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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TROY WRAGG, *et al.*, *Petitioners*, v. DAVID E. ORTIZ, *et al.*, *Respondents*.	Hon. Renée Marie Bumb, U.S.D.J. Civil Action No. 20-cv-5496

RESPONDENTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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PRELIMINARY STATEMENT

"Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turney v. Safley*, 482 U.S. 78, 84–85 (1987). "Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.* Those principles carry even greater weight in times like these. Everyone—not just those at FCI Fort Dix—confronts risks from the COVID-19 pandemic, and the Federal Bureau of Prisons is carrying out its mission responsibly to mitigate those risks.

Yet Petitioners ask this Court to ignore the deference that Congress requires and throw judicial restraint to the wind. They insist this Court has jurisdiction under 28 U.S.C. § 2241 to entertain their challenges to the conditions of their confinement at FCI Fort Dix. They insist they can evade the strictures of the Prison Litigation Reform Act—even though they are demanding release of hundreds, if not thousands, of inmates—merely by alleging that nothing else can ensure their safety during the balance of their terms of imprisonment. And they insist they have legally viable claims under the Rehabilitation Act and can pursue a class-based remedy. They are wrong in all respects, and this Court should dismiss their hybrid § 2241 petition/civil complaint.

ADDITIONAL FACTS

Petitioners advance an expert declaration and five declarations by present and former inmates with their opposition papers. Those declarations include assertions not included in Petitioners' initial papers. Accordingly, Respondents are providing a second declaration, dated May 21, 2020, from Dr. Nicoletta Turner-Foster, the Clinical Director of FCI Fort Dix, with exhibits. Dr. Turner-Foster

addresses—and corrects—Petitioners' assertions and speculations on a variety of topics. Those include BOP's decision to use an Abbott testing machine and its approach to testing in general; the alleged cross-contamination of staff between the COVID-19 positive inmates and the rest of the Low compound, and the equipment they use to provide services to the inmates; the alleged inadequacy of medical care for those inmates in the isolation unit; and the alleged inaccurate reporting of hospitalizations from the institution.

In addition, on May 21, 2020, the Court issued a text order that inquired "whether Phase Six of the BOP's Action Plan has been extended beyond May 18, 2020, and if so, until when." ECF No. 32. Respondents provide information on Phase 7 of BOP's Action Plan in ¶¶ 3–5 of Dr. Turner-Foster's Declaration. On Monday, May 18, 2020, the Director of the BOP ordered the implementation of Phase 7 of the agency's COVID-19 Action Plan. This phase extends all measures from Phase 6, including all measures to contain movement and decrease the spread of the virus. The Phase 7 Action Plan will remain in place through June 30, 2020, at which time the plan will be evaluated. *See* Declaration of Dr. Nicoletta Turner Foster, Exhibit 1 (BOP Memorandum – COVID-19 Phase 7 Action Plan, dated May 18, 2020).

ARGUMENT

I. Despite What Petitioners Say, this Court Lacks Jurisdiction over the Petition and the PLRA Bars the Relief They Seek.

The Supreme Court has declared "in no uncertain terms" that "when a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at 'the core of habeas corpus,' and may be brought, if at all," as a civil rights claim. *Skinner v. Switzer*, 562 U.S. 521, 535 n.13 (2011) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 84 (2005)). And the Supreme Court has never "recognized habeas" as "even an available" remedy "where the relief sought would "'neither terminat[e] custody,

accelerat[e] the future date of release from custody, nor reduc[e] the level of custody.'" *Id.* at 534 (quoting *Dotson*, 544 U.S. at 86 (Scalia, J., concurring)).

Release to home confinement under BOP supervision does not count as a reduction in the "level of custody" in this context. The Third Circuit has long "held that a claim to be entitled to home furlough is a civil rights claim, not a habeas corpus claim, because if successful it would merely change the location where the prisoner's sentence is to be served." *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991); *see Wright v. Cuyler*, 624 F.2d 455, 458 (3d Cir. 1980). That is because a prisoner who is not "seeking a judgment at odds with his conviction or with the State's calculation of time to be served" is not raising a claim "on which habeas relief could [be] granted on any recognized theory." *Muhammad v. Close*, 540 U.S. 749, 754–55 (2004) (per curiam).

Despite Petitioners' assertions, *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005), did not hold otherwise. Opp. at 18–20. The outcome there meshed perfectly with a traditional basis for § 2241 jurisdiction: assessing whether BOP was carrying out the sentence in a manner consistent with the sentencing court's judgment. *See Cardona v. Bledsoe*, 681 F.3d 533, 536 (3d Cir. 2012) ("Woodall was challenging the inconsistency between the sentencing court's recommendation and BOP's refusal to abide by that recommendation."). Beyond that, the *Woodall* petitioner could plausibly argue that, in executing his sentence, BOP had failed to comply with a statutory command to consider certain factors before making individual placement decisions in carrying out the sentence. *Woodall*, 432 F,3d at 245–46.

Neither circumstance applies here. Petitioners do not claim their confinement at FCI Fort Dix conflicts with "any express command or recommendation in" their "sentencing judgment[s]." *Cardona*, 681 F.3d at 537; *see Setser v. United States*, 566 U.S. 231, 244 (2012) (acknowledging that, if BOP's determination conflicts with "the

District Court's judgment," then the prisoner "may seek a writ of habeas corpus"). Nor do they allege that BOP is disregarding a statutory command. And in trying to skirt the PLRA, Petitioners claim they merely seek a "prison transfer order," not a reduction, alteration, or correction in their sentence. Opp. Br. at 38. Because they seek only to change *where* they serve their terms of imprisonment, their claims "also would not necessarily result in a change to the duration of" their sentences. *Cardona*, 681 F.3d at 537. That means this Court lacks jurisdiction over their § 2241 claims. *Id.* at 538.

In arguing otherwise, Petitioners invoke non-precedential opinions and decisions from other district courts, including two by the same district judge. Opp. at 2–3, 17, 19–25. Non-precedential opinions, of course, "are not precedents for the district courts of this circuit." *In re Grand Jury Investigation*, 445 F.3d 266, 276 (3d Cir. 2006). And a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (quotation marks omitted).

But if this Court intends to rely on non-binding precedent, then it should consider the non-binding-precedent that doesn't favor the Petitioners' expansive theory of § 2241's scope. For example, one panel of the Third Circuit held that a "claim of cruel and unusual punishment" predicated upon the petitioner's being "transported in shackles and a belly-chain around the country with stops in the 'holes' of various federal prison facilities" fell "outside the realm of challenges which may be brought in habeas." *Stanko v. Obama*, 422 F. App'x 146, 148 (3d Cir. 2011) (per curiam).

Meanwhile, no controlling precedent has *ever* identified a circumstance where a prisoner could invoke habeas corpus to challenge conditions of confinement. And the Ninth Circuit has held that the remedies under § 2241 and § 1983 are mutually

exclusive. *See Nettles v. Grounds*, 830 F.3d 922 (9th 2016) (en banc). So if a claim can be brought under § 1983 (or in this case, *Bivens*), then it cannot be brought under § 2241. In any event, "a habeas court is not bound in every case to issue the writ." *Munaf v. Geren*, 553 U.S. 674, 693 (2008). Thus, even when "the habeas court has the authority to grant relief, it must consider" whether "that power ought to be exercised." *Reese v. Warden Philadelphia FDC*, 904 F.3d 244, 247 (2018) (quotation marks omitted). Here, there are adequate alternatives to § 2241: court-ordered reductions of sentence through 18 U.S.C. § 3582(c)(1)(A); and early transfers by BOP to home confinement through the CARES Act and 18 U.S.C. § 3624(c). Those remedies are not unavailable or inadequate merely because Petitioners would rather obtain their desired relief more quickly or would not like the outcomes in particular cases.

The PLRA. But even if *Woodall*'s broader dicta still controls here, despite *Cardona*, the most Petitioners could obtain would be an order "requiring the BOP to consider—in good faith—whether or not [he] should be transferred to" home confinement or another facility on an individualized basis in light of the statutory factors. *Woodall*, 432 F.3d at 251. That is a far cry from an order directing the mass release of inmates from FCI Fort Dix. But mass release—what Petitioners call "temporary enlargement of custody"—is the very relief they are demanding. And that, in turn, runs headlong into at least two Congressional prohibitions.

First, Congress has decreed that BOP's decisions concerning an inmate's "designation of a place of imprisonment" are "not reviewable by any court." 18 U.S.C. § 3621(b). Petitioners all but concede that a transfer to home confinement is a "designation of a place of imprisonment" because they would remain (at least technically) in BOP custody. Opp. at 38–39. Second, putting aside whether Petitioners could possibly satisfy its exhaustion requirement, the PLRA also requires that any "prisoner release order" be "entered only by a three-judge court,"

and only after "a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation ... sought to be remedied" and "the defendant has had a reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3).

Petitioners don't even acknowledge § 3621(b), and they resort to linguistic legerdemain to distinguish § 3626(a)(3). The latter provision does not apply to "habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). So Petitioners pretend they are only challenging the "fact of their confinement." Opp. at 16–17, 35. Not so. The PLRA tracks the basic distinction between habeas suits challenging the "fact or duration of confinement itself," and civil actions "challenging the conditions of confinement." *Porter v. Nussle*, 534 U.S. 516, 527–28 (2002) (citation omitted). If the "relief" sought "would not prevent the State from implementing" the sentence, then the prisoner's claim is not "a challenge to the fact of the sentence itself." *Hill v. McDonough*, 547 U.S. 573, 579–80 (2006).

If Petitioners prevailed here, that would not "necessarily imply the invalidity of their convictions or sentences." *Wilkinson*, 544 U.S. at 82 (brackets and quotation marks omitted). Nor would success entitle them to release, but only to the improvement of the challenged conditions. In any event, seeking "temporary enlargement of custody" cannot automatically convert a suit to a habeas "fact or duration" challenge because the PLRA provides that actions challenging "prison conditions" may lead to release from a particular facility in rare circumstances where the conditions cannot be redressed. 18 U.S.C. § 3626(a); *see Brown v. Plata*, 563 U.S. 493 (2011) (applying those PLRA provisions where prisoners alleged that deficiencies in medical care constituted an Eighth Amendment entitling them to orders granting the release or transfer of a portion of the state prison population).

Petitioners' alternative bases for evading the PLRA contravene the text of the statute. According to them, so long as this Court orders that they stay in some form of BOP custody, that order won't count as a PLRA "prisoner release order." Opp. at 38. Alternatively, they claim that this aspect of the PLRA would apply only if "the primary basis" for their "claim is overcrowding." Opp. at 30. Under the PLRA, however, "[t]he term 'prisoner release order' includes *any order*, including a temporary restraining order or preliminary injunctive relief, *that has the* purpose or *effect of reducing or limiting the prison population*." 18 U.S.C. 3626(g)(4) (emphasis added). The order Petitioners seek here plainly would have that effect. And *Brown* recognized that an order allowing state officials to "comply by … transferring prisoners to [other] facilities," was still a "prisoner release order" because it had the "'effect of reducing or limiting the prison population.'" 563 U.S. at 511 (quoting 18 U.S.C. 3626(g)(4)).

Nor does it matter that § 2241 might theoretically be available in an extraordinary case to challenge conditions of confinement. Opp. at 16–18 & n.6. Section 3626(g) does not exclude *all* "habeas corpus proceedings"; it excludes only those "*challenging the fact or duration* of confinement in prison." 18 U.S.C. § 3626(g)(2) (emphasis added). So even if Petitioners could resort to § 2241 to bring their Eighth Amendment claim, this Court by itself cannot grant the broad relief they seek. That Eighth Amendment claim could never succeed, in any event, as Respondents explained in their initial brief.

For example, Petitioners cannot show that the mitigated health risk at FCI Fort Dix is "so grave" that it would "violate[] contemporary standards of decency to expose anyone unwillingly to" it. *Helling v. McKinney*, 509 U.S. 25, 36 (1993). COVID-19 poses risks confronting not only prisoners but law abiding citizens nationwide, including front-line workers and vulnerable nursing home patients. The CDC has issued guidance for appropriately mitigating the risks in correctional

facilities, explaining that inmates may continue to be detained in "housing units" in which bunks "ideally" are separated by at least six feet, but that such separation and other "social distancing strategies" for recreation, meals, and other activities "need to be tailored to the individual space in the facility." CDC Interim Guidance 11 (emphasis omitted). That expert guidance is contrary to the view that risks at FCI Fort Dix are so grave that contemporary societal standards wholly forbid them.

II. Despite What They Say, Petitioners Have Not Stated a Viable Claim Under the Rehabilitation Act.

Petitioners' defense of their Rehabilitation Act claim, ECF 30 at 62-66, reveals why this claim must be dismissed. They concede, as they must, that a Rehabilitation Act claim requires a showing of discrimination "by reason of ... disability." *Furgess v. Pennsylvania Dep't of Corr.*, 933 F.3d 285, 288-89 (3d Cir. 2019). But pleading "deliberate indifference" by BOP is not enough to meet that statutory requirement. That is because Petitioners' allegations of deliberate indifference to inmates with disabilities are indistinguishable from their allegations of Eighth Amendment deliberate indifference to the entire population of FCI Fort Dix. *See* Opp. at 65 (citing ECF 1 ¶¶ 83-99). This cannot qualify as discrimination "solely by reason of their disability," as is required under the Rehabilitation Act. *Docherty v. Cape May Cty.*, Civ. No. 15-8785 (RMB), 2017 WL 2819963, at *12 (D.N.J. June 29, 2017).

It is not enough merely to say that Petitioners' status as disabled individuals fulfills this element:

> Plaintiffs do not allege that Defendants exclude insulin-dependent inmates from receiving medical treatment. Their claim is that corrections officers determine when inmates can access medical services. Plaintiffs have not alleged that corrections officers permit other inmates to access medical treatment without delay. These facts do not support the conclusion that, solely by reason of their disability, Defendants discriminate against insulin-dependent inmates.

Id. *See also Brown v. Pennsylvania Dep't of Corr.*, 290 F. App'x 463, 467 (3d Cir. 2008) ("Brown has not alleged facts sufficient to show that the prison denied him access to mental health treatment 'by reason of' his alleged disabilities").

Petitioners also never explain *where* they plead discriminatory denial of a service or reasonable accommodation—apart from their broad, conclusory statement that BOP has "to protect" them from COVID-19. They contend that "[v]irtually everything in a prison is a service for purposes of the" Rehabilitation Act. ECF 30 at 64.[1] They demand "safe conditions at Fort Dix, and adequate preventative and responsive measures to combat COVID-19." Opp. at 65. But Petitioners demand that for the larger class as well, not just the disability subclass. Of course, Respondents *are* working continually to provide "safe conditions" to all inmates at the facility. But for purposes of Rule 12(b)(6), what matters is that, according to their own pleading, Respondents are subject to the same conditions as every other inmate at FCI Fort Dix is.

Tellingly, Petitioners never specify what aspects of life or services at FCI Fort Dix are unequal for them or what requested accommodations BOP denied them. But every case they cite in their brief makes this requirement clear. *See*, *e.g.*,*Furgess*, 933 F.3d at 287 (inmate "was unable to take a shower for three months because the prison staff did not provide him with a handicapped-accessible shower facility"); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 255 (3d Cir. 2013) (student sued for erroneous disability classification that "prevented her from participating in certain regular-curriculum classes, including science and one year of foreign language during middle school, and higher-level courses in high school").

[1] This statement, as vague and ethereal as it is, pales by comparison to Petitioners' assertion that "the Subclass is comprised of people whose particular conditions qualify them under the [Rehabilitation Act]." Opp. at 65. Stripped to its core, this phrase amounts to the tautology that "the class of disabled persons is made up of disabled persons."

Petitioners cannot plead a Rehabilitation Act claim by merely asserting that (1) they have medical conditions that place them at greater risk to COVID-19; and (2) BOP discriminates by failing to ensure their protection as the result of those medical conditions. ECF 30 at 64-65. The Rehabilitation Act does not provide a cause of action to challenge medical or hygiene services provided by a government entity as improper, incorrect, or insufficient. *See Iseley v. Beard*, 200 F. App'x 137, 142 (3d Cir. 2006) (noting that the ADA does not guarantee medical treatment or create another route to bring a medical malpractice claim).

Moreover, the notion that the Rehabilitation Act entitles Petitioners to release from incarceration unless BOP provides physical facilities that virtually eliminate all risk from COVID-19 would transform the statute from a remedial civil rights law into a comprehensive legal duty to protect disabled inmates in full from a variety of potential harms. On its face, such a duty would exceed the statutory and constitutional duties owed to other inmates. The Rehabilitation Act does not provide such exceptional, special protections. *See Clark v. California*, 123 F.3d 1267, 1270 (9th Cir. 1997) (holding that neither "the ADA" nor "the Rehabilitation Act" provides "remedies so sweeping that they exceed the harms that they are designed to redress."); *Filar v. Bd. of Educ. of City of Chicago*, 526 F.3d 1054, 1067 (7th Cir. 2008) (concluding that plaintiff's "request would have amounted to preferential treatment, which the ADA does not require").

Petitioners cannot escape the core infirmities in their claim by mischaracterizing them as merely "fact issues." Opp. at 65. Petitioners did not pursue any administrative remedies with BOP regarding their disabilities, much less exhaust—a point they fail to address at all in their opposition and which is dispositive here. As a result of this failing, Respondents never received notice of any particularized need, service, or accommodation Petitioners were lacking regarding their disabilities and, thus, could make no suitable accommodation. Further,

Petitioners have not articulated in their pleading or brief what they need to address their *disabilities* at this time—apart from stating that facilities of their own design or release to their own homes alone will suffice. The Rehabilitation Act does not afford such relief, particularly where Congress granted BOP broad authority regarding inmate placement and prison management.

III. Despite What They Say, Petitioners Cannot Pursue Class Relief.

Contrary to Petitioners' suggestion, Rule 23(a)'s commonality and typicality requirements are not satisfied merely because Petitioners allege an across-the-board "violation of the Eighth Amendment" caused by their fear of contracting COVID-19. *See* Opp. at 47.

Commonality does not mean "that they have all suffered a violation of the same provision of law." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "Any competently crafted class complaint literally raises common questions" in that respect. *Id.* (internal quotations and alterations omitted). Rather, commonality "requires the plaintiff to demonstrate that the class members "have suffered the same injury." *Id.* at 350–51 (internal quotations omitted); *see also Mielo v. Steak 'N Shake Operations, Inc.*, 897 F.3d 467, 450 (3d Cir. 2018) (emphasizing the Supreme Court's "teachings" in *Dukes* and declining to certify a class based on alleged common violations of the Americans with Disabilities Act).

In this case, the putative class members have not suffered the same injury. Each member has different medical needs and presents a distinct risk profile for contracting COVID-19. *Cf. Kress v. CCA of Tennessee, LLC*, 694 F.3d 890, 893 (7th Cir. 2012) ("'Claims of inadequate medical care by their nature require individual determinations, as the level of medical care required to comport with constitutional and statutory standards will vary depending on each inmate's circumstances, such as preexisting medical conditions.'"); *see, e.g.*, *Money v. Pritzker*, -- F. Supp. 3d --,

No. 20-cv-2093, 2020 WL 1820660, at *15 (N.D. Ill. Apr. 10, 2020) (denying proposed inmate class action based on COVID-19).

Indeed, even if there were some similarities in the preexisting medical conditions of inmates resulting in a constitutional violation, Petitioners do not attempt to identify those similarities in their petition or opposition brief. The petition is 163 paragraphs, but Petitioners devote only four paragraphs (one paragraph for each Petitioner) to identifying their alleged preexisting medical conditions. And each of those preexisting medical conditions is distinct (not common to all of them). *See* Pet. ¶¶ 114–117 (describing Petitioners' distinct conditions).

The cases cited by Petitioners cannot remedy this conspicuous pleading deficiency and are otherwise distinguishable. In fact, in many respects, Petitioners' case law only illustrates that a habeas petition is an inappropriate procedural vehicle for Petitioners' claims. For example, in *Hassine v. Jeffes*, 846 F.2d 169 (3d Cir. 1988), the plaintiffs brought a civil rights lawsuit (not a habeas petition) challenging "deteriorated conditions" of confinement at a state prison, which included a leaky roof, dampness, overcrowding, and poor ventilation affecting inmates across the facility. *Id.* at 171. Those complained-of conditions did not uniquely affect the inmates' preexisting medical conditions, unlike the situation here. In addition, *Hassine* applied the "relaxed" pre-2003 Rule 23 standard that is "no longer the law of this circuit." *See Mielo*, 897 F.3d at 482–83.

Likewise, in *Hagan v. Rogers*, 570 F.3d 146 (3d Cir. 2009), the plaintiffs brought a civil rights lawsuit (not a habeas petition) alleging the "threat of a serious and undiagnosed contagious skin disease, possibly scabies, spreading through the facility." *Id.* at 150. Again, in that situation, the skin disease did not uniquely affect the inmates' preexisting medical conditions, unlike the situation here. *See id.* at 157 (rejecting the district court's reasoning). And even more pertinent, *Hagan* rested its holding entirely on the pre-2003 Rule 23 standard as understood by *Hassine*, which

is no longer the law of this Circuit. *See id.* at 158 ("On the limited basis of the District Court's brief opinion, we fail to see how the Plaintiffs in this case failed to satisfy the requirements of *Hassaine*.").

Petitioners assert that the Third Circuit's pre-2003 decision in *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48 (3d Cir. 1994) allows them to ignore the "disparate effects of [BOP's] conduct"—in other words, Petitioners' actual injuries. *See* Opp. at 51. But the facts of *Baby Neal* bear no relationship to this case, and *Baby Neal* does not license the use of conclusory allegations. *Baby Neal* is another civil rights lawsuit (not a habeas petition) brought on behalf of putative class of children (not convicted criminals in prison) in the legal care and custody of a deficient state government agency. 43 F.3d at 52. The defendants engaged in a "common course of conduct" dispensing with the need for "individualized determinations." *Id.* at 57. By contrast, in this case, FCI Fort Dix is making individualized determinations regarding inmates' medical conditions and eligibility for home confinement. And any Court-ordered release of putative class members will require a fact-specific analysis, if for no other reason than to protect the community from drug traffickers, child predators, fraudsters, and gang members.

Petitioners make the same broad-brush mistake in citing to district court decisions outside of this Circuit. According to Petitioners, those cases stand for the proposition that commonality can be found by evaluating "Defendants' system-wide response." *See* Petitioners' Opp. Br. at 52-53 (citing *Martinez-Brooks v. Easter*, No. 3:20-cv-00569, 2020 WL 2405350, at *30 (D. Conn. May 12, 2020); *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); *Alcantara v. Archambeault*, No. 20-cv-0756, 2020 WL 2315777, at *5 (S.D. Cal. May 1, 2020); *Wilson v. Williams*, No. 20-cv-00794, 2020 WL 1940882, at *7 (N.D. Ohio Apr. 22, 2020); *Fraihat v. U.S. Immigration & Customs Enforcement*, No. EDCV 19-1546, 2020 WL 1932570, at *18 (C.D. Cal. Apr. 20, 2020)). But

Petitioners' interpretation of those cases, to the extent that interpretation is correct, cannot be squared with binding Third Circuit precedent cautioning against certifying blanket violations of law without consideration of specific injuries. *Cf.* *Mielo*, 897 F.3d 467 at 450.

Finally, Petitioners argue that the district court's decision in *Money*, which denied class treatment for COVID-19, has "little persuasive effect." Opp. at 51 (citing *Mays v. Dart*, No. 20C2134, 2020 U.S. Dist. LEXIS 73230 (N.D. Ill Apr. 27, 2020)). However, even *Mays*, which departs from *Money* in some respects, cites *Money* as "persuasive authority" in its opinion. *See Mays*, 2020 U.S. Dist. LEXIS 73230, at *57. And to the extent the *Mays* court holds that injuries can solely derive from "the Sheriff's response to the coronavirus pandemic," *see id.* at 54, *Mays* cannot be reconciled with the Third Circuit's decision in *Mielo*, 897 F.3d 467 at 450. Thus, the Court should strike Petitioners' class allegations.[2]

CONCLUSION

For all these reasons and those in the Government's opening brief, this Court should dismiss Petitioners' hyrid § 2241 petition/civil complaint in its entirety.

[2] In their moving brief, Respondents embedded their discussion of the class allegations within a discussion of the merits of a preliminary injunction. Mov. Br. at 57-59, ECF No. 28-1. That does not affect Respondents' entitlement to a reply brief under Local Civil Rule 7.2. Petitioners concede in their opposition brief that Respondents effectively submitted a motion to strike the class allegations, which entitles Respondents to a reply as of right. *See* Petitioners' Br. at 42 (noting that Respondents filed a "motion to strike Petitioners' Class allegations"). Moreover, if this Court does not strike Petitioners' class allegations, Respondents reserve the right to move for a stay of any motion to certify the class and to file a full and complete opposition to any motion for class certification.

Respectfully submitted,

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Dated: May 21, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TROY WRAGG, MICHAEL SCRONIC, LEONARD BOGDAN, and ELIEZER SOTO CONCEPCION, individually and on behalf of others similarly situated;	
Petitioners,	Civil Action No. 20-5496 (RMB)
v.	
DAVID E. ORTIZ, Warden of the Federal Correctional Institution, Fort Dix and MICHAEL CARVAJAL, Director of the Federal Bureau of Prisons,	
Respondents.	

DECLARATION OF NICOLETTA TURNER FOSTER, M.D.

I, Nicoletta Turner-Foster, M.D., do hereby declare, certify and state as follows:

1. I am employed by the United States Department of Justice, Federal Bureau of Prisons (Bureau or BOP). I currently work as the Clinical Director at the Federal Correctional Institution ("FCI") Fort Dix, New Jersey. I have been employed by BOP since 2001.

2. I make this Declaration in support of Respondents' Reply Brief in Support of Respondents' Motion to Dismiss and in Opposition to Petitioners' Motion for a Preliminary Injunction.

Action Plan for COVID-19, Phase Seven

3. On Monday, May 18, 2020, the Director of the BOP ordered the implementation of Phase 7 of the agency's COVID-19 Action Plan. This phase extends all measures from Phase 6, including all measures to contain movement and decrease the spread of the virus. The Phase 7 Action Plan will remain in place through June 30, 2020, at which time the plan will be evaluated. *See* Exhibit 1 (BOP Memorandum – COVID-19 Phase Seven Action Plan, dated May 18, 2020).

4. In addition to extending all Phase 6 measures, Phase 7 includes an extension of plans to significantly decrease movement between BOP facilities nationwide. BOP identified specific facilities to handle mandatory movement needs: Oklahoma City, Victorville, and Yazoo City. These locations will provide COVID-19 testing and quarantine for inmates until they can safely transfer to their final destination.

5. BOP also directed that, consistent with existing health and safety protocols, inmates should have access to electronic law library resources at the discretion of facility Wardens. Further, BOP stated that it is unable to offer staff testing at institutions at present, but BOP encouraged Wardens to identify and publish testing sites in the community where interested staff could obtain testing.

Response to Petitioners' Declarations

6. I am aware that Petitioners have filed several declarations in opposition to Respondents' motion to dismiss the petition and opposition to their motion for a preliminary injunction. Several of those assertions contain incomplete

and in some instances, incorrect information. In several instances, the declarants did not provide identifying information, which prevented the BOP from investigation of that anecdotal information.

7. The rapid Abbott testing machine is FDA approved and provides immediate results in approximately 20 minutes per inmate. Prior to obtaining the Abbott testing machine, testing was sent to an outside laboratory for testing and would take between two days to one week obtain testing results. The use of the Abbott testing machine has allowed us to significantly increase our testing capability at FCI Fort Dix. The Abbott test machine, along with most viral diagnostic tests, does have a margin of error. We are aware that test results from the Abbott machine can provide a false negative, however positive results are certainly positive. The specifics regarding the margin error rates and science behind instances that might result in a false negative test result, we assume were considered by the FDA when they approved use of the Abbott testing machine for COVID 19. We are mindful of the possibility of a false negative, as clinical decisions are made regarding diagnosis, treatment, isolation, quarantine, inmate movement and management of institution operations, as they relate to COVID-19.

8. Petitioners allege that Respondents have denied inmates who tested negative for COVID-19 with proof of their test results. Any inmate is permitted to request a copy of their medical record to include their COVID-19 test results. We have provided, and continue to provide, COVID-19 test results to many inmates upon their request. Our records indicate that Inmate Scronic has yet to request any

medical records, including COVID-19 test results.

9. When COVID-19 test ordering was first added to the electronic medical record, the "print chart" function used for printing an inmate's entire record, did not automatically include the COVID-19 test result. This issue was brought to the attention of our Medical Records' clerks and they currently ensure that COVID-19 results are included when an inmate requests his entire chart.

10. After consulting with our Regional Health Service Administrator on May 20, 2020, we were able to attach and configure a printer to the Abbott testing machine. Starting on May 21, 2020, test results from the Abbott machine will be printed and scanned into the inmates' electronic medical records, in addition to entering the test result value into the electronic medical record point of care testing flow sheet.

11. Petitioners also allege that Health Services is not regularly monitoring or testing of symptoms for COVID-19 at the Camp and the Low compound. That is incorrect. Medical staff who perform temperature checks absolutely have addressed inmates who present with temperatures or other possible COVID-19 symptoms. Any inmate with a fever or symptoms is immediately separated from other staff and inmates and made to wear a mask. Such inmates are then escorted to Health Services for further evaluation.

12. FCI Fort Dix has 2,855 inmates, which required us to develop a realistic plan that could be executed with the staffing resources available. Due to the size and scope of this plan, it was not possible to record every temperature

reading and negative response to symptoms into each inmate's medical record. However, for all COVID-19 positive inmates housed in isolation unit 5851, a full set of vital signs and a complete symptom assessment is recorded daily.

13. Petitioners contend that the BOP did not provide masks to the inmates until mid-April. All inmates and staff were provided surgical masks as of April 5, 2020. However, all staff at the Camp began wearing full PPE, including surgical masks, as of April 3, 2020, the date of the first positive COVID-19 result at the Camp. *See* Exhibit 2 (BOP Memorandum, dated Apr. 3, 2020).

14. We have no evidence of any inmate's hesitancy to report COVID-19 symptoms for fear of being housed in quarantine and because those inmates house in isolation unit 5851 are not receiving medical treatment. Camp inmates have not had communication with any of the inmate housed in isolation unit 5851, so the information must be based on incorrect assumptions.

15. Petitioners allege that correctional officers and nurses move between the Camp, the East and West sides of the Low Compound, and the isolation unit contained in housing unit 5851, without regard to the potential spread of COVID-19. Only essential staff may enter this housing unit and the Camp. They must wear full protective PPE including an N-95 mask, a face shield, a gown, and gloves.

16. From the beginning of the COVID-19 pandemic, Health Services has recognized the benefits of limiting movement of clinical staff between the East and West Compounds and the Camp. To the greatest extent possible, Health Services has carried out this initiative. The nurses and doctors assigned to the East

compound have remained assigned to the East. The nurses and doctors assigned to the West compound have remained on assigned to the West. Only four nurses and two doctors, all assigned to West compound, have entered isolation unit 5851 to provide evaluation and treatment for COVID-19 positive inmates. The only exception was on one single occasion, when a nurse practitioner assigned to the Camp, entered the isolation unit to assist with daily assessments. None of the nurses or doctors assigned to the East has entered West Compound or isolation unit 5851.

17. In addition, only three correctional officers are assigned to work in the Camp. They cover all three shifts (day, evening, and night) during which they don full PPE. If one of those officers signs up for overtime, he/she is allowed to work only on the West Compound. The BOP cannot deny a staff member overtime who is otherwise eligible to work it. By donning full PPE in this manner, the likelihood of spread is negligible.

18. FCI Fort Dix began testing for COVID-19 only for inmates with symptoms. After receiving additional swabs for send-out testing, on April 22, 2020, we began testing asymptomatic Camp inmates who were pending release from BOP custody. We continued testing asymptomatic Camp inmates using the Abbott testing machine, which we received on April 22, 2020. As of May 6, 2020, all Camp inmates were tested for COVID-19. On May 15, 2020, FCI Fort Dix proposed a plan to begin testing asymptomatic inmates on the East and West Compounds. This plan established goals and priority groups for testing. That plan was submitted to

the Regional Health Services Administrator, Regional Medical Director, and Regional Infectious Disease Nurse. To date, their approval is pending.

19. With regard to the knowledge of COVID-19 symptoms and the treatment provided in response to those symptoms, FCI Fort Dix continues to use the guidelines and advice from multiple sources, including but not limited to, the BOP's Health Services Division - Central Office, the Centers for Disease Control, the State of New Jersey's Health Department, and the Burlington County Health Department. We are confident that all inmates received prompt, appropriate and quality health care for all their COVID-19 related symptoms.

20. Petitioners also allege that equipment, such as food and beverage crates and laundry transport, travel between the isolation unit 5851 and the dining hall, which could contribute to the spread of COVID-19. Staff use the food and beverage carts to feed the inmates in isolation unit 5851 because those inmates are not permitted to leave the unit. Staff sanitize this equipment both before and after exiting the isolation unit and at all times, staff wear full PPE. In addition, inmates confined to isolation unit 5851 wash their own laundry with a designated washer and dryer on the first floor. Laundry staff wash all other inmate (non-isolation unit 5851) laundry and transport the clothing to centralized laundry via laundry carts. Inmates who work in the laundry are not entering 5851.

21. As of today, May 21, 2020, the Camp lifted from a 14-day quarantine period. This quarantine period was a result of the final COVID-positive tests on May 6, 2020. In an effort to destroy any virus remaining on Camp surfaces, the

institution hired a commercial COVID-19 disinfecting service to clean thoroughly the entirety of the Camp. The company uses EPA-approved disinfectant and will clean all areas of the Camp, including the kitchen and sleeping quarters. In conjunction with the cleaning, all inmates were provided brand new bedrolls (sheets, blankets, pillow cases) and were required to turn in all used bed linens to Laundry. Inmates also were instructed to wash clothing on the warmest water possible prior to today's scheduled cleaning. Finally, inmates were instructed to keep all personal items locked in their locker. *See* Exhibit 3.

22. Petitioners raise the issue of staff testing. Health Services Division - Central Office is exploring options to offer testing for staff; however, there is currently no options for staff testing offered by BOP. Currently, the BOP's Phase 7 Action Plan mentions community testing sites being the option for staff testing. *See* Exhibit 1. Staff are required to self-report illness, including possible exposure to COVID-19, and they are required to submit to enhanced screening before entering the institution.

23. In response to Petitioners' allegations that inmates had contact with a COVID-19 positive staff member in Food Service, all inmates assigned to that work detail were notified that they were in contact with a person who tested positive. Medical staff assessed those inmates, which included their vital signs and symptom screening. These encounters were documented in each of those inmate's medical records. Taking into consideration the staff member's work schedule, the day he developed symptoms, and the date in which he may have been in close contact with

the inmate workers, quarantine was not indicated at that time as per the CDC guidelines.

24. Since the beginning of the pandemic, 5 staff members tested positive for the virus. All 5 have fully recovered and returned to work. The fifth staff member described in Petitioners' brief on pages 11-12 returned to work on May 16, 2020. If any inmate exhibited symptoms of COVID-19 based on interaction with this staff member, they would have been identified during temperature checks/symptoms assessments and tested for the virus.

25. Inmates in isolation unit 5851 are evaluated by Health Service twice daily. If an inmate's condition should decline, he would be sent to the hospital immediately. Moreover, a medical officer is on call 24/7. If an inmate required hospitalization when Health Services was closed, the Lieutenant on duty contacts the on-call medical provider. At no time is an inmate denied transport to the hospital because a Health Services staff member is not physically present at the institution.

26. Petitioners' information regarding the hospitalization of inmates related to COVID-19 is mistaken. As it relates to the four COVID-19 positive inmates recently treated in the hospital, only one was transferred to the hospital specifically for COVID-19. The other inmates were transferred for other illnesses and subsequently were diagnosed with COVID-19 during their hospitalization.

27. Inmate #1, [redacted]

[redacted]

28. Inmate #2 [redacted]

29. Inmate #3 [redacted]

[redacted]

30. Inmate #4 [redacted]

31. Attached hereto, please find true and correct copies of the following documents:

Exhibit 1 BOP Memorandum – COVID-19 Phase Seven Action Plan, dated May 18, 2020;

Exhibit 2 BOP Memorandum, dated Apr. 3, 2020; and

Exhibit 3 BOP Memorandum, dated May 19, 2020.

I declare that any and all records attached to this declaration are true and accurate copies maintained in the ordinary course of business by the Federal Bureau of Prisons. I further declare that the foregoing is true and correct to the best of my knowledge and belief, and is given under penalty of perjury pursuant to 28 U.S.C. § 1746.

N. A. Turner-Foster, MD CD — May 21, 2020

Nicoletta A. Turner Foster, M.D. — Date

Clinical Director

FCI Fort Dix

Exhibit 1

U.S. Department of Justice
Federal Bureau of Prisons

Washington, D.C. 20534

May 18, 2020

MEMORANDUM FOR ALL CHIEF EXECUTIVE OFFICERS

FROM: **ANDRE MATEVOUSIAN, ACTING ASSISTANT DIRECTOR**
CORRECTIONAL PROGRAMS DIVISION

L. Cristina Griffith

L. CRISTINA GRIFFITH, ASSISTANT DIRECTOR
HUMAN RESOURCE MANAGEMENT DIVISION

SUBJECT: **CORONAVIRUS (COVID-19) PHASE SEVEN ACTION PLAN**

This memorandum describes the BOP's Coronavirus (COVID-19) Phase Seven Action Plan, which includes an extension of previously disseminated guidance along with new measures to implement in the management of the evolving pandemic. Effective immediately, the following preventative measures are mandated for all Bureau locations:

EXTENSION OF PHASE SIX ACTION PLAN:

Effective Monday, May 18, 2020, the Bureau will continue its nationwide action as described in the Phase Six Action Plan, to include measures to minimize movement and decrease the spread of the virus. These restrictions will remain in place through June 30, 2020, at which time the plan will be reevaluated.

MOVEMENT AND TESTING:

The Bureau will continue to coordinate with the U.S. Marshals Service to significantly decrease incoming movement. Three strategic institutions (OKL/VVM/YAZ) have been identified for mandatory movement needs along with all detention centers and jail units throughout the country to accommodate population increases. These locations will serve as testing and quarantine sites until such time that inmates can be moved safely to their final destination. Testing will be carried out in accordance with Abbot ID Now Point of Care testing guidance issued by the Health Services Division.

Internal movement will continue to be suspended. Exceptions to this restriction are transfers related to forensic studies, writs, Interstate Agreements on Detainers, necessary medical or mental health treatment, and RRC/HC placements. Any exceptions must be routed through your Regional Director for approval by the Assistant Director, Correctional Programs Division.

ACCESS TO ELECTRONIC LAW LIBRARIES:

Whenever possible, consistent with social distancing protocols and safe institution operations, inmates should be permitted access to the Electronic Law Library (ELL) at the discretion of the Warden at each facility. We recommend that a schedule be established to permit fair and timely access to ELL terminals upon inmate request, and that the use of such schedule be made known to inmates at the facility.

STAFF TESTING:

Currently, we are unable to offer staff testing at the institution. However, we encourage Wardens to identify and publish possible testing sites in the community, where interested staff may be tested.

QUESTIONS:

If staff have questions about COVID-19, they may reach out to the agency at the following email box: COVID19Questions@bop.gov.

We appreciate your assistance in this significant phase, and all phases of our COVID-19 response.

Exhibit 2

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Institution
P.O. Box 38
JBMDL, New Jersey 08640

April 3, 2020

MEMORANDUM FOR ALL STAFF

FROM: LCDR Ronell Copeland, RN, QI/ICN

SUBJECT: Notice to Staff – Quarantine of Camp

Please be advised, the Camp has been placed on quarantine following a Camp offender's protracted symptomology, despite treatment. The Camper has been isolated in West side medical and tested for COVID-19 as well as other maladies. Although this offender does not fully reflect the symptomology consist with COVID-19, precautions are being taken per Central Office Guidelines to ensure the safety of staff and Camp offenders, in light of the patient's sluggish clinical recovery.

Consequently, the Camp will remain on quarantine through April 14, 2020 or until the suspected case is found to be negative for COVID-19. All staff entering the identified quarantined field at the Camp must dawn proper PPE consisting of a surgical mask, gown, gloves and face shield or goggles. All meals will be made available in the usual fashion. Pill-line, sick call and all patient care will be rendered by health care staff outfitted with the proper PPE in the Health Service Unit. Staff assigned to the Camp should observe social distancing guidelines and self-report any symptoms of cough, fever or shortness of breath. Temperatures will be taken twice daily and symptomatic inmates will be isolated accordingly. There will be no offender movement in or out of the Camp, this includes all work details outside Camp confines.

Please reinforce the need for frequent hand washing, avoiding noticeably ill offenders, social distancing and observing proper cough etiquette with the inmate population. Inmates should also be instructed to report symptoms including fever, cough or shortness of breath.

Exhibit 3

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Institution

Office of the Environmental and
Safety Compliance Administrator

Fort Dix, New Jersey 08640

DATE: May 19, 2020

TO: Camp Population

FROM: A. Sassaman, Safety Administrator

SUBJECT: Commercial COVID-19 Disinfecting Services

In conjunction with the end of quarantine on Thursday, we have hired a company to provide commercial disinfection and sanitizing services throughout the Camp. It is our intent that a comprehensive disinfecting will destroy any potentially remaining virus on surfaces in the Camp and provide a healthy, sanitized environment following the end of quarantine.

The Contractor will disinfect all areas using a combination of electrostatic and atomizer sprayers containing an EPA approved disinfectant approved for use against SARS-CoV-2, the novel coronavirus that's causes COVID-19 disease.

New bedrolls will be provided to all inmates. The morning of the disinfecting old sheets, blankets, and pillow cases will be bagged and placed outside for pickup by laundry. **PILLOWS WILL NOT BE EXCHANGED.** Leave your pillow on your bed for disinfecting or store it in your locker if you prefer. It is recommended that between Wednesday and Thursday, you launder all personal clothing on the warmest setting possible.

We will be disinfecting the kitchen, as well, so the noon meal will be a box lunch. We have coordinated to ensure the evening meal should run normal.

Please see that attached pre-visit checklist, in order to prepare for disinfection and sanitizing services on Thursday. Ensure all personal items, clothes, and linens are stored in your locker to avoid unwanted contact with disinfectant.

If there are any questions, staff please call me or inmates e-mail FTD/InmateToSafety.

COVID-19 Disinfecting Pre-Visit Checklist

FINISHED SPACES – offices, copy rooms, storage rooms, kitchens and breakrooms, bathrooms, lobbies, etc. (generally, any space with finished flooring i.e. carpets, tile and/or wood flooring).

1. SURFACES - wipe down all surfaces with cleaning products normally used.
2. FLOORS - clean; vacuumed, sweep and mop clean as needed.
3. DESKS AND WORK AREAS- remove all papers, files, pictures and keepsakes from on the top of Desk and Work areas (only computers and keypads to be Disinfected should be remaining on Desks and Work areas)
4. BUNK AREAS - remove pictures, keepsakes, papers, clothes, linens, and other personal items.
5. KITCHENS AND BREAKROOMS - put away all food and all kitchenware, coffee machines, cups, mugs, bottles, tumblers, dishes and cutlery, etc.
6. RESTROOMS – remove or cover any paper products.
7. LOCKER AND BUNK AREAS – store boots and footwear away, uniforms and personal items must be removed.
8. PLANTS - cover any live plants with plastic or move outdoors.

UNFINISHED SPACES – garages, storage, warehouse, etc. (generally, any space with concrete flooring).

1. FLOORS - broom sweep floors.
2. ACCESS - ensure unobstructed access to garage doors, doors, hand rails, safety rails and all work benches.
3. WALLS - remove all pictures, keepsakes and papers hanging on walls.
4. WORK BENCHES - remove all papers, files, pictures and keepsakes from on the top of work benches (only computers and keypads to be disinfected should be remaining on work bench areas).

INMATE LOCKERS AND PERSONAL CLOTHES –

1. Inmates should launder all personal clothes on the warmest wash setting possible.
2. Inmates will be responsible to disinfect inside their own locker. Remove all items, spray disinfectant, and allow to sit recommended time to kill coronavirus prior to wiping down.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TROY WRAGG, *et al.*, *Petitioners*, v. DAVID E. ORTIZ, *et al.*, *Respondents*.	Hon. Renée Marie Bumb, U.S.D.J. Civil Action No. 20-cv-5496 **CERTIFICATE OF SERVICE**

I, JOHN F. BASIAK JR., hereby certify that on May 21, 2020, the following documents were filed and served on Petitioners' counsel via the Court's ECF system: Reply Brief in Support of Respondents' Motion to Dismiss; May 21, 2020 Declaration of Nicoletta Turner-Foster, M.D. (redacted version); and Certificate of Service. In addition, Petitioners' counsel will be served via e-mail with an un-redacted version of the May 21, 2020 Declaration of Nicoletta Turner-Foster, M.D.

By: /s/ John F. Basiak Jr.
JOHN F. BASIAK JR.
Assistant U.S. Attorney
Attorney for Respondents