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

MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION TO RECONSIDER THE COURT'S MAY 8, 2020 DECISION DENYING PRELIMINARY RELIEF

In light of new evidence, this Court should reconsider its denial of Petitioners' request for emergency injunctive relief. The Court's May 8 order expressly relied on steps supposedly taken by the Bureau of Prisons, including its receipt of the Attorney General's instructions to transfer individuals to home confinement, as evidence that Respondents had not been "actionably deliberately indifferent to the health risks of inmates" at FMC Devens. D.E. 45 at 5. Since then, however, the prison's warden has admitted under oath that Respondents *are* deliberately disregarding health risks to prisoners. In fact, contrary to the Attorney General's instructions, deliberately disregarding health risks to prisoners is Respondents' *policy*.

Specifically, in *United States v. Pena*, No. 16-CR-10236-MLW, Respondent Warden Stephen Spaulding has testified as follows:

- BOP policy actually prohibits considering a prisoner's COVID-19 vulnerability when evaluating whether the prisoner should be granted compassionate release during the COVID-19 pandemic;

- BOP policy also prohibits transferring prisoners to home confinement during the COVID-19 pandemic, regardless of their vulnerability to

COVID-19, until they have served at least 50% of their sentences or at least 25% of their sentences with under 18 months left to serve;

- "[E]veryone would be safer if the population [of FMC Devens] were reduced to create greater social distancing"; and
- Thus far, FMC Devens has "been both fortunate and somewhat lucky" to have escaped a more serious confirmed outbreak.

Meanwhile, likely due to the alarming policies to which Respondent Spaulding has testified, another fact on which this Court relied is no longer true, namely, that "only one inmate at FMC Devens had been diagnosed with the COVID-19 virus." D.E. 45 at 5. In fact, the infection is spreading: FMC Devens now has confirmed 24 open prisoner cases, 2 open staff cases, and 1 prisoner death. Respondents' rigid adherence to arbitrary and irrational policies, which do not comply with the recommendations of public health experts or guidance from the DOJ, fails to address the known and growing risk of COVID-19. For Respondents to stay the course at FMC Devens, in the face of this new evidence and the unfolding tragedy, is classic deliberate indifference.

BACKGROUND

Fearing for their health and safety in the face of the COVID-19 pandemic, Petitioners Alexander Grinis, Michael Gordon, and Angel Soliz[1] filed a motion for a temporary restraining order and preliminary injunctive relief on April 15, asking this Court to order Respondents to utilize all available tools to reduce the population at FMC Devens in sufficient numbers and with sufficient speed to permit effective social distancing before an outbreak of deadly infections. D.E. 3, 4. Petitioners argued that Respondents' failure to reduce the population where they had

[1] On May 12, Petitioner moved to substitute Pablo Rivera, a prisoner in the FMC Devens "Camp," as a named petitioner and proposed class representative, D.E. 49, in place of Grinis, who was released from the Camp on May 5 pursuant to a decision granting compassionate release in his underlying criminal case. That motion is still pending.

the authority to do so and where social distancing—a cornerstone of COVID-19 prevention—was impossible at current population levels, constituted deliberate indifference in violation of the Eighth Amendment. D.E. 4 at 11-17; D.E. 38 at 16-19.

On May 8, this Court denied the motion, concluding that Petitioners had failed to establish a likelihood of success on their claim that Respondents were deliberately indifferent. D.E. 45 at 3-4. Based on the government's submissions, this Court made two factual findings. First, this Court concluded Respondents had established an adequate plan to respond to COVID-19, including implementation of their home confinement authority, as the Attorney General instructed. *Id.* at 4-5. Second, this Court accepted Respondents' assurance that their plan was working because the "government reported at the hearing . . . only one inmate at FMC Devens had been diagnosed with the COVID-19 virus" and "the BOP website indicates no additional cases identified at FMC Devens since then." *Id.* at 5.

Now, however, new evidence that was previously unavailable to both Petitioners and this Court undermines both factual predicates of the May 8 decision and establishes that immediate judicial action is warranted.

Respondents previously asserted that BOP's response to the COVID-19 pandemic included "immediately reviewing all inmates who have COVID-19 risk factors . . . to determine which inmates are suitable for home confinement" by considering "the totality of circumstances" including "the age and vulnerability of the inmate to COVID-19." D.E. 36-1 at 2-3. But on May 13, Respondent Spaulding provided sworn testimony in *United States v. Pena*, No. 16-CR-10236-MLW (D. Mass. May 13, 2020), concerning a pending individual compassionate release motion [hereinafter May 13 Transcript] [attached as Exhibit 1]. Respondent Spaulding unequivocally stated that (1) COVID-19 has *no* bearing on FMC Devens' compassionate release

decisions and (2) FMC Devens will *not* review the need for any prisoner to be transferred to home confinement in light of COVID-19, regardless of the prisoner's age or medical vulnerability, *until* the prisoner has served at least 50% of his sentence or at least 25% of his sentence with under 18 months left to serve. *See, e.g.*, May 13 Transcript at 42-43, 66-67. As Judge Wolf found, this policy is "utterly inconsistent" with the Attorney General's direction to maximize the use of home confinement as a tool combat COVID-19, and it necessarily means "there are at-risk inmates who are not being individually assessed for release. And some of them may get very sick. Some of them may die." *Id.* at 127.

Indeed, the newest BOP data demonstrate exactly that. Respondents' earlier submissions emphasized that there was only one confirmed prisoner case at FMC Devens. D.E. 5 and n.3. As of May 26, however, the BOP website reports 24 confirmed prisoners cases, along with 1 prisoner death and 2 confirmed staff cases at the facility.[2] While tragic, it is not surprising that the BOP's policy that does not *consider* COVID-19 risks has not effectively *addressed* COVID-19 risks. Respondent Spaulding conceded that FMC Devens may have "been both fortunate and somewhat lucky" through mid-April, when the number of confirmed COVID-19 infections could be counted on one hand. May 13 Transcript at 90. It was deliberate indifference to rely on "luck" to save lives during the COVID-19 pandemic; that indifference is more pronounced now that the luck has run out.

In light of this new evidence, Petitioners ask this Court to reconsider its May 8 decision under Federal Rules of Civil Procedure 59(e) and to grant Petitioners' previously requested preliminary injunctive relief, consistent with the injunctive relief ordered by other courts in *Savino v. Souza*, No. 20-10617, 2020 WL 1703844 (D. Mass. Apr. 8, 2020); *Gomes v. Dep't of*

[2] BOP.gov/coronavirus (last visited May 27, 2020 at 11:12 am).

Homeland Security, No. 20-cv-453, 2020 WL 2113642 (D. N.H. May 4, 2020); *Wilson v. Williams*, No. 4:20-cv-00794, 2020 WL 1940882 (N.D. Ohio, Apr. 22, 2020), and *Martinez-Brooks v. Easter,* No. 3:20-cv-00569, 2020 WL 2405350 (D. Conn. May 12, 2020).

ARGUMENT

This Court has "'substantial discretion and broad authority' to grant a motion for reconsideration pursuant to Fed. R. Civ. P. 59(e)." *CrossFit, Inc. v. Mustapha*, 162 F. Supp. 3d 46, 51 n.5 (D. Mass. 2016) (quoting *Ruiz Rivera v. Pfizer Pharm., LLC*, 521 F.3d 76, 81-82 (1st Cir. 2008)). Under Rule 59(e), a "motion for reconsideration will be granted upon a showing of . . . new evidence." *Id.*[3] Reconsideration is warranted here because Respondent Spaulding's May 13 testimony about BOP's home confinement policy and the number of confirmed positive cases at FMC-Devens as of May 26, constitute new evidence that proves preliminary injunctive relief is appropriate, before more people—prisoners at FMC Devens, staff, and members of the surrounding community—get sick and die.

I. New evidence demonstrates that Respondents have failed to use compassionate release and home confinement authority appropriately because they refuse to take COVID-19 into account.

When Petitioners demanded population reductions at FMC Devens to permit social distancing, Respondents responded that they were implementing "numerous measures to fight the introduction and spread of COVID-19 within its facilities," D.E. 32 at 4-5, including the use of compassionate release and home confinement in response to the pandemic, *id.* at 13-20, 41. In her April 24 declaration, Amber Bourke, the Case Management Coordinator at FMC Devens, stated that, "pursuant to the Attorney General's directives in light of the COVID-19 pandemic," the "BOP began immediately reviewing all inmates who have COVID-19 risk factors, as

[3] Rule 59(e) motion must be brought no later than 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). This motion was timely filed 18 days after this Court's May 8, 2020 order.

described by the Centers for Disease Control and Prevention (CDC), to determine which inmates are suitable for home confinement" and "is prioritizing transfers to home confinement of all suitable inmates as an appropriate response to the COVID-19 pandemic." D.E. 36-1 at 2. Recognizing that the Attorney General's April 3 memo called on the BOP to review "a much broader pool of at-risk inmates – not only those who were eligible for transfer prior to the Attorney General exercising his authority under the CARES Act," *id.* at 4, Bourke added that "BOP Case Management staff are urgently reviewing all inmates to determine which ones meet the criteria established by the Attorney General," *id.* at 6. To make this assessment, Bourke attested that "BOP considers the totality of circumstances for each individual inmate," including "[t]he age and vulnerability of the inmate to COVID-19, in accordance with the CDC guidelines." *Id.* at 2-3.

Respondent Spaulding's May 13 testimony makes clear, however, that Respondents do not consider COVID-19 in reviewing prisoners for compassionate release, and will not review any prisoner for transfer to home confinement in light of COVID-19 until the prisoner satisfies an arbitrary time-served threshold absent from, and in conflict with, the Attorney General's directives.

As Respondent Spaulding testified, "I don't consider COVID-19 as part of the criteria for reduction of sentence or compassionate release." May 13 Transcript at 43; *see also id.* at 28-29 (confirming BOP's compassionate release program statement has not been revised since the pandemic began); *id.* at 31 (confirming that compassionate release request reviewed "based on the same criteria that [he] would have used before the pandemic"); *id.* at 42-43 (confirming the pandemic is not considered in any prisoner's request for compassionate release). His testimony similarly revealed that COVID-19 vulnerability is not a salient factor in decisions regarding

transfers to home confinement. "That is because the Bureau of Prisons has directed its wardens not to evaluate inmates for release under the Attorney General's criteria unless they have served 50 percent or more of their sentence or have served 25 percent or more of their sentence and have 18 months or less to serve." *United States v. Pena*, No. 16-CR-10236-MLW (D. Mass. May 15, 2020) [hereinafter May 15 Transcript] [attached as Exhibit 2] at 19; *see also* May 13 Transcript at 66-67. "Despite the directions from the Attorney General," Respondents will not consider a prisoner for home confinement, *irrespective* of COVID-19 vulnerability, until the prisoner satisfies one of those arbitrary time-served thresholds. May 15 Transcript at 19. As Respondent Spaulding emphasized, "the Bureau has made a firm stance on this." May 13 Transcript at 91; *see also* May 15 Transcript at 6-7, 19.[4] Illustrating the strictness of the BOP's policy, Respondent Spaulding testified the BOP would not even consider for home confinement a 70-year old prisoner who met all of the Attorney General's criteria—including "outstanding" prison conduct, May 13 Transcript at 85, and "the best possible [risk assessment] score for PATTERN," *id.* at 86—because he "does not meet the criteria that the Bureau pushed down to the wardens for the 50 percent or 18 months/25 percent," *id.* at 89.

[4] As Judge Wolf found, "Warden Spaulding testified that an exception to these eligibility requirements, these percentages, can be made only if Bureau of Prisons central office in Washington D.C. orders a warden to evaluate for home confinement an inmate who does not meet the criteria." May 15 Transcript at 19. For example, the central office apparently made such an exception for President Trump's former campaign manager Paul Manafort. *See, e.g.,* Eileen Sullivan, *Paul Manafort, Trump's Ex-Campaign Manager, Released to Home Confinement*, N.Y. Times (May 13, 2020), https://www.nytimes.com/2020/05/13/us/politics/paul-manafort-released-coronavirus.html.

II. New evidence demonstrates that Respondents' actions have failed to prevent a deadly outbreak of COVID-19 at FMC Devens.

Respondents previously told this Court that, "as a result" of their efforts in response to the pandemic, there was only one confirmed prisoner at FMC Devens as of April 22. D.E. at 4-5 and n. 3. This claim implied, and this Court's May 8 order seemed to accept, that Respondents' plan was working to prevent the spread of COVID-19 at FMC Devens. *Id.*

New numbers indicate otherwise. The web site BOP.gov now reports 24 confirmed-positive prisoners, along with 1 prisoner death and 2 confirmed-positive staff members at the facility as of May 26.[5] At present, FMC-Devens has the 15th highest outbreak out of 122 BOP facilities.[6] As Judge Wolf held on May 15—when there were still no confirmed positive prisoners at the FMC Devens camp—"it is probable that" the facility's "good luck will not continue and an inmate at camp will become infected," at which point there is "significant potential that the virus will spread." May 15 Transcript at 15; *see also id.* at 16 (noting "the risk of any infection spreading at the camp is significant").

The BOP's recent track record in these circumstances is not good. On April 30, another federal medical center—FMC Lexington—had 5 confirmed-positive prisoners. By May 3, it was up to 32; on May 6, it was 57; and by May 9, it was 136. As of May 26, FMC Lexington had 213 confirmed-positive prisoners.[7] Respondents can no longer suggest that they have kept COVID-19 out of FMC Devens. And given the alarming trajectory at other similar BOP medical centers, it would be deliberately indifferent—and profoundly dangerous—to assume that the situation will not worsen. The need to stop the spread of COVID-19 at FMC Devens is urgent.

[5] BOP.gov/coronavirus (last visited May 27, 2020 at 11:12 am).
[6] *Id.*
[7] *Id.*

III. In light of this new evidence, this Court should grant Petitioners' motion for reconsideration of its May 8 decision and order the requested preliminary injunctive relief.

The new evidence described above establishes Petitioners' likelihood of success in proving Respondents' deliberate indifference to a serious risk in violation of the Eighth Amendment. *See also* D.E. 4 at 11-17; D.E. 38 at 16-19. Because Petitioners have also demonstrated irreparable harm and that the balance of equities and the public interest favor relief, *see* D.E. 4 at 9-11, 17-20; D.E. 38 at 19-22, this Court should grant Petitioners' motion for reconsideration of its May 8 decision and order preliminary injunctive relief.

Respondent Spaulding admits that "we have the sickest inmates from around the country that come to us" at FMC Devens. May 13 Transcript at 104. He concedes "there's a degree of risk" that staff members "may be [a]symptomatic but bring the virus into the camp," *id.* at 90-91; *see also id.* at 108. And he agrees that "at FMC Devens, everyone would be safer if the population were reduced to create greater social distancing". *Id.* at 64; *see also id.* at 63 (agreeing that "reducing the population at FMC Devens makes everyone safer). For good reason. "Distancing has been, and continues to be, the institution's best hope for sparing medically-vulnerable inmates from serious medical consequences, and potential death, associated with COVID-19." *Wilson v. Williams*, No. 4:20-cv-00794, at 3 (N.D. Ohio May 19, 2020).

Under these circumstances, it is constitutionally insufficient for Respondents to refuse to use the authority that Congress has granted, in the ways that the Attorney General has directed, to decrease the population at FMC Devens and, instead, "knock on wood" that positive cases do not enter a facility. May 13 Transcript at 79. As Judge Wolf explained, "it's utterly illogical" for the BOP to "add criteria inconsistent" with the new criteria set the Attorney General established for home confinement in light of the pandemic. May 13 Transcript at 83; *see also Wilson*, No. 4:20-cv-00794, at 7 ("By thumbing their nose at their authority to authorize home confinement,

Respondents threaten staff and they threaten low security inmates."); *Martinez-Brooks*, No. 3:20-CV-00569, 2020 WL 2405350, at *23 ("Especially in light of the Barr memos, it is unimaginable that the Respondents would not be taking COVID-19 medical risk factors—some of which, by some estimates, gives an inmate a better than 10% chance of dying should the inmate contract COVID-19—into consideration in reviewing inmates for home confinement.").

Yet as Respondent Spaulding's testimony now makes clear, that is exactly what FMC Devens has done. As a result, "Petitioners have shown a likelihood of success on the merits of their claim that the Warden's inadequate implementation of the home confinement authority in the CARES Act constitutes 'deliberate indifference' under the Eighth Amendment." *Martinez-Brooks*, 2020 WL 2405350, at *23; *see also Wilson*, No. 4:20-cv-00794, at 7 (granting motion to enforce preliminary injunction and ordering Respondents to "make full use of the home confinement authority beyond the paltry grants of home confinement it has already issued"); *Cameron v. Bouchard*, No. 20-10949, at *61-62 (E.D. Mich. May 21, 2020) (granting preliminary injunction after concluding "Defendants' failure to make prompter, broader, and more meaningful use of their authority to implement what appears to be the only solution capable of adequately protecting medically-vulnerable inmates may constitute deliberate indifference under the Eighth Amendment").

CONCLUSION

Petitioners respectfully request that this Court grant their motion for reconsideration of its May 8 decision and, further, grant the requested preliminary injunctive relief.

[signatures on next page]

Respectfully submitted,

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and others similarly situated,

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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 27, 2020.

/s/ Jessie J. Rossman