

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

ANTONY JOSE CANELA RODRIGUEZ,

*Plaintiff,*

vs.

CHAD F. WOLF, Acting Secretary, Department of  
Homeland Security; TONY H. PHAM, Deputy Director  
and Senior Official Performing the Duties of the Director  
of U.S. Immigration and Customs Enforcement;  
TODD LYONS, Acting Field Office Director, U.S.  
Immigration and Customs Enforcement Boston Field  
Office.

*Defendants*

Case No. \_\_\_\_\_

**PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION, AND INCORPORATED MEMORANDUM OF LAW**

**INTRODUCTION**

Immediate action is necessary to prevent Immigration and Customs Enforcement (“ICE”) from transferring Plaintiff, Antony Jose Canela Rodriguez (“Plaintiff”), out of the Cumberland County Jail (“CCJ”) in Portland, Maine, to detention facilities in the southern United States. Prison and jail facilities have seen some of the worst outcomes from the deadly COVID-19 virus, and these dangers are multiplied by ICE’s practice of unnecessarily transferring ICE detainees from CCJ to points south, forcing them to travel in crowded and unhygienic conditions, to detention facilities and communities where COVID-19 is running rampant.

Similar inter-facility transfers by ICE have led to several high-profile outbreaks, including an outbreak of almost 90% of detainees in a Farmville, Virginia facility. Even in lower profile examples, discussed in declarations attached to this Motion, ICE transfer from New England to

the southern states has led to increased rates of infection with COVID-19. Yet contrary to guidance by ICE and the U.S. Centers for Disease Control and Prevention (“CDC”) instructing against inter-facility transfers, ICE has dramatically increased such transfers into, and out of, CCJ in recent months.

This new practice by ICE does not appear to be calculated to achieve any legitimate purpose, but rather appears to be an exercise in forum shopping at the expense of detainee health and safety. By playing this shell game, ICE is evidently seeking to sidestep procedural protections granted by or available in the federal courts of New England. During the COVID-19 pandemic, courts across New England have scrutinized ICE’s detention conditions and, in some cases, ordered bail hearings or other relief to protect detainees in ICE’s custody.<sup>1</sup> Other recent decisions granted additional procedural protections for certain detainees subject to the jurisdiction of the Boston immigration court, covering Maine, New Hampshire, Massachusetts, Rhode Island, and Vermont.<sup>2</sup> Yet in June 2020, ICE started a new practice that appears to be a calculated attempt to frustrate or evade many of these protections, by transporting detainees to CCJ for a matter of days, and then rapidly transferring them to points south.<sup>3</sup>

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<sup>1</sup> See, e.g., *Yanes v. Martin*, No. 120CV00216MSMPAS, 2020 WL 3047515 (D.R.I. June 2, 2020) (in a class habeas action by ICE detainees in Wyatt Detention Facility in Rhode Island, ordering individualized bail hearings for ICE detainees); see also *da Silva Medeiros v. Martin*, No. CV 20-178 WES, 2020 WL 2104897, at \*1 (D.R.I. May 1, 2020) (in habeas corpus petitions on behalf of medically vulnerable ICE detainees, granting relief enjoining ICE from transferring petitioners outside the Court’s jurisdiction throughout the action and granting their immediate release); *Gomes v. US Dep’t of Homeland Sec., Acting Sec’y*, No. 20-CV-453-LM, 2020 WL 2514541 (D.N.H. May 14, 2020) (in emergency habeas petition, holding that that detainees whose age or health conditions placed them at high risk for serious illness or death from exposure to COVID-19 were entitled to bail hearings); *Quadrelli v. Moniz*, No. 20-CV-10685-ADB, 2020 WL 3051778 (D. Mass. June 8, 2020) (granting class certification for a habeas corpus petition by ICE detainees in a certain unit of the Plymouth County Correctional Facility); *Savino v. Souza*, -- F. Supp. 3d --, 2020 WL 2404923 (D. Mass. May 12, 2020) (requiring universal testing of ICE detainees, prohibiting new immigration detention in Bristol County House of Correction, prohibiting transfer out of Bristol County until individuals are tested).

<sup>2</sup> *Brito v. Barr*, 415 F. Supp. 3d 258, 263 (D. Mass. 2019); *Reid v. Donelan*, 390 F. Supp. 3d 201, 227-28 (D. Mass. 2019).

<sup>3</sup> To be clear, counsel do not agree that transporting these detainees out of New England necessarily deprives them of the protections arising from such litigation, or strips them of membership in any class they may have joined. For present purposes, it is enough to say that ICE appears to have no purpose in effectuating these transfers other than attempting to evade such protections or frustrate their application.

Plaintiff is currently being held in civil detention by ICE in CCJ. According to data gathered in recent months, ICE transfers detainees out of CCJ after an average period of 3.5 days—and transfers some people even more quickly. Based on this pattern, the Plaintiff (who arrived in CCJ on October 21, 2020) would be on track for transfer over the upcoming weekend. However, according to the Chief of the Civil Division of the United States Attorney’s Office for the District of Maine, ICE has confirmed that no transfers out of CCJ are planned prior to Tuesday. Accordingly, Plaintiff requests that no later than Monday, October 26, 2020, the Court enjoin Defendants from transferring Plaintiff out of CCJ until further notice, to protect Plaintiff from unsafe conditions that would greatly increase his risk of exposure to COVID-19.

## **I. Factual Background**

### **A. Plaintiff is Vulnerable to Serious Illness or Death if Infected by COVID-19.**

ICE’s practices place Mr. Canela Rodriguez at heightened and unreasonable risk of illness and potential death from COVID-19. Mr. Canela Rodriguez is currently detained in CCJ, and at risk of imminent transfer to facilities in the south. He is a lawful permanent resident who lives in Rhode Island with his wife and daughter, both of whom are U.S. citizens. Canela Rodriguez Decl. ¶¶ 1-2. He is diagnosed with asthma. *Id.* ¶ 3. During asthma attacks, he cannot breathe and needs a nebulizer treatment to breathe again. *Id.*

COVID-19 is a serious and potentially deadly communicable disease. Roy Gibson Parrish, M.D. Decl. ¶ 4 (“Parrish Dec.”).<sup>4</sup> As of October 15, 2020, COVID-19 has killed at least 216,025 people in the United States in the roughly eight months since the pandemic began.<sup>5</sup> Complications

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<sup>4</sup> Dr. R. Gibson Parrish is a medical epidemiologist who formerly served as the Acting Director of the Division of Public Health Surveillance and Informatics at the U.S. CDC, and now works as an independent consultant in population health and population health information systems. His curriculum vitae is attached as an exhibit to his declaration. Parrish Dec. ¶ 1.

<sup>5</sup> <https://www.cdc.gov/mmwr/volumes/69/wr/mm6942e2.htm>.

of the virus include “pneumonia, respiratory failure, acute respiratory distress syndrome (ARDS), acute cardiac injury, multiple organ failure, and death.” *Id.* ¶ 10. People with moderate or severe asthma may be at increased risk of serious illness from COVID-19. *Id.* ¶ 13. Those who survive COVID-19 can suffer long-term effects, with some people experiencing symptoms for months. *Id.* ¶ 15. And even people who are asymptomatic may develop lung or heart abnormalities, which could have long-term health consequences. *Id.* ¶ 16. “In sum, infection with COVID-19 can result in a serious illness or even death, and may also carry longer term effects that are not yet fully understood.” *Id.* ¶ 17.

There is no vaccine against COVID-19. *Id.* ¶ 16. “The best way to prevent illness is to avoid being exposed to the virus.”<sup>6</sup> The best measures for protecting against infection and spread of COVID-19 are remaining physically separated from known or potentially infected individuals (keeping in mind that people without symptoms may be able to spread the virus), vigilant hygiene and sanitation, and wearing face masks. *Id.* ¶ 16.

B. Transferring People Between Closed Congregate Settings Substantially Increases the Risk of Infection with COVID-19.

Transferring people between multiple closed congregate settings dramatically increases the risk of exposure to COVID-19. *Id.* ¶¶ 9, 19-21. COVID-19 “is particularly likely to spread in closed, congregate settings like nursing homes, prisons, and jails, and during travel in confined, crowded vehicles or other spaces.” *Id.* ¶ 21. “[T]ravel can increase the risk of getting and spreading COVID-19.” *Id.* ¶ 5. “Additionally, traveling between multiple different closed congregate facilities—like a jail or detention facility—can further increase the risk of exposure for the people traveling, as well as the people in the closed congregate facility at which the travelers arrive.” *Id.*

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<sup>6</sup> How to Protect Yourself & Others, CDC (Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

“Given the risk of asymptomatic spread of COVID-19, every transfer of a new person into a closed congregate facility carries the risk that the person may be infected with COVID-19[.]” *Id.* ¶ 24. Inter-facility transfers are particularly dangerous because the risk of infection “increases with each successive transfer to a new facility, and with the exposure to new settings and new people (whether staff or other detainees).” *Id.*

ICE officials are aware of the dangers associated with inter-facility transfer during the COVID-19 pandemic. In a prior court declaration, for example, one ICE official discussed the “increased risk of infection stemming from inter-facility transfers.” Decl. of Alan Greenbaum. ¶ 4 (May 2020) (hereinafter “May 2020 Greenbaum Decl.”).<sup>7</sup> As he explained, “placing detainees on transfer flights . . . also creates a greater risk of detainees being exposed to, or exposing others to, COVID-19 as they are transferred between detention facilities.” *Id.* ¶ 4.

Consistent with these heightened risks, there have been several high profile outbreaks following transfers between jail and prison facilities. *Id.* ¶ 26. For example, transfer of prisoners from one facility to another led to one of the largest COVID-19 outbreaks in the country, in San Quentin prison in California. *Id.* ¶ 26(a). Before the transfer on May 30, 2020, “there were no inmates known to have had the virus at San Quentin,” but within a matter of weeks, almost a third of prisoners in San Quentin were infected. *Id.* (citation omitted). By mid-September, “26 inmates [had] died of the virus and more than 2,500 prisoners and staff members [had] been sickened[.]” *Id.* (citation omitted).

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<sup>7</sup> Mr. Alan Greenbaum is the Assistant Field Office Director of ICE in Burlington, Massachusetts, and originally filed this declaration in *Savino v. Souza*, 1:20 – cv – 10617- WGY, a case seeking the release of ICE detainees due to risk of COVID-19. The May 2020 Greenbaum Declaration is attached to this Motion as Exhibit 3.

In another high profile example, there was a COVID-19 outbreak at a facility in Farmville, Virginia, after ICE transferred in 74 people from other detention facilities.<sup>8</sup> *Id.* ¶ 26(b) (citations omitted).<sup>9</sup> By early August, one person had died and nearly 90% of the detainees at the Virginia facility had tested positive for COVID-19.<sup>10</sup>

In another example, on April 11, 2020, ICE reportedly transferred seventy-two detainees from New York and Pennsylvania facilities to a facility in Texas, purportedly to reduce the populations of facilities in the Northeast.<sup>11</sup> In the following two and one-half weeks, twenty-one (21) of the transferred detainees reportedly tested positive for COVID-19. *Id.*

These are not isolated incidents. In a lower-profile example, a resident of Massachusetts, J.C., was arrested by ICE and transferred from Plymouth, to Louisiana, to Texas, and exposed to COVID-19 along the way, ultimately testing positive at the end of the journey. *See* Decl. of J.C. ¶ 17.<sup>12</sup> After he tested positive, ICE released him and left him to find his own way, by commercial bus, back home. *Id.* ¶ 22.

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<sup>8</sup> Antonio Olivo and Nick Miroff, *ICE flew detainees to Virginia so the planes could transport agents to D.C. protests. A huge coronavirus outbreak followed*, Washington Post (Sept. 11, 2020), available at [https://www.washingtonpost.com/coronavirus/ice-air-farmville-protests-covid/2020/09/11/f70ebe1e-e861-11ea-bc79-834454439a44\\_story.html](https://www.washingtonpost.com/coronavirus/ice-air-farmville-protests-covid/2020/09/11/f70ebe1e-e861-11ea-bc79-834454439a44_story.html).

<sup>9</sup> *See* Jenny Gathright, *Cases Spike at Virginia ICE Detention Facility After Transfers from COVID-19 Hotspots*, NPR (June 29, 2020), available at <https://www.npr.org/local/305/2020/06/29/884735646/cases-spike-at-virginia-i-c-e-detention-facility-after-transfers-from-c-o-v-i-d-19-hotspots> (last accessed Oct. 5, 2020); Fernie Ortiz, *Ongoing Transfer of ICE Detainees Leading to COVID-19 Outbreaks*, BORDERREPORT (June 1, 2020), available at <https://www.borderreport.com/health/coronavirus/report-ongoing-transfer-of-ice-detainees-leading-to-covid-19-outbreaks/>; Emily Cassie & Barbara Marcolini, *How ICE Exported the Coronavirus*, The Marshall Project (July 10, 2020), available at <https://www.themarshallproject.org/2020/07/10/how-ice-exported-the-coronavirus>.

<sup>10</sup> Decl. of Jeffrey Crawford, *Santos Garcia v. Wolf*, Civ. No. 1:20-cv-00821 (E.D. Va.), Docket No. 30-1 (Aug. 6, 2020) (stating that 261 of 299 detainees “yielded a positive result” and one person “passed away . . . on August 5, 2020”).

<sup>11</sup> *See* Hamed Aleaziz, *ICE Moved Dozens of Detainees Across the Country During the Coronavirus Pandemic. Now Many Have COVID-19*, BuzzFeed News (Apr. 29, 2020), available at <https://www.buzzfeednews.com/article/hamedaleaziz/ice-immigrant-transfer-jail-coronavirus>.

<sup>12</sup> J.C. is a resident of Massachusetts who was detained by ICE in Plymouth, Massachusetts, and transported by plane to a facility in Louisiana, then again by van to another facility in Texas, ultimately testing positive for COVID-19 after arriving in Texas. J.C.’s declaration is attached as Exhibit 7.

C. Contrary to CDC and ICE Guidance Against Inter-Facility Transfers, ICE Has Dramatically Increased Its Transfers Into, and Out of, CCJ During the COVID-19 Pandemic.

In recognition of these risks of inter-facility transfers, the CDC instructs that facilities should generally “[l]imit transfers of incarcerated / detained persons to and from other jurisdictions and facilities” and “[m]ake every possible effort to modify staff assignments to minimize movement across housing units and other areas of the facility.” Parrish Decl. ¶¶ 27-28 (citations omitted). In guidance last updated on September 4, 2020, ICE similarly instructed that “[w]here possible,” ICE officials must “limit transfers of ICE detainees and non-ICE detained populations to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, to facilitate release or removal, or to prevent overcrowding.”<sup>13</sup> *Id.* ¶ 29.

Despite this guidance, ICE transfers to and from the CCJ have increased during the COVID-19 pandemic. ICE relies on a contract between the federal government and CCJ to house people detained pending removal proceedings. *See* Ex. 8 (Contract between the U.S. Marshals Service and CCJ). In the past, ICE used CCJ almost exclusively to temporarily hold people arrested in Maine, before they were transferred to one of the five Boston-region facilities<sup>14</sup> to await further proceedings in removal cases pending before the Boston immigration court. Yet during the

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<sup>13</sup> COVID-19 Pandemic Response Requirements, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>. *See also* Hamed Aleaziz, *Federal Officials Now Say That Transferring Detainees Between Jails Holding Immigrants Contributed To Coronavirus Outbreaks*, BuzzFeed (Oct. 6, 2020), available at <https://www.buzzfeednews.com/article/hamedaleaziz/dhs-report-detainee-transfers-covid-spread> (describing that ICE officials acknowledged in internal documents that transfers of detainees between facilities holding immigrants for ICE had “contributed to outbreaks” of COVID-19).

<sup>14</sup> According to the Assistant Field Office Director for ICE in Burlington, Massachusetts, ICE uses five facilities within the Boston area of responsibility, specifically, Strafford County Department of Correction in New Hampshire, the Wyatt Detention Center in Rhode Island, and the Bristol, Franklin, and Plymouth Houses of Correction in Massachusetts. *See* Decl. of Alan Greenbaum, *Augusto v. Moniz*, 20-cv-10685 (D. Mass. June 12, 2020) (ECF No. 153-1), attached to this Motion as Ex. 4.

COVID-19 pandemic, the number of people transferred to, and from, CCJ has increased. Since June 10, 2020, ninety-four ICE detainees have been transferred to and from CCJ. *See* Berg Decl. ¶¶ 16.<sup>15</sup> The majority of ICE detainees arrive toward the end of the week or on the weekend, when it is more difficult for detainees to connect with counsel. *Id.* ¶¶ 21-22, 26. On average, ICE detainees stay in CCJ for a mere 3.5 days before transfer. *Id.* ¶¶ 18, 27. The majority of ICE detainees are transferred in the early hours of Tuesday mornings. *Id.* ¶¶ 21-25, 29.

In short, despite the known dangers of transferring people between different jail and detention facilities, ICE has actually increased that practice during the COVID-19 pandemic, placing people like the Plaintiff at significantly higher risk of contracting COVID-19.

D. Crowded and Unsanitary Conditions During Transport and in Destination Facilities Introduce Further Risk.

The conditions in which ICE transports people to different facilities, and the conditions in destination facilities introduce yet further risk of infection. The conditions in the planes, vans, and detention facilities are crowded and unsanitary, with inconsistent masking, and exposure to additional detainees, ICE staff, and local corrections staff—any of whom could have COVID-19.

For example, one person described his transfer from Plymouth, Massachusetts to Etowah, Alabama where he flew with other detainees, stopping in New Jersey and Texas before being brought to a processing center where detainees from all over the country were held in a single room without property sanitary conditions and with no ability to maintain social distance.<sup>16</sup> Dorce and at least ten other detainees were then shackled, placed in a van together and transported in close quarters for the approximately eight-hour drive to Etowah, Alabama. *Id.* Once there, Dorce

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<sup>15</sup> Brandon Berg is a student attorney with the University of Maine School of Law's Refugee and Human Rights Clinic who directly consulted with certain immigrant detainees at CCJ and who analyzed data provided to him by CCJ on detainee arrivals and transfers, Berg Decl. ¶¶ 1-4, 14-16.

<sup>16</sup> *See* Dorce Decl., Ex. 2-B. This declaration was originally submitted in a case pending in the United States District Court for the District of Massachusetts, *Dorce v. Wolf, et al.*, 1:20-CV-11306-RWZ (D. Mass.) (ECF No. 1-3).



and the others were forced to remain in the van for approximately nine (9) hours as their paperwork was processed, during which time ICE officials discovered that two of the detainees had fevers. *Id.*

In another example, ICE transported J.C. from Plymouth, Massachusetts, to Louisiana, to Texas, via crowded and unsanitary travel by plane and van. *See generally* J.C. Decl. ICE did not test J.C. in Plymouth before the journey. *Id.* ¶ 2. The flight from Plymouth to Louisiana was crowded, with J.C. seated inches away from other detainees; ICE kept the detainees on the plane for eight or nine hours, with a single, unsanitary shared bathroom and no sink. *Id.* ¶ 3. The detainees were masked during some of the flight but had to remove their masks to eat during meal time. *Id.* ¶¶ 4-5. After three days in the facility in Louisiana (including exposure to new staff at this facility), J.C. and other detainees were transported in a crowded van to a facility in Texas, where J.C. was put in a small unit with almost 50 other detainees. Not long after, J.C. and the other detainees tested positive for COVID-19. *Id.* ¶ 17.

E. Keeping Plaintiff in Maine Where COVID-19 Infection Rates Are Low is Necessary to Maintain Plaintiff's Safety.

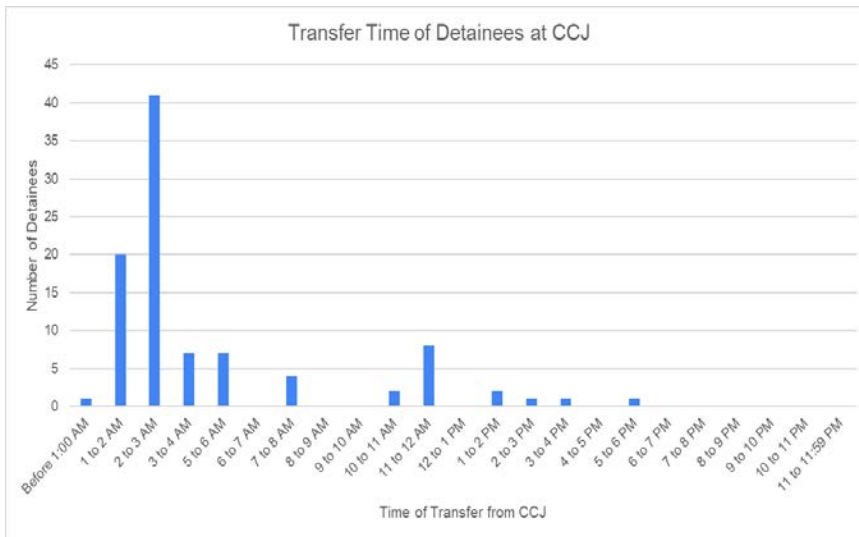
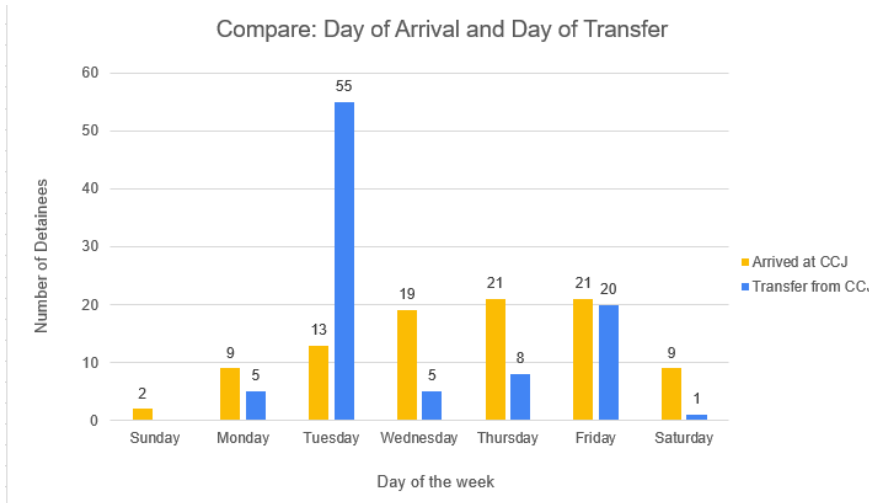
Transporting Plaintiff from Maine to Louisiana, Alabama, Texas, or other facilities in the south imposes additional risk. Maine has one of the lowest infection rates of COVID-19 in the United States. Parrish Decl. ¶ 31. “As of October 16, 2020, Maine had recorded only 199 cases during the past seven days, with Vermont being the only state with a lower seven-day count. During this same period, Maine’s rate of new COVID-19 cases was 2.1 per 100,000 residents; the only state with a lower rate was Vermont, at 1.5 positive cases per 100,000 residents.” *Id.* “For this reason, people from many other states are restricted in traveling to Maine because people traveling from a region with higher COVID-19 rates could bring the infection to Maine.” *Id.* (citing An Order Regarding Travelers Into Maine, Executive Order 57 (June 9, 2020)).

By contrast, several of the states to which ICE transfers detainees, including Louisiana, Alabama, and Texas, have significantly higher rates of COVID-19. “As of October 16, 2020, Louisiana had 11.7 new cases per 100,000; Texas had 13.9 cases per 100,000; and Alabama had 21 cases per 100,000—all of which are several times greater than Maine’s rate of 2.1.” *Id.* ¶ 32 (citation omitted). “As of October 16, 2020, Texas was the state with the highest total count of cases in the prior seven days, with 28,014 total cases.” *Id.* (citation omitted).

As explained by Dr. Parrish, “Forcing a person to travel from a region with lower rates of COVID-19 cases, to an area with higher rates of COVID-19 cases, introduces additional risks to that person.” *Id.* ¶ 33. The risk may be even greater when forcing someone to travel to a closed congregate facility in a higher-risk region. *Id.* The more people who are infected in the community, the more likely it is that a staff member or other person visiting the facility will introduce the virus to the facility. “Thus, by transferring people from Maine to regions and facilities with greater prevalence of COVID-19, ICE exposes them to additional risk of infection.” *Id.* ¶ 35.

F. ICE Will Imminently Transfer Plaintiff Absent Intervention by this Court.

Decisions to move detainees between facilities are made solely by ICE officials, not by CCJ. Detainees are disproportionately processed for intake at CCJ on a Thursday, Friday, or Saturday and are almost always transferred on or before the following Tuesday morning, and often in the early hours of the morning between 2:00 a.m. and 4:00 a.m. Berg Decl. ¶¶ 21-31. Most detainees are transferred from CCJ after only 72 to 84 hours, with close to half being transferred within 72 hours, leaving little to no opportunity for a detainee to seek and obtain legal counsel. Berg Decl. ¶¶ 17, 28. The following graph compares the day of arrival and day of transfer for the ninety-four ICE detainees brought in and out of CCJ between June and October, as well as the times that they were transferred from CCJ:



Berg Decl. ¶¶ 22-23. Of the detainees that it was possible to track, most were transferred to detention centers in Louisiana. Berg. Dec. ¶ 34; Lee Decl. ¶¶ 3-6.<sup>17</sup> In other examples, ICE detainees were transferred from New England to Alabama and Texas. *See* Dorce Decl. ¶ 9 (transfer from Massachusetts, to Louisiana, to Alabama); J.C. Decl. ¶¶ 3-12 (transferred from Massachusetts, to Louisiana, to Texas). During travel to these facilities, ICE often makes multiple stops and pick up additional detainees from other ICE facilities. *See, e.g.,* Lee Decl. ¶ 6 (describing one detainee who traveled from CCJ, to Vermont, to New Hampshire, to Louisiana, facing

<sup>17</sup> Kelsey Lee is a student attorney at the Cumberland Legal Aid Clinic who has been conducting interviews with ICE detainees housed at CCJ. Lee Decl. ¶¶ 1-6.

exposure to new people at each stop along the way); R-Decl. ¶ 4(b), Ex. 2-C (describing how a plane from New Hampshire stopped at New Jersey and Texas before stopping in Louisiana) <sup>18</sup>

Absent the Court ordering Plaintiff's requested injunction, Plaintiff is likely to be imminently transferred out of Maine to a location where he is at a significantly higher risk of contracting COVID-19.

## **II. Argument**

A party seeking injunctive relief by a temporary restraining order or preliminary injunction must demonstrate that the following four criteria are met: (1) Plaintiff is likely to succeed on the merits; (2) Plaintiff will suffer irreparable harm absent injunctive relief; (3) the injury to Plaintiff outweighs any harm the injunction would cause to the other party; and (4) the public interest will not be adversely affected by granting the injunction. *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991). Because Plaintiff satisfies each of these prerequisites, this Court should grant Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction and enjoin ICE from transferring Plaintiff out of CCJ.

### **A. Likelihood of Success on the Merits.**

The sine qua non of the injunction inquiry is likelihood of success on the merits – here, Plaintiff's claim that any transfer out of Maine violates his Fifth Amendment constitutional right to reasonable safety in ICE's custody. *Esso Standard Oil Co. (Puerto Rico) v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006) (citation omitted). The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. U.S. Const. amend. V. The protection applies to “all

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<sup>18</sup> R-Declaration refers to another declaration filed by Mr. Dorce in Civ. No. 20-cv-11306 (D. Mass. July 10, 2020), ECF No. 1-3, which describes his transfer in greater detail.

‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

ICE has an affirmative duty to provide civil detainees with conditions of reasonable health and safety. “[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 County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). As a result, the government must provide those in its custody with “food, clothing, shelter, medical care, and reasonable safety.” *Id.* at 200.

For convicted inmates, conditions of “reasonable safety” are not met, and violate the Eighth Amendment prohibition against cruel and unusual punishment, where the conditions of confinement pose an unreasonable risk of future harm. *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Thus, government officials are constitutionally prohibited from being “deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.” *Id.* Indeed, the Eighth Amendment requires a remedy for convicted inmates in such conditions even when it is not “alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.” *Id.*

Under the Fifth Amendment, civil detainees, such as Plaintiff, are entitled to *greater* protection than the Eighth Amendment protections for convicted inmates. As the Supreme Court explained: “If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the [civilly] committed—who may not be punished at all—in unsafe conditions.” *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982). Indeed, “[p]ersons who have been [civilly] committed are entitled to more considerate

treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *Youngberg*, 457 U.S. at 321–22; *see also Ruiz-Rosa v. Rullan*, 485 F.3d 150, 155 (1st Cir. 2007); *Santana v. Collazo*, 714 F.2d 1172, 1180 (1st Cir. 1983) (“[B]ecause the state has no legitimate interest [in] punishment, the conditions of . . . confinement of [civil detainees] are subject to more exacting scrutiny than conditions imposed on convicted criminals.”).

“The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on [government] action set by . . . the Due Process Clause.” *DeShaney*, 489 U.S. at 200 (citing *Youngberg*, 457 U.S. at 315–316). “In the substantive due process analysis, it is the [government’s] affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause.” *Id.*

In analyzing Defendants’ constitutional duty under the Due Process Clause, “[t]here are, in a sense, two separate state-of-mind questions.” *Kingsley v. Hendrickson*, 576 U.S. 389, 395 (2015). “The first concerns the defendant’s state of mind with respect to his physical acts”—here, whether the Defendants intend to physically transfer Plaintiff out of CCJ and Maine entirely. *Id.* On this question, a detainee must “prove more than negligence but less than subjective intent—something akin to reckless disregard.” *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016); *see Miranda v. Cty. of Lake*, 900 F.3d 335, 354 (7th Cir. 2018). It appears that, as a matter of both practice and policy, Defendants intentionally transfer civil detainees out of CCJ; accordingly, even under a subjective-intent standard, this criterion is met.

Under *Kingsley*, the second question in the due process analysis is purely objective: is there a “substantial risk of serious harm to the plaintiff that could [be] eliminated through reasonable and available measures that [Defendants] did not take.” *Castro*, 833 F.3d at 1071. Thus, for civil detainees, the baseline constitutional duty assumed by the government is to protect detainees from conditions and treatment that are *objectively* unreasonable. *Kingsley*, 576 U.S. at 398. “[A] pretrial detainee can prevail [on a due process claim] by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.” *Id.*<sup>19</sup>

Defendants’ imminent plan to transfer Plaintiff out of CCJ and the State of Maine is objectively unreasonable given the extreme risk to Plaintiff of contracting COVID-19 and the apparent absence of any legitimate justification for such a transfer. Defendants are well aware that transfer between facilities creates a greater risk of detainees being exposed to, or exposing others to, COVID-19. May 2020 Greenbaum Decl. ¶ 4; *see also* Parrish Decl. ¶¶ 27-29 (describing CDC and ICE guidance). Yet ICE has pursued a practice of transferring people from CCJ to other

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<sup>19</sup> The Supreme Court in *Kingsley* expressly disapproved of analyzing due process claims for pretrial detainees the same as Eighth Amendment claims for convicted inmates, stating:

Several considerations have led us to conclude that the appropriate standard for a pretrial detainee’s excessive force claim is solely an objective one. For one thing, it is consistent with our precedent. We have said that “the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.” *Graham [v. Connor]*, 490 U.S. 386,] 395, n.10. And in *Bell v. Wolfish*, 441 U.S. 520, (1979), we explained that such “punishment” can consist of actions taken with an “expressed intent to punish.” 441 U.S., at 538. But the *Bell* Court went on to explain that, in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not “rationally related to a legitimate nonpunitive governmental purpose” or that the actions “appear excessive in relation to that purpose.” *Id.* at 561.

*Kingsley*, 576 U.S. at 397-98. The Supreme Court has been signaling that courts must pay careful attention to the different status of pretrial detainees. *See, e.g., Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 920 (2017) (allowing Fourth Amendment challenges to extend to pretrial detention even beyond the start of the legal process). The Court has similarly cautioned that the Eighth Amendment and Due Process Clause analyses are *not* co-extensive. *Kingsley*, 576 U.S. at 400. Nonetheless, even were this Court to apply the pre-*Kingsley* “deliberate indifference” standard, Plaintiff is still likely to succeed on the merits of his claim based on the circumstances of the transfer and the extreme and known risk of contracting COVID-19 during such transfer. *See, e.g., Seth v. McDonough*, No. 8:20-CV-01028-PX, 2020 WL 2571168, at \*11 (D. Md. May 21, 2020) (agreeing that the objectively unreasonable test applies after *Kingsley*, but deferring “the ultimate decision on this legal question because Plaintiffs have established a likelihood of success on the merits even under the more exacting [deliberate indifference] standard”).

facilities in the south. *See generally* Berg Decl. Not only that, but the conditions of transportation and detention inject additional and unnecessary risk. The vans and planes are unsanitary and crowded. *See, e.g.*, J.C. Decl. ¶¶ 4-6, 9-11; R- Decl. ¶ 4(e). ICE combines detainees from multiple different facilities during transport. *See, e.g.*, Lee Decl. ¶ 6; R-Decl. ¶ 4(b), Ex. 2-C. The destination facilities are also dirty and crowded, and are located in areas with heightened rates of COVID-19. *See, e.g.*, J.C. Decl. ¶ 14 (describing the destination facility in Texas); Dorce Decl. ¶ 11 (describing conditions in the destination facility in Alabama); Parrish Decl. ¶ 6 (describing risks of travel to regions with higher rates of COVID-19). Similar practices have led to outbreaks of COVID-19 in the past, *see, e.g.*, Decl. of J.C. ¶ 17, *supra* nn. 8-9, without any apparent change in course from ICE. Overall, these practices needlessly increase the risk that Plaintiff will be exposed to COVID-19 upon transfer.<sup>20</sup> *See* Parrish Decl ¶¶ 3-8 (summarizing risks).

There is no straight-faced argument that can be made that the purpose behind Plaintiff's transfer is to protect Plaintiff's health and safety. ICE's new practice is not actually moving to areas of lesser risk, but rather to areas of lesser oversight and (because of transfer), to *greater* risk. Indeed, ICE's recent practice increasing transfers from CCJ appear designed as an attempt to evade procedural protections—including bail hearings—from recent court decisions to ICE detainees in Boston-area facilities. *See, e.g.*, *Yanes v. Martin*, No. 120CV00216MSMPAS, 2020 WL 3047515 (D.R.I. June 2, 2020) (in a class habeas action by ICE detainees in Wyatt Detention Facility in Rhode Island, ordering individualized bail hearings for ICE detainees); *see also da Silva Medeiros v. Martin*, No. CV 20-178 WES, 2020 WL 2104897, at \*1 (D.R.I. May 1, 2020) (in habeas corpus

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<sup>20</sup> Other courts have recognized the same risks and imposed orders restricting transfer between detention facilities, even in cases with known risks *within* the facility. In *Savino v. Souza*, for example, the court required ICE to seek court approval and test each detainee before transferring detainees out of facility. No. 20-10617, 2020 WL 2404923, at \*11 (D. Mass. May 12, 2020).



petitions on behalf of medically vulnerable ICE detainees, granting relief enjoining ICE from transferring petitioners outside the Court's jurisdiction throughout the action and granting their immediate release); *Gomes v. US Dep't of Homeland Sec., Acting Sec'y*, No. 20-CV-453-LM, 2020 WL 2514541 (D.N.H. May 14, 2020) (in emergency habeas petition, holding that that detainees whose age or health conditions placed them at high risk for serious illness or death from exposure to COVID-19 were entitled to bail hearings); *Quadrelli v. Moniz*, No. 20-CV-10685-ADB, 2020 WL 3051778 (D. Mass. June 8, 2020) (granting class certification for a habeas corpus petition by ICE detainees in a certain unit of the Plymouth County Correctional Facility). Additional recent decisions have imposed additional procedural protections for people subject to mandatory detention in Massachusetts and New Hampshire,<sup>21</sup> and required ICE to carry the burden of proof in bond proceedings for detainees with no serious criminal convictions.<sup>22</sup>

As these procedural protections in New England reached a critical mass in June 2020, ICE started ramping up transfers out of the area. For example, ICE transferred Mr. Dorce and a broader group of detainees from Plymouth to Alabama in June 2020. *See* Dorce Decl. ¶ 9. Also in June 2020, ICE attempted to transfer a number of other detainees from Plymouth to Etowah just hours after the District Court of Massachusetts granted certain detainees' motion to certify a class challenging the conditions at Plymouth during the pandemic. *See Emergency Mot. Order Halting Transfers, Quadrelli v. Moniz, No. 20-10685-ADB* (D. Mass. June 8, 2020) (ECF No. 138).<sup>23</sup> And, as discussed in this case, June 2020 also marked the time when ICE started transferring people from elsewhere in New England to CCJ, then rapidly transporting them to facilities in the south.

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<sup>21</sup> *Reid v. Donelan*, 390 F. Supp. 3d 201 (D. Mass. 2019), (in a class action challenging mandatory detention under 8 U.S.C. § 1226(c), ordering a bond hearing when their detention becomes unreasonably prolonged in relation to its purpose in ensuring the removal of deportable criminal aliens).

<sup>22</sup> *Brito v. Barr*, 415 F. Supp. 3d 258, 263 (D. Mass. 2019) (applicable to "aliens detained under 8 U.S.C. § 1226(a), the provision applicable to aliens with no serious criminal convictions who are not subject to an order of removal").

<sup>23</sup> In *Quadrelli*, however, petitioners argued that transfer was retaliatory and posed an unconstitutional risk of serious harm, whereafter ICE agreed not to transfer them.

In sum, transferring the Plaintiff to facilities in the southern United States is unreasonable and would expose the Plaintiff to additional and unreasonable risk of exposure to COVID-19. To expose the Plaintiff to these risks simply because of ICE's administrative convenience or forum shopping is unconscionable. The Plaintiff has thus demonstrated that imminent transfer would violate his Fifth Amendment rights, satisfying this criterion of the injunction analysis.

B. Plaintiff Will Suffer Irreparable Injury Absent Injunctive Relief.

An irreparable injury is one “for which there is no adequate remedy at law.” *Lopez v. Garriga*, 917 F.2d 63, 68 (1st Cir. 1990). Plaintiff's entire claim is rooted in irreparable harm. Plaintiff faces the imminent and significant risk of becoming infected—potentially fatally—with COVID-19 if he is transferred out of Maine. Absent entry of an injunction in this case, ICE will transfer Plaintiff to an out-of-state location with higher state-wide rates of infection, and through a transfer process that prevents Plaintiff from performing the necessary preventative measures to minimize the risk of exposure to the virus—distancing, sanitation, and masks.

First, a substantive constitutional violation, such as a substantive due process claim, constitutes irreparable harm. “[S]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself.” *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998); *Romero Feliciano v. Torres Gaztambide*, 836 F.2d 1, 4 (1st Cir. 1987) (holding that loss of First Amendment freedoms is “unquestionably” irreparable injury) (citation omitted); *see Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (“[I]t is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm.”); *see also Malam v. Adducci*, 452 F. Supp. 3d 643, 658 (E.D. Mich. 2020), as amended (Apr. 6, 2020) (“The alleged violation of a constitutional right is sufficient for a court to find irreparable harm.”). “Indeed, courts have even

specifically held that COVID-19 constitutes an irreparable harm that supports the granting of a TRO.” *Thakker v. Doll*, 451 F. Supp. 3d 358, 369–70 (M.D. Pa. 2020) (citation omitted) (“The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO”); *Castillo v. Barr*, CV-20-00605-TJH (C.D. Cal. 2020) (granting a TRO to immigration detainees due to the COVID-19 pandemic); *see also Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (finding irreparable harm “premised ... upon [the district court’s] finding that [Petitioner] was subject to risk of injury, infection, and humiliation”).

Second, public health officials acknowledge that there is little that can be done to stop the spread of COVID-19 absent effective sanitation and social distancing procedures. *See Parrish Decl.* ¶ 16 (stating “there is no vaccine or cure for COVID-19” and emphasizing methods of prevention). As evidenced from previously transferred detainees and ICE’s transfer protocols and procedures, Plaintiff will be unable to maintain social distance during a transfer and is likely to be forced into unsanitary conditions in a geographic location with significantly higher community transmission rates. *Decl. of J.C.* ¶ 17; *Lee Decl.* ¶ 6; *see also generally Dorce Decl.*; *R-Decl.* Based upon the nature of the virus, the evidence of conditions during transport and in ICE facilities, and Plaintiff’s specific medical concerns, Plaintiff faces the significant risk of illness or death upon transfer, and he cannot litigate his case or vindicate his rights if he is intubated or dead. This is the very definition of an irreparable injury. The Constitution does not require that Plaintiff may obtain a remedy only after he has been exposed to coronavirus, developed COVID-19, and suffered the consequences. As stated by the Supreme Court, “a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

C. The Public Interest and the Equities Tip Heavily in Plaintiff’s Favor.

When the government opposes the issuance of a temporary restraining order or injunction, the final two factors—the balance of equities and the public interest—merge, because “the government’s interest is the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

“[I]t is always in the public interest to prevent violation of a party’s constitutional rights.” *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 929 (6th Cir. 2020) (internal quotation marks omitted). As stated herein, Plaintiff has demonstrated a strong likelihood of success on the merits of his constitutional claim. Additionally, the injunction will protect the public health. Given the highly unusual and unique circumstances posed by this pandemic and the public health crisis, exposing Plaintiff to infection of the virus has a ripple effect impacting the public at large. By protecting the Plaintiff from exposure, the Court in effect prevents additional spread of a highly contagious disease to other civil detainees, institutional staff, and community members in other geographic locations. The public also maintains a significantly broader interest in reaping the collateral benefits of reduced transmission risk, such as conserving precious healthcare resources. In short, both the public interest and the balancing of the equities weigh heavily in Plaintiff’s favor.

**CONCLUSION**

For the foregoing reasons, Plaintiff is at immediate risk of being transferred out of CCJ, by the early morning hours of Tuesday, October 27, 2020. Plaintiff respectfully requests that this Court grant his Motion for Temporary Restraining Order and Preliminary Injunction barring Defendants from transferring Plaintiff out of CCJ until further notice.

DATED: October 23, 2020

/s/ Sara A. Murphy

John J. Aromando, Bar No.  
Sara A. Murphy, Bar No.  
Cameron Goodwin, Bar No.  
PIERCE ATWOOD LLP  
Merrill's Wharf  
254 Commercial Street  
Portland, ME 04101  
(207) 791-1185  
smurphy@pierceatwood.com

/s/ Emma E. Bond

Emma E. Bond (Maine Bar No. 5211)  
Zachary L. Heiden (Maine Bar No. 9476)  
ACLU of Maine Foundation  
PO Box 7860, Portland, Maine 04112  
(207) 619-8687  
ebond@aclumaine.org  
zheiden@aclumaine.org

/s/ Anna R. Welch

Anna R Welch, Bar No: 10000  
Kelsey Lee, Student Attorney  
Sander Goldthwait, Student Attorney  
Refugee and Human Rights Clinic  
University of Maine School of Law  
246 Deering Avenue  
Portland, Maine 04106  
(207) 228-8462  
anna.r.welch@maine.edu

Daniel McFadden (Mass. BBO # 676612)

*Motion for admission pro hac vice forthcoming*

AMERICAN CIVIL LIBERTIES UNION

FOUNDATION OF MASSACHUSETTS, INC.

211 Congress Street

Boston, MA 02110

(617) 482-3170

dmcfadden@aclum.org

*Attorneys for Plaintiff Antony Jose Canela*

*Rodriguez*