UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TROY WRAGG, MICHAEL SCRONIC, LEONARD BOGDAN, and ELIEZER SOTO-CONCEPCION, individually and on behalf of all others similarly situated, *Petitioners*, v. DAVID E. ORTIZ, in his capacity as Warden of the Federal Correctional Institution, Fort Fix, and MICHAEL CARVAJAL, in his capacity as Director of the Bureau of Prisons, *Respondents*.	Case No. 20-cv-5496-RMB

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

In the face of grave risks that COVID-19 poses to medically vulnerable people housed in the tight congregate quarters at FCI Fort Dix, the Government's brief tries to make a virtue of the fact that the BOP is flying blind: because they admit they are not testing prisoners comprehensively, Respondents assert only that "none of the nearly 2,700 inmates assigned to FCI Fort Dix's low security facility has tested positive for the virus." *See* Respondents' Brief ("MTD") at 1, 13. That is not informative or comforting given that Respondents do not disclose how many tests they have actually performed at the low security facility. And the limited testing that has taken place confirms the severity of the risk: of the 274 tests performed just at the Camp, 58 prisoners tested positive, suggesting an infection rate between 20 and 25 percent—a rate similar to one a district court just yesterday called "an unacceptable number." *Wilson v. Williams*, No. 4:20-cv-0794, ECF No. 85 (N.D. Ohio May 19, 2020) (estimating the infection rate at Elkton at approximately 25 percent).

Because even the limited record before the Court lays bare the imminent and serious risks facing Petitioners, Respondents invoke several purported jurisdictional and procedural bars to hearing the petition at all. Respondents' arguments are meritless, their motion to dismiss should be denied, and Petitioners' motion for a preliminary injunction should be granted.

First, Respondents' jurisdictional objections fail. Respondents rely on *Cardona v. Bledsoe*, 681 F.3d 533 (3d Cir. 2012), for the proposition that the Third Circuit only recognizes § 2241 claims if the petitioner alleges BOP conduct inconsistent with the petitioner's sentencing judgment. MTD at 38. But, as the Third Circuit has explained, the circumstances in *Cardona* present avenues through which a petitioner can challenge the execution of his sentence via habeas; the other, and the one pursued by Petitioners here, involves a petition seeking "a quantum change in the level of custody." *Ganim v. Federal Bureau of Prisons*, 235 Fed. Appx. 882, 884 (3d Cir. 2007); *see also Mabry v. Warden Allenwood FCI Low*, 747 Fed. Appx. 918, 919 (3d Cir. 2019) (recognizing the distinction between *Cardona* and cases like *Ganim* and *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005)). Nor are Petitioners required to exhaust administrative remedies before bringing this petition. Because this is a habeas case, the Prison Litigation Reform Act ("PLRA") does not apply, and even if it did, Petitioners would be excused from exhaustion because Respondents' purported remedies are not available. For similar reasons, Petitioners should be excused from § 2241's judicially created exhaustion requirement.

Second, class relief at this preliminary injunction stage is appropriate and manageable. Respondents do not specifically engage with Rule 23 at all and instead argue—ignoring on-point precedent from the Third Circuit—that a class cannot be

certified here because not all members of the class are identically situated in every respect. But the Third Circuit has on multiple occasions reversed trial courts on precisely this issue and held that commonality is not defeated merely because members of the class are not injured or compensated in exactly the same way. Class treatment is appropriate here because substantial common questions of law and fact are relevant to the Class.

Third, the Court should grant Petitioners' request for a preliminary injunction on their Eighth Amendment claim. Respondents' alleged measures to contain COVID-19 are inadequate given the undisputed record evidence about the virus. For example, Respondents' testing regime, by their own admission, is only implemented if a prisoner shows symptoms, and even then only sometimes. But COVID-19 is particularly insidious because it can be spread even by individuals showing no symptoms, which means that by the time Respondents might test a prisoner, many more have almost surely been exposed. As Respondents admitted to the prisoners at Fort Dix, social distancing—the only truly effective method of containment—is simply impossible in the prison environment. Pet. ¶ 1. By clinging to ineffective half measures in the face of a COVID-19 outbreak, Respondents show deliberate indifference to Petitioners' serious risk of infection and death. Nor can Respondents seriously contest the irreparability of the injury; though COVID-19 may present some theoretical risk to everyone, as Respondents contend, the Class here represents

the *most* vulnerable prisoners. And Respondents' interest in managing Fort Dix and the prisoners there can be addressed through supervision on home confinement and the other methods described in the Petition.

Finally, Petitioners have properly pled their Rehabilitation Act claim. Respondents misread Third Circuit cases as suggesting that petitioners must plead intentional animus, but that requirement applies only if the petitioner seeks compensatory damages, whereas here Petitioners seek only injunctive and declaratory relief. Moreover, Petitioners have pled deliberate indifference, which is all the law requires. Respondents' remaining arguments raise fact disputes not appropriate for resolution on a motion to dismiss.

"It is cruel and unusual to hold convicted criminals in unsafe conditions," *Helling v. McKinney*, 509 U.S. 25, 33 (1993), and here Respondents are unable to protect Petitioners from an unprecedented risk of serious illness and death. Respondents' motion should be denied and Petitioners' motion should be granted.[1]

FACTUAL BACKGROUND

As outlined in the Petition ("Pet."), Declarations of all four Petitioners, and Memorandum of Law in Support of the Preliminary Injunction, a COVID-19 out-break has spread at the Fort Dix Camp and is not under control; the virus has already

[1] To the extent the Court grants Respondents leave to file an oversize brief, *see* MTD at 35 n.15, Petitioners respectfully ask that they also be given leave to file an oversize brief in response.

entered or may imminently enter the 200-300 person units in the low security main facility ("the Low"); and people confined in medical isolation with confirmed cases of COVID-19 are at risk of death or serious illness that requires care Fort Dix is not prepared to provide. Petitioners incorporate by reference the facts outlined in these prior submissions to the Court as if set forth fully herein and address only the new information submitted by Respondents here.

A. Fort Dix's Alleged Efforts to Prevent Spread of COVID-19

Respondents outline the policies of the Bureau of Prisons and Fort Dix with respect to the BOP Action Plan and provision of cleaning supplies, personal protective equipment, information to the incarcerated population, and purported opportunities for social distancing. MTD at 6–12. Even if those policies had been implemented assiduously, Respondents have failed to show they have protected Petitioners against their heightened risk of contracting and becoming seriously ill from COVID-19. For example, the two largest increases in positive test results reported by the BOP were on April 25 and May 1, 2020. *See* Pet. ¶ 109. Given a median incubation period of four to five days and a maximum of 14 days,[2] most of the reported cases of COVID-19 at Fort Dix were likely contracted after Respondents had

[2] Centers for Disease Control & Prevention, *Interim Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, May 15, 2020, https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html

already taken all of the principal steps they describe. Moreover, Respondents acknowledge that the first prisoner tested positive at the Camp on April 3, 2020. MTD at 13. However, they did not provide any masks until April 5 (according to Respondents, MTD at 10) or mid-April (according to people incarcerated at Fort Dix, Pet. ¶ 88), and did not report the positive result on the BOP website until April 7. Pet. ¶ 86; *see also* McCombs Decl. ¶ 4 (describing delay in provision of masks at the Camp following the announcement of the first positive case).

Accordingly, even if these policies had been in effect, Respondents have put forward no evidence to show their effectiveness in practice. *See also* Goldenson Decl. ¶ 44 (concluding that, "[a]lthough Dr. Turner-Foster states that various steps have been taken, these steps are described too vaguely to determine their effectiveness.").[3] Rather, the experiences of people confined at the Camp, the Low, and the isolation unit in Building 5851 demonstrate Respondents have and continue to put Petitioners at grave risk of serious illness or death. These experiences are documented at Exhibits 2 through 6 and summarized below.

B. COVID-19 at the Camp

On May 6, the last COVID-19 test was performed at the Camp, Scronic Decl. ¶ 6, and the results in creased the total number of positive results among prisoners

[3] Throughout, this citation refers to Dr. Joe Goldenson's updated expert declaration, as of May 20, 2020, attached hereto as Exhibit 1.

at Fort Dix to 58. MTD at 14. By respondents' account, 124 people remain at the Camp and have all tested negative. *Id.* at 13. Adding those numbers together, that could mean close to 30 percent of the people at the Camp contracted COVID-19 in just one month.[4]

No tests have been performed at the Camp since May 6, despite the fact that nine prisoners tested positive on that day. Scronic Decl. ¶ 4. This is also despite the high rate of false negatives with the Abbott machine and the fact that studies suggest the virus might remain undetected by a test for a number of days. Goldenson Decl. ¶ 50; *see also False Negatives and Reinfections: the Challenges of SARS-CoV-2 RT-PCR Testing*, American Soc'y for Microbiology, April 27, 2020, https://asm.org/Articles/2020/April/False-Negatives-and-Reinfections-the-Challenges-of.

Among those nine was a kitchen line server who had recently passed out in a church service. The previous week, he had been out sick from his work assignment but had worked on May 5 and during the breakfast shift on May 6 before receiving his positive test result. Scronic Decl. ¶ 4. Also among those nine was a man who had been experiencing symptoms throughout the previous week and had begged to

[4] Respondents submit a number of people have since left the camp on compassionate release and/or home confinement, MTD at 19–21, and in the initial petition, Petitioners alleged 230 people were at the Camp as of the date of filing, Pet. ¶ 3. Even with that denominator, the rate of infection is still over 25 percent.

be tested, but was told to wait until the mass testing was performed for his wing. Scronic Decl. ¶ 4.

Respondents acknowledge they are relying on the Abbott rapid testing machine. MTD at 10. The Food and Drug Administration has issued an alert about the accuracy of this test. Goldenson Decl. ¶ 50. Specifically, it has been shown to have a 15 to 20 percent false negative rate and may miss as many as 48 percent of infections. Goldenson Decl. ¶ 50. By this false negative rate alone, somewhere between nineteen and twenty-five people still at the Camp could be infected with COVID-19. Those people still remain fewer than six feet apart from the others. Scronic Decl. ¶ 4.

Despite this false negative rate and the asymptomatic nature of many carriers, Goldenson Decl. ¶¶ 28, 34, Respondents have refused to provide people who tested negative with proof of their results, Scronic Decl. ¶ 3, and have represented that there are no further plans for mass testing. MTD at 13. People in the Camp have continued to experience symptoms. Scronic Decl. ¶ 5. This includes at least one person who was told he tested was negative on May 1 but was nevertheless bedridden for days and certain he had COVID-19. Scronic Decl. ¶ 5. It also includes four people who sleep in bunk beds in the same row and are exhibiting dry throat, coughs, chills, and weakness and who registered high temperatures during temperature check. Scronic Decl. ¶ 5; *see also* Goldenson Decl. ¶ 45 (describing COVID-19 symptoms).

In practice, although there are daily, and often twice daily, temperature checks at the Camp, as of May 13, people who trigger a high reading notification on the temperature device are not evaluated by medical staff as a matter of course. Scronic Decl. ¶ 15. Moreover, temperature readings and associated names are not being visibly recorded or otherwise noted for patterns of recurring high temperatures or contact tracing. Scronic Decl. ¶ 15.

People in the Camp and the Low are not reporting symptoms out of fear of being placed in quarantine and of the lack of treatment and medical care being provided in Building 5851. Scronic Decl. ¶¶ 5, 16; Telfair Dec. ¶ 5; Valas Decl. ¶ 26. There appears to be no regular monitoring or testing of symptoms beyond temperature checks at either the Camp or the Low. Scronic Decl. ¶ 13; Valas Decl. ¶ 27; Goldenson Decl. ¶ 45. Some people at the Camp and the Low are concerned the temperature readings are consistently lower than they should be. Scronic Decl. ¶ 13; Valas Decl. ¶ 27.

Correctional officers and nursing staff move between the Camp, east and west compounds at the main facility (or "the Low"), and Building 5851. Scronic Decl. ¶¶ 9–12; Valas Decl. ¶¶ 12–13. This is due in part to officers working double shifts and assisting with counts. At least one officer goes directly from the Camp to the Low in a double shift. Scronic Decl. ¶¶ 10–11. Nursing staff acknowledged to

prisoners as recently as May 13 that they rotate between the Camp and the Low, including Building 5851. Scronic Decl. ¶ 12.

C. COVID-19 at the Low

Respondents' submissions are opaque regarding testing practices at the Low. By their account, only one person has been tested for COVID-19. Turner-Foster Decl. ¶ 23. Respondents have no plans to test people housed at the Low and have offered no reason for that refusal, despite the capacity to test 75 people a day. Turner-Foster Decl. ¶ 23. Respondents allude to a protocol that "would" be followed should people exhibit symptoms, Turner-Foster Decl. ¶ 23, but provide no information about whether and how often such exhibition of symptoms has occurred.

In fact, people at the Low have exhibited symptoms typical of COVID-19. Telfair Decl. ¶¶ 2–4. This has included one man on the east compound who was sick for two months and fainted twice. It also includes four others in the same building who have exhibited vomiting, coughs, chills, and other symptoms, Telfair Decl. ¶¶ 2–4, which are commonly associated with COVID-19, Goldenson Decl. ¶ 45. Yet these people have not been tested, Telfair Decl. ¶¶ 3–4, despite their potential exposure to the virus through staff who come in and out of the community each day and who circulate between the Camp and the Low.

In addition to staff movement between the Camp and the Low, officers and items moved between the medical isolation unit at Building 5851 and the rest of the

west compound. Scronic Decl. ¶¶ 9–12; Valas Decl. ¶¶ 12–13. Specifically, one or more officers, as well as food and beverage crates, travel back and forth from 5851 to the dining hall daily. Valas Decl. ¶ 12. Other staff go back and forth between 5851 and other units to transport laundry. Valas Decl. ¶ 13. Prisoners on the west compound go the first floor of 5851 for clean linens. Valas Decl. ¶ 13; Pet. ¶ 106. Many officers in the west compound do not always wear masks and many or all do not wear gloves. Valas Decl. ¶¶ 14–16.

Respondents make no representations about the number of staff who have been tested for COVID-19. Indeed, they suggest that, other than temperature checks, staff must self-report symptoms. Turner-Foster Decl. ¶¶ 7, 8; *see also* Goldenson Decl. ¶ 45. Elsewhere, the BOP has acknowledged that it only learns of staff positive results when staff seek such testing outside of the BOP and choose to self-report the results. *See, e.g.,* Resp.'s Objections to Pet.'s "Limited Interrogatories to Resp.," *Brown v. Marler*, No. 2:20-cv-01914, dkt. no. 39, at 11 (E.D. Pa. May 4, 2020) (BOP noting "staff are tested in consultation with their own (non-[facility] -affiliated) medical providers, and they are not obligated to share the fact of their testing (or any other protected health information) with the [facility].); *see also* Goldenson Decl. ¶ 45.

On or around May 3, an officer tested positive for COVID-19 and is now understood by prisoners and staff to be very sick. Valas Decl. ¶¶ 17, 21. It is unclear

from the BOP website whether the current report of 1 current positive and 4 recovered staff reflects this case.[5] The officer worked five days per week scanning the IDs of all prisoners in the west compound who go for daily meal pickups in the compound's sole dining hall. Valas Decl. ¶ 18. He wore a mask and did not touch the IDs, but in order to scan them was required to come within six inches of nearly every prisoner on the west compound several times per week. Valas Decl. ¶ 21; Pet. ¶ 93 (describing meal pickups from the dining hall). Between meal shifts, he was known usually not to wear a mask. Valas Decl. ¶ 22.

In addition to the contact he had with prisoners picking up morning and/or midday meals, the officer had sustained contact with prisoners who worked in the kitchen. The officer worked the morning shift and was in almost daily contact with the 25 prisoners who worked that morning shift. Valas Decl. ¶¶ 18–20. Additionally, because he had a one- to two-hour overlap with the afternoon shift, he also had regular contact with the 25 prisoners who worked the afternoon shift. Valas Decl. ¶¶ 18–20, 23.

On May 5 or 6, the 25 prisoners who worked the morning shift were tested for COVID-19. Valas Decl. ¶ 23. The afternoon shift was not tested, despite the regular contact they had had with the officer, and were not provided the reasons for the lack

[5] Fed. Bureau of Prisons, *COVID-19*, https://www.bop.gov/coronavirus/index.jsp (updated May 20, 2020).

of testing when they asked. Valas Decl. ¶¶ 23–24. Prisoners in the west compound who came within six feet—indeed, six inches—of the officer during ID checks were also not tested, including those who had direct and sustained contact with the afternoon kitchen crew. Valas Decl. ¶ 25.

Respondents have not acknowledged this positive test result. They have also not provided significant information about staff positives in their submission to this Court, beyond rehashing the protocols and the aggregate data published on BOP's website. They have also not acknowledged the 25 tests of prisoners performed in early May. To the contrary, they have submitted that only one test has been performed at the Low. Turner-Foster Decl. ¶ 23.

D. Severity of COVID-19 Cases at Fort Dix

Respondents acknowledge that Building 5851 has been converted into an ad hoc medical isolation unit for those who have tested positive for COVID-19, although it is otherwise designed like the other buildings with predominately 12-person rooms. MTD at 12; McCombs Decl. ¶¶ 2–3; Quiambao Decl. ¶ 11. The first floor is a laundry facility; the second floor houses people with active symptoms; and the third floor houses people Respondents deem to have recovered, before they are released back to the general population. MTD at 9; McCombs Decl. ¶¶ 4, 8; Scronic Decl. ¶ 7. Building 5851 and Fort Dix more broadly are not equipped to provide necessary care for those who are sick with COVID-19. Care has been limited to two

daily rounds by nurses or doctors. Quiambao Decl. ¶ 10, Pet. ¶ 112. At least as of mid-April, there were no nurses or doctors on site throughout the day and night, such that if a sick person required urgent medical care between rounds, he had to find the corrections officer on duty, or wait. Quiambao Decl. ¶ 10. Prisoners are only offered Tylenol, or Tylenol with codeine to make them sleep. Quiambao Decl. ¶ 9, Pet. 112. Because of reports of this lack of care, people have been dissuaded from reporting symptoms. Scronic. Decl. ¶ 16 (noting fear at the Camp of being placed in quarantine, where only Tylenol is provided and people have required hospitalization); Telfair Dec. ¶ 5; Valas Decl. ¶ 26.

Respondents represent that only one prisoner has required hospitalization. MTD at 10 n.5; Turner-Foster Decl. ¶ 27. In fact, at least four people have become so sick with COVID-19 at Fort Dix that they have required hospitalization. McCombs Decl. ¶¶ 4–7; Quiambao Decl. ¶¶ 1, 15. Among the people who required hospitalization, at least one required a ventilator and/or oxygen support before returning to Building 5851. McCombs Decl. ¶ 4. Another person currently in Building 5851 also spent time in the hospital. McCombs Decl. ¶ 6. A third was transported to the hospital on May 9 and has not yet returned. McCombs Decl. ¶ 7. Finally, one of the ten Fort Dix prisoners to be granted compassionate release by a judge, MTD at 21, thought he would die in Building 5851 until a judge heard his motion over the weekend and ordered him immediately released. Quiambao Decl. ¶ 14; McCombs

Decl. ¶ 5. The 75-year-old man was transported from Building 5851 in an ambulance and ended up at the hospital the next day, eventually in the ICU. Quiambao Decl. ¶ 15. Over a month later, he is still at a rehabilitation and nursing center. Quiambao Decl. ¶ 16. He writes that if he had not been released, "I believe I would not have survived this ordeal. . . . the failure to be sent to a hospital was almost fatal. I do not say this to be dramatic but to be certain the Court appreciates what almost happened to me." Quiambao Decl. ¶ 17.

STANDARD OF REVIEW

To survive a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6), a petitioner need only set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007). The court must assume that all the allegations in the petition are true and construe it in the light most favorable to the petitioner. *Id.* at 555–56; *see also Phillips v. Cty. Of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) ("It remains an acceptable statement of the standard … that courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." (citation omitted)).

To the extent Respondents challenge this Court's jurisdiction, Fed. R. Civ. P. 12(b)(1) permits a court to dismiss an action for "lack of subject matter jurisdiction." A motion to dismiss for lack of jurisdiction under 12(b)(1) may present either a facial

or a factual challenge to subject matter jurisdiction. *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). When a respondent makes a factual challenge to the availability of subject matter jurisdiction, as Respondents have done here, conflicting evidence may be considered and the court may "decide for itself the factual issues which determine jurisdiction." *Cohen v. Kurtzman*, 45 F. Supp. 2d 423, 428 (D.N.J. 1999) (citation omitted).

ARGUMENT

I. THIS COURT HAS JURISDICTION

A. Section 2241 Permits Petitioners to Challenge the Fact and Execution of Their Sentences

Petitioners' request for temporary enlargement of custody (and, if necessary, release) is cognizable under § 2241 both as a challenge to the fact of their confinement and as a challenge to the execution of their sentences. Either way, this Court has jurisdiction to order the temporary and ultimate remedies Petitioners seek.

Petitioners challenge the fact of their confinement because, given the unique and extraordinary circumstances present here, no set of conditions at Fort Dix can protect Petitioners' Eighth Amendment rights. As the Sixth Circuit recently recognized, "[w]here a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of the confinement" and the petition is properly brought under § 2241. Order at 3, *Wilson v. Williams*, No. 20-3447, ECF No. 23-2 (6th Cir., May 4, 2020).

Respondents' attempt to wave *Wilson* away as "pure semantics," MTD at 42, is unavailing. The case cited by Respondents, *Alvarez v. LaRose*, No. 20-782, ECF No. 46 (S.D. Cal. May 9, 2020), distinguished *Wilson* because "unlike the inmates in *Wilson*, Plaintiffs fail to argue there are no set of conditions of confinement that would be constitutionally sufficient." *Id.* at *7. *Alvarez* therefore confirms, rather than undermines, the rule articulated by the Sixth Circuit in *Wilson* that Petitioners' claim here sounds in habeas.

But even if the Court construes Petitioners as bringing a challenge to the execution of their sentences, as Respondents urge, *see* MTD at 37–38, this Court still has jurisdiction. On this point, Respondents' main objection is their claim that the Third Circuit in *Cardona* "cabined" this Court's jurisdiction to hear challenges to the execution of Petitioners' sentences. *See* MTD at 38. Respondents are incorrect: as the Third Circuit has explained as recently as last year, *Cardona* and *Woodall* offer two separate routes by which a Petitioner may challenge the constitutionality of his confinement through habeas. *See Mabry v. Warden Allenwood FCI Low*, 747 F. App'x 918, 919 (3d Cir. 2019). Because Petitioners satisfy the jurisdictional requirements articulated in *Woodall* and affirmed in *Mabry*, this Court has jurisdiction. Respondents' other arguments, which draw artificial distinctions between different types of habeas cases and seek to insert additional requirements into § 2241, do not change this result.

District Courts in the Third Circuit have jurisdiction under § 2241 to hear petitions that seek release from ordinary penal institutions like Fort Dix to different types of custody. In *Woodall*, an incarcerated person brought a claim under § 2241 seeking release from prison to a halfway house. 432 F.3d 235, 241 (3d Cir. 2005). Much like Respondents here, the government in *Woodall* argued that the court lacked habeas jurisdiction because the petitioner was "challenging the 'conditions' of his confinement . . . rather than the fact or duration of his sentence." *Id.* The Third Circuit rejected the government's argument and held that the petitioner's claim challenged the "execution" of his sentence, which fit squarely within the scope of § 2241.[6] In so doing, it emphasized that "[c]arrying out a sentence through detention in [the halfway house] is very different from carrying out a sentence in an ordinary penal institutional." *Id.* at 243. Because transfer to a halfway house amounted to more than a "garden variety prison transfer," it constituted a challenge to the manner in which the sentence was executed. *Id.*

[6] Respondents acknowledge, as they must, that the Supreme Court has not foreclosed habeas challenges to conditions of petitioners' confinement. MTD at 37; *see also Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) ("[W]e need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement. When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal."); *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) ("[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement[.]").

Subsequent Third Circuit decisions confirm this point. In *Ganim v. Federal Bureau of Prisons*, the Third Circuit explained that under *Woodall*, courts have habeas jurisdiction to consider petitions challenging the execution of a sentence so long as the relief sought would result in "a quantum change in the level of custody." 235 F. App'x 882, 884 (3d Cir. 2007) (quoting *Pischke v. Litscher*, 178 F.3d 497, 499 (7th Cir. 1999)). Unlike "garden variety prison transfer[s]," if the relief sought would result in the petitioner being transferred to a facility without the "same security level" as an ordinary penal institution, the "quantum change in the level of custody" needed to confer habeas jurisdiction exists. *Id.*

Respondents' claim about the "finality of judgments" is a red herring. *See* MTD at 35–36. Respondents elsewhere acknowledge that courts have jurisdiction to review and modify "the execution of [a prisoner's] federal sentence" via § 2241. *See id.* at 37. Under *Woodall*, courts in the Third Circuit have habeas jurisdiction to consider petitions for transfers that surpass "garden variety prison transfers." MTD at 38. Unlike a "garden variety prison transfer," a transfer to home confinement would allow Petitioners to carry out their sentence in a manner that is "very different from carrying out [their] sentence[s]" at Fort Dix. *Woodall*, 432 F.3d at 241. Because transfer from Fort Dix to home confinement would result in a "quantum change in the level of custody," Petitioners have properly brought their claim under § 2241. *Ganim*, 235 F. App'x at 884.

Respondents argue, incorrectly, that the Third Circuit limited habeas jurisdiction in *Cardona v. Bledsoe*, 681 F.3d 533, 537 (3d Cir. 2012). *See* MTD at 38. In *Cardona*, the petitioner brought a § 2241 petition challenging his transfer to the Special Management Unit of the penitentiary in which he was serving his sentence. *Id.* at 534. Significantly, the *Cardona* petitioner did not challenge the fact of his confinement or bring a claim that, if successful, would affect the duration of his confinement. *Id.* at 537. His confinement in the Special Management Unit was also not inconsistent with anything in his sentencing judgment. *Id.* at 536. The Court therefore held that the petitioner's claim did not constitute a challenge to the execution of the sentence for purposes of § 2241. *Id.*

Respondents rely on *Cardona* for the proposition that the only way a petitioner can challenge the execution of his sentence is by identifying an inconsistency between the execution and the sentencing order. MTD at 38. However, *Cardona* did not abrogate or overturn *Woodall* or *Ganim*. Indeed, the Third Circuit recently made clear that a claim premised upon the inconsistency between the execution of the sentence and the sentencing order is only one of two ways that the execution of a sentence can be challenged. *Mabry,* 747 F. App'x at 919. The other way a petitioner can challenge the execution of his sentence is by seeking a change in custody that is "more than a simple transfer." *Id.* (citing *Woodall*, 432 F.3d at 243).

Petitioners here seek precisely the type of transfer that the *Woodall* court deemed sufficient to confer § 2241 jurisdiction.[7]

In allowing Petitioners' claim to proceed under § 2241, this Court would join a steadily growing number of courts in this district that have found § 2241 an appropriate vehicle by which detained persons may challenge unsafe conditions during the COVID-19 pandemic. *See, e.g.*, *Cristian A.R. v. Decker*, No. 20-cv-3600-MCA, ECF No. 26 at 29 (D.N.J. Apr. 12, 2020) (Arleo, J.) (ordering immediate release of medically vulnerable ICE detainees from Hudson and Bergen County jails in New Jersey); *Durel B. v. Decker*, No. 20-cv-3430-KM, ECF No. 34 at 1, 5–6, 18 (D.N.J. Apr. 21, 2020) (McNulty, J.) (same, for medically vulnerable detainee at Hudson); *Leandro R.P. v. Decker*, No. 20-cv-3853-KM, ECF No. 29 at 1 (D.N.J. Apr. 17, 2020) (McNulty, J.) (same); *Jason Anthony W. v. Anderson*, No. 20-cv-3704-BRM, ECF No. 22 at 1–7 (D.N.J. Apr. 17, 2020) (Martinotti, J.) (same, for medically vulnerable detainees at Essex County Correctional Facility and Elizabeth County Detention Center in New Jersey); *Rafael L.O. v. Tsoukaris*, No. 20-3481,

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[7] Respondents' citation to *Johnson v. Zickefoose*, No. 12-2544, 2012 WL 5880344, at *7 (D.N.J. Nov. 20, 2012) is inapposite. MTD at 38. In *Johnson*, this Court noted that traditional conditions of confinement claims, like those challenging medical care, working conditions in the prison, denial of access to the courts, and interference with legal mail, are not properly brought under habeas. *Johnson*, 2012 WL 5880344, at *8. However, this Court explained that habeas jurisdiction *does* exist when a petitioner seeks transfer to a different location that would have a "'quantum change in the level of custody.'" *Id.* at *6 (citing *Woodall*, 432 F.3d at 237).

2020 WL 1808843, at *9 (D.N.J. Apr. 9, 2020) (Vasquez, J.) (same, for medically vulnerable detainees at Essex County Correctional Facility).

Respondents also insist that bail pending habeas is unavailable because Petitioners have failed to establish "extraordinary or exceptional circumstances." MTD at 45. But, first, whether Petitioners have met the standard for bail pending habeas is an unrelated inquiry from whether this Court has jurisdiction to hear their claim. Second, and in any event, Petitioners outline the extraordinary circumstances warranting enlargement. *See, e.g.*, *Camacho Lopez v. Lowe*, No. 20-cv-563, 2020 WL 1689874, at *5–6 (M.D. Pa. Apr. 7, 2020) (holding that, in the Third Circuit, claims premised upon "extraordinary conditions of confinement" that threaten the basic wellbeing of inmates during this public health crisis amount to challenges to the execution of the sentence and are cognizable under § 2241); *see also Wilson*, 2020 WL 1940882, at *10–11 (granting enlargement to inmates seeking home confinement based on the threat to their health and safety).

Respondents argue that this Court ought not consider cases involving civil detainees because they "d[o] not have the same statutory or regulatory avenues for relief." MTD at 43. In so doing, Respondents attempt to insert an additional requirement—the unavailability of other relief—into the analysis of whether jurisdiction lies under § 2241. Courts in this district have expressly treated motions for release pursuant to the CARES Act as petitions for habeas, thus making clear

that the availability of other types of relief does not foreclose petitions for a writ of habeas corpus. *See, e.g.*, *United States v. Serfass*, No. 15-39, 2020 WL 1874126, at *3 (M.D. Pa. Apr. 15, 2020) (finding the availability of habeas jurisdiction for a prisoner seeking release despite the availability of alternatives for relief); *see also United States v. Ashby*, No. 20-cv-0789, 2020 WL 2494679, at *6 (M.D. Pa. May 14, 2020) (same).

Respondents also suggest that habeas jurisdiction differs for civil immigration detainees and prisoners because of the difference in the underlying constitutional claims. Though the groups' underlying constitutional claims may differ, courts in the Third Circuit have in both contexts "concluded that emergency petitions for release, based on COVID19 are properly construed pursuant to 28 U.S.C. § 2241." *Serfass*, 2020 WL 1874126, at *3 (construing prisoner's motion "as a § 2241 habeas petition since [petitioner] seeks relief affecting how her sentence is executed, i.e., serving her sentence in home confinement as opposed to confinement in prison to which she was sentenced"); *see also Ashby*, 2020 WL 2494679, at *6 (same). In *Ashby*, for example, an incarcerated petitioner sought immediate home release based on unsafe conditions in the prison. The court explained that the motion should be treated as a habeas petition, and acknowledged that "[a]lthough [she] appears, in part, to raise a challenge to the conditions of her confinement" based on her allegations of inadequate medical care, "she is seeking release from prison in her

motion and not damages, and thus her filing is not a civil rights action." *Id.* at *4. As such, she "clearly seeks relief that affects the execution of her 30-month prison sentence since she requests the court alter its terms and to immediately release her to home confinement." *Id.* ; *see also Camacho Lopez*, 2020 WL 1689874, at *4–5 (M.D. Pa. Apr. 7, 2020) (acknowledging that a petition for release during the pandemic falls within the subset of challenges to the execution of a sentence recognized by the Third Circuit).

Respondents' out-of-circuit cases finding no habeas jurisdiction are distinguishable. *See* MTD at 42–43. In *Livas*, the court explained that although no Fifth Circuit cases had previously recognized a conditions of confinement claim under § 2241, it was "theoretically possible." *Livas v. Myers*, No. 20-422, 2020 U.S. Dist. LEXIS 71323, at *8 (W.D. La. Apr. 22, 2020). As explained above, courts in the Third Circuit have held such claims to be cognizable. *See, e.g.*, *Camacho Lopez*, 2020 WL 1689874, at *6. Further, the petitioners in *Livas* did not contend that their imprisonment or custody itself was unlawful, whereas such allegations are the crux of Petitioner's claim in the instant action. *Livas*, 2020 U.S. Dist. LEXIS 71323, at *7. The petitioners in *Grinis v. Spaulding*, No. 20-10738, 2020 U.S. Dist. LEXIS 81464, at *4 (D. Mass. May 8, 2020), likewise did not challenge the lawfulness of their custody. Further, the Court in *Grinis* did not hold that it lacked jurisdiction to

consider petitioners' claim; instead, it said that it was "not necessary to resolve that dispute," because they had failed to show a likelihood of success on the merits. *Id.*

Further, this argument ignores the mounting out-of-circuit courts that have followed the approach taken in the Third Circuit. *See, e.g.*, *Martinez-Brooks v. Easter*, No. 3:20-cv-00569, 2020 WL 2405350, at *30 (D. Conn. May 12, 2020); *Wilson v. Williams*, 2020 WL 1940882, at *6 (N.D. Ohio Apr. 22, 2020).[8]

As *Woodall* and its progeny—and, more recently, district courts considering precisely this type of petition—make clear, habeas jurisdiction exists in this context. Respondents' suggestion otherwise misreads *Cardona* as the only avenue to challenge execution of sentences in the Third Circuit and invents novel additional hurdles petitioners must meet to establish jurisdiction. Because Petitioners seek more than a "garden variety prison transfer," this Court has jurisdiction under § 2241 to hear this Petition.

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[8] Respondents' suggestion that *Wilson* is factually distinguishable is incorrect. Like the prisoners in *Wilson*, Petitioners have limited access to testing, live in close quarters, and have faced the rampant spread of the disease. ECF No. 28-1 at 5; Goldenson Decl. ¶ 36. By Respondents' own account, Fort Dix has tested a small minority of prisoners, and of those tests, roughly 20% have been positive. MTD at 1, 5. Respondents' vague assertion that *Wilson* "has been criticized," *id.* at 44, ignores both the number of courts recognizing jurisdiction in this context and that the Sixth Circuit has not questioned the district court's exercise of jurisdiction. Order at 3, *Wilson*, No. 20-3447, ECF No. 23-2 (6th Cir. May 4, 2020).

B. Petitioners Are Not Required To Exhaust Administrative Remedies Under § 2241

Although "[f]ederal prisoners are ordinarily required to exhaust their administrative remedies before petitioning for a writ of habeas corpus pursuant to § 2241," *Moscato v. Fed. Bureau of Prisons*, 98 F.3d 757, 760 (3d Cir. 1996), this judicially created exhaustion requirement "is not ironclad," *Goldberg v. Beeler*, 82 F. Supp. 2d 302, 309 (D.N.J. 1999). The Third Circuit has held that exhaustion will be excused where the administrative remedy would be futile, there is a likelihood of irreparable injury absent immediate judicial relief, or the administrative remedy would not serve the requirement's underlying policy goals. *Brown v. Warden Canaan USP*, 763 F. App'x 296, 297 (3d Cir. 2019); *see also Cerverizzo v. Yost*, 380 F. App'x 115, 116 (3d Cir. 2010) ("[W]e have held that the administrative exhaustion requirement in this context may be excused if an attempt to obtain relief would be futile or where the purposes of exhaustion would not be served." (citing *Woodall*, 432 F.3d at 239 n.2)); *Lyons v. U.S. Marshals*, 840 F.2d 202, 205 (3d Cir. 1988) (explaining, even when exhaustion is required by law rather than judicial discretion, that "[e]xhaustion is not required if administrative remedies would be futile, if the actions of the agency clearly and unambiguously violate statutory or constitutional rights, or if the administrative procedure is clearly shown to be inadequate to prevent irreparable injury"); *Carling v. Peters*, No. Civ. A. 00-CV-2958, 2000 WL 1022959, at *2 (E.D. Pa. July 10, 2000) (excusing a prisoner's

failure to exhaust because he "would suffer irreparable injury if he is compelled to wait until an administrative petition is ruled upon"). All three exceptions apply here.

First, exhaustion would be futile because there is no administrative procedure that can grant Petitioners the relief that they seek. Respondents argue that Petitioners should have raised their concerns about COVID-19 through the BOP's Administrative Remedy Program ("ARP"), MTD at 28–29, which provides "formal review of an issue relating to any aspect of [a prisoner's] own confinement." 28 C.F.R. § 542.10(a). But the gravamen of Petitioners' Eighth Amendment claim is that there is no set of protective measures that Respondents can feasibly implement to contain the spread of COVID-19 in Fort Dix. *E.g.*, Petition ¶ 76–82. Thus, even if Petitioners utilized ARP to seek review of Respondents' deficient COVID-19 containment measures, Respondents could not feasibly adjust them to adequately protect Petitioners from the heightened risk of COVID-19 transmission.

In addition, it is unclear that ARP can, in fact, provide the relief Petitioners seek. Respondents fail to cite any authority suggesting that ARP can be properly used to challenge the fact of confinement at Fort Dix, or that any person in BOP custody has successfully obtained a change in custody—let alone enlargement of custody—by filing an ARP grievance. *See* MTD at 29. Accordingly, recourse to the ARP would be futile because its would neither allow Respondents to cure their constitutionally deficient conduct nor grant Petitioners their requested relief.

Respondents also contend that, in the alternative, Petitioners could obtain their desired relief through the process for requesting compassionate release. *Id.* at 40. But compassionate release is not an administrative remedy: Respondents elsewhere acknowledge that the "BOP does not have authority to provide inmates with a reduction in sentence through compassionate [release]," which can only be authorized by a district judge. *Id.* at 20 (*citing* 18 U.S.C. § 3582(c)(1)(A)). The BOP is authorized by statute to file a motion in the district court recommending compassionate release, and a prisoner may file a request with the BOP that it do so. 18 U.S.C. § 3582(c)(1)(A). But such a filing merely satisfies a statutory prerequisite that allows the prisoner to directly petition the district court for this relief if (a) the BOP declines to make such a motion or (b) 30 days pass without decision from the BOP. *Id*). As such, compassionate release is merely another form of relief that the BOP is unable to grant Petitioners; the attendant procedures for requesting such relief from the BOP would similarly be futile.

Second, and independently, exhaustion here is excused because Petitioners will suffer imminent and irreparable injury if forced to undertake any administrative procedure. Petitioners have medical conditions that make them uniquely susceptible to the severe illnesses and death that can result from COVID-19 infection. Petition ¶¶ 114–17, 135. The conditions and facility design at Fort Dix not only make social distancing and self-quarantining—the only effective means of preventing COVID-

19 transmission—impossible, but also subject all prisoners to a heightened risk of COVID-19 exposure. Petition ¶¶ 76–99. Indeed, COVID-19 has already rapidly spread throughout Fort Dix: as of May 19, 2020, 58 prisoners tested positive for COVID-19 at the Camp. MTD at 14. In the Camp, despite Respondents' claim to have tested all prisoners, some continue to register high temperatures and exhibit other symptoms. See Scronic Second Decl. ¶ 5. Meanwhile, in the Low, prisoners are continually exposed to corrections officers and medical staff who travel between the Camp, the Low, and the isolation unit within the Low, *id.* at ¶ 9; Valas Decl. ¶ 12; and Respondents have undertaken no mass testing efforts there and have no plans to do so, MTD at 13. With COVID-19 running rampant within Fort Dix in spite of Respondents' containment measures, Petitioners cannot meaningfully engage in any administrative-remedy process quickly enough to protect themselves from the risk of contracting the virus under these circumstances and the catastrophic health consequences such infection would cause. *Cf. Cordaro v. Finley*, No. 10-CR-75, 2020 WL 2084960, at *5 (M.D. Pa. Apr. 30, 2020) (finding no exception to exhaustion "since there are no confirmed cases of the COVID-19 virus at FCI-Schuylkill").

Respondents' erroneous suggestion that Petitioners should have utilized ARP merely illustrates the heightened risk of impending and irreparable injury to Petitioners that would result from exhaustion. MTD at 28–29. ARP consists of four

different steps that collectively permit the relevant BOP decisionmakers 90 days to respond to a prisoner's ARP grievance; the BOP decisionmakers routinely extend the response deadlines at least once at each step if "the time period for response [to an ARP grievance] is insufficient to make an appropriate decision." 28 C.F.R. § 542.18; *see also* MTD at 29. Moreover, Respondents have taken the position that there is no emergency at Fort Dix and, even assuming this mechanism were an appropriate one, provided no assurances that they would otherwise adjudicate ARP grievances in an expedited or timely manner. MTD at 28–29. In light of the current spread of COVID-19 within Fort Dix, subjecting Petitioners to a 90 day administrative remedy process would all but guarantee their exposure to COVID-19 and the attendant irreparable injury of serious illness or death, thereby mooting their very claims. *See Morris v. Zickefoose*, 368 F. App'x 280, 281 n.1 (3d Cir. 2010) (affirming the excusal of exhaustion where "further [procedural] efforts would be futile because [the prisoner's] claim will become moot by his May 15, 2010, release date"). At least one district court found the irreparable harm arising out of the extraordinary circumstances of the COVID-19 pandemic to warrant excusing exhaustion of ARP. *Martinez-Brooks v. Easter*, No. 3:20-cv-00569 (MPS), 2020 WL 2405350, at *19 (D. Conn. May 12, 2020) ("Given the rapid spread of COVID-19 at FCI Danbury, as evidenced by the number of positive tests among inmates and staff to date, Petitioners have shown that that they would likely suffer irreparable

harm if they were required to exhaust the administrative remedy process before seeking relief in court."). Even if ARP were the applicable administrative remedy process (it is not), the Court should reach the same conclusion here.

This same flaw pervades Respondents' alternative contentions that Petitioners should utilize the procedures for requesting compassionate release and home confinement. MTD at 40–41. As discussed above, the process for requesting that the BOP file a motion for compassionate release provides the BOP with at least 30 days to consider such a request. *See* 18 U.S.C. § 3582(c)(1)(A). And once a motion is filed, either by the BOP or the prisoner, in the district court, additional time will be required for the district court to decide the motion. The process for requesting home confinement is similarly temporally indeterminate; Respondents fail to identify provisions in the governing statute, *id.* § 3624(c)(2), as amended by § 12003(b)(2) of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), or guidance from the Attorney General that guarantees a prompt decision once a prisoner submits an application to his case manager. MTD at 18–19. In practice, of the nearly 2,900 people at Fort Dix, Respondents acknowledge they have referred only 56 people for transfer to home confinement under the CARES Act, and only 39 have or will be transferred by the end of May. MTD at 18–19. This amounts to less than two percent of the Fort Dix prison population, and does not make social distancing possible for those who remain. In sum, both processes would prolong

Petitioners' exposure to the very imminent and irreparable harm from which they seek relief.

Third, exhaustion under the current circumstances would disserve the doctrine's purpose. Exhaustion promotes three policy goals: "(1) allowing the appropriate agency to develop a factual record and apply its expertise facilitates judicial review; (2) permitting agencies to grant the relief requested conserves judicial resources; and (3) providing agencies the opportunity to correct their own errors fosters administrative autonomy." *Moscato*, 98 F.3d at 761–62. These benefits are most clearly implicated when a prisoner challenges "the rationale of the BOP's factual and substantive determination" as opposed to the validity of a BOP regulation or procedure as a whole. *See Huggins v. Grondolsky*, No. 09-cv-3143, 2009 WL 2413658, at *4 (D.N.J. Aug. 4, 2009) (dismissing petition without prejudice where, unlike here, petitioner "did not state valid grounds excusing his failure to exhaust available administrative remedies"); *Miller v. Williamson*, No. 07-cv-1326, 2008 WL 471550, at *2 (M.D. Pa. Feb. 19, 2008) ("The Third Circuit has held that exhaustion would be futile where a prisoner challenges the validity of a law or regulation, rather than its application in a particular case.").

Here, nothing would be gained through exhaustion because Petitioners are not challenging the application of any BOP regulation or procedure as it relates to them. Rather, Petitioners' claims are based on federal constitutional and statutory

principles that focus on the conditions within Fort Dix itself; the adjudication of the merits of these claims does not require Respondents to make any individualized determinations about Petitioners. Moreover, Respondents have no special expertise in analyzing Eighth Amendment principles or public health considerations that would otherwise warrant deference in favor of administrative proceedings. Thus, the inapplicability of the policy reasons animating the exhaustion requirement to this case further supports excusing exhaustion.

Finally, this Court's decision in *Furando v. Ortiz*, No. 20-cv-3739-RMB, 2020 WL 1922357 (D.N.J. Apr. 21, 2020), does not compel a different conclusion. As a threshold matter, the *Furando* petitioner failed to raise any exception to exhaustion, and so this Court treated the issue as waived and expressly declined to address it. *Id*. at *4 ("Respondent correctly points out that Petitioner has not offered any justification for his failure to exhaust prior to filing the present petition. Thus, the Court will not address whether exhaustion is futile."). In contrast, Petitioners here exceeded their pleading obligations by raising exhaustion exceptions in the Petition. Petition ¶¶ 21–23; *Small v. Camden Cty.*, 728 F.3d 265, 268–69 (3d Cir. 2013) ("Failure to exhaust is an affirmative defense the defendant must plead and prove; it is not a pleading requirement for the prisoner-plaintiff."). And through this memorandum, they reiterate their entitlement to those exceptions for the reasons explained above.

Another critical distinction between this case and *Furando* is the different claims asserted in each case. In *Furando*, the petitioner based his habeas petition on his alleged entitlement to home confinement or release pursuant to the CARES Act. *Furando*, 2020 WL 1922357 at *1, 4. But "[t]he CARES Act places decision making authority [to authorize home confinement] solely within the discretion of the Attorney General and the Director of the Bureau of Prisons." *United States v. Coker*, No. 3:14-cr-085, 2020 WL 1877800, at *1 (E.D. Tenn. Apr. 15, 2020). *Furando* presented a quintessential case implicating the policy goals of exhaustion because the petitioner was ultimately challenging "the rationale of the BOP's factual and substantive determination" of his home confinement eligibility. *Huggins*, 2009 WL 2413658 at *4. Exhaustion was therefore particularly important because the BOP had not yet determined the petitioner's home confinement eligibility in the first instance and "[was] now in the process of reviewing the [*Furando* prisoner's] eligibility for home confinement[.]" *Furando*, 2020 WL 1922357 at *4. By bypassing the BOP's initial determination and filing his habeas petition, the *Furando* petitioner asked this Court to review the reasonableness of home confinement eligibility determination the BOP never made based on "a record that does not yet exist." *Huggins*, 2009 WL 2413658 at *4.

But here, as explained above, Petitioners do not allege entitlement to home confinement based on an individualized application of BOP regulation or procedure.

They instead seek the temporary remedy of enlargement of custody, which can take the form of home confinement, because of Respondents' unconstitutional conduct. The merits of Petitioners' constitutional claims therefore do not depend on this Court's review of any administrative record. Forcing Petitioners to complete the ARP or some other administrative remedy process would not improve this Court's adjudication of Petitioners' constitutional claims but would subject them to imminent and irreparable injury.

In sum, this Court should find that all three exceptions to exhaustion apply to Petitioners' § 2241 petition.

C. The PLRA Does Not Apply, And Even If It, That Would Not Bar Petitioners' Requested Relief

Because Petitioners have properly invoked § 2241 to challenge the fact of their confinement and execution of their sentences, *see* I.A, *supra*, this case is not a "civil action with respect to prison conditions" within the meaning of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(g)(2), and is therefore specifically excluded from its coverage.

But even if this Court concludes otherwise, the PLRA would not deprive this Court of authority to order Petitioners' requested relief. First, the PLRA's exhaustion requirement must be excused because there are no administrative remedies available to Petitioner. Second, even if the PLRA generally applies restrictions to civil actions that seek a "prisoner release order," transferring a

detainee does not trigger the definition of a "prisoner release order" as defined by the PLRA. *See id.* § 3626(g)(4). The PLRA's plain language also renders it applicable only where a party seeking a "prisoner release order" must demonstrate as a prerequisite that "crowding is the primary cause of the violation" in order to obtain relief. *Id.* §§ 3626(a)(3)(B) , (a)(3)(E)(i) . This narrow definition of a "prisoner release order" cannot apply in situations like this one, where the constitutional violation alleged stems primarily not from overcrowding, but instead from the rampant spread of a novel and deadly disease that the BOP is ill-equipped to control. Finally, Petitioners' requested relief is both narrowly tailored and proportional to the Eighth Amendment violation.

1. Petitioners Are Excused From The PLRA's Exhaustion Requirement Because Administrative Remedies Are Not Available

The PLRA requires plaintiffs to exhaust administrative remedies when "such administrative remedies . . . are available." 42 U.S.C. § 1997e(a). The PLRA thus contains a "textual exception to mandatory exhaustion": a plaintiff need "not exhaust remedies if they are not 'available.'" *Ross v. Blake*, 136 S. Ct. 1850, 1855, 1858 (2016); *accord Brown v. Croak*, 312 F.3d 109, 111 (3d Cir. 2002). In other words, the PLRA "requires exhaustion of all *available* remedies, not all remedies." *Berry v. Klem*, 283 F. App'x 1, 4-5 (3d Cir. 2008) (emphasis added). In *Ross*, the Supreme

Court defined "available" as "capable of use for the accomplishment of a purpose." *Ross*, 136 S. Ct. at 1858.

Administrative remedies are unavailable where the plaintiff's attempts to exhaust are thwarted through "machination, misrepresentation, or intimidation," where officers are unable or unwilling to provide relief to the aggrieved petitioner, or where the administrative scheme is "so opaque" that it becomes practically incapable of use. *Ross*, 136 S. Ct. at 1860. Similarly, the Third Circuit has found administrative remedies unavailable where prison officials ignore their own procedural rules, *e.g.*, *Robinson v. Superintendent Rockview SCI*, 831 F.3d 148, 154 (3d Cir. 2016); *Small v. Camden County*, 728 F.3d 265, 273 (3d Cir. 2013); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003); *Camp v. Brennan*, 219 F.3d 279, 280-81 (3d Cir. 2000). While *Ross* sets forth some paradigmatic types of circumstances in which administrative remedies are unavailable, "neither the Supreme Court nor this Circuit has held that those three circumstances are comprehensive, as opposed to exemplary." *West v. Emig*, 787 F. App'x 812, 815 (3d Cir. 2019). Respondents mischaracterize *Ross* in suggesting otherwise. MTD at 54.

Here, administrative remedies are unavailable to Petitioners. As a threshold matter, as discussed in the § 2241 exhaustion context, Respondents have failed to identify any administrative procedure that could even award Petitioners their requested relief of enlargement of custody or release. Even assuming an available

remedy process exists, it would almost certainly require Petitioners to engage in an administrative process that could take weeks or months to resolve, all the while Petitioners remain exposed to imminent and irreparable harm. Accordingly, any administrative-remedy program that would require Petitioners to wait even a week to complete is not "capable of use for the accomplishment of [that] purpose." *Ross*, 136 S. Ct. at 1858.

2. Petitioners' Requested Relief Is Not A "Prisoner Release Order" for PLRA Purposes

Although Petitioners seek physical release from Fort Dix, this requested relief does not qualify as a "prisoner release order" within the meaning of the PLRA because the Court can impose conditions on their release, including that they remain within the custody of the BOP. *Wilson v. Williams*, No. 20- CV-794, 2020 WL 1940882, at *10 (N.D. Ohio Apr. 22, 2020) (rejecting application of Section 3626 because "the Court is not ordering the release of the prisoners. Instead, the inmates will remain in BOP custody, but the conditions of their confinement will be enlarged."), *stay denied*, No. 20-3447, Dkt. 23-2 (6th Cir. May 4, 2020). Here, Petitioners seek, to the extent possible, to remain within the BOP's custody and alter only the location of their confinement. This requested relief is more accurately characterized as a prisoner transfer, which does not trigger the PLRA.

In *Reaves v. Department of Correction*, the district court found this distinction between prisoner transfer and prisoner release to be dispositive. 404 F. Supp. 3d

520, 522 (D. Mass. 2019) ("*Reaves II*"). The *Reaves* court had previously ordered a prisoner to be transferred to an outside facility so that he could be treated by a physician with the training to care for his medical needs. *Reaves v. Dep't of Corr.*, 392 F. Supp. 3d 195, 210 (D. Mass. 2019). The government moved to stay the execution of that order, arguing, as Respondents do here, that under the PLRA, a three-judge panel must approve the transfer of the prisoner. *Reaves II*, 404 F. Supp. 3d at 522. The *Reaves* court rejected the government's argument because the prisoner had not been "released" within the meaning of the PLRA. *Id*. Instead, the court explained that its prior order "did not release Mr. Reaves from incarceration, it transferred him. This is a distinction not without a difference." *Id*.

Even assuming that Petitioners' requested relief could constitute "release" under the PLRA, the statutory text, legislative history, and familiar principles of statutory construction also establish that the phrase "prisoner release order" in the PLRA applies only in situations where the primary basis of the detainees' claim is overcrowding. The *Reaves* court explained that the definition of a "prisoner release order" is best read include such a limitation because:

> Reading the statue as a whole entails harmonizing the definition of "prisoner release order" with the requirements for entering one. One of two necessary conditions for entering a release order . . . is that the three-judge panel find by clear and convincing evidence, that '*crowding is the primary cause of the violation of a Federal right*.' 18 U.S.C. § 3626 (a)(3)(E)(i).

Id. at 523 (emphasis added, citing *Plata v. Brown*, 427 F. Supp. 3d 1211, 1222–23 (N.D. Cal. 2013)). Without such a limitation, a broad interpretation of the term "prisoner release order" would mean that the only way a district court can order the release of a prisoner is for a violation of his constitutional rights where overcrowding caused the violation, but not if any other reason caused the violation. The PLRA cannot impose such a strict limitation, which would essentially limit all prisoner claims to only those that stem from overcrowding. As the *Reaves* Court noted, nothing in the legislative history of the PLRA "evidences Congressional intent to limit the protection of inmates' constitutional rights in this way." *Id*. In fact, the legislative history suggests that the "[s]ponsors of the PLRA were especially concerned with courts setting 'population caps' and ordering the release of inmates as a sanction for prison administrators' failure to comply with the terms of consent decrees designed to eliminate overcrowding." *Gilmore v. California*, 220 F.3d 987, 998 n.14 (9th Cir. 2000) (quoting 141 Cong. Rec. S14414 (daily ed. Sept. 27, 1995) (remarks of Sen. Dole) (highlighting Congress's concern that population caps were a "pernicious form of micromanagement" that required legislative attention)).

In the instant case, mere overcrowding is not the primary cause of Respondents' Eighth Amendment violation. Instead, their unconstitutional conduct was caused by the unprecedented threat of the highly infectious COVID-19 outbreak in Fort Dix, of which the physical layout of the prison, not overcrowding, is the

primary driver. Under such circumstances, the requested relief of release relates to the prisoners' medical needs or vulnerabilities and does not implicate the PLRA's restrictions on "prisoner release orders."

3. The Requested Relief Is Narrowly Tailored

Assuming, once again, that the PLRA applies here, the PLRA additionally requires that any remedy be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A).

Petitioners' requested relief is narrowly tailored to those who are facing imminent and irreparable harm as a result of Respondents' unconstitutional deliberate indifference. Petitioners and members of the proposed class, because of certain preexisting health conditions or their age, are all uniquely susceptible to the serious illnesses or death attendant to COVID-19 infection. Transferring them into some alternative form of custody is the only way they can properly practice social distancing and self-quarantining, the most effective methods of preventing COVID-19 transmission; this, in turn, will improve the feasibility of implementing these methods in Fort Dix by reducing the prison population.

As discussed more fully in Petitioners' memorandum of law in support of their motion or a preliminary injunction as well as Section IV.A of this memorandum, Petitioners have also demonstrated a substantial likelihood of success on the merits

of their Eighth Amendment deliberate indifference claim. Plaintiffs have thus additionally satisfied the bar for a mandatory injunction. *See* MTD at 57 (citing *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018)).

II. A CLASS ACTION IS AN APPROPRIATE AND EFFECTIVE VEHICLE FOR PETITIONERS' CLAIMS

A. Respondents Motion To Strike Should Be Denied

Respondents' motion to strike Petitioners' Class allegations is meritless. *See* MTD at 57. In the Third Circuit, courts may only make decisions on class certification "after a rigorous analysis." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2008), *as amended* (Jan. 16, 2009). "A class certification decision requires a thorough examination of the factual and legal allegations." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001), *as amended* (Oct. 16, 2001). Thus, "[i]n most cases, some level of discovery is essential to such an evaluation." *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 93 (3d Cir. 2011), *opinion reinstated in part*, No. 09-3105, 2012 WL 2052685 (3d Cir. Apr. 17, 2012).

For the foregoing reasons, "district courts within the Third Circuit typically conclude that motions to strike class action allegations filed before plaintiffs move for class certification are premature." *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 284 F.R.D. 238, 244 (E.D. Pa. 2012). As the Third Circuit explained in *Landsman*, which Respondents cite in their brief:

> When the District Courts decided the class certification issue, there had been no motion for class certification and no discovery; whether the class could potentially fit within Rule 23 was determined on a motion to dismiss. This ruling was premature.

640 F.3d 72 at 93. This is because "[a] motion to strike class allegations under Rule 23(d)(4) seems, for all practical purposes, identical to an opposition to a motion for class certification." *Korman v. Walking Co.*, 503 F. Supp. 2d 755, 762 (E.D. Pa. 2007). Thus, only when it "appear[s] beyond doubt that no relief could be granted under any set of facts which could prove consistent with the allegations" may a court strike class allegations before discovery. *Andrews v. Home Depot U.S.A., Inc.*, No. Civ-A-03CV5200 (DMC), 2005 WL 1490474, at *3 (D.N.J. June 23, 2005). Such instances, where the "complaint itself demonstrates that the requirements for maintaining a class action cannot be met" are "rare." *Landsman*, 640 F.3d at 93; see also *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 205 (D.N.J. 2003) (noting a motion to strike class action allegations "prior to discovery" would only be appropriate in "those rare cases where the complaint itself demonstrates that the [Rule 23] requirements for maintaining a class action cannot be met."). Even then, "a thorough evaluation of the Rule 23 factors" is necessary, and "[a] district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements." *In re Hydrogen Peroxide*, 552 F.3d at 318.

Here, Respondents fail to show why Petitioners' claims do not satisfy Rule 23. Indeed, Respondents do not attempt to analyze Petitioners' claims in the context of Rule 23 at all. Instead, Respondents merely list the four elements of Rule 23(a) and then assert, without analysis, that the "Petitioners cannot satisfy any of these elements for class certification." MTD at 58. Respondents' *ipse dixit* falls short of the "rigorous analysis" required and should be rejected. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 309. [9]

B. Petitioners Satisfy The Rule 23(a) and Rule 23(b) Requirements

Rule 23(a) of the Federal Rules of Civil Procedure establishes four requirements for class certification—numerosity, commonality, typicality, and adequate representation—to ensure that the named plaintiffs are "appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). "Besides meeting the requirements of Rule 23(a) , plaintiffs must also satisfy one of the requirements of 23(b) ." *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994). Because Petitioners have

[9] For similar reasons, Respondents should not be permitted to raise new arguments regarding Rule 23 in their reply papers. Respondents do not explain to the Court (or Petitioners) why the Rule 23(a) elements are not satisfied and ignore Rule 23(b) entirely. *See Datasphere, Inc. v. Computer Horizons Corp.*, 2008 WL 4561509, at *6 (D.N.J. Oct. 9, 2008) ("As a matter of procedure, this Court will not accept arguments offered for the first time in the reply brief, as they were not properly asserted in the opening brief and Defendants have not had the opportunity to respond to them.").

established each of the four requirements of Rule 23(a) and have demonstrated that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," Fed. R. Civ. P. 23(b)(2) , they are entitled to class treatment.

Petitioners plainly satisfy Rule 23(a)'s numerosity requirement. In the Third Circuit, "[n]o minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs *exceeds 40*, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001) (emphasis added); *see also Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 486 (3d Cir. 2018) (noting that numerosity is usually satisfied if potential number of plaintiffs exceeds 40). Furthermore, where injunctive relief is sought, "rigorous application of the numerosity requirement would not . . . appear to be warranted." *Weiss v. York Hosp.*, 745 F.2d 786, 808 (3d Cir. 1984). This is because in most cases seeking "injunctive relief against discriminatory practices by a defendant, the defendant will not be prejudiced if the plaintiff proceeds on a class action basis . . . because the requested relief generally will benefit not only the claimant but all other persons subject to the practice under attack." *Id.* Respondents do not contest that the Class is numerous.

Petitioners have also satisfied Rule 23(a)'s commonality and typicality requirements. In the Third Circuit, and indeed across the country, "[t]he concepts of commonality and typicality are broadly defined and tend to merge." *Baby Neal*, 43 F.3d at 56. "Commonality requires the presence of questions of law or fact common to the class, and typicality demands that the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182 (3d Cir. 2001) (citations and internal quotation marks omitted). The Third Circuit has "set a low threshold for satisfying both requirements." *Id.* at 183. "[N]either of these requirements mandates that all putative class members share identical claims." *Id.* (alteration in original). Commonality is "demonstrated [when] there is *at least one* common question of law or fact." *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998) (emphasis added). "[C]lass members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice." *Baby Neal*, 43 F.3d at 56. Likewise, "even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories." *Id.* at 58. "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Newton*, 259 F.3d at 183–84.

Petitioners here clearly satisfy both requirements. First, Petitioners raise a common question of law and fact: whether the Respondents' failure to enlarge the confinement of medically vulnerable prisoners in light of the COVID-19 constitutes deliberate indifference in violation of the Eighth Amendment to the Constitution as understood by the Supreme Court's decision in *Helling v. McKinney*, 509 U.S. 25, 31–32 (1993). That there may be factual differences among the class members, such as age, medical history or length of time left on their sentences, does not defeat commonality. As the Petition makes clear, all prisoners within the medically vulnerable Class are exposed to enormous medical risk. Furthermore, the Petition conclusively explains why that risk is *inherent* to confinement at Fort Dix and cannot be cured through changes in prison practices. The necessity of supervision and interaction with other individuals (*e.g.*, corrections officers and medical staff) on a daily basis places medically vulnerable people at Fort Dix at constant risk of infection, particularly in light of COVID-19's asymptomatic spread.

That certain members of the class may not yet be sick is also of no matter. As the Supreme Court explained in *Helling*, "[w]e have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." 509 U.S. at 33. Thus, the Court ruled it was impermissible for prison officials to be

"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.* "[A] remedy for unsafe conditions," the Court noted, "need not await a tragic event." *Id.* Here, the data makes clear that medically vulnerable prisoners have an enormously heightened risk of infection, and—upon infection—die at much higher percentages than the general population. Thus, the quantum of medical risk has well passed the threshold of unconstitutionality. While some Petitioners may face an even more serious threat than others, those are differences in the degree of injury and not in kind.

For the same reasons, Petitioners satisfy Rule 23(a)'s typicality requirement. The legal claims raised by the named Petitioners are substantially identical to the rest of the Class' claims. While certain class members may have conditions that make their risk from COVID-19 worse than others, *all* class members—by virtue of age or health conditions—face an unconstitutional risk of medical harm through their continued confinement at Fort Dix. The named Petitioners' claims thus are sufficiently typical of the Class for Rule 23(a)'s purposes.

The Third Circuit's holding in *Hassine v. Jeffes*, 846 F.2d 169 (3d Cir. 1988) supports a finding in Petitioners' favor on both commonality and typicality. There, a putative class of prisoners challenged numerous conditions at a correctional facility, including allegations that the prison was overcrowded, dangerous, and

posed numerous serious medical risks to patients. Reversing the trial court's denial of class certification, the Third Circuit observed that:

> Rule 23 does not require that the representative plaintiff have endured precisely the same injuries that have been sustained by the class members, only that the harm complained of be *common* to the class, and that the named plaintiff demonstrate a personal interest or threat of injury that is real and immediate, not conjectural or hypothetical.

Id. at 177 (internal quotation marks, ellipsis, and brackets omitted). Thus, the named plaintiffs could pursue claims on behalf of the class even if they "themselves could not demonstrate that there was intolerable water seepage into their cells, or that there was no ventilation because their windows could not be operated, or that they had gotten ill because of food that had not been properly stored or prepared in compliance with sanitary requirements." *Id.* at 178 Instead, "complainants' assertion that these conditions existed, and that they were subject to them—even if they had not at the time of assertion themselves been injured by those conditions—was sufficient to require adjudication of the claims as to the class." *Id.* Similarly, the Class here is "subject to" conditions that threaten severe risk of deadly infection. That is sufficient to satisfy Rule 23(a)'s commonality and typicality requirements.

The Third Circuit has since extended *Hassine* to situations even more analogous to the one presented by Petitioners. In *Hagan v. Rogers*, 570 F.3d 146 (3d Cir. 2009), a putative class of prisoners sued a correctional facility alleging "that the Defendants violated their Eighth and Fourteenth Amendment rights by failing to

address the threat of a serious and undiagnosed contagious skin disease, possibly scabies, spreading through the facility." *Id.* at 150. The trial court found that the proposed class suffered from commonality and typicality defects since it "would include inmates that suffered life-threatening injuries, and inmates that suffered no physical injuries." *Id.* at 158. Because "the treatment received by different members of the class could vary" based on "medical needs and injury," the trial court found class treatment was "undesirable." *Id.*

On review, the Third Circuit reversed the trial court's class findings and noted "its reasoning [was] problematic." *Id.* Relying on *Hassine*, the Third Circuit highlighted that the complaint included allegations that "all prisoners at the facility, including the named plaintiffs, were subject to the threat of an injury." *Id.* Thus, the Court held that the trial court failed to explain why the "alleged threat of injury is insufficiently typical or common to allow Appellants' action to proceed as a class." *Id.* The justification for class treatment here is even stronger because Petitioners present a *narrower* class (of medically vulnerable inmates only) and have identified an even more serious medical risk (of COVID-19) than the petitioners in *Hagan*. Third Circuit law thus supports a finding of commonality and typicality.

Rather than address the commonality and typicality requirements as they have been interpreted in the Third Circuit, Respondents focus the near entirety of their limited briefing on class issues on a single out-of-circuit district court opinion,

Money v. Pritzker, Nos. 20-cv-2093, 20-cv-2094, 2020 WL 1820660 (N.D. Ill. Apr. 10, 2020). In *Money*, a Northern District of Illinois court found a group of prisoners seeking comparable relief as here could not satisfy Rule 23's commonality requirement because "individualized determinations" would be required to answer the class's common questions. *Id.* at *15. Respondents point to *Money* to support their argument that the differing backgrounds of the class members make class certification undesirable. But, as explained above, the Third Circuit has repeatedly rejected this exact theory, holding that "class members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice." *Baby Neal*, 43 F.3d at 56. As explained in *Baby Neal*, "(b)(2) classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members *irrespective of their individual circumstances and the disparate effects of the conduct*." *Id.* at 57 (emphasis added).

In addition, *Money* has already proven to have little persuasive effect even within its own district. In *Mays v. Dart*, No. 20 C 2134, 2020 WL 1987007 (N.D. Ill. Apr. 27, 2020), a different Northern District of Illinois court rejected the *Money* court's reasoning on commonality, stating that the court would "depart[] from the analysis in *Money*" that "the putative classes failed to satisfy the commonality

requirement because their requested relief would entail individualized determinations." *Id.* at *18. Instead, the court found commonality satisfied, noting that the "commonality requirement does not mean that the relief ultimately awarded to each plaintiff must be the same." *Id.*

Outside the Third Circuit, the weight of authority supports the Petitioners. As one district court has explained:

> At bottom, a common question of law and fact in this case is whether the government must modify the conditions of confinement -- or, failing that, release a critical mass of Detainees -- such that social distancing will be possible and all those held in the facility will not face a constitutionally violative substantial risk of serious harm. Crucial to the Court's determination is the troubling fact that even perfectly healthy detainees are seriously threatened by COVID-19. To be sure, the harm of a COVID-19 infection will generally be more serious for some petitioners than for others. Yet it cannot be denied that the virus is gravely dangerous to all of us.

Savino v. Souza, No. 20-106172020, WL 1703844, at *7 (D. Mass. Apr. 8, 2020) (citations and internal quotation marks omitted).

Numerous other courts across the country have likewise rejected *Money*'s central thesis and found incarcerated persons challenging COVID-19 related detention conditions present sufficiently common concerns for interim class relief. *See, e.g.*, *Martinez-Brooks v. Easter*, No. 3:20-cv-00569, 2020 WL 2405350, at *30 (D. Conn. May 12, 2020) ("Facts regarding the process employed by the Warden in considering inmates for home confinement and compassionate release are common

to the entire putative subclass, as are the legal questions regarding whether the Warden's handling of those processes in these circumstances is constitutional."); *Gomes v. Acting Sec'y, U.S. Dep't of Homeland Sec.*, No. 20-cv-453, 2020 WL 2113642, at *3 (D.N.H. May 4, 2020) ("Petitioners' deliberate indifference claim thus presents at least two common questions: whether each respondent had actual knowledge of the impending harm or risk posed to the putative class by COVID-19; and whether each respondent failed to take steps that would have easily prevented the harm to detainees."); *Alcantara v. Archambeault*, No. 20-cv-0756, 2020 WL 2315777, at *5 (S.D. Cal. May 1, 2020) (rejecting sufficiency of government's argument that each subclass member "has a different risk profile," noting that "this may be true, but it does not detract from the undisputed common feature of the subclass, which is that each member is at high risk" of contracting COVID-19); *Wilson v. Williams*, No. 20-cv-00794, 2020 WL 1940882, at *7 (N.D. Ohio Apr. 22, 2020) (rejecting similar arguments made in *Money* and by Respondents here, and finding commonality satisfied because "[t]he motivating question in the litigation is whether the subclass members' rights are being violated by the deteriorating conditions at Elkton"); *Fraihat v. U.S. Immigration & Customs Enforcement*, No. EDCV 19-1546, 2020 WL 1932570, at *18 (C.D. Cal. Apr. 20, 2020) ("Plaintiffs present[ed] the Court with shared factual and legal issues more than adequate to support a finding of commonality" and, "[s]tated in general terms, the

common question driving this case is whether Defendants' system-wide response—or the lack of one—to COVID-19 violates Plaintiffs' rights").

Finally, Petitioners satisfy Rule 23(a)'s adequacy requirement. "Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975). Respondents have not identified any conflicts in interest that may exist between the named Petitioners and the broader class., and no such conflicts exist. Nor have Respondents offered any argument as for why the Petitioners legal team would be incapable of conducing the proposed litigation. Because Respondents have failed to meaningfully challenge the Petitioners' satisfaction of Rule 23(a) , and because Petitioners have satisfied all four requirements of Rule 23(a) , interim class certification is appropriate.[10]

C. The Court Can Provide Interim Relief on a Class-Wide Basis Without Need for Constant and Individualized Judicial Decisions

Finally, Respondents suggest that class certification is improper because "[t]here would be no feasible way for the Court to decide the constitutionality of

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[10] Although Respondents do not address Rule 23(b) at all, Petitioners also satisfy Rule 23(b)(2) because "the relief sought by the named plaintiffs should benefit the entire class." *Baby Neal*, 43 F.3d at 59. Orders "forcing the [Government] to comply with [its] statutory and constitutional mandates would constitute relief generally applicable to the entire putative class," *id.* at 64, thereby meeting the requirements of Rule 23(b)(2) . Petitioners also, in the alternative, satisfy Rule 23(b)(3) .

these inmates' conditions of confinement without evaluating all of those different conditions." MTD at 58. But other courts have squarely rejected Respondents argument and demonstrated that the proposed Class can be managed efficiently and effectively.

For example, in *Martinez-Brooks*, the District Court for Connecticut granted in part a temporary restraining order on behalf of incarcerated persons at FCI Danbury seeking relief due to the threat of COVID-19. 2020 WL 2405350, at *34. In doing so, the court laid out a sequence of orders to remedy the unconstitutional risk posed by COVID-19. Of note, none of these orders required extensive involvement of the court beyond a supervisory role. For example, the Court ordered that: (a) within 3 days, the Warden file on the docket a list of all medically vulnerable inmates; (b) within 3 days, the respondents implement a process by which home confinement would be assessed (with certain conditions) and provide to members of the subclass the factors relevant to a decision; (c) within 7 days, the respondents begin to process applications for home confinement; (d) within 13 days, respondents finish the review of applications and provide the court with a list of denied individuals. *Id.* at *32–34.

Likewise, in *Wilson*, the court ordered that: (a) within 1 day, all members of the subclass be identified; (b) within the next 14 days, the respondents evaluate "each subclass member's eligibility for transfer out of Elton through any means, including

but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough" with certain conditions. *Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882, at *10–11 (N.D. Ohio Apr. 22, 2020) . The court there has, as recently as yesterday, continued to oversee BOP's implementation of the court's order. *See Wilson v. Williams*, No. 4:20-cv-00794, ECF No. 85 (N.D. Ohio May 19, 2020).

Here, the Court should first declare unconstitutional the current state of incarceration for the class, and then order BOP—as done in *Wilson* and *Martinez-Brooks*—to implement processes to remedy this violation. While individual determinations may ultimately need to be made, they can be made by the Respondents, not the Court. The Court's role will instead be supervisory. As the Third Circuit explained in *Baby Neal*, relief predicated on ordering a government entity to undertake certain remedial measures avoids the "need to make individual, case-by-case determinations in order to assess liability or order relief." *Baby Neal*, 43 F.3d at 64. Instead, courts "can fashion precise orders to address specific, system-wide deficiencies and then monitor compliance relative to those orders." *Id.*

III. PLAINTIFFS HAVE MADE THE REQUIRED SHOWING FOR A PRELIMINARY INJUNCTION

Petitioners have established that all four factors necessary for the issuance of an injunction weigh in their favor, as explained more fully in the Memorandum of Law in Support of Petitioners' Motion for a Preliminary Injunction. Petitioners Br.

at 24–37. Respondents nevertheless contend that Petitioners cannot demonstrate any of these factors. MTD at 3–4. In so doing, they mischaracterize Petitioners' factual allegations and requested relief and ignore Petitioners' supporting evidence. This Court should disregard Defendants' misleading arguments and issue a preliminary injunction ordering immediate, temporary enlargement of custody.

A. Petitioners Have Demonstrated A Likelihood of Success on the Merits

In addition to demonstrating this Court's jurisdiction and the appropriateness of class treatment, Petitioners are also likely to succeed on the merits of their habeas claim. To establish an Eighth Amendment deliberate indifference violation, a petitioner must "make (1) a subjective showing that the defendants were deliberately indifferent to his or her medical needs and (2) an objective showing that those needs were serious." *Pearson v. Prison Health Serv.*, 850 F.3d 526, 534 (3d Cir. 2017) (internal quotation marks, brackets, and citations omitted). The Third Circuit has provided the following guidance on the required subjective showing:

> The knowledge element of deliberate indifference is subjective, not objective knowledge, meaning that the official must actually be aware of the existence of the excessive risk; it is not sufficient that the official should have been aware. However, subjective knowledge on the part of the official can be proved by circumstantial evidence to the effect that the excessive risk was so obvious that the official must have known of the risk. Finally, a defendant can rebut a prima facie demonstration of deliberate indifference either by establishing that he did not have the requisite level of knowledge or awareness of

> the risk, or that, although he did know of the risk, he took reasonable steps to prevent the harm from occurring.

Beers-Capitol v. Whetzel, 256 F.3d 120, 133 (3d Cir. 2001) (internal citations omitted).

Respondents do not contend that they are unaware that inmates with medical conditions such as Petitioners are at heightened risk for severe, life-threatening cases of COVID-19. Nor do they contend that they are unaware that social distancing and self-quarantining are impossible to implement in Fort Dix. *Cf.* Petition ¶ 87 (email from Respondent Ortiz stating, in part, "social distancing is not possible in this environment"). Respondents instead point to the variety of containment measures they have implemented to argue that they are providing all Fort Dix prisoners with a sufficient degree of care. MTD at 52.

Although Respondents may subjectively believe that their containment measures are the best they can do, these measures remain "contrary to current standards of decency for anyone to be so exposed" because they fail to meaningfully mitigate the risk of COVID-19 transmission and attendant serious illness and death that Petitioners face. *Helling v. McKinney*, 509 U.S. 25, 35 (1993). As an initial matter, Respondents' containment measures are premised on the fundamental assumption that all COVID-19-infected prisoners have already been quarantined in the isolation unit and the Fort Dix staff is vigilantly monitoring all remaining prisoners. MTD at 8–13. But Petitioners have uncovered evidence that prisoners at

the Low and the Camp remain at risk of contracting COVID-19 and indeed are showing symptoms typical of it, in spite of these measures. *See generally* Valas Decl.; Telfair Decl.; Scronic Decl. More problematically, Respondents' containment measures similarly rely on their testing efforts, which are fundamentally incomplete. Respondents do not contend—nor could they—that they have tested *every* prisoner in Fort Dix. They do not even contend that they test every prisoner who has symptoms. Instead, their practice moving forward is to only test (and later isolate) those inmates who first exhibit symptoms and who are determined eligible for testing by medical staff. Turner-Foster Decl. ¶ 23. This procedure wholly fails to account the spread of COVID-19 by asymptomatic prisoners, a flaw that is exacerbated by the significant false negative rate of the Abbott Laboratories testing kits that Respondents are currently using. MTD at 13–14; *see also* Joe Neel & Hannah Hagemann, FDA Cautions About Accuracy Of Widely Used Abbott Coronavirus Test, NPR (May 14, 2020) *available at* https://www.npr.org/sections/coronavirus-live-updates/2020/05/14/856531970/fda-cautions-about-accuracy-of-widely-used-abbott-coronavirus-test (noting that NPR found that "as many as 15 to 20 out of every 100 tests may produce falsely negative results" and citing study that found "the test could be missing as many as 48% of infections"). *See also* Goldenson Decl. ¶ 50 (noting 15 to 20 percent false negative rate and FDA alert as to the machine's inaccuracies).

Lastly, and most importantly, the current containment measures do not include social distancing or self-quarantining, the only two effective means of preventing COVID-19 transmission. Respondents' bare assertion that Fort Dix is encouraging social distancing by limiting the number of inmates allowed in certain spaces does not allow the Court to meaningfully assess risk of contraction, as Respondents do not explain what kind of distance inmates are realistically able to maintain given the size of such spaces. Goldenson Decl. ¶ 47. And although Respondents maintain that they are quarantining some inmates, they do not quarantine inmates in separate groups based on date of entry. Goldenson Decl. ¶ 44. Further, Respondents do not assert that they have adequate staffing, resources, and equipment for the quarantine unit. Goldenson Decl. ¶ 46. Having failed to contest their knowledge of the serious health dangers that COVID-19 presents, Respondents' implementation of flawed containment measures constitutes deliberate indifference in violation of the Eighth Amendment.

B. Petitioners Have Established Irreparable Harm

Respondents argue that Petitioners have failed to establish "irreparable harm that they uniquely would suffer if they obtain no relief" because COVID-19 "poses risks to everyone, not just the inmates at FCI Fort Dix." MTD at 4. This argument utterly fails to address the theory of harm alleged in the Petition: because of certain preexisting medical conditions or advanced age, Petitioners and the proposed class

members are *uniquely* vulnerable to the serious illnesses or death that COVID-19 can cause. Petition ¶¶ 7–10, 135; *see also Thakker v. Doll*, No. 1:20-CV-480, 2020 WL 1671563, at *1 (M.D. Pa. Mar. 31, 2020) (finding that "[t]here can be no injury more irreparable" than such adverse health consequences). While members of the general public may share this vulnerability, Petitioners and the proposed class members face a *heightened and more imminent degree* of this irreparable harm because social distancing and quarantining are impossible to practice within Fort Dix. Petitioners are therefore subject to a unique and individualized form of irreparable harm by the very fact of their confinement in Fort Dix.

As discussed in the preceding section of this memorandum, Respondents fail to undermine this showing of irreparable harm with their allegations that they have put in place adequate measures to contain COVID-19 within Fort Dix. MTD at 59–60. While Respondents' current set of containment measures may represent "a good faith effort" to contain COVID-19, *id.* at 60, they cannot meaningfully mitigate the imminent and irreparable harm that Petitioners face because they do not include the ability to socially distance or self-quarantine. Indeed, Petitioners have put forth evidence that prisoners continue to exhibit symptoms consistent with COVID-19 despite any containment measures. Telfair Decl. ¶¶ 2-4; Scronic Decl. ¶ 5.

C. Equity and Public Interest Weigh In Petitioners' Favor

Respondents ignore the significant risks to public health posed by an uncontrolled COVID-19 outbreak at Fort Dix. There is, first, the risk that sick prisoners will take up hospital beds in the community, and second, the risk that prisons staff "will carry the virus into their homes and communities." *See* Order at 11, *Hope v. Doll*, No. 20-cv-562, ECF No. 11 (M.D. Pa. Apr. 7, 2020). Respondents instead emphasize the importance of their ability to monitor prisoners at Fort Dix, but that interest can be appropriately balanced by the imposition of specific conditions of release. *See*, *e.g.*, *Cristian A.R. v. Decker*, No. 20-cv-3600, 2020 WL 2092616, at *13 (D.N.J. Apr. 12, 2020) (concluding the government's "interest in ensuring that Petitioners do not flee and in protecting the public" is adequately addressed "in fashioning appropriate conditions of release for each prisoner").

IV. PETITIONERS HAVE PROPERLY PLED A CLAIM UNDER THE REHABILITATION ACT

Petitioners have adequately pleaded their Rehabilitation Act claims for the purposes of a motion to dismiss.[11] Although Respondents have identified one of the possible frameworks for Rehabilitation Act claims—which Petitioners' claim nevertheless satisfies—Respondents have elided the commonly-used framework to

[11] Because Petitioners have not sought a preliminary injunction on their Rehabilitation Act claim, the standard Petitioners must meet here is merely the notice pleading standard of Fed. R. Civ. P. 12(b)(6).

which Petitioners' pleadings conform. Moreover, Respondents' Rehabilitation Act ("RA") argument generally fails because it misunderstands the nature of what an "even playing field" entails for the medically vulnerable Petitioners and proposed Subclass Members in this case, and because it attempts to frame disputed questions of fact as matters of law.

To state a claim under the RA, a prisoner may "allege that he is a qualified individual with a disability, who was precluded from participating in a program, service, or activity, or otherwise was subject to discrimination, by reason of his disability." *Furgess v. Pennsylvania Dep't. of Corr.*, 933 F.3d 285, 288-89 (3d Cir. 2019). Even where RA claims allege intentional discrimination, the "requisite intent [is] deliberate indifference." *Id.* at 291. In such circumstances, an RA claim must allege deliberate indifference by pleading facts that show that the prison "had knowledge that a federally protected right is substantially likely to be violated," and that "the prison failed to act despite that knowledge." *Id*. at 292 (quoting *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 265 (3d Cir. 2013)).

Contrary to Respondents' arguments, Petitioners in this case need not show intentional animus at all. Under the law of this and other Circuits, a person bringing an RA claim need only show intentional animus when seeking compensatory damages. *See Durrell*, 729 F.3d at 263 ("two courts of appeals have suggested that [RA] plaintiffs seeking compensatory damages must demonstrate a higher showing

of intentional discrimination than deliberate indifference"); *see also Furgess*, 933 F.3d at 289 (setting out "intentional discrimination" from the base elements of the RA claim, "because he seeks compensatory damages"). Petitioners have not asked for compensatory damages in this case. *See* Doc. 1 at 55-56. Accordingly, they need not show intentional animus on the part of disability to make out an RA claim.

Even if Petitioners did have to show intentional animus, they have sufficiently alleged deliberate indifference, as required. Deliberate indifference, in this context, includes failure to take affirmative steps to protect Petitioners and the RA Subclass. Virtually everything in a prison is a service for purposes of the RA, which Respondents cannot meaningfully dispute. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) ("Modern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners.…"). Correctional entities like Fort Dix must "fulfill an affirmative duty . . . to reasonably accommodate" prisoners' equal access to those activities and services. *Cotton v. Douglas Cty. Dep't of Corr.*, No. 8:16-cv-153, 2016 WL 5816993, at *5 (D. Neb. Oct. 5, 2016) (quoting *Peebles v. Potter*, 354 F.3d 761, 767 (8th Cir. 2004)). Indeed, Respondents' failure to identify the RA Subclass and proactively accommodate them may itself violate the statute, which "contemplates that prophylactic steps must be

taken to avoid discrimination." *Wisconsin Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006).

With this background, Petitioners' RA claims more than meet the requisite standard. Petitioners have explicitly alleged that the Subclass is comprised of people whose particular conditions qualify them under the RA, Doc. 1 at 54 ¶ 159; that safe conditions at Fort Dix, and adequate preventative and responsive measures to combat COVID-19, "are programs or services that Fort Dix must provide—but is not presently providing," Doc. 1 at 54 ¶ 160; and that Respondents have denied them reasonable accommodations in deliberate indifference to their medical conditions. Doc. 1 at 54 ¶ 161-62. To the extent that Petitioners need to allege deliberate indifference, the complaint is replete with facts demonstrating Respondents' knowledge of Petitioners' rights and failure to act to protect Petitioners and the Subclass members from exposure to COVID-19. Pet. ¶¶ 83–99.

Respondents' arguments also fail in part because they attempt to reframe disputed questions of fact as matters of law. For example, even if Respondents were correct as a matter of law that Petitioners need have engaged in a particular sort of interactive process, Petitioners' many efforts to get Respondents to protect them from COVID-19 and Respondents' lackluster responses are disputed facts not suitable for disposal at a motion to dismiss stage. *See Coldwell v. Rite Aid Corp.*, 602 F.3d 495, 506-07 (3d Cir. 2010). Similarly, although Respondents raise the

question of whether reasonable accommodations under the circumstances would amount to a "fundamental alteration" of the services and programs in question, that, too, is a fact question unsuitable for this Court's decision at this stage. *See id*. at 507. Whether such accommodations fundamentally alter the programs involves sub-questions of fact about things like cost and burden, and the nature of modification. *See Wagner by Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002, 1009 (3d Cir. 1995) (reversing a directed verdict reinstating a verdict for an RA plaintiff because the district court had improperly construed fact questions as matters of law).

Respondents' arguments also misunderstand the nature of "even playing field," and cannot support dismissal as a result. Although Respondents argue that Petitioners and the Subclass ask for preferential treatment, *see* Doc. 28-1 at 59, their argument evinces a failure to understand their obligations under the RA in the first place. Petitioners and the Subclass members, all with qualifying disabilities that put them at higher risk of COVID-19 infection *and* higher risk of complications (including death) should they contract COVID-19, are not on an even playing field as prisoners without the same medical vulnerabilities. As alleged, they are more likely to contract the virus, and more likely to suffer or die if they do. *See, e.g.*, Doc. 1 at ¶¶ 21, 139; Doc. 1-1 at 2, ¶¶ 8-9. Accommodating their disabilities in the provision of correctional services simply acknowledges the terrifying increased risk they face by virtue of those disabilities—as the RA requires.

CONCLUSION

For the reasons set forth above, this Court should grant Petitioners' Motion for a Preliminary Injunction and deny Respondents' Motion to Dismiss.

Dated: May 20, 2020

Respectfully submitted,

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Declaration of Joe Goldenson, MD

1. I am a medical physician with 33 years of experience in correctional health care. For 28 years, I worked for Jail Health Services of the San Francisco Department of Public Health. For 22 of those years, I served as the Director and Medical Director. In that role, I provided direct clinical services, managed public health activities in the San Francisco County jail, including the management of HIV, tuberculosis, Hepatitis C, and other infectious diseases in the facility and the planning and coordination of the jail's response to H1N1, and administered the correctional health enterprise, including its budget, human resources services, and medical, mental health, dental, and pharmacy services.

2. I served as a member of the Board of Directors of the National Commission on Correctional Health Care for eight years and am past President of the California chapter of the American Correctional Health Services Association. In 2014, I received the Armond Start Award of Excellence from the Society of Correctional Physicians, which recognizes its recipient as a representative of the highest ideals in correctional medicine.

3. For 35 years, I held an academic appointment as an Assistant Clinical Professor at the University of California, San Francisco.

4. I have worked extensively as a correctional health medical expert and court monitor. I have served as a medical expert for the United States District Court for the Northern District of California for 25 years. I am currently retained by that Court as a medical expert in *Plata v. Newsom*, Case No. 3:01-cv-01351 (N.D. Cal.), to evaluate medical care provided to inmate patients in the California Department of Correctional Rehabilitation. I have also served as a medical expert and monitor at Cook County Jail in Chicago; Los Angeles County Jail; at other jails in Washington state, Texas, and Florida; and at prisons in Illinois, Ohio, and Wisconsin.

5. My curriculum vitae is attached as exhibit A.

The nature of COVID-19

6. The SARS-nCoV-2 virus, and the human infection it causes, COVID-19 disease, is a global pandemic and has been termed a global health emergency by the World Health Organization ("WHO"). Cases first began appearing between December 1 and December 31, 2019, in Hubei Province, China. Most of these cases were associated with a wet seafood market in Wuhan City.

7. On January 7, 2020, the virus was isolated. The virus was analyzed and discovered to be a coronavirus closely related to the SARS coronavirus that caused the 2002–2003 SARS epidemic.

8. COVID-19 is a serious disease. The overall case fatality rate has been estimated to range from 0.1 to 3.5%, which is up to 35 times the fatality associated with influenza infection. COVID-19 is characterized by a flu-like illness. While more than 80% of cases are self-limited and generally mild, overall some 20% of cases will have more severe disease requiring medical intervention and support.

9. The case fatality rate varies significantly depending on the presence of certain demographic and health factors. The case fatality rate varies significantly with advancing age, rising after age 50, and above 5% (1 in 20 cases) for those with pre-existing medical conditions including cardiovascular disease, respiratory disease, diabetes, and immune compromise.

10. Among patients who have more serious disease, some 30% will progress to Acute Respiratory Distress Syndrome (ARDS), which has a 30% mortality rate overall, higher in those with other health conditions. Some 13% of these patients will require mechanical ventilation, which is why intensive care beds and ventilators have been in insufficient supply in Italy, Iran, and in parts of China.

11. COVID-19 is widespread. Since it first appeared in China in late 2019, outbreaks have subsequently occurred in more than 160 countries and all populated continents; heavily affected countries include Italy, Spain, Iran, South Korea, and the U.S. The U.S. is now the world's most affected country. As of April 29, 2020, there have been 3,142,942 confirmed human cases globally and 218,564 known deaths.[1] It is not contained, and cases are growing exponentially.

12. In the United States alone, the Centers for Disease Control and Prevention ("CDC") reports 981,246 cases and 55,258 deaths as of April 28.[2] The New Jersey Department of Health reports 113,856 cases and 6,442 dead as of April 28.[3] All these numbers are likely underestimates because of limited availability of testing.

13. SARS-nCoV-2 is now known to be fully adapted to human-to-human spread. This is almost certainly a new human infection, which also means that there is no pre-existing or "herd" immunity, allowing for very rapid chains of transmission once the virus is circulating in communities.

14. The U.S. CDC estimates that the reproduction rate of the virus, the R0, is 2.4-3.8, meaning that each newly infected person is estimated to infect on average 3 additional persons. This is highly infectious and only the great influenza pandemic of 1918 (the Spanish Flu as it was then known) is thought to have higher infectivity. This again is

[1] https://coronavirus.jhu.edu/map.html (last accessed April 29, 2020)
[2] https://www.cdc.gov/covid-data-tracker/index.html ((last accessed April 29, 2020)
[3] https://covid19.nj.gov/#live-updates ((last accessed April 29, 2020)

likely a function of all human populations currently being highly susceptible. The attack rate given an exposure is also high, estimated at 20–30% depending on community conditions, but may be as high as 80% in some settings and populations. The incubation period is thought to be 2–14 days, which is why isolation is generally limited to 14 days.

15. CDC has recently added to the list of possible signs and symptoms of COVID-19 to include fever, cough, shortness of breath or difficulty breathing, chills, repeated shaking with chills, muscle pain, headache, sore throat, or new loss of taste or smell.[4] This means the questionnaires currently used to screen staff and prisoners need to be updated and the numbers of suspect cases will increase.

16. There is currently no vaccine for COVID-19, and no cure. The only known ways to prevent the spread of SARS-nCoV-2 involve measures such as thorough handwashing, frequent decontamination of surfaces, and maintaining six feet of physical distance between individuals ("social distancing").

The risks of COVID-19 in detention facilities

17. COVID-19 poses a serious risk to prisoners, workers, and anyone else in detention facilities. Detention facilities, including prisons like Fort Dix, have long been associated with high transmission probabilities for infectious diseases, including tuberculosis, multi-drug resistant tuberculosis, MRSA (methicillin resistant staph aureus), and viral hepatitis.

18. The severe epidemic of tuberculosis in prisons in Central Asia and Eastern Europe was demonstrated to increase *community* rates of tuberculosis in multiple states in that region, underscoring the risks prison outbreaks can lead to for the communities surrounding a prison.

19. Infections that are transmitted through droplets, like influenza and SARS-nCoV-2 virus, are particularly difficult to control in detention facilities, as social distancing and proper decontamination of surfaces are virtually impossible.

20. For example, several deaths were reported in the U.S. in immigration detention facilities associated with ARDS following influenza A, including a 16-year old male immigrant child who died of untreated ARDS in custody in May 2019.

21. Current recommendations for social distancing, frequent hand washing, and frequent cleansing of surfaces to prevent infection and the spread of the virus are extremely difficult, if not impossible, to implement in the correctional setting. A number of features of these facilities can heighten risks for exposure, acquisition, transmission, and clinical

[4] Centers for Disease Control and Prevention, Symptoms of Coronavirus, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html

complications of these infectious diseases. These include physical/mechanical risks such as overcrowding; population density in close confinement; insufficient ventilation; shared toilet, shower, and eating environments; and limits on hygiene and personal protective equipment such as masks and gloves in some facilities. Shared spaces and equipment (such as telephones) are commonly not adequately disinfected, especially during the current pandemic when more frequent cleaning and disinfecting are required. Limits on soap (copays are common) and hand sanitizer, since they can contain alcohol, are also risks for spread. The nationwide shortage of personal protective equipment (PPE), as well as ancillary products (such as cleaning supplies and thermometer probes) further impacts the ability of correctional facilities to implement necessary precautions.[5]

22. The risk of exposure to and transmission of infectious diseases, as well as the risk of harm from developing severe complications or death if infected, is significantly higher in jails, prisons, and detention centers than in the community.

23. Close, poorly ventilated living quarters and often overcrowded conditions in these facilities foster the rapid transmission of infectious diseases, particularly those transmitted by airborne droplets through sneezing, speaking, or coughing. In these congregate settings, large numbers of people are closely confined and forced to share living spaces, bathrooms, eating areas, and other enclosed spaces. Groups of persons are often moved from space to space, for example, from a dormitory to a cafeteria. Persons congregate and come in close contact while standing in lines for medication, commissary, fresh laundry, telephones, or court appearances. These group movements, which may cluster large numbers of people together in small spaces, increase the risk of transmission. It is common for detainees in a given housing unit to routinely be subjected to such group movements multiple times each day. They are physically unable to practice social distancing, which the CDC has identified as the "cornerstone of reducing transmission of respiratory diseases such as COVID-19."[6]

24. This forced congregation spreads infection from one area of a prison to other areas, too. In addition, detention facilities often rely on detainees to perform work that supports the operation of the facility, such as food service, laundry, and cleaning. To perform these work assignments, they typically travel from their housing units to other parts of the facility. Officers and other detention facility staff routinely have direct physical contact with detainees, especially when handcuffing or removing handcuffs from detainees who are entering or exiting the facility Staff members also move around within the facility, which creates opportunities for transmission both among staff in different parts of the

[5] *Study of COVID-19 in Correctional Facilities*, Harvard University and National Commission on Correctional Health Care, April 9, 2020

[6] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html

facility and transmission to and from detainees in different parts of the facility. This regular circulation makes the spread of infection throughout a prison all but inevitable.

25. While jails, prisons, and detention centers are often thought of as closed environments, this is not the case. Custody, medical, and other support staff and contractors enter and leave the facility throughout the day. New detainees arrive on a frequent basis. Since there is no effective way to screen for newly infected or asymptomatic individuals, they can unknowingly transmit COVID-19 to those housed in the facility. Detainees and inmates are often transferred between housing units, to other facilities, and to and from court. This further increases the likelihood of transmission of COVID-19.

26. It has long been known that jails, prisons, and detention centers can be hotbeds of disease transmission. Due to the frequent ingress and egress of employees at these facilities, an outbreak within a jail, prison, or detention center can quickly spread to surrounding communities. For example, the tuberculosis epidemic that broke out in New York City in the early 1990s began in jails and was spread to the community by jail employees who became infected and then returned home to their families and communities.

27. In addition to the nature of the prison environment, prison and jail populations are also at additional risk due to high rates of chronic health conditions, substance use, mental health issues, and, particularly in prisons, aging and chronically ill populations who may be vulnerable to death or severe illnesses after infection from COVID-19 disease.

28. Testing kits are widely unavailable, and it can take anywhere from a day to a week or more to obtain test results. Someone who is tested shortly after he or she was infected may test negative. Non-test-based screens like taking people's temperatures or asking them for subjective reports of symptoms—cannot adequately screen for new, asymptomatic or pre-symptomatic infections. COVID-19 has a typical incubation period of 2 to 14 days, commonly five days, and transmission often occurs before presentation of symptoms. According to the CDC, up to 25 percent of people infected with COVID-19 will remain asymptomatic.[7] Similarly, infected individuals may experience only mild symptoms. These newly infected, asymptomatic, and mildly symptomatic individuals can, and do, transmit the virus, contributing to its rapid spread. As a result, such inadequate screening presents a critical problem. The possibility of asymptomatic transmission means that monitoring staff and incarcerated people for symptoms and fever is inadequate to identify all who may be infected and to prevent transmission.

29. While every effort should be made to reduce exposure in detention facilities through internal mitigation efforts, this may be extremely difficult to achieve and sustain quickly

[7] Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html

enough. Further, no mitigation effort can change the inherent nature of detention facilities, which force people to live in close proximity to one another. It is therefore an urgent priority in this time of national public health emergency to reduce the number of persons in detention as quickly as possible. Indeed, that is the only public health solution available at this time to reduce the spread of COVID-19 and potentially save lives.

30. Given the experience in China as well as the literature on infectious diseases in jail, additional outbreaks of COVID-19 among the U.S. jail and prison populations are highly likely. Releasing as many inmates as possible is important to protect the health of inmates, correctional facility staff, health care workers at jails and other detention facilities, and the community as a whole. Indeed, according to the WHO, "enhanced consideration should be given to resorting to non-custodial measures at all stages of the administration of criminal justice, including at the pre-trial, trial and sentencing as well as post-sentencing stages."[8]

31. For these reasons, the pandemic has prompted prisoner releases around the world. France has freed 5,000 inmates[9], and, in the United States, California officials are planning to release up to thousands of prisoners.[10] In Britain, the Ministry of Justice is planning to grant thousands of prisoners early release within weeks in an effort to contain the spread of the virus in cells and facilities where it said social distancing rules are impossible to maintain.[11] Many cities and counties across the US, including San Francisco, Los Angeles, Chicago, Cleveland and New York, are also releasing prisoners to reduce the risk of COVID-19.[12]

32. It is difficult to overstate the devastation that a COVID-19 outbreak could inflict on a correctional facility such as FCI Fort Dix. At Rikers Island jail in New York, between April 1 and April 15, 2020, the number of COVID-19 positive incarcerated individuals and staff members grew by 104 and 114 people, respectively, upping the jail's total numbers of confirmed cases to 288 among the incarcerated population, 488 among

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[8] World Health Organization, Regional Office for Europe, Preparedness, prevention and control of COVID-19 in prisons and other places of detention: Interim guidance (Mar. 15, 2020), http://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf.

[9] *Coronavirus: Low-risk prisoners set for early release*, BBC News (Apr. 4, 2020), https://www.bbc.com/news/uk-52165919.

[10] Paige St. John, *California to release 3,500 inmates early as coronavirus spreads inside prisons*, L.A. Times (Mar. 31, 2020), https://www.latimes.com/california/story/2020-03-31/coronaviruscalifornia-release-3500-inmates-prisons.

[11] *Britain plans to free many inmates early as it reports a on-day death toll*, New York Times, 4/3/20.

[12] Timothy Williams et al., *'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. Times (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/us/coronavirusprisons-jails.html.

correction staff, and 78 among health care workers.[13,14] The first known case of COVID-19 at Rikers was confirmed on March 18,[15] illustrating just how quickly this disease can and will overwhelm detention facilities. Two Ohio prisons, Marion Correctional Institution and Pickaway Correctional Institution, have emerged as the largest-known sources of U.S. coronavirus infections, according to data compiled by The New York Times. To date 3,808 cases have been connected to the two prisons.[16] Over 80% of the approximately 2,500 prisoners in Marion tested positive.[17] In addition, 169 staff have tested positive for COVID-19.[18] Eight of the ten largest-known infections sources in the U.S. are jails or prisons.

33. At Ohio's Marion Correctional, close to 95% of those who tested positive were asymptomatic and would otherwise not have been tested.[19] This underscores the risk of the spread of COVID-19 by asymptomatic individuals.

34. According to the Bureau of Prisons, 27 detainees and 3 staff members at FCI Fort Dix currently have tested positive for COVID-19. Dozens more have symptoms. Even these dozens may represent the tip of the iceberg, since newly-infected people typically do not show symptoms for 2–14 days, many infected individual are asymptomatic, and since the infection spreads rapidly to additional people. While no detainees are reported to have died from COVID-19 in FCI Fort Dix yet, the death toll is likely to mount rapidly given the way the disease has progressed elsewhere.

35. It is my understanding that FCI Fort Dix has two open bay / dormitory housing units; at least seven housing units with 2-, 10-, and 12-man dormitory-style rooms; and a segregation unit. It also my understanding that FCI Fort Dix has roughly 2,900 detainees in the facility on any given day; that staff enter and leave the facility regularly; and that detainees share restroom and shower facilities and eat communally prepared food.

36. Based on these understandings, it is my opinion that the exponential infection of rate for COVID-19 we already see in the community would be magnified within FCI Fort Dix.

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[13] Julia Craven, *Coronavirus Cases Are Spreading Rapidly on Rikers Island*, Slate (Apr. 2, 2020), https://slate.com/news-and-politics/2020/04/rikers-coronavirus-cases-increase.html.

[14] Jan Ranson, *Jailed on a Minor Parole Violation, He Caught the Virus and Died*, N.Y. Times (Apr. 10, 2020)

[15] *As Testing Expands, Confirmed Cases of Coronavirus in N.Y.C. Near 2,000* (Mar. 18, 2020), N.Y. Times, https://www.nytimes.com/2020/03/18/nyregion/coronavirus-new-york-update.html.

[16] *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=Top%20Stories&pgtype=Homepage&action=click&module=Spotlight&pgtype=Homepage#states (last accessed April 29, 2020).

[17] Ohio Department of Rehabilitation & Correction, COVID-19 Inmate Testing Updated 4/28/2020, https://coronavirus.ohio.gov/static/DRCCOVID-19Information.pdf.

[18] *Id.*

[19] https://www.nytimes.com/reuters/2020/04/25/us/25reuters-health-coronavirus-prisons-testing-insight.html?searchResultPosition=8

Adequate social distancing would be impossible to achieve. What's more, the infection in FCI Fort Dix would not stay limited to the facility, but would worsen infection rates in the broader community. The infection rate will increase substantially before it starts to diminish without major interventions. The number at risk for death is substantial. This is why leaving implementation in the hands of local officials alone, who lack the expertise and resources and were incapable of preventing the outbreak in the first place, is insufficient.

Conclusions

37. For the reasons above, it is my professional opinion that persons currently detained at FCI Fort Dix are at significantly greater risk of contracting COVID-19 than if they were permitted to shelter in place in their home communities. If infected, many are at increased risk of suffering severe complications and outcomes.

38. It is my professional opinion that conditions in FCI Fort Dix threaten the health and safety of every individual within the prison—detained persons and staff alike—and in their surrounding communities.

39. It is my professional opinion that a necessary component of bringing FCI Fort Dix into compliance with the recommendations of the CDC to minimize the risk of COVID-19 transmission within the facility and to the larger community is to substantially reduce the population. Doing so will allow the facility to significantly reduce the risk of infection for both incarcerated people and correctional officers, which in turn protects the communities where corrections staff live.

40. It is my professional opinion that those who are medically vulnerable[20] need to be moved out of FCI Fort Dix to the absolute maximum extent possible. In addition, the overall population needs to be significantly lowered to reduce the density in the jails to allow for adequate social distancing, minimize the strain on the jail's medical care system, ensure adequate space is available for necessary quarantining.

[20] Persons held at Fort Dix over the age of 50, as well as all current and future persons held at Fort Dix of any age who experience (a) lung disease, including asthma, chronic obstructive pulmonary disease (e.g. bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease, or other chronic conditions associated with impaired heart function; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other endocrine disorders; (e) epilepsy; (f) hypertension; (g) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (h) blood disorders (including sickle cell disease); (i) inherited metabolic disorders; (j) history of stroke; (k) a developmental disability; and/or (l) a current or recent (last two weeks) pregnancy.

41. It is my public health recommendation that a public health expert be appointed to oversee operations related to preventing further spread of COVID-19 in FCI Fort Dix, which may include authorizing further staggered release of detainees until it is possible to maintain consistent social distancing and appropriate hygiene within the facility.

Dr. Turner-Foster's declaration indicates deficient attempts to ensure social distancing and therefore my professional opinions and recommendations have not changed.

42. On May 18, the government filed a brief in support of a motion to dismiss and in opposition to the petitioners' motion for a preliminary injunction. Attached to this brief was the declaration of Dr. Nicoletta Turner-Foster, Clinical Director at FCI Fort Dix. I have reviewed this declaration.

43. Dr. Turner-Foster's declaration indicates that Fort Dix has taken certain steps to educate prisoners and staff; screen prisoners, staff, and contractors entering the prison; and reduce the spread of COVID-19 within the prison. However the fundamental problem remains that prisoners cannot effectively social distance. My professional opinion remains that the prison is not doing what is reasonably necessary to prevent further spread of COVID-19 infection.

44. Although Dr. Turner-Foster states that various steps have been taken, these steps are described too vaguely to determine their effectiveness. For example, she describes a Bureau of Prisons policy whereby newly arriving asymptomatic inmates with reported risk of exposure are placed in quarantine, and she states that at Fort Dix new prisoners are put into an automatic 14-day quarantine only for those inmates. But Dr. Turner-Foster does not indicate whether inmates who enter the prison on different dates are all quarantined together. It is necessary to maintain separate quarantine groups based on date of entry or exposure to prevent cohort cross-exposure. Dr. Turner-Foster's description does not indicate whether that is being done.

45. Similarly, Dr. Turner-Foster describes the prison's practice for screening staff members of taking their temperatures and administering a medical questionnaire. But requiring staff members to take a questionnaire would not be adequate if staff members are not being asked about specific COVID-19 symptoms. This is particularly important because throughout March and April the public were told of only three symptoms (fever, cough, and shortness of breath), but in late April the CDC substantially expanded the list of symptoms to add chills, muscle pain, sore throat, and new loss of taste or smell. The CDC also notes that other reported symptoms include nausea, vomiting, and diarrhea. Awareness of COVID-19's symptoms cannot be assumed, so administering a questionnaire is adequate only if it covers the specific symptoms.

46. Dr. Turner-Foster indicates that the prison is using two floors of a housing building to serve as a quarantine unit for prisoners who have tested positive and have symptoms (on one floor) and who are recovering (on another floor). Separating infected inmates is a necessary step but is not sufficient on its own. The quarantine unit would need adequate staffing, equipment, and resources, and Dr. Turner-Foster's declaration fails to provide that essential information.

47. Most concerningly, Dr. Thomas-Foster describes efforts to promote social distancing but does not give any details necessary to assess whether effective social distancing is occurring. She states that Health Services appointments are limited to 20 inmates at a time so that inmates can socially distance, that prisoners are encouraged to maintain social distancing, that prisoners who tested positive were moved to another building to assist in social distancing, and that the current camp population of 124 inmates provides sufficient space for social distancing. But she provides no information about the size of the different spaces or the social distance that prisoners actually are able to maintain within them. Without the concrete information absent from her declaration, it is impossible to independently assess whether the prison's efforts are adequate.

48. The lack of necessary detail in Dr. Thomas-Foster's report reinforces my original recommendation for the appointment of a public health expert to review COVID-19-related operations at Fort Dix. Allowing an expert to examine conditions at the prison firsthand is the most efficient and effective way to determine whether the steps it is taking are reasonable.

49. Dr. Thomas-Foster states that the prison does not plan to consolidate medically vulnerable inmates and that it is safer to spread them out across the prison. I disagree with her view. Housing medically vulnerable inmates together would be safer because the inmates' overall health and COVID-19 symptoms could be monitored more easily, access in and out of the housing unit could be controlled more effectively, and staff could be designated for that unit in order to reduce the number of sources of potential infection. For these reasons, consolidating at-risk prisoners is safer.

50. Another specific concern that emerges from Dr. Thomas-Foster's declaration is the prison's reliance on the Abbott rapid testing machine to determine which prisoners are infected. The Food and Drug Administration has issued an alert about the accuracy of the the Abbott test.[21] The FDA issued this alert due to scientific studies casting doubt on the reliability of negative test results, and it warned that negative results from the Abbott machine may need to be confirmed. One study found that 15 to 20 out of 100 tests

[21] *See Coronavirus (COVID-19) Update: FDA Informs Public About Possible Accuracy Concerns with Abbott ID NOW Point-of-Care Test* (May 14, 2020), https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-informs-public-about-possible-accuracy-concerns-abbott-id-now-point.

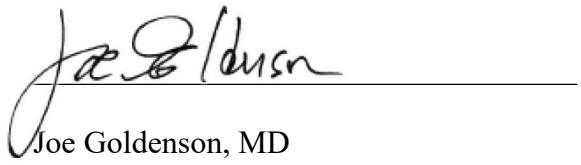
produce false negative results, while another reported that it could be missing as many as 48% of infections.[22] Dr. Thomas-Foster's declaration makes no mention of the FDA's alert or the studies which led to it. Worse, she indicates that the prison is relying on negative results from the Abbott machine to decide when to house inmates together, without social distancing. Fort Dix's reliance on unreliable test results creates a clear danger of spreading infection.

51. I am informed by counsel for the petitioners of reports that a staff member who scanned in each prisoner at mealtimes in one of the compounds of the main facility has tested positive for COVID-19. If that report is accurate, it would mean that all of the prisoners in that compound were likely exposed to infection. Any prisoners who were exposed to a person who tested positive should, at a minimum, be quarantined with social distancing. This would be true even if the staff member wore a mask and did not touch the prisoners. Dr. Thomas-Foster's declaration does not mention this report, and indeed does not mention any of the Fort Dix staff members who BOP has reported testing positive. Her silence about any steps taken to prevent the spread of infection from staff members who tested positive reinforces my conclusion that the prison is failing to take necessary steps to protect inmates.

52. Accordingly, Dr. Thomas's declaration does not change my professional opinions. In fact, given the 21-day period between my original declaration and this one, the continuing spread of COVID-19 in federal prisons, and the continuing failure to implement social distancing at Fort Dix, I believe the urgency of taking effective action has increased even more.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of May, 2020, in Alameda County, California.



Joe Goldenson, MD

[22] *See* Joe Neel & Hannah Hagemann, *FDA Cautions About Accuracy of Widely Used Abbot Coronavirus Test*, NPR (May 14, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/05/14/856531970/fda-cautions-about-accuracy-of-widely-used-abbott-coronavirus-test.

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DECLARATION OF RODOLFO QUIAMBAO

I, Rodolfo Quiambao, am over the age of 18 and fully competent to make the following Declaration:

1. Until April 13, 2020, I had been incarcerated in the minimum security satellite camp at the Federal Correctional Institution at Fort Dix. My Federal Bureau of Prisons Register Number was 85923-053. I pleaded guilty to certain tax and bribery offenses. I received a sentence of 48 months incarceration and was scheduled for release on October 23, 2021. It was my first offense. I make this declaration to describe the horror of my experience of COVID-19 at Fort Dix, which nearly took my life and caused me ultimately to end up in a hospital ICU.

2. I am 75 years old. As indicated in my Pre-Sentence Report, I suffer from the pre-existing health problems of both diabetes and hypertension. These conditions were also noted in my BOP medical file.

3. I had been housed at the Fort Dix Camp with more than 100 men when, on Monday morning, April 6, I awoke at 5:30 to report for my assignment in the kitchen as a food server. I had been feeling unwell for days. That morning, I felt feverish and was suffering from a severe cough and headache. I asked the corrections officer on duty if I might be excused for the day. He excused me and I went back to bed.

4. At approximately 7:30 that morning, there was an announcement to line up and I went to the lineup with the other inmates. Our temperatures were taken and I had a fever of 102.4. I was placed in Special Housing Unit ("SHU") for medical treatment, which was far away and which I had to walk to despite my condition.

5. Later that day, I was seen by the Fort Dix doctor. I was examined and x-rayed and told that I was suffering from pneumonia. I now know that I was suffering from COVID-19. I

was given Tylenol for my temperature and also antibiotics late that day for pneumonia. The doctor appeared to be confused or overwhelmed. I heard her talking about my condition and about getting hold of my Unit Manager to notify my next of kin. It got me very worried. I had no access to a phone and no one knew where I was.

6. As noted above, at the time I became ill, my work assignment at the camp was as a food server in the kitchen, where I worked until the onset of my symptoms. During the first week of April, I estimate I came in contact with dozens of men in my unit.

7. On Tuesday, April 7, my condition worsened and I was tested for COVID-19. I remained bedridden and was not eating.

8. On Thursday, April 9, I was told that I had tested positive for COVID-19 and was told that I had to move yet again. By this time, after four days of high fevers and not eating, I was extremely weak but was told I had to walk to another location. Moreover, I was told I had to carry my own bedlinens and pillows despite my age and weakened condition. I recall that walk very well. It was a long walk; it was cold and windy and I was in my sleepwear and slippers. I fell twice. To the best of my recollection I and five other inmates made that walk to a different isolation area.

9. On Friday, April 10, I complained of extreme weakness and my cough was uncontrollable. I received no real medical care. The only medication I received was at night when I was given Tylenol with codeine to make me sleep. I repeatedly asked for antibiotics because it was clear I had a lung infection, but did not receive them. The only medication I was offered was Tylenol or Tylenol with codeine to make me sleep.

10. There were no nurses or doctors on site throughout the day and night. Instead, they made two daily rounds, so that if you needed urgent medical care between those rounds, you had to find the corrections officer on duty, or wait.

11. I was left to myself the whole day and my symptoms became progressively worse. I had trouble breathing and pain in my lungs. I was scared to see no oxygen masks or ventilators in the building. The building was clearly not set up to be the hospital care I needed. Instead, I was simply put in a room with bunks, much like I imagine the rest of the rooms in the west compound.

12. Although we were isolated, we could walk around the floor with masks. I saw other men who looked very ill. Among the men I saw were three inmates I knew by name, but there were others too.

13. On Monday, April 6, because I was quarantined, I was unable to call my wife as I tried to do daily. Not hearing from me, she became concerned and I understand that she then called my attorney, Ronald G. Russo. Unbeknownst to me, on that day Mr. Russo called the Legal Department at Fort Dix to inquire of my condition. I have now learned that he was subsequently told that I was in quarantine, had been tested for COVID-19, but that the results of the test were not yet known. After multiple attempts at contact, on Thursday, April 9, Mr. Russo was told that I had tested positive for COVID-19.

14. On April 10, Mr. Russo wrote to the Warden asking to know of my condition and whether I had made a request for Compassionate Release. I was told that Mr. Russo sent a copy of that letter as a courtesy to the sentencing judge in the Eastern District of New York. At that point, I understand, things moved very quickly. The Court asked my attorney and the prosecutor to be on a phone conference at 5:30 pm that day. The Judge asked the prosecutor to determine,

among other things, my condition and my medical treatment. At the Court's request, the government and the Bureau of Prisons responded later on the evening of Friday, April 10. My attorney moved for an Order of Compassionate Release the following day, Saturday April 11. The government consented to my release and on Sunday, April 12, the Court entered an Order directing my release forthwith.

15. An ambulance picked me up at Fort Dix on Monday, April 13, and transported me to my home as directed by the Court's Order. Although I was to have remained at home, I was simply too ill to stay there. Accordingly, on Tuesday, April 14, I understand that Mr. Russo called 911 and I was transported to St. Francis Hospital in Nassau County. Becoming progressively sicker, I was moved to an ICU unit as the virus, I was told, was beginning to attack my kidneys. I was also put on oxygen.

16. By some miracle, several days later I was so improved that I was moved out of the ICU to a regular bed in that hospital. Finally, approximately one week later I was moved to Grand Rehabilitation & Nursing in Great Neck, NY where I remain under the constant care of doctors. I still have a bad cough at night but believe now that I will survive. I am not certain when I can be released from this facility.

17. In closing, I wish to make it clear that had I not been released on Monday, April 13, I believe I would not have survived this ordeal. As noted, while in quarantine, I did not receive any appropriate medication or treatment. I had stopped eating and was extremely weak when I was removed from the camp. After suffering from COVID-19 for a week, the failure to be sent to a hospital was almost fatal. I do not say this to be dramatic but to be certain the Court appreciates what almost happened to me.

/s/ Rodolfo Quiambao (by consent)

I , Ronald G. Russo, certify that I am attorney of record for Rodolfo Quiambao and obtained his Order for Compassionate Release on April 12, 2020, E.D.N.Y No. 1:15-cr-00515-ARR. I further certify that I reviewed the information contained in this declaration with Mr. Quiambao by telephone on May 14 and 15, 2020 and that, at that time, he certified that the information contained in this declaration was true and accurate to the best of his knowledge.

Ronald G. Russo /MN

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DECLARATION OF EZRA MCCOMBS

I, Ezra McCombs, am over the age of 18 and fully competent to make the following declaration:

1. I am currently incarcerated at the Federal Correctional Institution at Fort Dix. My Federal Bureau of Prisons Register Number is 28646-050. I am serving a sentence for a 2017 drug conspiracy case. My current release date is September 2021.

2. Until May 1, 2020, I was housed in the Fort Dix camp. On May 1, I and others in my unit were tested for COVID-19. Twenty-one of us tested positive and were moved to Building 5851 in the west compound, where I am currently housed on the second floor.

3. Before I was in the camp, I had been housed in Building 5852 in the west compound. The second floor here looks pretty much the same as Building 5852. It is not set up as a medical department. I am currently housed on the second floor in a 12-man room with bunk beds. I have three other men in my room, who all have tested positive and have symptoms. There are some single rooms in the back for really sick guys. There were a lot of really sick guys here when I first arrived, but they have either been taken to the hospital or have recovered.

4. A number of people from the camp have ended up in the hospital because of COVID-19. I know this either from talking with them or from the staff. For example, for the first guy to leave the camp, staff told us they did not think he had COVID-19 and that he would be tested for pneumonia. Then they announced he had tested positive and that we should not touch our faces, but they would not let us use makeshift masks. A little after that staff came to the camp with masks on, and then eventually we got masks. This man is now back in 5851. We are able to talk when we do our laundry on the ground floor. He told me that he was put in the Special Housing Unit or “hole” at first – I think he said for two days – then they took him to the

hospital. He had to be on the machine that helps you breathe. Eventually, he came back to 5851 to the second floor. He moved to the third floor right around when I got here.

5. There was another guy from the camp, an older Filipino man, who also ended up in the hospital but was released home around the same time.

6. Another man who I know from the camp got very sick there and was also taken to the hole before going to the hospital. He is in 5851 now and told me himself that he had been in the hospital.

7. On May 9, a man who had been on the second floor with me at 5851 was taken to the hospital. He was visibly very sick even when we were at the camp and would just sit by the window. In 5851, he told other men who speak Spanish how he was feeling. I saw the side of his face was swelling up. I don't speak Spanish but I would ask him, "you ok?" He'd shake his head and say, "I'm trying I'm trying." I haven't seen him since May 9. One of the officers confirmed that he was taken to the hospital.

8. The second floor of Building 5851 is being used to house people who have tested positive and are still actively sick. Once a person has been here for 14 days without symptoms, if they test negative, they go to the third floor.

9. But asymptomatic inmates who test positive are only kept on the second floor for ten days and then go right up to the third floor without being tested. That means they are going upstairs without any knowledge if they are still a carrier of the virus. My understanding is that asymptomatic carriers are the most dangerous and that that is how the virus got into the camp. One inmate who was previously asymptomatic and on the third floor was supposed to go home today. He developed a fever of 103 and was sent back to the second floor with me today. His family was here to pick him up and everything.

/s/ Ezra McCombs (by consent)

I, Tess Borden, certify that I reviewed the information contained in this declaration with Ezra McCombs by telephone on May 15, 2020 and by correspondence on May 19 and 20, 2020 and that, at that time, he certified that the information contained in this declaration was true and accurate to the best of his knowledge.

/s/ Tess Borden

Tess Borden (260892018)
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DECLARATION OF TOMMIE TELFAIR

I, Tommie Telfair, am over the age of 18 and fully competent to make the following declaration:

1. I am currently incarcerated at the Federal Correctional Institution at Fort Dix. My Federal Bureau of Prisons Register Number is 28646-050. In 2010, I was convicted of conspiracy and possession with intent to distribute heroin. My current release date is February 2024. I am listed as a BOP "chronic care inmate" with nerve damage, stomach issues, and hip and knee injuries. On April 1, 2020 I was approved for surgery due to neurological damage in my back, which I believe also compromises my immune system.

2. I have been at Fort Dix since 2011 and, since February of this year, have been housed in the east compound in Building 5752 in a 12-man room. For months, I have witnessed many people in my building experiencing symptoms that are descriptive of COVID-19. My cellmate and I have had various symptoms but have not been tested for COVID-19.

3. My cellmate has been very sick for a while. He showed signs of sickness in March 2020 and in the weeks between March and April, he fainted twice. He was evaluated by medical but was not tested.

4. Additionally, I have witnessed four other men in my building being very ill. Their symptoms have included vomiting, long-term coughs, chills, headaches, sinus trouble, mucus and runny nose, hot and cold temperature checks, and unusual tiredness. To my knowledge, they have not been evaluated by medical and have not been tested for the virus. Other than my cellmate who fainted, none of us have been evaluated by medical for COVID-19 symptoms beyond the every-other-day temperature checks.

5. To my knowledge, no one in the east compound has been tested for COVID-19. I believe people are afraid of reporting symptoms to medical for fear of ending up in quarantine. Also, as a result of the long hours which it tends to take to be seen by medical, when we feel ill, we are forced to self medicate using medications from commissary, which hardly ever work, and are even more difficult to access now with controlled moves and the decreased staff-to-inmate ratio.

/s/ Tommie Telfair (by consent)

I, Tess Borden, certify that I reviewed the information contained in this declaration with Tommie Telfair by correspondence on May 20, 2020 and that, at that time, he certified that the information contained in this declaration was true and accurate to the best of his knowledge.

/s/ Tess Borden

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DECLARATION OF RAYMOND R. VALAS, III

I, Raymond R. Valas, III, am over the age of 18 and fully competent to make the following declaration:

1. I am currently incarcerated at the Federal Correctional Institution at Fort Dix. My Federal Bureau of Prisons Register Number is 21449-052. I was convicted in the Western District of Texas of one count of violating 18 U.S.C. § 1591(a) & (b)(2) arising out of allegations that I had sexual relations with an underaged prostitute in August 2013. I maintain my innocence and have filed a petition pursuant to 28 U.S.C. § 2255 and a motion for new trial based on newly discovered evidence, *Brady*, and ineffective assistance of counsel, which is pending in the District Court for the Western District of Texas, *Raymond R. Valas, III v. United States of America*, No. SA-17-CV-733-FB; No. SA-13-CR-806-FB (W.D. Tex.). I am currently serving a 15-year sentence and am scheduled for release on Feb. 28, 2027 due to good time credit I have earned by maintaining good behavior while incarcerated. I have no prior offenses of any kind. My PATTERN score is -4, indicating a "minimal risk of recidivism," the lowest possible risk.

2. I suffer from exercise-induced asthma, which was diagnosed by Col. Patrick Tangney MD (Ret.) USARNG, a Board-Certified Pulmonology/Critical Care Physician, in 2009-2010. Because I was experiencing shortness of breath and severe wheezing after vigorous activity following my deployment to Iraq, I was referred to a Pulmonology Specialist at Hanscom AFB in Massachusetts, Col. Tangney. Col. Tangney examined me and sent me for testing at the Medical Command in Manchester, NH (co-located with the Manchester VA). After that, Col. Tangney diagnosed me with exercise-induced asthma and prescribed two medications: a rescue inhaler for use as needed and a purple disc inhaler to be used regularly, at least initially. I was removed from the 197th Deployment to Kuwait in 2010/2011 due to lung function issues and asthma.

3. On May 1, 2020, my attorney, S. Amy Spencer, filed a petition with Warden Ortiz requesting that the Bureau of Prisons ("BOP") move the court for compassionate release or home confinement, or, in the alternative, that Warden Ortiz and the BOP grant me home confinement or furlough until there is either an effective treatment or vaccine for COVID-19 that is accessible to me. I have not received a decision on my petition to Warden Ortiz as of the date of this declaration, although on or about May 15, 2020, informally, my case manager informed me that it would be denied.

4. On Saturday, May 9, 2020, at approximately 10:00 a.m., I saw a doctor for the first time since I have been at FCI Ft. Dix, notwithstanding the fact that I arrived in June 2015 and have left and returned most recently for my January 2020 hearing on February 19, 2020.

5. The doctor told me that the reason I was being seen was because Warden Ortiz had received my petition for compassionate release. He asked why I wasn't taking anything for my asthma, and I told him it was because that was the first time I'd seen a doctor here in 5 years.

6. After examining me, the doctor prescribed a rescue inhaler for my asthma. As of this date, I have not received notification that it has arrived. The doctor also said he would order blood work done for me because in addition to asthma, I have a family history of diabetes.

7. According to the Centers for Disease Control and Prevention ("CDC"), asthma is an underlying condition that puts me at risk of "severe illness from COVID-19." My doctor says that it puts me at increased risk for COVID-19 infection, complications, and death. These conditions make me medically vulnerable and afraid for my life of getting infected with COVID-19.

8. At FCI Ft. Dix, I am the co-founder of the Veterans Support Group. I have taught German, Spanish, English, and Sicilian to other inmates. I sought and received

permission to teach a class on Shakespeare, which was so popular that I ended up teaching 3 classes. I was approved to teach a fourth Shakespeare class and a third German class but have not been able to do so due to COVID-19. I also work in the library, have helped other inmates lose weight, get into shape, and lead healthier lifestyles, and since the quarantine, I took it upon myself to catalogue the books available in my building and create a sign-out list, ensuring that each book is accounted for so that other inmates can enjoy them.

9. I know what proper sanitation and quarantine conditions are because in my prior position as a Lt. Col. in the New Hampshire Army National Guard at the Joint Force Headquarters, I was responsible for helping to run exercises for 12th CST (civil support team) handling CBRNE response (Chemical Biological Radiological Nuclear Explosive). Because of this experience, I know what proper disinfecting of an area consists of and what a quarantine is supposed to look like. Based on that experience, the way it is being done at FCI Ft. Dix is tragic.

10. I am currently housed in Building 5802 on the west side of the prison. I am in a two-person room with my roommate. Even in a 2-person room, there is no way for me to stay 6' away from my roommate. Our beds are only 3' apart. It is also impossible to socially distance in 12-person rooms. I have also been in a 16-person room in the past, and it would be similarly be impossible to socially distance in those rooms. I am lucky to be in a two-man room, but I still have contact with shared space and surfaces with hundreds of other people in my building each day.

11. My roommate works in the kitchen and prepares meals for individuals who have tested positive for COVID-19 and are housed in the quarantine building on west campus, which is also the commissary and laundry building. The laundry is on the 1st floor, and the quarantined inmates are on the 2nd and 3rd floors.

12. I know the following from my roommate who works on the p.m. shift in the chow hall: Through the process of getting food and ice and water to the quarantine building, there is interaction between the quarantine wing and the main west campus. There are four officers in the quarantine building. They send 1 officer over to get water and food from the chow hall four times per day. They generally wear gloves and masks when picking up food. They pick up food in a big red crate and carry the milk over in a crate. Both of those crates travel back and forth between the quarantine building and the building containing the chow hall. The trays themselves are Styrofoam and are thrown away in the quarantine building, but the guard every day carries a big Gatorade-type cooler back and forth with ice and water in it for the quarantine building. Because the quarantine building is the laundry building, there is no potable water there. The guard fills the cooler in the chow hall every day then all the quarantined inmates get ice from it all day, and the guard brings it back to the chow hall to refill it. The water jug went back and forth through the month of April, but it does not go back and forth now. However, at least one or more guards travel back and forth from the quarantined building to the main campus for food and milk every day.

13. We all who live on the west campus have to go to the quarantine building to pick up commissary items such as soap and toothpaste and laundry in the building where the patients who have tested positive for COVID-19 are quarantined. Each and every inmate has to go to 1st floor of the quarantine building for clean sheets, blankets, and pillowcases. Our clothing goes into a bin in our unit and is wheeled into the quarantine building, washed, and returned that afternoon. Staff necessarily go back and forth between the quarantine building and my building to transport the laundry.

14. When I have gone to the chow hall, I see officers who come in wearing no mask

and only wear a mask when they are expressly told to. Many must be told 4 or more times in the amount of time I'm in the chow hall.

15. This week, I walked into the chow hall and saw an officer who had no mask on. He had his mask around his neck and was telling inmates to put masks on.

16. None of the officers wear gloves, and they come in and do pat down searches of inmates without gloves on. On the morning of May 13, 2020, I watched an officer do a pat down of an inmate without gloves.

17. I learned that, on or about Sunday, May 3, 2020, an officer responsible for supervising kitchen staff (including inmate workers) told the kitchen staff that another officer who supervised the kitchen staff and scanned IDs of inmates entering the chow hall tested positive for COVID-19. My roommate, who works in the kitchen, initially told me, but it is common knowledge among inmates and staff now. It is so widely known and discussed among inmates and staff that I believe it would be impossible for Warden Ortiz not to know that this officer tested positive.

18. The officer who tested positive is one of the officers who scans the IDs of every person on west campus going into the only chow hall. He works 5 days per week, not always Monday through Friday. He works the a.m. shift, which is from 4 a.m. to noon. P.M. is 11 a.m. to 8 p.m. during Ramadan, so there is at least an hour overlap between the two shifts.

19. There are two shifts of kitchen workers as well with approximately 25 individuals on each shift. However, there is a 1 to 2-hour overlap when both the a.m. and p.m. inmate kitchen crews are working together.

20. Both inmate kitchen crews come into close contact with the officer who tested positive for COVID-19.

21. The officer who tested positive is not currently scanning IDs, and, unfortunately I understand from my roommate who learned from his supervisor that the officer who tested positive is very sick. When he was scanning IDs during the pandemic, he usually wore a mask but no gloves. He did not have to touch the IDs because he had a scanner that would scan them without touching them, but he came within 6 inches of nearly every inmate several times per week.

22. According to my roommate, in between meal shifts, the officer who tested positive was much more lax and did not usually wear a mask.

23. My roommate told me his supervisor said that, since the officer tested positive, 25 inmates and the other co-founder of the Veterans Support Group from the main campus were tested for COVID-19 on May 5 or 6, 2020. The inmates who were tested worked on the a.m. kitchen crew. Although the p.m. crew, including my roommate, also came into the same close contact with the officer who tested positive for 1-2 hours per day, no one on the p.m. crew, including my roommate, was tested.

24. When members of the p.m. crew asked why they were not being tested because they had been in close contact with the officer who tested positive also, my roommate told me that they did not receive direct answers.

25. I have not been tested even though I came into close contact with the officer who tested positive regularly when I entered the chow hall and even though my roommate works on the p.m. kitchen crew and came into the same close contact with the officer who tested positive as the a.m. crew who were tested.

26. Relatedly, while thankfully I am not aware of any inmate in my building experiencing symptoms, I have heard inmates say regularly that they would be intimidated to

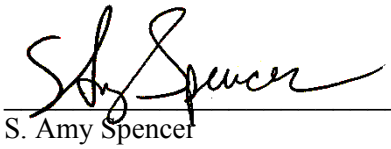
report symptoms if they have them because they are afraid of going to the quarantine building.

27. As far as I am aware, the only symptom of COVID-19 being regularly tested for in my building is fever. For the first two weeks, the staff was taking inmate temperatures during room checks using a thermometer that touched each person's forehead without sanitizing the thermometer between individuals. Now, the staff is checking temperatures every other day during room checks using a thermometer that hovers about 1 cm over our foreheads, which sometimes touches a person inadvertently, without sanitizing the thermometer between individuals. To my knowledge, the highest temperature the thermometer registers is 97.9 degrees Fahrenheit.

28. Because of this contact I have had with the officer who tested positive, especially in light of my diagnosed asthma, I feel exposed, vulnerable, nervous, and fearful for my life. I do not feel like I am being adequately protected from this deadly virus because there has not been adequate contact tracing of individuals who came into contact with the officer who tested positive and testing of those individuals.

/s/ Raymond R. Valas (by consent)

I, S. Amy Spencer, certify that I am attorney of record for Raymond R. Valas, III in *Raymond R. Valas, III v. United States of America*, No. SA-17-CV-733-FB; No. SA-13-CR-806-FB (W.D. Tex.). I further certify that I reviewed the information contained in this declaration with Mr. Valas by telephone on May 13, 14, 15, and 19, 2020 and that, at that time, he certified that the information contained in this declaration was true and accurate to the best of his knowledge.



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DECLARATION OF MICHAEL SCRONIC

I, Michael Scronic, am over the age of 18 and fully competent to make the following declaration:

1. I am currently incarcerated in the minimum security[1] satellite camp at the Federal Correctional Institution at Fort Dix. I make this declaration in follow up to my April 28, 2020 declaration.

2. On the morning of April 30, I and the 60 to 70 other inmates in B-wing were tested for COVID-19. That evening, during temperature check, a member of medical staff told a group of five inmates that there had been 41 positives from that testing. On May 1, a staff member told us 19 had tested positive. Later, we learned from the bulletin board the total was 14. Those people were moved to Building 5851 that day. Many of us believe the actual number of positive results was higher. An officer told a group of three inmates that there were "more positives on the B-side" but they didn't want "regional" to know of more.

3. People have not been allowed to see records of their negative tests, although a number have asked for them.

4. I tested negative and have remained in B-wing. On May 5, the last set of tests was performed at the camp, for people in A-wing. On May 6, nine people learned they had tested positive and were moved to Building 5851. Included in these were an older man who was a

[1] My April 28, 2020 declaration referred to the Fort Dix camp as low security in paragraph 1. That was a typographical error. In fact, the camp is minimum security and the main facility is low security, often referred to by inmates as "the Low." There was also a typographical error in paragraph 11. The following language appeared in duplicate in that paragraph. "In order to maintain the health of staff and inmates, the following is expected from all inmates: wear your surgical face masks! Since social distancing is not possible in this environment, masks will help keep you and others from spreading viruses." This language appeared once, not in duplicate, in the April 11 Notice to the Inmate Population.

kitchen line server and had recently passed out during church service. He had had his blood pressure taken and then was returned to the population. The previous week, he had been away from the kitchen sick for four days and then had returned to work on May 5 and for the breakfast shift on May 6 before receiving his positive result. I know this from another kitchen server who told me and also because I saw him when I picked up my meal tray. Also included was a man who had been experiencing symptoms for about five to seven days and had begged to be tested then, but was told to wait until the mass testing was performed for his wing. I know this because he told me about it about two days before the mass testing.

5. Since May 6, I have witnessed people in B-wing experience symptoms of COVID-19. This includes someone who was told he was negative on May 1 but was nevertheless sure he had the virus and was bedridden for days. I have been told and/or observed at least four other people in B-wing exhibiting symptoms, all of whom have bunks in the same row. These symptoms include dry throat and cough, chills, and weakness, with a number of people staying in bed and not eating. As I describe later, these same people have registered high temperatures during temperature check but have not yet been evaluated by medical. I know there are a number of people who are not reporting their symptoms because they are afraid of being moved to Building 5851 where we have heard there is no medical care and no doctors on site.

6. To my knowledge, since May 6, no one at the camp has been evaluated by a nurse or doctor for COVID-19 symptoms and no additional tests have been performed. Although there are fewer of us here than before, we are still sleeping in beds close together. From my observations, most people sleep in bunks with someone to their left and right still, and not empty bunks in between. This is in part because we were able to choose our bunks when A-wing and B-

wing populations were rearranged on April 24. I am fortunate to have chosen a bunk near the bathroom with fewer people around.

7. About a week ago, we heard that people in Building 5851 who have "recovered" would be returning to the camp. That has not yet happened but it makes us very nervous because of the crowded, communal living conditions.

8. On May 6, my locker was searched by corrections officers and printouts of the warden's Notices to Inmate Population, including the March 30 Notice about makeshift masks being forbidden and the April 11 Notice acknowledging social distancing was impossible, were removed. I was not provided a reason. After that, I went to the computer and also saw that those two Notices had been deleted from the online bulletin board.

9. It is my understanding from corrections officers and nurses that they go back and forth between the camp and the main facility east and west compounds (called "the low"), possibly with increased frequency now because of staff shortages. The obvious added contamination potential scares me. Other people in my unit have shared similar concerns with me.

10. Since COVID-19 started, I have observed that there have been many more officers working double shifts, as I believe staff are calling in sick or taking vacation more often. Since the low is larger, it has more openings, so our typical camp officers will fill in over there, before or after their shifts here. Officers openly tell inmates that they are on the front or back of a double shift.

11. Additionally, officers who are usually at the low come to the camp now. For example, we only have one officer on the night shift now (whereas it used to be two). Now, for every night count (at 7 pm, 9:30 pm, midnight, 3:30 am, and 5 am) an officer comes from the

low and does our count and returns back to the low. After count one time, I heard our night officer mention to another officer that he is working many double shifts. He said he works at our camp from 4 pm to midnight and then goes to the low to work midnight to 8 am.

12. I have been told by nursing staff that they also rotate between the camp and rest of the prison. For example, nursing staff spend an hour at the camp each morning and then again in the afternoon to take temperatures, give out pills, and deal with anything else that is needed. They rotate between the camp, the Unicor building where a group of negatives were sent, Building 5851 where the positives were sent, and the east and west compounds. I had heard this from nursing staff a while ago. On May 13, another inmate asked the nurse on-duty where she works and how, and he told me she explicitly verified this rotation.

13. Until about mid-May, we had temperature checks usually twice per day. The results were consistently low, around mid-96, with some low 94s. Many of us believe these readings are lower than they should be. When the temperature device hits a certain threshold temperature, it is supposed to beep. In the past, people who got beeps were taken to medical to be examined. Significantly, to my knowledge, temperature checks are the only COVID-19 symptom Fort Dix is ostensibly checking prisoners for.

14. On May 13, during the morning temperature check, three inmates who are in bunks close together set off the temperature device. The nurse took all three IDs and told each they would have an oral test in her office after all the temperature checks were complete. However, upon completion, she returned to the three and without explanation handed them back their IDs and never called them in for an oral test. Although I did not observe this, the three of them told me this directly. To my knowledge, none of them have been tested yet. To me this represents a changed protocol, because in the past anyone who had a high temperature reading

would receive an oral test. Although temperature checks are usually twice per day, that afternoon, we had no temperature check.

15. During afternoon temperature check on May 14, a man who sleeps between two of the three men who registered high temperatures on May 13 set off the control. His ID or name was not taken and he was not evaluated further at the time. I do not observe our temperature readings, even the high ones, being written down anywhere or otherwise recorded to look for patterns or exposure of contacts. There is often a different person performing the temperature checks from day to day, so they may not be able even to observe any recurrence or patterns.

16. My understanding is people do not report symptoms because they are afraid of going to Building 5851 and think we can take care of it better ourselves. I have heard that people in 5851 are only being provided Tylenol and are having to go to the hospital because treatment there is insufficient.

17. I have still not been provided cleaning supplies by Fort Dix such as a spray bottle or disinfectant, even though sometimes one of the day officers tells us to disinfect items we touch, such as gym equipment, phones and computers. I only have bar soap and alcohol-free hand sanitizer, both of which I had to buy off commissary during the two times we have had access to commissary since mid-March

/s/ Michael Scronic (by consent)

I, Tess Borden, certify that I reviewed the information contained in this declaration with Michael Scronic by telephone and, as to footnote 1, by correspondence on May 20, 2020, and that, at that

time, he certified that the information contained in this declaration was true and accurate to the best of his knowledge.

/s/ Tess Borden

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May 20, 2020

VIA ECF

The Honorable Renee Marie Bumb
United States District Judge
Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets, Room 1050
Camden, New Jersey 08101

Re: *Wragg, et al. v. Ortiz, et al.*
Civil Action No. 20-cv-5496

Dear Judge Bumb:

In accordance with the Court's May 12, 2020 order, enclosed is Petitioners' Memorandum of Law in further support of Petitioners' Motion for a Preliminary Injunction and in opposition to Respondents' Motion to Dismiss.

It is our understanding that, under Local Rule 7.2, the length of a brief in opposition to a motion to dismiss is ordinarily limited to 40 pages and a reply to an opposition to a motion for preliminary injunction is ordinarily limited to 15 pages, when using proportional 14-point font. Petitioners respectfully submit that the significance of this matter supports the filing of an over-length consolidated submission. To the extent the Court grants Respondents leave to file an oversize brief, *see* Motion to Dismiss at 35 n.15 and Exhibit 8 (dkt. no. 28), Petitioners respectfully ask that they also be granted leave to file an oversize brief in response.

We appreciate the Court's attention to this matter.

Respectfully,

/s/ Tess Borden

Tess Borden
Co-Counsel for Petitioners