IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY BROWN, MYLES HANNIGAN, and ANTHONY HALL, individually and on behalf of all others similarly situated,	:	
Petitioners,	:	CLASS ACTION
v.	:	
	:	Case No. 20-cv-1914-AB
SEAN MARLER, in his capacity as Warden of the Federal Detention Center of Philadelphia,	:	
Respondent.	:	

PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS THE PETITION AND CLASS ACTION COMPLAINT

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I. Introduction

Since the COVID-19 pandemic swept into the United States, 352 federal corrections staff members have tested positive, 702 federal inmates have tested positive, and 22 people in federal custody have died from this virus.[1] The numbers, which reflect results only from very limited testing, are stunning, and they are compounding daily. As this Court has noted, "[w]e are in the midst of an unprecedented pandemic," which has paralyzed not just our country, but the world. *United States v. Rodriguez*, 2:03-cr-271-AB, 2020 WL 1627331, at *1 (E.D. Pa. Apr. 1, 2020). It is an extraordinary time that requires extraordinary measures to address the very real and present dangers posed by COVID-19 in prison environments—"tinderboxes for infectious disease." *Id.* It is not a time for business as usual in our criminal justice system, as stridently advocated by the Government in conference calls with this Court and in their brief. The virus will not wait for detainees to file hundreds of individual motions, and for attorneys and courts to review and appeal them one by one over the coming months or year. Nor will justice be served by allowing the government to review unilaterally their earlier detention motions, since they have aggressively opposed all motions for release filed by detainees and their counsel to date in this district. What justice requires in these increasingly dangerous times is an expedited and individualized review—with participation by both the government and defense counsel—of those detainees at the Federal Detention Center (FDC) who face imminent harm from COVID-

[1] BOP COVID-19 Information Page, located at https://www.bop.gov/coronavirus/ (last visited Apr. 20, 2020). It is worth noting that the BOP website numbers do not include the number of inmates and staff who have been infected and recovered from COVID-19. In addition, there is good reason to believe that the numbers reported by the BOP understate the actual number of tested-positive cases. *Compare* M. Licon-Vitale, MCC Warden, and D. Edge, MDC Warden, Response to EDNY Administrative Order 2020-14 (Apr. 7, 2020), *available at* https://www.nyed.uscourts.gov/pub/bop/MDC_20200407_042057.pdf (3 positive inmates at MDC Brooklyn), *with* COVID-19 Cases Federal Bureau of Prisons (Apr. 7, 2020) at www.bop.gov/coronavirus (2 positive inmates at MDC Brooklyn).

19. And, if determined necessary after an inspection by a court-appointed infection prevention and control expert, action to mitigate the risks of severe illness and death for those who will remain confined at FDC during this pandemic. This Class Action Petition for Writ of Habeas Corpus is the proper legal vehicle to facilitate quick action to save lives of not just hundreds of detainees at the FDC, but also of the FDC staff and their family members and those they interact with in our shared communities.

II. Standard of Review

Fed. R. Civ. P. 12(b)(1) permits a court to dismiss an action for "lack of subject matter jurisdiction." A Rule 12(b)(1) motion can be treated as either a factual or facial challenge to the court's jurisdiction. *Davis v. Wells Fargo,* 824 F.3d 333, 346 (3d Cir. 2016). A facial challenge attacks subject matter jurisdiction without disputing the facts alleged in the Petition. *Cartmell v. Credit Control, LLC*, No. 5:19-CV-1626, 2020 WL 113829, at *2 (E.D. Pa. Jan. 10, 2020). In other words, a facial attack challenges the legal sufficiency of a claim whereas a factual attack challenges the sufficiency of jurisdictional fact. Here, Respondent raises a facial challenge. In considering Respondent's facial attack, the trial court is restricted to a review of the allegations of the complaint and any documents referenced therein, in a light most favorable to the plaintiff. *Liberty Fencing Club LLC v. Fernandez-Prada,* No. 17-cv-0180, 2017 WL 3008758, at *3 (E.D. Pa. July 14, 2017). When considering a facial challenge, "the trial court must consider the allegations of the complaint as true." *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3d Cir. 1977).[2]

[2] In contrast, a factual challenge "attacks the factual allegations underlying the complaint's assertion of jurisdiction, either through the filing of an answer or 'otherwise present[ing] competing facts." *Cartmell,* 2020 WL 113829, at *2 (internal citations omitted). A court considering a factual challenge can "weigh evidence outside the pleadings and make factual

Fed. R. Civ. P. 8(a)(2) requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the … claim is and the grounds on which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41 (1957)). Indeed, a plaintiff must only set forth "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. In deciding a motion to dismiss under Rule 12(b)(6), the court must assume that all the allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff. *Bell Atlantic*, 550 U.S. at 555-56; *see also Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) ("It remains an acceptable statement of the standard . . . that courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.").

III. Background

Respondent presents a purportedly thorough list of the "extraordinary actions" the Bureau of Prisons (BOP) has taken to prevent the spread of COVID-19 throughout its facilities. Despite these "exhaustive measures," Respondent acknowledges in his brief that as of April 19, 495 BOP detainees have COVID-19 and 22 have died from the disease. Respondent's Brief in Support of MTD ("Respondent's Brief") at 2. The rate at which the cases have multiplied despite the BOP's efforts to minimize spread is alarming. The BOP failed to anticipate and prepare for the magnitude of the threat that COVID-19 poses to its own staff and the detainees entrusted to its care; it then failed to respond properly to initial signs of uncontrolled outbreaks at a number of its facilities across the country; and it has continued to fail to implement even the baseline

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findings related to the issue of jurisdiction." *Trupp v. Ally Fin., Inc.*, 17-cv-5404, 2018 WL 2462777, at *1 (E.D. Pa. May 31, 2018).

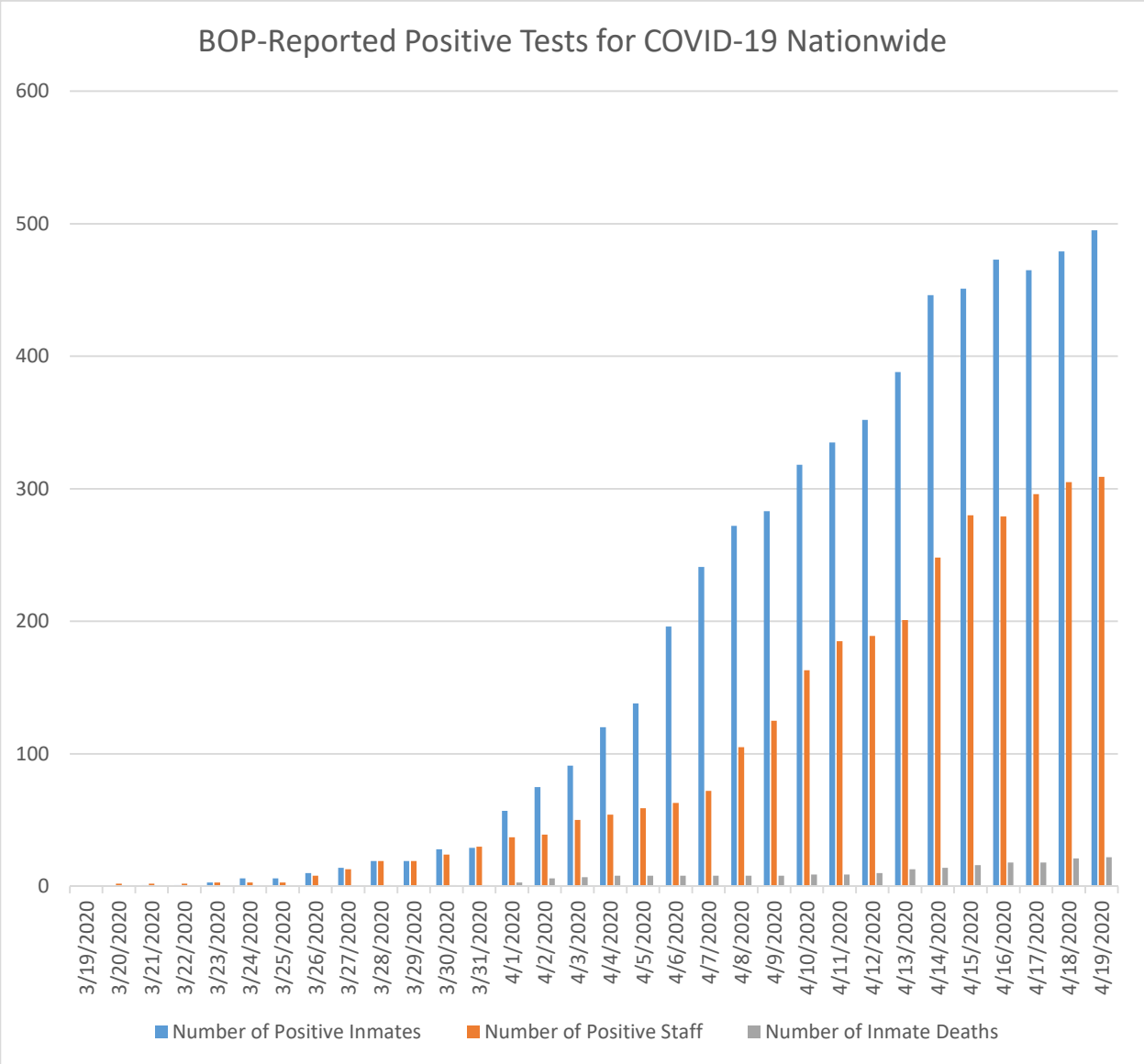
measures that would assure the safety of its own staff, of Petitioners and their fellow class members and others incarcerated by the BOP, and of the communities into which staff and others travel on a daily basis.

A table and a chart, based on data from http://www.bop.gov/coronavirus, illustrate the surge in infections and deaths across the country:

BOP-Reported Positive Tests for COVID-19 Nationwide

Date	Number of Positive Inmates	Number of Positive Staff	Number of Inmate Deaths
3/19/2020	0	0	0
3/20/2020	0	2	0
3/21/2020	1	2	0
3/22/2020	1	2	0
3/23/2020	3	3	0
3/24/2020	6	3	0
3/25/2020	6	3	0
3/26/2020	10	8	0
3/27/2020	14	13	0
3/28/2020	19	19	1
3/29/2020	19	19	1
3/30/2020	28	24	1
3/31/2020	29	30	1
4/1/2020	57	37	3
4/2/2020	75	39	6
4/3/2020	91	50	7
4/4/2020	120	54	8
4/5/2020	138	59	8
4/6/2020	195	63	8
4/7/2020	241	72	8
4/8/2020	272	105	8
4/9/2020	283	125	8
4/10/2020	318	163	9
4/11/2020	335	185	9
4/12/2020	352	189	10
4/13/2020	388	201	13
4/14/2020	446	248	14
4/15/2020	451	280	16

4/16/2020	473	279	18
4/17/2020	465	296	18
4/18/2020	479	305	21
4/19/2020	495	309	22



BOP's preparations were woefully inadequate from the start, as the facts alleged in the Petition show in detail. Even in Respondent's own telling, "phase three" guidance by the BOP addressed only the possibility of telework, which has no bearing in a case where Respondent

admits that FDC's mission necessitates that its staff physically appear to do their jobs.[3] By its own admission, the only precautionary measures the FDC took with new detainees prior to March 26 were to measure their temperatures and to ask them questions about recent travel. By March 26, Philadelphia already had 475[4] confirmed cases of COVID-19 and Pennsylvania 1,687.[5] Further, by March 26, reports of the virus's spread by asymptomatic people and the particular risks of spread of the virus within jails and prisons were widely known.[6] Pet. ¶ 79. Even after implementing new quarantine requirements for new detainees entering the facility and knowing about asymptomatic spread, FDC took no steps to house new detainees separately from one another. Pet. ¶ 80.

Respondent further concedes that detainees are limited to their cells for the majority of each day in an effort to enforce social distancing. Doc. 12-2 at 12. However, most detainees at FDC are held two per cell, with a shared toilet and sink in each cell. Pet. ¶ 83. A standard FDC cell is smaller than 100 square feet, which is too small for effective social distancing or self-quarantine precautions as recommended by the CDC. *Id.* Even despite their inability to practice social distancing, detainees weren't given masks until April 6, 2020, and they still have no gloves. Pet. ¶ 84. Moreover, FDC staff does not even enforce the use of the masks. Pet. ¶¶ 82,

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[3] *See* BOP Memorandum (Mar. 9, 2020), https://cdn.govexec.com/media/gbc/docs/pdfs_edit/031020cb.pdf; *see also* Doc. 12-2 at 13 ("Because of the mission of the FDC, teleworking is not an option for its staff.").

[4] *City Provides Update on COVID-19 for Thursday, March 26, 2020* (March 26, 2020), https://www.phila.gov/2020-03-26-city-provides-update-on-covid-19-for-thursday-march-26-2020/

[5] *Dep't of Health Provides Update on COVID-19* (March 26, 2020), https://www.media.pa.gov/Pages/Health-Details.aspx?newsid=752

[6] *See, e.g.*, Roni Caryn Rabin, *They Were Infected With the Coronavirus. They Never Showed Signs.*, N.Y. Times (Feb. 26, 2020) ("'I don't think there's any question that someone who is without symptoms and carrying the virus can transmit the virus to somebody else,' said Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases."), *available at* https://www.nytimes.com/2020/02/26/health/coronavirus-asymptomatic.html.

84. Unsurprisingly in light of their disregard for enforcement of recommended health protocols among detainees, staff members have masks and gloves but fail to wear them consistently. Pet. ¶ 84. And even with minimal use of masks and gloves within the facilities, detainees continue to use shared resources outside their cells, including computers and showers, and have increased use of telephones. Pet. ¶ 85. These shared resources are ripe for transmission of COVID-19.

Notwithstanding its claims to the contrary, BOP persists in transferring detainees between prisons. Pet. ¶ 72. In their recently filed OSHA complaint, 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 contact or proximity to infected inmates, to areas of the Country that do not have any rate of infections, or to Institutions that otherwise have not shown signs of any introduction of the virus, thus introducing the virus into an uninfected area."[7] In fact, BOP's blatant disregard for the safety risks involved in continued transfers moved U.S. Representative Fred Keller (PA-12) to introduce the Pausing All New Detention and Ending Movement of Inmates for Coronavirus (PANDEMIC) Act, H.R. 6427 to force BOP to stop all transfers for the foreseeable future. Pet. ¶ 72.

Respondent's self-congratulatory recitation of its inadequate response to this pandemic is unavailing at the motion-to-dismiss stage. But even Respondent's version of the facts is concerning given the many pitfalls in its efforts and the rate of spread within BOP facilities. Most crucially, Respondent's own briefing evinces why this Court must not take Respondent's word about the purported effectiveness of that preparation: Respondent particularly emphasizes

[7] OSHA Complaint (Mar. 31, 2020), *available at* https://www.afge.org/globalassets/documents/generalreports/coronavirus/4/osha-7-form-national-complaint.pdf.

the lack of a positive test as a sign of success despite acknowledging that the FDC has not tested *any detainees at all*. Doc. 12-2, pg. 34.[8] Respondent could have stated, based on the same facts, that nobody at the FDC has tested *negative* for COVID-19, which is scarcely cause for celebration.

IV. Prisoners may challenge conditions of confinement affecting the fact of their detention or execution of sentence in habeas corpus

Petitioners and putative class members may challenge the conditions in the FDC at issue in this case through habeas corpus. Habeas corpus has long provided a remedy for prisoners and detainees to challenge conditions of detention affecting the fact or duration of their confinement, as the Third Circuit and courts across the country have recognized. The distinction between pre-sentence detainees and post-sentence prisoners does not matter for that purpose. Moreover, beyond the propriety of doing this in an individual petition, circuit courts of appeal have authorized habeas class petitions of the sort at issue here for nearly fifty years. This Court may apply such procedural mechanisms and is not constrained by the Bail Reform Act, which does not provide the exclusive process for prisoners to pursue their claims here.

A. Habeas corpus has long provided a remedy for prisoners to challenge conditions of confinement

Petitioners properly seek redress under § 2241 because the fact of their confinement creates the constitutional violation at issue here. This Court has jurisdiction to hear petitions for habeas corpus alleging "custody in violation of the Constitution or laws or treaties of the United States," such as the Fifth and Eighth Amendments. 28 U.S.C. § 2241(c)(3). Respondent's entire responsive pleading attempts to reframe Petitioners' initial Petition as merely a mis-styled civil rights action subject to the Prison Litigation Reform Act (PLRA) and other statutes. To the

[8] "No inmate has required testing . . ."

contrary, Petitioners seek transfer to home confinement as a remedy for custody that violates the Fifth and Eighth Amendments. *See* Petition, Doc. 1 at 39.[9] Such a challenge to the *fact*, rather than *solely the conditions* of their confinement, properly sounds in habeas corpus.

The claim here is precisely the sort contemplated by § 2241. Challenges to the fact of confinement, seeking release, fall within "the heart of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). The key distinction between actions properly brought in habeas corpus and those properly brought as a civil-rights action is that habeas actions "involve someone's liberty, rather than mere civil liability." *Davis v. Fechtel*, 150 F.3d 486, 490 (5th Cir. 1998) (citing *Prieser,* 411 U.S. at 489). Habeas corpus petitions under 28 U.S.C. § 2241 have long provided a remedy for prisoners to challenge conditions of confinement that affect "the execution of [a federal inmate's] sentence." *Cardona v. Bledsoe*, 681 F.3d 533, 535 (3d Cir. 2012) (quoting *Woodall v. Federal Bur. of Prisons*, 432 F.3d 235, 241 (3d Cir. 2005)); *see also Levine v. Apker*, 455 F.3d 71, 78 (2d Cir. 2006) (defining challenges to execution of sentence as including challenges to prison conditions).[10]

Habeas corpus petitions may encompass claims to conditions of confinement where petitioners seek release because conditions of confinement may create the constitutional violations at issue. The Third Circuit's line of decisions in *Cardona*, *Woodall*, and *McGee v. Martinez*, 627 F.3d 933 (3d Cir. 2010), illustrates the relevant distinctions. In *Cardona*, a prisoner made a claim that even if successful would not have changed the duration or fact of his confinement at all. *Cardona*, 681 F.3d at 537. He ultimately challenged his placement in a

[9] "WHEREFORE, Petitioners and the Class members respectfully request that the Court enter a class-wide judgment: A. Ordering immediate release of vulnerable persons to home confinement . . ."

[10] *See also Cardona*, 681 F.3d at 535 n.5 (collecting cases from 1st, 2d, 4th, 6th, 7th, 8th, 9th, and 11th Circuits holding that "§ 2241 permits challenges to the execution of an inmate's sentence").

particular institution relative to other possible institutions, based on a theory of retaliatory transfer and because he speculated about possibly losing more good-time credits at one facility than the other. *Id*. The Court understandably contrasted that with *Woodall*, where the Court had held that a petition seeking transfer to a halfway house properly arose in habeas because it affected the execution of sentence and fact of confinement. *Woodall*, 432 F.3d at 238. In alleging, ultimately, a retaliatory transfer, the petitioner in *Cardona* had misstated a classic *Bivens* claim and did not address "conditions of confinement" at all, much less the type of conditions of confinement cognizable in a habeas petition.

An allegation that the threat of COVID-19 has affected the fact of confinement and execution of sentence, on the other hand, properly arises in habeas. Courts across the country have already held as a matter of law that they may hear petitions for habeas corpus based on medical vulnerability to COVID-19 infections in custody. *E.g.*, *Vazquez Barrera v. Wolf*, No. 4:20-cv-1241, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020); *Malam v. Adduci*, No. 20-10829, 2020 WL 1672662, at *3 (E.D. Mich. Apr. 5, 2020); *Money v. Pritzker*, Nos. 20-cv-2093 & 20-cv-2094, 2020 WL 1820660, at *8 (N.D. Ill. Apr. 10, 2020; *Mays v. Dart*, No. 20-cv-2134, 2020 WL 1812381, at *6 (N.D. Ill. Apr. 9, 2020); *Newton v. La. Dep't. of Corrs.*, No. 20-cv-447, 2020 WL 1869018, at *1 (W.D. La. Apr. 13, 2020); *Bent v. Barr*, No. 19-cv-6123, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020); *Coreas v. Bounds*, No. 20-cv-780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020).[11] Regardless of how those Courts resolved the merits, they agreed about the suitability of habeas corpus as a matter of jurisdiction. Whether because "the sudden

[11] *See also Amaya-Cruz v. Adduci*, No. 20-cv-789, 2020 WL 1903123, at *2-3 (N.D. Ohio Apr. 18, 2020); *Fofana v. Albence*, No. 20-10869, 2020 WL 1873307, at *6-12 (E.D. Mich. Apr. 15, 2020); *Jefferson V.G. v. Decker*, No. 20-cv-3644, 2020 WL 1873018, at *5 (D.N.J. Apr. 15, 2020).

threat to mortality from the spread of the virus in a congregate setting may affect the fact or duration of confinement," *Money*, 2020 WL 1820660 at *8, or because contentions that petitioners could not be held in conditions consistent with the constitution's requirements "*do* bear on the duration of their confinement," *Mays*, 2020 WL 1812381 at *6 (emphasis in original), "seek[ing] release relate[d] to their conditions of confinement . . . is the heart of habeas corpus." *Thakkar v. Doll*, No. 20-cv-480, 2020 WL 1671563, at *2 (M.D. Pa. Mar. 31, 2020).

B. Habeas jurisdiction includes petitioners of all types, including pre-sentence and post-sentence

This Court has jurisdiction to release Petitioners and class members notwithstanding their ongoing criminal matters because of the nature of the claims they bring. As noted above, 28 U.S.C. § 2241 itself confers jurisdiction for claims, like those here, that challenge the fact or duration of confinement based on an underlying constitutional violation that renders custody invalid. The statutes and cases cited by Respondent do not bear the load he piles atop them, and even the cases he cites acknowledge that this Court has the authority to act in habeas corpus in exceptional circumstances such as those at issue in this case. This is as true for pre-trial and pre-sentence detainees as it is for post-sentence prisoners.

This Court has jurisdiction to consider habeas corpus petitions under § 2241 filed by pretrial detainees. Respondent's citation to and discussion of *Reese v. Warden Philadelphia FDC*, 904 F.3d 244 (3d Cir. 2018), illustrates the differences between valid habeas corpus petitions for release such as this one, and invalid petitions seeking to evade the Bail Reform Act. Although Respondent cites *Reese* for the proposition that the Bail Reform Act is the exclusive avenue for release pending trial, that mischaracterizes the case and misstates the holding. The *pro se* § 2241 petition at issue there purported to challenge, among other things, conduct by police during Reese's arrest and the underlying criminal charge itself. *Reese*, 904 F.3d at 245.

And in fact, he filed his *pro se* § 2241 petition while a counseled motion for pretrial release was pending on appeal. *Id*. at 246. The Court thought the case was not one in which its acknowledged habeas authority "*ought* to be exercised," *id.* (emphasis added), because of "the absence of exceptional circumstances . . . which justified a departure from the regular course of judicial procedure." *Id*. Respondent's suggestion that the Bail Reform Act provides the exclusive remedy (or that *Reese* holds that it does) is simply wrong. Courts have that authority, and may exercise it in exceptional circumstances. *Id*. Moreover, Respondent's insistence that those circumstances require "a showing of delay, harassment, bad faith, or other intentional activity on the part of the state," Doc. 12-2 at 17 (citing *Reese*, 904 F.3d at 246 n.2), omits the directly preceding sentence of that footnote, which states: "Neither the Supreme Court nor this Court has delineated the circumstances that might qualify as 'exceptional' in this context." *Id*.

Even if the Bail Reform Act provided the exclusive avenue for relief here, it would not tie this Court's hands in the manner described.[12] The Bail Reform Act allows one district court to reconsider detention decisions of another district court "where 'changed circumstances' support release." *United States v. Smith*, 200 F. Supp. 3d 192, 194 (D.D.C. 2016); *see also United States v. Logan*, 613 F. Supp. 1227, 1228 (D. Mont. 1985) (declining to disturb determination of a different judge because of the "absence of . . . changed circumstances); *United States v. Rouleau*,

[12] Nor does it so tie the Government's. For pretrial detainees, Respondent cites a litany of factors it says a court must consider under 18 U.S.C. § 3142(f) and that prevent the Government from assenting to more—any—requests for pretrial release. Notably, it does not acknowledge the possibility of temporary release when necessary to prepare a defense or *for other compelling reason* under 18 U.S.C. § 3142(i). While the Court may of course consider conditions of release that would ensure reappearance and public safety, that part of the statute does not require consideration of the various section (g) factors at all. Similarly, for post-conviction but pre-sentence detainees, even the presumption of detention for defendants convicted of drug crimes or crimes of violence has a carve-out for exceptional circumstances. 18 U.S.C. § 3145(c). As Petitioners have alleged repeatedly, this unprecedented global pandemic amounts to the most exceptional circumstance possible.

673 F. Supp. 57, 59 (D. Mass. 1987) (noting that a detention order should not be amended "unless the underlying factual circumstances have changed in some significant way"); *United States v. Thomas*, 667 F. Supp. 727, 728 (D. Or. 1987) (noting that a district judge "should not disturb a release decision made by a magistrate, or by another district judge, in the absence of either clear error of law or changed factual circumstances").

This Court similarly has jurisdiction to hear petitions for habeas corpus under § 2241 from sentenced prisoners. This is axiomatic; Respondent's assertion, if accepted, would apparently bar habeas corpus petitions challenging the fact or duration of confinement in defiance of the statute. Respondent's assertion to the contrary, Doc. 12-2 at 18, depends on the same misunderstanding of the Petition as a mere mis-styled conditions-of-confinement civil claim. That argument fails for the same reasons outlined above. However clear it is that a court may alter a sentence only as specifically permitted by statute, 18 U.S.C. § 2241 is just such a statute. Respondent cites "finality" and cases about retroactivity of watershed rules of criminal law, failing to acknowledge the key feature of Petitioners' claims: that they are being held in custody that violates the Fifth and Eighth Amendments of the Constitution. *See* Doc. 1 at ¶¶ 12, 13, 98, 100, 101, 103-105, 124-134.

C. This jurisdiction includes petitioners who pursue relief as a class

Petitioners who pursue habeas corpus relief asserting common facts have long seen such claims authorized on class bases. "Certainly the usual habeas corpus case relates only to the individual petitioner and to his unique problem. But there can be cases, and this is one of them, where the relief sought can be of immediate benefit to a large and amorphous group. In such cases, it has been held that a class action may be appropriate." *Mead v. Parker*, 464 F.2d 1108, 1112-1113 (9th Cir. 1972). While actions seeking damages may not be suited for class habeas

petitions, actions seeking solely declaratory and injunctive relief, including transfer to home confinement, fit the purposes of habeas class petitions. *See Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973). Class habeas petitions especially suit circumstances where ruling on common questions of law would apply across the class and requiring individual petitions might shut some people out from efficient relief, and where petitioners seek certification of a habeas action under Fed. Rule Civ. P. 23(b)(2). *Streicher v. Prescott*, 103 F.3d 559, 561 (D.D.C. 1984).

Several courts of appeal have explicitly authorized class habeas petitions. *See, e.g.*, *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-26 (2d Cir. 1974); *Mead*, 464 F.2d at 1112-13; *Rodriguez v. Hayes*, 591 F.3d 1105, 1113 (9th Cir. 2010); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973). *Williams* neatly illustrates why this claim should proceed as a habeas class. There, the Eighth Circuit reversed a decision that had granted BOP respondents' motion to dismiss a putative classwide habeas petition on the grounds that such a device did not exist. While reversing, the Court pointed to the same considerations that demand class habeas here: "a class action provides an appropriate procedure to resolve the claims of a group of petitioners and avoid unnecessary duplication of judicial efforts in considering multiple petitions." *Williams*, 481 F.2d at 361. The Supreme Court itself has noted that the question of classwide habeas petitions is reserved, while simultaneously noting in dicta that petitioners seeking conditional or unconditional release, who sued the custodian, outside of the immigration context, have habeas claims that may go classwide. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 858 n.7 (2018) (citing *Schall v. Martin*, 467 U.S. 253, 261 n.3 & 10 (1984) (reserving the question and accepting district court's certification of habeas class)). And the Supreme Court has repeatedly declined the opportunity to invalidate class habeas petitions as a procedural device across more than four decades. *E.g. Jennings*, 138 S. Ct. at 858 n.7; *Schall*, 467 U.S. at 261 n.10;

Preiser, 506 F.3d at 1125-26, *cert. denied*, 421 U.S. 921 (1975); *Middendorf v. Henry*, 425 U.S. 25, 30 (1976) (declining to decide whether class habeas petitions are cognizable).

This case presents exactly the circumstances under which classwide habeas petitions may proceed. Petitioners and their fellow class members do not face unique problems—the risk of COVID-19 affects them all. Petitioners seek declaratory and injunctive relief that includes transfer to home confinement. Petitioners have appropriately sued the custodian, a BOP respondent. And Petitioners present a situation demanding a procedure appropriate to resolve claims affecting a large group of individuals without needlessly duplicating judicial efforts considering the same factual and legal issues. Requiring inmates at FDC Philadelphia to obtain a prison inspection, infectious disease expert, or other discovery into FDC Philadelphia's COVID-19 preparedness on individual bases would stand as exactly the sort of unnecessary duplication of judicial efforts warned against in *Williams*. This Court has the authority to certify a class of habeas corpus petitioners, and it should exercise that authority.

V. Petitioners are excused from the administrative exhaustion requirements of Section 2241 and the Prison Litigation Reform Act

A. Petitioners are excused from Section 2241's exhaustion requirements because they are likely to suffer catastrophic health consequences without immediate judicial relief and because pursuing the administrative remedies would be futile

Under § 2241, a petitioner is generally required to exhaust all administrative remedies. *Gambino v. Morris*, 134 F.3d 156, 171 (3d Cir. 1998). However, exhaustion is not required where the petitioner is likely to suffer an irreparable injury without immediate relief or where the administrative remedy would be futile. *Id.; Cerverizzo v. Yost*, 380 F. App'x 115, 116 (3d Cir. 2010) (acknowledging that Section 2241's administrative exhaustion requirement may be excused if an attempt to obtain relief would be futile or where the purposes of exhaustion would

not be served); *Carling v. Peters*, No. 00-CV-2958, 2000 WL 1022959, at *2 (E.D. Pa. July 10, 2000) (finding that petitioner would suffer an irreparable injury if forced to wait for the resolution of the administrative process); *Lyons v. U.S. Marshals*, 840 F.2d 202, 205 (3d Cir. 1988) (noting in a *Bivens* case that "[e]xhaustion is not required if administrative remedies would be futile, if the actions of the agency clearly and unambiguously violate statutory or constitutional rights, or if the administrative procedure is clearly shown to be inadequate to prevent irreparable injury").[13]

The lethal and rapidly spreading COVID-19 virus will likely flourish in the densely populated conditions at FDC. As this Court recently noted, many of the recommended social distancing and preventative measures "are impossible or unfeasible in prison." *United States v. Rodriguez*, 2:03-cr-271-AB, 2020 WL 1627331, at *8 (E.D. Pa. Apr. 1, 2020). As detailed more fully in the Petition, if they are forced to wait for the outcome of a protracted administrative process, there is a very real risk that Petitioners will suffer the catastrophic health consequences that they now seek to avoid. Here, even a delay of days carries the risk of dire health consequences for Petitioners. Given the deadly nature of COVID-19 and its exponential spread, compounded with the lack of effective preventive measures at the FDC, there is a significant risk that COVID-19 will overrun the FDC before Petitioners can meaningfully engage in—let alone complete—any administrative remedy process. More bluntly, detainees around the country are contracting COVID-19 and dying even as petitions like these are being litigated.

Second, it would be futile for Petitioners to engage in in the administrative process here. As Respondent concedes, the BOP's administrative program does not provide for the relief

[13] Respondent argues that *Cerverizzo*, *Woodall*, and *Lyons* are inapplicable because they predate the Supreme Court's analysis in *Ross*. Notably, however, *Ross* opines on the mandatory exhaustion requirement *as it applies to the PLRA*. *Ross* offers no analysis regarding the exhaustion requirements under § 2241. Accordingly, FDC's argument is of no moment here.

requested by Petitioners. Here, the futility of exhaustion is underscored by FDC's own position. Indeed, the government contends that the Petitioners are precluded—as a matter of law—from the remedies they seek. Yet the government simultaneously argues that Petitioners must first have pursued such unavailable remedies through the administrative process. Such a catch-22 is not only illogical, but dangerous. If the undue delay described above results in dire health consequences, it could also render exhaustion futile.[14]

Several courts have similarly addressed administrative exhaustion requirements in the context of this pandemic and have concluded that, even where statutorily mandated, exhaustion requirements are not always absolute. *See, e.g. United States v. Haney*, 19-CR-541, 2020 WL 1821988, at *1 (S.D.N.Y. Apr. 13, 2020) (waiving a statutory exhaustion requirement due to the extraordinary circumstances now faced by prisoners as a result of the COVID-19 crisis and its capacity to spread in swift and deadly fashion); *United States v. Colvin*, 3:19-CR-179, 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020) (FDC case waiving statutory exhaustion requirement and noting that "[u]ndue delay, if it in fact results in catastrophic health consequences, could make exhaustion futile" (internal quotation marks and citation omitted)); *United States v. Perez*, 17-CR-513-3, 2020 WL 1546422, at *1 (S.D.N.Y. Apr. 1, 2020) (concluding that exhaustion requirement waived due in light of "extraordinary threat" posed by the COVID-19 pandemic). Here, the COVID-19 pandemic presents extraordinary circumstances and poses especially disastrous risks for those with certain medical conditions. Given the rapidly spreading nature of this virus, and the availability of Petitioners' requested remedy, exhaustion would be futile and

[14] And it might expose the detainee to an argument from the government that "claimed deficiencies in disease *prevention* efforts cannot serve as a basis, in habeas, to release a detainee who has already contracted the disease." *See Lopez v. Lowe*, No. 3:20-CV-563, 2020 U.S. Dist. LEXIS 60796, at *18 (M.D. Pa. Apr. 7, 2020).

could cause Petitioners' to suffer irreparable harm while they wait for the administrative process to unfold.

B. Petitioners are excused from the exhaustion requirement under the Prison Litigation Reform Act because administrative remedies are not available

Petitioners' claim is properly brought under § 2241, *see* section IV, *supra*, and therefore not subject to Prison Litigation Reform Act ("PLRA") exhaustion requirements that would apply to a civil-rights action. Respondent's argument that Petitioners must meet the exhaustion requirements set forth in the PLRA relies on his incorrect characterization of the Petition here, and is wrong for the same reason. That said, however, even if Petitioners were limited to bringing a straightforward civil-rights action—which they are not—Petitioners would be excused from the administrative-exhaustion requirement under the PLRA.

The PLRA requires plaintiffs to exhaust administrative remedies when "such administrative remedies are available." 42 U.S.C. § 1997e(a). However, the PLRA contains a "textual exception to mandatory exhaustion." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016). Under the PLRA, a plaintiff need "not exhaust remedies if they are not 'available.'" *Id.* at 1855; *see also Brown v. Croak*, 312 F.3d 109, 111 (3d Cir. 2002). In other words, the PLRA "requires exhaustion of all available remedies, not all remedies." *Berry v. Klem*, 283 F. App'x 1, 4-5 (3d Cir. 2008). In *Ross*, the Supreme Court defined "available" as "capable of use for the accomplishment of a purpose." *Ross*, 136 S. Ct. at 1858.

Courts have found that administrative remedies are unavailable where the plaintiff's attempts to exhaust are thwarted through "machination, misrepresentation, or intimidation," where officers are unable or unwilling to provide relief to the aggrieved petitioner, or where the administrative scheme is "so opaque" that it becomes practically incapable of use. *Ross*, 136 S. Ct. at 1860. Similarly, courts have found administrative remedies unavailable where prison

officials ignore their own procedural rules, *See, e.g., Robinson v. Superintendent Rockview SCI*, 831 F.3d 148, 154 (3d Cir. 2016); *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003); *Camp v. Brennan*, 2019 F.3d 279, 280-81 (3d Cir. 2000). Notably, while *Ross* sets forth some paradigmatic types of circumstances in which administrative remedies are unavailable, "neither the Supreme Court nor this Circuit has held that those three circumstances are comprehensive, as opposed to exemplary." *West v. Emig*, 787 F. App'x 812, 815 (3d Cir. 2019).

Here, administrative remedies are unavailable to Petitioners. Any available remedy would almost certainly require Petitioners to engage in an administrative process that could take weeks or months to resolve. However, a lethal pandemic is spreading swiftly and exponentially. Throughout the United States and around the world, organizations and governments have taken dramatic and economically devastating measures to help slow the spread of this deadly disease because of the particular rapidity with which it infects, debilitates, and sometimes kills. Accordingly, any administrative-remedy program that would require Petitioners to wait even a week to complete is not "capable of use for the accomplishment of [that] purpose. *Ross*, 136 S. Ct. 15 1858. Even the regulation cited by Respondent as allowing for "emergency" remedies on an expedited basis illustrates unavailability here. *See* Doc. 12-2 at 33 (citing 28 C.F.R. § 542.18). The BOP is the entity that "determine[s]" whether the request actually is "of an emergency nature" that would trigger an emergency response on an expedited timeline. *Id.* As Respondent has stated repeatedly, he does not regard this situation as rising to that level. Moreover, any such denial issued by Respondent is still not deemed exhausted for weeks until it has been appealed further, and the regulation makes no provision for expediting the appeal to the regional office or BOP central office. *See id.*

Each day that Petitioners must wait for relief is significant. Both administrative remedies preceding habeas litigation and administrative remedies preceding civil rights litigation (which this is not) are practicably unavailable to petitioners. Accordingly, petitioners' claims are not barred by the PLRA's exhaustion requirement.

VI. The FDC's exposure of vulnerable detainees to a high risk of COVID-19 infection violates the Fifth and Eighth Amendments

In *Helling v. McKinney*, the Supreme Court stated "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." 509 U.S. 25, 33 (1993). Here, a fire is crackling outside the FDC's walls, and at any moment an ember could slip in and ignite an inferno. This risk to life, and the FDC's deliberate indifference to it, are a classic Fifth and Eighth Amendment violation.[15]

A Fifth or Eighth Amendment claim requires the petitioner to "make (1) a subjective showing that the defendants were deliberately indifferent to his or her medical needs and (2) an objective showing that those needs were serious." *Pearson v. Prison Health Serv.*, 850 F.3d 526, 534 (3d Cir. 2017) (internal quotation marks, brackets, and citations omitted). Both elements are present here.

A. The FDC is acting with deliberate indifference to vulnerable detainees' health and safety

A prison official is deliberately indifferent when he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the

[15] The due-process rights of a pretrial detainee are "'at least as great as the Eighth Amendment protections available to a convicted prisoner.'" *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 581 (3d Cir. 2003) (quoting *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)). This case does not implicate any potential differences between the Fifth and Eighth Amendment standards.

inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

Respondent knows well that facilities like the FDC are exceptionally susceptible to a deadly outbreak of COVID-19. Pet. ¶¶ 30-72; *see also, e.g.*, *United States v. Rodriguez*, 2:03-cr-271-AB, 2020 WL 1627331, at *8-10 (E.D. Pa. Apr. 1, 2020) (detailing the risks posed by the virus to prisons and jails). He further knows that inmates with medical conditions such as Petitioners' are at heightened risk for severe, life-threatening cases of COVID-19. Pet. ¶¶ 22-26, 92-94; *see also, e.g.*, *Rodriguez*, 2020 WL 1627331, at *7-8. Despite knowing all this, Respondent continues to hold Petitioners and all other FDC detainees in conditions in which they cannot maintain effective social distancing and recommended hygienic practices, and lack access to COVID-19 tests, among other shortcomings. Pet. ¶¶ 73-91; *see also, e.g.*, *United States v. Colvin*, No. 3:19-CR-179, 2020 WL 1613943, at *4 (D. Conn. Apr. 2, 2020). This is deliberate indifference to the health and safety of Petitioners and their fellow detainees.

B. Petitioners' health needs are serious

Public-health hazards can present serious health threats that violate the Fifth and Eighth Amendments, even if the detainee has not yet been harmed. *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 28 (1993) ("[R]espondent was assigned to a cell with another inmate who smoked five packs of cigarettes a day."); *Hutto v. Finney*, 437 U.S. 678, 682-83 (1978) ("Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening."). Respondent's chief defense on this point is that COVID-19 is also a risk outside of jail. *See* Br. at 34. This is true of virtually any contagious disease or other public-health hazards—true but trivial. The risk inside the FDC is much higher than the risk outside, where

people can wash their hands with soap, minimize the number of people they encounter on a daily basis, get tested for COVID-19 (not one test has been administered in the FDC to detainees), and so on. "[A] remedy for unsafe conditions need not await a tragic event." *Helling*, 509 U.S. at 33.

Furthermore, Petitioner Hall is not precluded from pursuing a § 2241 habeas claim in this civil case by Judge Beetlestone's denial of a motion in his criminal case. In particular, the discovery process in this civil action will allow Mr. Hall to put into evidence information that was impossible for him to obtain in his criminal action, including information gleaned from an inspection of the FDC, as well as Respondent's responses to Petitioners' discovery requests.

VII. The PLRA does not apply to this action, and even if it did, it would not bar the requested relief

As previously discussed more fully, the PLRA does not apply to or impose any limitations upon § 2241 actions seeking release. However, even if this Court finds that this is a conditions-of-confinement action to which the PLRA applies on the theory that Petitioners are not seeking "release," the PLRA does not limit this Court's power to grant the relief that is requested. First, even if the PLRA generally applies restrictions to civil actions that seek a "prisoner release order," numerous courts have held that transferring a detainee does not trigger the definition of a "prisoner release order" within the meaning of the statute. *See* 18 U.S.C. § 3626(g)(4). Second, by the PLRA's plain language, a party seeking a "prisoner release order" must demonstrate as a prerequisite that "crowding is the primary cause of the violation" in order to obtain relief. 18 U.S.C. §§ 3626(a)(3)(B) & (a)(3)(E)(i). Therefore, the PLRA's narrow definition of a "prisoner release order" cannot apply in situations like this one, where the constitutional violation alleged stems primarily not from overcrowding, but instead from the rampant spread of a novel and deadly disease that the BOP is ill-equipped to control. Finally, the PLRA does not set an outright prohibition on appointing a special master where the special

master will not exercise final authority but rather will propose findings to the Court to facilitate quick judicial decision-making.

A. The PLRA does not preclude a single district judge from ordering a detainee transfer, nor does it apply to detainee claims that go beyond mere overcrowding.

Under the PLRA, there is a difference between a prisoner transfer and a prisoner release. In *Reaves v. Department of Correction*, the court had previously ordered a prisoner to be transferred to an outside facility so that he could be treated by a physician with the training to care for his medical needs. 392 F. Supp. 3d 195, 210 (D. Mass. 2019). The government moved to stay the execution of that order, arguing, as it does here, that under the PLRA, a three-judge panel must approve the transfer of the prisoner. *Id.* at 522. The court rejected the government's argument because the prisoner had not been released within the meaning of the statute. *Id.* Instead, the Court "did not release Mr. Reaves from incarceration, it transferred him. This is a distinction not without a difference." *Id.* Here, as in *Reaves*, the remedy requested is not release from prison but instead a transfer to a different location of incarceration. The detainees in this action will still be under BOP control—they will merely be confined in a different location, which is permissible under the PLRA.

Second, and to the extent that the requested remedy is a "release," the highly restrictive definition of "prisoner release order" that triggers the PLRA applies only in situations where the primary basis of the detainees' claim is overcrowding. The *Reaves* Court explained that the definition of a "prisoner release order," which, as cited by the government in the instant matter, would seem to limit *any* civil action that had the "purpose or effect of reducing or limiting the prison population," is best read to limit only civil actions where the primary basis of the constitutional claim is overcrowding. As the court explained,

> Reading the statue as a whole entails harmonizing the definition of "prisoner release order" with the requirements for entering one. One of two necessary conditions for entering a release order . . . is that the three-judge panel find by clear and convincing evidence, that '*crowding is the primary cause of the violation of a Federal right*.' 18 U.S.C. § 3626 (a)(3)(E)(i).

Reaves v. Dep't of Corr., 404 F. Supp. 3d 520, 523 (D. Mass. 2019) (quoting *Plata v. Brown*, No. C01-1351, 2013 WL 3200587, at *8 (N.D. Cal. June 24, 2013)) (emphasis added).

In this instance, mere overcrowding is not the primary cause of the violation. Instead, the primary cause of the violation is the unprecedented threat of the highly infectious COVID-19 outbreak in the prison population, of which overcrowding is but one part of a much larger issue. Accordingly, the *Reaves* Court found, where, as here, accepting the government's argument "would mean that the *only* way a district court can order the release of a prisoner is for a violation of his constitutional rights where overcrowding caused the violation, but not if any other reason caused the violation." *Id.* The PLRA cannot impose such a strict limitation, which would essentially limit all prisoner claims to only those that stem from overcrowding.

This plain-language interpretation of the PLRA is supported by the legislative history and legislative intent. As further noted in *Reaves*, the legislative history suggests that the sponsors of the PLRA were primarily "concerned with courts setting 'population caps' and ordering the release of inmates as a sanction for prison administers' failure to comply with the terms of consent decrees designed to eliminate overcrowding." *Id.* It naturally follows then that the legislative intent could not have been to limit the Court's ability to grant relief during an unprecedented global pandemic but instead to curb overcrowding suits generally. Accordingly, because overcrowding is not the primary basis of the plaintiffs' claim, the PLRA does not limit the requested remedy.

B. The PLRA does not prohibit the "broad" relief requested, as the novel coronavirus poses an unprecedented risk that cannot be abated by lesser means

The government argues that the PLRA limits the Court's authority to grant the requested relief because any remedy granted under the PLRA must be "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). As noted for multiple reasons above, the PLRA does not limit the Court's authority. However, again, considering *arguendo* that it did, this language would hardly preclude the requested relief, especially in light of an unprecedented global pandemic.

Reaves is again instructive on this point. There, the Court found simply that the requested relief is appropriately narrow because, "if Mr. Reaves is not transferred, he will die." *Id.* In the instant matter, if a substantial number of detainees are not transferred to home confinement, in all likelihood many will catch COVID-19, and some of them will die. The virus will rage inside the walls of the prison, spread to guards and other staff members, trickle back out into the community, and prolong this crisis for the population at large. It would be wholly inappropriate, especially on a motion to dismiss, to bar this claim on the basis that it is not sufficiently narrow when absolutely no precedent exists for the kind of danger the world is facing from COVID-19.

Finally, the PLRA does not limit the Court's authority to appoint a special master to help facilitate this urgently needed relief. The government concedes that the PLRA allows special masters to "conduct hearings on the record and *prepare proposed findings of fact*." Doc. 12-2 at 42 (emphasis added). This is exactly how the special master should function in this case. Specifically, given the exigency of the crisis and the broad review that must be undertaken, a special master could review the files of individual detainees and make recommendations to the

court, *i.e.* "prepare proposed findings of fact." The Court would be under no obligation to accept those recommendations. Rather, the Court could and would still exercise its discretion in choosing whether or not to follow the recommendation. Appointing a special master in this fashion cannot possibly run afoul of the PLRA, especially when the government implicitly concedes that this is a permissible practice. Given the urgent need of these detainees and the relative ease with which this Court could avoid an impermissible delegation, appointing a special master is not only permissible, it makes good sense.

VIII. There is no cause to strike Petitioners' class allegations

Respondent asks the Court to strike Petitioners' class allegations before he has even filed his answer to the initial pleading. This request is premature and groundless.

There are "rare few" cases "where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met." *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 93 n.30 (3d Cir. 2011). "As such, district courts in the Third Circuit typically hold that motions to strike class allegations are premature and that the proper avenue is to oppose the plaintiff's motion for class certification." *Whitaker v. Herr Foods, Inc.*, 198 F. Supp. 3d 476, 497 (E.D. Pa. 2016) (internal quotation marks and citations omitted). No special factors would warrant a departure from this practice here, even if the request to strike had merit.

And Respondent's request to strike does not have merit. As described above, courts have long authorized class-based habeas petitions as a procedural device. *See* section IV.c. And as Petitioners will more fully show at the appropriate procedural stage, all four requirements of Federal Rule of Civil Procedure 23(a) are met. The first factor is numerosity: the FDC holds over 1,000 detainees. Respondent does not, and could not, dispute that the class satisfies the numerosity requirement.

Second is commonality, which "does not require perfect identity of questions of law or fact among all class members. Rather, 'even a single common question will do.'" *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011)). "Because the requirement may be satisfied by a single common issue, it is easily met . . . ." *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). "[C]ommonality is not defeated by a showing that 'individual facts and circumstances' will have to be resolved." *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 392 (E.D. Pa. 2001) (quoting *Baby Neal*, 43 F.3d at 57). Commonality is easily established in this case. The Proposed Class members are all currently incarcerated at the FDC. They are all facing elevated risk of exposure to the same deadly virus because of the same failures to undertake protective measures that would help guard against transmission. They are all unable to practice social distancing because of the conditions in which they are held, they all lack sufficient PPE, and they all regularly interact with shared surfaces and objects that have seen insufficient sanitization. *See also* Pet. ¶ 117 (listing six common questions of fact and law).

Third is typicality. The purpose of this requirement is to assure that the claims of the named plaintiffs and the class "are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982). Petitioners, like all the Proposed Class members, are FDC detainees who each face elevated risk because of the facility's common failures to undertake sufficient protective measures. They all face a virus that can infect any human. "If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001).

Fourth is adequacy of representation. Respondent challenges Petitioners' "fit[ness] to represent the members of their proposed class" on the grounds that they have "fail[ed] to consider or account for . . . concerns" about some detainees' access to food, shelter, or medical care if released. Br. at 45. To the contrary, Petitioners have proposed the appointment of a special master to review all detainees' situations. And Petitioners' counsel bring to this case a combination of expertise that includes criminal law, prisoner litigation, and Rule 23(b)(2) class actions.

Finally, this case is appropriate for class certification under Rule 23(b)(2). Courts routinely use Rule 23(b)(2) to adjudicate claims involving treatment of inmates. *E.g.*, *Woods v. Marler*, No. 17-4443, 2018 WL 1439591 (E.D. Pa. Mar. 22, 2018) (certifying class of FDC detainees challenging Warden Marler's visitation policy); *Williams v. City of Phila.*, 270 F.R.D. 208, 222 (E.D. Pa. 2010) (certifying Rule 23(b)(2) class of inmates); *Colon v. Passaic Cty.*, No. 08-cv-4439, 2009 U.S. Dist. LEXIS 45151, at *16–18 (D.N.J. May 27, 2009) (certifying class of those who were currently, or would become, incarcerated in Passaic County Jail); *Dittimus-Bey v. Taylor*, 244 F.R.D. 284, 293 (D.N.J. 2007) (certifying Rule 23(b)(2) class of individuals incarcerated at Camden County Correctional Facility on overcrowding claim); *Death Row Prisoners of Pa. v. Ridge*, 169 F.R.D. 618, 623 (E.D. Pa. 1996) (certifying Rule 23(b)(2) class of death-row detainees).

IX. Discovery is necessary, and will be fast and efficient

Respondent argues that discovery in this case is inappropriate and that in any event it has already fulfilled any discovery obligations it could possibly have by supplying Petitioners with their own records and directing them to the BOP website, which according to Respondent is

"detailed and transparent regarding its efforts to respond to the COVID-19 pandemic."[16] Respondent's Brief at 45. That argument is premature given that no discovery has yet been served, but it is also not supported by the facts or the law.

The BOP website may set forth high-level COVID-19 guidelines, but it hardly details the facts on the ground at the FDC. Petitioners are entitled to probe those facts, which will either support or contradict the FDC's claims that it has "taken exhaustive measures . . . to protect inmates and staff against COVID-19." Repsondent's Brief at 1. The website does not provide the number of detainees and staff who have received tests for COVID-19; it does not provide information on how often commonly touched surfaces at the FDC are being disinfected and what cleaning products are available for use; it does not provide the number of masks given to staff and detainees; it does not provide information on detainees' ability, if any, to self-quarantine. In short, the website is silent when it comes to providing the particulars at the FDC that all of us have come to understand are critical in preventing the spread of COVID-19.

The sole case Respondent cites about discovery, *Bracy v. Gramley*, 520 U.S. 899, 904 (1997), does not block Petitioners from obtaining discovery. In contrast to *Bracy*, the current lawsuit is not only a petition for writ of habeas corpus under § 2241, but is also a class-action complaint for declaratory and injunctive relief for which litigants are most certainly "entitled to discovery as a matter of ordinary course." Moreover, even in *Bracy*, a habeas petition brought pursuant to 28 U.S.C. § 2254, the Court allowed discovery, pursuant to Rule 6(a) of the Rules Governing § 2254 Cases (providing that a judge may allow discovery in a habeas action "for

[16] The FDC's claim that Petitioners have ignored the BOP's website is puzzling. Petitioners cited the BOP's website three times in their Petition, most notably for the concerning fact that as of April 14, the BOP reported at least 388 inmates have tested positive, along with 201 BOP staff. Pet. ¶ 70, n. 63. Even more concerning, however, is that these numbers are drastically increasing and as of April 20, there are now 702 federal inmates who have tested positive, and 22 people in federal custody who have died from this virus. https://www.bop.gov/coronavirus/

good cause"). *See generally Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) ("'[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry.'") (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)). Here, in the midst of a pandemic, where Petitioners have already asserted disturbing facts about the lack of testing at the FDC, their inability to practice social distancing, the lack of what the rest of the country acknowledges to be standard sanitizing and disinfecting protocols, there is ample cause for the Court in its discretion to allow an independent inspection as well as Petitioners' proposed discovery to fill in the remaining facts that are exclusively within the possession of the FDC.

Petitioners have therefore drafted the attached discovery requests with an eye toward minimizing burdensomeness. *See* Interrogatories, attached as Exhibit A; Requests for Production of Documents, attached as Exhibit B; Notice of Deposition, attached as Exhibit C.[17]

X. Conclusion

Every one of us recognizes that we live in a very different world than we did just a few months ago. Each of us now knows that we must take extreme measures—social distancing, wearing gloves and masks when we shop for food (if we dare go out and shop), and taking frequent hygienic measures, including handwashing and the use of hand sanitizer and wiping down surfaces with bleach cleansers—in order to protect ourselves and loved ones from contracting COVID-19. We can no longer go to work but must work from home. Many have lost employment. We cannot enjoy social engagements such as dining out, attending concerts or movies. There are no sporting events to be seen on television because all sports have been

[17] Some of this discovery will likely become unnecessary should the Court appoint an inspector to visit the FDC.

canceled. Many of us have restricted ourselves from seeing children and grandchildren because of the deadly health risks from this virus that can be so infectious it spreads before those infected are symptomatic. Given these extraordinary times, it is evident that extraordinary measures must be undertaken to ensure that lives are protected where the insidious COVID-19 virus can most easily spread like a wildfire—inside prison walls. Petitioners therefore have properly brought this Class Action Petition for Writ of Habeas Corpus to accomplish what must be done to save those lives. For all the reasons set forth in this Response, Petitioners respectfully submit that Respondent's Motion to Dismiss the Petition and Class Action Complaint is without merit and should be denied.

Respectfully submitted,

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Dated: April 21, 2020

CERTIFICATE OF SERVICE

I, Linda Dale Hoffa, counsel for Petitioners, hereby certify that on this date, a true and correct copy of Petitioners' Brief in Opposition to Respondent's Motion to Dismiss the Petition and Class Action Complaint was served on all counsel of record via ECF.

Dated: April 21, 2020

/s/ Linda Dale Hoffa
Linda Dale Hoffa