UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

AARYANA MALCOLM, LAVELL WILLIAMS, SHELLE BROOKS, KRISTINA BOHNENKAMP, CARRIE CASAREZ, NOELLE DUBRAY, PAULINE HEMICKER, KIMBERLY INABNIT, CASSANDRA KASOWSKI, KRISTEN MARTIN, JOY RAMOS, KELLY SORENSON RAFAI, KATHERINE REED, CHASSTADY WALKER, *on behalf of themselves and a class of similarly-situated individuals*,

Petitioners,

v.

M. STARR, *in her official capacity as Warden of the Federal Correctional Institution*, Waseca, and MICHAEL CARVAJAL, *in his official capacity as Director of the Bureau of Prisons*,

Respondents.

Civil Action No. _____

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRITS OF HABEAS CORPUS

For eight months, the novel coronavirus known as COVID-19 has wreaked havoc on the United States, killing over 275,000 Americans as of December 4, 2020. For eight months, the Centers for Disease Control and experts around the world have promulgated guidelines for how to prevent the spread of this horribly contagious and deadly disease. For eight months, people have been social distancing, scrubbing their hands, and wearing masks.

The Federal Bureau of Prisons ("BOP") and the Warden of the federal prison in Waseca, Minnesota had eight months to implement measures necessary to fulfill their duty—imposed by the U.S. Constitution—to keep prisoners safe. They had eight months to, among other preventative measures, release medically vulnerable prisoners to ensure their safety and decrease the prison population so that remaining inmates could practice social distancing—the cornerstone of reducing transmission of this dangerous respiratory disease.

Despite the months they had to prepare and the detailed guidance they received, the BOP and Warden in Waseca did not take necessary action to prevent the spread of COVID-19 in Minnesota's only all-female federal prison. Instead, the Warden and the BOP rejected requests for release to home confinement filed by non-violent offenders and refused to implement common-sense precautions like social distancing and routinely testing staff. As an unfortunate but unsurprising result of their inaction, when COVID-19 came to Waseca, it spread like wildfire: one positive test in August led to over 400 infected inmates by October. A staggering 70 percent of inmates—approximately 450 women—have contracted the virus in less than three months.

There is no reason to think that the BOP and the Warden will now, after eight months, leap into action and follow the advice they previously dismissed. Indeed, the Warden is actually rolling back protections she previously instituted like closing the cafeteria, and the Respondents are continuing to deny home confinement to medically vulnerable inmates.

Petitioners thus bring this action against the Warden of the Federal Correctional Institution ("FCI") in Waseca and the Director of the BOP on behalf of themselves and a class of individuals incarcerated at FCI-Waseca who are at elevated risk of complications and death from COVID-19, which feeds on precisely the unsafe, congregate conditions in which they are being held. Respondents are aware of the grave dangers posed by COVID-19 and have failed to implement measures to comply with their constitutional obligations to those in their custody. Because of their unlawful and unconstitutional confinement, Petitioners seek declarations and orders requiring: (1) the immediate transfer of Petitioner and class members to home confinement or other appropriate setting; or, in the alternative (2) immediate implementation of the social distancing and hygiene measures essential to lowering the risk of the disease and of death; (3) necessary, legally required modifications for those subclass members who have a qualifying disability under the Rehabilitation Act; (4) adequate medical care for Class Members suffering from symptoms of COVID-19 even after the BOP has considered these individuals "recovered;" (5) Respondents to immediately review Class Members' eligibility for home confinement under the CARES Act in a manner that is neither an abuse of discretion nor arbitrary and capricious.

JURISDICTION

1. Petitioners bring this putative class action pursuant to 28 U.S.C. § 2241 for release from custody that violates the Eighth Amendment to the United States Constitution and the Rehabilitation Act, 29 U.S.C. § 794, and pursuant to 5 U.S.C. § 702 for declaratory and injunctive relief from the same.

2. This Court has subject-matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 2241 (habeas jurisdiction). The Court also has the authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, Federal Rules of Civil Procedure 57 and 65, and by the inherent equitable powers of this Court.

3. This Court has personal jurisdiction over Respondents. At all times relevant to this action Respondent Warden M. Starr has been employed in Waseca, Minnesota, at FCI-Waseca, and all of the actions and omissions complained of herein have occurred and continue to occur in Waseca, Minnesota. Respondent Michael Carvajal has set policies and issued guidance that Respondent Starr has applied at FCI-Waseca and has failed to exercise his authority to protect its prisoners.

PARTIES

Petitioners

Aaryana Malcolm

4. Petitioner Aaryana Malcolm is a 51-year-old woman who has been incarcerated at FCI-Waseca since 2016. She is serving time for a drug offense. Ms. Malcolm has diabetes, stress-induced cardiomyopathy, asthma, and a Body Mass Index (BMI) of 34.3. Due to these conditions and because her BMI falls into the "obese" category, Ms. Malcolm is a medically vulnerable individual who has an increased risk of serious illness or death if she contracts COVID-19.

5. On September 1, 2020, while living in Unit A, Ms. Malcolm tested positive for COVID-19. She was locked in a "range" or wing in the basement with 20 other inmates who tested positive. Over the next two days, she got so weak that the other inmates had to help her eat, shower, and fill out requests for medical attention—all of which were ignored. She was coughing up blood and vomiting. Ms. Malcolm was not permitted to use the phone or computer to contact her family. Only after one guard contacted her caseworker did medical staff come to check Ms. Malcolm's vitals. After discovering that her oxygen level was 74, medical staff rushed Ms. Malcolm to the hospital by ambulance. When she arrived, the doctor said, "My friend, I have to paralyze you and put you on a ventilator or you are going to die." Ms. Malcolm was in the hospital for 10 days.

6. Upon her return to FCI-Waseca, Ms. Malcolm was locked in a room in the medical unit for two weeks. She could only take a few steps at a time and was too weak to dress herself. No one helped her with the daily tasks of getting to the shower, dressing and undressing, or eating. Because she could not get onto the bed on her own, she had to sleep on the floor. She was not given a pillow for four to five days. Ms. Malcolm had to bang on the door to remind medical staff to at least take her vitals. Again, she was not allowed to call or email her family. She did not have access to soup, tea, or hot water, and she was not allowed to have any of her property with her.

7. As of December 8, 2020, Ms. Malcolm is still sick and taking numerous medications that she was not taking before she tested positive for COVID-19. She has coughing spells, asthma attacks, and she frequently becomes dizzy and light-headed. She easily is winded and can only walk a few steps at a time. She had to stop taking her

depression and anxiety medication because the prison required her to walk to a different building to get it, and she is too weak to make the trip. The prison is not treating her diabetes, which Ms. Malcolm did not learn she had until hospital staff told her. Prison staff have rejected her requests for a modified diet for her diabetes, and, as of December 8, 2020, prison staff have not checked her glucose levels since she left the hospital in late September.

8. Because she is scared that she will contract COVID-19 again, Ms. Malcolm avoids the TV rooms in the evenings when inmates crowd together, as well as the phones, where inmates stand closely in long lines. Respondent Starr denied Ms. Malcolm's request for compassionate release on the basis that Ms. Malcolm has "recovered" from COVID-19. If released to home confinement, Ms. Malcolm would live with her mom in Spokane, Washington. She could self-isolate and social distance. She would also have access to medical care.

Lavell Williams

9. Petitioner Lavell Williams is a 46-year-old woman who has been incarcerated at FCI-Waseca for six years. She is serving time for a drug offense. Ms. Williams has chronic kidney disease-stage III, hypertension, and asthma. She is also prediabetic. Ms. Williams is medically vulnerable to COVID-19 and has one or more disabilities recognized by the Rehabilitation Act.

10. After contracting COVID-19 around August 31, 2020, Ms. Williams was sent to the Special Housing Unit (SHU), which typically is used for punishment, after a

nurse said she did not have time to give Ms. Williams a steroid shot, antibiotics, and a breathing treatment. In the SHU, Ms. Williams had to sleep on the floor because the severe back pain caused by her kidney disease made it impossible for her to climb to the top bunk assigned to her. The only time she left her room in the SHU was to use a nebulizer in a dirty supply room.

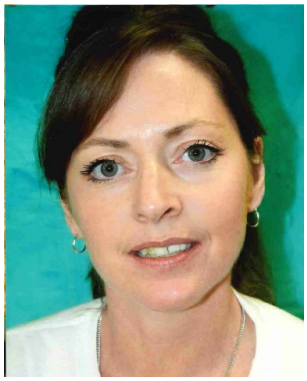
11. Ms. Williams has filed grievances about the failure of Respondent Starr to enact COVID-19 precautions, including but not limited to: the failure to train staff members on moving inmates and how to properly use and dispose of PPE; mixing housing units during work details; and placing new and infected inmates in a unit where people did not have the virus. In at least one written response, Respondent Starr disregarded Ms. Williams's concerns by parroting boilerplate language about the policies of U.S. Centers for Disease Control and Prevention ("CDC") and BOP.

12. Ms. Williams worked as a cleaning orderly before getting sick. The prison never provided her with additional training or cleaning supplies during the COVID-19 outbreak.

13. Ms. Williams is terrified that she will contract COVID-19 again, and that the outcome will be worse than it was before. Respondent Starr had previously agreed to release Ms. Williams to home confinement, and Ms. Williams received two different release dates. But the BOP's "Super Committee" that reviews home confinement under

the CARES[1] Act subsequently blocked her release citing safety concerns, though she has no prior violent offenses. Before Ms. Williams tested positive for COVID-19, Respondent Starr denied her request for compassionate release, stating that her concerns about COVID-19 did not warrant early release. Ms. Williams later resubmitted the request. While it was pending before Respondent Starr, Ms. Williams tested positive for COVID-19. Respondent Starr denied the request again, stating that Ms. Williams was no longer at risk of COVID-19 because she had "recovered." Ms. Williams's motion for compassionate release in federal court is pending. If released to home confinement, Ms. Williams would live with her sister in Davenport, Iowa, where she could self-isolate and social distance. She would also have access to medical care.

Shelle Brooks



14. Petitioner Shelle Brooks is a 47-year-old woman who has been incarcerated at FCI-Waseca since 2014. She is serving time for a drug offense. Ms. Brooks has asthma, hypertension, and Graves' Disease, which is an autoimmune disorder. Although she is supposed to have her blood checked every six months to monitor her Graves' Disease, the BOP failed to monitor her blood for nine months, from February to October 2020. Ms. Brooks's underlying health conditions put her at risk of severe illness or death if she contracts COVID-19, making her a medically vulnerable individual.

[1] Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, § 12003(b), 134 Stat. 281 (2020).

15. As of December 7, 2020, Ms. Brooks has not yet contracted COVID-19, but she is terrified that she will test positive for the virus. Ms. Brooks lives in Unit A, with about 125 women, most of whom have previously tested positive for COVID-19. She works in the UNICOR factory at the prison with inmates from Units A and D.

16. Ms. Brooks applied to Respondent Starr for transfer to home confinement under the CARES Act because of her medical vulnerabilities. While Respondent Starr approved Ms. Brooks's request, the BOP Super Committee subsequently denied it. Ms. Brooks has repeatedly requested an explanation of the denial. She still has not received one. Instead, Respondent Starr informed her that Ms. Brooks was "reviewed on a totality of your circumstances to include medical risk factors, projected release date and PATTERN risk score." Ms. Brooks is filing grievances about the denial and the lack of any specific explanation. Ms. Brooks's motion for compassionate release in federal district court is pending. If released to home confinement, Ms. Brooks would live at her dad's house in Cherokee, Iowa, where she could socially distance and isolate herself. She would also have access to medical care.

Kristina Bohnenkamp

17. Petitioner Kristina Bohnenkamp is a 47-year-old woman who has been incarcerated at FCI-Waseca since 2010. She is serving time for a drug offense. Ms. Bohnenkamp has Hepatitis C and Adult Onset Stills Disease, which is a rare autoinflammatory disorder. The medication she takes for Stills Disease suppresses her

immune system. Ms. Bohnenkamp's underlying health conditions put her at risk of severe illness or death if she contracts COVID-19, making her a medically vulnerable individual.

18. Ms. Bohnenkamp tested positive for COVID-19 on September 1, 2020, after new inmates were brought to Unit A, where she lives. After she contracted the virus, she was moved to a range in the basement with other infected inmates. They were locked in the range together for more than three weeks.

19. In mid-October, Ms. Bohnenkamp went back to work at UNICOR, where she works with inmates from Units A and D. She sleeps in a range that has two to three feet of space between bunkbeds so it is impossible to social distance.

20. Ms. Bohnenkamp is scared of the risk of COVID-19 reinfection at FCI-Waseca. Health services at the prison recommended Ms. Bohnenkamp for home confinement under the CARES Act but Respondent Starr and the BOP Super Committee ultimately denied her release, citing her criminal history. Ms. Bohnenkamp also filed two motions for compassionate release in federal court, which the judge denied. If released to home confinement, Ms. Bohnenkamp would live with her sister in Nevada, Iowa, where she could isolate and social distance. She would also have access to medical care.

Carrie Casarez

21. Petitioner Carrie Casarez is a 50-year-old woman who has been incarcerated at FCI-Waseca since 2015. She is serving time for a drug offense. Ms. Casarez has a BMI of 42, hypothyroidism, hypertension, high cholesterol, osteoarthritis, unspecified urethral disorder, unspecified abdominal pain, and dermatitis. Due to her age,

hypertension, and BMI, Ms. Casarez is a medically vulnerable individual at risk of serious illness or death if she contracts COVID-19.

22. In September, Ms. Casarez, who lives in Unit A, was locked in a range with other inmates who had not yet contracted the virus. As inmates in the range began to fall ill with COVID-19, she watched people struggle to breathe and even move. She eventually tested positive for COVID-19 in mid-September. She had trouble breathing, a persistent cough, diarrhea, and body aches. Ms. Casarez is scared that she will contract COVID-19 for a second time and again face the risk of serious illness or death.

23. Ms. Casarez has no history of violent offenses and her disciplinary record has been clear for at least the past 12 months. She was initially approved for home confinement under the CARES Act and set for release on September 4, 2020—mere weeks before she contracted COVID-19. But the BOP Super Committee ultimately blocked her release, citing the nature of her offense and her history on probation. Respondent Starr and the BOP's Regional Director subsequently denied her grievances on this issue. Ms. Casarez applied for compassionate release through the prison and then in federal district court, where her motion was denied. If released, Ms. Casarez could live with her adult daughter in Roseville, Minnesota, where she would have her own room and could self-isolate and quarantine. She would also have access to medical care.

Noelle DuBray

24. Petitioner Noelle DuBray is a 40-year-old woman who has been incarcerated at FCI-Waseca since it opened in 2009. She is serving time for second-degree murder, and her projected release date is May 3, 2022. She has served 88 percent of her sentence, and the BOP has assigned her a "minimum" security level—the lowest possible level. Ms. DuBray, who has a BMI of 34, anemia, and a persistent cough, is a medically vulnerable individual who has an increased risk of serious illness or death if she contracts COVID-19.

25. In mid-September, Ms. DuBray was locked in a range in Unit A with about 30 other people. She watched as nearly everyone in her range contracted COVID-19. She eventually tested positive on September 18, 2020. She was moved twice after testing positive—first to a different range in Unit A, and then to Unit C. When she reported that she had chest pains, trouble breathing, diarrhea, body aches, and terrible headaches, health services told her to drink water and buy ibuprofen.

26. Ms. DuBray now lives in Unit A and works at UNICOR with inmates from other units. She is scared she will again contract COVID-19. A federal judge denied her motion for compassionate release after Ms. DuBray exhausted her administrative remedies. If released to home confinement, Ms. DuBray would live with her father and daughter, where she could self-isolate and social distance. She would also have access to medical care.

Pauline Hemicker

27. Petitioner Pauline Hemicker is a 37-year-old woman who has been incarcerated at FCI-Waseca for nearly four years. She has a BMI of 44.9 and severe allergies. She is also borderline diabetic. Due to her BMI, Ms. Hemicker is a medically vulnerable individual who has an increased risk of serious illness or death if she contracts COVID-19.

28. Ms. Hemicker lives in Unit A and tested positive for COVID-19 on September 9, 2020. She is still experiencing chest pains and shortness of breath. She gets dizzy easily and is constantly shaking. Months after contracting the virus, she has had to take steroids and other medications, and even use a nebulizer to manage her lingering symptoms. Her medical issues make it difficult for her to work as a sewer at UNICOR, which recently implemented mandatory overtime where she must work 7:15 AM to 8:00 PM during the week and until 3:00 PM on Sundays. She is paid 92 cents an hour. The foreman at UNICOR denied her request to change jobs. If she refuses to go to work, the BOP will send her to the SHU and file an incident report against her, which could lead to additional punishment, including loss of privileges or good-time credit.

29. Ms. Hemicker is familiar with the protracted BOP grievance process, which can last months. Because she believed her life was in danger due to the COVID-19 and the risk of cross contamination in her unit, she requested a "sensitive 10" form, which is a complaint that goes directly to the Regional Director and expedites the grievance process. But five days passed before FCI-Waseca staff gave her this form. When she finally was

able to file the grievance, the Regional Director rejected it, informing her that she could not use the sensitive-10 process for her COVID-related complaint. Ms. Hemicker then started the grievance from the beginning, only to have Respondent Starr reject her complaint for failing to list a date and time. Ms. Hemicker is aware of the regional office returning sensitive-10 complaints about COVID-19 filed by other incarcerated people as well.

30. Ms. Hemicker fears she will contract COVID-19 for a second time. Upon information and belief, Ms. Hemicker has requested home confinement under the CARES Act and compassionate release. If released to home confinement, she would live with her husband in Casper, Wyoming, where she could self-isolate and social distance. She would also have access to medical care.

Kimberly Inabnit

31. Petitioner Kimberly Inabnit is a 52-year-old woman who has been incarcerated at FCI-Waseca since July 2020. She is serving time for a drug offense. Ms. Inabnit has diverticulitis and a BMI of 38.3. Due to her BMI, Ms. Inabnit is a medically vulnerable individual who has an increased risk of serious illness or death if she contracts COVID-19.

32. Ms. Inabnit came to FCI-Waseca from the Grady County Jail in Oklahoma. While in Grady County, she wrote multiple grievances to the BOP about the lack of COVID-19 precautions at the jail. By the time she arrived at FCI-Waseca, she had been exposed to COVID-19 and had a runny nose, headaches, and body aches. During the intake

process at FCI-Waseca, a nurse told her to answer "no" to the question of whether she had been exposed to the virus. Three days later, she tested positive for COVID-19 and was moved from Unit A to the SHU. While there, she was so sick she thought she would die. She was not permitted to call her family, and Respondent Starr told her that COVID-19 was not "detrimental enough" for the prison to inform her emergency contact of her diagnosis.

33. Months after contracting COVID-19, Ms. Inabnit is still sick. She has shortness of breath, regular headaches, sore eyes, a sore throat, and body aches. The prison has ignored her multiple sick calls. After Respondent Starr denied Ms. Inabnit's request for compassionate release, Ms. Inabnit filed a motion in federal district court, which is pending. She is scared she will contract COVID-19 again. If released to home confinement, Ms. Inabnit would live with her niece and nephew in a house in Indianapolis, where she could social distance and self-isolate if necessary. She would also have access to medical care.

Cassandra Kasowski

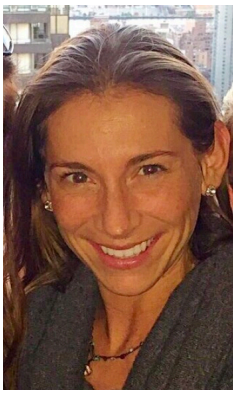
34. Cassandra Kasowski is a 46-year-old woman who has been incarcerated at FCI-Waseca since 2014. She is serving time for a drug offense. Ms. Kasowski has hypertension, a BMI of 33, and mental health issues. Due to her BMI and hypertension, Ms. Kasowski is a medically vulnerable individual who has an increased risk of serious illness or death if she contracts COVID-19. She also has an abnormal lump in her breast.

Although she had a mammogram and ultrasound scheduled at a local hospital, the BOP put her appointment on hold indefinitely due to the COVID-19 pandemic.

35. Around September 2, 2020, Ms. Kasowski asked to be moved from Unit A to Unit D. She made this request because she was scared that the new inmates living in Unit A were infected with COVID-19 and that the Respondents were not taking proper precautions to prevent the virus from spreading. A week later, while still in Unit A, she tested positive for COVID-19, along with approximately 75% of the unit. She had headaches, difficulty breathing, and lost her senses of taste and smell. The nurses told her to buy Tylenol and ibuprofen and drink water. She was not able to contact her family to tell them what was happening.

36. Ms. Kasowski is terrified she will be re-infected with COVID-19. Upon information and belief, Respondents denied her requests for home confinement under the CARES Act, though she has served more than half of her sentence and has a clear disciplinary record at FCI-Waseca. Respondents and then a federal district court judge denied her requests for compassionate release. If released to home confinement, Ms. Kasowski would live with her adult son in Fargo, North Dakota, where she would have her own room and bathroom. She could self-isolate and social distance, and she would have access to medical care.

Kristen Martin



37. Petitioner Kristen Martin is a 39-year-old woman who has been incarcerated at FCI-Waseca since late July 2020. She is serving time for mail fraud and tax evasion. Ms. Martin has moderate-to-severe asthma and experiences shortness of breath, tightness in her chest, wheezing, and coughing.

38. Ms. Martin is one of the few inmates in Unit A who has not tested positive for COVID-19 yet. Upon arrival at FCI-Waseca, Ms. Martin was sent to the SHU for 20 days. While there, she was not allowed to leave her room, or call or email her family. The only property she was permitted was her dental retainer. She was then locked in different ranges in Unit A, as people around her started testing positive for COVID-19. The ranges were crammed with people, and there was no social distancing. Ms. Martin has seen people who tested positive months ago still suffer and struggle to breathe. She is scared she will get COVID-19 because Respondents have not implemented proper precautions to avoid the spread of COVID-19, and she is exposed to prison staff at her job and new inmates in Unit A.

39. Ms. Martin's request for compassionate release is pending with Respondent Starr. If released to home confinement, she would live in her house in Colorado. She would have her own room and could self-isolate and social distance. Ms. Martin would have remote employment and access to medical care.

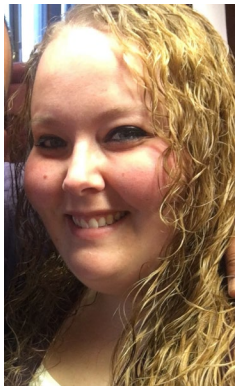
Joy Ramos

40. Petitioner Joy Ramos is a 43-year-old woman who has been incarcerated at FCI-Waseca since 2018. She is serving time for a drug offense. Ms. Ramos has hypertension and a BMI of 57.1. Due to these conditions, Ms. Ramos is a medically vulnerable individual who has an increased risk of serious illness or death if she contracts COVID-19.

41. After Ms. Ramos tested positive for COVID-19 on August 31, 2020, she was brought to the SHU and handcuffed. She was put in a small room in the SHU with another inmate who had COVID-19. Because both inmates had bottom bunk restrictions due to their high BMIs, the other inmate, Petitioner Sorenson Rafai, ended up sleeping on the wet concrete floor. Ms. Ramos is still suffering the effects of COVID-19. She coughs, has trouble breathing, and has to use an inhaler and nebulizer daily. She has also been given antibiotic shots in her buttocks, which were administered in an unsanitary staff bathroom.

42. Ms. Ramos has applied to Respondent Starr for compassionate release twice—both before and after contracting COVID-19. A BOP Super Committee concluded she was not eligible for release under the CARES Act due to a change in the criteria they use to assess release. If released to home confinement, she would live with a friend in Omaha, Nebraska, where she would have her own room. She could quarantine and social distance there. She would also have access to medical care.

Kelly Sorenson Rafai



43. Petitioner Kelly Sorenson Rafai is a 34-year-old woman who has been incarcerated at FCI-Waseca since May of 2019. She is serving time for a drug offense. Because Sorenson Rafi has hypertension and a BMI of 50.4, she is a medically vulnerable individual at increased risk of serious illness or death if she contracts COVID-19.

44. Ms. Sorenson Rafai tested positive for COVID-19 on August 31, 2020 while living in Unit A. She was handcuffed and brought to the SHU, where she was locked in a small room with another inmate who contracted the virus (first, Petitioner Ramos, and later, another inmate). Ms. Sorenson Rafai was in the SHU for 12 days while she suffered from diarrhea, terrible headaches, extreme fatigue, chills, and loss of taste and smell. Her blood pressure also skyrocketed. Every day, she would ask nurses and guards for Tylenol, which she desperately needed. She was told that she had to buy it from the commissary, which was only available to people in the SHU on specific days. For nine days in the SHU, Ms. Sorenson Rafai was not able to purchase medication. She also was made to sleep on a thin mattress on the wet concrete floor because she could not use the top bunk.

45. Ms. Sorenson Rafai has started to feel ill again. She is terrified about getting reinfected with COVID-19 and having to suffer in the SHU, or experience an even worse outcome. Ms. Sorenson Rafai's first application for compassionate release was denied. Her second application for compassionate release has been pending with Respondent Starr since late July. If released to home confinement, she would live with a family friend in St.

Paul, Minnesota, where she could self-isolate and social distance. She would have access to medical care.

Katherine Reed

46. Petitioner Katherine Reed is a 44-year-old woman who has been incarcerated at FCI-Waseca since 2018. She is serving time for a drug offense. Ms. Reed is a lifelong smoker who has a BMI of 26.6. In March 2020, Ms. Reed had gallbladder surgery, which the BOP had delayed for one year. Ms. Reed also suffers from PTSD and has had weekly panic attacks due to her fear of contracting COVID-19. One of the main drivers of her anxiety is the lack of information Respondent Starr provides inmates about COVID-19 at FCI-Waseca. Initially, Respondent Starr posted bulletins that reported the number of COVID-19 cases at the prison. An inmate newsletter delivered by email, Lisa Legal, reported on these numbers as well. But as numbers of COVID-19 infections climbed at FCI-Waseca, Respondents began cutting off access to this information. Ms. Reed was unable to print Respondent Starr's second bulletin and the BOP blocked email access to Lisa Legal and another legal newsletter.

47. Ms. Reed lives in Unit E—the only unit which has not had any COVID-19 infections—but prison administration is seeking to move her to Unit A, where the COVID-19 outbreak at FCI-Waseca began. Ms. Reed has repeatedly objected to the move because she is terrified to live in a unit with new inmates who may have COVID-19. She has written to Respondent Starr about her fears. Recently, Ms. Reed told a lieutenant that she was scared to move to Unit A. He said that if she were truly scared of COVID-19 then she

would not go to the cafeteria to get a "grab-and-go" meal, implying that doing so was not safe. The lieutenant also threatened that Ms. Reed would be sent to the SHU if she refused to move to Unit A.

48. If released to home confinement, Ms. Reed would live in Omaha, Nebraska at a friend's apartment. She would have her own room and could self-isolate and social distance. Ms. Reed would have employment at a restaurant and access to medical care.

Chasstady Walker

49. Petitioner Chasstady Walker is a 36-year-old Native American woman who has been incarcerated at FCI-Waseca since September 1, 2020. She is serving a sentence of 12 months and 1 day for a drug offense, which means her projected release day is June 9, 2021. Ms. Walker has chronic asthma, hypertension, and an arthritic knee that makes it impossible for her to get onto a top bunk. She was hospitalized for kidney stones before self-surrendering at FCI-Waseca.

50. Upon arrival at FCI-Waseca, Ms. Walker reported that she had not been exposed to COVID-19 and did not have any symptoms. She was tested for COVID-19 and then immediately sent to the SHU. Her room in the SHU had black mold growing on the walls and a shower that dripped constantly. Her 69-year-old roommate had already taken the bottom bunk, so Ms. Walker had to sleep on a thin plastic mat on the concrete floor. Two weeks after being in the SHU, she was given another COVID-19 test. She later learned that both of her tests were negative. Despite being COVID-negative, she was kept in the SHU—never leaving the small moldy room—for more than 21 days. The date Ms. Walker was first locked in the SHU was written on a board outside of the door, so anyone

passing by could see how long she had been there. While she was in the SHU, Ms. Walker repeatedly asked the correctional officers and Respondent Starr when she could leave. Even though she had neither tested positive for COVID-19 nor shown any symptoms of the virus, Respondent Starr told her she could leave "when medical figures it out."

51. Ms. Walker was finally transferred to a basement room in Unit A. The bunkbeds in her room are so close together that she can touch the bunk next to hers. Inmates who have previously tested positive for the virus have been placed in her room. Although medical staff told her these inmates are considered "recovered," many of them are still sick. One woman in Ms. Walker's room still did not have a voice several weeks after contracting COVID-19. Due to the risk of cross contamination in Unit A and at the cafeteria, Ms. Walker is terrified of getting COVID-19.

Respondents

52. Respondent M. Starr is the Warden at FCI-Waseca. As Warden of FCI-Waseca, Respondent Starr is responsible for and oversees all day-to-day activity at FCI-Waseca. Respondent Starr is in charge of all aspects of FCI-Waseca's operations and functions. Respondent Starr's responsibilities include ensuring the safety of all in the institution and ensuring its orderly operations. Respondent Starr is aware of and has adopted and enforced policies that leave Petitioners and all those similarly situated exposed to infection, severe illness, and death due to COVID-19. She is the immediate and physical custodian responsible for the detention of Petitioners. Respondent Starr has declined to release inmates who qualify under Department of Justice guidance for release or home

confinement despite having the authority to do so. Petitioners sue Respondent Starr in her official capacity only.

53. Respondent Michael Carvajal is the Director of the BOP. As Director, Respondent Carvajal is responsible for all BOP policies implemented at FCI-Waseca, including those pertaining to resource distribution and factors that BOP facility leadership should consider in determining an incarcerated individual's eligibility for early release. His responsibilities include ensuring the safety of all in the BOP system and ensuring that BOP institutions operate in an orderly fashion. Respondent Carvajal is aware of and has promulgated, adopted, and enforced administrative guidance and policies that leave Petitioners and all those similarly situated exposed to infection, severe illness, and death due to COVID-19. He is sued in his official capacity only.

STATEMENT OF FACTS

The Scope of the Pandemic

54. The novel coronavirus, SARS-CoV-2, is the causal pathogen of the COVID-19 disease, an extremely infectious and deadly virus. COVID-19 has led to a global pandemic of historic proportions. More than 65 million individuals worldwide have tested positive for COVID-19, and more than 1.5 million have died from the disease.[2] This pandemic has affected every corner of the world, with the United States at its epicenter.

[2] *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE)*, Coronavirus Resource Center, Johns Hopkins University, https://coronavirus.jhu.edu/map.html (last visited Dec. 4, 2020).

55. In the United States, more than 14 million individuals have tested positive for COVID-19, and more than 275,000 have died.[3] Every State has recorded numerous positive COVID-19 tests, including Minnesota, which, as of December 7, 2020, has reported 346,152 positive tests and 4,005 deaths.[4]

56. The World Health Organization ("WHO") declared COVID-19 a pandemic on March 11, 2020.[5] On March 13, 2020, the President declared "that the COVID-19 outbreak in the United States constitutes a national emergency."[6] That same day, Minnesota Governor Tim Walz signed Emergency Executive Order 20-01 ("EO 20-01") declaring a state of peacetime emergency.[7]

The Devastating Nature of COVID-19

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[3] *Id*.

[4] Situation Update for COVID-19, Minnesota Department of Health, https://www.health.state.mn.us/diseases/coronavirus/situation.html (last visited Dec. 7, 2020).

[5] *WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020*, World Health Organization (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[6] President Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

[7] Governor Tim Walz, Emergency Executive Order 20-01, *Declaring a Peacetime Emergency and Coordinating Minnesota's Strategy to Protect Minnesotans from COVID-19* (Mar. 13, 2020), https://mn.gov/governor/assets/EO%2020-01_tcm1055-422957.pdf.

57. The catastrophic consequences of the COVID-19 pandemic are due to two major factors: (1) the ease of transmissibility of the infection and (2) the severity of the disease in the human population.

The Ease of Transmissibility of COVID-19

58. COVID-19 is a highly contagious disease. When "unconstrained, the coronavirus spreads exponentially, the caseload doubling at a steady rate."[8] The virus is thought to survive for three hours in the air in droplet form that can be inhaled or transferred to surfaces, surviving up to twenty-four hours on cardboard, up to two days on plastic, and up to three days on steel.[9]

59. SARS-CoV-2 is now known to be fully adapted to human-to-human spread.[10] The virus passes from person to person through respiratory droplets.[11] Individuals may become infected if they breathe in a respiratory droplet containing the virus, have contact with an infected individual within six feet for 15 minutes or more within

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8 Kenneth Chang, *A Different Way to Chart the Spread of Coronavirus*, NEW YORK TIMES (Mar. 20, 2020), https://www .nytimes.com/2020/03/20/health/coronavirus-data-logarithm-chart.html.

9 Neeltje van Doremalen et al., Correspondence, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, NEW ENGLAND J. MEDICINE (Mar. 17, 2020), https://www.nejm.org/doi/full/10.1056/NEJMc2004973.

10 *What you should know about COVID-19 to protect yourself and others*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf ("COVID-19 Fact Sheet").

11 COVID-19 Fact Sheet.

24 hours, or touch a surface that has the virus on it and then touch their mouth, nose, or eyes.[12] Transmission of the virus can occur before the onset of symptoms or through asymptomatic infected individuals.[13]

Severity of the COVID-19 Disease

60. COVID-19 is a very serious disease. The overall case fatality rate for the virus has been estimated to range from 0.3% to 3.5%, which is anywhere from 5 to 35 times the fatality associated with the influenza infection.

61. While approximately 80% of COVID-19 cases are generally mild, overall approximately 20% of cases will have a more severe disease requiring medical intervention and support.[14] Even mild cases of COVID-19 generally involve about two weeks of fevers, dry cough, and shortness of breath, and are more severe than the flu.[15]

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[12] *Id.*; Julia C. Pringle et al., *COVID-19 in a Correctional Facility Employee Following Multiple Brief Exposures to Persons with COVID-19 –Vermont, July-August 2020*, MORBIDITY AND MORTALITY WEEKLY REPORT, 1569-70 (Oct. 30, 2020), http://dx.doi.org/10.15585/mmwr.mm6943e1; *see also* Lena Sun, *CDC expands definition of who is a 'close contact' of an individual with covid-19*, THE WASHINGTON POST (Oct. 21, 2020), https://www.washingtonpost.com/health/2020/10/21/coronavirus-close-contact-cdc/.

[13] Wycliffe E. Wei et al., *Presymptomatic Transmission of SARS-CoV-2—Singapore, January 23 – March 16, 2020*, MORBIDITY AND MORTALITY WEEKLY REPORT, 411–15 (Apr. 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm.

[14] Graham Readfearn, *What Happens to People's Lungs When They Get Coronavirus?*, THE GUARDIAN (Mar. 24, 2020), https://www.theguardian.com/world/2020/apr/15/what-happens-to-your-lungs-with-coronavirus-covid-19.

[15] Holly Secon & Aria Bendix, *There is a wide misconception of what a 'mild' case of COVID-19 looks like. It can be ugly and brutal.*, BUSINESS INSIDER (Apr. 16, 2020), https://www.businessinsider.com/mild-coronavirus-cases-high-fever-dry-cough-2020-3.

62. In severe cases of the disease, COVID-19 can severely damage lung tissue, requiring an extensive period of rehabilitation or possibly a permanent loss of respiratory capacity. In some cases, COVID-19 can even develop into Acute Respiratory Distress Syndrome (ARDS), in which fluid displaces air in the lungs.[16] Patients who develop ARDS have approximately a 40% mortality rate, and are "essentially drowning in their own blood and fluids because their lungs are so full [of fluid]."[17]

63. A severe course of COVID-19 can also cause grave injury to the heart, a condition called myocarditis, either due to direct viral infection or the immune response to the virus.[18] Myocarditis can affect the heart muscle and the heart's electrical system, reducing the heart's ability to pump; this can lead to rapid or abnormal heart rhythms in the short term, and permanent heart failure in the long term.

64. COVID-19 may also trigger an over-response of the immune system, worsening a patient's outcome. This complication can result in widespread damage to other organs, including permanent injury to the kidneys, neurologic injury, multi-system organ failure, and ultimately death.

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16 Lizzie Presser, *A Medical Worker Describes Terrifying Lung Failure From COVID-19—Even in His Young Patients*, PROPUBLICA (Mar. 21, 2020), https://www.propublica.org/article/a-medical-worker-describes--terrifying-lung-failure-from-covid19-even-in-his-young-patients.

17 *Id*.

18 Tian-Yuan Xiong et al., *Coronaviruses and the cardiovascular system: acute and long-term implications*, EURO. HEART J. (Mar. 18, 2020), https://academic.oup.com/eurheartj/article/41/19/1798/5809453.

65. A statistically significant correlation exists between SARS-CoV-2 viral load and severity of COVID-19 disease, COVID-19-related ARDS, and fatality.[19] That is, studies have shown that the severity of COVID-19 disease, ARDS, and the likelihood of death is directly proportional to the amount of measurable virus exposure, even controlling for other variables, such as age or underlying medical conditions.

66. COVID-19 patients who survive may experience lingering or ongoing symptoms in the weeks and months after infection. The symptoms can range from mild headaches to debilitating chest pain, shortness of breath, weakness, and ringing in the ears. These symptoms represent new morbidity and sometimes disability, and they may create vulnerability to worse outcomes upon second COVID-19 infection (discussed below), influenza infection, or other health comorbidities.

COVID-19 Disease in Medically Vulnerable Populations

67. The COVID-19 disease outcome, including fatality rate, varies significantly depending on the presence of certain demographic and underlying health factors. The CDC has listed the individuals who are at highest risk of severe illness, meaning that these

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[19] Elisabet Pujadas et al., *SARS-CoV-2 viral load predicts COVID-19 mortality*, THE LANCET (Aug. 6, 2020), https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(20)30354-4/fulltext; Reed Magleby et al., *Impact of SARS-CoV-2 Viral Load on Risk of Intubation and Mortality Among Hospitalized Patients with Coronavirus Disease 2019*, Clinical Infectious Diseases: An Official Publication of the Infectious Diseases Society of America (June 30, 2020), at 4, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7337625/pdf/ciaa851.pdf; Mathieu Blot et al., *Alveolar SARS-CoV-2 viral load tightly correlated with severity in COVID-19 ARDS*, Clinical Infectious Diseases (Aug. 8, 2020), at 4, https://doi.org/10.1093/cid/ciaa1172.

individuals are most likely to require hospitalization, intensive care, use of a ventilator, or at increased risk of death from COVID-19.[20] This high-risk group includes older adults and people with underlying medical conditions, collectively "medically vulnerable individuals."[21]

68. Individuals over the age of 50 are more vulnerable to COVID-19, and those 70 and older face a particularly serious risk of death from the disease.[22]

69. People of any age are at increased risk of severe illness and death from COVID-19 if they suffer from any of the following underlying medical conditions: cancer; chronic kidney disease; chronic obstructive pulmonary disease (COPD); immunocompromised from solid organ; obesity with a body-mass index (BMI) of 30 or more; serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies; sickle cell disease; type II diabetes mellitus; asthma (moderate to severe); cerebrovascular disease; cystic fibrosis; hypertension; immunocompromised from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or

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[20] Coronavirus Disease 2019 (COVID-19), People at Increased Risk, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html.

[21] *Id*.

[22] Coronavirus Disease 2019 (COVID-19), Older Adults, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

other immune-suppressing medications; neurologic conditions, such as dementia; liver disease; pregnancy; pulmonary fibrosis; smoking; thalassemia; type I diabetes mellitus.[23]

Difficulties in Treatment of COVID-19

70. Because COVID-19 is a novel virus, no cure exists and a vaccine is unlikely to be widely available until "later in 2021."[24] No information is available as to when a vaccine will be made available to incarcerated individuals. Nor does contracting COVID-19 confer permanent immunity from re-infection of the virus.[25] The CDC has indicated that immunity may only last 90 days.[26]

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[23] Coronavirus Disease 2019 (COVID-19), People with Certain Medical Conditions, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

[24] Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions about COVID-19 Vaccination, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html.

[25] Threat Assessment Brief, *Reinfection with SARS-CoV-2: public health response*, European Centre for Disease Prevention and Control (Sept. 21, 2020), at 2-3, https://www.ecdc.europa.eu/en/publications-data/threat-assessment-brief-reinfection-sars-cov-2.

[26] Coronavirus Disease 2019 (COVID-19), Duration of Isolation and Precautions for Adults with COVID-19, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/hcp/duration-isolation.html ("The duration and robustness of immunity to SARS-CoV-2 remains under investigation. . . . [P]eople appear to become susceptible to reinfection around 90 days after onset of infection.").

71. The risk of reinfection does exist;[27] and more documented cases of reinfection are appearing.[28] Reinfected patients may suffer worse outcomes upon second infection than at first infection.[29]

72. Severe cases of COVID-19 infection may require extremely invasive measures to manage respiratory function, including the use of highly specialized equipment like ventilators, acute kidney dialysis machines (continuous hemofiltration), and life support machines (extracorporeal membrane oxygenation). The demand for medical intervention due to widespread COVID-19 disease has resulted in supply shortages of medical equipment and personnel, as well as extreme strain on healthcare systems around the world.[30]

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[27] Ashley Yeager, *More SARS-CoV-2 Reinfections Reported, But Still a Rare Event*, THE SCIENTIST (Oct. 26, 2020), https://www.the-scientist.com/news-opinion/more-sars-cov-2-reinfections-reported-but-still-a-rare-event-68089.

[28] Richard L. Tillett et al., *Genomic evidence for reinfection with SARS-CoV-2: a case study*, THE LANCET (Oct. 12, 2020), https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30764-7/fulltext; Press Releases, "Inmate Death at FCI Butner (Low)," U.S. Department of Justice, Federal Bureau of Prisons (Sept. 17, 2020), https://www.bop.gov/resources/news/pdfs/20200917_press_release_bux.pdf.

[29] Akiko Iwasaki, *What reinfection means for COVID-19*, THE LANCET (Oct. 12, 2020), https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30783-0/fulltext; Press Releases, "Inmate Death at FCI Butner (Low)," U.S. Department of Justice, Federal Bureau of Prisons (Sept. 17, 2020), https://www.bop.gov/resources/news/pdfs/20200917_press_release_bux.pdf (documenting case of reinfection where inmate survived first infection, but died upon second infection of COVID-19).

[30] Nicholas Kulish et al., *The U.S. Tried to Build a New Fleet of Ventilators. The Mission Failed*, NEW YORK TIMES (Mar. 29, 2020), https://www.nytimes.com/2020/03/29/business/coronavirus-us-ventilator-shortage.html; Andrew Jacobs et al., *'At War With No Ammo': Doctors Say Shortage of Protective Gear*

73. The only known effective measures for protecting people from transmission of COVID-19 are social distancing (remaining physically separated from known, suspected, or potentially infected individuals), mask wearing, and vigilant hygiene (including frequent hand washing and disinfecting high-touch, shared surfaces).[31]

Prisons Are at the Epicenter of the COVID-19 Pandemic

74. The current COVID-19 outbreaks in American correctional facilities, including BOP prisons like FCI-Waseca, underscore the ease of transmission of COVID-19 in these settings. People in congregate-living environments (i.e., places where people live, eat, and sleep in close proximity) face increased danger of spreading and contracting COVID-19. Indeed, detention facilities are epicenters for infectious diseases, like COVID-19,[32] precisely because of their design.

Is Dire, NEW YORK TIMES (Mar. 19, 2020), https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html.

[31] COVID-19 Fact Sheet, note 10 *supra*.

[32] Josiah Bates, *'We Feel Like All of Us Are Gonna Get Corona.' Anticipating COVID-19 Outbreaks, Rikers Island Offers Warning for U.S. Jails, Prisons*, TIME (Mar. 24, 2020), https://time.com/5808020/rikers-island-coronavirus/; Sarah Volpenhein, *Marion prison coronavirus outbreak seeping into larger community*, MARION STAR (Apr. 25, 2020), https://www.marionstar.com/story/news/local/2020/04/25/marion-prison-ohio-coronavirus-outbreak-seeping-into-larger-community/3026133001/; Anat Rubin et al., *Inside the U.S.'s Largest Maximum Security Prison, COVID-19 Raged. Outside, Officials Called Their Fight a Success*, PROPUBLICA (June 24, 2020), https://www.propublica.org/article/inside-the-uss-largest-maximum-security-prison-covid-19-raged.

75. There simply is not enough room in a typical prison facility to comply with CDC guidance on social distancing.[33] Absent intervention, correctional facilities operate as designed with incarcerated people sharing close living quarters and bunk beds, dining halls, bathrooms, narrow hallways, showers, telephones, computers, televisions, libraries, and other common areas, each of which present dangerous opportunities for transmission. COVID-19 survives for extended periods on metal and other non-porous surfaces, which are the most prevalent materials in prison facilities. Based on the number of people who touch these surfaces (i.e., "high-touch areas"), CDC guidance dictates near constant disinfection and decontamination, especially for shared phones, computers, tables, chairs, faucets, and the like. And spaces within correctional facilities often are poorly ventilated, with shared ventilation systems and poorly-circulating and recycled air, further promoting the spread of the disease.

76. Similarly, the nature of the correctional setting makes it a hotbed for viral outbreak. As explained above, social distancing, which has been critical to COVID-19 mitigation efforts, is nearly impossible in a correctional facility. Accordingly, in order to "quarantine" or "isolate" COVID-19-positive or COVID-19-suspected inmates, the BOP

[33] *United States v. Rodriguez*, 451 F. Supp. 3d 392, 402–03 (E.D. Pa. 2020) ("Prisons are ill-equipped to prevent the spread of COVID-19. . . . People live in close quarters and are also subject to security measures which prohibit successful social distancing that is needed to effectively prevent the spread of COVID-19. Toilets, sinks, and showers are shared, without disinfection between use. Food preparation and food service is communal, with little opportunity for surface disinfection. The crowded conditions, in both sleeping areas and social areas, and the shared objects (bathrooms, sinks, etc.) will facilitate transmission." (internal quotation marks omitted)).

has been using disciplinary segregation/solitary confinement and/or cohorting or grouping inmates in a singular open location. These are not adequate measures and may actually increase the spread of the virus or the severity of COVID-19 in infected individuals.

77. First, for example, the use of punishment for medical purposes, while unconstitutional, also discourages infected inmates from self-reporting symptoms, contributing to infection spread. Respondents have been warned about the danger of this practice but the BOP, including FCI-Waseca, still continue to use it.[34]

78. Second, cohorting positive or suspected COVID-19 cases exposes individuals to far higher loads of the COVID-19 virus, which as explained above, is linked to more severe disease outcomes.

79. Further, BOP facilities are not hermetically sealed environments. Because people—staff, inmates, contractors, community members, and others—constantly cycle in and out of correctional facilities, there is an ever present risk that new carriers will bring the virus (or a new strain of the virus) into the facility, setting off a COVID-19 outbreak.[35] For these reasons, public health experts have recommended the release from custody of

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[34] *See* Letter from U.S. Senator Elizabeth Warren and U.S. Senator Richard Durbin to Attorney General William Barr and Director Michael Carvajal at 4 (Oct. 2, 2020) ("Individuals experiencing COVID-19 symptoms may decline to report to BOP staff if they fear being placed in solitary confinement, as was recently reported at FCC-Lompoc."), https://www.warren.senate.gov/imo/media/doc/Letter%20from%20Warren%20and%20Durbin%20to%20AG%20Barr%20and%20Director%20Caraval%20re%20solitary%20confinement%20during%20COVID-19%20pandemic%2010.2.20%20FINAL.pdf.

[35] *Why Jails Are So Important in the Fight Against the Coronavirus*, THE MARSHALL PROJECT (Mar. 31, 2020), https://www.themarshallproject.org/2020/03/31/why-jails-are-so-important-in-the-fight-against-coronavirus.

people most vulnerable to COVID-19, protecting the medically vulnerable and thinning the population of incarcerated individuals to allow those who remain in custody the ability to better comply with CDC guidance for viral spread mitigation.

80. Courts across the country have intervened to release COVID-vulnerable inmates who are at high risk of severe infection or disease from the disease. *See, e.g.*, *Martinez-Brooks v. Easter*, No. 20-cv-00569, 2020 WL 2405350 (D. Conn. May 12, 2020) (ordering identification of medically vulnerable inmates, their sentencing information, their consideration for compassionate release or home confinement, implementation of a process to make full and speedy use of home confinement, and requiring elimination of certain barriers to consideration for release or transfer).[36] This includes decisions providing for the release of all medically vulnerable prisoners (or at least those not presenting special concerns of flight or dangerousness).[37]

81. In addition to causing significant harm to those incarcerated, rampant outbreaks of COVID-19 in prisons become the direct cause of additional infections, hospitalizations, and deaths among staff and the surrounding community.[38] Conversely,

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[36] *See also, e.g.*, *Malam v. Adducci*, 452 F. Supp. 3d 643, 662 (E.D. Mich. 2020) (ordering release of detainee in Michigan at high risk for serious illness due to underlying health conditions).

[37] Many courts have also ordered compassionate release or release based on time served in light of the dangers of COVID-19. *See, e.g.*, *United States v. Amarrah*, 458 F. Supp. 3d 611, 612 (E.D. Mich. 2020); *United States v. Hansen*, No. 17-cr-50062, 2020 WL 2219068, at *3 (N.D. Ill. May 7, 2020).

[38] Eric Lofgren et al., *The Epidemiological Implications of Incarceration Dynamics in Jails for Community, Corrections Officer, and Incarcerated Population Risks from COVID-19*, MEDRXIV (May 4, 2020), https://www.medrxiv.org/content/10.1101/2020.04.08.20058842v2.

release of the most vulnerable people from custody reduces the burden on the surrounding region's healthcare infrastructure by reducing the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

Inadequate Efforts of the BOP to Respond to COVID-19

82. The BOP has failed to adequately respond to the COVID-19 pandemic. The catastrophic consequences of Respondents' inaction turned FCI-Waseca into ground zero for COVID-19, where approximately 70 percent of inmates contracted the virus in less than three months.

83. The BOP failed to anticipate and prepare for the magnitude of the threat that COVID-19 poses to its own staff and the people it detains, and then failed to respond in any meaningful way to initial signs of uncontrolled outbreaks at several of its facilities across the country, including FCI-Waseca.

84. The BOP has not improved its response, despite the passage of nearly eight months since the CDC began issuing guidance on how to prevent the spread of COVID-19 in correctional and detention facilities. As recently as November 2020, the Inspector General of the United States Department of Justice issued its *seventh* report documenting the failures of the BOP to implement CDC guidance at different institutions around the country.[39]

[39] U.S. Department of Justice Office of the Inspector General, *Remote Inspection of Federal Correctional Complexes Oakdale and Pollack* (Nov. 2020), https://oig.justice.gov/sites/default/files/reports/21-003.pdf ("DOJ OIG Nov. Report");

85. The failures across BOP-managed facilities reported by the Inspector General and others are numerous and striking. Correctional officers who had been exposed to the virus were required to work without proper personal protective equipment (PPE), and staff and inmate screening procedures were insufficient.[40] PPE was in short supply and staff were not advised how and when to use the PPE that was available.[41] Social distancing was completely impossible or not enforced. Contrary to CDC advice, the BOP continued transferring incarcerated people around the country, potentially spreading the virus.[42] Inmates who tested positive for COVID-19 were not always immediately isolated or quarantined per CDC guidance.[43] BOP did not test staff potentially infected with COVID-19.[44] UNICOR, which runs BOP labor factories, remained largely operational.

U.S. Department of Justice Office of the Inspector General, COVID-19 Reports, *available at* https://oig.justice.gov/reports/pandemic.

[40] *Correcting Myths and Misinformation about BOP and COVID-19*, Bureau of Prisons (Apr. 11, 2020), at 3, https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf ("In keeping with CDC 'Guidance for Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19,' the BOP performs pre-screening of all employees reporting to work and requires exposed workers to wear a mask for 14 days after last exposure."); DOJ OIG Nov. Report at 1.

[41] *E.g.*, DOJ OIG Nov. Report, at 8-10, note 39 *supra*.

[42] Notice of Alleged Safety or Health Hazards, Occupational Safety and Health Administration, U.S. Dept. of Labor (Mar. 31, 2020), *available at* https://www.afge.org/globalassets/documents/generalreports/coronavirus/4/osha-7-form-national-complaint.pdf ("OSHA Complaint").

[43] *E.g.*, DOJ OIG Nov. Report at 10, note 39 *supra*.

[44] *E.g.*, DOJ OIG Nov. Report at 16, note 39 *supra*.

86. Despite the BOP's "scrambling" to address staffing and resource needs, the BOP has limited the number of contractors who can supply PPE, does not have enough tests, and has been sued by its own staff for requiring them to work in hazardous working conditions.[45]

87. The BOP's primary and ongoing failure has been its unwillingness to engage in population reduction measures, despite mechanisms at its disposal to be able to do so, clear public health guidance that it is necessary to prevent widespread COVID-19 infection, and concern expressed by its own Medical Director about the difficulty of controlling COVID-19 in correctional environments.[46]

88. The CARES Act, signed into law on March 27, 2020, makes funding available for federal correctional facilities to purchase PPE and test kits for COVID-19 and authorizes Respondent Carvajal to lengthen the maximum time for which the BOP can place an inmate in home confinement under 18 U.S.C. § 3624(c)(2). Respondent Carvajal's authority under the CARES Act is limited. It is triggered only when the Attorney General finds that "emergency conditions will materially affect the functioning of the BOP."[47] And if that occurs, Respondent Carvajal's power under the CARES Act

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[45] Kim Bellware, *Prisoners and guards agree about federal coronavirus response: 'We do not feel safe'*, THE WASHINGTON POST (Aug. 24, 2020), https://www.washingtonpost.com/nation/2020/08/24/prisoners-guards-agree-about-federal-coronavirus-response-we-do-not-feel-safe/.

[46] Testimony by BOP Medical Director Dr. Jeffrey Allen to U.S. Senate Judiciary Committee at 52:00-52:20 (June 2, 2020), https://www.c-span.org/video/?472615-1/senate-judiciary-hearing-prison-safety-coronavirus-pandemic.

[47] CARES Act, note 1 *supra*.

only lasts through the "covered emergency period"—the time spanning from the President's declaration of a national emergency due to COVID-19 to 30 days after the declaration terminates.[48]

89. Acting under the CARES Act, Attorney General Barr declared that emergency conditions were materially affecting the functioning of the BOP. On April 3, 2020, he directed Respondent Carvajal to review inmates with COVID-19 risk factors to determine their eligibility for home confinement, stating that the BOP's efforts to prevent COVID-19 from entering BOP facilities and infecting prisoners have "not been perfectly successful at all institutions."[49]

90. According to the Office of Inspector General of the Department of Justice ("OIG"), in response to the Attorney General's directives, the BOP issued three memoranda on April 3, April 22, and May 8, 2020.[50] The BOP does not appear to make these documents publicly available.[51] However, the April 22 memoranda is available on a

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48 *Id.* § 12003(a)(2).

49 William Barr, "Memorandum For Director of Bureau of Prisons," Office of the Attorney General (Apr. 3, 2020), https://www.justice.gov/file/1266661/download.

50 *DOJ OIG Releases Report of Remote Inspection of BOP FCC Oakdale and FCC Pollock Examining the Institutions' Response to the Coronavirus Pandemic* at 26-27 (Nov. 17, 2020), https://oig.justice.gov/sites/default/files/2020-11/2020-11-17.pdf; DOJ OIG Nov. Report, note 39 *supra*.

51 The BOP's lack of transparency on this important issue has led to confusion among incarcerated people about whether they are eligible for home confinement under the CARES Act. Even though the BOP has added criteria prisoners must meet, on the FAQ section of its website about who is eligible for release, the BOP has only links to the Attorney General's memoranda. *See* FEDERAL BUREAU OF PRISONS, *Frequently Asked*

third-party website,[52] and the OIG's November Report briefly summarizes the contents of each memorandum.

91. The BOP's memoranda purported to interpret Attorney General Barr's guidance but arbitrarily and capriciously limited the number and types of people who might qualify for home confinement. For example, even though the April 3 Barr memo directed the BOP to "immediately maximize appropriate transfers to home confinement," including prioritizing those at "outbreak prisons," the BOP's own guidance excludes the vast majority of prisoners in its custody by adding a number of barriers to consideration for release.

92. These BOP memoranda gave wardens virtually unchecked discretion to deny a request for release and impose unnecessary and impractical barriers on incarcerated individuals seeking release. For example, the BOP required inmates: (i) to have zero disciplinary infractions of any kind—regardless of severity—for 12 months; (ii) to provide verification that they would have a lower risk of contracting COVID-19 outside the prison than inside of it; and (iii) to show that their medical needs could be met outside the prison and that they would have a 90-day supply of prescribed medication. The BOP memoranda also stated that the BOP would prioritize for review those inmates who have served 50%

Questions regarding potential inmate home confinement in response to the COVID-19 pandemic. https://www.bop.gov/coronavirus/faq.jsp.

[52] Memorandum from Correctional Programs Division Acting Assistant Director Andre Matevousian & Reentry Services Division Assistant Director Hugh J. Hurwitz to Chief Executive Officers (Apr. 22, 2020), *available at* https://famm.org/wp-content/uploads/bop-memo-4.23.2020.pdf.

of their sentence or, if they have less than 18 months remaining on their sentences, inmates who have served 25% or more of their time.

93. The BOP's April 22 memorandum does not provide any explanation for the limiting criteria. In testimony before the U.S. Senate Judiciary Committee, Respondent Carvajal stated that the requirement that inmates must have served 50% of their sentence was to "triage" and release individuals who had risk factors as "quickly as possible."[53] But while this alleged criterion proved fatal to Petitioner Ramos's and many other inmates' requests for home confinement, it seemingly did not apply when the BOP decided to release to home confinement one of its most famous inmates: Paul Manafort—who had served less than 30 percent of his sentence and was considered "high risk" due to his age and underlying conditions.[54]

94. Additionally, the OIG concluded that all of the BOP memoranda failed to address the Attorney General's directives that BOP "immediately maximize appropriate transfers to home confinement" and that "inmates with a suitable confinement plan will generally be appropriate candidates for home confinement rather than continued detention at institutions in which COVID-19 is materially affecting their operations."[55]

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[53] Testimony by BOP Director Carvajal to U.S. Senate Judiciary Committee at 2:02:50-2:03:05 (June 2, 2020), https://www.c-span.org/video/?472615-1/senate-judiciary-hearing-prison-safety-coronavirus-pandemic.

[54] Justine Coleman, *Manafort Released to Home Confinement due to coronavirus concerns*, THE HILL (May 13, 2020), https://thehill.com/regulation/court-battles/497495-manafort-released-to-home-confinement-due-to-coronavirus-concerns.

[55] DOJ OIG Nov. Report, at 26-27, note 39 *supra*.

95. The BOP's April 22 memorandum empowered the warden to seek approval from the "BOP Central Office" to transfer to home confinement inmates who did not meet the criteria but for whom the warden determined transfer was necessary "due to [COVID-19] risk factors, or as a population management strategy during the pandemic."[56] However, based on some of the Petitioners' experiences, as described above, the Central Office (which, upon information and belief, the FCI-Waseca staff and Petitioners refer to as the "Super Committee") routinely reversed the limited attempts Respondent Starr made to release select inmates to home confinement.

96. The consequences of BOP's failure to release inmates to allow for social distancing and contain or prevent the spread of COVID-19 have been dramatic. Nationwide, the BOP has approximately 126,000 federal inmates in BOP-managed institutions.[57] The BOP staff complement is approximately 36,000 persons.[58] As of December 8, 2020, the BOP reported that 5,555 federal inmates and 1,613 BOP staff nationwide had tested positive for COVID-19, and that 22,612 inmates and 2,101 staff have "recovered" from it.[59] Not everyone recovers: over 145 inmates in federal facilities and at least two BOP staff members have died from COVID-19.[60]

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56 DOJ OIG Nov. Report, at 17 (quotations in original), note 39 *supra*.

57 COVID-19 Coronavirus, Bureau of Prisons, https://www.bop.gov/coronavirus/ (last visited Dec. 8, 2020).

58 *Id*.

59 *Id*.

60 *Id*.

97. Federal facilities all over the country—including in the Midwest—have been overrun with the virus. In addition to FCI-Waseca, the other BOP prisons that have had uncontrolled and devastating outbreaks include:

- FCI-Seagoville, in Texas (1,278 inmates tested positive, 12 inmates currently positive, 4 inmate deaths as of November 12, 2020);[61]
- FCI-Elkton, in Ohio (907 inmates tested positive, 5 inmates currently positive, 9 inmate deaths as of November 12, 2020);
- FCI Forrest City, in Arkansas (627 inmates tested positive, 55 inmates currently positive, 0 inmate deaths as of November 12, 2020);
- FCI-Butner, in North Carolina (613 inmates tested positive, 0 inmates currently positive, 17 inmate deaths as of November 12, 2020);
- FCI-Beaumont, in Texas (500 inmates tested positive, 187 inmates currently positive, 0 inmate deaths as of November 12, 2020).[62]

98. Even those numbers do not tell the full story. The BOP has repeatedly understated the scope of the problem and refused to take steps to assess the situation transparently.[63]

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61 Some time after November 12, 2020, the BOP changed the information it reports for each facility on its website. The information now available on the BOP's website is only the number of inmates with completed tests, pending tests, and positive tests.

62 *Id*.

63 *E.g.*, Delaney Smith, *Santa Barbara County COVID-19 Cases Multiple, Public Health Data Inconsistent with Lompoc Prison*, SANTA BARBARA INDEPENDENT (May 7, 2020), https://www.independent.com/2020/05/07/santa-barbara-county-covid-19-cases-multiply-public-health-data-inconsistent-with-lompoc-prison/; WKBN Staff, *Elkton union president reports different COVID-19 stats than Federal Bureau of Prisons*, WKBN (Apr. 9, 2020), https://www.wkbn.com/news/coronavirus/elkton-union-president-reports-different-covid-19-stats-than-federal-bureau-of-prisons/; *see also* note 61, *supra.*

99. The appalling conditions of BOP facilities across the country and the BOP's failure to address the constitutional rights of inmates in its care have prompted repeated calls from members of Congress to take urgent action to reduce prison populations and contain the further spread of COVID-19 in federal prisons.[64]

[64] *See, e.g.*, Letter from New Jersey Congressional Delegation (U.S. Senators Robert Menendez and Cory Booker and U.S. House Representatives: Frank Pallone, Jr., Bill Pascrell, Jr., Albio Sires, Donald Payne, Jr., Donald Norcross, Bonnie Watson Coleman, Josh Gottheimer, Mikie Sherrill, Andy Kim, and Tom Malinowski) to Director Michael Carvajal (Nov. 9, 2020), *available at* https://www.menendez.senate.gov/imo/media/doc/Senator%20Menendez%20Letter%20on%20FCI%20Fort%20Dix%20COVID19%20Outbreak%2011.9.20.pdf; Letter from U.S. Senator Elizabeth Warren and U.S. Senator Richard Durbin to U.S. Attorney General William Barr and BOP Director Robert Carvaraj (Oct. 2, 2020), *available at* https://www.warren.senate.gov/imo/media/doc/2nd%20Letter%20to%20DOJ.BOP%2010.2.2020%20Final.pdf.

100. Federal courts have also been forced to address BOP failures in a large number of individual cases seeking compassionate release;[65] bail pending appeal;[66] delayed self-surrender;[67] writs of habeas corpus;[68] class-wide relief;[69] and furloughs.[70]

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[65] *E.g.*, *Rodriguez*, 451 F. Supp. 3d at 394 (granting release after finding risk factors for COVID-19 constitute extraordinary and compelling reason and noting that prisons are "tinderboxes for infectious disease"); *United States v. Foster*, No. 14-cr-324-02, ECF No. 191 (M.D. Pa. Apr. 3, 2020) (noting the "unprecedented" circumstances facing "our prison system" and finding that COVID-19 is an extraordinary and compelling basis for release; indeed, "[n]o rationale is more compelling or extraordinary"); *United States v. Smith*, No. 12-cr-133, ECF No. 197 (S.D.N.Y. Apr. 13, 2020) (granting release; finding exhaustion waivable and waived); *United States v. Zukerman*, No. 16-cr-194, ECF No. 116 (S.D.N.Y. Apr. 3, 2020) (waiving exhaustion and granting immediate compassionate release in light of COVID-19 to defendant convicted in multi-million dollar fraud scheme); *United States v. Sawicz*, No. 08-cr-287, ECF No. 66 (E.D.N.Y. Apr. 10, 2020) (releasing child-pornography offender); *United States v. Clagett*, No. 97-cr-265, ECF No. 238 (W.D. Wash. Apr. 9, 2020); *United States v. Oreste*, No. 14-cr-20349, ECF No. 200 (S.D. Fla. Apr. 6, 2020); *United States v. Hakim*, No. 05-cr-40025, ECF No. 158 (D.S.D. Apr. 6, 2020); *United States v. Hernandez*, No. 18-cr-20474, ECF No. 41 (S.D. Fla. Apr. 2, 2020).

[66] *E.g.*, *United States v. Chavol*, No. 20-50075 (9th Cir. Apr. 2, 2020) (stipulation in FRAP(9) appeal to release on conditions).

[67] *United States v. Roeder*, 807 Fed. App'x 157, 158 (3d Cir. 2020) (reversing district court's denial of defendant's motion to delay execution of his sentence because of the COVID-19 pandemic); *United States vv. Garlock*, No. 18-cr-418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) (observing that "[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided"); *United States v. Matthaei*, No. 19-cv-243, 2020 WL 1443227, at *1 (D. Idaho Mar. 16, 2020) (extending self-surrender date by 90 days in light of pandemic).

[68] *E.g.*, *Xochihua-James v. Barr*, 962 F.3d 1065, 1066 (9th Cir. 2020) (*sua sponte* releasing detainee from immigration detention "in light of the rapidly escalating public health crisis"); *Fraihat v. Wolf*, No. 5:20-CV-590, ECF No. 18 (C.D. Cal. Mar. 30, 2020).

[69] *E.g.*, *In re Request to Commute or Suspend County Jail Sentences*, Dkt. No. 084230 (N.J. Mar. 22, 2020), *available at* https://www.njcourts.gov/notices/2020/n200323a.pdf (releasing large class of defendants serving time in county jail "in light of the Public Health Emergency" caused by COVID-19).

[70] *E.g.*, *United States v. Stahl*, No. 18-cr-694, ECF No. 53 (S.D.N.Y. Apr. 10, 2020); *United Sates v. Underwood*, No. 18-cr-201, ECF No. 179 (D. Md. Mar. 31, 2020) (noting

101. What is more, even in the midst of the virus's rapid spread across the country, the BOP persists in transferring detainees between prisons. In a complaint filed with the Occupational Safety and Health Administration alleging unsafe conditions at numerous prisons, including FCI-Waseca, BOP employees report that BOP "continuously mov[es] inmates by bus and/or airlift to various prison sites across the nation. They have authorized movement of infected inmates, inmates suspected of being infected, inmates who have been in close proximity to infected inmates, to areas of the country that do not have any rate of infection, or to facilities that otherwise have not shown signs of any introduction of the virus, thus introducing the virus into an uninfected area."[71] Indeed, that is what happened at FCI-Waseca, where a staggering 70 percent of the inmates contracted the virus in less than three months.

FCI-Waseca's Failure to Implement Precautions to Protect Medically Vulnerable Inmates

102. The outbreak of COVID-19 at FCI-Waseca demonstrates how the BOP has severely mishandled the pandemic and continues to place medically vulnerable individuals at grave risk.

103. FCI-Waseca is a low security prison with only female inmates. It is comprised of five living units: A, B, C, D, and E. Unit A is known as the "camp" or "cadre" unit, which means that it houses the lowest security prisoners and allows them additional

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that although there has not yet been a positive COVID-19 test in elderly petitioner's facility, "there is significant potential for it to enter the prison in the near future").

[71] OSHA Complaint, at note 42 *supra*.

privileges. Units A, B, and E are in a triplex building while Unit C and Unit D are in separate buildings.[72] The UNICOR factory, where many Petitioners make clothing, textiles, and facemasks and earn less than $1 an hour, is in a separate building.

104. Most of the inmates at FCI-Waseca live in dormitory-style units where they sleep in rooms with multiple bunk beds only a few feet apart, making social distancing impossible. Inmates at FCI-Waseca share a limited number of communal bathrooms, toilets, sinks, showers, phones, and computers, where it is also not possible to social distance.

105. On or about August 18, 2020, approximately 30 new inmates from Grady County, Oklahoma, and possibly other jails or transfer centers, arrived on a bus at FCI-Waseca. FCI-Waseca accepted and processed the new inmates, despite prior reports of COVID-19 infections at the Grady County Jail.[73]

106. New inmates from Grady County Jail were aware they had been exposed to COVID-19. In fact, at least one of them—Petitioner Inabnit—had written grievances to BOP about the appalling and risky conditions there. Despite the known exposure, medical staff at FCI-Waseca instructed Petitioner Inabnit to answer "no" to the question of whether she had been exposed to COVID-19, interpreting the question to inquire about international

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[72] *See generally* Sonya Love, *Prison Rape Elimination Act Audit Report* at 5 (Oct. 25, 2018), https://www.bop.gov/locations/institutions/was/was_prea_20181109.pdf.

[73] *See, e.g.,* Keegan Hamilton, *'Con Air' is Spreading COVID-19 All Over the U.S. Prison System*, VICE NEWS (Aug. 13, 2020), https://www.vice.com/en/article/wxqbzw/con-air-is-spreading-covid-19-all-over-the-us-prison-system.

travel only. Inmates with runny noses, headaches, and body aches—all symptoms of COVID-19—were not isolated. Rather, they were tested and placed in a range in Unit A.

107. There are approximately 100-120 inmates in Unit A. They all live in one of six wings or "ranges"—ranges 1 and 2 are in the basement, ranges 3 and 4 are on the ground level, and ranges 5 and 6 are on the first floor.

108. Upon information and belief, the BOP assigned the new inmates to range 1 in Unit A. Within days, nearly all of them tested positive for COVID-19. The approximately one or two people who tested negative were moved to the SHU. The BOP then moved anyone already in the SHU infected with COVID-19 to range 1.

109. Due to FCI-Waseca's failure to enact proper precautions to prevent the spread of this highly contagious virus, more inmates fell ill in Unit A. In less than three weeks, approximately 100 people in Unit A—all but approximately 29 inmates—tested positive for COVID-19. The 29 inmates who were not infected were then put in their own range in the basement. The other ranges in Unit A housed infected inmates.

110. It is no surprise that nearly all but about *eight* people in Unit A eventually contracted the virus. Although the CDC has issued guidance for how prisons should avoid the spread of COVID-19 in prisons, FCI-Waseca failed to enact basic precautions to protect the incarcerated women. Even Ryan Burk, a CO at FCI-Waseca and president of the staff

union acknowledged that "[b]ringing positive inmates into a facility that doesn't have any infections and watching it erupt" means there was obviously "a screw-up."[74]

111. Before and during the outbreak, inmates at FCI-Waseca were given masks made by inmates at UNICOR. The masks are a piece of untreated cotton, folded in half with three pleats and sewed with elastic. They fall apart easily, and inmates are prohibited from making improved versions for themselves. Inmates and correctional officers ("COs") do not consistently wear masks, and some COs have flatly refused requests by inmates to wear one.

112. Beyond the limited provision of masks, Petitioners were not given other personal protective equipment or cleaning supplies. They were not provided gloves, detergents or other sanitizing agents within their ranges, and at times had to rely on sanitary napkins to wipe down surfaces they touched.

113. FCI-Waseca also failed to implement procedures to ensure that high-touch areas were frequently and properly sanitized. Orderlies, inmates who clean the units, were not given additional training or supplies to clean before, during, or after the initial COVID-19 outbreak at FCI-Waseca. And orderlies were only provided gloves if they asked a CO who happened to be available and willing to hand them out.

114. There are too many inmates sharing too little space to effectively social distance at FCI-Waseca. For example, the majority of inmates (if not all) sleep in bunkbeds

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[74] Keegan Hamilton, *A Super-Spreader Jail Keeps Sparking COVID Outbreaks Across the US*, VICE NEWS (Oct. 13, 2020), https://www.vice.com/en/article/889w8p/a-super-spreader-jail-keeps-sparking-covid-outbreaks-across-the-us.

that are only an arm's length apart in sleeping rooms that may have as many as 10 people in them. Inmates use the same bathrooms and share a limited number of toilets, sinks, and showers. On the first floor of Unit A, for example, around 50 inmates share four toilets and two showers (as two other showers have not worked for months).

115. FCI-Waseca has failed to implement adequate social distancing measures in other aspects of prison life. Inmates are unnecessarily required to line up in close proximity to one another to receive their meals and medication. They also congregate in common areas to watch television, or use the limited number of computers or telephones, which are only a few feet apart and not regularly disinfected. Because it is not possible to social distance in these areas, some inmates, like Petitioners Williams, Malcolm, Walker, and Brooks, terrified to contract COVID-19 due to their underlying conditions and disabilities, avoid watching television, using the phones and computers, or going to the cafeteria.

116. Respondent Starr is aware of the risk posed by the lack of social distancing, and she is aware that there was not adequate social distancing at FCI-Waseca. For example, on October 16, 2020, in an administrative remedy response to Petitioner Ramos, Respondent Starr recognized that Petitioner Ramos had filed a complaint stating she was in fear for her physical health due to the lack of social distancing in her unit, which was only half open but at full or near-full capacity. Respondent Starr disregarded Ms. Ramos's concerns and the risk of not social distancing. In her written response, Respondent Starr simply stated that the unit "is not at full capacity" and claimed that a "review" of unspecified origin revealed that FCI-Waseca was following CDC guidelines and BOP guidance.

117. Respondent Starr has also disregarded the risk posed by the lack of social distancing by repeatedly denying compassionate release or home confinement to incarcerated people, like Petitioners, and increasing the number of inmates living in different ranges or areas. Staff at FCI-Waseca, under Respondent Starr's leadership and with her knowledge, are even transferring incarcerated individuals like Petitioner Reed from Unit E—which has not had one case of COVID-19—to Unit A, the site of largest outbreak that also continues to house new inmates who can bring the virus into the facility. And FCI-Waseca staff is making such reckless and unnecessary transfers even if the inmate objects, as Petitioner Reed has repeatedly done.

118. UNICOR is yet another example of how FCI-Waseca has failed to enact basic social distancing guidelines. In July—in the midst of the COVID-19 pandemic—UNICOR doubled the number of workers at its FCI-Waseca facility, crowding an already packed warehouse. Now, hundreds of inmates work within an arm's length of each other at sewing desks in a large factory. Although UNICOR closed for six weeks this summer, it has remained mostly operational at FCI-Waseca. Inmates with disabilities and medically vulnerable inmates, like Petitioner Hemicker, must choose between working and putting her health—and her life—at risk, or going to SHU for punishment for up to 3 months.

119. FCI-Waseca staff have also contributed to the spread of the virus. In contravention to proper social distancing practices, staff move regularly between infected ranges, quarantine ranges—which may or may not house infected inmates—and areas where inmates do not actively have the virus.

120. At the beginning of the outbreak of COVID-19 in September, some COs would enter a range with infected inmates without any PPE. Contrary to CDC recommendations,[75] when COs would wear PPE, they would often fail to change it when going from infected ranges to uninfected ranges, causing multiple Petitioners to file grievances. COs also would haphazardly throw PPE gear around the doffing station, making inmates step over it on the way to get ice or access the computers. Respondent Starr was aware of and disregarded the risk posed by the COs not properly wearing, changing, or disposing of PPE.

121. When only one range was full of infected inmates in Unit A, some COs would stand in the open doorway to speak to them, creating a substantial risk that uninfected inmates walking by would contract the virus.

122. One incident witnessed by multiple petitioners demonstrates just how dangerous and callous some officers acted at FCI-Waseca. Officer W.[76] was one staff member who, upon information and belief, tested positive for COVID-19. This officer would serve trays of food to the infected ranges and then go to the uninfected ranges. Officer W. told inmates that she needed assistance serving the trays because she was getting over COVID-19 and was having trouble breathing. She enlisted the help of an inmate,

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75 *Operational Considerations for Personal Protective Equipment in the Context of Global Supply Shortages for Coronavirus Disease 2019 (COVID-19) Pandemic: non-US Healthcare Settings*, Centers for Disease Control and Prevention (Sept. 15, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/non-us-settings/emergency-considerations-ppe.html.

76 The officer's last name initial is used here to protect her privacy.

V.G., who would carry trays to the ranges and then stand at the door to pass them out with Officer W. Upon information and belief, V.G. contracted COVID-19 around September 9. By September 12, however, she was back serving trays to uninfected inmates, even though she was still contagious.

123. Respondent Starr was aware of the substantial risk of transmission such lax actions by staff presented, but she disregarded those risks. Petitioners Ramos, Williams, and others, brought such troubling incidents to Respondent Starr's attention. In an administrative remedy response to Petitioner Ramos, Respondent Starr recognized that "COVID-19 is very contagious and may be spread by asymptomatic, as well as symptomatic individuals . . . ." In the same response, Respondent Starr also acknowledged the necessity of separating inmates who are symptomatic or who test positive for COVID-19 from the general population.

124. In addition to increasing the risk of transmission due to cross contamination, staff can be vectors of COVID-19. Despite the obvious risk of prison staff contracting the virus and spreading it to inmates, the BOP is not testing staff for COVID-19. And the BOP directed staff who had been exposed to COVID-19 to report to work within 48 hours rather than quarantine for the recommended 14 days—all but ensuring that an infected employee would bring the virus into the prison.[77]

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[77] OSHA Complaint, note 42 *supra*.

FCI-Waseca's Troubling and Ineffective Isolation Methods

125. FCI-Waseca's quarantine policies and procedures are punitive, dangerous, and may actually increase the severity of COVID-19 symptoms.

126. Certain inmates who were infected or exposed to COVID-19, or just arriving at FCI-Waseca, may be locked in one of the 35 rooms[78] in the SHU. According to the FCI-Waseca manual and handbook given to all inmates upon their arrival, there are two types of "special" housing—Administrative Detention and Disciplinary Segregation. Inmates in Administrative Detention are supposed to have the same general privileges as in the general population. But inmates in Disciplinary Segregation, which is used to punish rule violators, are denied certain privileges: personal property is not permitted and inmates are given only blankets, a mattress, a pillow, toilet tissue, and necessary hygiene items.[79]

127. The Petitioners sent to the SHU were not there for disciplinary purposes. But they were treated as if they were. In short: Respondents punished inmates for having COVID-19, being exposed to it, or simply being new to the prison. This policy discouraged inmates from reporting they have COVID-19 symptoms for fear they would end up in the SHU.

128. Petitioners, even after testing positive for COVID-19, were handcuffed and brought to the SHU. They had to change out of the general population clothing and into

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[78] Sonya Love, *Prison Rape Elimination Act Audit Report* at 5, note 72 *supra*.

[79] *Federal Correctional Institution, Waseca, Minnesota, Admissions and Orientation Handbook* at 51 (revised March 14, 2017), https://www.bop.gov/locations/institutions/was/was_ao_handbook_eng_031517.pdf.

the SHU uniforms, which are orange, even though the pants were too small for at least one of the Petitioners. The orange uniforms meant the Petitioners were indistinguishable from inmates who may have been in the SHU for misconduct.

129. The rooms in the SHU are small, concrete, and stuffy. At least one of the rooms has black mold growing in it. Each room has a big gray door with a tiny window and a slot below it to pass through trays of food. Most, if not all, rooms contain a bunk bed, a concrete slab table with a little stool, and a toilet and shower built into the wall. The mattresses on the bunk bed are no thicker than a yoga mat. There is a small window, approximately four inches wide and 12-18 inches high at the very top of the high wall, away from eye level. Petitioners in the SHU were not allowed to leave the room, unless they had to go to a dirty supply closet to use a nebulizer.

130. Petitioners in the SHU were not allowed any personal property.

131. FCI-Waseca unreasonably limited the rights of quarantined inmates in the SHU to communicate with people outside of the prison. During their time in the SHU, most Petitioners were also not able to call their family or attorneys. Although many of the Petitioners were sick with COVID-19 and unable to contact their loved ones, Respondent Starr did not consider the virus "detrimental enough" for prison staff to inform the inmates' emergency contacts of their conditions.

132. Although inmates in the SHU are supposed to receive the same meals as the general population, at least one of the Petitioners was served food that was moldy and milk that had expired.

133. Petitioners Williams and Sorenson Rafai, whose disabilities and physical limitations required them to have a bottom bunk, had to sleep on the floor in the SHU—even when they were sick with COVID-19. Respondent Starr failed to accommodate these women by providing them a bottom bunk, even after they reported the issue. When Petitioner Sorenson Rafai—who was sick with terrible headaches, diarrhea, and hypertension—complained that the floor she had to sleep on was wet, prison staff only gave her towels to mop up the water. Days later when it rained, Petitioner Sorenson Rafai woke up in a puddle of water on the floor.

134. Medication and pain relief for Petitioners in the SHU suffering from COVID-19 symptoms like severe headaches and body aches was delayed, and in some situations, completely denied. Petitioners like Petitioner Hemicker in the SHU requesting pain relief were told they had to wait to buy medication from the commissary, which they could only do on one specific day per week. Some Petitioners had to wait days before accessing basic medication like Tylenol or even an inhaler while sick with COVID-19. Others like Petitioner Williams never received her prescription medication while she was in the SHU.

135. Plaintiff Williams submitted an informal resolution attempt—the first step of the BOP's protracted grievance process—about FCI-Waseca's failure to provide her with prescription blood pressure medication while she was in the SHU, among other complaints. The response she received simply stated: "[Y]ou received care in accordance to [sic] BOP policies and procedures." By the time she received that response—20 days later—she was no longer in the SHU. Accordingly, the BOP's grievance process is unavailable to individuals in the SHU.

136. In addition to the SHU, FCI-Waseca uses "respiratory rooms" in the medical unit to isolate individual inmates. Even there, however, medical care is essentially non-existent, and inmates are treated the same as if they were in the SHU for punishment. After Petitioner Malcolm spent 10 days in the hospital, she was locked in a respiratory room for two weeks. She could not call her family. She did not have any of her property. The only medical attention she received was when she would remind staff to take her vitals. FCI-Waseca did not provide her assistance in dressing herself or even getting her into bed, forcing her to put her thin mattress on the floor. Although the prison provides inmates in Disciplinary Segregation a pillow, for days Ms. Malcolm, who was still too weak to dress herself, was without a pillow and extra blanket, despite the chill of the room.

137. Because inmates like Ms. Malcolm are held in these rooms for around two weeks, the BOP's protracted grievance process is unavailable, and any effort to use it would be futile.

138. FCI-Waseca's quarantine or isolation strategy also involved cohorting—housing inmates who had tested positive for COVID-19 together en masse. Despite the documented correlation between the SARA-CoV-2 viral load and the severity of COVID-19 disease,[80] Respondent Starr crammed inmates infected with COVID-19 together for weeks.

[80] For explanation of the link between viral load and disease severity, see note 19 *supra*.

139. When inmates started testing positive for COVID-19 in Unit A, Respondent Starr authorized staff to move additional inmates into ranges in Unit A. Sleeping rooms that had six people in them soon had 10. The bunkbeds were so close together that an inmate in one bed could touch the person next to her. Staff even put four or five single beds in a workout room. Doing so pushed the populations of these ranges to near full or full capacity and made social distancing impossible.

140. Respondent Starr also implemented this dangerous strategy in Unit C, which in September of 2020, housed 188 women—all infected with COVID-19.

141. Unit C has about 12-13 open ranges. When infected inmates were moved in, people were stacked on top of each other. There were at least 10 people in each small sleeping room. Because the rooms do not have doors, and the ranges are not separated by a full wall, an inmate on the top bunk in one range can reach out and touch someone on the top bunk in the next range. There was no room for social distancing at any time. When staff would take all 188 women's vitals or distribute food, inmates had to line up next to each other.

142. Like the inmates in Unit A, many of the women in Unit C were very ill. Petitioner Casarez was moved to Unit C after testing positive for COVID-19 and then inexplicably moved back to Unit A after a few days. She had difficulty breathing, diarrhea, a persistent cough and body aches. She describes Unit C as "zombieland," because of all the sick women wandering around the open ranges. Some women were too weak to pull their clothes all the way up. Others were so sick they could not get out of bed.

143. The dangerous method of housing hundreds of infected COVID-19 patients together in tight quarters has led to disastrous results: many of the women are still very sick. Even *months* after contracting COVID-19, many Petitioners are still using nebulizers, suffering asthma attacks, getting steroid shots, taking antibiotics, and having their chests x-rayed.

144. To make matters and possibly the health of these women worse, medical staff often gives steroid shots and provides nebulizer treatments in unsanitary places like a mop closet or staff bathroom.

145. While many Petitioners are now receiving some minimal medical attention, access to medication and health services has generally been delayed and even denied to inmates at FCI-Waseca, causing Petitioners unnecessary suffering and pain. When Respondent Starr shut down the medical unit at FCI-Waseca due to COVID-19, Petitioners had to fill out paperwork—known as a sick call—to request help. These sick calls are routinely unanswered. Prescription medication is not refilled. Medical staff has attended to an inmate only after a guard or caseworker is so alarmed by her condition that they personally seek help for her. Even calls from emergency phones placed by inmates on behalf of ailing roommates do not result in immediate care.

146. Through grievances and complaints filed by Petitioners, Respondent Starr was aware that medical care was delayed and even denied at FCI-Waseca. Respondent Starr also knew the substantial risk of harm that would befall these women if they did not receive their medications or proper care. Yet, Respondent Starr continually disregarded that risk: as of the filing of this petitioner-complaint, Petitioners like Ms. Malcolm and Ms.

Hemicker still must wait days for medical staff to answer their sick calls to address serious medical issues like chest pain.

147. Given how quickly someone with COVID-19 can deteriorate, these delays in medical attention cause worse outcomes and may be deadly. FCI-Waseca waited three days before sending Petitioner Malcolm to the hospital, even though she was vomiting, coughing up blood, and unable to feed herself. When an ambulance finally rushed her to the hospital, doctors told her she had double pneumonia in both lungs, and she would die unless doctors put her in a coma and onto a ventilator.

The Continuing Threat of COVID-19 at FCI-Waseca

148. The threat of serious illness or death for Petitioners and other medically vulnerable women at FCI-Waseca remains ongoing and acute.

149. Petitioners and other medically vulnerable inmates at FCI-Waseca are at high risk of harm due to their age and health status if infected with COVID-19 and are likely to be infected or re-infected with COVID-19 absent immediate action to protect inmates and reduce the inmate population.

150. As of December 8, 2020, the BOP reported that FCI-Waseca housed 635 incarcerated people. At current facility population levels, inmates at FCI-Waseca cannot comply with the CDC's guidelines for physical distancing, a "cornerstone" of risk reduction in prisons.[81]

[81] *See* CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020), at 4 ("CDC Interim Correctional Facility Guidance") ("Although social distancing is challenging to practice in

151. As long as inmates are unable to practice social distancing, any other mitigating steps will fail to decrease meaningfully the risk of COVID-19 infections at FCI –Waseca.

152. Despite Attorney General Barr's urging to immediately transfer medically "at risk" inmates to home confinement, Respondents are refusing to release Petitioners and other medically vulnerable women to home confinement to reduce the population density at FCI-Waseca to allow for social distancing.

153. Because Respondents have not implemented necessary precautions to prevent a second outbreak or agreed to release medically vulnerable individuals to home confinement, Petitioners and purported Class and Subclass members are still at serious risk of illness or even death if they contract COVID-19.

154. Respondents' shifting guidance on who is eligible for release for home confinement under the CARES Act has meant that medically vulnerable inmates once eligible for home confinement are suddenly and without explanation not qualified. Petitioner Malcolm, for example, who nearly died after contracting COVID-19, had a "low" security level, which she believed made her a candidate for home confinement. She recently learned, however, that Respondents have further restricted the pool of inmates

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correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19"); *id*. ("Social distancing is the practice of increasing the space between individuals and decreasing the frequency of contact to reduce the risk of spreading a disease (ideally to maintain at least 6 feet between all individuals, even those who are asymptomatic."), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

eligible for release by now accepting only those with the lowest security level—"minimum."

155. Petitioner Ramos had a similar experience. Petitioner Ramos, who initially qualified for release to home confinement under the CARES Act, was informed by her case manager that she could not seek release because the BOP was now requiring that inmates serve at least 50 percent of her sentence, which she had not done. By October, however, she met this criterion and submitted the necessary paperwork for home confinement. Respondent Starr approved her release. But once again, the BOP seemingly changed its criteria. Ms. Ramos was informed that the BOP Super Committee reviewing release would not consider her application because her PATTERN risk score was "low" instead of "minimum." Ms. Ramos previously had a minimum score. The BOP *increased* her score to "low" around June, when it made arbitrary changes to the PATTERN risk assessment tool. Ms. Ramos's case manager told her that it was unfair how the BOP kept changing criteria and precluding people from being released.

156. Respondents have also failed to use their power to grant compassionate release to decrease FCI-Waseca's prison population. Although Respondent Starr considers inmates infected with COVID-19 "recovered" after 10-14 days, many medically vulnerable women are still suffering from lingering or ongoing symptoms, which could lead to even worse outcomes from a second COVID-19 infection. For example, Petitioners Malcolm and Ramos continue to cough and struggle to breathe. Petitioners Malcolm and Hemicker are still experiencing chest pains and chronic dizziness. Yet, Respondent Starr is repeatedly denying requests for compassionate release from Petitioners on the basis that

they have "recovered" from COVID-19. And when Petitioners have appealed those denials, the regional and/or central BOP office has affirmed them. Such decisions, which disregard the risk of reinfection and the substantial harm COVID-19 may cause these medically vulnerable inmates, are additional examples of Respondent's deliberate indifference.

157. The Petitioners and purported Class Members are still at grave risk. The unproven and speculative 90-day period of COVID-19 immunity for people who contracted the virus expires for Petitioners in December.

158. Busses of new inmates who may be infected with COVID-19 continue to arrive at FCI-Waseca. And once again, these inmates are all placed—not in isolation—but together in a range in Unit A, which is exactly how the first outbreak began.

159. There are more opportunities now for inmates in different units to mix and possibly spread COVID-19, than there were before the outbreak. UNICOR has not only reopened—it has announced mandatory overtime, where hundreds of women from different units will sit elbow-to-elbow in a factory for nearly 70 hours per week. Inmates from Unit B have returned to serve food in the kitchen, which prison staff had previously taken over to ensure inmates from different units were separated. And as of November 23, 2020, rather than receiving meals in their respective units, inmates now go to the cafeteria to get their meals to bring back to their units. Some medically vulnerable and disabled inmates, like Ms. Williams, are so scared of the risk of cross contamination in the cafeteria that they buy food for every meal from the commissary and eat in their cells.

CLASS ALLEGATIONS

160. Petitioners bring this representative habeas action pursuant to 28 U.S.C. § 2241 and as a class action lawsuit pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 7.1 of the Local Rules on their own behalf and on behalf of all persons similarly situated.

161. The Class is defined as follows: All persons currently or in the future imprisoned at FCI-Waseca during the COVID19 pandemic who are medically vulnerable because they are either (1) 50 and older, or (2) at any age have: cancer; chronic kidney disease; chronic obstructive pulmonary disease (COPD); immunocompromised from solid organ transplant; obesity with a body-mass index (BMI) of 30 or more; serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies; sickle cell disease; type II diabetes mellitus; asthma (moderate to severe); cerebrovascular disease; cystic fibrosis; hypertension; immunocompromised from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or other immune-suppressing medications; neurologic conditions, such as dementia; liver disease; pregnancy; pulmonary fibrosis; smoking; thalassemia; type I diabetes mellitus.

162. Petitioners Bohnenkamp, Casarez, DuBray, Hemicker, Inabnit, Kasowski, Malcolm, Ramos, Sorenson Rafai, Walker, and Williams seek to represent a subclass consisting of all current and future inmates at FCI-Waseca who are medically vulnerable, who have previously tested positive for COVID-19, and who are now at risk of reinfection, serious illness, and death from COVID-19 (“Subclass I”) .

163. Petitioners Brooks, Martin, and Reed seek to represent a subclass consisting of all current and future inmates at FCI-Waseca who are medically vulnerable, and who have not yet contracted COVID-19 ("Subclass II").

164. Petitioners Brooks, Malcolm, Walker, and Williams also seek to represent a subclass consisting of all current and future inmates at FCI-Waseca who are medically vulnerable because of a disability as defined in the Rehabilitation Act ("Subclass III"). Subclass III includes people with all conditions listed in paragraph 160, except those who are medically vulnerable solely because of age or BMI. People with all other conditions listed in paragraph 160 above are people with disabilities as defined under federal law.

Numerosity

165. Joinder is impracticable because (1) the Classes and Subclasses are numerous; (2) the Classes and Subclasses include future members, and (3) the members of the Class and Subclasses are incarcerated, limiting their ability to institute individual lawsuits, particularly in light of reduced legal visitation and in-person court restrictions due to the COVID-19 pandemic.

166. Specific information regarding the size of the Class and the Subclasses, as well as the identity of the members of each group, is in Respondents' exclusive control.

Predominance of Common Issues

167. Common questions of law and fact exist as to all members of the Class and Subclasses and predominate over questions that affect only the individual members. These common questions of fact and law include but are not limited to: (1) whether the conditions of confinement described in this Petition amount to constitutional violations; (2) what

measures Respondents have taken and are taking in response to the COVID-19 crisis; (3) whether Respondents have implemented and are implementing an adequate emergency plan during the COVID-19 crisis; (4) whether Respondents' practices during the COVID-19 crisis have exposed and are exposing inmates at FCI-Waseca to a substantial risk of serious harm; (5) whether the Respondents have known of and disregarded a substantial risk of serious harm to the safety and health of the Class and/or Subclasses; (6) whether Respondents' actions regarding release to home confinement under the CARES Act are an abuse of discretion and/or arbitrary and capricious; and (7) what relief should be awarded to redress the harms threatened to members of the Class and/or Subclasses as a result of the conditions.

Typicality

168. The claims of the Petitioners are typical of the claims of the Class and Subclasses, because (a) each Petitioner is currently in Respondents' custody and (b) the Petitioners and all of the Class and Subclass Members' claims arise from the same wrongful acts, omissions, policies, and practices of Respondents, and are based on the same legal theories.

Adequacy

169. Petitioners will fairly and adequately represent the interests of the Class and Subclasses, and they have no interests antagonistic to the interests of the Class or Subclasses. The Petitioners and Class and Subclass Members seek to ensure that Respondents protect the Class and Subclass Members committed to their custody;

specifically, Petitioners seek the release of medically vulnerable individuals, who are at greater risk for severe COVID-19 disease and death.

170. Petitioners' attorneys are experienced public interest and trial lawyers with extensive experience litigating civil rights and class action lawsuits, including federal class actions against government entities.

Superiority

171. A class action is preferable and superior to other available methods for the fair and efficient adjudication of this controversy. Class treatment will permit the adjudication of claims by many class members who could not afford to individually litigate their claims or vindicate their rights against Respondents. There are no difficulties likely to be encountered in the management of this case that might preclude its maintenance as a class action, and no superior alternatives exists for the fair and efficient adjudication of this matter.

CAUSES OF ACTION

COUNT I:

Unconstitutional Confinement in Violation of the Eighth Amendment to the United States Constitution

Class Against All Respondents

172. Petitioners reallege and incorporate the allegations of the preceding paragraphs as if fully set forth herein.

173. The Eighth Amendment to the United States Constitution protects Petitioners and the putative Class Members from "cruel and unusual" punishment. U.S. CONST. amend. VIII. It is cruel and unusual punishment to imprison individuals in "a condition of

confinement that is sure or very likely to cause serious illness and needless suffering." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

174. To amount to the infliction of cruel and unusual punishment (1) prison conditions must pose "an unreasonable risk of serious damage" to a prisoner's health and (2) prison officials must have acted with deliberate indifference to the risk posed. *Helling*, 509 U.S. at 35.

175. Petitioners and Class Members are uniquely and particularly vulnerable to serious complications or death from contracting/re-contracting COVID-19 because of their age and/or because they suffer from medical conditions that render them medically vulnerable individuals, according to the CDC.

176. Because of the conditions at FCI-Waseca, Petitioners cannot take steps to protect themselves and Respondents have not provided adequate protections. As COVID-19 works its way through the FCI-Waseca inmate population, the already deplorable conditions at the prison will continue to deteriorate. Petitioners and the Class are subjected to constant and "unreasonable risk of serious damage" to their health.

177. Respondents' failure to adequately protect Petitioners and the putative Class and Subclass Members from these unconstitutional conditions, or release them from the conditions entirely, constitutes deliberate indifference to a substantial risk of serious harm to Petitioners and members of the Class and Subclasses, thereby establishing a violation of the Eighth Amendment.

178. Respondents were aware of these conditions, which were and are open and obvious throughout the facility. Respondents were warned against the dangerous

conditions resulting from their policies and procedures (or lack thereof) with respect to the COVID-19 pandemic. Respondents were also warned about the importance of decreasing prison populations to protect medically vulnerable inmates from the threat of COVID-19.

179. Respondents knew of and disregarded this excessive risk to the Petitioners' and Class and Subclass Members' health and safety, a risk which today's society does not tolerate. Respondents consciously disregarded that risk. Respondents failed to act with reasonable care to mitigate these risks, and failed to properly exercise their authority under the CARES Act to release medically vulnerable prisoners to home confinement. Respondents' actions and inactions subjected Petitioners to a grave and serious risk of harm of serious illness, permanent injury, or death.

180. As a result of Respondents' actions, Petitioners and Class Members are suffering irreparable injury.

COUNT II:

Discrimination on the Basis of Disability in Violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794

Subclass III Against All Respondents

181. Petitioners reallege and incorporate the allegations of the preceding paragraphs as if fully set forth herein.

182. Section 504 of the Rehabilitation Act states that "no qualified individual with disability in the United States . . . shall, solely by reason of [ ] disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

183. The regulations implementing Section 504 of the Rehabilitation Act require that entities receiving federal financial assistance avoid unnecessary policies, practices, criteria, or methods of administration that have the effect of discriminating against persons with disabilities. *See* 28 C.F.R. § 41.51(b)(3)(i).

184. Respondents receive "Federal financial assistance" within the meaning of 28 U.S.C. § 794.

185. Access to safe conditions of confinement and adequate preventative and responsive conditions, including medical treatments, are programs and services that FCI-Waseca must provide—but is not adequately providing—to the qualified people in its custody, in order to comply with the Rehabilitation Act.

186. Petitioners Brooks, Malcolm, Walker, and Williams, and the Subclass Members they seek to represent, are individuals with disabilities for the purposes of the Rehabilitation Act, 42 U.S.C. § 12012, 29 U.S.C § 705(20)(B). They are "qualified" for the programs, services, and activities being challenged herein.

187. Respondents are violating Section 504 of the Rehabilitation Act by failing to make the reasonable modifications necessary to ensure equal access to adjudication, prison services, programs, and activities and release for people with disabilities who are at high risk of severe infection or death from COVID-19. Respondents are further violating the Rehabilitation Act by employing methods of administration (including a policy of non-release even in the face of the dangers of COVID-19) that tend to discriminate against people with disabilities.

COUNT III:

Agency Action that is Arbitrary and Capricious and/or An Abuse of Discretion in Violation of the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

Class Against All Respondents

188. Petitioners reallege and incorporate the allegations of the preceding paragraphs as if fully set forth herein.

189. The Federal Bureau of Prisons is an "agency" under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

190. Petitioners and the Class Members they seek to represent are the "at-risk" inmates Attorney General Barr directed Respondents to review for transfer to home confinement under the CARES Act in a memorandum dated April 3, 2020.

191. Respondents' policies, procedures and/or rules regarding home confinement under the CARES Act, their failure to review eligible Petitioners and purported Class Members for home confinement, and their denial of home confinement to eligible Petitioners and purported Class Members are final agency actions for which there is no other adequate remedy in a court subject to judicial review. 5 U.S.C. § 704; 5 U.S.C. § 701(b) (2); 5 U.S.C. § 551(4), (13).

192. The agency actions described above regarding home confinement under the CARES Act for Petitioners and purported Class Members are an abuse of discretion and/or "arbitrary and capricious" because Respondents have: (1) relied on factors that Congress has not intended them to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for their decisions that runs counter to the evidence

before the agency; and/or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

193. Petitioners and purported Class Members eligible for review under the CARES Act and the directive of Attorney General Barr's memorandum are adversely affected and/or aggrieved by actions of the agency. *See* 5 U.S.C. § 702.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

I. For certification of the proposed Class and Subclasses pursuant to Fed. R. Civ. P. 23, for the reasons stated herein and in Petitioners' forthcoming Motion for Class Certification;

II. For issuance of a writ of habeas corpus requiring Respondents to release from custody and/or to home confinement the Petitioners;

III. Pursuant to 28 U.S.C. § 2243 and issued "forthwith," for entry of an Order to Show Cause requiring Respondents to identify within forty-eight (48) hours of the Court's order, and submit to the Court a list of all Class and Subclass members and requiring Respondents to answer as to why the habeas petition and relief sought herein should not be granted as to them;

IV. For entry of an order declaring the Respondents' policies and practices (or lack thereof) regarding COVID-19 are unconstitutional, in violation of the Eighth Amendment to the United States Constitution;

V. For entry of an order declaring the Respondents' policies and practices (or lack thereof) regarding COVID-19 constitute discrimination on the basis of Petitioners' disabilities, in violation of the Rehabilitation Act, 29 U.S.C. § 794;

VI. For entry of an order requiring Respondents to comply with the Constitution for any Class Members who remain at FCI-Waseca, and with the Rehabilitation Act for any Subclass Members who remain;

VII. For entry of an order declaring the Respondents' review of Petitioners and Class Members for home confinement under the CARES Act was an abuse of discretion and/or arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 701 et seq.;

VIII. For issuance of a temporary restraining order, preliminary injunction, and permanent injunction pursuant to Fed. R. Civ. P. 65;

IX. For appointment of a Special Master pursuant to Fed. R. Civ. P. 63 or an expert under Fed. R. Evid. 706 to make recommendations to the Court regarding the number of incarcerated people that FCI-Waseca can house consistent with CDC Guidance on strategies to mitigate the spread of COVID-19;

X. For the Court to retain jurisdiction over this case until Respondents have fully complied with the orders of this Court, and there is reasonable assurance that they will continue to comply in the future, absent continuing jurisdiction;

XI. For an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

XII. For such additional relief as the Court deems just and appropriate.

Dated: December 9, 2020

AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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