UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALEXANDER GRINIS, MICHAEL GORDON, and ANGEL SOLIZ, on behalf of themselves and those similarly situated, *Petitioners*, v. STEPHEN SPAULDING, Warden of Federal Medical Center Devens, and MICHAEL CARVAJAL, Director of the Federal Bureau of Prisons, in their official capacities, *Respondents*.	No. 20-cv-10738-GAO

THIRD NOTICE OF SUPPLEMENTAL AUTHORITIES AND INFORMATION

Petitioners respectfully submit this Notice to provide citations and information regarding cases discussed during the hearing held on May 12, 2020, and to bring other recent developments to this Court's attention.

First, bop.gov now confirms 10 open[1] COVID-19 cases at FMC Devens – eight prisoners and two staff members – in addition to one prisoner death. Federal Medical Centers now have two of the top four confirmed COVID-19 clusters within the BOP: FMC Fort Worth has confirmed 622 open prisoner cases, four open staff cases, and seven prisoner deaths; FMC Lexington reports 206 open prisoner cases, six open staff cases, and one prisoner death.[2]

[1] It appears that "open" cases represent individuals who *currently* have a confirmed COVID-19 infection, as the BOP separately reports "recovered" COVID-19 cases and deaths.
[2] Bureau of Prisons: COVID-19 Cases, https://www.bop.gov/coronavirus/ (last visited May 14, 2020 at 4:49 pm). During the hearing, the government made several unsworn assertions regarding the current conditions at FMC Devens. These assertions go to the disputed merits of Petitioners' claims and cannot defeat class certification. The absence of record support for these assertions, however, underscores the need for discovery to obtain actual evidence about FMC Devens, including the ability or inability to practice social distancing within each unit and testing protocols. Although there has been no evidence submitted in this case regarding the number of people tested at FMC Devens, the facility's case management coordinator, Amber Bourke,

Second, as discussed at the hearing, Petitioners write to provide the following citations to decisions granting class certification in litigation addressing COVID-19 in carceral settings:

- *Roman v. Wolf*, No. 20-00768-TJH, 2020 WL 1952650 (C.D. Cal. April 23, 2020) (certifying provisional class of all immigration detainees at Adelanto Immigration and Customs Enforcement Processing Center)[3];
- *Rivas v. Jennings*, No. 20-cv-02731-VC, -- F.Supp.3d --, 2020 WL 2059848 (N.D. Cal. April 29, 2020) (certifying provisional class of all immigration detainees at the Mesa Verde Detention Facility and the Yuba County Jail);
- *Fraihat v. ICE*, No. 19-1546-JGB, 2020 WL 1932570 (C.D. Cal. April 20, 2020) (certifying provisional class of all people detained in ICE custody whose medical risk factors or disabilities "place them at heightened risk of severe illness and death upon contracting the COVID-19 virus");
- *Alcantara v. Archambeault*, No. 20-cv-0756-DMS (S.D. Cal. May 1, 2020) (certifying provisional subclass of medically vulnerable detained at the Otay Mesa Detention Center), attached as Exhibit 2;
- *Savino v. Souza*, No. 20-10617-WGY, 2020 WL 1703844 (D. Mass. April 8, 2020) (certifying class of all civil immigration detainees housed at Bristol County House of Corrections);
- *Gomes v. ICE*, No. 20-cv-453-LM, 2020 WL 2113642 (D.N.H. May 4, 2020) (certifying provisional class of all civil immigration detainees housed at the Strafford County Department of Corrections for the purpose of facilitating expedited bails hearings of those individuals); and
- *Wilson v. Williams*, No. 4:20-cv-00794, 2020 WL 1940882 (N.D. Ohio April 22, 2020) (certifying conditional class of medically vulnerable prisoners incarcerated at FCI Elkton)[4]

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recently submitted a declaration in *United States v. Pena*, No. 16-10236-MLW, attesting that as of May 8, 2020, only 43 prisoners at the main facility and no prisoners at the Camp had been tested. D.E. 189-1, ¶ 22 and n.3, attached as Exhibit 1.

[3] The Ninth Circuit stayed the preliminary injunction pending appeal, but it did not disturb this class certification. *Roman v. Wolf*, No. 20-55436, 2020 WL 2188040 (9th Cir. May 5, 2020).

[4] The Sixth Circuit denial of a stay pending appeal did not overturn this conditional class certification. *Wilson v. Williams*, No. 20-3447 (6th Cir. May 4, 2020) [D.E. 23-2].

Aside from *Fairhat*, each of these cases sought habeas relief under § 2241.[5] As Petitioners' counsel noted during the May 12 hearing, these decisions granting class certification in COVID-19 litigation are consistent with decisions in this District that have granted class certification in immigration-related habeas cases asking the federal court to deem unlawful or unconstitutional government practices with respect to holding people in immigration detention, while leaving to another entity – *not* the federal court in the class action itself – the determination of whether specific individuals should be released.[6]

Neither of the cases submitted by the government in its May 7, 2020, notice of supplemental authority [D.E. 43] addressed, let alone denied, class certification. *See Valentine v. Collier*, No. 20-20207, 2020 WL 1934431 (5th Cir. Apr. 22, 2020) (granting stay of injunctive

[5] *Fairhat* was a pre-COVID 19 case that later sought emergency relief in light of the pandemic. 2020 WL 1932570 at *1-2.

[6] *See, e.g.*, *Prereira Brito v. Barr*, 395 F. Supp. 3d 135 (D. Mass.), *modified*, 415 F. Supp. 3d 258 (D. Mass. 2019) (certifying class of noncitizens detained under 8 U.S.C. § 1226(a), concluding due process requires the government to prove dangerousness by clear and convincing evidence or risk of flight by preponderance of the evidence during § 1226(a) bond hearings, and ordering immigration courts to implement this procedure in individual § 1226(a) bond determinations); *Reid v. Donelan*, No. CV 13-30125-PBS, 2018 WL 5269992 (D. Mass. Oct. 23, 2018) and *Reid v. Donelan*, 390 F. Supp. 3d 201 (D. Mass. 2019) (certifying class of noncitizens detained for more than six months under 8 U.S.C. §1226(c) without a bond hearing, holding noncitizens must bring individual habeas petitions to determine if bond hearing was required but ordering immigration court to place the burden of proof on the government to prove dangerousness by clear and convincing evidence or risk of flight by preponderance of the evidence during any such required § 1226(c) bond hearing); *see also Gordon v. Johnson*, 300 F.R.D. 28 (D. Mass 2014) (certifying class of noncitizens detained by ICE under 8 U.S.C. § 1226(c) after more than 48 hours of release from criminal custody whose requested relief was that the government provide all class members with a bond hearing before an immigration judge to determine their eligibility for release from ICE custody); *Calderon v. McAleenan*, No. 18-10225-MLW, (D. Mass. May 17, 2019) (certifying class of citizens and noncitizen spouses seeking status under a 2016 regulatory process in a § 2241 habeas petition whose requested relief was an order directing ICE to consider a noncitizens' eligibility for status under the 2016 regulatory process in making its removal decisions).

relief pending appeal without addressing class certification); *Swain v. Junior*, No. 20-11622, 2020 WL 2161317 (11th Cir. May 5, 2020) (same).

Third, two relevant opinions have issued since this Court's class certification hearing began on May 12.

Judge Young issued a written decision to accompany his May 7, 2020 order requiring universal COVID-19 testing of all immigration detainees at Bristol County House of Correction. *Savino v. Souza*, No. 20-10617-WGY (D. Mass. May 12, 2020), attached as Exhibit 2. Noting that "the real infection rate" at the facility "is a mystery," because "testing of both staff and detainees has been minimal," *id.* at 15, the court concluded, "[k]eeping individuals confined closely together in the presence of a potentially lethal virus, while neither knowing who is carrying it nor taking effective measures to find out, likely displays deliberate indifference to a substantial risk of serious harm." *Id.* at 29.

That same day, in the District of Connecticut, Judge Shea denied a motion to dismiss and granted a temporary restraining order in a § 2241 habeas petition brought by prisoners at FCI Danbury who alleged that "Respondents were violating the Eighth Amendment by 'fail[ing] to use the BOP's available statutory authority to reduce the population at FCI Danbury to mitigate the severe risk posed by COVID-19." *Martinez-Brooks v. Easter*, No. 3:20-cv-00549 (D. Conn. May 12, 2020) at 2-3, attached as Exhibit 3.[7]

[7] Noting that the Second Circuit has held "'that the class action device should not be imported into collateral actions, at least in its full vigor as contemplated by Rule 23'" but also "'recognized the power of the judiciary . . . to fashion for habeas actions appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage,'" Judge Shea analyzed whether the case was proper for "'a multiparty party proceeding similar to a class action.'" *Id.* at 62 (quoting *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-26 (2d Cir. 1974)). Analyzing Rule 23(a) requirements, he concluded it was, noting consideration of these requirement "further bolsters my conclusion that multi-party treatment is likely appropriate." *Id.* at 65.

Judge Shea first rejected the Warden's argument that the Court did not have jurisdiction over the habeas petition as "lack[ing] merit." *Id.* at 27. He then determined that the medically vulnerable subclass was likely to succeed on the merits of their contention that "the Warden's failure to transfer medically vulnerable prisoners from FCI-Danbury to home confinement in any 'meaningful numbers' constitutes deliberate indifference." *Id.* at 46-47. In so doing, he contrasted the BOP's self-imposed eligibility criteria that were "unrelated to medical vulnerability, and at best, tangentially related to public safety," with the "explicit statutory authorization in the CARES Act to make widespread use of home confinement in response to the threat posed by COVID-19, and the exhortation of the head of the government department in which the Bureau of Prison sits." *Id.* at 47-48.[8] As a result, he issued an injunction that "directs the Warden to make prompt, meaningful use of her home confinement and compassionate release authority; expeditiously to consider all medically vulnerable inmates for home confinement and compassionate release; and to discontinue the use of unduly burdensome eligibility criteria that are divorced from the interests of vulnerable inmates as well as the public and that preclude otherwise eligible inmates from consideration." *Id.* at 63-64. He further ordered expedited discovery on contested questions of fact regarding broader class-wide relief. *Id.* at 74.

[8] Judge Shea noted the Warden's representation that "only 159 inmates have been reviewed since March 26, and a mere 21 inmates have actually been placed on home confinement, out of a population of roughly 1000." *Id.* The numbers are even lower at FMC Devens, a similarly sized facility. As of April 22, 2020, Ms. Bourke indicated that 118 prisoners at FMC Devens had been reviewed for home confinement, 91 were denied "as not meeting all of the stated criteria," and 8 had "been approved for home transfers." D.E. 32-2, ¶ 22. Ms. Bourke's May 11, 2020 Declaration states that twelve prisoners in the camp "have been approved for compassionate release or early home confinement" as of May 8, 2020, but it did not state whether any have been released yet.

Respectfully submitted,

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and others similarly situated,

By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 14, 2020.

/s/ Jessie J. Rossman