**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**

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| ANTHONY BAEZ, JONATHAN BERMUDEZ, JERMAINE GONSALVES, and DEDRICK LINDSEY on behalf of themselves and all others similarly situated;<br><br>Plaintiffs-Petitioners,<br><br>v.<br><br>ANTONE MONIZ, SUPERINTENDENT OF THE PLYMOUTH COUNTY CORRECTIONAL FACILITY, in his official capacity;<br><br>Defendant-Respondent. | Case No. 1:20-cv-10753 |

**REPLY IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

## I. The Requested Injunctive Relief is Appropriate Here

Respondent's Opposition to Petitioner's Motion for a Temporary Restraining Order and Preliminary Injunction ("Opp.) first[1] argues that injunctive relief is inappropriate because Petitioners have an "adequate remedy at law" and that the proposed injunction offends principles of comity (Opp. 14-16). These arguments are meritless. The cases cited by Respondent involve instances where courts were asked to interfere with a separate sovereign's authority. *See, e.g., Coors Brewing Co. v. Mendez-Torres*, 678 F.3d 15 (1st Cir. 2012). *El Dia v. Hernandez Colon*, 963 F.2d 488 (1st Cir. 1992); *Porto Rico Tel. Co. v. Puerto Rico Comm. Auth.*, 189 F.2d 39 (1st Cir. 1951). Thus, those decisions were informed by the longstanding doctrines discouraging federal courts from interfering with "the exercise of sovereign power by a state or territory." *Id.* at 41. No similar concerns are present here.

Nor is there merit to Respondent's contention that Petitioners' concerns can be fully addressed through individual proceedings arising under the Bail Reform Act. The injunction sought by Petitioners would impose a wide range of relief, including the appointment of a monitor to examine and make recommendations regarding the many-faceted concerns of the Petitioners and the Class regarding the serious threat of COVID-19 to all federal detainees at Plymouth. *See, e.g., Banks v. Booth*, Case. No. 20-CV-00849-CKK (D.D.C.) (Memorandum Opinion of April 19, 2020). Respondent cites no authority indicating that these same concerns can be addressed through individual bail proceedings. Indeed, as argued elsewhere, that type of divide-and-conquer approach is not only inefficient, it has proven to be wholly ineffective in addressing the concerns presented here. *See* DE 38 at 25-26 (discussing *United States v. Moore- Bush*, No-CR.-30001 (D. Mass.)).

For the same reason, there is nothing about the Petitioners' proposed injunctive relief that would interfere directly with other federal proceedings. Petitioners are seeking to address and correct Plymouth's response to the COVID-19 crisis—nothing in the proposed injunctive relief would interfere

[1] To the extent that Respondent's Opposition incorporates by reference the arguments advanced in its Separate Motion to Deny the Petition (see Opp. at 13-14), it should be rejected for the very same reasons as those set forth in Petitioners separately-filed Opposition to that Motion. *See* DE 38.

directly with the detention decisions of any other judges in this district. Indeed, a reduction of the detainee population at Plymouth would not necessarily mean that all detainees are "released from custody." *See* DE 38 at 13-14 (discussing the concept of "enlargement"). Indeed, the inapposite cases cited by Respondent make clear that federal courts can and do work avoid the "comity problems" that Respondent wrongly implies could arise here. *See, e.g., CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 252 (5th Cir. 2006) (noting that "the sum of the actions of the two judges was a cooperative response to issues arising out of the same dispute").

## II. Petitioners Are Likely to Succeed on Their Fifth and Eighth Amendment Claims

Petitioners have established that they are likely to succeed on their Fifth and Eighth Amendment claims through five affidavits detailing conditions of confinement at Plymouth, three affidavits by medical professionals regarding Plymouth's failures to adequately respond to the COVID-19 crisis, and factual allegations supporting those affidavits. *See* Pet. Exs. A-C, H-L. In response, Respondent offers only vague and conclusory assertions to assure the Court that he has instituted "strict protocols" and implemented "all prudent measures" to protect Petitioners and proposed class members from the fatal risk presented by COVID-19. Resp.'s Opp. 3; McDonald Decl. I ¶ 5. Indeed, Respondent concedes that he has not undertaken any broad-based effort to educate proposed class members about COVID-19's symptoms, risks, or modes of transmission. Without providing this basic education – both to proposed class members and staff – even the *de minimis* measures Respondent has allegedly undertaken will necessary be undermined.[2] Respondent is conspicuously silent about any broad-based efforts to educate proposed class members about the importance of consistent social distancing – what it consists of, and how to do it effectively – or any effort undertaken to ensure or enforce proper social

[2] Sheriff McDonald admits that his staff "has not made a general announcement [about COVID-19] to detainees." McDonald Decl. II" ¶ 5, ECF No. 31-1. The posters placed in the housing unit are no substitute for directly educating detainees.

distancing.[3]

Petitioners' claims regarding the lack of hygiene measures undertaken at Plymouth are also supported by Respondent's responses. Respondent also obscures the precise cleaning and disinfecting measures Plymouth has instituted to combat COVID-19 and the frequency with which they are undertaken. *Id.* ¶ 14. Respondent asserts that he provides Plymouth's federal detainees with all the cleaning supplies they need, but he offers no details to substantiate that claim, which flatly contradicts Petitioners' experience.[4] Next, Respondent rationalizes the dangerous conditions at Plymouth by reference to the offenses with which Petitioners were charged. *See id.* Respondent offers no authority for the bewildering suggestion that pretrial detainees may be subjected to heightened risk of contracting a fatal virus if they have been charged with a crime. *Id.*

Respondent has repeatedly acknowledged that he is "acutely aware" of the grave risk COVID-19 poses to the federal detainees in his custody. Opp. 21; Dr. Baker Decl. ¶ 22, ECF No. 23-2. His failure to implement adequate measures to prevent the spread of COVID-19 in the facility constitutes deliberate indifference to this known risk of infection. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Respondent also mischaracterizes his decision to ignore CDC guidelines as "a difference of medical judgment." Opp. 21 (quoting *Scott v. Benson*, 742 F.3d 335, 340 (8th Cir. 2014)). Corrections officials act with deliberate indifference when they make "decisions about medical care made recklessly with 'actual knowledge of impending harm, easily preventable.'" *Leavitt v. Corr. Med. Servs., Inc.*, 645 F.3d 484, 497 (1st Cir. 2011) (quoting *Ruiz-Rosa v. Rullan*, 485 F.3d 150, 156 (1st Cir. 2007)). Respondent offers no expert reasoning supporting his knowing departure from the public

[3] That unit managers are allegedly "reinforcing the importance of social distancing" provides no insight into the content or frequency of those alleged communications. McDonald Decl. II ¶ 5. Moreover, Petitioners' affidavits, which detail proposed class members' routine encounters with others both at meals and during recreation time, contravening social distancing precepts, demonstrates the ineffectiveness of these alleged communications. Pet. At Ex. I ¶¶ 4, 8; Ex. J ¶¶ 11-12; Ex. H. ¶ 5; Ex. K ¶ 7; Ex. L ¶ 9.

[4] Sheriff McDonald does not refute that Mr. Bermudez had to pack up his cellmate's belongings without gloves. Petition Ex. I at ¶ 12. The affidavits submitted by Petitioners indicate that Plymouth's cleanliness has not improved since the COVID-19 pandemic began. *Id.* ¶¶ 5, 9; Petition Ex. J ¶ 9; Petition Ex. H ¶ 9; Petition Ex. L ¶ 11.

health consensus as manifested in the CDC's guidelines. Opp. 18-19; *see also Banks, supra,* slip op. at 22, 26 (ordering extensive remedial measures in response to DOC officials failure "to take comprehensive, timely, and proper steps to stem the spread of [COVID-19]"); *see also Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *5 (N.D. Ill. Apr. 9, 2020).

Respondent asserts that Petitioners have not alleged a "substantial risk of serious harm" because "none of the Petitioners is held in a crowded unit." *Id.* But in the same breath, he admits that two Petitioners are housed in shared cells. Opp. at 20 n.10. Incredibly, Respondent justifies this by comparing cellmates to roommates or family households. *Id.* His comparison ignores the fact that family members and/or roommates are typically able to stay six feet apart from each other while sharing the same home. But family members and roommates share a home; cellmates share an extremely small cell. Respondent's decision to ignore CDC guidelines demonstrates a deliberate indifference for proposed class members' wellbeing.

**III. Petitioners Will Suffer Irreparable Harm Absent Injunctive Relief**

A plaintiff shows that he will suffer irreparable harm in the absence of injunctive relief when his "legal remedies are inadequate." *Ross–Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 18 (1st Cir.1996). Respondent's claim that Petitioners and proposed class members could seek individualized bail hearings does not excuse Respondent placing federal detainee in serious risk of harm. Resp's Opp'n at 14-15. Indeed, a high risk of infection with COVID-19 is a prototypical irreparable harm requiring a preliminary injunction, since the ravages of the disease cannot be compensated with monetary damages if an outbreak occurs before this Court can decide the merits. *See Banks, supra*, slip op. at 24 (inmates facing risk of contracting COVID-19 showed irreparable harm); *Mays*, 2020 WL 1812381, at *13 (plaintiffs showed risk of harm "for which it is not practicable to calculate damages and therefore has no adequate remedy at law.").

Respondent's contention that Petitioners have not shown irreparable injury because Plymouth has not yet had a confirmed case of COVID-19 among its inmate population is simply inaccurate. Opp.

23. Respondent has received test results for merely seven inmates out of an inmate population of 702 – only 1% of all inmates. *See* Resp.'s Suppl. to Opp., McDonald Decl. II, ECF. 31-1 at ¶ 1; Resp.'s Opp., Ex. A., McDonald Decl. I, ECF. 23-1 at ¶ 7. The absence of positive tests from such a tiny fraction of the population reveals nothing about the prevalence of the virus, which easily evades screening measures due to the high rates of asymptomatic or pre-symptomatic infection, nor does it diminish the serious risk Respondent's inadequate precautions pose to Petitioners. *See* Rich Aff. ¶ 7.

Finally, Respondent makes the baseless, incredible claim that Petitioners are actually safer within Plymouth than they would be if they were released. Resp.'s Opp'n at 23-24. Petitioners' medical experts easily expose this fiction.[5] Indeed, the dangers of correctional facilities compared to the general population are broadly recognized by state and federal courts, and Attorney General Barr himself. And these risks are particularly heightened at Plymouth, where Respondent has failed to implement multiple foundational preventative measures.

**IV. The Balance of Equities and Public Interest Favor Petitioners**

Drs. Giftos and Rich state that preventing further outbreaks in jails and prisons is critical to flattening the curve of infection and hospitalization. Giftos Aff. ¶ 27; Rich Aff. ¶¶ 6, 15, 21-24. Respondent cites no expert opinion to the contrary. At most, he suggests—without support--that releasing detainees without considering where they would be housed poses risks to the public health. The evidence before the Court makes clear, however, that the public interest favors the requested injunction. *See Banks, supra,* slip op. at 24-26.

**CONCLUSION**

For all the foregoing reasons, Petitioners' application for a TRO and preliminary injunction should be granted.

[5] *See* Giftos Aff. ¶ 18 (noting "the high numbers of people with chronic, often untreated, illnesses housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, and no possibility of staying at a distance from others."); LaRocque Aff. ¶ 21 ("Defendants are not taking vital steps to prevent and mitigate a COVID-19 outbreak at the facility."); Rich Aff. ¶ 5 (the nature of the virus "create[s] a perfect storm for correctional settings.").

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Daniel J. Cloherty, counsel for Petitioners, hereby certify that this document has been filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

*/s/ Daniel J. Cloherty*
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