UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CLEBERSON QUADRELLI and ABDY NIZEYIMANA, on behalf of themselves and all others similarly situated Petitioners, v. ANTONE MONIZ, Superintendent of the Plymouth County Correctional Facility, Respondent.	)	C.A. No. 20-10685-ADB LEAVE TO FILE GRANTED JUNE 15, 2020

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ORDER HALTING TRANSFERS OF CLASS MEMBERS OUT OF THE DISTRICT

Last Monday, the Court certified a class of civil immigration detainees held at the Plymouth County Correctional Facility (the "PCCF"). Hours later, ICE informed multiple class members that they would be transferred from the PCCF to Etowah County Jail in Alabama. ICE's asserted motive is to improve detainee health and safety. But there is strong evidence that this procedure—which involves aggregating detainees from all over the country, in filthy conditions, and without any apparent COVID-19 testing—would dramatically and unconstitutionally *increase* the health risks for class members, for other immigration detainees, and for members of the public. It appears that ICE is attempting to create an appearance of safety within its detention system, at the expense of the detainees' actual health. The Court's Order halting these transfers is critically necessary to protect these detainees and should remain in effect.

I. FACTS

This habeas petition was filed on April 7, 2020, by 65 civil immigration detainees being held in Unit C-3 at the PCCF. The Court denied the government's motion to dismiss on May 5 (D.E. 79). The Court entered an order certifying a class at approximately 8:35 a.m. on Monday, June 8 (D.E. 135). The certified class consists of "[a]ll civil immigration detainees who are Petitioners in this action (i.e., who signed the original petition, [ECF No. 1]) or are otherwise presently detained in Unit C-3 at the PCCF." *See* Jun. 8, 2020 Order (D.E. 135) at 13.

About five hours after the class was certified, class counsel learned that multiple class members were being told that they were being transferred to Alabama the next day. *See* McFadden Decl. ¶¶2-3. Class counsel promptly contacted opposing counsel. *See id.* ¶3. Thereafter, at approximately 3 p.m. on June 8, opposing counsel informed class counsel by telephone that 25 immigration detainees were being transferred out of the PCCF, including three class members who were being removed, and five class members who were being transferred to Alabama. *See id.* ¶4. At 4:35 p.m., class counsel moved to stop the transfers (D.E. 138). The Court then ruled that the three class members slated for removal could be removed, and stayed the transfers of the other five pending briefing by the parties. *See* June 8, 2020 Orders (D.E. 139 & 142).

Counsel understand that, of the three class members slated for removal, only two actually left the PCCF. McFadden Decl. ¶5. The other was found to have a fever and remained there. *See id*. Similarly, two of the non-class members slated for transfer to Alabama reportedly remained behind because they were found to have fevers. *See id*. As far as class counsel are aware, none of these three detainees were tested for COVID-19 after their fevers were detected.

Those non-class members who were actually transferred to Alabama are now beginning to report a process and result can only be described as horrifying, especially in light of the ongoing

pandemic. Mr. R- reported that his transfer from the PCCF began at about 4 a.m. on June 9. *See* Putman Decl. ¶¶3-4. He was taken to New Hampshire and placed on an airplane, which then made stops to pick up detainees from facilities in several other locations, including New Jersey and Texas. *See id.* ¶4(b). The plane finally landed in Louisiana at about 11 p.m., and the detainees were taken to an ICE processing center. *See id.* ¶4(c)-(d). There, people from many different detention centers were combined in a single holding cell with no opportunity to remain socially distanced or to bathe. *See id.* ¶4(d). There were no beds in the holding cell, and the detainees were each given a single blanket to either keep warm or pad the floor. *See id*. The only water to drink was a single dirty jug in the middle of the cell. *See id*.

The next morning, Mr. R- and the other detainees were awoken and shackled with wrist cuffs, ankle cuffs, and a belly chain. *See id.* ¶4(e). Ten people from the PCCF (including Mr. R-) were placed in close quarters inside a van. *See id*. The van had a toilet that was covered in urine, and liquid from the toilet spilled out onto the floor when the van moved. *See id*. It was impossible for the detainees to avoid other people's bodily fluids because they were so tightly shackled. *See id*. The van arrived at the Etowah facility at about 2 p.m., but the detainees were not allowed to exit the van until after 11 p.m. *See id.* ¶4(f).

Once inside the Etowah facility, Mr. R- and the other detainees were held in the booking unit for processing. *See id.* ¶4(g). Mr. R- was forced to shower in front of the staff, and was then subjected to a visual cavity search and a manual check of his testicles, even though he had been continuously in ICE custody. *See id*. During this processing, two of the PCCF detainees were found to have fevers and were removed from the group. *See id.* ¶4(h). The remaining eight detainees were moved to a holding tank that was smeared with blood, feces, and mucus. *See id.* ¶4(i). Recent arrestees "from the street" were placed in the holding tank with the detainees. *See*

id. ¶4(k). The holding tank had no beds, and Mr. R- and the other detainees slept on the floor using blankets that they could see had just been turned in by other prisoners. *See id*.

Mr. R- is now being held in what ICE calls a "quarantine" unit at Etowah. *See id.* ¶4(*l*). There are about twelve ICE detainees there, including about seven from the PCCF and others from other parts of the country (including Tennessee). *See id*. There are also about 14 people in criminal custody in the unit, who have been there for varying lengths of time. *See id*. Mr. R- does not have his own cell, but rather is currently sharing a small cell with another detainee. *See id*. The unit is visibly dirty (including the showers and toilets), with no apparent attempts to sanitize it. *See id.* ¶4(m). The occupants share a single shower with three spigots, which Mr. R- has not seen cleaned or sanitized since he arrived. *See id*. It appears Mr. R- will remain in these conditions for at least seven days. *See id.* ¶4(n).

As Mr. R-'s experience demonstrates, there is no universe in which such transfers could help the detainees or improve their health or safety. To the contrary, Mr. R- was held in filthy and unsanitary conditions, and was closely and extensively intermingled with detainees from facilities around the country (many of which have COVID-19 outbreaks[1]), and also with new arrestees right off the street. Unless the PCCF is willing to concede that its conditions are *worse* than what is described above (which is hard to imagine), the transfers cannot serve any possible legitimate interest. ICE may wish to depopulate the PCCF to make immigration detention *appear* safer during this Court's inquiry, but this "shell game" is, in fact, placing these civil detainees in vastly greater danger in violation of ICE's constitutional obligations.

[1] *See* "ICE Detainee Statistics" tab at: https://www.ice.gov/coronavirus.

II. ARGUMENT

A. The First Circuit has already ruled that 8 U.S.C. §1252(a)(2)(B)(ii) does not strip this Court of jurisdiction to hear claims arising from transfer decisions.

The government argues that 8 U.S.C. §1252(a)(2)(B)(ii) strips this Court of jurisdiction to hear claims relating to the planned transfer. Opp. at 2-4. That provision states that actions or decisions "specified" to be discretionary by certain other statutes are not reviewable. *See* 8 U.S.C. §1252(a)(2)(B)(ii). However, as explained below, the First Circuit already held in *Aguilar v. ICE*, 510 F.3d 1, 20-21 (1st Cir. 2007), that this provision does not bar review of decisions to transfer detainees.

In *Aguilar*, the government had arrested hundreds of people in a workplace raid in New Bedford. *See id.* at 5-6. The detainees were initially housed in Massachusetts, but then ICE began to transfer groups of them to Texas. *See id.* at 6. The petitioners alleged that these transfers violated their rights, including their right to access their counsel and their due process right to family integrity. *See id.* at 7. The government challenged the Court's jurisdiction over such claims under §1252(a)(2)(B)(ii). *See id.* at 19-20. The argument was literally the same argument the government raises here: that, because 8 U.S.C. §1231(g)(1) provides that "[t]he Attorney General shall arrange for appropriate places of detention," every individual transfer decision is an exercise of the discretion assigned by the statute and, therefore, unreviewable under §1252(a)(2)(B)(ii). *See id.* at 20.

The First Circuit expressly rejected this argument. *See id.* at 20-21. Agreeing with the Fifth and Ninth Circuits, the court held simply that, because §1252(a)(2)(B)(ii) applies only when discretion has been "specified" in the statute, and because the plain language of §1231(g)(1) does not "specify" that transfers between facilities are discretionary, §1252(a)(2)(B)(ii) does not bar

claims challenging such transfers. *See id.* at 20-21. This holding remains the law of the circuit. Indeed, the First Circuit's reasoning was later reinforced by the Supreme Court's decision in *Kucana v. Holder*, which confirmed that §1252(a)(2)(B)(ii) applies only when the challenged act has been specified as discretionary in the statute itself, as opposed to any related regulation. *See* 130 S. Ct. 827, 837 (2010) (explaining that "both clauses [of §1252(a)(2)(B)] convey that Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute").

The government argues that *Aguilar*'s rejection of a jurisdictional bar under §1252(a)(2)(B)(ii) does not apply here because the petitioner in *Aguilar* raised a claim based on family integrity, and petitioners here raise somewhat different claims. *See* Opp. at 3-4. But the existence or absence of a jurisdictional bar under §1252(a)(2)(B)(ii) depends on the nature of the "decision or action" of the government, not the legal basis for the resulting claim. *See Aguilar*, 510 F.3d at 20. The reason the First Circuit noted the nature of the claim is that, earlier in the decision, it had held that a separate statute, 8 U.S.C. §1252(b)(9), strips jurisdiction over claims that are not "independent of" the removal process, and that the family integrity claims survive because they are independent of that process. *See id.* at 11. Here, the government does not argue that §1252(b)(9) applies, *see* Opp. at 2-4, so the nature of the claim is irrelevant to the jurisdictional analysis. And, in all events, §1252(b)(9) would not bar the petitioners' claims here because they relate to transfers within the United States and have nothing to do with removal. *See Aguilar*, 510 F.3d at 19.

B. The proposed transfers should be halted because they would dramatically increase the risk to detainees.

The government admits that the entire purpose of the proposed transfers is to reduce the detainee population at the PCCF. *See* Greenbaum Decl. (D.E. 153-1) ¶15. The government asserts that it wishes to improve detainee health and safety, *see id.*, but it is clear that these transfers would have exactly the opposite effect. The transferred detainees are being combined with detainees from other detention facilities (many of which have COVID-19 outbreaks) and recent arrestees right off the street. *See generally* Putman Decl. They are being held in close quarters where social distancing is impossible, and are being housed and transported in filthy conditions. *See generally id.* ICE does not contend that any of these detainees or arrestees were tested for COVID-19 before being mixed together in this fashion. *See generally* Greenbaum Decl. ICE's transfer strategy does not protect these detainees from COVID-19, but rather dramatically increases their risk of death or serious bodily injury while in confinement. *See* Super. Greifinger Decl.¶¶19-20, 32; Peeler Decl. ¶¶20-22; Grad Decl. ¶¶7, 11.

The Eighth Amendment requires that "inmates be furnished with the basic human needs, one of which is 'reasonable safety.'" *Helling v. McKinney*, 509 U.S. 25, 33 (1993). For civil detainees like these class members, the Due Process Clause entitles them to "*at least* as much protection . . . as the Eighth Amendment provides for convicted inmates" (*i.e.*, protection from deliberate indifference). *Ruiz-Rosa v. Rullan*, 485 F.3d 150, 155 (1st Cir. 2007) (emphasis added); *accord Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st Cir. 1990). And, even where conditions do not amount to "deliberate indifference," pretrial and civil detainees are also protected from treatment that is objectively unreasonable. *See Miranda v. Cty. of Lake*, 900 F.3d 335, 350–51 (7th Cir. 2018); *see also Hardeman v. Curran*, 933 F.3d 816, 822 (7th Cir. 2019); *Darnell v.*

Pineiro, 849 F.3d 17, 36 (2d Cir. 2017). Here, the transfers would violate the class members' due process rights under either standard. Regardless of whether ICE's asserted motive is innocent or malicious, it cannot knowingly and intentionally take steps that vastly *increase* the detainees' risk of infection. The petitioners have argued that the risks at the PCCF are unacceptable, but the Constitution does not permit ICE to respond to such claims by making their conditions dramatically *worse*. *See Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (explaining that pretrial and civil detainees may not be subject to conditions that amount to punishment, including conditions that do not "reasonably relate[] to a legitimate governmental objective").

There is also a jarring lack of "fit" between ICE's asserted motive for the proposed transfers (the protection of detainee health and safety) and the actual impact of the transfers already effectuated (dramatically increased risks to health and safety). As the Court has observed, there is a grave risk that ICE has adopted a "shell game"—moving detainees from facilities under scrutiny to create the *appearance* of safe confinement, while in fact putting the detainees in danger and dramatically reducing the overall safety of its detention system. ICE appears to have a practice of transferring detainees out of facilities where there is active litigation regarding COVID-19.[2] This practice has reportedly caused COVID-19 outbreaks both at the facilities receiving the transfers and among the people transferred.

For example, on April 11, ICE reportedly transferred 72 detainees from New York and Pennsylvania facilities to a facility in Texas, purportedly to reduce the populations of facilities in

[2] *See* Lisa Riordan Seville and Hannah Rappleye, *ICE keeps transferring detainees around the country, leading to COVID-19 outbreaks*, NBC News (May 31, 2020), available at https://nbcnews.to/3cNVMVL (reporting that transfers of ICE detainees have led to COVID-19 outbreaks in facilities in at least five states).

the Northeast.[3] In the ensuing two and a half weeks, 21 of the detainees who had been transferred reportedly tested positive for COOVID-19.[4] This pattern suggests gamesmanship. Class counsel are also, to be perfectly candid, concerned about whether ICE is unlawfully retaliating against the PCCF detainee population for asserting their rights in this and other cases, including by placing them in severe conditions far away from their lawyers and families. *See Powell v. Alexander*, 391 F.3d 1, 16 (1st Cir. 2004) (explaining that unlawful "[r]etaliation for the exercise of the right to petition the courts for redress may take many forms"). Regardless, no matter ICE's motives, the Due Process Clause does not permit it to needlessly place these detainees in even *greater* danger. The Court should stop these transfers.

C. If the Court authorizes ICE to transfer class members, their claims should not be dismissed.

Class counsel assume that, if the proposed transfers occur, the government will move to dismiss the claims of the transferred class members because they are no longer in Massachusetts. If such a motion is filed, class counsel would respectfully request an opportunity to brief the issue. Each of the detainees to be transferred filed an individual habeas petition with this Court, and each is a class member. The government cannot avoid judicial adjudication of a habeas petition merely by moving the petitioner out of the District. *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2721 (2004) (explaining the rule of *Ex Parte Endo*, 323 U.S. 283 (1944)). Moreover, the Court is empowered to adjudicate the claims of all people who were class members at the time of certification (and arguably all people who were class members when the relevant complaint was filed), regardless

[3] *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, https://www.buzzfeednews.com/article/hamedaleaziz/ice-immigrant-transfer-jail-coronavirus.

[4] *Id.*

of subsequent government actions to take them out of the scope of the class definition. *See Gayle v. Meade*, No. 10-21553, 2020 WL 3041326, at *22-*23 (S.D. Fla. Jun. 6, 2020) (certifying class that expressly includes detainees transferred out of the district after the petition was filed). Accordingly, if these transfers occur—though, to be clear, they should not—class counsel respectfully request an opportunity to brief the question of whether these class members' claims should remain before this Court.

CONCLUSION

For all the foregoing reasons, and those articulated in their opening memorandum, the petitioners request that their motion for an order stopping these transfers be allowed.

Respectfully Submitted,

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