

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALEXANDER GRINIS, MICHAEL
GORDON, and ANGEL SOLIZ, on
behalf of themselves and those
similarly situated,

Petitioners,

v.

STEPHEN SPAULDING, Warden of
Federal Medical Center Devens, and
MICHAEL CARVAJAL, Director of the
Federal Bureau of Prisons, in their
official capacities,

Respondents.

No. 20-cv-10738-GAO

**MEMORANDUM IN SUPPORT OF
MOTION FOR IMMEDIATE BAIL CONSIDERATION, TEMPORARY
RESTRAINING ORDER, AND PRELIMINARY INJUNCTIVE RELIEF**

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INTRODUCTION

“The COVID-19 global pandemic threatens all of us,”¹ but “correctional institutions face unique difficulties in keeping their populations safe during this pandemic.”² And these life-threatening conditions pose a special threat to FMC Devens, which houses many of the oldest and most medically vulnerable prisoners in the entire federal prison system.

Yet the Respondents, Warden Stephen Spaulding and BOP Director Michael Carvajal, have failed to take necessary measures to mitigate that threat, in violation Eighth Amendment rights of Petitioners and proposed Class Members. Immediate judicial action is necessary to reduce the population of FMC Devens to a level that is sufficient to ensure effective social distancing, thereby reducing the spread of COVID-19, preventing serious illness—and, ultimately, saving the lives of prisoners, staff, and people in the surrounding community.

¹ *Savino v. Souza*, No. 20-cv-10617-WGY, 2020 U.S. Dist. LEXIS 61775, at *7 (D. Mass. Apr. 8, 2020); see Declaration of Joe Goldenson, M.D. (Apr. 14, 2020) (“Goldenson Decl.”) ¶¶ 6-16, attached as Exhibit 1.

² *Savino*, 2020 U.S. Dist. LEXIS 61775, at *7 (quoting *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, 484 Mass. 431, 436 (2020)); see Goldenson Decl. ¶¶ 17-27.

FACTUAL BACKGROUND

Because there is no vaccine, cure, or proven therapeutic treatment for COVID-19, the only public health measures that have proven effective in limiting the spread of potentially deadly infections are strict social distancing and diligent hygiene practices. *See* Goldenson Decl. ¶ 16.³

The Centers for Disease Control and Prevention (“CDC”) recommends that *everyone* practice “social distancing,” even among people with no symptoms, because asymptomatic and pre-symptomatic people can transmit the virus to others.⁴ Also known as “physical distancing,” “social distancing” means “stay[ing] at least 6 feet from other people” and “stay[ing] out of crowded places.”⁵

Social distancing is no less important for prisoners at FMC Devens than it is for personnel in the federal courthouse or members of the public at large. “Although social distancing is challenging to practice in correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases

³ *See also* CDC, “Coronavirus Disease (COVID-19),” (updated Apr. 7, 2020) (“There are no drugs or other therapeutics approved by the U.S. Food and Drug Administration to prevent or treat COVID-19. Current clinical management includes infection prevention and control measures and supportive care, including supplemental oxygen and mechanical ventilatory support when indicated.”), available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/therapeutic-options.html> (last accessed Apr. 14, 2020).

⁴ CDC, “Social Distancing,” available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last accessed Apr. 13, 2020).

⁵ *Id.*

such as COVID-19.”⁶ Because “many individuals with COVID-19 do not display symptoms, the virus could be present in facilities before cases are identified. Both good hygiene practices and social distancing are critical in preventing further transmission.”⁷

In fact, preventing the rampant spread of infection at FMC Devens may be more important than in almost any other institutional setting. By design, FMC Devens houses many of the oldest and most medically vulnerable prisoners in the entire BOP system. These are the people who, if infected, are most likely to require advanced support and intensive care; they also face the greatest risks of serious illness and death.⁸

But effective social distancing is impossible at FMC Devens, both in the Medical Center and the Camp. *See* Declaration of Alexander Grinis (Apr. 13, 2020)

⁶ CDC, “Interim Guidance for Correctional and Detention Facilities.” (“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.”)), *available at* <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last accessed Apr. 13, 2020).

⁷ *Id.*

⁸ *See* Sharon Begley, “Who Is Getting Sick, and How Sick? A Breakdown of Coronavirus Risk by Demographic Factors,” *STAT NEWS* (Mar. 3, 2020), *available at* <https://www.statnews.com/2020/03/03/who-isgetting-sick-and-how-sick-a-breakdown-of-coronavirus-risk-by-demographic-factors/>; *see also* Jason Oke & Carl Heneghan, “Global Covid-19 Case Fatality Rates,” *Oxford COVID-19 Evidence Service* (Mar. 28, 2020) (“Patients with comorbid conditions had much higher [fatality] rates.”), *available at* <https://www.cebm.net/covid-19/global-covid-19-case-fatality-rates/>.

“Grinis Decl.”), ¶ 7, attached as Exhibit 2; Declaration of Michael Gordon (Apr. 13, 2020) (“Gordon Decl.”), ¶ 8, attached as Exhibit 3; Declaration of Angel Soliz (Apr. 13, 2020) (“Soliz Decl.”), ¶ 7, attached as Exhibit 4; *see generally* Goldenson Decl. ¶¶ 17-19 (“Space and resource limitations—and the resulting inability of inmates and employees to practice social distancing—make it extremely difficult to effectively quell the explosive growth of a highly contagious virus.”); *id.* ¶¶ 21-23 (“[P]risoners are physically unable to practice social distancing,” consistent with CDC guidelines, and “[b]ecause of this, incarcerated individuals are less able to protect themselves from being exposed to and becoming infected with infectious diseases, such as COVID-19.”); *cf. Calderon Jimenez v. Cronen*, No. 18-cv-10225-MLW (D. Mass. Mar. 26, 2020) [DE 507-1 at 4] (recognizing “[s]ocial distancing is difficult or impossible” in prisons).

The limited steps that FMC Devens has reportedly taken, thus far, to prevent, detect, and treat cases of COVID-19 in the Medical Center and Camp fail to comply with even the most minimal recommendations of public health experts, and those steps are “clearly not enough to mitigate the risk of a surge of COVID-19 infections at the facility.” Goldenson Decl. ¶ 35. For example, taking the temperatures of prisoners and staff who *already* show symptoms of COVID-19, such as fever, sneezing, or coughing, “will not prevent the infection from infiltrating” FMC Devens, or spreading throughout the facility, because “individuals who are asymptomatic, either during the early stages of infection or throughout their entire

period of infection” can unknowingly transmit the virus to others and shed the virus to surfaces and objects that others touch. *Id.* ¶ 36.

Indeed, Respondents are “flying blind” without adequate testing, so they do not—and cannot know—how many prisoners and staff may already be infected at FMC Devens. As of this filing, the BOP has not implemented any national testing protocol to detect the actual incidence of COVID-19 cases in FMC Devens or other institutions.⁹ Although 17 prisoners at FMC Devens had reportedly been tested as of April 7, 2020, all with negative results,¹⁰ that figure represents *less than 2 percent of the facility’s total population*, and it almost certainly understates the actual number of infections in the Medical Center and Camp, due to limited testing and dubious disclosures.¹¹

Moreover, despite the assurances from Respondent Carvajal and directions from Attorney General William Barr, the BOP is moving far too slowly to address the COVID-19 pandemic. As of April 14, 2020, 444 federal prisoners and 248

⁹ See Frank G. Runyeon, “NY Prison’s Uneven COVID-19 Testing Puts Inmates At Risk,” *Law360* (Apr. 10, 2020), *available at* <https://www.law360.com/articles/1262694/ny-prisons-uneven-covid-19-testing-puts-inmates-at-risk>.

¹⁰ See *United States v. Turner*, No. 17-cr-132 (E.D. Pa.) (letter from U.S. Attorney’s Office to Judge Baylson) [DE #44 at 1].

¹¹ See Walter Pavlo, “Bureau Of Prisons Underreporting COVID-19 Outbreaks In Prison,” *Forbes* (Apr. 1, 2020), *available at* <https://www.forbes.com/sites/walterpavlo/2020/04/01/bureau-of-prisons-underreporting-outbreaks-in-prison/#487c61f27ba3>; see Gordon Decl. ¶ 8 (noting prisoners in various and staff have “appear[ed] to be sick” and “suffering flu-like symptoms” in recent weeks).

correctional staff, across 44 institutions, have tested positive for COVID-19, representing a jump of more than 100 confirmed cases in just one day.¹² Notably, half of the Medical Centers in the BOP system (Butner, Carswell and Forth Worth) have already reported multiple cases.¹³ Yet the BOP continues to fail to take full advantage of its statutory authorities to quickly and significantly reduce the population at FMC Devens to prevent deadly outbreaks *before they occur*.

LEGAL ARGUMENT

Both “the light of reason” and “the expert advice of the CDC” demand that this Court take immediate action “to reduce the population” at FMC Devens in sufficient number, and with sufficient speed, to prevent the spread of deadly infection, especially among older, medically vulnerable prisoners, “so that all those who remain (including staff)” may be better protected.” *Savino*, 2020 U.S. Dist. LEXIS 61775, at *26-27.

I. Petitioners and other Class Members should be considered for immediate release on personal recognizance or bail pending a decision in these habeas proceedings.

In these habeas proceedings pursuant to 28 U.S.C. § 2241, this Court has “inherent power to release the petitioner[s],” and other similarly situated federal prisoners at FMC Devens, “pending determination of the merits.” *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972) (*per curiam*). “Such authority may be

¹² See BOP, “COVID-19 Cases,” available at <https://www.bop.gov/coronavirus/> (last accessed Apr. 14, 2020). As of April 14, 2020, 388 federal prisoners and 201 correctional staff had tested positive.

¹³ See *id.*

exercised in the case of ‘a health emergency,’ where the petitioner has also demonstrated a likelihood of success on the merits.” *Savino*, 2020 U.S. Dist. LEXIS 61775, at *26-27 (“diligently entertaining bail applications while the petition for habeas corpus are pending”).

The COVID-19 pandemic is such an emergency, because “some infected people die,” and “if [a habeas] petitioner is infected and dies, the case will be moot,” and “[t]he habeas remedy will be ineffective.” *Calderon Jimenez v. Cronen*, No. 18-cv-10225-MLW (D. Mass. Mar. 26, 2020) (granting immediate interim release of class member in habeas proceeding) [DE 507-1 at 4]. And as described *infra* Section II(B), Petitioners are likely to succeed on the merits of their Eighth Amendment claim.

One court in this district, and courts elsewhere, have granted such preliminary habeas relief to civil immigration detainees who also face risks of infection, illness, and death due to COVID-19. *See, e.g., Avendano-Hernandez v. Decker*, No. 20-cv-1589 (JPO) (S.D.N.Y. Apr. 1, 2020) (ordering immediate release of habeas petitioner); *Calderon Jimenez v. Wolf*, No. 18-cv-10225-MLW (D. Mass. Mar. 26, 2020) (finding “extraordinary circumstances exist that make the grant of bail necessary . . . to make the habeas remedy effective”). Indeed, in *Savino*, the court has repeatedly exercised “its authority to order bail for habeas petitioners under the reigning ‘exceptional circumstances’ of this nightmarish pandemic.” *Savino*, 2020 U.S. Dist. LEXIS 61775, at *27 (quoting *Glynn v. Donnelly*, 470 F.2d 95, 98 (1972)).

Since that case was filed on March 27, the court has released 43 detainees on bail, pending a decision on the merits of their underlying habeas claims.

Similarly, this Court should immediately implement an efficient and effective process for identifying all those prisoners at FMC Devens who may be released on personal recognizance or bail pending a decision on the merits in this habeas proceeding.

II. Immediate judicial action is necessary to protect Petitioners, other Class Members, and the general public from the dangers of the COVID-19 pandemic.

For a temporary restraining order, a petitioner “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “[W]hen the government is the opposing party,” the third and fourth factors—whether the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is denied and weighing the public interest—“merge.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). For a preliminary injunction, a petitioner must make a substantially similar showing to obtain relief. *See Largess v. Supreme Jud. Ct. for the Com. of Mass.*, 317 F. Supp. 2d 77, 81 (D. Mass. 2004).

The purpose of a TRO is “preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing[.]” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 439 (1974). Thus, this Court may issue a temporary

restraining order without waiting for any response from Respondents, or holding an adversary hearing, if it finds that “immediate and irreparable injury . . . will result to the movant before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1). Here, immediate judicial action is warranted, because the “risk of injury”—or worse, death—“is traceable to the government’s act of confining” Petitioners and Class Members “in close quarters” at FMC Devens, where they cannot engage in effective social distancing, yet that imminent danger “would of course be redressable by a judicial order of release or other ameliorative relief.” *Savino*, 2020 U.S. Dist. LEXIS 61775, at *13.

A. In the absence of immediate relief, Petitioners and other Class Members will suffer irreparable harm—infection, serious illness, and death.

Respondents have responsibility for, and control over, Petitioners and Class Members, yet Respondents have failed to comply with public health recommendations, including CDC guidelines, to protect the prisoners at FMC Devens. Respondents have not only failed to implement effective social distancing, but they have also prevented—and continue to prevent—prisoners from taking steps to protect themselves. As a result, “FMC Devens is a tinder-box that is waiting to explode with a surge of COVID-19 infections” among Petitioners and the proposed Class Members. Goldenson Decl. ¶ 34.

The facility has a high number of medically vulnerable individuals living in conditions where they are unable to practice any kind of meaningful physical distancing or maintain proper hygiene. The failure to routinely clean bathrooms and surfaces like phones and computers after every use creates a perfect pathway for the transmission of the virus. The facility is not a closed environment, with

correctional officers and new prisoners arriving daily, and many people circulating amongst the units for jobs and medical treatment. And most important, the current population levels and physical structures do not allow prisoners or correctional officers to follow CDC's recommendation to maintain 6 feet of distance between themselves.

Id.; see generally *id.* ¶ 26 (stating that “outbreaks of COVID-19 in jails, prisons, and detention centers in the U.S. are inevitable” and, therefore, that “[r]eleasing as many individuals as possible is important to protect the health of those incarcerated” as well as “custodial, health care, and other facility staff and the community as a whole”).

Petitioners or other Class Members will inevitably suffer infections unless immediate, remedial measures are taken, including reducing the population at FMC Devens such that effective social distancing becomes possible. Many prisoners will get severely ill; some will suffer permanent injury to their lungs or other organs; and others will die, “the single most irreparable harm of all.” *Turner v. Epps*, 842 F. Supp. 2d 1023, 1028 (S.D. Miss. 2012). See Goldenson Decl. ¶¶ 11-12, 14.

“In this moment of worldwide peril from a highly contagious pathogen, the government cannot credibly argue that [Petitioners and Class Members] face no ‘substantial risk’ of harm (if not ‘certainly impending’) from being confined in close quarters in defiance of the sound medical advice that all other segments of society now scrupulously observe.” *Savino*, 2020 U.S. Dist. LEXIS 61775, at *13. It makes no difference whether, as of this filing, there are confirmed infections among

prisoners and staff at FMC Devens. Prisoners who are not yet known to be infected, or who are incarcerated in facilities that the BOP has not publicly identified as “materially affected” by the COVID-19 pandemic, cannot be disregarded as “remote bystanders” to worsening public health crisis in the federal prison system, because “[t]hey are that system’s next victims.” *Brown v. Plata*, 563 U.S. 493, 532 (2011).

B. Petitioners and other Class Members are likely to succeed on the merits of their Eighth Amendment claim.

“Prisoners retain the essence of human dignity inherent in all persons,” and “[r]espect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.” *Plata*, 563 U.S. at 510 (citing *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” (internal quotations omitted))).

“A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e. g.*, . . . medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment.” *DeShaney v. Winnebago Cnty. Dep’t of Social Servs.*, 489 U.S. 189, 199-200 (1989). “Contemporary standards of decency require no less.” *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976)). “A prison that deprives prisoners of . . . adequate medical care is

incompatible with the concept of human dignity and has no place in civilized society.” *Plata*, 563 U.S. at 511.

Of particular significance here, incarcerating prisoners in crowded conditions that expose them to infectious disease violates the prohibition on cruel and unusual punishment.

In *Hutto v. Finney*, 437 U.S. 678, 682 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed. We would think that a prison inmate could also successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no sign of current symptoms.

Helling, 509 U.S. at 33; see *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982)

(holding it is “cruel and unusual punishment to hold convicted criminals in unsafe conditions”); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (holding “correctional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease”); see generally *Plata*, 563 U.S. at 519 (“Crowding . . . creates unsafe and unsanitary living conditions that hamper effective delivery of medical and mental health care.”).

A prison official acts with “deliberate indifference” to the substantial risk of serious harm, such as from the spread of infectious disease among prisoners, when

he “knows of but disregards an excessive risk” to the health or safety of prisoners. *Farmer*, 511 U.S. at 837. This Court “may conclude” that Respondents know of the substantial risk from the COVID-19 pandemic “from the very fact that the risk [is] obvious.” *Id.* at 842. Respondent Carvajal has publicly acknowledged that “[t]he COVID pandemic is creating unique challenges” for the BOP and has already resulted in hundreds of positive cases among prisoners and staff as well as numerous deaths.¹⁴

Although strict social distancing is the only effective means to prevent the spread of COVID-19, it is impossible at FMC Devens, both in the Medical Center and the Camp. *See* Gordon Decl. ¶ 8 (“It is impossible to stay six feet away from other inmates.”); Soliz Decl. ¶ 7 (same); Grinis Decl. ¶ 7 (same). At almost all times, prisoners are “very close together,” and they are “not instructed to maintain distance from each other.” Gordon Decl. ¶ 9. Staff have “not provided [prisoners] with any specific education about COVID-19 except that wearing masks and washing hands frequently is recommended.” Soliz Decl. ¶ 12.

Some Medical Center prisoners are housed in open, dormitory-style units, where they sleep in two-person bunk beds and move around freely. *See* Gordon Decl. ¶¶ 8, 15. Within “open” units, Medical Center prisoners also share common showers and toilets. *See id.* ¶ 8. They also share common phones and computers, which are clustered together and not cleaned between uses. *See id.* ¶ 9. Throughout the day,

¹⁴ Michael Carvajal, Video Transcript of Message to BOP Staff (Apr. 10, 2020), available at <https://prisonology.com/wp-content/uploads/2020/04/COVID-19-Video-transcript-of-BOP-Director-Michael-Carvajal.pdf> (last accessed Apr. 14, 2020).

prisoners move in and out of their units, for programming, recreation, and medical treatment, and during these times, prisoners are required to move in line together, only inches apart, and they often congregate in groups. *See id.* ¶¶ 11-14. For example, prisoners must “march in line to pick up meals from the ‘chow hall’” and then return to the unit to eat; they “sit four or five to a table,” so “it is not possible to maintain six feet of separation from each other during meals.” *Id.* ¶ 14.

Others Medical Center prisoners are housed in units with two-person cells that each contain a bunk bed, toilet, and sink. *See Soliz Decl.* ¶ 7. Within these “closed” units, approximately 120 prisoners share 12 common showers that are “often dirty and littered with used soap, used band-aids, used razors, and other debris.” *Id.* ¶ 8-9. They also share 4 common phones and 5 common computers that are “very close together” and “not cleaned between users.” *Id.* ¶ 10. Although prisoners in closed units no longer eat in common areas (they now eat in their cells), they must go to the dining hall, pick up their food, and return to the unit to eat. *See id.* ¶ 9. They also “must stand in line next to each other to receive their medications.” *Soliz Decl.* ¶¶ 11.

Conditions are similarly cramped for prisoners in the Camp. *See Grinis Decl.* ¶ 7. There are more than 100 prisoners in the Camp, and they are housed in an open, dormitory-style space, where they sleep in open cubicles, with no doors and walls that do not extend to ceiling. *See id.* Most cubicles are occupied by 4 prisoners in 2 bunk beds; some are occupied by 2 prisoners in a single bunk bed. *See id.* All Camp prisoners share 12 common toilets, sinks, and showers. *See id.* ¶ 8. Prisoners

are tasked with cleaning these facilities twice per day, and they are “often not sanitary.” *Id.* Moreover, no free soap is available to Camp prisoners, and hand sanitizer is only available in the kitchen. *See id.* ¶ 9. Camp prisoners also share 4 telephones and 5 computers, which are clustered close together and not cleaned between users. *See id.* ¶ 11. Meals are eaten in the Camp; prisoners stand “very close together” in line to be served food, and they eat at communal tables. *Id.* ¶ 12.

Given these conditions, “persons currently detained at FMC Devens are at significantly greater risk of contracting COVID-19 than if they were permitted to shelter in place in their home communities,” and “[i]f infected they are at increased risk of suffering severe complications and outcomes.” Goldenson Decl. ¶ 39.

Respondents’ failure to minimize these known risks by reducing the population at FMC Devens, through compassionate release and/or transfer to home confinement, in order to enable effective social distancing among the remaining prisoners, amounts to deliberate indifference to infection, illness, and death from COVID-19.

“[I]n order to meaningful[ly] decrease the risk of COVID-19 infections at FMC Devens, the facility must reduce the prisoner population sufficiently to ensure social distancing and permit personal hygiene in compliance with CDC guidelines.” *Id.* ¶ 40. Nevertheless, Respondents Spaulding and Carvajal have failed to use the BOP’s statutory authority to reduce the prisoner population at FMC Devens, and Respondent Spaulding has also denied, or failed to respond to, requests by Petitioners for compassionate release or, in the alternative, transfer to home

confinement. *See* Soliz Decl. ¶ 5 (denied); Gordon Decl. ¶ 20 (no response); Grinis Decl. ¶ 5 (no response).

Since March 26, 2020, when Attorney General Barr issued his first memorandum directing Respondent Carvajal to “utilize home confinement, where appropriate, to protect the health and safety of BOP personnel and the people in our custody,” Barr Mem. (Mar. 26, 2020) at 1, attached as Exhibit 5, the BOP has reportedly placed 1,019 prisoners on home confinement.¹⁵ That figure represents *less than 0.5 percent* of the total inmate population in BOP custody. Although no specific statistics are publicly available for FMC Devens, if the BOP has transferred a proportionate number of prisoners from the Medical Center or Camp to home confinement, it would have moved only 5 or 6 prisoners, leaving the remaining prisoners—who still cannot socially distance per CDC guidelines and who are at high risk—vulnerable to infection, serious illness, and death.

These meager efforts pale in comparison to the more urgent steps taken, some weeks ago, by some state officials to significantly reduce the populations of prisons and jails, enable social distancing, and slow the spread of COVID-19.¹⁶

¹⁵ *See* BOP, “Frequently Asked Questions regarding potential inmate home confinement in response to the COVID-19 pandemic,” *available at* <https://www.bop.gov/coronavirus/faq.jsp> (last accessed Apr. 13, 2020).

¹⁶ *See, e.g.,* Tracey Tully, “1,000 Inmates Will Be Released from N.J. Jails to Curb Coronavirus Risk,” *The New York Times* (Mar. 23, 2020), *available at* <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html>; Bernadette Hogan, “Cuomo Orders 1,100 parole violators released from jails over coronavirus concerns,” *The New York Post* (Mar. 27, 2020), *available at* <https://nypost.com/2020/03/27/cuomo-orders-1100-parole-violators-released-from-jails-over-coronavirus-concerns/>; “Kentucky plans to release more than 900

These states have done much more, far faster, for their own prison populations than the BOP has accomplished for its national prison system.

C. The balance of equities favors immediate relief, and the public interest demands it.

The urgent need to comply with the Eighth Amendment by protecting prisoners—especially elderly and medically vulnerable prisoners at FMC Devens—from infection, disease, and death outweighs any interest in continuing to incarcerate them in a BOP facility or any possible harm to Respondents. Indeed, neither Respondent Spaulding nor Respondent Carvajal will suffer any harm if this Court orders them to fulfill their “profound obligation[s] to protect the health and safety” of all prisoners at FMC Devens. Barr Mem. (Apr. 3, 2020) at 1, attached as Exhibit 6 (recognizing that the duty to “administer the lawful punishments that our justice system imposes” on the entire BOP “a profound obligation to protect the health and safety of all inmates”); *see also* Barr Mem. (Mar. 26, 2020) at 1.

Meanwhile, there is a “strong public interest in ensuring that the detainees of correctional facilities are treated in a human fashion.” *Mattsen v. Massimiano*, No. 78-cv-2454-F, 1983 U.S. Dist. LEXIS 11891, at *12 (D. Mass. Nov. 8, 1983) (citing *Preiser v. Newkirk*, 422 U.S. 395, 402 (1974)). And “[i]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Jackson Women’s*

prisoners because of the COVID-19 outbreak,” *WDRB.com* (Apr. 2, 2020), available at https://www.wdrb.com/news/kentucky-plans-to-release-more-than-900-prisoners-because-of-the-covid-19-outbreak/article_aef84282-7541-11ea-8a18-efe5a8cf107d.html; “Inslee: 950 nonviolent offenders will get early release to fight spread of coronavirus in state prisons,” *Q13 Fox News* (Apr. 13, 2020), available at <https://q13fox.com/2020/04/13/inslee-950-nonviolent-offenders-will-get-early-release-to-fight-spread-of-coronavirus-in-state-prisons/>.

Health Org. v. Currier, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quoting *Awad v. Ziriya*, 670 F.3d 1111, 1132 (10th Cir. 2012)); see *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010) (“When a constitutional violation is likely . . . , the public interest militates in favor of injunctive relief[.]”); *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (“[P]ublic interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.”).

Moreover, putting aside the risks to the prisoners themselves, the public interest also demands aggressive efforts to control outbreaks in prisons, such as FMC Devens, because infections within prison walls will inevitably spread outside them.

Experts warn that an outbreak in correctional institutions has broader implications for the Commonwealth’s collective efforts to fight the pandemic. First, the DOC has limited capacity to offer the sort of specialized medical interventions necessary in a severe case of COVID-19. Thus, as seriously ill individuals are transferred from correctional institutions to outside hospitals, any outbreak in a correctional institution will further burden the broader health care system that is already at risk of being overwhelmed. Second, correctional, medical, and other staff enter and leave correctional institutions every day. Should there be a high concentration of cases, those workers risk bringing infections home to their families and broader communities.

CPCS v. Trial Ct., 484 Mass. 431, 437 (2020); see Goldenson Decl. ¶ 27 (“It is difficult to overstate the devastation that a COVID-19 outbreak can inflict on the prisoners, correctional staff and *their surrounding communities.*”) (emphasis added).

Public health experts recently explained, in the *New England Journal of Medicine*, that immediate and extensive “efforts to decarcerate” are necessary to protect people inside *and outside* of prisons.

The boundaries between communities and correctional institutions are porous, as are the borders between countries in the age of mass human travel. Despite security at nearly every nation’s border, Covid-19 has appeared in practically all countries. We can’t expect to find sturdier barriers between correctional institutions and their surrounding communities in any affected country. . . .

To promote public health, we believe that efforts to decarcerate, which are already under way in some jurisdictions, need to be scaled up; and associated reductions of incarcerated populations should be sustained. The interrelation of correctional-system health and public health is a reality not only in the United States but around the world.¹⁷

In the early 1990s, a tuberculosis epidemic broke out in New York City; it began in local jails and was spread to the general public by correctional staff who became infected and, then, returned home to their families and communities. *See* Goldenson Decl. ¶ 27. The same could occur with COVID-19: “due to the frequent ingress and egress of employees at [BOP] facilities, *an outbreak within [FMC Devens] can quickly spread to surrounding communities.*” *Id.* (emphasis added). Indeed, the risk of such community transmission is especially high for FMC Devens

¹⁷ Matthew J. Akiyama, M.D., Anne C. Spaulding, M.D., and Josiah D. Rich, M.D., “Flattening the Curve for Incarcerated Populations — Covid-19 in Jails and Prisons,” *New England Journal of Medicine* (Apr. 9, 2020), available at <https://www.nejm.org/doi/pdf/10.1056/NEJMp2005687?articleTools=true>.

which houses a population of medically vulnerable prisoners that require travel outside the institution for medical treatment.

Finally, any countervailing “public safety” concerns—that is, the fear that a significant release of prisoners will cause a crime wave—are unwarranted, overblown, and outweighed by the real, imminent risk of serious illness and death. First, as noted above, the safety of prisoners at FMC Devens is a matter of “public safety.” Further, the Medical Center houses many prisoners that, due to their advanced age and/or poor health, pose no dangers to the community, and the Camp houses mostly non-violent offenders who are serving short sentences or otherwise nearing release. Prisoners transferred to home confinement would remain in BOP custody, and those granted compassionate release would remain on supervised release. Others who may be released on bail, pending a merits decision in this habeas proceeding, could be subject to appropriate release conditions, and they will face severe consequences for any failure to appear or other misconduct. Prisoners, like the rest of us, would also be required to comply with state and local “shelter in place” directives, significantly diminishing any asserted threat to public safety. *Cf. Thakker v. Doll*, No. 1:20-cv-480, 2020 U.S. Dist. Lexis. 59459, at *26 (M.D. Pa. Mar. 31, 2020) (holding that balance of equities favors release of immigration detainees during COVID-19 pandemic in part because failure to appear already carries grave consequences and travel is currently restricted).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court allow their Motion for the Immediate Consideration of Bail, a Temporary Restraining Order, and Preliminary Injunctive Relief.

Respectfully submitted,

ALEXANDER GRINIS, MICHAEL GORDON, ANGEL SOLIZ,
and others similarly situated,

By their attorneys,

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CERTIFICATE OF SERVICE

I, William Fick, certify that I have caused the foregoing document to be served by e-mail PDF upon AUSA Ray Farquhar, Civil Chief (D. Mass.), on April 15, 2020.

Because the government declined to waive formal service under Fed. R. Civ. P. 4, on that same day, I traveled in person to a U.S. Post Office to send the document to the following recipients by certified U.S. Mail:

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