

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES WHITTED, individually, and on	:	
behalf of all others similarly situated,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. No. 3:20 cv 569 (MPS)
	:	
DIANE EASTER, Warden of Federal	:	
Correctional Institution at Danbury	:	
in her official capacity	:	
	:	
Respondent.	:	AUGUST 3, 2020

**PETITIONER’S MOTION TO CERTIFY SETTLEMENT CLASS
AND FOR APPOINTMENT OF CLASS REPRESENTATIVE AND CLASS COUNSEL**

Petitioner James Whitted, through counsel, respectfully moves, pursuant to Fed.R.Civ.P. 23(c), (e), and (g), to certify a class for settlement purposes, for appointment of petitioner James Whitted as class representative and for appointment of the undersigned as class counsel.

While respondent denies the allegations of the Petition, she consents to the certification of the Settlement Class and for appointment of the class representative and class counsel.

Petitioner submits the annexed Memorandum of Law in support of this Motion.

Dated: August 3, 2020

Respectfully Submitted,

/s/ Jonathan M. Levine

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**MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S
MOTION TO CERTIFY SETTLEMENT CLASS AND FOR
APPOINTMENT OF CLASS REPRESENTATIVE AND CLASS COUNSEL**

Petitioner James Whitted, through counsel, submits this Memorandum in support of his Motion, pursuant to Fed.R.Civ.P. 23(c), (e), and (g), to Certify a Class for Settlement Purposes consisting of the following:

any person incarcerated at FCI Danbury anytime from the Effective Date [of the parties' Settlement Agreement (July 27, 2020)] until the termination date of [the] Agreement, October 31, 2021, unless otherwise modified by the parties pursuant to the terms of [the] Agreement who either (a) is a List One Inmate or List Two Inmate, or (b) possesses one or more underlying medical conditions which, according to current CDC guidance (i.e., the CDC guidance in effect at the time of the individual's home confinement review), either (i) places that inmate at increased risk of severe illness from COVID-19 ("Tier 1 medical conditions"); or (ii) might place that inmate at an increased risk of severe illness from COVID-19 ("Tier 2 medical conditions").

As set forth in detail below, the proposed Settlement Class is intended to include those individuals previously identified as members of the original medically vulnerable subclass conditionally certified in the Temporary Restraining Order entered by this Court on May 12, 2020 (ECF No. 30 at 65-66, n.32), and to conform the proposed class to subsequent guidance

from the United States Centers for Disease Control and Prevention (the “CDC”) issued since the entry of the TRO and that may be issued at any future point during the pendency of the proposed Settlement (clause b).

While respondent denies the allegations of the Petition, she consents to the certification of the Settlement Class and to appointment of the class representative and class counsel.

I. STATEMENT OF THE CASE / HISTORY OF THE PROCEEDING

The original petitioners¹ brought this action, pursuant to 28 U.S.C. § 2241, against the Warden of FCI Danbury,² on behalf of the class of all prisoners held at FCI Danbury who are at imminent risk of contracting COVID-19, which feeds on the unsafe, congregate conditions in which they are held. Petitioners also identified a subclass of prisoners who are particularly at risk because they have medical conditions identified by the United States Centers for Disease Control and Prevention which put them at heightened risk of serious illness or death if they

¹ This action was originally brought by four named petitioners: Dianthe Martinez-Brooks, Rejeanne Collier, Jackie Madore and Kenneth Cassidy. As required by this Court’s May 12, 2020 Temporary Restraining Order as well as subsequent Orders, the Bureau of Prisons began a process of identifying prisoners eligible and appropriate for home confinement under the criteria set forth by the Court in its Order and released a number of the prisoners so reviewed, including two of the original named petitioners in this action. Mr. Cassidy was released via a compassionate release order on May 13, 2020. Dianthe Martinez-Brooks, and Rejeanne Collier were released in June 2020. Counsel filed a voluntary dismissal of Mr. Cassidy’s claims pursuant to Fed. R. Civ. P. 41(a) on June 4, 2020 [ECF No. 76] and filed voluntary dismissals for Ms. Martinez-Brooks and Ms. Collier on June 12, 2020 [ECF Nos. 105 and 106].

At a telephonic status conference with the parties on June 5, 2020, the Court and the parties agreed that petitioners would file a Rule 21 motion to add parties to protect against a potential procedural default in the event that the final class representative was likewise released. On June 15, 2020, petitioners’ Rule 21 Motion was granted by the Court [ECF No. 108], and on June 16, petitioners filed an Amended Petition [ECF No. 111] naming Amanda Cooper and James Whitted (along with original petitioner Jackie Madore) as named class representatives.

Ms. Madore and Ms. Cooper have subsequently been released from FCI Danbury, *see* voluntary dismissals at ECF Nos. 130 and 130, leaving Mr. Whitted as the sole named class representative.

This memorandum will use plural term “petitioners” in reference to allegations made or relief sought in prior pleadings filed when there were multiple named representatives.

² Michael Carvajal, the Director of the Federal Bureau of Prisons, was also originally named as a respondent, but petitioners voluntarily dismissed their claims against Carvajal. [ECF No. 50].

contract the disease. Petitioners allege that the fact of their confinement in light of the dangers of COVID-19 violates their Eighth Amendment right against cruel and unusual punishment.

The petition and the subsequently filed Motion for Temporary Restraining Order sought a two-part response to the COVID dangers facing the class of all prisoners and the subclass of medically vulnerable prisoners at FCI Danbury.

First, petitioners contended that the Bureau of Prisons has failed to make full and sufficient use of the authority accorded it to transfer prisoners to home confinement to protect them against COVID-19 at FCI Danbury despite explicit directives from the Attorney General of the United States that it should make aggressive use of that authority to transfer appropriate prisoners to home confinement on an expedited basis. To cure that failure, petitioners sought orders requiring FCI Danbury to identify and undertake the immediate transfer of the most medically vulnerable individuals to home confinement or other appropriate settings.

Second, petitioners contended that FCI Danbury had failed to implement measures necessary to protect the prison population from COVID-19 infection. Petitioners further contended that FCI Danbury's failure to respond to the COVID-19 epidemic has further put petitioners and putative class members at unacceptably heightened risk of injury and illness unrelated to COVID-19. With respect to these failures, petitioners sought immediate implementation for those who remain at FCI Danbury of the social distancing and hygiene measures essential to lowering the risk of the disease and of death and necessary improvements in the system of health care delivery at Danbury.

On May 12, 2020, this Court issued a Temporary Restraining Order granting in part petitioners' request for provisional remedies. The Court found that the facts regarding the Bureau of Prison's use of its home confinement authority are largely undisputed and held that those facts establish that officials at FCI Danbury have been making only limited use of their

home confinement authority, as well as other tools at their disposal to protect inmates during the outbreak.

Accordingly, the Court entered an Order provisionally certifying the following class of individuals who are medically vulnerable to COVID-19 in accordance with CDC guidelines:

All individuals in custody at FCI Danbury, while the threat of COVID-19 at the facility remains, who are aged 65 or over and/or who have any of the following conditions specifically identified by the United States Centers for Disease Control as putting them at higher risk for severe illness from COVID-19: (a) chronic lung disease including moderate to severe asthma, COPD, emphysema, chronic bronchitis, idiopathic pulmonary fibrosis and/or cystic fibrosis; (b) immunocompromised status, including status as a transplant recipient, on chemotherapy, HIV positive, prolonged use of corticosteroids, using immunosuppressive medication, and/or having an immune deficiency; (c) severe obesity (BMI of 40 or higher); (d) diabetes mellitus Type I or Type II, (e) gestational diabetes mellitus; (f) chronic kidney disease on dialysis; (g) chronic liver diseases, cirrhosis; and/or (h) serious heart conditions, including congestive heart failure, coronary artery disease, congenital heart disease, cardiomyopathy, and/or pulmonary hypertension."

ECF No. 30 at pp. 65-66 n.32. The Court ordered expedited consideration of home confinement for all such medically vulnerable class members, and set forth standards for determining their suitability for home confinement release. The Court subsequently entered additional Orders pertaining to the home confinement review of the medically vulnerable class. [*See, e.g.*, ECF Nos. 68, 70]. The Court further scheduled an evidentiary hearing on petitioners' Motion for Preliminary Injunction.³

On May 15, 2020, as required by the TRO, respondent filed an initial list identifying 314 inmates who are potential members of the Medically Vulnerable Class. [ECF No. 41 ("List One Inmates")].⁴ Respondent identified the 314 List One Inmates by searching the BOP's record

³ That hearing, originally scheduled for June 11 and 12, was subsequently continued in light of the Court's referral of the parties to Magistrate Judge Thomas Farrish for settlement discussions.

⁴ Under the parties' Settlement Agreement, the 314 inmates identified as potential members of the

systems using a list of ICD-9 and ICD-10 codes identified by petitioner's counsel as representing conditions specifically identified by the CDC as putting a person at higher risk for severe illness from COVID-19.

As a result of further discussions among the parties concerning the identification of medically vulnerable individuals missed in the initial search, respondent ran a second search of BOP's record systems, again using a list of ICD-9 and ICD-10 codes identified by petitioner's counsel as representing conditions specifically identified by the CDC as putting a person at higher risk for severe illness from COVID-19, which resulted in a list of 111 additional inmates who are also potential members of the Medically Vulnerable Class. Subsequently, at petitioner's counsel's request, respondent agreed to add an additional 14 inmates to the second list of inmates who are potential members of the Medically Vulnerable Class ("List Two Inmates").⁵

While the parties were engaged in settlement discussions with Magistrate Judge Farrish, the CDC refined its guidance on medical conditions that increase an individual's risk of severe illness from COVID-19. Under its updated guidance, set forth at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>, the CDC distinguishes between conditions that are scientifically established to increase risk of severe illness from COVID-19 (designated as "Tier I medical conditions" in the

Medically Vulnerable Class are included as members of the proposed certified Settlement Class and are designated as "Medically Vulnerable Class List One Inmates" or "List One Inmates. In accordance with the terms of paragraph 4 of the Settlement Agreement, the parties' proposed Settlement Class references these individuals as "List One Inmates."

⁵ At the time it conducted this supplemental search, respondent did not concede that the individuals identified by that second search were necessarily medically vulnerable consistent with CDC guidance. Under the parties' Settlement Agreement, respondent has agreed to treat these individuals as medically vulnerable and the 125 inmates identified as potential members of the Medically Vulnerable Class are included as actual members of the proposed certified Settlement Class and are designated as "Medically Vulnerable Class List Two Inmates" or "List Two Inmates." In accordance with the terms of paragraph 4 of the Settlement Agreement, the parties' proposed certified Settlement Class references these individuals as "List Two Inmates."

Settlement Agreement) and those for which there is still only limited data but which, on the basis of current available science, the CDC believes might put individuals at increased risk of severe illness from COVID-19 (designated as “Tier II medical conditions”). Under the parties’ proposed settlement agreement, individuals with either Tier I or Tier II medical conditions who have not yet been identified as List One or List Two Inmates – including, in particular, any inmates newly incarcerated at or transferred into FCI Danbury since the BOP’s ICD searches or those with conditions that were not covered by the searches – are, likewise, included as members of the proposed certified Settlement Class. [A copy of the Settlement Agreement with redacted versions of the annexed exhibits is attached hereto as Exhibit 1.]⁶

Under the Settlement Agreement, members of the Medically Vulnerable Class will be entitled to home confinement review pursuant to the standards set forth in the Court’s May 12, 2020 TRO [ECF. No. 30], including, *inter alia*, that (a) both Danbury and the Home Confinement Committee shall “assign substantial weight ... to the inmate’s risk factors for COVID-19 based on CDC guidance,” that (b) a medical clinician shall participate in the home confinement determination at the Home Confinement Committee, (c) that the factors considered in the home confinement determination will be set forth in Review Worksheets; and (d) that both FCI Danbury and the Home Confinement Committee will provide a written explanation of the factual basis for any factors relied upon in a determination to deny home confinement.⁷

⁶ The Settlement Agreement contains provisions for the identification and evaluation of potentially medically vulnerable class members not previously included in List One or List Two (“Non-List Inmates”). Except in extraordinary circumstances, individuals who have been in BOP custody for two years or longer will be evaluated for qualifying conditions based exclusively on their BOP medical records; while individuals who have been incarcerated for less than two years may submit outside medical records. The Settlement Agreement further provides a mechanism for newly admitted inmates to receive notice of the settlement and the opportunity to execute authorizations to permit release of their medical records for consideration of their class eligibility.

⁷ The Settlement Agreement also provides for reconsideration of home confinement denials shown to be based on a material error or mistake of fact or failure to otherwise follow the TRO standards as well

Petitioner now seeks an order pursuant to Fed. R. Civ P. 23(c)(1)(C) certifying the proposed Class for settlement purposes. Respondent consents to the granting of plaintiffs' Motion and to the certification of the proposed class for settlement purposes.

II. ARGUMENT

As this Court has previously noted, although the class action device should not be imported into habeas corpus proceeding to the full limits contemplated by Rule 23, *see* ECF No. 30 at 62, the Second Circuit has endorsed “the power of the judiciary ... to fashion for habeas actions appropriate modes of procedure, by analogy to existing rules,” including Rule 23. *Id.*, quoting *U.S. ex. Rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974). Thus, although the precise provisions of Rule 23 are not specifically applicable to this habeas proceeding, consideration of the Rule 23 factors may properly inform whether multi-party or “class” treatment is appropriate in a habeas proceeding. *Id.*

A case may proceed as a multi-party or “class” action in this Court if all of the prerequisites of Federal Rule of Civil Procedure 23(a) and one or more of the subsections of Rule 23(b) are satisfied:

Before approving a class settlement agreement, a district court must first determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied. *See In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 341 (3d Cir. 2010). Thus, the court must assess whether the proposed class satisfies Rule 23(a)'s four threshold requirements: (1) numerosity (“the class is so numerous that joinder of all members is impracticable”), (2) commonality (“there are questions of law or fact common to the class”), (3) typicality (“the claims or defenses of the representative parties are typical of the claims or defenses of the class”), and (4) adequacy of representation (“the representative parties will fairly and adequately protect the interests of the class”). Fed. R. Civ. P. 23(a).

In re American Intern. Group, Inc. Securities Litigation, 689 F.3d 229, 238 (2d Cir. 2012).

as reconsideration of denials where there has been a change in a circumstance which informed the prior denial, i.e., a new suitable release plan not previously available or the resolution of an outstanding criminal charge or detainer.

Both the United States Supreme Court and the Second Circuit have expressly approved the propriety of certifying a class solely for purposes of a class action settlement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997); *American Intern. Group*, 689 F.3d at 238-39; *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982). See also *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *8 (S.D.N.Y. Dec. 23, 2009); *In re SCOR Holding (Switzerland) AG Litig.*, 537 F. Supp.2d 556 (S.D.N.Y. 2008). Indeed, certification of a settlement class “has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants.” *In re Prudential Sec. Inc., Ltd. P’ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995). “[S]ettlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge.” *Id.* (quoting *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979)).

A district court “[c]onfronted with a request for settlement-only class certification ... need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.” *American Intern. Group*, 689 F.3d at 239, quoting *Amchem*, 521 U.S. at 620. However, in the settlement context “other specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention.” *Id.*

It is well-settled that the relevant inquiry for class certification is not whether plaintiffs are likely to prevail on the merits of their claims, but rather, whether the requirements of Rule 23 are met. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (“In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met”); see also *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (class certification

motion should not become pretext for partial trial of the merits). In applying Rule 23, courts are to use a liberal, not restrictive, construction. *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

This case is appropriate for certification of a medically vulnerable class for settlement purposes, as it indisputably meets the four prerequisites of Rule 23(a), as well as all of the requirements of Rule 23(b)(3).

A. The Proposed Class

Petitioner seeks certification of the following proposed settlement class:

any person incarcerated at FCI Danbury anytime from the Effective Date [of the parties' Settlement Agreement (July 27, 2020)] until the termination date of [the] Agreement, October 31, 2021, unless otherwise modified by the parties pursuant to the terms of [the] Agreement who either (a) is a List One Inmate or List Two Inmate, or (b) possesses one or more underlying medical conditions which, according to current CDC guidance (i.e., the CDC guidance in effect at the time of the individual's home confinement review), either (i) places that inmate at increased risk of severe illness from COVID-19 ("Tier 1 medical conditions"); or (ii) might place that inmate at an increased risk of severe illness from COVID-19 ("Tier 2 medical conditions").

B. The Proposed Class Satisfies the Four Prerequisites of Rule 23(a)

Rule 23(a) provides:

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Each of these prerequisites is fully satisfied in this case.

1. Numerosity

There is no mechanical test for determining whether in a particular case the class is so numerous that joinder of all members is impracticable. To meet the numerosity requirement, one need only show that it is difficult or inconvenient to join all members of the class. *Cent. States SE. & SW. Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244-45 (2d Cir. 2007). The issue is one for the court to be resolved in light of the facts and circumstances of the case. *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (citing 1 Herbert B. Newberg, *Newberg on Class Actions: A Manual for Group Litigation at Federal and State Levels* §3.05, at 141-42 (2d ed. 1985)). The “difficulty in joining as few as 40 class members should raise a presumption that joinder is impracticable.” *Id.*; *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (holding that “numerosity is presumed at a level of 40 members”); see also *Marcera v. Chinlund*, 595 F.2d 1231, 1238 (2d Cir.), *judg. vacated on other grounds*, 442 U.S. 915 (1979) (“[t]here is little doubt that the 42 sheriffs constitute a group sufficiently large to meet the numerosity requirement of Rule 23(a)(1)”; 3B James W. Moore, et al., *Moore’s Federal Practice* if 23.05[1], at 139-45 (2d ed. 1987) (courts generally certify classes in excess of forty). As this Court noted earlier in this proceeding

In this case at least 439 prisoners at FCI Danbury have already been identified as members of the proposed medically vulnerable class by virtue of their inclusion in List One and List Two based on respondent’s search of relevant ICD codes for CDC COVID-19 risk factors in the BOP medical records database. These 439 prisoners represent approximately 40 percent of the pre-COVID census at the institution. Extrapolating from this experience, it is reasonable to conclude that between 30 and 40 percent of new admissions to the institution between now and October 2021 will, likewise, be eligible for membership in the proposed medically vulnerable class such that the final number of would be class members will almost certainly exceed 600.

The size of the proposed class is plainly more than sufficient to meet the numerosity requirement of Rule 23(a).

In addition to class size, several other factors in this case suggest the impracticability of joinder and favor class certification. “Determination of practicability depends on all the circumstances surrounding a case, not on mere numbers”” *Robidoux*, 987 F.2d at 936.

The considerations identified by the Second Circuit as relevant to determining the practicability of joinder include:

judicial economy arising from the avoidance of a multiplicity of actions, geographical dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members.

Id. These considerations also militate strongly in favor of a finding of numerosity here.

Consolidation of these claims serves judicial economy because it obviates the need for hundreds of individual suits. *See id.* at 936 (judicial economy served by consolidating “what could be over 100 individual suits”). Joinder of the potential class members would also be impracticable because the members of the class are transient and subject to being dispersed throughout the BOP network of facilities. *See Westchester Independent Living Center, Inc. v. State University of New York, Purchase College*, 331 F.R.D. 279, 291 (S.D.N.Y. 2019) (“fluid composition” of SUNY’s student body “weighs in favor of finding numerosity requirement satisfied”); *Clarkson v. Coughlin*, 783 F. Supp. 789, 797 (S.D.N.Y. 1992) (“fluid composition” of prison population supports certification). The limited economic resources of the overwhelming majority of prisoners also militates strongly in favor of certification. *See Robidoux*, 987 F.2d at 936 (“[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device”) (*quoting Deposit Guar. Nat’l*

Bank v. Roper, 445 U.S. 326, 339 (1990)). Finally, this action seeks prospective injunctive relief which would implicate the interests of future class members (who would also be at risk of inconsistent results from individual suits) – a consideration which weighs heavily in favor of class certification. *Westchester Independent Living*, 331 F.R.D. at 291.

2. Common Questions of Law and Fact

Rule 23(a)(2) requires that the action contain questions of law or fact that are common to the class. Fed. R. Civ. P. 23(b)(2). “The commonality requirement [of Rule 23(a)(2)] is met if plaintiff’s grievances share a common question of law or fact.” *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001) (quoting *Marisol*, 126 F.3d at). This does not mean that all issues must be identical as to each class member. Rather, it requires plaintiffs simply to “identify some unifying thread among the members’ claims that warrants class treatment.” *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 245 F.R.D. 147, 158 (S.D.N.Y. 2007) (quoting *In re Vivendi*, 242 F.R.D. at 84); *In re NTL, Inc. Sec. Litig.*, No. 02 Civ. 3013 (LAK) (AJP), 2006 WL 330113, at *6 (S.D.N.Y. Feb. 14, 2006). The threshold for commonality is not high – it is only necessary to find at least one issue common to all class members. *Marisol A.*, 126 F.3d at 376 (“The commonality requirement is met if plaintiffs’ grievances share a common question of law or of fact”); see also *Matyasovsky v. Housing Auth. of the City of Bridgeport*, 226 F.R.D. 35, 41 (D. Conn. 2005) (to establish commonality, “plaintiffs need not establish that all questions of law and fact among the putative class are identical”) (emphasis in original); *In re PE Corp. Sec. Litig.*, 228 F.R.D. 102, I 08 (D. Conn. 2005) (test for commonality is “not demanding”).

As this Court has previously noted, even applying the “more stringent standards” suggested by the Second Circuit in *Preiser*, 506 F.2d at 1127, the medically vulnerable class proposed for settlement purposes satisfies the commonality requirement. As the Court noted, all

members of the class “are recognized as falling in the high-risk group as to which heightened precautions are justified,” ECF No. 30 at 65, and the facts “regarding the process employed by the Warden [and the BOP] in considering inmates for home confinement are common to the entire []class, as are the legal questions regarding whether the Warden [and the BOP]’s handling of those processes in these circumstances is constitutional.” *Id.*; *see, e.g., Karen L. v. Physicians Health Serves.*, 202 F.R.D. 94, 100 (D. Conn. 2001) (“An alleged common course of conduct is sufficient to satisfy the common question requirement”) (citation omitted). The relief sought is, likewise, common throughout the class – i.e., expedited home confinement review pursuant to the mandate of the Court’s May 12, 2020 TRO [ECF. No. 30], with due consideration (i.e., “substantial weight) assigned to each class member’s risk factors for COVID-19 based on CDC guidance, pursuant to procedures applied commonly to every home confinement review.

3. Petitioner’s Claims are Typical of the Claims of the Class

Rule 23(a)(3) requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(b)(3). The requirement is satisfied here because “each class member’s claim arises from the same course of events [application of respondent’s home confinement review process], and each class member makes similar legal arguments to prove the defendant’s liability.” *Cent. States SE. & SW. Areas Health and Welfare Fund*, 504 F.3d at 245; *accord Robidoux*, 987 F.2d at 936-37 (“When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.”).

4. The Representative Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Interests of the Class.

The final requirement of Rule 23(a) is that “the representative parties will fairly and

adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In connection with Rule 23(a)(4), courts in the Second Circuit consider whether the plaintiffs’ interests are antagonistic to the class and whether class counsel is experienced and qualified. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Cmp.*, 222 F. 3d 52, 60 (2d Cir. 2000); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *see also Amchem Prods. v. Windsor*, 521 U.S. 591, 624 (1997) (inquiry “serves to uncover conflicts of interest between named plaintiffs and the class they seek to represent”).

Mr. Whitted is an appropriate and adequate class representative for the proposed class of medically vulnerable individuals who are or may be at increased risk of severe illness from COVID-19. Mr. Whitted suffers from asthma for which he currently uses two medicated inhalers. He is also morbidly obese. In 2018, Mr. Whitted suffered a fall which resulted in head trauma, spinal damage, and permanent injury to his left leg for which he requires a custom brace. As a result of his injury he is required to use a walker and a cane to ambulate. He is in need of physical therapy to maintain leg function but has not received any such therapy since the onset of the COVID-19 lockdown at FCI Danbury.

Additionally, class counsel are “qualified, experienced and able to conduct the litigation” *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000), and also meet the requirements of Rule 23(g). *See* Declarations of Professor Sarah F. Russell, Professor Marisol Orihuela, David S. Golub, Esq. and Professor Alexandra Harrington (annexed hereto as Exhibits 2 through 5 respectively)(setting forth the qualifications and experience of class counsel in class action litigation, the work counsel performed in identifying and investigating potential claims in this action, and the resources counsel have and will commit to representing the class to support the findings required pursuant to Rule 23(g)(1)).

C. The Proposed Settlement Class Satisfies the Requirements of Rule 23(b)(2)

The proposed settlement class also satisfies the requirements of Rule 23(b)(2) in that respondent “acted or refused to act on grounds that apply generally to the class” so that “a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (citing Fed. R. Civ. P. 23(b)(2)).

Rule 23(b)(2) certification is generally appropriate for litigation seeking institutional reform through class-wide declaratory or injunctive relief. *See A.R. v. Connecticut State Board of Education*, 3:16-cv-01197 (CSH), 2020 WL 2092650 at *12 (D. Conn. May 1, 2020), *citing Stinson v. City of New York*, 282 F.R.D. 360, 379 (S.D.N.Y. 2012) (internal citations omitted). “Certification under Rule 23(b)(2) is appropriate when a plaintiff seeks to enjoin a “systemic failure” on the part of a governmental body or public entity to comply with statutory [or other] requirements. *Id.* (citing *Westchester Indep. Living Ctr.*, 331 F.R.D. at 300 (certifying a Rule 23(b)(2) class of individuals with mobility disabilities alleging that the state university failed to comply with the requirements set forth in the Americans with Disabilities Act and Rehabilitation Act); *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 412, 420 (S.D.N.Y. 2012) (certifying a Rule 23(b)(2) class of individuals with disabilities alleging that the City of New York systemically failed to address the needs of disabled persons in the City’s emergency and disaster planning in violation of the Americans with Disabilities Act and Rehabilitation Act).

As this Court has already noted, this case alleges that the Warden and the BOP’s existing pre-suit home confinement policies, as applied to medically vulnerable prisoners, amount to deliberate indifference. ECF 30 at 64. Those policies applied to the entire proposed medically vulnerable class. The relief sought in the settlement – expedited home confinement review based on the standards set forth in this Court’s TRO with additional procedural protections enumerated in the settlement agreement – is clearly susceptible of class-wide declaratory or injunctive relief.

The relief sought in the proposed settlement agreement establishes procedural protections common to the class as a whole and does not require the Court to make individualized determinations with respect to particular prisoners or even to review the substantive correctness of a home confinement determination as to any particular prisoner. The allegation of a policy failure by the Warden and BOP to make appropriate use of their home confinement authority and request for expedited home confinement consideration for all class members based on uniform agreed policies and procedures are plainly susceptible to “a single injunction or declaratory judgment would provide relief to each member of the class,” and represent the paradigmatic example of claims for which Rule 23(b)(2) certification was designed.

III. CONCLUSION

For the foregoing reasons, petitioner’s Motion Certify Settlement Class should be granted, the proposed settlement class should be certified, petitioner should be appointed as class representative and petitioner’s counsel should be appointed as Counsel for the class.

Dated: August 3, 2020

Respectfully Submitted,

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Counsel for the petitioner James Whitted

EXHIBIT 1

Whereas, on May 12, 2020, United States District Judge Michael P. Shea entered a Temporary Restraining Order in this Action (the “May 12, 2020 TRO” (ECF 30)) provisionally certifying a putative subclass of medically vulnerable to COVID-19 FCI Danbury inmates and setting forth standards for determining their suitability for home confinement release.¹

Whereas, on May 15, 2020, Respondent filed an initial list identifying 314 inmates who are potential members of the Medically Vulnerable Class (the “Medically Vulnerable Class List One Inmates” or “List One Inmates”). Respondent identified the 314 List One Inmates by searching the BOP’s record systems using a list of ICD-9 and ICD-10 codes identified by Petitioner’s counsel as representing conditions specifically identified by the CDC as putting a person at higher risk for severe illness from COVID-19;

Whereas Respondent ran a second search of BOP’s record systems, again using a list of ICD-9 and ICD-10 codes identified by Petitioner’s counsel as representing conditions specifically identified by the CDC as putting a person at higher risk for severe illness from COVID-19, which resulted in a list of 111 additional inmates who are also potential members of the Medically Vulnerable Class; and subsequently, at Petitioner’s counsel’s request, Respondent agreed to add an additional 14 inmates to be included into the second list of inmates who are

¹ In the May 12, 2020 TRO, the medically vulnerable subclass was defined as: “All individuals in custody at FCI Danbury, while the threat of COVID-19 at the facility remains, who are aged 65 or over and/or who have any of the following conditions specifically identified by the United States Centers for Disease Control as putting them at higher risk for severe illness from COVID-19: (a) chronic lung disease including moderate to severe asthma, COPD, emphysema, chronic bronchitis, idiopathic pulmonary fibrosis and/or cystic fibrosis; (b) immunocompromised status, including status as a transplant recipient, on chemotherapy, HIV positive, prolonged use of corticosteroids, using immunosuppressive medication, and/or having an immune deficiency; (c) severe obesity (BMI of 40 or higher); (d) diabetes mellitus Type I or Type II, (e) gestational diabetes mellitus; (f) chronic kidney disease on dialysis; (g) chronic liver diseases, cirrhosis; and/or (h) serious heart conditions, including congestive heart failure, coronary artery disease, congenital heart disease, cardiomyopathy, and/or pulmonary hypertension.” ECF 30 at pp. 65-66 n.32; *see also* ECF No. 26 at p. 2.

potential members of the Medically Vulnerable Class (collectively, these 125 inmates are the “Medically Vulnerable Class List Two Inmates” or “List Two Inmates”);

Whereas attached as Exhibit A is a list setting out the List One Inmates and the List Two Inmates, respectively;

Whereas the parties recognize that there may be certain inmates, including future inmates, who are not List One Inmates or List Two Inmates but who nevertheless may already be or may in the future become members of the Medically Vulnerable Class (“Non-List Medically Vulnerable Class Inmates” or “Non-List Inmates”);

Whereas the BOP has statutory authority to transfer prisoners to home confinement under 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541;

Whereas, on March 26, 2020, Attorney General William Barr issued a memorandum that directed the BOP to “prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic,” and provided a non-exhaustive list of discretionary factors for evaluating inmates for home confinement;

Whereas, on March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), which authorized the Director of the BOP to lengthen the amount of time prisoners can be placed on home confinement under Section 3624(c)(2)—previously capped at the shorter of 10% of their sentence or 6 months—provided that the Attorney General makes a finding that “emergency conditions will materially affect the functioning of the Bureau”;

Whereas, on April 3, 2020, Attorney General Barr issued a memorandum in which he found that “emergency conditions are materially affecting the functioning of the Bureau” and

directed the Bureau to “move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of these institutions” while cautioning that the BOP must continue to make “individualized [home confinement] determinations”;

Whereas the BOP has established a multidisciplinary committee within its Central Office in Washington, D.C. (the “Home Confinement Committee” or “HCC”) to make home confinement review determinations for inmates who are not eligible for home confinement under BOP’s current guidance but nevertheless could possibly be determined suitable for home confinement as an exception case;

Whereas the parties now desire to resolve the present litigation on the mutually acceptable terms set forth below, which they agree are a fair, reasonable and adequate resolution of this case;

NOW, THEREFORE, in consideration of the promises set forth herein, the parties agree and covenant as follows:

SETTLEMENT TERMS

Settlement Class

1. This Settlement Agreement is entered into on behalf of all members of the Medically Vulnerable Class, consisting of any person incarcerated at FCI Danbury anytime from the Effective Date until the termination date of this Agreement, October 31, 2021, unless otherwise modified by the parties pursuant to the terms of this Agreement, who either: (a) is a List One Inmate or List Two Inmate, or (b) possesses one or more underlying medical conditions which, according to current CDC guidance (i.e., the CDC guidance in effect at the time of the individual’s home confinement review), either (i) places that inmate at increased risk of severe illness from COVID-19 (“Tier 1 medical conditions”); or (ii) might place that inmate at an

increased risk of severe illness from COVID-19 (“Tier 2 medical conditions”).

List One and List Two Inmate Home Confinement Reviews

2. Respondent has already reviewed all List One Inmates for home confinement at the institutional level and Respondent asserts that it has conducted these reviews pursuant to Attorney General Barr’s March 26 and April 3, 2020 memoranda, the current BOP guidance at the time of each review, and the standards set forth in the May 12, 2020 TRO (see ECF 30). The Respondent has already referred to the Home Confinement Committee all List One Inmates who were not eligible for home confinement under the current BOP guidance at the time of each review but whom the Respondent nevertheless believed could even possibly be eligible for home confinement as an exception case based upon the standards set forth in the May 12, 2020 TRO (see ECF 30). BOP asserts that the Home Confinement Committee has already made home confinement determinations based upon the standards set forth in the May 12, 2020 TRO (see ECF 30) for all List One Inmates referred to it. The parties agree that Section 13 of this Agreement, *infra*, resolves any disputes or disagreements the parties may have, or have ever had, with respect to the adequacy of the home confinement reviews performed under this Section.

3. To the extent she has not already done so, the Respondent agrees to have all List Two Inmates reviewed for home confinement at the institutional level pursuant to Attorney General Barr’s March 26 and April 3, 2020 memoranda, the current BOP guidance at the time of each review, and the standards set forth in the May 12, 2020 TRO (see ECF 30). To the extent that the standards set forth in the May 12, 2020 TRO differ from Attorney General Barr’s March 26 and April 3, 2020 memoranda or the current BOP guidance at the time of each review, the provisions of the May 12, 2020 TRO shall control. Petitioner acknowledges that Respondent, at the institutional level, may not be authorized to apply provisions of the May 12, 2020 TRO that

conflict with current BOP guidance. Respondent agrees to refer all List Two Inmates who are not approved for home confinement at the institutional level to the Home Confinement Committee. BOP agrees to have the Home Confinement Committee make a home confinement determination for all such inmates based upon the standards set forth in the May 12, 2020 TRO (see ECF 30).

Identification of Medically Vulnerable Non-List Inmates

4. The parties agree that Non-List Inmates can become recognized as members of the Medically Vulnerable Class, but only through the following process:
 - a. Petitioner's counsel may propose any Non-List Inmate to become a recognized member of the Medically Vulnerable Class, but only upon a good faith belief, substantiated by documentary evidence, that such individual falls within the definition of the Medically Vulnerable Class.
 - b. Respondent and BOP agree to recognize as a member of the Medically Vulnerable Class any inmate proposed under Section 4(a), unless within 7 days of such proposal the Respondent or BOP disagrees that the proposed inmate is a member of the Medically Vulnerable Class.
 - c. Any disagreements between counsel for Petitioner and Respondent or BOP over whether a particular Non-List Inmate is a recognized member of the Medically Vulnerable Class shall be finally resolved by a physician detailed to the BOP from the United States Public Health Service, Department of Health and Human Services, (the "PHS Physician") within 7 days of such dispute being referred to him or her.
 - d. Neither Respondent nor BOP nor the PHS Physician will consider whether an

inmate has previously tested positive for COVID-19 in making a determination about whether such individuals falls within the definition of the Medically Vulnerable Class for purposes of this Section.

- e. Determinations about whether any Non-List Inmate is a recognized member of the Medically Vulnerable Class will be based solely on BOP records, unless (1) the inmate at issue has been in BOP custody for less than the two consecutive years preceding the date of the inmate's proposal under Section 4(a), or (2) Petitioner's counsel makes a good faith representation that extraordinary and compelling circumstances show the Non-List Inmate has a COVID-19 risk factor(s) which warrant consideration of such outside medical records. In either such instance, the inmate may submit outside medical records to be included in the inmate's BOP records, which—once submitted and made part of the inmate's BOP records—will collectively be reviewed in determining whether an inmate is a member of the Medically Vulnerable Class.

5. To help facilitate the identification of medically vulnerable Non-List Inmates, the parties agree to abide by the following timeline:

- a. Within 1 day of the Effective Date, Petitioner's counsel agrees to provide Respondent medical release forms for certain inmates currently housed at FCI Danbury.
- b. Within 7 days of the Effective Date, Respondent or BOP will begin producing to Petitioner's counsel the past two years of medical records for each inmate on behalf of whom Petitioner's counsel submits a medical release form pursuant to Section 5(a). Respondent or BOP will finish producing all such records within 14

days of the Effective Date.

- c. Respondent will continue to undertake efforts to identify medically vulnerable to COVID-19 inmates who have arrived or will arrive at FCI Danbury after June 3, 2020 pursuant to Attorney General Barr's March 26 and April 3, 2020 memoranda. Respondent will ensure that each inmate admitted to FCI Danbury after June 3, 2020 receives a copy of the attached notice and authorization to release medical records form, attached as Exhibit C to this Agreement (the "Authorization Form"). For those inmates admitted after the Effective Date of this Agreement, Respondent will provide each such inmate a copy of the Authorization Form at the time of their admission. Inmates will be responsible for submitting signed Authorization Forms to Respondent. Within 7 days of Respondent's receipt of a signed Authorization Form, Respondent will provide a copy of the signed form and the inmate's past two years of BOP medical records to Petitioner's counsel.

Medically Vulnerable Non-List Inmate Home Confinement Reviews

6. Respondent agrees to have all Non-List Inmates who are recognized as members of the Medically Vulnerable Class pursuant to the process set forth in Section 4 of this Agreement reviewed for home confinement at the institutional level pursuant to Attorney General Barr's March 26 and April 3, 2020 memoranda, the current BOP guidance at the time of each review, and the standards set forth in the May 12, 2020 TRO (see ECF 30). To the extent that the provisions set forth in the March 12, 2020 TRO differ from Attorney General Barr's March 26 and April 3, 2020 memoranda or the current BOP guidance at the time of each review, the provisions of the May 12, 2020 TRO shall control. Petitioner acknowledges that

Respondent, at the institutional level, may not be authorized to apply provisions of the May 12, 2020 TRO that conflict with current BOP guidance. Respondent agrees to refer all such inmates who are not approved for home confinement at the institutional level to the Home Confinement Committee. BOP agrees to have the Home Confinement Committee make a home confinement determination for all such inmates based upon the standards set forth in the May 12, 2020 TRO (see ECF 30). After the List Two Inmates are reviewed for home confinement, with respect to anyone else subsequently recognized as a Medically Vulnerable Class member under Section 4 of this Agreement, Respondent and BOP shall complete their home confinement review within a reasonable time from recognition and shall endeavor to do so within fourteen days.

Principles Governing Home Confinement Assessments

7. For each inmate reviewed for home confinement pursuant to Section(s) 3, 6, 13, and/or 14 of this Agreement, a medical clinician employed or appointed by Respondent or BOP will verify that all Tier 1 medical conditions and Tier 2 medical conditions that each such inmate has, based on qualifying medical records as set forth in Section 4(e) herein, are identified and listed for consideration at both the institutional and Home Confinement Committee levels of review.

8. In making home confinement determinations under this Agreement pursuant to the May 12, 2020 TRO, including in particular the May 12, 2020 TRO's mandate to "assign substantial weight ... to the inmate's risk factors for COVID-19 based on CDC guidance," Respondent and the BOP agree not to utilize the "high-average-no" risk methodology employed in ECF 92, or consider the fact that any particular inmate may have previously tested positive for COVID-19.

9. BOP's National Health Technology Administrator—or a substitute medical

clinician in the event the National Health Technology Administrator is unavailable—will remain a member of the Home Confinement Committee to assist the Committee’s home confinement reviews.

10. The Respondent will create Review Worksheets for each person being reviewed that include: (i) a list of the person’s CDC tier one and tier two COVID-19 risk factors; (ii) the person’s age; (iii) the offense/s of conviction; (iv) the person’s projected release date (PRD); (v) the percentage of statutory time served; (vi) a list of pending charges or detainers, if applicable; (vii) the person’s security level; (viii) the person’s PATTERN risk level; (ix) if the release plan has been deemed unsuitable, the reasons for that conclusion; and (x) the person’s DST, if he or she has one. The Home Confinement Committee will also use these Review Worksheets in making home confinement determinations. Respondent agrees that if she determines that a Medically Vulnerable Class member is not eligible for home confinement, she will comply with the May 12, 2020 TRO and provide a written explanation of the factual basis for any factors relied upon for the denial.

11. The BOP agrees that if the Home Confinement Committee denies home confinement to a Medically Vulnerable Class member, it will comply with the May 12, 2020 TRO regarding a written explanation of the factual basis for any factors relied upon for the denial. Respondent and BOP agree to provide Petitioner’s counsel copies of the documents generated in the process of conducting home confinement reviews under this Agreement, including the Review Worksheets, the PATTERN Worksheets (i.e., worksheets containing the PATTERN score calculations) and the reason for denial (if the person is denied). The parties agree that the form of the documents produced under this Section will be consistent with the worksheets that have been disclosed in this litigation (see, e.g., ECF 59). BOP will endeavor to

release individuals approved for home confinement to home confinement within 14 days of the approval decision unless public safety or the absence of any home in which to place the inmate would make it unsafe to move the inmate to home confinement within that 14 day period.

Home Confinement Reconsiderations

12. Petitioner's counsel may, based on a good faith belief, submit to Respondent and BOP for the Home Confinement Committee's reconsideration any inmate who was denied home confinement but whose Review Worksheets or PATTERN Worksheets produced to Petitioner's counsel under Section 11 contain an error or mistake of fact, including but not limited to a mistake in the description of an inmate's PATTERN score or percentage of time served, or if the incorrect underlying medical condition(s) is listed on the worksheets for a particular inmate. Respondent and BOP may refuse to submit for reconsideration any such inmate to the extent they disagree on a good faith basis with Petitioner's counsel's determination that an error or mistake of fact exists or that the error or mistake of fact is material, in which case the parties' dispute will be subject to the Dispute Resolution Procedures in Section 23.

13. Respondent and BOP agree to submit the 54 List One Inmates set out in the list attached to this Agreement as Exhibit B ("Exhibit B Inmates") to the Home Confinement Committee for it to reconsider their denials of home confinement. The Home Confinement Committee's re-review for home confinement of the Exhibit B Inmates will comply with Sections 7 through 11 of this Agreement, and is subject to enforcement under this Agreement.

14. The BOP agrees that, if an inmate's lack of a release plan is, or is among, the reason(s) for denial of home confinement, and a suitable release plan is subsequently presented, each such inmate will have the right to apply, on their own initiative, for a home confinement re-review. Such inmates shall be re-reviewed first by the institution, and, if denied again by the institution, then by the Home Confinement Committee. Where a pending charge, detainer, or

warrant is, or is among, the reason(s) for denial of home confinement, and that pending charge, detainer, or warrant has been resolved, each such inmate will have the right to apply, on their own initiative, for a home confinement review. Such inmates shall be re-reviewed first by the institution, and, if denied again by the institution, then by the Home Confinement Committee. All such home confinement re-reviews under this Section will comply with Sections 7 through 11 of this Agreement, and are subject to enforcement under this Agreement. This Section applies to all List Two Inmates and Non-List Inmates, as well as to List One Inmates previously denied home confinement by the Home Confinement Committee.

Resolution and Release of Claims

15. The parties agree that this Agreement resolves all claims in the above-captioned case.

16. The named Petitioner and all members of the Medically Vulnerable Class, as defined in Section 1, individually and behalf of all their respective heirs, beneficiaries, successors and assigns, in consideration of the benefits of this Agreement, release and forever discharge the Respondent and BOP, and all their respective present and former officers, employees, agents, heirs, successors and assigns, from all actions, causes of action, suits, claims, or controversies, for any and all forms of non-monetary relief arising from or based on either: (i) any denial of home confinement or exercise of the BOP's statutory authority to transfer prisoners to home confinement which may be brought during the time this Agreement is in effect, except as otherwise provided under this Agreement, or (ii) any acts or omissions alleged or that could have been alleged in the Action relating to the COVID-19 pandemic occurring prior to the Effective Date. For the avoidance of doubt, this release applies to any and all Medically Vulnerable Class members' habeas corpus cases pursuant to 28 U.S.C. § 2241 seeking any relief

due to the COVID-19 pandemic for acts or omissions occurring prior to the Effective Date. The aforementioned releases do not apply to sentence reduction/compassionate release motions filed pursuant to 18 U.S.C. § 3582.

Duration and Termination of Settlement

17. The parties intend that this Agreement will remain in place until October 31, 2021, but upon the mutual consent of the parties, this date of termination may be modified, shortened or extended. Additionally, the parties may make a motion to extend or motion to terminate this Agreement based on any substantial change in circumstances related to the COVID-19 pandemic's effect on FCI Danbury or other good faith basis.

18. Upon termination, without the need for any further order of any state or federal court, all jurisdiction of any court to enforce this Agreement shall end.

Certification of the Settlement Class and Conditional Dismissal

19. This Agreement is not a consent decree and shall not be incorporated into any judgment of the Court. To the contrary, this is a settlement agreement which the parties agree is a fair, reasonable and adequate resolution of this case.

20. The Petitioner shall file a consent motion for certification of the Medically Vulnerable Class within 5 days of the Effective Date. The Medically Vulnerable Subclass shall be defined, as in Section 1, as "any person incarcerated at FCI Danbury anytime from the Effective Date until the termination date of this Agreement, October 31, 2021, unless otherwise modified by the parties pursuant to the terms of this Agreement, who either: (a) is a List One Inmate or List Two Inmate, or (b) possesses one or more underlying medical conditions which, according to current CDC guidance (i.e., the CDC guidance in effect at the time of the individual's home confinement review), either (i) places that inmate at increased risk of severe

illness from COVID-19; or (ii) might place that inmate at an increased risk of severe illness from COVID-19.” Within three days of the consent motion for class certification being granted, Petitioner and Respondent shall jointly move for an Order to Give Notice, and for a fairness hearing, analogous to Fed. R. Civ. P. 23(e).

21. Subsequent to the fairness hearing referenced above, Petitioner and Respondent shall jointly move pursuant to Fed. R. Civ. P. 41(a)(2) to approve this Agreement and to dismiss the Petition subject to the parties’ compliance with the terms of the Agreement. The dismissal shall be with prejudice and without costs as to all claims asserted in the Action by the Medically Vulnerable Class pertaining to home confinement review and all other claims released under Section 16. This dismissal will be without prejudice and without costs to all other claims brought in the Action. The parties agree that the Court shall retain jurisdiction over the parties and this case to the full extent necessary to enforce the terms of the Agreement.

22. Throughout the duration of the Agreement, the parties agree to enforce the Agreement and resolve any dispute, controversy or claim arising out of or relating to this Agreement, only pursuant to the procedures outlined in Section 23 of this Agreement (the “Dispute Resolution Procedures”). The parties understand and agree that, if approved, and the Court consents, the Court will maintain jurisdiction of this action throughout the duration of the Agreement to resolve any disputes which cannot be amicably resolved between the parties pursuant to the Dispute Resolution Procedures set forth in Section 23. If the parties are unable to resolve any such disputes with the assistance of the Settlement Judge, the Court shall retain jurisdiction to enforce the provisions of the Agreement and the Petitioner may seek specific performance of the Agreement.

Dispute Resolution Procedures

23. The following Dispute Resolution Procedures will govern any dispute, controversy or claim arising out of or relating to this Agreement, or any breach or enforcement of this Agreement:

- a. In the event of any dispute, controversy or claim arising out of or relating to this Agreement, or any breach or enforcement of this Agreement, counsel for the parties shall meet and confer with each other before seeking intervention from the Court. The parties agree to meet and confer within 5 days of notice of a dispute.
- b. Either Party may request that the Honorable Thomas O. Farrish, United States Magistrate Judge or, if Judge Farrish is not available, another D. Conn. United States Magistrate Judge (the “Settlement Judge”), participate in a meet and confer, or in a meeting subsequent to a meet and confer, in order to facilitate informal resolution of the issue.
- c. If the parties are unable to resolve their dispute informally, they may seek intervention from the Court.
- d. Petitioner agrees he shall not file a motion for contempt in connection with this Agreement. The Court may not entertain a motion for contempt and the Court may not grant any remedial relief in the nature of a contempt of court finding against Respondent or BOP. If Petitioner prevails on any claim alleging Respondent’s or BOP’s non-compliance with this Agreement, the sole remedy shall be specific performance of this Agreement.
- e. The Petitioner agrees not to seek any attorneys’ fees and/or costs for any time spent in any portion of dispute resolution.

- f. The Home Confinement Committee's substantive determination of whether to place any particular member of the Medically Vulnerable Class on home confinement shall not be subject to judicial review, except that the Court may order the BOP to have the Home Confinement Committee reconsider a home confinement denial that is based upon erroneous factual underpinnings pursuant to Section 12 of this Agreement or a failure to comply with the terms of the Agreement, and may compel specific performance of this Agreement.

Other Provisions

24. This Agreement may be modified only by the mutual written agreement of all parties.
25. This Agreement will not be interpreted against any party as the drafter, and it shall only ever be interpreted as if the organizational headings within the Settlement Terms do not exist.
26. The parties agree that this Agreement may be made public, and Petitioner expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).
27. This Agreement shall in no way be deemed an admission by any party of liability, fault, misconduct, or a violation of any policies, procedures, or federal, state, or local laws or regulations. Neither this Agreement nor the fact of this settlement shall be construed to be, nor shall it be, admissible in any proceeding as evidence of an admission by any party of a violation of any policies, procedures, or federal, state, or local laws or regulations; nor shall this Agreement or the fact of settlement constitute evidence of any admission by any party as to any issue of law or fact. This Agreement is entered into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation. This

Agreement shall only ever be admissible in a proceeding to enforce its terms.

28. It is understood between the parties that certain presently unforeseeable events or conditions, including but not limited to changes in the established treatment practices or standard of care for treatment of COVID-19 infection or the prevalence or effect of COVID-19 in the state of Connecticut, may prevent or obviate the need for compliance with this Agreement. If so, the parties agree to enter into good-faith discussions to attempt to resolve such issues or modify or terminate this Agreement as appropriate. In the event the parties are unable to reach agreement, the Dispute Resolution Procedures in Section 23 shall apply.

29. The provisions of this Agreement may be temporarily suspended or modified in part or in their entirety if the Respondent or her designees determine that a “genuine emergency” exists at FCI Danbury. Genuine emergency means any special circumstances under which it is reasonable to conclude that there is any actual or potential threat to the security of FCI Danbury, or to the safety of the staff, prisoners or other persons within any one of the institution’s facilities. If a “genuine emergency” lasts longer than forty-eight hours, or occurs more than once in a one-week period, Respondent shall report to Petitioner’s counsel, within forty-eight hours except for good cause, the date of the emergency, the nature of the emergency, and which provisions of this Agreement have been temporarily suspended. For the avoidance of doubt, this Section is subject to the Dispute Resolution Procedures in Section 23.

30. Petitioner’s counsel agrees not to seek any attorneys’ fees, costs or expenses of any kind for their past or future work on this case.

Petitioner and Class Representative James Whitted:
By His Counsel

July 27, 2020
Date



David S. Golub
Jonathan M. Levine
Sarah F. Russell
Tessa Bialek
Marisol Orihuela
Alexandra Harrington

Respondent, Diane Easter, Warden of Federal
Correctional Institution at Danbury, in her official
capacity and through her attorneys:

John H. Durham
United States Attorney

July 24, 2020
Date

John B. Hughes
Michelle L. McConaghy
David C. Nelson
Jillian R. Orticelli
Nathaniel M. Putnam
Assistant U.S. Attorneys

24 July 2020
Date

Federal Bureau of Prisons

Darrin Howard
Darrin Howard
Northeast Regional Counsel
Federal Bureau of Prisons

EXHIBIT A

LIST ONE INMATES	
First Three Digits of Register Number	Initials (first name, last name)
792	SA
098	JA
674	AA
326	LA
046	DA
750	MA
652	KA
591	RA
806	MA
333	CA
154	JA
092	JA
684	RA
062	CA
719	GA
244	DB
530	DB
226	CB
008	AB
644	AB
133	SB
063	LB
624	SB
856	AB
122	DB
116	JB
117	HB
161	KB
795	VB
045	DB
866	JB
860	MB
824	KB
249	AB
516	AB
757	KB
071	JB
923	LB
127	LB
156	BB
679	KB
134	KB
008	GB
657	JB
722	CC
087	SC
159	JC

EXHIBIT A

093	AC
652	EC
766	IC
161	DC
260	NC
724	BC
728	JC
916	WC
212	RC
635	KC
763	AC
614	JC
608	IC
363	CC
291	SC
477	CC
706	AC
959	JC
658	MD
261	KD
857	ED
674	OD
798	RD
070	AD
212	SD
262	MD
636	ED
054	RD
695	JD
251	CD
200	DD
041	DD
141	TD
133	HD
120	CD
969	ED
516	MD
511	AE
892	LE
857	AE
699	CE
065	FE
353	TE
136	CF
619	RF
796	JF
115	SF
218	CF
284	JF
125	JF
136	CF
746	DF
499	CG

EXHIBIT A

168	OG
129	MG
505	RG
067	DG
776	RG
632	KG
017	CG
302	TG
760	CG
773	JG
182	AG
765	MG
554	KG
415	JG
157	BG
339	JG
088	SG
972	DG
257	CH
706	TH
057	RH
463	DH
967	LH
543	MH
668	VH
216	FH
303	WH
121	TH
965	NH
716	LH
255	JH
051	BH
197	AI
582	RI
146	JI
231	MI
620	CJ
085	BJ
134	CJ
002	WJ
205	BJ
449	RJ
671	LJ
665	SJ
253	DJ
271	EJ
156	FJ
131	TJ
686	VK
394	RK
049	DK
218	GK
134	LL

EXHIBIT A

899	SL
298	BL
134	LL
758	JL
285	JL
103	FL
036	CL
722	AM
561	EM
624	JM
196	DM
126	MM
250	DM
094	EM
114	RM
713	DM
757	YM
698	AM
255	SM
244	JM
864	HM
058	JM
134	KM
010	CM
993	MM
479	BM
177	DM
001	MM
691	CM
076	MM
132	TM
718	GM
218	LM
219	DM
559	TM
722	JM
592	AM
778	RM
356	LM
175	DM
602	JM
252	RM
145	FM
527	NM
470	BM
809	DM
228	MM
010	DM
789	JN
257	MN
108	NN
122	KN
920	CO
224	NO

EXHIBIT A

583	AP
059	TP
652	SP
179	WP
967	SP
619	GP
892	MP
103	IP
137	RP
427	RP
633	MP
135	MP
626	AP
004	CP
766	BP
286	TP
915	KP
560	MQ
892	JR
522	MR
696	RR
241	DR
082	WR
049	KR
344	LR
634	ER
399	GR
123	CR
468	DR
773	WR
826	CR
554	CR
116	NR
632	AR
675	JR
494	AR
945	IR
298	BR
715	KR
261	TR
660	AR
668	RR
116	RR
711	JR
827	KR
249	MS
261	TS
588	SS
507	RS
454	WS
788	DS
867	LS
907	TS

EXHIBIT A

278	DS
274	LS
911	SS
086	RS
180	LS
691	MS
994	JS
219	MS
583	ES
337	TS
252	IS
221	MS
913	MS
791	DS
261	JS
059	MT
718	MT
038	PT
161	JT
256	RT
231	DT
737	CT
207	LT
776	NT
329	FT
486	AT
011	MT
140	ET
655	NT
129	EU
761	MV
170	JV
670	JV
536	AV
496	JV
663	AW
830	DW
838	JW
108	TW
210	JW
248	BW
799	MW
275	KW
306	JW
759	DW
284	MW
223	AW
162	JY
694	CY
040	JY
998	AY
162	MY
260	JZ

EXHIBIT A

LIST TWO INMATES	
First Three Digits of Register Number	Initials (first name, last name)
617	AA
247	SA
325	JA
203	FA
762	EA
717	CA
907	DA
114	RB
230	LB
465	SB
728	MB
927	TB
273	SB
735	RB
352	AB
153	RB
169	AC
158	JC
244	EC
117	JC
020	FC
831	AC
060	AC
612	JC
963	SC
183	JC
522	JC
127	EC
374	FC
714	MD
539	MD
776	JD
256	GD
773	YD
818	SD
273	KD
714	AD
159	VD
892	ME

EXHIBIT A

390	WF
133	OF
158	DF
501	GG
011	WG
129	MG
264	AG
791	MG
138	JH
117	KH
859	BI
012	KK
027	DK
722	KK
860	VL
859	KL
637	EL
985	TL
858	BL
183	AL
434	JL
252	AM
280	AM
161	JM
087	JM
266	RM
854	KM
265	NM
046	MM
646	OM
340	HM
248	BM
248	GM
286	AM
682	SM
115	KM
288	BM
089	JM
251	RM
584	TM
922	SM
011	DO
554	TO
214	CP
462	LP
740	GP
116	JP

EXHIBIT A

761	EP
860	KP
160	DP
377	FP
084	RP
855	AP
497	JP
037	HQ
119	KR
203	JR
880	MR
102	CR
135	TR
158	NR
966	NR
762	JR
260	CS
219	MS
102	CS
675	DS
725	CS
308	DS
197	JS
710	SS
245	TS
501	JT
004	DU
301	TV
069	TW
762	SW
710	JW
926	BW
082	BW
732	MW
057	TW
519	JW
689	DW
051	PY
496	CY

EXHIBIT B

First Three Digits of Register Number	Initials (first name, last name)
792	SA
046	DA
652	KA
719	GA
116	JB
795	VB
159	JC
916	WC
635	KC
291	SC
706	AC
969	ED
516	MD
619	RF
125	JF
136	CF
773	JG
182	AG
765	MG
554	KG
415	JG
339	JG
967	LH
668	VH
303	WH
049	DK
036	CL
722	AM
196	DM
864	HM
244	JM
010	CM
076	MM
718	GM
602	JM
228	MM
257	MN
920	CO
633	MP
286	TP
261	TS
907	TS
691	MS
252	IS

EXHIBIT B

791	DS
261	JS
256	RT
017	DT
486	AT
011	MT
670	JV
838	JW
108	TW
193	JW

Exhibit C

MARTINEZ-BROOKS V. EASTER NOTICE

If you are medically vulnerable to COVID-19, as defined by the CDC, you have the right to expedited consideration for home confinement. This notice informs you of your potential rights if you have **documentation (medical records) of the following conditions:**

- **Obesity** (BMI of 30 or higher)
- **Diabetes**
- **Serious heart conditions** (such as heart failure, coronary artery disease, cardiomyopathies, pulmonary hypertension)
- **Cardiovascular or cerebrovascular disease** (such as hypertension, high blood pressure, or stroke)
- **Chronic Kidney Disease**
- **Liver Disease**
- **Chronic Lung Disease** (such as COPD, emphysema and chronic bronchitis, idiopathic pulmonary fibrosis, or cystic fibrosis)
- **Asthma** (moderate-to-severe)
- **Cancer**
- **Immunocompromised state** (from blood, bone marrow, or organ transplant; immune deficiencies; HIV; use of corticosteroids; or use of other immune weakening medicines)
- **Hemoglobin Disorders** (such sickle cell disease and thalassemia)
- **Neurologic conditions** (such as dementia)
- **Pregnancy**
- **Smoking**

If you believe you are medically vulnerable to COVID-19 based on the above criteria, please contact or have your attorney contact Attorney Jonathan Levine at jlevine@danburylawsuit.com or at 184 Atlantic Street, Stamford, CT 06902.

Please provide the following information:

Your name, register number, medical condition(s), medications you are taking, and any other information you think is important.

In order to be considered for home confinement pursuant to the *Martinez-Brooks* lawsuit, you must sign the attached records release form and return it to your case manager so that the *Martinez-Brooks* lawyers can access your BOP medical records.

(Once you have submitted the release, you should also contact the lawyers to let them know to expect your release form.)

U.S Department of Justice

Certification of IdentityFORM APPROVED OMB NO.
1103-0016 EXPIRES 05/31/2020

Privacy Act Statement. In accordance with 28 CFR Section 16.41(d) personal data sufficient to identify the individuals submitting requests by mail under the Privacy Act of 1974, 5 U.S.C. Section 552a, is required. The purpose of this solicitation is to ensure that the records of individuals who are the subject of U.S. Department of Justice systems of records are not wrongfully disclosed by the Department. Requests will not be processed if this information is not furnished. False information on this form may subject the requester to criminal penalties under 18 U.S.C. Section 1001 and/or 5 U.S.C. Section 552a(i)(3).

Public reporting burden for this collection of information is estimated to average 0.50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Suggestions for reducing this burden may be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Public Use Reports Project (1103-0016), Washington, DC 20503.

Full Name of Requester ¹ _____

Citizenship Status ² _____ Social Security Number ³ _____

Current Address _____

Date of Birth _____ Place of Birth _____

OPTIONAL: Authorization to Release Information to Another Person

This form is also to be completed by a requester who is authorizing information relating to himself or herself to be released to another person.

Further, pursuant to 5 U.S.C. Section 552a(b), I authorize the U.S. Department of Justice to release any and all information relating to me to:

Print or Type Name

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more than \$10,000 or by imprisonment of not more than five years or both, and that requesting or obtaining any record(s) under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) by a fine of not more than \$5,000.

Signature ⁴ _____ Date _____

¹ Name of individual who is the subject of the record(s) sought.

² Individual submitting a request under the Privacy Act of 1974 must be either "a citizen of the United States or an alien lawfully admitted for permanent residence," pursuant to 5 U.S.C. Section 552a(a)(2). Requests will be processed as Freedom of Information Act requests pursuant to 5 U.S.C. Section 552, rather than Privacy Act requests, for individuals who are not United States citizens or aliens lawfully admitted for permanent residence.

³ Providing your social security number is voluntary. You are asked to provide your social security number only to facilitate the identification of records relating to you. Without your social security number, the Department may be unable to locate any or all records pertaining to you.

⁴ Signature of individual who is the subject of the record sought.

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES WHITTED, individually, and on	:	
behalf of all others similarly situated,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. No. 3:20 cv 569 (MPS)
	:	
DIANE EASTER, Warden of Federal	:	
Correctional Institution at Danbury	:	
in her official capacity	:	
	:	
Respondent.	:	AUGUST 3, 2020

DECLARATION OF SARAH F. RUSSELL

I, Sarah F. Russell, hereby declare pursuant to 28 U.S.C. § 1746:

1. I am a Professor of Law at Quinnipiac University School of Law and Director and Supervising Attorney in the School of Law's Legal Clinic. I serve as counsel to the Petitioner in this case.
2. I make this declaration in support of Petitioner's motion for class certification, consented to by Respondent's counsel. This declaration is based on my personal knowledge.
3. As Director of the Legal Clinic, I oversee the Clinic's litigation and other projects. My practice, and that of the Clinic's law student interns, includes litigating prison conditions cases in federal court and representing incarcerated clients on a range of other matters include compassionate release motions in federal court, parole hearings, habeas petitions, and reentry planning.
4. Along with law student interns at Legal Clinic, I have litigated numerous cases involving prisoners in the U.S. District Court for the District of Connecticut. *See, e.g., United States v.*

Almontes, No. 3:05-CR-58 (SRU), 2020 WL 1812713 (D. Conn. Apr. 9, 2020) (compassionate release motion granted on behalf of man at FCI Danbury based, *inter alia*, on BOP's failure to provide adequate medical care for his spinal cord injury); *Bardo v. Wright*, No. 3:17-CV-1430 (JBA), 2019 WL 5864820 (D. Conn. Nov. 8, 2019) (court denied summary judgment in case alleging deliberate indifference to client's serious medical needs); *Brodeur v. Champion*, No. 3:17 CV 1738 (RMS) (D. Conn.) (litigated through trial prisoner excessive force case); *Milner v. Black*, 3:16-cv-1621 (SRU) (D. Conn.) & *Milner v. Mulligan*, 3:16-cv-1857 (D. Conn.) (appointed pro bono counsel to incarcerated client asserting claims of excessive force and deliberate indifference to his medical needs); *Jane Doe v. Corrections, et. al*, 3:14-cv-00469-RNC (D. Conn.) (appointed guardian ad litem in case challenging transfer by the Department of Children and Families of 16-year-old transgender girl to adult prison absent charges or conviction in adult court); *Goode v. Blue*, No. 3:10CV135-MRK (D. Conn.) (appointed pro bono counsel for client alleging assault by a correctional officer at Connecticut's supermax prison).

5. Prior to joining Quinnipiac, I served as Director of the Liman Public Interest Program at Yale Law School, where I led projects, research, and workshops relating to incarcerated people and litigated prison conditions cases with the Jerome N. Frank Legal Services Organization's Prison Legal Service Clinic and Complex Federal Litigation Clinic. *See, e.g., Forde v. Baird*, 720 F. Supp. 2d 170 (D. Conn. 2010) (successfully challenged on religious freedom grounds the BOP's policy of subjecting a Muslim woman to non-emergency pat searches by male correctional officers at FCI Danbury); *Ilina v. Zickefoose*, 591 F. Supp. 2d 145, 145 (D. Conn. 2008) (habeas petition filed under 28 U.S.C. § 2241 on behalf of woman incarcerated at FCI Danbury alleging denial of adequate medical care). I was previously an assistant federal defender in the District of Connecticut, where I represented clients facing federal criminal

charges from arraignment through appeal. I also served as a law clerk in the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit.

6. Tessa Bialek is the Senior Clinical Fellow and Staff Attorney at Quinnipiac's Legal Clinic, where she has worked since 2016. In this role, she has worked on litigation involving state and federal prisoners, including amicus briefs addressing issues related to long sentences for juvenile offenders, juvenile parole hearings under Connecticut's Public Act 15-84, and prison conditions cases, including claims of inadequate medical care, in federal court. Prior to joining the Legal Clinic, she clerked for federal judges on the U.S. District Court for the District of Connecticut and the U.S. Court of Appeals for the Second Circuit, and co-led the San Francisco Affirmative Litigation Project at Yale Law School, which partners with the San Francisco City Attorney's Office to conceive, develop, and litigate consumer protection and other public interest-focused lawsuits.

7. I have worked with Attorney Bialek and law student interns on all aspects of the current litigation. To investigate the claims underlying this litigation, we have communicated with hundreds of persons currently incarcerated at FCI Danbury, with several persons recently released from FCI Danbury, and with dozens of family members of people currently incarcerated at FCI Danbury. We have also communicated with more than 100 attorneys representing individuals currently incarcerated at FCI Danbury, including federal public defenders in Connecticut and in districts across the country. Over the course of these communications, we have received and reviewed dozens of compassionate release submissions and other court documents, as well as medical records, grievances, and other documents from individuals currently and recently incarcerated at FCI Danbury.

8. In developing legal claims and charting a course of action in this case, we have collaborated with prison litigation experts nationwide, as well as with attorneys pursuing similar class claims in federal courts across the country. Informed by these resources and independent research, counsel identified Homer Venters, M.D., and Jaimie Meyer, M.D., M.S., F.A.C.P., to serve as experts in the case. Dr. Venters conducted an inspection of FCI Danbury on May 27, 2020, where he observed the conditions in medical, isolation, and housing facilities and spoke with a number of staff members and incarcerated people at FCI Danbury. He prepared an expert report based on his observations. Dr. Meyer has been involved in the process of identifying medically vulnerable individuals (including developing relevant ICD-diagnostic code searches and prepared an expert report. Both experts have advised the team on a range of COVID-19 issues in correctional settings.

9. In addition, we have reviewed voluminous discovery in this case, including more than 20,000 pages of documents related to, *inter alia*: the home confinement review process at FCI Danbury and at the Home Confinement Committee; FCI Danbury's policies and practices related to the provision of medical care generally and during the COVID-19 pandemic, including medical records; pandemic response-related policies and practices, including those pertaining to testing, sanitation, hygiene, protective equipment, physical distancing, quarantine, and isolation; and staffing, including medical staffing, at the institution. Petitioner's counsel deposed the two defense experts, Asma Tekbali and Jeffery Beard, as well Warden Diane Easter, Health Services Administrator Angela Dukate, Case Manager Coordinator Ashley Cocho, and FCI Danbury Union President Drew Ueberroth.

EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES WHITTED, individually, and on	:	
behalf of all others similarly situated,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. No. 3:20 cv 569 (MPS)
	:	
DIANE EASTER, Warden of Federal	:	
Correctional Institution at Danbury	:	
in her official capacity	:	
	:	
Respondent.	:	AUGUST 3, 2020

DECLARATION OF MARISOL ORIHUELA

I, Marisol Orihuela, hereby declare pursuant to 28 U.S.C. § 1746

1. I am a Clinical Associate Professor of Law at Yale Law School and a Supervising Attorney at the Jerome N. Frank Legal Services Organization (LSO). I serve as counsel to the Petitioner in this case.
2. I make this declaration in support of Petitioner's motion for class certification, consented to by Respondent's counsel. This declaration is based on my personal knowledge.
3. My practice, and that of law student interns of the LSO, includes complex habeas litigation, complex civil rights litigation, and class actions, including specifically on behalf of incarcerated populations.
4. One of the clinics at LSO that I co-direct is lead class counsel in a Rule 23(b)(2) class action brought on behalf of immigration detainees challenging prolonged no-bond detention. *Reid v. Donelan*, CV 13-30125 PBS (D. Mass), 19-787, 19-1900 (1st Cir.). In addition, I have previously been involved in Rule 23(b)(2) class actions involving the rights of incarcerated

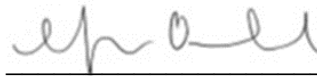
populations. *See Franco-Gonzalez-Holder*, CV 10-02211 DMG (C.D. Cal) (class action successfully establishing right to counsel on behalf of immigration detainees who are not competent to represent themselves in removal proceedings); *Rosas v. Baca*, CV 12-00428 DDP (C.D. Cal) (class action challenging deputy-on-inmate violence at the Los Angeles County Jail).

5. I and law student interns at LSO have also previously litigated numerous complex habeas challenges, including recent challenges to incarceration based on COVID-19. *See e.g., JSR v. Sessions*, CV 18-1110 VAB (D. Conn.) (habeas action on behalf of detained children challenging Immigration and Customs Enforcement (ICE)'s family separation and detention practice); *Campbell, et al v. Moniz*, CV 20-10697 PBS (D. Mass) (multi-petitioner COVID-19 habeas on behalf of immigration detainees); *Terwilliger v. Cook*, CV 20-540 SRU (D. Conn) (COVID-19 habeas on behalf of state prisoner); *Hurdle v. Cook*, CV 20-605 KAD (D. Conn) (same); *Diaz v. Cook*, CV 20-653 KAD (D. Conn) (same). In addition, I and law student interns at LSO also have experience litigating complex civil rights actions. *See, e.g., Thiersaint v. DHS*, CV 18-12406 DJC (D. Mass) (Federal Tort Claims Act action seeking damages for torts committed while plaintiff was in ICE custody); *Batalla-Vidal v. Wolf*, CV 16-4756 NGG (E.D.N.Y), 18-845 (2d. Cir.), 18-889 (Sp Ct) (successful challenge to Trump Administration's 2017 attempted termination of the DACA program). Prior to becoming a clinical law professor, counsel served for three and a half years as a Deputy Federal Public Defender in the Central District of California, where she defended complex federal prosecutions mostly for an incarcerated population.

6. Through the course of this litigation thus far, law student interns working under my supervision have conducted legal research, reviewed discovery, investigated the claims asserted

by Petitioner, and drafted documents. They have also appeared with me in the course of settlement negotiations, and assisted Petitioner's counsel during the course of those negotiations.

I declare that the foregoing is true and correct to the best of my knowledge.

A handwritten signature in black ink, appearing to read 'M. Orihuela', written over a horizontal line.

Marisol Orihuela
Clinical Associate Professor of Law

EXHIBIT 4

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES WHITTED, individually, and on	:	
behalf of all others similarly situated,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. No. 3:20 cv 569 (MPS)
	:	
DIANE EASTER, Warden of Federal	:	
Correctional Institution at Danbury	:	
in her official capacity	:	
	:	
Respondent.	:	AUGUST 3, 2020

DECLARATION OF DAVID S. GOLUB

David S. Golub does declare, under penalty of perjury, as follows:

1. I am a member of the law firm of Silver Golub & Teitell LLP, attorneys for petitioner Whitted and the proposed Settlement Class in this action. I submit this Declaration in support of petitioner's pending Motion for Certification of a Settlement Class in this action and to describe the qualifications and class action experience of my firm and the work we (and our co-counsel) have performed in this action.

Efforts of Class Counsel and Resources Committed to the Class

2. Commencing in April 2020, my firm – predominantly, my partner Jonathan M. Levine and I – undertook, in combination with co-counsel from the Quinnipiac and Yale legal clinics, to bring this proposed class action on behalf of individuals at FCI Danbury imperilled by the COVID-19 pandemic. In April 2020, FCI Danbury had been identified as one of the institutions in the federal Bureau of Prisons most severely affected by the COVID-19 pandemic,

and the BOP had, at that point, made virtually no use of its home confinement authority to protect prisoners at risk from COVID-19.

3. My firm agreed to participate in the litigation understanding that our participation would entail a considerable investment of time and resources. Petitioners' claims in this matter involved significant legal complexity and difficulty and had to be litigated in an extremely time-intensive fashion in light of the urgency of the risk faced by medically vulnerable prisoners from the presence of COVID-19 in FCI Danbury.¹ Within approximately two weeks of forming the legal team, counsel had made extensive contacts with a significant number of FCI Danbury prisoners through the Corrlinks system as well as communications with family and outside counsel, had reviewed pleadings from similar cases being filed against other federal and state facilities throughout the country, and had assembled and filed a 71-page Petition for Writ of Habeas Corpus accompanied by 14 declarations, compellingly detailing petitioners' allegations concerning the conditions at FCI Danbury and the dangers to medically vulnerable inmates in the institution. Three days after the filing of the original Petition, the team filed an Emergency Motion for a Temporary Restraining Order supported by an extensive memorandum of law and eight additional declarations.

4. On May 12, 2020, after a hearing on May 6, 2020, the Court entered a temporary restraining order ("TRO") providing procedures for the identification and consideration for home confinement release of medically vulnerable Danbury inmates, and scheduled a hearing on petitioners' motion for a preliminary injunction.

¹ In the three months that have elapsed since the initiation of this matter, the parties and the Court have generated more than 130 entries on the Court docket.

5. Subsequent to the entry of the TRO, we undertook oversight of the BOP's process for identifying medically vulnerable individuals at Danbury as mandated by the TRO. We also undertook extensive discovery in preparation for the preliminary injunction hearing, including serving and responding to written discovery; review of over 30,000 pages of discovery production; and multiple depositions of FCI Danbury staff responsible for both the administration of the health care system at the facility and the process for home confinement review. We retained experts on both the public health and prison management issues arising from the presence of COVID-19 at FCI Danbury, undertook an inspection of the facility, and completed depositions of petitioners' and respondent's experts. All of this – involving hundreds of hours of legal time – was accomplished by early June 2020. Simultaneous with these efforts to litigate this case, the team maintained regular contact with prisoners at the facility, their families, attorneys and other representatives, fielding and generating well over 2,000 communications on behalf of several hundred prisoners.

6. Attorney Levine and I have personally devoted several hundred hours of time to this action; and, as the litigation intensified in preparation for the preliminary injunction hearing, four associates at my firm also became significantly involved in the representation, and also devoted substantial time to this action.

7. After this matter was prepared for hearing on petitioners' Motion for Preliminary Injunction, the parties agreed to enter into settlement discussions under the aegis of Magistrate Judge Thomas Farrish. Those discussions proceeded over 9 separate sessions (encompassing more than 38 hours), stretched over a calendar month, and ultimately resulted in an agreement in principle. Subsequent to that agreement, reported to Judge Farrish on July 8, 2020, the parties

engaged in extensive discussions among themselves to produce the written Settlement Agreement which was finalized on July 27, 2020 subject to the Court's approval after a fairness hearing.

8. Attorney Levine and I, and all counsel for petitioner and the proposed Settlement Class, believe that the agreement we have reached provides significant benefit to the proposed class of medically vulnerable prisoners at FCI Danbury. The TRO entered by the Court in this matter – which set standards and a process for identifying medically vulnerable inmates at FCI Danbury and evaluation medically vulnerable inmates for home confinement release, but carefully did not supersede the BOP's authority to make ultimate decisions about such release – was, unlike other orders involving federal correctional institutions, not challenged on appeal by the Bureau of Prisons and is one of fewer than a handful of emergency orders affecting federal and state facilities entered nationwide that have not been reversed or stayed on appeal. As a result of the continued vitality of the Court's TRO, we were able to negotiate a Settlement Agreement that provides, in accordance with the standards set forth by the Court in the TRO, for identification of medically vulnerable prisoners at FCI Danbury who meet criteria set forth in relevant CDC guidance – importantly, including whether such prisoner's medical conditions are scientifically established as or merely suspected of putting the individual at risk of severe illness from COVID-19. Further, and, we believe, a unique result among any COVID-related prison cases in the country, the Settlement Agreement accords medically vulnerable individuals at FCI Danbury expedited home confinement consideration subject to the standards originally mandated by the Court in its May 12, 2020 TRO (including substantial weight accorded to the prisoners'

medical conditions and a prohibition against the use of automatic disqualifiers), which the BOP has agreed to adhere to in future FCI Danbury home confinement determinations.

9. I have reviewed the Declaration of Professor Sarah Russell, co-counsel in this matter, and concur in her description and analysis of the prosecution of this litigation by the team representing the named petitioner(s) and the proposed class.

The Experience of My Firm with Class and other Complex Litigation

10. Silver Golub & Teitell LLP has extensive experience in class action litigation and in assessing the reasonableness of class action settlements, having served as lead class counsel in a number of federal and state court class actions. *See State Employees Bargaining Agent Coalition et al. v. Rowland, et al.*, 3:03-cv-221 (AVC) (D. Conn.) (class action against former Governor of State of Connecticut on behalf of unionized State workforce challenging decision to target union members for lay-off in retaliation for their and their unions' exercise of their First Amendment rights of speech and association, resulting in back pay and other relief to approximately 2,800 workers who suffered adverse employment action and compensatory damages to an additional 45,000 state workers for the chilling of their First Amendment rights); *Oshonya Spencer, et al. v. Hartford Financial Services Group, Inc.*, 3:05-cv-1681 (JCH) (D. Conn.) (class action against national insurance company and its property and casualty subsidiaries on behalf of almost 22,000 nationwide class members challenging structured settlements entered into by defendant with personal injury claimants resulting in the creation of a \$72.5 million common fund); *Anglim v Xerox Corporation*, Civ. No. B-83-251 J(EBB) (D. Conn.) (class action resulting in increased benefits to a class of approximately 40,000 members of Xerox's pension plan); *Christiansen v. Chesebrough Pond's, Inc.*, No. 592 CV 727 (AHN) (D.

Conn.) (class action resulting in severance awards to a class of 45 former employees of Chesebrough Pond's); *Town of New Hartford et al. v. Connecticut Resources Recovery Authority*, 291 Conn. 433 (2009) (class action on behalf of 70 Connecticut municipalities resulting in judgment in excess of \$35 million); *see also Heidgerd v. Olin Corporation*, Civ. No. N-86-51 (TFGD) (D. Conn.), *aff'd*, 906 F.2d 903 (2d Cir. 1990) (action on behalf of 178 former employees of Olin Corp resulting in award of severance benefits to all plaintiffs); *Rodriguez v. Progressive Northwestern Insurance Company*, No. UWY CV-00-0160554 S (X06) (Conn. Super. CLD at Waterbury) and *Diglio v. Nationwide Mutual Insurance Company*, No. UWY-CV-00-0161135 (X06) (Conn. Super. CLD at Waterbury) (class actions pursuant to the Connecticut Unfair Trade Practices Act and Unfair Insurance Practices Act on behalf of 814 and 129 personal injury claimants respectively whose personal injury claims were improperly settled by the defendant insurance companies in violation of Conn. Gen. Stats. § 52-572a).

11. As noted above, Jonathan Levine and I have been the principal attorneys in our firm responsible for this litigation from the outset. I am a graduate of Yale College (1970) and Yale Law School (1973). I helped found and have been a partner at Silver Golub & Teitell since it was formed in 1978. Attorney Levine is a graduate of Harvard College (1986) and Yale Law School (1990). He joined the firm in 1990 upon graduation from law school, and became a partner on January 1, 1999. Both Attorney Levine's and my practices have focused on trial and appellate litigation of complex matters, and he and I have litigated together the substantial majority of the cases referred to above.

12. My firm has, further, been previously involved in class action litigation involving prison conditions at FCI Danbury. *See Miles, et al v. Bell*, Nos. B-79-137 (TFGD) & B-82-626 (TFGD) (D. Conn.), an action that resulted, mid-trial, in “voluntary” changes by the BOP in the conditions for pre-trial detainees at Danbury.

13. My firm is, further, currently involved in a number of proposed class actions in this District and other federal and state courts around the country. *See e.g., Curtis, et al v. Aetna Life Insurance Co.*, 3:19 cv 1579 (MPS) (D. Conn); *Dill, et al v. JPMorgan Chase Bank, N.A.*, 1:19 cv 10947 (KLF) (S.D.N.Y.); *Hubbard, et al v. Google, LLC, et al*, 5:19 cv 7016 (BLF) (N.D. Cal.); *Rochester Drug Co-operative, Inc., et al v. Mylan, Inc.*, 0:20 cv 827 (ECT) (D. Minn.); *Thornley, et al v. Clearview AI, Inc.*, 1:20 cv 3843 (N.D. Ill.) (SLC); *Retirement Programs of the Town of Fairfield, et al v. Allianz Global Investors US LLC*, 1:20 cv 5817 (KLF) (S.D.N.Y.).

14. My firm also has extensive experience in litigating other complex actions. *See, e.g., State of Connecticut v. Philip Morris, Inc., et al.*, CV 96 0072414 S (Conn. Super. CLD at Waterbury); *United States ex rel. Douglas D. Keeth v. United Technologies Corporation*, Civ. No. H-89-323 (AHN) (D. Conn.). In *State of Connecticut v. Philip Morris*, my firm served as private lead counsel for the State of Connecticut in the State’s sovereign enforcement action against the tobacco industry, a case involving substantial CUTPA claims for relief. An independent panel of three former attorneys general concluded that the contribution of Connecticut’s legal team to the national settlement was among the top five of the 57 states and other entities participating in the nation-wide settlement. This determination resulted in an increase in Connecticut’s share of the national settlement by over \$350,000,000. In *United*

States ex rel. Keeth, my firm represented the relator in a complex False Claims Action brought against United Technologies Corporation, resulting in a settlement of \$150,000,000 on behalf of the United States Government, then the largest such recovery under the False Claims Act.

15. Based on the foregoing, we respectfully submit that my firm has the qualifications and experience to serve as Class Counsel in this action.²

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

Executed on August 3, 2020.

/s/ David S. Golub
DAVID S. GOLUB

² To the extent that Rule 23(g)(1)(iv) requires the Court to make findings concerning the “resources that counsel will commit to representing the class, my firm has specifically agreed to assume responsibility for the litigation expenses associated with this litigation, including expert fees, deposition and transcripts fees, and discovery document-related expenses. In the event the Court certifies the proposed Class and approves the fairness of the proposed settlement, my firm remains committed to defraying the costs associated with the administration of the settlement.

EXHIBIT 5

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES WHITTED, individually, and on	:	
behalf of all others similarly situated,	:	
	:	
Petitioner,	:	
	:	
v.	:	Civ. No. 3:20 cv 569 (MPS)
	:	
DIANE EASTER, Warden of Federal	:	
Correctional Institution at Danbury	:	
in her official capacity	:	
	:	
Respondent.	:	AUGUST 3, 2020

DECLARATION OF ALEXANDRA HARRINGTON

I, Alexandra Harrington, hereby declare pursuant to 28 U.S.C. § 1746:

1. I am an Associate Professor of Law at the University at Buffalo School of Law and Director of the Criminal Justice Advocacy Clinic. I serve as counsel to the Petitioner in this case.
2. I make this declaration in support of Petitioner's motion for class certification, consented to by Respondent's counsel. This declaration is based on my personal knowledge.
3. As Director of the Criminal Justice Advocacy Clinic, I will represent clients and supervise students in their handling of criminal and post-conviction proceedings.
4. Prior to joining the University at Buffalo I was a Senior Liman Fellow in Residence at the Liman Center for Public Interest Law at Yale Law School.
5. At the Liman Center I supervised law students working on criminal justice reform projects. These projects included preparing testimony and recommendations for the U.S. Commission on Civil Rights at a briefing on Women in Prison, providing comments on proposed

New York State regulations on the use of restrictive housing in prisons, and surveying the administrators of U.S. prisons and compiling a report on the national use of solitary confinement.

6. During my time at Yale Law School I also advised students working on resentencing cases, motions to correct an illegal sentence, sentence modifications, and parole hearings. I continued work started while a public defender on an appeal from the denial of a habeas corpus petition in a case involving a claim of actual innocence. I participated in the Criminal Justice Clinic at Yale Law School; students in the clinic represent defendants in criminal cases in New Haven. I also supervised in the Media Freedom & Information Access Clinic law students working on a project related to criminal system information access in Connecticut.

7. From January 2020 to the present I served as a member of the Subcommittee on Successive Petitions as part of the Connecticut Legislature's Habeas Corpus Matters Task Force.

8. Before joining Yale Law School I was a Deputy Assistant Public Defender in the Connecticut Division of Public Defender Services. I worked in the Innocence Project / Post-Conviction Unit from 2014-2018. During my time in that office I represented clients in habeas corpus proceedings in state court, in appeals in the state appellate and supreme court, in motions to correct an illegal sentence, and in parole hearings before the Connecticut Board of Pardons and Paroles. I also second-chaired two felony trial cases from investigation through pre-trial (resolution post-jury selection and -motions but pre-trial) in the New Haven Judicial District. In addition to individual client representation, I also coordinated the division's representation of individuals who were juveniles at the time of the crime and who had been sentenced to lengthy prison terms in adult court. This involved providing training, written samples, guides, and other resources to attorneys working on these cases.

9. As part of this case and with co-counsel, I have communicated with hundreds of persons currently incarcerated at FCI Danbury, with several persons recently released from FCI Danbury, and with dozens of family members of people incarcerated at FCI Danbury. I have also communicated with dozens of attorneys representing individuals currently incarcerated at FCI Danbury. As part of this investigation, I have reviewed medical records, grievances, and other documents from individuals currently and recently incarcerated at FCI Danbury.

10. I accompanied Dr. Homer Venters, petitioner's expert in the case, on an inspection of FCI Danbury on May 27, 2020. During the course of this inspection, Dr. Venters observed the conditions in medical, isolation, and housing facilities and spoke with a number of staff members and incarcerated people at FCI Danbury. He prepared an expert report based on his observations.

I declare that the foregoing is true and correct to the best of my knowledge.

/s/
Alexandra Harrington
Associate Professor of Law