together in common areas. Detainees sleep in bunk beds bolted to the wall, with only about four feet of vertical space between the top and bottom bunks. They share communal showers and telephones that are not disinfected between uses. New detainees continue to be transferred into the pod. Dkt. No. 1-1, Declaration of Oscar Yanes (“Yanes Decl.”), ¶¶ 11-22; Dkt.

No. 1-2, Declaration of Gagik Mkrtchian (“Mkrtchian Decl.”), ¶¶ 9-27; Dkt. No. 1-3, Declaration of Wendell Rafael Baez Lopez (“Baez Decl.”), ¶¶ 4-28. Wyatt cannot comply with CDC and State recommendations on social distancing and limits on the size of gatherings. Baez Decl. ¶ 16; Mkrtchian Decl. ¶ 14; Yanes Decl. ¶ 18. Petitioners must line up within a foot of each other for meals. Most of the detainees in line do not wear masks, and none wear gloves. One of the detainees who has the job of serving food has been sick for a long time, has red eyes, and has been coughing. He is afraid to report his symptoms for fear that he will be punished or put into isolation. Baez Decl. ¶ 20; Mkrtchian Decl. ¶ 17; Yanes Decl. ¶ 13.

Once they get their food, detainees sit to eat in immovable seats at small tables within arm’s length of each other. Baez Decl. ¶ 21; Mkrtchian Decl. ¶ 17; Yanes Decl. ¶ 13; Valencia Decl. ¶ 4(d). In addition to eating together in a common area, detainees exercise together, watch TV together, and socialize together, all in a common area where social distancing is impossible. Baez Decl. ¶ 22; Mkrtchian Decl. ¶ 18. Wyatt has instituted a staggered recreation schedule in J-2 to limit the number of detainees outside their cells, but the guards do not consistently enforce the schedule. Baez Decl. ¶ 19; Mkrtchian Decl. ¶ 13.

The risk of spreading COVID-19 throughout the facility is greatly increased because correctional officers and staff rotate regularly throughout the facility. Guards alternate between working in pods housing ICE detainees and Wyatt’s other pods, where at least 36 detainees have tested positive for COVID-19. Baez Decl. ¶¶ 4-6; Mkrtchian Decl. ¶ 26; Yanes Decl. ¶ 21. Guards do not practice social distancing and frequently fail to properly wear protective masks, which they instead let hang around their necks. Baez Decl. ¶ 10-11; Mkrtchian Decl. ¶ 16; Yanes Decl. ¶ 21.

Detainees were issued cloth masks in the last week of April but were not told how or when to wear them, and many detainees do not wear them at all. The masks that were given to Petitioners

have not been washed. Some of the detainees have left their masks on the dining tables and forgotten them. Baez Decl. ¶ 23; Mkrtchian Decl. ¶ 19; Yanes Decl. ¶ 17.

Respondents have not provided the detainees with accurate information about COVID-19. In March, ICE detainees asked Wyatt and ICE officials to explain what they were doing to keep them safe during the pandemic. On April 4, after they received no response, the detainees went on a hunger strike. Rather than providing information about what they were doing to protect the detainees, Respondents put them on lockdown and punished the perceived instigators by placing them in isolation. Yanes Decl. ¶¶ 6-7; Mkrtchian Decl. ¶¶ 23-24. Petitioner Mkrtchian was placed in isolation for 22 days for his purported role in the hunger strike. Mkrtchian Decl. ¶ 24.

Respondents have since given detainees false information about COVID-19. On May 6, Respondent Martin incorrectly told detainees that COVID-19 cannot be spread by asymptomatic individuals and cannot be spread on surfaces. When detainees challenged these statements, Respondent Martin became upset and gave nonsensical responses. Baez Decl. ¶¶ 8-12; Mkrtchian Decl. ¶¶ 9-11; Yanes Decl. ¶ 18.

Respondents have neither instructed detainees on the necessity of frequent handwashing nor made it possible for them to maintain proper hygiene. Detainees have not been given adequate cleaning supplies. If they wish to clean their cells, they must use their shower towels, even though they are only issued one clean towel per week. Baez Decl. ¶ 27; Mkrtchian Decl. ¶ 20; Yanes Decl. ¶¶ 15, 18. Detainees had not received any soap for a span of almost one month – from on or about April 14 to on or about May 11, and many detainees have stopped showering and washing. Petitioners have also not been provided hand sanitizer. Baez Decl. ¶¶ 15, 23-24; Mkrtchian Decl. ¶ 20; Yanes Decl. ¶ 16.

Petitioners and other detainees have asked to be tested for COVID-19, but Wyatt officials have told them that they will be tested only if they show symptoms for multiple days. Respondents have not tested asymptomatic ICE detainees for infection with COVID-19. Around April 25, Wyatt staff took the temperatures of ICE detainees, but that is the only testing they have received. Baez Decl. ¶¶ 13, 26; Mkrtchian Decl. ¶¶ 10, 26; Yanes Decl. ¶ 19. Respondents have refused to tell Petitioners what happens to detainees who test positive for COVID-19. Mkrtchian Decl. ¶ 12; Baez Decl. ¶ 9; Yanes Decl. ¶ 20. Detainees do not feel comfortable reporting that they are sick for fear that they will be sent to isolation or otherwise punished. At least nine detainees have told Petitioner Baez that they have felt unwell but are afraid to speak to nurses or guards about their symptoms. Baez Decl. ¶ 25; Mkrtchian Decl. ¶ 27.

III. Respondents' Responses to COVID-19 Do Not Protect ICE Detainees from Infection.

Respondents are aware of the serious risks that COVID-19 poses to detained populations. On March 9, the ACLU of Rhode Island and other groups notified Respondents about the threat posed by COVID-19 in ICE detention centers.⁷ In April, Petitioners and other detainees at Wyatt raised concerns about the risks they face from COVID-19, and held a hunger strike to protest the lack of transparency and protective measures. Mkrtchian Decl. ¶ 23; Yanes Decl. ¶¶ 9-10.

Respondents are also aware of public health guidelines and the need to implement and facilitate social distancing. For example, in an April 10 guidance (“April 10 Guidance”), ICE belatedly acknowledged the risks of coronavirus infection and COVID-19 to those in immigration detention.⁸ Dr. Joseph Amon, an infectious disease and correctional health expert, has concluded

⁷ See Dkt. No. 1-7, Declaration of Sarah Mujahid (“Mujahid Decl.”), at 151-53 (Exh. R, Letter from Steven Brown of ACLU of Rhode Island, Cherie Cruz of Formerly Incarcerated Union of Rhode Island, and Mavis Nimoh of Center for Prisoner Health and Human Rights, to Wyatt Warden Daniel Martin, Mar. 9, 2020).

⁸ U.S. Immigration & Customs Enforcement, *COVID-19 Pandemic Response Requirements* (Apr. 10, 2020), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

that the April 10 Guidance and related protocols “are likely to be inadequate to prevent or mitigate the rapid transmission of COVID-19 in the Wyatt facility.” Amon. Decl. ¶ 28. The protocols do not sufficiently implement necessary preventative measures, and lack a plan for the “identification of special protections for medically high-risk patients.” *Id.* ¶ 29 (emphasis omitted). “Because Wyatt fails to create increased protections for people with risk factors for serious illness and death from COVID-19, the Facility is unlikely to detect illness in these individuals until many of them have already been exposed to and contracted the coronavirus and fallen critically ill.” *Id.* ¶ 31.d.

In its twice-weekly status reports, Wyatt has asserted that it “relies on and routinely refers to the guidelines issued by the [CDC] for correctional and detention facilities.” *E.g., In re Wyatt*, Dkt. No. 11 at 3. Notably, Wyatt does not even claim to be *implementing* those guidelines.

Dr. Amon assessed the mitigation efforts described in Wyatt’s May 11 status report and concluded that they are “insufficiently clear on several key points and are likely to be inadequate to prevent or mitigate the rapid transmission of COVID-19 in the Wyatt facility.” Amon Decl. ¶ 28. Wyatt’s protocols fail to make clear that social distancing is required, rather than just recommended; do not follow guidance from ICE or the CDC to identify and protect medically high-risk individuals; do not implement sufficient screening protocols to identify potentially infected individuals; and do not implement sufficient sanitation and cleaning measures to prevent the spread of COVID-19. *Id.* ¶¶ 30-33, 37, 39. Additionally, Wyatt’s lockdown practices can reduce the likelihood that detainees receive medical treatment in a timely fashion, increase their risk of suicide and self-harm, increase the physical contact between detainees and guards, and may deter people from reporting their symptoms, which “would not only accelerate the spread of infection within facilities but could increase the likelihood of prisoner deaths due to lack of treatment.” *Id.* ¶ 50. Accordingly, neither ICE’s April 10 Guidance nor Wyatt’s protocols address

the numerous vectors of COVID-19 infection at Wyatt. *Id.* ¶ 40.

Wyatt has now reported a significant number of COVID-19 cases among detainees. *See In re Wyatt*, Dkt. No. 11 at 1. As Dr. Amon further explains, outbreaks in detention facilities can spiral out of control. *See id.* ¶¶ 42-46. Many detainees—including those who do not have existing conditions that make them specifically medically vulnerable—are far safer at home than in detention settings where social distancing is difficult or impossible. *See id.* ¶¶ 55-58. These predictions are further supported by a recent study, forthcoming in the *Journal of Public Health*, which projected that 72% of ICE detainees nationwide will be infected by day 90 of our immigration detention system’s ongoing COVID-19 outbreak under an *optimistic* contagion scenario—while nearly 100% will be infected under a more pessimistic scenario.⁹ The researchers project that between 11 and 15% of ICE detainees likely will require hospitalization. The study discusses possible interventions, including that “[l]owering a facility’s population density can slow the spread[.]” As “the total number of infections drop, the time to peak infection shifts, and the proportion of the population infected is lower.”¹⁰ At Wyatt specifically, the same researchers projected that between 78 and 95% of ICE detainees will be infected within 90 days of the first case of COVID-19 at the facility¹¹—which occurred on or before April 21.

The consequences will not be borne solely by detainees and Wyatt’s staff. Dr. Amon notes that the prevalence of the virus at Wyatt will mean that “[l]arge numbers of ill detainees and corrections staff will also strain the limited medical infrastructure” in the community surrounding Wyatt. Amon. Decl. ¶ 49. He observed that “[t]his is of particular concern as Wyatt is located in

⁹ Dkt. No. 1-7, Mujahid Decl., at 20-36 (Exh. C, Irvine et al., *Modeling COVID-19 and Impacts on ICE Detention Facilities*, 2020, *J. of Urban Health* (forthcoming 2020)).

¹⁰ *Id.*

¹¹ Irvine et al., *Modeling COVID-19 & Impacts on ICE Detention Facilities*, 2020, Wyatt Detention Center, www.icecovidmodel.org.

Central Falls, Rhode Island, which currently has the highest number of cases of people who have tested positive for COVID-19 per 100,000 people in the state.” *Id.* ¶ 34.b.

In light of these profound dangers, former ICE officials have called for the humanitarian release of large numbers of immigration detainees. Former Acting ICE Director John Sandweg acknowledged in March that that ICE detention centers “are extremely susceptible to outbreaks of infectious diseases” and that “preventing the virus from being introduced into these facilities is impossible.”¹² He called for “releasing from custody the thousands of [ICE] detainees who pose no threat to public safety and do not constitute an unmanageable flight risk.”¹³

Dr. Dora Schriro—a former ICE official, corrections administrator, and immigration detention expert—has concluded that “the plans that ICE has put forth are insufficient to protect the detained population, detention staff, and the public at-large.” Schriro Decl. ¶ 18. Dr. Schriro “recommend[s] that any other individuals deemed likely to comply on appropriate conditions of supervision where necessary, be released immediately to protect themselves, other detainees, correctional and medical staff, and the general public, without impeding immigration court proceedings or other legally-required appointments.” *Id.* ¶ 78.

ARGUMENT

Petitioners and putative class members face a growing threat to their lives and health that justifies immediate emergency relief. COVID-19 is present and spreading exponentially at Wyatt, and Respondents have no effective way to protect them. Petitioners’ continued detention at Wyatt is “objectively unreasonable,” in violation of the Due Process Clause of the Fifth Amendment. *See Kingsley*, 135 S. Ct. at 2472-73. The grave threat to Petitioners’ lives is imminent and growing.

¹² John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, The Atlantic (Mar. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/release-icedetainees/608536/>.

¹³ *Id.*; see also ICE, *ICE Guidance on COVID-19*, “Overview & FAQs” Tab, “How are ICE Detention Facilities Engaging in Social Distancing,” <https://www.ice.gov/coronavirus> (last updated Apr. 6, 2020, 1:27 p.m.).

To address this emergency and prevent a tragedy, this Court should (1) adopt a streamlined, expedited process by which to consider releasing class members on bail pending a final determination on this class habeas petition; (2) order expedited discovery and other measures to facilitate those expedited bail adjudications; and (3) prohibit Respondents from transferring Petitioners and putative class members to custody outside this Court’s jurisdiction, as well as transferring new or additional civil immigration detainees to Wyatt, while this action is pending.

I. This Court Should Implement an Expedited Bail Process to Facilitate the Release of Members of the Petitioner Class.

“[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). As numerous courts have held, the court’s power to release habeas petitioners before resolving the merits of their claims is appropriately exercised through the court’s longstanding authority to grant bail. The history and scope of that power are explained in detail in the leading case of *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001). As the *Mapp* court explained, “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.” *Id.* at 223.

Expedited bail hearings provide an efficient mechanism for resolving class-wide emergency habeas petitions in the extraordinary present circumstances. As Judge Young noted in *Savino*, several courts “have recently relied on *Mapp* to order bail for habeas petitioners who were civil immigration detainees at risk due to the COVID-19 pandemic.” *Savino I*, 2020 WL 1703844 at *9 (collecting cases); *see also Gomes*, 2020 WL 2113642 at *1 (implementing bail process for immigration detainees at risk for COVID-19); *Zepeda Rivas*, 2020 WL 2059848, at *1, 3 (same).

In *Savino*, Judge Young certified a class of “[a]ll civil immigraion detainees” held at the Bristol County House of Corrections (“BCHOC”), located less than 35 miles from Wyatt in North

Dartmouth, Massachusetts. *Savino I*, 2020 WL 1703844, at *4, 9. He then ordered a process to “diligently entertain[] bail applications” among the class members, which created a process for making “individualized [release] determinations, on an expedited basis” in order “to reduce the population in the detention facilities so that all those who remain (including staff) may be better protected.” *Id.* Between April 7 and May 7, Judge Young granted release on bail to 44 ICE detainees, substantially reducing the immigration detainee population at BCHOC. *Savino v. Souza*, No. CV 20-10617-WGY, 2020 WL 2404923, at *2 (D. Mass. May 12, 2020) (“*Savino II*”).

In *Zepeda-Rivas*, Judge Chhabria of the Northern District of California likewise “implement[ed] a system for considering individual bail applications, modeled after [the] system created and successfully implemented by Judge Young in [*Savino*].” 2020 WL 2059848, at *3. Judge Chhabria explained that he would “consider bail applications from class members over a roughly 14-day period,” after which “the Court w[ould] have a better understanding of the number of people who will continue to be detained during the public health crisis, which in turn could affect the relief (if any) to be ordered by way of preliminary injunction to help ensure social distancing at the facilities.” *Id.*

Judge McCafferty in the District of New Hampshire has also followed the *Savino* model, “provisionally certify[ing] the class [of ICE detainees] for the purpose of holding expedited bail hearings” as “a form of preliminary and emergency relief.” *See Gomes*, 2020 WL 2113642, at *1. Judge McCafferty explained that the court would “give each petitioner a bail hearing,” at which the respondents will have the burden to prove by clear and convincing evidence that [the] petitioner is either a danger to the public or a flight risk.” *Gomes*, Case No. 20-cv-453-LM, Dkt. No. 34 at 3-4 (D.N.H. May 1, 2020).

These courts explicitly recognized that the appropriate test for granting bail for civil immigration detainees is set forth in *Mapp*, under which a court “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.’” *Savino I*, 2020 WL 1703844 at *8; *see also id.* at *8-9 & n.11; *Gomes*, Case No. 20-cv-453-LM, Dkt. No. 34, at 3 (D.N.H. May 1, 2020) (“Courts in both the First and Second Circuits have relied on *Mapp* in considering whether to grant bail to habeas petitioners who were civil immigration detainees at risk due to the COVID-19 pandemic.”) (collecting cases).

The *Mapp* standard applied and held satisfied in *Savino*, *Gomes*, and *Zepeda-Rivas* is also readily satisfied here: First, Petitioners raise “substantial claims” on the merits, and are likely to prevail on the merits of their claim that continued detention at Wyatt violates their rights under the Due Process Clause. Second, the COVID-19 crisis and the imminent threat to Petitioners’ lives has created precisely the sort of “extraordinary circumstances” that make the grant of bail necessary to make habeas effective.

A. Petitioners Raise a Substantial Constitutional Claim.

Petitioners bring a single cause of action on behalf of themselves and the class of similarly situated civil immigrant detainees at Wyatt, asserting a violation of their Fifth Amendment due process rights due to detention conditions that amount to unconstitutional punishment. *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). “When the Government detains a person for the violation of an immigration law, the person is a civil detainee, even if he has a prior criminal conviction.” *Sallaj*, 2020 WL 1975819, at *3 (quoting *Castillo v. Barr*, --- F. Supp. 3d ----, Case No. CV20-00605TJHAFMX, 2020 WL 1502864, at *3 (C.D. Cal. Mar. 27, 2020) (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001))). Civil detainees are “entitled to more considerate treatment than a

criminal detainee, whose conditions of confinement are designed to punish.” *Id.* (quoting *Castillo*, 2020 WL 1502864, at *3) (citing *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982))); *see Zadvydas* 533 U.S. at 721 (Scalia, J. dissenting) (“Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish.”).

The Due Process Clause protects civil detainees, like Petitioners, from objectively unreasonable conduct that amounts to punishment by creating an unreasonable risk to their safety. *See Kingsley*, 135 S. Ct. at 2472-73; *see also, e.g., Miranda v. Cnty of Lake*, 900 F.3d 335, 352 (7th Cir. 2018); *Gordon v. Cnty of Orange*, 888 F.3d 1118, 1120, 1122-25 (9th Cir. 2018). The “objective reasonableness” standard applicable to civil immigration detention imposes a higher duty on Respondents than the standard applicable to individuals convicted of *criminal* offenses.

Under *Kingsley*, civil detainees establish a violation of the Due Process Clause by showing that, “from an objective viewpoint,” the conditions of their detention are “not rationally related to a legitimate governmental objective or that [they are] excessive in relation to that purpose.” *Miranda-Rivera*, 813 F.3d at 70 (quoting *Kingsley*, 135 S. Ct. at 2473-74). Conditions of confinement for civil immigration detainees therefore violate the Constitution if they do not “reasonably relate[] to a legitimate governmental objective.” *Bell*, 441 U.S. at 539; *accord Lyons v. Powell*, 838 F.2d 28, 29 (1st Cir. 1988).

It is well settled that the Due Process Clause “imposes upon the Government a duty to assume responsibility for a detainee’s safety and general well-being while in custody.” *Sallaj*, 2020 WL 1975819, at *3 (citing *Helling v. McKinney*, 509 U.S. 25, 32 (1993)). Accordingly, the First Circuit has held that, at a minimum, detention conditions are unconstitutional where they: (1) objectively deny a “minimal measure of necessities required for civilized living”; and (2) are

imposed with “deliberate[] indifferen[ce] to inmate health or safety.” *Surprenant v. Rivas*, 424 F.3d 5, 18-19 (1st Cir. 2005); *see Reaves v. Dep’t of Corr.*, 333 F. Supp. 3d 18, 26 (D. Mass. 2018); *Couchon v. Cousins*, Civ. Action No. 17-10965-RGS, 2018 WL 4189694, at *6 (D. Mass. Aug. 31, 2018).

In assessing whether conditions imposed upon civil immigration detainees violate their due process rights, courts need not wait until tragedy has already occurred. Detainees’ constitutional protections extend to “future harm,” including a “condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” *Helling*, 509 U.S. at 33. Therefore, constitutional violations can arise from “the exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.” *Id.*; *see 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); *accord DeGidio v. Pung*, 920 F.2d 525, 526-28, 532-33 (8th Cir. 1990) (inadequate screening and control procedures in response to tuberculosis outbreak violated the Eighth Amendment).

As the facts summarized above demonstrate, Petitioners’ continued detention at the Wyatt is “objectively unreasonable” and is therefore inconsistent with the duties imposed upon Respondents by the Due Process Clause. Respondents have a constitutional duty to protect the health and lives of Petitioners while they are in custody, but Respondents have not and cannot do so at Wyatt under the circumstances of this pandemic. Cases of COVID-19 have already increased sharply over the past few weeks. Social distancing is impossible in Wyatt’s congregate setting. Petitioners eat, socialize, watch TV, and spend much of their days in a common area where it is impossible to maintain distance. Guards and other Wyatt staff come in and out of the facility, potentially bringing in the virus from the outside, and then move between the different detainee

Pods, potentially spreading the virus further. Furthermore, the lack of hygiene and sanitation measures will facilitate the spread of COVID-19: Showers and telephones are not cleaned between uses. Petitioners have no access to hand sanitizer. Guards and detainees have been issued masks but often do not wear them.

The continued detention of civil immigration detainees at Wyatt—even those without pre-existing medical conditions—“expose[s] [them] to an unnecessary substantial risk of serious harm to [their] health” in violation of the Fifth Amendment. *Sallaj*, 2020 WL 1975819, at *3. This is because “[t]he risk of contracting COVID-19 in a detention center, such as the Wyatt, is dangerously high [since] conditions of confinement inherently prevent one’s ability to socially distance, which, until a treatment is discovered, or a vaccine developed, is the best measure to reduce the spread of the disease.” *Id.*(citation omitted); *see, e.g.*, Amon Decl. ¶¶ 14, 22-23, 30, 40.a, 52.

Judge McConnell’s reasoning in *Sallaj* is consistent with a wave of decisions involving civil immigration detention. Indeed, “[c]ourts around the country are recognizing th[e] fact” that it is substantially likely that continued immigration detention under circumstances like those at the Wyatt is unconstitutional. *Sallaj*, 2020 WL 1975819, at *3 (collecting cases); *see, e.g.*, *Savino*, 2020 WL 1703844, at *9 (“[T]he Court follows the light of reason and the expert advice of the CDC in aiming to reduce the population [of immigration detainees] in the [Bristol County] detention facilities so that all those who remain (including staff) may be better protected.”); *Zepeda Rivas*, 2020 WL 2059848, at *2-3 (“There is no need to repeat a discussion of the ‘tinderbox’ risk of the virus spreading in crowded detention facilities. Nor is there need to recount the health risks posed by the virus—not just for people in high-risk categories but for healthy people as well. In detention facilities throughout the nation, ICE has failed to take sufficient action to address the

obvious health risks to detainees. . . . The conditions of confinement do not merely threaten detainees; they also threaten facility staff, not to mention the greater community whose health is put at risk by the congregation of large groups in cramped spaces.”) (footnotes omitted); *Jimenez v. Wolf*, Case No. 18-10225-MLW, Dkt. No. 507 (D. Mass. Mar. 26, 2020) at 4 (ordering release of immigrant detainee in the midst of the COVID-19 pandemic and noting that “being in a jail enhances risk” and that in jail “social distancing is difficult or impossible”); *Castillo*, 2020 WL 1502864, at *1, 5-6 (ordering release of multiple immigration detainees upon concluding that “a civil detainee cannot [constitutionally] be subject to the current conditions of confinement at [immigration detention facility]” where “[detainees] are not kept at least 6 feet apart from others at all times” and “are forced to touch surfaces touched by other detainees, such as with common sinks, toilets and showers”; and recognizing that “the risk of infection in immigration detention facilities . . . is particularly high if an asymptomatic guard, or other employee, enters a facility”); *Basank v. Decker*, --- F. Supp. 3d ---, 2020 WL 1481503, at *1, 3, 7 (S.D.N.Y. Mar. 26, 2020) (ordering immediate release of ten immigration detainees held in county jails upon recognizing, inter alia, that (1) “[t]he nature of detention facilities makes exposure and spread of [COVID-19] particularly harmful”; (2) “medical doctors, including two medical experts for the Department of Homeland Security, have warned of a ‘tinderbox scenario’ as COVID-19 spreads to immigration detention centers and the resulting ‘imminent risk to the health and safety of immigrant detainees’ and the public”; and (3) “[a] number of courts in this district and elsewhere have recognized the threat that COVID-19 poses to individuals held in jails and other detention facilities”).

There is overwhelming evidence that Respondents are aware of the obvious risk that COVID-19 poses to the detained population at Wyatt. *See Burrell v. Hampshire Cty.*, 307 F.3d 1, 8 (1st Cir. 2002) (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). This Court already has

twice released detained immigrants from Wyatt in light of the risks to their health. *See Sallaj*, 2020 WL 1975819, at *4; *Medeiros*, 2020 WL 2104897, at *5-6. Petitioners have submitted expert evidence demonstrating the grave risk COVID-19 poses to Petitioners if they remain in Wyatt. COVID-19 is highly contagious and can cause severe health problems and death. Petitioners and other detainees have raised concerns at Wyatt about the risks they face from COVID-19, even going on hunger strike to protest the conditions and lack of transparency. Yanes Decl. ¶¶ 6-7; Mkrtchian Decl. ¶¶ 23-24. Advocacy groups have also notified Respondents about the threat posed by COVID-19 in ICE detention centers. *See* Steven Brown of ACLU of Rhode Island, Cherie Cruz of Formerly Incarcerated Union of Rhode Island, and Mavis Nimoh of Center for Prisoner Health and Human Rights, March 9, 2020 Letter to Wyatt Warden Daniel Martin, attached to Petition as Exhibit R to Attachment 7 (Dkt. No. 1-7 at 152), Mujahid Decl. Both ICE and Wyatt have released guidance showing that they are aware of the spread of COVID-19, even if their procedures plainly fail to address the threat that it poses. *See* Amon Decl. ¶¶ 30-38. “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.” *Sallaj*, 2020 WL 1975819, at *3. This ineffective response in the face of an indisputably grave risk to health and life violates the Due Process Clause. *Id.* While the number of confirmed cases of COVID-19 has continued to grow since this Court’s April 24 order in *Sallaj*, “the full extent of the risk is [still] unknown” due to inadequate testing. *See id.* Accordingly, Petitioners here, like Mr. Sallaj before them, have “a likelihood of success on the merits of [their] Fifth Amendment claim because continuing to hold [them] in civil detention at the Wyatt, where COVID-19 is present, could expose [them] to an unnecessary substantial risk of serious harm to [their] health.” *Id.*

B. The Imminent Threat to Petitioners from COVID-19 Constitutes an Extraordinary Circumstance Justifying Bail

Under the *Mapp* standard, habeas petitioners can be released on bail upon a showing of “extraordinary circumstances.” 241 F.3d at 226. As numerous courts have held, “[s]evere health issues” are “the prototypical...case of extraordinary circumstances that justify release pending adjudication of habeas.” *Coronel v. Decker*, Case No. 20-CV-2472 (AJN), 2020 WL 1487274, at *9 (S.D.N.Y. Mar. 27, 2020) (collecting cases). As demonstrated by *Savino*, *Gomes*, and *Zepeda-Rivas*, courts have recognized that the threat posed by COVID-19 in congregate facilities amounts to an extraordinary circumstance justifying bail.

The threat to Petitioners’ lives from continued detention at Wyatt constitutes an “extraordinary circumstance” justifying bail. Over the past three weeks, the number of confirmed COVID-19 cases among detainees at Wyatt has jumped from 0 to 38, and the number of confirmed cases among Wyatt staff has jumped from 0 to 10. It is nearly certain that the actual extent of infection at Wyatt is much higher, but the extent of infection among Petitioners remains unknown because Respondents have not undertaken widespread testing among the immigration detainees. Respondents have insisted that only detainees who report COVID-19 symptoms for numerous days can be tested.

While COVID-19 poses the gravest threat to Petitioners with certain medical conditions, the threat is severe among all detainees. As this Court held in *Sallaj*, all civil immigration detainees held in Wyatt are at risk—both “older people” and those with “pre-existing [medical] conditions,” and “young people without preexisting conditions.” *Sallaj*, 2020 WL 1975819 at *1. Accordingly, the threat to Petitioners’ lives and health constitutes an extraordinary circumstance justifying bail.

An expedited bail application procedure is necessary because proceeding on an individual basis will not adequately safeguard the putative class members’ constitutional rights. The COVID-

19 pandemic poses an unprecedented and imminent threat to the health and safety of the civil immigration detainees held at Wyatt. Requiring each member of the putative class to prepare and file individual habeas petitions *and* bail applications would waste precious time and resources. This “urgent and unprecedented” situation, caused by a “nightmarish pandemic,” *Savino*, 2020 WL 1703844, at *9, will not abate until the population of civil immigration detainees at Wyatt is reduced to a level that permits appropriate social distancing.

II. This Court Should Adopt Immediate Measures to Facilitate the Expedited Bail Process.

Petitioners urge the Court to follow the lead of other courts that have implemented an expedited bail process, which have adopted a set of measures to facilitate the speedy resolution of these emergency claims. Such measures include expedited discovery, the ability for class counsel to communicate with detainees, and requiring Respondents to identify any putative class members for whom they oppose granting bail and describe with particularity their reason(s) for doing so.

A. Expedited Discovery.

This Court should require expedited discovery of information necessary to process the bail for each member of the Petitioners’ class. Respondents currently possess the names, biographical information, and facility medical records of the immigration detainees held at Wyatt. Petitioners seek expedited discovery of this information in order to facilitate the bail process. In particular, Petitioners seek an order requiring Respondents to provide the following information and documents in Respondents’ possession for each class member on an expedited basis:

- a. biographical information, including name, country of citizenship, sex and age;
- b. last known home address and telephone number(s);
- c. Alien registration number (“A number”);
- d. immigration history, including charges of removal, and status of past and present removal proceedings and any appeal and petition of review thereof;

- e. criminal history and rap sheets, including any pending criminal charges and the outcome of any criminal proceedings (e.g., conviction, pending, or dismissed);
- f. whether Respondents possess a travel document (e.g., passport) for the detainee;
- g. scheduled removal date and plan for removal (if any);
- h. name and contact information for the detainee's immigration attorney(s) of record on file with DHS (e.g., as contained in DHS Form G-28);
- i. relevant medical information and records, including whether the detainee falls within a group at higher risk for severe illness as a result of COVID-19, as recognized by the CDC¹⁴ or by ICE in its April 4 Updated COVID-19 Detained Docket Review Guidance.¹⁵

Expedited discovery is justified when a plaintiff demonstrates “good cause.” Courts in this Circuit have applied two standards to analyze whether good cause exists: “(1) a four-part inquiry that is similar to a preliminary injunction standard . . . ; and (2) a ‘reasonableness’ standard that assesses the reasonableness of the request in light of all the circumstances.” *Laughlin v. Orthofix Int'l, N.V.*, 293 F.R.D. 40, 41 (D. Mass. 2013). Under either approach, expedited discovery is warranted here because Respondents, not Petitioners, possess this information that will identify the members of the putative class and allow the Court to assess on an expeditious basis the emergency bail applications filed by putative class members. Courts adopting an expedited bail process have agreed. *See, e.g., Zepeda Rivas*, 2020 WL 2059848, at *3 (ordering ICE “to provide the Court and class counsel with information and records regarding each [ICE] detainee at the facilities [at issue],” “includ[ing] names, ages, any health vulnerabilities, and any criminal information”); *see also* Order, *Gomes v. DHS*, Civil No. 20-cv-453-LM, Dkt. No. 34 (D.N.H. May 1, 2020) (placing burden on respondents at bail hearings “to prove by clear and convincing

¹⁴ CDC, Groups at Higher Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited May 17, 2020).

¹⁵ E-mail Guidance from ICE Assistant Director Peter Berg to ICE Field Office Directors and Deputy Field Office Directors, Apr. 4, 2020 Updated Guidance: COVID-19 Detained Docket Review, <https://www.ice.gov/doclib/coronavirus/attk.pdf> (last visited May 17, 2020).

evidence that [a] petitioner is either a danger to the public or a flight risk”). The Court should order Respondents to provide that information immediately.

B. Facilitation of Class Counsel’s Communication with Class Members.

As the court in *Zepeda Rivas* held, this Court should order Respondents “to ensure that class counsel has the ability to promptly communicate with detainee[.]” class members. *Zepeda Rivas*, 2020 WL 2059848, at *3. Granting this request will allow class counsel to better understand the particular circumstances and needs of each class member, as well as more effectively and efficiently represent each individual’s interest before the Court. The Court should order Respondents to adopt measures to ensure adequate access and communication by class members to class counsel and vice versa, including the posting of appropriate notices within all areas of Wyatt where class members are located, and enabling free and confidential telephone calls between class counsel and class members upon request.

C. Respondents Should Identify Putative Class Members Whose Bail They Oppose and Describe the Reason(s) For Such Opposition.

To ensure an efficient and thorough process, the Court should require Respondents to identify any putative class members for whom they oppose granting bail and offer justification for such refusal prior to engaging in any bail hearings. Because Petitioners have already demonstrated on a class-wide basis a likelihood of success on the merits as well as extraordinary circumstances justifying release on bail, Respondents bear the burden of demonstrating that bail would be inappropriate for specific detainees. *See Gomes*, Order, Civil No. 20-cv-00453 (D.N.H. May 4, 2020) (“At the bail hearings, the respondents will have the burden to prove by clear and convincing evidence that each petitioner is either a danger to the public or a flight risk.”); *see also Hernandez-Lara v. ICE.*, Case No. 19-CV-394-LM, 2019 WL 3340697, at *4 (D.N.H. July 25, 2019) (collecting cases).

III. The Court Should Order a Preliminary Injunction Prohibiting Respondents from Transferring Petitioners and Punitive Class Members to Other Detention Facilities and the Admission of New Immigration Detainees to Wyatt.

Petitioners request the Court to grant a preliminary injunction (1) prohibiting Respondents from transferring Petitioners—or any putative class members—to custody outside this Court’s jurisdiction while this action is pending, and (2) prohibiting Respondents from transferring new or additional civil immigration detainees to Wyatt while this action is pending. A district court’s assessment of whether to grant a preliminary injunction requires the consideration of four factors: (1) the movant’s likelihood of success on the merits; (2) whether and the extent to which the movant will suffer irreparable harm in the absence of an injunction; (3) a balance of the equities; and (4) the potential impact of an injunction on the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The irreparable harm factor is assessed on “a sliding scale, working in conjunction with a moving party’s likelihood of success on the merits, such that the strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown.” *Braintree Labs., Inc. v. Citigroup Glob. Markets Inc.*, 622 F.3d 36, 42 (1st Cir. 2010) (citations and quotation marks omitted).

A. Petitioners Are Likely to Succeed on the Merits.

As set forth *supra* Argument § I.A., Petitioners are likely to succeed on their Fifth Amendment claim that their continued detention “expose[s] [them] to an unnecessary substantial risk of serious harm to [their] health.” *Sallaj*, 2020 WL 1975819, at *3. This unconstitutional risk is exacerbated by the transfer of detainees to other facilities—both during the transport and intake process as well as upon detention elsewhere—and by the admission of new immigration detainees to Wyatt, particularly from congregate settings such as other ICE detention facilities, jails, and prisons.

The congregate conditions, impossibility of social distancing, and lack of adequate sanitation that have led to a significant outbreak of COVID-19 at Wyatt are prevalent throughout the nationwide network of facilities used by ICE. “Jails, prisons, and immigration detention facilities are notorious amplifiers of infectious disease.” Schriro Decl. ¶ 23. “The reason for the rapid spread of infectious disease, including COVID-19, in immigration detention is straightforward: prompt identification of COVID-19 cases utilizing symptom screening and conducting adequate testing, and consistent application of preventive measures such as valid quarantine methods are not in place.” *Id.* ¶ 21. “The conditions in immigration detention facilities do not allow detained individuals or staff to protect themselves and therefore are likely to facilitate the spread of COVID-19.” Amon Decl. ¶ 21; *see also id.* ¶ 22 (“People in immigration detention are housed in crowded spaces of limited size and are subjected to security measures that force them into close contact with guards. They cannot practice the ‘social distancing’ necessary to effectively prevent the spread of COVID-19. Bathrooms facilities—toilets, showers, and sinks—and other common areas are shared, without adequate surface disinfection between users. Food preparation and distribution without proper precautions also presents a further site for the virus to spread. Infectious spread presents a particular challenge in these facilities where the population often is disproportionately vulnerable, while facilities provide limited medical care.”).

Throughout the immigration detention system, “ICE has yet to adequately address the frequency with which detainees come into contact with one another, the lack of basic cleaning and sanitization supplies and PPE to mitigate the risk when such encounters occur, or staff’s continuing non-compliance with CDC recommendations.” Schriro Decl. ¶ 21. “The limited measures that ICE has taken are insufficient and simply do not allow detainees to practice either

the social distancing to avoid exposure or the sanitation and hygiene necessary to remediate exposure to protect themselves from contracting COVID-19.” *Id.*; *see also, e.g., id.* ¶ 31.c. (“[ICE detention facilities] facilities are densely populated. The square footage per housing unit is small, the use of bunkbeds is prevalent, and the ratio of sinks, showers, toilets, and urinals to beds is low. It is not uncommon for housing units to hold 50 to 100 or more detainees.”).

ICE continues to regularly transfers detainees between these facilities, and “[d]etainees are shackled to one another during transports and sit or stand shoulder to shoulder on benches” while being admitted to a new facility. *Id.* ¶ 31.d; *see also id.* ¶ 31.e. (“ICE adopted its own restriction for inter-facility movement on April 10 but with ample latitude for unspecified ‘extenuating’ security considerations.”). For example, ICE “regularly transfer[s] detainees” from Wyatt to Strafford County House of Corrections in New Hampshire, where the *Gomes* court has certified a class and instituted a bail process in light of the unconstitutional dangers of COVID-19. *See Order, Gomes v. DHS*, Case No. 20-cv-453-LM, Dkt. No. 123, at 12 (D.N.H. May 14, 2020).

Of course, “[t]ransfer [of detainees between ICE facilities] risks spread of infection.” Amon Decl. ¶ 35(b); *see also id.* (“transfer during [COVID-19’s incubation] period to open up space in one facility could facilitate transmission to another”); *id.* ¶ 51 (“There are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including from staff and transfer of incarcerated/detained persons.”).

Most significantly, there is a massive and fast-growing—while no doubt still severely underreported—outbreak of COVID-19 throughout ICE’s detention network as a whole. Schriro Decl. ¶ 20. “ICE is not conducting the kind of symptomatic screening and comprehensive testing necessary to show the full scope of the spread of COVID-19 in immigration detention.” Schriro Decl. ¶ 20. As of May 15, only 2,045 of the tens of thousands of detainees in ICE’s custody had

even been tested for COVID-19.¹⁶ Even “the limited testing that [ICE] ha[s] conducted demonstrates the speed at which COVID-19 is spreading in immigration detention.” Schriro Decl. ¶ 20. “ICE announced the first positive COVID-19 detainee on March 24. On April 9, just 37 detainees had tested positive for COVID-19. A month later, on May 14, the number had increased to 965.” *Id.* (footnotes omitted). As of May 15, ICE reported that 986 detainees had tested positive for COVID-19 in at least 47 facilities across the country, and that 44 ICE employees at detention centers had tested positive—not counting non-ICE guards and staff like the numerous Wyatt employees who have tested positive.¹⁷

Once new detainees arrive at Wyatt, whether or not they are being transferred from other detention facilities, the procedures in place to adequately screen and quarantine new detainees at Wyatt are not sufficient to prevent the spread of COVID-19 to detainees already at Wyatt. The screening questions in place have notable omissions, and fail to ask about all relevant symptoms and contact with potentially infected individuals. Amon Decl. ¶ 32.f. Further, the quarantine protocols are dependent on Wyatt having enough capacity to put in place, and without testing in place, they are “insufficient due to both asymptomatic and pre-symptomatic transmission, [meaning] there remains a possibility of transmission to new detainees and to the general population without implementing testing.” *Id.* ¶32.g. Particularly where new detainees are likely to come from the surrounding area, Dr. Deborah Birx, Coronavirus Response Coordinator for the White House Coronavirus Task Force, has singled out Rhode Island and the Providence area as a hot spot for increasing cases of COVID-19, because it is caught between New York City and the Boston area. *Id.* ¶ 49.

¹⁶ ICE, *ICE Guidance on COVID-19*, “Confirmed Cases” Tab, <https://www.ice.gov/coronavirus> (last updated May 15, 2020, 5:05 p.m.).

¹⁷ *Id.*

The extreme dangers of infection throughout ICE’s detention facilities—a number of which have worse confirmed outbreaks than Wyatt, despite even less testing—exacerbate the already unconstitutional dangers faced by Petitioners and the class they seek to represent, and underscore their likelihood of success on the merits of their Fifth Amendment claim.

B. Petitioners Will Suffer Irreparable Harm in the Form of Increased Risk of Infection, Illness, and Death in the Absence of a Preliminary Injunction.

The enormous, growing, and underreported outbreak of COVID-19 throughout ICE’s network of detention facilities also demonstrates that Petitioners and putative class members will be irreparably harmed absent an injunction prohibiting Respondents from transferring class members to other detention facilities and from admitting new immigration detainees to Wyatt.

As with the neighboring detention facility at issue in *Savino*, “the chances of a more dangerous outbreak [among ICE detainees at Wyatt] would rise were additional detainees to be added to the mix.” *See Savino II*, 2020 WL 2404923, at *6. And “ICE acknowledges that ‘[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.’” *Id.* (alteration in original) (quoting Mem. from Enrique M. Lucero, ICE, to Detention Wardens & Superintendents 1 (Mar. 27, 2020), available at <https://www.ice.gov/doclib/coronavirus/attF.pdf>).

In light of the extraordinary and daily-increasing danger posed by the massive, system-wide COVID-19 outbreak throughout the ICE detention system, Petitioners and the putative class “cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy.” *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 76 (1st Cir. 2005). They therefore easily satisfy the threshold required to establish irreparable harm.

C. The Public Interest and Balance of Equities Heavily Favor Petitioners.

Judges McConnell and Smith of this District, as well as many other federal courts in this Circuit and around the country, in the context of this pandemic, have rightly concluded that both the balance of equities and the public interest weigh heavily in favor of emergency injunctive relief in response to the dangers posed to civil immigration detainees by COVID-19. *See, e.g., Sallaj*, 2020 WL 1975819, at *4; *Medeiros*, 2020 WL 2104897, at *5-6. Given the interdependence of all parties' desire to limit the spread of COVID-19, and for all of the reasons discussed with respect to Petitioners' likelihood of success on the merits, Petitioners' interest in protecting their personal health and safety also aligns with that of Respondents, public health officials, and the public at large who have an interest in preventing further spread of the virus at Wyatt. Indeed, there should be no dispute that compounding the spread of infection at Wyatt and other ICE facilities by further admissions and transfers to and from Wyatt will directly affect guards, visitors, attorneys, and the families of those people—and in turn the larger communities surrounding Wyatt and ICE's other facilities. *See Sallaj*, 2020 WL 1975819, at *4 (“A spread of Covid-19 in this detention facility would be disastrous for the health and safety of those living and working there, as well as the burden it would cause on valuable medical resources.”); *Savino II*, 2020 WL 2404923, at *10-11 (“[T]he public has a powerful interest in ensuring that there is not an outbreak within the detention center that is then primed to spread via the staff to the wider community. . . . The virus, if allowed to thrive in the detention centers, will migrate back into our neighborhoods. . . . Were the government to loose an uncontrollable viral outbreak from within its detention centers, it would betray its duty to the public, not just to the detainees.”) (emphasis in original).

Additionally, with respect to the government interest prong of the assessment, “there is no harm to the Government when a court prevents the Government from engaging in unlawful practices,” *Castillo*, 2020 WL 1502864, at *6, and any public safety interest the government

purports to have in carrying on new admissions and transfers of ICE detainees to and from Wyatt during the pendency of this action does not justify increased exposure of detainees to life-threatening illness.

CONCLUSION

For the foregoing reasons, this Court should:

(1) Adopt a streamlined, expedited process for the consideration of bail for each member of the Petitioner class, pending a resolution of this class habeas petition;

(2) Adopt the measures outlined above to facilitate the expedited bail process, including (i) expedited discovery of the information and documents set forth above, (ii) means to ensure adequate access by class members to class counsel, and (iii) the identification by Respondents of individual class members for whom they oppose release on bail and the reasons for that opposition; and

(3) Enter an order (i) prohibiting Respondents from transferring Petitioners and any putative class members to custody outside this Court's jurisdiction while this action is pending, and (ii) prohibiting Respondents from transferring new or additional civil immigration detainees into Wyatt while this action is pending.

Dated: May 18, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2020, I electronically filed the foregoing document with the United States District Court for the District of Rhode Island by using the CM/ECF system. I certify that the parties or their counsel of record registered as ECF Filers will be served by the CM/ECF system, and paper copies will be sent to those indicated as non-registered participants, if any.

/s/ Deborah S. Gonzalez
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