

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION**

)
PATRICK R. SMITH and)
BRANDON S. HOLM, individually and on behalf)
of all others similarly situated,)

Plaintiffs,)

v.)

Case No. 2:20-cv-630

WILLIAM P. BARR, in his official capacity as)
the Attorney General of the United States;)
MICHAEL CARVAJAL, in his official capacity)
as the Director of the Federal Bureau of Prisons;)
and T.J. WATSON, in his official capacity as)
Complex Warden for the Terre Haute Federal)
Correctional Complex,)

Defendants.)
_____)

**CLASS ACTION COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs PATRICK R. SMITH and BRANDON S. HOLM (“Plaintiffs”), by their undersigned attorneys, bring this complaint individually and on behalf of all others similarly situated against defendants WILLIAM P. BARR, in his official capacity as the Attorney General of the United States, MICHAEL CARVAJAL, in his official capacity as the Director of the Federal Bureau of Prisons, and T.J. WATSON, in his official capacity as Complex Warden for the Terre Haute Federal Correctional Complex (collectively, “Defendants”), and allege as follows:

INTRODUCTION

1. This is an action for declaratory and injunctive relief to protect Plaintiffs from serious and substantial risks to their health due to Defendants’ plan to open the doors of the Terre Haute Federal Correctional Complex (“FCC Terre Haute”) to scores of outside visitors in connection with upcoming scheduled executions.

2. The country is besieged by the COVID-19 pandemic. More than 58 million people worldwide have contracted COVID-19, and more than a million people have died.¹ In the U.S., more than 12 million people have tested positive for the disease, and roughly 256,000 people have died.²

3. Indiana has not been spared. Almost 290,000 people have tested positive, and more than 5,250 people have died.³ And things are getting worse, not better. With winter approaching, the number of cases in Indiana has been “significantly and steadily increasing” and hospitalizations are “at an all-time high,” prompting Governor Holcomb to issue an Executive Order that imposes stricter measures to “counter the spread” of COVID-19, including “social distancing” requirements and limits on how many people may convene “in a single space.”⁴

4. Incarcerated individuals have no control over their own health and safety during this crisis. They do not have the option to “socially distance” from others or to limit the number of people in their space. They are at the mercy of those who decide and implement the conditions of their confinement and, of immediate relevance here, the policies regarding who is allowed in the prison and when such visits are permitted.

5. The plaintiffs in this case are incarcerated at FCC Terre Haute. They are struggling to stay safe and healthy during these unprecedented times, and their situation is being made worse by the actions challenged in this lawsuit.

6. The Attorney General of the United States and the Federal Bureau of Prisons plan to carry out executions at FCC Terre Haute on December 8, December 10, and December 11, 2020,

¹ See Johns Hopkins University of Medicine, Coronavirus Resource Center, at <https://coronavirus.jhu.edu/> (last visited Nov. 22, 2020).

² *Id.*

³ See <https://coronavirus.jhu.edu/region/us/indiana> (last visited Nov. 22, 2020).

⁴ Executive Order 20-48 at 2, 6, 8-9, at www.in.gov/gov/files/Executive_Order_20-48_Color-Coded_County_Assessments.pdf.

and on January 14 and January 15, 2021.⁵ Each execution is expected to result in roughly 200 people, many from across the country, congregating at or near the prison. These individuals will interact with members of the local community at hotels and restaurants before going to the prison, they will interact with each other and prison staff when they enter the prison, and they will congregate in small and confined spaces in the prison as the executions are carried out. Many, if not all, of the FCC Terre Haute staff who interact with these visitors will then return to their regular duties throughout FCC Terre Haute, including interacting with Plaintiffs and others in the prison population.

7. The upcoming execution events are putting the individually named Plaintiffs and all other incarcerated people at FCC Terre Haute at significant risk of serious illness or even death, for no good reason. Prior to 2020, there had been only *three* federal executions in the United States in the last forty-three years.⁶ There is no legitimate justification for holding executions now, at the height of the pandemic, and creating in the process a significant risk of serious health complications or death for Plaintiffs and all other people incarcerated at FCC Terre Haute.

8. Plaintiffs bring this lawsuit on their own behalf and on behalf of a putative class of all incarcerated individuals at FCC Terre Haute, with a modest request: that the scheduled executions be enjoined until the threat of the COVID-19 pandemic has passed and Plaintiffs and members of the Class have received an appropriate vaccine. This relief will cause no harm to the Defendants, but it will ameliorate the significant risk of substantial harm to Plaintiffs and other members of the class (in addition to countless other individuals).

⁵ See Federal Bureau of Prisons, Federal Execution Information, at https://www.bop.gov/resources/federal_executions_info.jsp (last visited Nov. 19, 2020).

⁶ See Historical Information, Capital Punishment, at www.bop.gov/about/history/federal_executions.jsp.

JURISDICTION AND VENUE

9. This Court has jurisdiction pursuant to 28 U.S.C. § 1331. The Court has authority to grant declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

10. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial part of the events and omissions giving rise to the claims asserted in this complaint have occurred and continue to occur in this District.

PARTIES

11. Plaintiff Patrick R. Smith, inmate registration number 53264-074, is incarcerated at FCC Terre Haute. He is housed in C-Dorm at FCI Terre Haute, a medium security federal correctional institution at FCC Terre Haute. He is serving a 53-month sentence and his scheduled release date is January 24, 2022. Mr. Smith has asthma and hyper-inflated lungs with chronic coarsened interstitial markings, among other health complications. Mr. Smith has twice sought compassionate release due to his health conditions and the COVID-19 pandemic pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). His first request, dated March 26, 2020, was denied by the warden. He did not receive a response from the warden to his second request, dated June 12, 2020, within thirty days. He thereafter filed a petition for compassionate release with the United States District Court for the Eastern District of Tennessee, without the aid of counsel. The court denied his motion.

12. Plaintiff Brandon S. Holm, inmate registration number 19005-030, is incarcerated at FCC Terre Haute. He is housed in C-Dorm at FCI Terre Haute. He is serving a 60-month sentence and is eligible for release to a halfway house on April 21, 2023. Mr. Holm has anxiety and regularly suffers from panic attacks and shortness of breath related to his anxiety. As a child, he had open-heart surgery for a congenital heart defect. Mr. Holm sought compassionate release due to his health conditions and the COVID-19 pandemic pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), and currently has a petition for compassionate release or release to home confinement pending in the United States District Court for the Southern District of Iowa. The court has not yet ruled on Mr. Holm's request.

13. Defendant William P. Barr is the Attorney General of the United States. Attorney General Barr oversees the Bureau of Prisons (“BOP”), an agency within the United States Department of Justice (“DOJ”), and has responsibility over carrying out death sentences against federal prisoners. He is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

14. Defendant Michael Carvajal is the Director of the BOP. He oversees the operations of BOP facilities (including FCC Terre Haute), BOP staff, and individuals in BOP custody. Defendant Carvajal is responsible for designating the date, time, and place for a sentence of death. He is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

15. Defendant T.J. Watson is the Complex Warden for FCC Terre Haute. He is sued in his official capacity for the purpose of obtaining declaratory and injunctive relief.

FACTUAL ALLEGATIONS

A. The COVID-19 epidemic is a global health emergency, and Indiana has been hit particularly hard.

16. In a period of only nine months, more than 12 million people in the United States have tested positive for COVID-19 and more than 256,000 people have died.⁷ The high mortality rate is likely to continue or worsen in coming weeks, as sharp increases in case numbers are followed a few weeks later by increases in hospitalizations, which are then followed by increases in deaths.

17. As of November 15, 2020, 53.7 million confirmed cases and 1.3 million deaths from COVID-19 have been reported worldwide to the World Health Organization.⁸

⁷ See Johns Hopkins University COVID-19 Data Center, <https://coronavirus.jhu.edu/> (last visited Nov. 23, 2020).

⁸ See World Health Organization, Overview, Weekly Epidemiological Update, <https://www.who.int/publications/m/item/weekly-epidemiological-update---17-november-2020> (last visited Nov. 19, 2020).

18. This month, Indiana has seen single-day records of reported COVID-19 cases and was “ranked 35th in the world in per capita COVID-19 deaths.”⁹

B. COVID-19 is a highly contagious and lethal disease.

19. In severe cases, COVID-19 can lead to respiratory failure, permanent lung, heart, or neurological damage, or death, among other serious complications. The disease is spread through respiratory droplets, and the only measure that fully prevents infection is avoiding contact with others. According to the federal Centers for Disease Control and Prevention (the “CDC”), social distancing—remaining at least six feet from all other persons not sharing one’s household—is a cornerstone of reducing transmission of respiratory diseases such as COVID-19.

20. As the CDC warns, “**the more people you interact with, the more closely you interact with them, and the longer that interaction, the higher your risk of getting and spreading COVID-19.**”¹⁰

21. According to the CDC, adults of any age with the following underlying medical conditions are at increased risk of severe illness from the virus that causes COVID-19: cancer, chronic kidney disease, COPD (chronic obstructive pulmonary disease), heart conditions (such as heart failure, coronary artery disease, or cardiomyopathies), immunocompromised state (weakened immune system) from solid organ transplant, obesity, pregnancy, sickle cell disease, smoking, or Type 2 diabetes mellitus.¹¹

22. Likewise, adults of any age with the following underlying medical conditions might be at an increased risk of severe illness from the virus that causes COVID-19: asthma (moderate-to-severe), cerebrovascular disease (affects blood vessels and blood supply to the brain), cystic

⁹ See Indianapolis Star, “If Indiana were a country, our COVID-19 mortality rate would be 35th worst in the world,” <https://www.indystar.com/story/news/health/2020/11/18/covid-indiana-death-rate-coronavirus-ranks-35th-world/6338823002/> (Nov. 18, 2020).

¹⁰ See Centers for Disease Control and Prevention, *People with Certain Medical Conditions* (updated Nov. 2, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (original emphasis) (last visited Nov. 19, 2020).

¹¹ *Id.*

fibrosis, hypertension or high blood pressure, immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, use of other immune weakening medicines, neurologic conditions (such as dementia), liver disease, overweight, pulmonary fibrosis (having damaged or scarred lung tissues), thalassemia (a type of blood disorder), or Type 1 diabetes mellitus.¹²

23. Older adults are also at increased risk of severe illness from the virus that causes COVID-19.¹³ Eight out of ten COVID-19-related deaths reported in the United States have been among adults aged 65 years and older.¹⁴

24. Men also appear to be at greater risk of death from COVID-19, as more men than women are dying from the disease.¹⁵

C. Incarcerated people are particularly vulnerable to COVID-19.

25. Prisons are petri dishes for COVID-19. “The infrastructure of most prisons and jails is ... conducive to spreading disease,” similar to what is seen on a cruise ship.¹⁶ Indeed, the risk of exposure is even greater for incarcerated people, “as correctional officers and other staff frequently leave the facility and then return” and “social distancing is typically a physical impossibility.”¹⁷

¹² *Id.*

¹³ See Centers for Disease Control, *Older Adults* (updated Sept. 11, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Nov. 19, 2020).

¹⁴ *Id.*

¹⁵ See Derek M. Griffith, Ph.D. et al., “Men and COVID-19: A Biopsychosocial Approach to Understanding Sex Differences in Mortality and Recommendations for Practice and Policy Interventions,” *Prev. Chronic Dis.* 2020; 17:-:200247 (July 16, 2020), available at https://www.cdc.gov/pcd/issues/2020/20_0247.htm (last visited Nov. 23, 2020).

¹⁶ Laura Hawks, MD, et al., “COVID-19 in Prisons and Jails in the United States,” *JAMA Intern Med.* 2020; 180(8):1041-1042, available at <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2765271> (last visited Nov. 16, 2020).

¹⁷ *Id.*

26. Nine of the ten largest COVID-19 outbreaks in the country have occurred in prisons.¹⁸

27. According to a report on the CDC’s website, “[h]igh COVID-19 attack rates can occur in correctional and detention facilities.... During May 7-21 [2020], among 98 incarcerated and detained persons who were quarantined because of exposure to the virus, 71 (72%) had laboratory-confirmed SARS-CoV-2 infection identified through serial testing.”¹⁹

28. Prison populations also “have a high prevalence of chronic diseases, increasing their risk for severe COVID-19–associated illness....”²⁰ Roughly 50% of all incarcerated persons have at least one chronic disease and many are over the age of 60.²¹

29. According to the CDC, restrictions on the non-essential movement of inmates and visitors into and out of prisons and social distancing are key components of managing the transmission of COVID-19 in prisons and the communities in which they are located.²²

¹⁸ See “San Quentin Prison was Free of the Virus. One Decision Fueled an Outbreak.,” N.Y. Times (June 30, 2020), available at www.nytimes.com/2020/06/30/us/san-quentin-prison-coronavirus.html.

¹⁹ Henry Njuguna, MD, et al., Serial Laboratory Testing for SARS-CoV-2 Infection Among Incarcerated and Detailed Persons in a Correctional and Detention Facility—Louisiana, April–May 2020, Morbidity and Mortality Weekly Report (July 3, 2020), available at https://www.cdc.gov/mmwr/volumes/69/wr/mm6926e2.htm?s_cid=mm6926e2_w (last visited Nov. 16, 2020).

²⁰ “Mass Testing for SARS-CoV-2 in 16 Prisons and Jails — Six Jurisdictions, United States, April–May 2020,” <https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm> (Aug. 21, 2020).

²¹ Matthew J. Akiyama, M.D., et al., “Flattening the Curve for Incarcerated Populations — Covid-19 in Jails and Prisons,” *The New England Journal of Medicine* 2020; 382:2075–2077, available at <https://www.nejm.org/doi/full/10.1056/NEJMp2005687?fbclid=IwAR2ZCnntADAKmLMzBX544IkRPL344bGMkIN8mbghZkNgvU6XR0pOH9WLSF9A> (last visited Nov. 16, 2020).

²² See CDC, “Interim Guidance on Management of Coronavirus Disease in Correctional and Detention Facilities,” available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (updated Oct. 21, 2020) (last visited Nov. 23, 2020).

D. Conditions at FCC Terre Haute exacerbate the risk of COVID-19 transmission.

30. FCC Terre Haute is comprised of three separate complexes, differentiated by the level of security. The complexes include (1) a U.S. Penitentiary (USP), which is a high security complex; (2) a Federal Correctional Institution (FCI), which is a medium level complex; and (3) a Satellite Prison Camp (SPC), which is a minimum-security level complex.

31. USP Terre Haute has six general population units that are designed as a “bow-tie” with two floors for non-death row inmates and a Special Confinement Unit (SCU) for death-row inmates. In addition to these living quarters, there are dining facilities, health services, maintenance shops, a commissary, a UNICOR factory, and an inmate visiting area. Buildings are in a general square shape, with a large, confined yard for recreational time. USP has a rated capacity of 910 inmates.

32. FCI Terre Haute has ten housing units with a rated capacity of 560 inmates. FCI also has a dining facility, health services, maintenance shops, a commissary, and an inmate visiting area.

33. SPC Terre Haute has a main building that includes living quarters, a dining room, and a gymnasium. There are eight dormitory-style housing units within the complex, with a total rated capacity of 324 inmates. The units contain two-man, eight-man, and 12-man rooms.

34. Two of the three FCC Terre Haute complexes have more inmates than their rated capacity, increasing the already prevalent risk of COVID-19 transmission. The USP has a rated capacity of 910 inmates but currently houses approximately 1,269 inmates. The FCI has a rated capacity of 560 inmates but currently houses approximately 875 inmates.

35. In the C-Dorm of the FCI Terre Haute complex, where the named Plaintiffs are incarcerated, prisoners are housed in cells with more than one person, in close quarters. Social distancing is impossible, given the small amount of space in the cell.

36. Social distancing is also impossible in the communal bathroom facilities. C-Dorm is equipped with 6 toilets, 4 urinals, 10 sinks, and 8 showers for the entire dorm population, along

with 4 soap dispensers. As of November 12, 2020, one of the toilets was out of order, two urinals were out of commission, and three sinks did not work.

37. Social distancing is also difficult to achieve in most other settings within FCC Terre Haute. Inmates are almost never six feet away from another person, whether inside or outside.

38. The use of masks at FCI Terre Haute is inconsistent among both staff and inmates.

39. Inmates who serve food to other inmates continue to serve in this role after testing positive for COVID-19.

40. Sinks in communal bathrooms are often filthy. Soap dispensers often do not contain soap, and bar soap is not always available.

41. BOP staff and inmates have daily contact in all FCC Terre Haute complexes.

42. The BOP reported its first case of COVID-19 at FCC Terre Haute on or about May 16, 2020.

43. Since then, at least three Terre Haute prisoners have died from the virus, and many more prisoners and staff have contracted COVID-19.

44. According to a recent BOP report, at least 82 inmates and 14 staff members are currently positive for COVID-19 at FCC Terre Haute, an additional 158 prisoners and 29 staff members had the virus but recovered, and one prisoner has died; at USP Terre Haute, at least 4 inmates and 2 staff members are currently positive, another 91 inmates and 5 staff members had the virus but recovered, and at least 2 inmates have died.²³

45. Despite the recoveries, some individuals might become re-infected with the COVID-19 virus.²⁴

46. It is not clear how much of the prison population at FCC Terre Haute (prisoners and staff) has been tested, or how the BOP decides whether a death was COVID-related. In all

²³ See COVID-19 Cases, <https://www.bop.gov/coronavirus/index.jsp> (as visited on Nov. 24, 2020).

²⁴ See Centers for Disease Control, *Reinfection with COVID-19* (updated Oct. 27, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html> (last visited Nov. 25, 2020).

events, the number of COVID cases and COVID deaths at FCC Terre Haute is likely higher than reported on the BOP website.

E. Defendants know about the serious health and safety risks of COVID-19 and recognize that movement in and out of prisons significantly increases those risks.

47. On March 26, 2020, Defendant Barr issued a Memorandum to Defendant Carvajal regarding “Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic.”²⁵ The memorandum authorized Defendant Carvajal to “grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic.”²⁶ Defendant Barr recognized Defendants’ obligation to “do the best we can to minimize the risk of COVID-19 to those in our custody, while also minimizing the risk to the public.”²⁷

48. On April 3, 2020, Defendant Barr issued another Memorandum to Defendant Carvajal, recognizing the BOP’s “profound obligation to protect the health and safety of all inmates.”²⁸ Defendant Barr charged Defendant Carvajal to “immediately review all inmates who have COVID-19 risk factors, as established by the CDC,” starting with facilities where COVID-19 was “materially affecting operations.”²⁹

49. Defendants have known for some time that movement into and out of BOP prisons was a source of risk to inmates and to prison staff. To “mitigate the spread of COVID-19,” Defendants announced at the start of the pandemic that they were heavily restricting movement in and out of BOP prisons.³⁰

²⁵ See Memorandum for Director of Bureau of Prisons (Mar. 26, 2020), available at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf (last visited Nov. 20, 2020).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Memorandum for Director of Bureau of Prisons (Apr. 3, 2020), available at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf (last visited Nov. 20, 2020).

²⁹ *Id.*

³⁰ See Federal Bureau of Prisons, “BOP Implementing Modified Operations,” www.bop.gov/coronavirus/covid19_status.jsp.

50. In March 2020, BOP suspended internal prisoner movement “with limited exceptions.”³¹

51. Also in March, BOP suspended all visitation, including legal visits at all federal prisons.³² Under this policy, BOP systematically canceled previously scheduled visits and refused to schedule future visits for both contact and non-contact meetings, including at Terre Haute.

52. In April, BOP issued a memorandum reporting that stopping visits had a “major impact” on keeping staff, prisoners, visitors, and the community at large safe from COVID-19.³³

53. Other measures have also been announced by BOP, including at Terre Haute.³⁴ The measures have been inconsistently implemented and, in all events, have not prevented the spread of COVID among prison inmates and prison staff.

F. Defendants know that executions will introduce additional, unnecessary risks of COVID-19 exposure at FCC Terre Haute.

54. The BOP’s execution plans and protocols anticipate the likely involvement of hundreds of individuals in each execution that occurs at FCC Terre Haute. An “execution team” consisting of some 40, geographically disbursed BOP staff members will spend several days at the prison before each execution preparing. Another specially staffed team of roughly 50 BOP employees will also travel to Terre Haute from other prisons (which might also be experiencing COVID-19 outbreaks). These teams will be assisted by up to 100 BOP staff at Terre Haute,

³¹ See Federal Bureau of Prisons, “Updates to BOP COVID-19 Action Plan,” www.bop.gov/resources/news/20200319_covid19_update.jsp.

³² See Federal Bureau of Prisons COVID-19 Action Plan,” at https://www.bop.gov/resources/news/20200313_covid-19.jsp (updated Mar. 13, 2020) (last visited Nov. 22, 2020).

³³ See Mem. for Inmate Families and Friends from M. Carvajal, Director, Federal Bureau of Prisons (Apr. 21, 2020), available at www.bop.gov/resources/news/pdfs/202004211_memo_to_inmate_families_and_friends.pdf.

³⁴ See Federal Bureau of Prisons, BOP Modified Operations, at https://www.bop.gov/coronavirus/covid19_status.jsp (updated Oct. 8, 2020) (last visited Nov. 19, 2020).

including those pulled from their normal duties, who will provide security and support for each execution.

55. The individuals who converge in Terre Haute to participate in the executions will stay in local hotels or homes, eat in local restaurants, and use local transportation. Many will travel by air or other public transit. One or more of those individuals could easily have been exposed to or infected with COVID-19 at home, on planes, in airports or hotels, at their BOP regional facilities, or in their communities more broadly. They will then convene and intermingle in small enclosed spaces with staff from FCC Terre Haute, which has numerous known COVID-19 cases among its inmates and staff, for group training, practices, meetings, and on-site work.

56. The strict security protocol associated with such executions will enhance the risks for the prisoners, staff, and ultimately anyone attending the execution or later interacting with those who did.

57. Large numbers of media representatives and demonstrators will likely converge on or near the prison grounds for each execution. Those who enter the prison will be subjected to in-person screening and security details. The media must participate in a Media Orientation at the institution prior to the execution and, on the date of the execution, will be contained within a single Media Center with communal restrooms. Demonstrators for and against capital punishment are instructed by the prison to meet at locations in the community for processing by BOP staff and then be transported to the prison in vans.

58. The execution facility, sometimes referred to as the “Death House,” is a small, single story building on the Terre Haute grounds. In addition to the roughly 40 members of the execution team, federal regulations authorize the attendance of up to 24 witnesses to the execution: six individuals selected by the death row prisoner, including his or her spiritual advisor and legal team, eight citizen witnesses, including members of the victim’s family, and ten members of the press. *See* 28 C.F.R. § 26.4(c)(3)-(4). Thus, the execution facility might hold, in close quarters, the 40-member execution team, up to 24 witnesses, the death row prisoner, and an unspecified number of attorneys from the DOJ. Again, many of these individuals will have traveled great

distances, including by plane or other public transit, and stayed in local hotels and eaten in local restaurants before assembling on the day of the execution.

59. The witnesses to the execution and prison staff will be shuttled together in vans to the execution facility from a designated location in accordance with USP protocol. In the days leading up to the execution, attorneys may be required to visit with their client in the Death House. During the execution itself, witnesses are grouped into four separate viewing rooms—one for media; one for the victim’s family members; one for attorneys, the prisoner’s loved ones, and his or her spiritual advisor; and one for government officials. It is not possible to socially distance in these cramped viewing rooms. Additionally, those in the viewing rooms cannot see or be seen by the prisoner unless they are inches from the Plexiglass that separates the witnesses from the prisoner.

60. The fact that the government schedules multiple executions in the same week further increases the risk of contracting COVID-19 for everyone in the prison population or participating in the executions. Three executions occurred the week of July 12, 2020, two the week of August 26, and two the week of September 20; two executions are scheduled for a single week in December, and three more are scheduled for the same week in January. Each execution brings its own group of counsel, spiritual advisers and family for the inmate who is to be executed, together with demonstrators, media witnesses, the victim’s family members, spiritual support, and government officials from all over the country--all of whom then interact with each other and BOP staff inside the prison and the Death House, and with members of the community outside the prison. Everyone then returns to their families and their communities, having potentially spread or contracted the disease before doing so.

61. The number of COVID-19 cases in FCC Terre Haute and in the local community increased after the executions that were held at FCC Terre Haute in July, August and September of this year.

62. The American Bar Association, members of Congress, and others have called upon the federal government to postpone the pending executions because of the health risks they create.³⁵

G. There is no need to conduct executions in December 2020 or January 2021.

63. There is no urgency to conducting the executions that are currently scheduled.

64. Executions are not necessary for the effective operation of the federal criminal justice system, as demonstrated by the fact that only three federal executions took place in the United States between 1957 and 2020.³⁶ There were no federal executions in the 1960s, 1970s, 1980s, 1990s, or 2010s.³⁷ There were two federal executions in 2001, and one in 2003.³⁸

65. In July 2019—prior to the onset of the COVID-19 global pandemic—Attorney General Barr directed BOP to adopt a proposed Addendum to the Federal Execution Protocol, thereby “clearing the way for the federal government to resume capital punishment after a nearly two decade lapse...”³⁹

66. Since then, following various stays of execution, the federal government has carried out eight executions at USP Terre Haute—three occurred the week of July 12, 2020, two the week of August 26, 2020, two the week of September 20, 2020, and one occurred on November 19, 2020.⁴⁰

³⁵ See Letter from ABA President Patricia Lee Refo to President Donald J. Trump (Nov. 12, 2020) (urging postponement of the executions because of the “alarming surge in COVID-19 cases nationwide,” and noting the risks presented to the health and safety of prisoners and their counsel, as well as prison staff), available at https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/fed-executions-letter-111220.pdf; Letter from the Congressional Black Caucus to Attorney General William Barr (Nov. 17, 2020) (urging postponement and noting a “causal link” between executions held earlier this year and “COVID-19 surges”), available at https://cbc.house.gov/uploadedfiles/cbc_letter_to_ag_barr_on_pending_executions.pdf.

³⁶ See Historical Information, Capital Punishment, www.bop.gov/about/history/federal_executions.jsp.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See DOJ Press Release, <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>.

⁴⁰ See Historical Information, *supra*.

67. More federal executions took place over a three-week period in 2020 than occurred in the prior 66 years.

68. Lisa Montgomery was scheduled to be executed on December 8, for crimes she committed in 2004. This would make her the first woman to be executed by the federal government since Ethel Rosenberg was executed in 1953. On November 19, 2020, however, the U.S. District Court for the District of Columbia enjoined Attorney General Barr and his co-defendants from executing Lisa Montgomery “before December 31, 2020,” because her attorneys contracted severe cases of COVID when visiting her in the Texas federal prison where she is currently being held and are unable to assist her in presenting “a meaningful petition for a reprieve or commutation of sentence to the President.” *See* Memorandum Opinion at 9 (Dkt. No. 19) and Order at 1 (Dkt. No. 20), *Montgomery v. Barr*, Civil Action No. 20-3261 (RDM) (D.D.C. Nov. 19, 2020). The Defendants have moved her execution date to January 12, 2021. Brandon Bernard is scheduled to be executed on December 10, for crimes he committed in 1999. He was 18 years old when the crimes were committed, which is the minimum age at which the death penalty may be imposed.⁴¹

69. Additional executions have recently been scheduled by Defendants to take place at FCC Terre Haute, on December 11, 2020, January 14, 2021, and January 15, 2021.

CLASS ACTION ALLEGATIONS

70. Pursuant to Fed. R. Civ. P. 23, the individual named Plaintiffs bring this action on behalf of themselves and on behalf of all persons similarly situated.

71. Plaintiffs seek to represent a class consisting of all people who are currently or who will in the future be incarcerated at FCC Terre Haute during the COVID-19 pandemic (the “Class”).

72. The members of the Class are so numerous that joinder of all members is impracticable. *See* Fed. R. Civ. P. 23(a)(1). There are approximately 2,300 incarcerated people

⁴¹ *See Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the 8th and 14th Amendments of the U.S. Constitution forbid the execution of offenders who were younger than 18 when the crime occurred).

at FCC Terre Haute, a significant percentage of whom are at an increased risk of harm from COVID-19 due to age or previous or existing medical conditions.

73. There are questions of law and fact common to the Class, including: (1) whether COVID-19 present a substantial risk of harm to individuals incarcerated at Terre Haute FCC; (2) whether holding executions at FCC Terre Haute during the current pandemic violates class members' constitutional right to be free from unreasonable risk of death and bodily harm; and (3) whether all further executions at FCC Terre Haute should be enjoined until such time as the COVID-19 virus no longer constitutes an ongoing pandemic that jeopardizes the public health. *See* Fed. R. Civ. P. 23(a)(2).

74. The claims of the class representatives are typical of the claims of the Class. *See* Fed. R. Civ. P. 23(a)(3). The individual named Plaintiffs are currently incarcerated at FCC Terre Haute and will be exposed to the risks attendant to the upcoming scheduled executions.

75. The individual named Plaintiffs will fairly and adequately protect the interests of the Class. *See* Fed. R. Civ. P. 23(a)(4). The interests of the class representatives are consistent with those of the Class members. Counsel for Plaintiffs are not aware of any conflicts with the unnamed members of the proposed Class. Plaintiffs are represented by counsel.

76. A class action is appropriate because Defendants have acted and refuse to act on grounds that apply generally to the Class, so that final injunctive and declaratory relief is appropriate with respect to the class as a whole. *See* Fed. R. Civ. P. 23(b)(2).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

77. Plaintiffs are not required to exhaust administrative remedies under 42 U.S.C. § 1997e because there is no available administrative remedy. The BOP Administrative Remedy Program cannot provide any relief relative to the upcoming scheduled executions and, even if administrative remedies were available, they would offer no possible relief in time to prevent the imminent danger from the upcoming scheduled executions.

COUNT I

Violation of the Eighth Amendment to the U.S. Constitution

78. Plaintiffs repeat and re-allege the preceding paragraphs as if fully set forth here.

79. Plaintiffs bring this claim on their own behalf and on behalf of the Class against all Defendants.

80. Plaintiffs and members of the Class have a right to be free from cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. These constitutional protections extend to “conditions of confinement that are not formally imposed as a sentence for a crime,” *Helling v. McKinney*, 509 U.S. 25, 29-30 (1993), and that are “sure or very likely to cause serious illness and needless suffering...,” *id.* at 33.

81. Defendants’ actions in conducting executions at FCC Terre Haute in the middle of the pandemic expose the Plaintiffs and members of the class to a substantial risk of contracting COVID-19, a serious and highly contagious disease that can lead to severe illness or death. Defendants have failed to take reasonable measures to provide for safe living conditions for the named Plaintiffs and members of the Class, and they have unnecessarily and unreasonably imposed on all Plaintiffs an increased risk of contracting a disease that is very likely to cause serious illness and needless suffering.

82. As set forth above, hundreds of people are likely to descend on FCC Terre Haute for each of the scheduled executions, many after travelling from different parts of the country and interacting in hotels and restaurants with individuals who might be contagious carriers of the COVID-19 virus. The individuals who come to Terre Haute will interact with members of the local community and with FCC Terre Haute staff members, who will later interact with the individual Plaintiffs and members of the Class. COVID-19 is a serious and highly contagious disease that can lead to severe illness or death. Defendants are therefore setting up a potentially lethal chain reaction at FCC Terre Haute.

83. Defendants are well aware of the substantial risk of harm that COVID-19 poses to all individuals and the particular risks that Plaintiffs and members of the Class face. The risks of

COVID-19 are well publicized and widely known, including the heightened risks for incarcerated persons. And Defendants have openly acknowledged the risks of COVID-19, including the significant risks attendant to bringing individuals into and out of the prison in the midst of the pandemic.

84. Defendants are also well aware of the CDC's recommendation that the movement of people into and out of a prison be restricted if there are positive COVID-19 cases in or out of the prison, so as to reduce the spread of the disease.

85. Despite this knowledge, Defendants have failed to take reasonable and known measures to mitigate the dangers of COVID-19 by choosing to move forward with additional executions at FCC Terre Haute in December 2020 and January 2021. Defendants' actions in moving forward with execution plans in the face of the known risks constitute deliberate indifference to the health and safety of the individual Plaintiffs and members of the Class.

86. As a result of Defendants' actions and inactions, the individual Plaintiffs and members of the Class face irreparable harm, both from the violation of their constitutional rights and the substantial risk of contracting COVID-19 and sustaining a serious illness that could lead to death.

87. The individual Plaintiffs and members of the Class are being threatened with unsafe, life-threatening conditions in their prison and are entitled to injunctive relief to prevent the violation of their constitutional rights.

REQUEST FOR RELIEF

Wherefore, Plaintiffs respectfully request that the Court:

A. Declare that conducting executions at FCC Terre Haute as planned by Defendants during the pendency of the COVID-19 pandemic violates the Eighth Amendment right against cruel and unusual punishment with respect to the named Plaintiffs and the Class;

B. Enter a preliminary and a permanent injunction ordering Defendants not to conduct further executions at FCC Terre Haute until such time as the COVID-19 virus no longer

constitutes an ongoing pandemic that jeopardizes the public health and Plaintiffs and members of the Class have received an appropriate vaccine; and

C. Order such other and further relief as this Court deems just, proper, and equitable.

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Respectfully submitted,

/s/ John R. Maley

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*Motions to appear *pro hac vice* forthcoming