

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

TROY WRAGG, MICHAEL SCRONIC,  
LEONARD BOGDAN, and  
ELIEZER SOTO-CONCEPCION,  
individually and on behalf of  
all others similarly situated,

*Petitioners,*

v.

DAVID E. ORTIZ, in his capacity as Warden  
of the Federal Correctional Institution, Fort  
Dix, and MICHAEL CARVAJAL, in his  
capacity as Director of the Bureau of Prisons,

*Respondents.*

Case No. 20-cv-5496-RMB

**NOTICE OF MOTION FOR PRELIMINARY INJUNCTION**

PLEASE TAKE NOTICE that pursuant to Fed. R. Civ. P. 65, and upon Petitioners' Memorandum of Law in Support of Petitioners' Motion for Preliminary Injunction and their Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2241, Petitioners hereby move this Court to issue a Preliminary Injunction ordering temporary enlargement of custody (or bail pending habeas corpus) of Petitioners and Class Members during the pendency of the petition for a writ of habeas corpus.

Given the exigencies and the threat of irreparable harm outlined in the accompanying Memorandum of Law, Petitioners respectfully request that the Court order Respondents to respond to this Motion expeditiously. Counsel for Petitioners have written to Counsel for Respondents via

electronic mail in an attempt to negotiate a jointly proposed briefing schedule for the Motion.

Counsel for Petitioners will file their proposal with the Court on May 7.<sup>1</sup>

Dated: May 6, 2020

Respectfully submitted:

s/ Tess Borden

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<sup>1</sup> Counsel for Petitioners will send courtesy copies, by electronic mail, of this Motion, Memorandum of Law, and accompanying Exhibit, to AUSAs Elizabeth Pascal, John Basiak, John Ruymann, and John Stinson, within one hour of the filing of this Motion.

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**MEMORANDUM OF LAW IN SUPPORT OF  
PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION**

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Troy Wragg, Michael Scronic, Leonard Bogdan, and Eliezer Soto-Conception (“Petitioners”), on behalf of themselves and a class of current and future people in post-conviction custody at Federal Correctional Institution, Fort Dix (“Fort Dix”) who are over the age of 50 or who experience medical conditions that make them uniquely vulnerable to risk of serious illness or death as a result of being infected with COVID-19 (the “Class”), respectfully submit this memorandum of law in support of their motion for a preliminary injunction.<sup>1</sup>

### **PRELIMINARY STATEMENT**

Petitioners are confined at Fort Dix, a low-to-minimum security federal prison<sup>2</sup> in which most of the roughly 3,000 prisoners eat, sleep, and congregate in crowded units. Because of their age and medical conditions, Petitioners are uniquely vulnerable to serious illness or death if they contract COVID-19. But people confined at Fort Dix are unable to take the steps that public health officials warn are necessary to avoid the rapid spread of COVID-19: social distancing and reliable, vigilant personal hygiene. The Warden, Respondent David Ortiz, has conceded as much, admitting to prisoners—just days after Fort Dix acknowledged its first case

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<sup>1</sup> Though Petitioners bring claims on behalf of both the Class and a Subclass of prisoners with qualifying disabilities under the Rehabilitation Act, 29 U.S.C. § 794, at this juncture Petitioners seek a preliminary injunction only as to the Class.

<sup>2</sup> Fort Dix is a low-security federal correctional institution with an adjacent minimum-security Camp. Borden Decl. Exs. 52, 54.

of a prisoner testing positive for COVID-19—that “social distancing is not possible in this environment.” Ex. 1; *see also* Scronic Decl. ¶ 11.<sup>3</sup> For that reason, the number of infections among prisoners is surely much higher than the Bureau of Prisons’ current report of 40. Borden Decl. Ex. 29. As that number continues to climb, Petitioners face imminent and serious risks to their health and safety that Respondents are unwilling or unable to mitigate. Petitioners therefore ask the Court to issue a preliminary injunction ordering temporary enlargement of custody for Fort Dix’s most vulnerable prisoners. Emergency relief is appropriate because Petitioners are likely to succeed on the merits of their habeas petition, they will suffer irreparable injury absent temporary enlargement of custody, and the equities and public interest weigh heavily in their favor.

*First*, Petitioners will likely succeed on the merits. Petitioners bring this action for release from custody that violates the Eighth Amendment to the U.S. Constitution, and seek this relief under § 2241 because it is the fact of their confinement that creates the constitutional violation. 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 Eighth Amendment. 28 U.S.C. § 2241(c)(3);

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<sup>3</sup> Citations to “\_\_\_\_ Decl.” refer either to the declarations attached to the Petition for Writ of Habeas Corpus, ECF No. 1, or to the Declaration of Tess Borden (“Borden Decl.”), dated May 4, 2020, ECF No. 3.

*see also Woodall v. Fed Bureau of Prisons*, 432 F.3d 235, 242 (3d Cir. 2005) (“[C]hallenges to the ‘manner, location, or conditions of a sentence’s execution’ must be brought pursuant to § 2241.” (quoting *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000))). The Eighth Amendment, in turn, guarantees prisoners “humane conditions of confinement,” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), and “[d]eliberate indifference to [the] serious medical needs of prisoners” is therefore unconstitutional, *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The continued confinement of medically vulnerable prisoners at Fort Dix presents the exact “unreasonable risk of serious damage to [a prisoner’s] future health” that the Eighth Amendment prohibits. *Helling v. McKinney*, 509 U.S. 25, 35 (1993). Respondents are aware of the grave dangers posed by COVID-19 but have failed to implement measures to comply with their constitutional obligations to Petitioners. Indeed, the design of Fort Dix, in which Petitioners are confined either in large dormitories or in 200- to 300-person buildings, would make it unsafe for Petitioners even if Respondents were following guidance from public health experts and the Centers for Disease Control and prevention (“CDC”)—which they are not. Because their confinement is and will continue to be unconstitutional, Petitioners are likely to prevail on their habeas claim. *See, e.g., Wilson v. Williams*, 2020 WL 1940882, at \*8–10 (N.D. Ohio Apr. 22, 2020) (ordering temporary enlargement of custody pursuant to

§ 2241 for medically vulnerable federal prisoners), *stay pending appeal denied*, No. 20-3447, ECF No. 23-1 (6th Cir. May 4, 2020).

*Second*, with respect to irreparable injury, the danger of COVID-19 both generally and in prisons specifically is by now well known. COVID-19 is a novel, dangerous, and extremely contagious disease with no known vaccine, cure, or reliable treatment. It spreads easily and rapidly—especially among individuals like Petitioners, who are confined in large groups and who rely on communal sleeping, dining, and bathroom facilities—and can be spread by people who are infected but asymptomatic. Courts across the country have quickly concluded that exposure to COVID-19 constitutes an irreparable injury, particularly for the most vulnerable. *See, e.g., Thakker v. Doll*, No. 20-cv-480, 2020 WL 1671563, at \*3 (M.D. Pa. Mar. 31, 2020) (“[C]ourts have specifically held that COVID-19 constitutes an irreparable harm.” (collecting cases)); *Cristian A.R. v. Decker*, No. 20-cv-3600-MCA, 2020 WL 2092616, at \*12 (D.N.J. Apr. 12, 2020) (“Petitioners have demonstrated irreparable harm should they remain in confinement.”).

*Finally*, both the balance of equities and the public interest weigh heavily in Petitioners’ favor. For Petitioners, the risk of inaction cannot be overstated: because of their unique vulnerability to COVID-19 and the conditions at Fort Dix, each day they are confined increases their risk of infection, serious illness and possibly death. By contrast, Respondents’ legitimate interests can be accommodated by temporary

enlargement of Petitioners' custody—a mechanism that a number of courts have found to be an appropriate response to COVID-19. *See, e.g., Kevin M.A. v. Decker*, No. 20-cv-4593-KM, 2020 WL 2092791, at \*10 (D.N.J. May 1, 2020) (finding government's "interest can be appropriately balanced by releasing Petitioner to strict conditions including home confinement, as well as electronic and telephonic monitoring"); *Wilson*, 2020 WL 1940882, at \*4 ("When a court exercises its power to 'enlarge' the custody of a defendant pending the outcome of a habeas action, the BOP maintains custody over the defendant, but the place of custody is altered by the court."). The public is also well-served by steps that will reduce the crowding at Fort Dix, allowing greater opportunities for social distancing for the prisoners whose custody is not enlarged and decreasing the rate of a COVID-19 outbreak that also impacts correctional staff and spills out into the broader community. *See, e.g., Hope v. Doll*, No. 20-cv-562-JEJ, ECF no. 11 at 11 (M.D. Pa. Apr. 7, 2020).

Because Petitioners meet the requirements for a preliminary injunction, they respectfully ask that the Court take quick action to order temporary enlargement of their custody, so they can begin to practice social distancing and protect themselves against this unprecedented pandemic. Federal courts have long had "the authority to grant a temporary release from confinement" during the pendency of a petition for habeas corpus. *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955). This power comes from "the inherent powers of the judiciary," *id.*, and "was exercised in habeas

corpus cases pending decision on the merits.” *Id.* This type of bail is available where, as here, “the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective.” *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992) (collecting cases); *see also Pellulo v. U.S.*, 487 F. App’x 1, 3 (3d Cir. 2012).

“Extraordinary circumstances” include, as with the medically vulnerable petitioners at Fort Dix, “situations involving poor health or the impending completion of the prisoner’s sentence.” *Landano*, 970 F.2d at 1239. While poor health is not a prerequisite, it makes the analysis that much clearer. *See Lucas v. Hadden*, 790 F.2d 365, 367 (3d Cir. 1986) (“[W]e do not mean to suggest that a habeas petitioner’s poor health is the only ‘extraordinary circumstance’ that may justify a grant of bail prior to disposition of the habeas petition[.]”). Similarly, Courts should consider whether a petitioner with a high probability of success on the merits would see any remedy lose effectiveness if forced to remain in confinement in the meantime, *Landano*, 970 F.2d at 1239, and whether “irreparable injury, injury to other parties interested in the proceeding, and the public interest” counsel in favor of granting temporary release, *Armstrong v. Grondolsky*, 290 F. App’x 451, 453 (3d Cir. 2008). The outbreak of COVID-19 at Fort Dix is unquestionably the sort of “extraordinary



circumstance” justifying Petitioners’ temporary enlargement of custody—whether “to a hospital, halfway house, a person’s home, or other setting.” Resnik Decl. ¶ 29.

### **FACTUAL BACKGROUND**

#### **A. COVID-19 Is A Dangerous And Extremely Contagious Disease, And Is Particularly Harmful To People Over 50 And Those With Underlying Health Conditions**

American life has been transformed by a global pandemic of the novel coronavirus that causes COVID-19. As of May 4, 2020, the day the Petition in this action was filed, there were over 3 million reported COVID-19 cases and 238,730 confirmed deaths worldwide. Borden Decl. Ex. 1. These figures are increasing every day, and as of today, there are over 247,652 deaths worldwide.<sup>4</sup> In the United States, as of May 4, at least 1,122,486 people were known to have COVID-19, and 65,735 people had died. Borden Decl. Ex. 2. As of today, there are 1,171,510 confirmed cases and 68,279 confirmed deaths in the United States.<sup>5</sup> The State of New Jersey has been particularly hard hit, ranking second in the United States both in the number of people reported to have tested positive with the coronavirus and in the number of people who have died. Borden Decl. Ex. 3.

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<sup>4</sup> World Health Org., *Coronavirus disease (COVID-19) Pandemic*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last accessed May 6, 2020).

<sup>5</sup> Ctrs. for Disease Control & Prevention, *Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last accessed May 6, 2020).

COVID-19 spreads easily from person to person through respiratory droplets, close personal contact, and contact with contaminated surfaces and objects. Goldenson Decl. ¶ 13; Fefferman Decl. ¶ 4. Infected people can spread the virus to others even if they are asymptomatic, such that simply avoiding people who are coughing or visibly ill is an insufficient measure to avoid infection. Goldenson Decl. ¶ 28. There is no known vaccine against COVID-19 and no known medication to prevent or treat infection. Goldenson Decl. ¶ 16. The only steps individuals can take to limit the risk of infection are vigilant personal hygiene and “social distancing,” or remaining physically separated from other people. *Id.*

According to the CDC, people who suffer from certain underlying medical conditions face elevated risk of serious illness or death if they contract COVID-19. Borden Decl. Ex. 5. Such conditions include lung disease, moderate to severe asthma, heart conditions, hypertension, high blood pressure, kidney disease, liver disease, diabetes, compromised immune systems (such as from cancer treatment, HIV, autoimmune disease, or use of immunosuppressing medication), and severe obesity. Goldenson Decl. at ¶ 40 n.20 (listing medical conditions causing vulnerability to COVID-19). One analysis found mortality rates of 13.2% for patients with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer. Borden Decl. Ex. 6.

COVID-19 is also especially dangerous for older people. In many patients, COVID-19 causes fever, cough, and shortness of breath. Goldenson Decl. ¶ 15. But for people over the age of fifty, shortness of breath can be fatal. Fefferman Decl. ¶ 7. Many people in higher-risk categories who develop serious illness will require advanced medical support, including specialized equipment that is in limited supply and a dedicated team of care providers, including 1:1 or 1:2 nurse-to-patient ratios, respiratory therapists, and intensive-care physicians. Fefferman Decl. ¶ 9.

Even for patients who do not die of COVID-19, the disease can severely damage lung tissue, requiring an extensive period of rehabilitation, and in some cases causing permanent loss of respiratory capacity. Borden Decl. Ex. 8. COVID-19 may also target the heart muscle, causing a medical condition called myocarditis, or inflammation of the heart muscle. Borden Decl. Ex. 7. Myocarditis can affect the heart muscle and the body's electrical system, reducing the heart's ability to pump. *Id.* This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and the ability to work. *Id.*

Emerging evidence also suggests that COVID-19 can trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury. Borden Decl. Ex. 8. These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as

little as two days after exposure, and their condition can seriously deteriorate in as little as five days. Borden Decl. Ex. 9.

**B. Prisons Like Fort Dix Are Uniquely Ill-Suited To Adequately Manage The Risk Of Contracting COVID-19**

People in so-called “congregate environments,” such as correctional facilities, face increased danger of contracting COVID-19. Fefferman Decl. ¶ 19. In such environments—where people live, eat, and sleep in close proximity—social distancing is difficult or impossible, as evidenced by the rapid spread of the virus in cruise ships and nursing homes. Borden Decl. Exs. 15–17. The danger of infection is even more acute in prisons, jails, and other detention centers, which—by design—make it impossible to engage in the necessary social distancing and hygiene required to mitigate the risk of COVID-19 transmission. Fefferman Decl. ¶ 19. Such facilities are particularly conducive to “community spread,” where COVID-19 spreads rapidly within a community even though the source of the infection is unknown. *Id.*

Correctional settings also increase the risk of rapid spread of an infectious disease because of 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 consistently maintaining distance from others. Borden Decl. Ex. 18. The CDC thus urges prison administrators to prevent overcrowding of correctional and detention facilities during a community outbreak. Borden Decl. Ex. 19. CDC guidance emphasizes that

social distancing is “a cornerstone of reducing transmission of respiratory disease such as COVID-19,” and calls not only for social distancing, but also for isolating detainees and staff who have (or are suspected of having) COVID-19 from those who do not have (or presumably do not have) the virus. Borden Decl. Ex. 19.

Correctional facilities, because of their design and limited resources, will inevitably struggle to implement these preventive strategies without a reduction in prison populations. Such facilities frequently lack sufficient medical supplies for the population, and, in times of crisis, medical staff may cease coming to the facilities. Goldenson Decl. ¶ 36; Fefferman Decl. ¶ 22. Hot water, soap, and paper towels are often in limited supply. Goldenson Decl. ¶ 21. Incarcerated people themselves, rather than professional cleaners, are often responsible for cleaning the facilities and often are not given appropriate supplies. Goldenson Decl. ¶ 24. The bottom line is that there are more people, all susceptible to infection, congregated together in a confined location—and thus fighting the spread of an infection is nearly impossible.

Accordingly, correctional public health experts recommend the release from custody of people most vulnerable to COVID-19. Fefferman Decl. ¶¶ 17–26. Exercising authority to enlarge custody or release people outright protects those with the greatest vulnerability to COVID-19 from transmission of the virus, and it also allows for greater risk mitigation for all people held or working in a prison, jail, or detention center. Fefferman Decl. ¶ 25. Release of the most vulnerable people from

custody also reduces the burden on the region's health-care infrastructure by lowering the chances that an overwhelming number of people will become seriously ill at the same time. Fefferman Decl. ¶ 24. As leading pandemic-preparedness expert, Professor Nina Fefferman, observed: "Epidemiologically, the only way to meaningfully reduce the risks posed to the entire population—prisoners, staff, and public—is to drastically reduce the prison population." Fefferman Decl. ¶ 25.

### **C. The Design of Fort Dix Makes Social Distancing Impossible**

As correctional-health expert Dr. Joe Goldenson explains, Fort Dix's communal set-up makes social distancing "impossible." Goldenson Decl. ¶ 36. Respondent Ortiz conceded as much when, on April 11, 2020, he issued a "Notice to Inmates" instructing them to wear surgical masks "[s]ince social distancing is not possible in this environment[.]" Scronic Decl. ¶ 11. Fort Dix is a low-security facility with an adjacent minimum-security camp, and the BOP has designated the prisoners held there with some of the lowest security statuses of people in BOP custody. Borden Decl. Exs. 52, 54. The main facility currently holds more than 2,700 people, and the Camp has, until recently, held approximately 230 people. All of the prisoners at Fort Dix face heightened risk from COVID-19 because of Fort Dix's design.

Except for disciplinary and medical isolation, Fort Dix has no separate one-person housing cells. Borden Decl. Ex. 55. Instead, people confined at Fort Dix are housed close together in group quarters. Scronic Decl. ¶ 4. Those at the Camp are

divided into two communal dorms, referred to as A-wing (or A-unit) and B-wing (or B-unit). *Id.* Each wing has typically housed approximately 150 people in a grid of bunk beds two to three feet apart. *Id.* People in the bunks are so close that they can reach out and touch the people in the bunks on both sides. *Id.* At least in some areas, the bunks appear to be arranged three-deep: people sleep not only with bunks to their left and right, but also at their head and feet. *Id.* Social distancing, as a matter of dorm design, is simply impossible at the Camp.

The main facility is divided into East and West Compounds, with approximately five buildings on each side that each can house more than 300 people. Wragg Decl. ¶ 9. The buildings are three stories high and consist mostly of 12-person rooms, with a limited number of two-person rooms. *Id.* The 12-person rooms can be as small as 430 square feet. *Id.* ¶ 10. Within that space are squeezed six two-person bunk beds, 12 lockers, and a card table. *Id.* Prisoners maintain free movement within the building, sharing common TV rooms, computers, telephones, and bathrooms. Bogdan Decl. ¶ 7. Even the few prisoners in two-person rooms encounter hundreds of other people in their building each day when they use the communal areas—including when they pick up meals simultaneously. Scronic Decl. ¶ 9. Prisoners at the Camp are exposed to others constantly, since they live in group dorms.

The bathrooms at Fort Dix are also communal. *Id.* ¶ 6. In both the main facility and the Camp, each person shares a limited number of sinks, showers, and

toilets with dozens of others within just feet of them. Bogdan Decl. ¶ 7; Scronic Decl. ¶ 6. In the Camp, for example, a single bathroom with shared sinks and toilets is used by some 150 people. Scronic Decl. ¶ 6. Social distancing in this environment simply cannot be achieved.

**D. Fort Dix Has Proven Itself Unable To Take Proper Precautions**

Fort Dix's actions to protect prisoners from COVID-19 have been slow and inadequate. Although the BOP purported to impose a nationwide quarantine on April 1, Fort Dix failed to impose effective quarantine measures. *See* Wragg Decl. ¶ 17; Scronic Decl. ¶ 8. The prison did not distribute masks to people in its custody until early April, and even then not all prisoners received masks. Scronic Decl. ¶ 10. Correctional officers, who live throughout the greater Philadelphia and central New Jersey area, continue to move in and out of Fort Dix each day without sufficient medical screening or protective equipment. Wragg Decl. ¶ 15. To this day, correctional officers move freely between the Camp and the main facility, potentially spreading the virus through various areas of the prison. *Id.* Fort Dix also continues to cross-assign prisoners between wings of the Camp and within single buildings in the main facility. Scronic Decl. ¶ 16. Fort Dix's failure to contain the movement of prisoners and staff throughout otherwise separate areas of the facility ensured that, once infection arrived, it would not be confined to particular areas, but would spread rapidly to other areas—as in fact happened. Scronic Decl. ¶¶ 16–22.



Fort Dix's inconsistent approach to face masks is another example of Respondents' inability to manage COVID-19. On March 30, the BOP reported that a staff member at Fort Dix had tested positive for COVID-19. Yet that same day, Respondent Ortiz sent a notice prohibiting prisoners from "enter[ing] the kitchen on either the East or West compounds for meals with their faces concealed with makeshift masks due to COVID-19 concerns." Scronic Decl. ¶ 8. For a full week afterwards, staff told prisoners they could not wear masks not issued by the prison and ordered prisoners to remove any masks they made for themselves. Scronic Decl. ¶¶ 7, 10. By April 7, the BOP reported the first positive COVID-19 test result for a prisoner at Fort Dix. Scronic Decl. ¶ 10. On April 9, it reported a second positive. *Id.* That day, a memorandum from the facility medical staff announced: "a second [C]amp offender has been determined to be positive for COVID-19 and a third Camper has been isolated for evaluation of symptoms and is awaiting COVID-19 test results. . . . [I]t is strongly recommended that you d[on] your surgical mask *upon issue.*" *Id.* (emphasis added). By April 11, the BOP was reporting four positive tests among prisoners. *Id.* Respondent Ortiz issued a notice that read: "In order to maintain the health of staff and inmates, the following is expected from all inmates: wear your surgical masks! Since social distancing is not possible in this environment, masks will help keep you and others from spreading viruses." *Id.* ¶ 11. By April 16, the BOP was reporting six positive cases among prisoners, and

Respondent Ortiz directed that it was mandatory to use “face coverings provided by staff.” *Id.* ¶ 13. By then, it was too late: hundreds of prisoners and staff had surely already been exposed.

On April 8, Fort Dix converted the B-wing of the Camp into a makeshift quarantine for 63 people who believed they were being considered for potential release on home confinement pursuant to the CARES Act. Scronic Decl. ¶ 16. Those 63 people were drawn from both A and B-wings. The remaining 160 or so people in the Camp were packed into A-wing, with no efforts to test them nor any attempt to limit mingling of people who had previously not been exposed. *Id.* From that point forward, prisoners in A-wing and B-wing went at different times to get their food from the Camp cafeteria and use the common rooms, but they saw no indication that the facilities were being thoroughly cleaned between uses. Scronic Decl. ¶ 20.

During mid to late April, prisoners observed others in their shared bunk spaces exhibiting symptoms of COVID-19 in both A-wing and B-wing, including coughing, feverish sweating, vomiting, and loss of consciousness. Scronic Decl. ¶¶ 16–22. Many of these likely infected prisoners were removed from the Camp—after they no doubt exposed the others around them to COVID-19—and brought to another location (Building 5851 in the West compound). Bogdan Decl. ¶ 11.

Fort Dix has not meaningfully changed conditions in the main facility buildings. The majority of people in the main buildings are still housed in 12-person

rooms where social distancing is impossible. Scronic Decl. ¶ 8. Moreover, Fort Dix made no effort to stagger use of the common areas. For example, common bathrooms are still used, ensuring that people from one 12-person room regularly encounter others from the same building. *Id.* Additionally, Respondents took no action to limit access to, or impose shift-based use of, common television rooms, computers, and phones. *Id.* As a result, large groups of prisoners congregate regularly in those rooms to this day in conditions conducive to spreading COVID-19.

Fort Dix has stopped communal meals in the dining hall, instead requiring prisoners to pick up “grab and go” meals from the dining hall. Scronic Decl. ¶ 9. But even then, prisoners must go to and from the dining hall together to pick up their food along with all 200 to 300 people in their building. *Id.* The prisoners crowd into the building’s entryway and adjoining hallway as they wait to enter and leave, allowed only five minutes to enter the building and five minutes to exit. *Id.* Three times per day, hundreds of people congregate in this way. *Id.* And after picking up their meals, prisoners still eat in each other’s rooms or in the TV rooms. *Id.*

Fort Dix has also failed to provide prisoners with adequate cleaning supplies. For weeks, Fort Dix maintained its practice of requiring people in custody to buy soap through commissary to wash their hands. Wragg Decl. ¶ 11; Scronic Decl. ¶ 6. Respondents exacerbated this problem by limiting commissary for people in the main facility and terminating it entirely for people at the Camp, requiring those at

the Camp to rely on the scant supplies provided by Fort Dix. Scronic Decl. ¶ 6. Fort Dix then took weeks to install soap dispensers in some bathrooms. Wragg Decl. ¶ 11. And even where there were soap dispensers, many remained empty as of the end of March; in at least one building, notices were posted urging prisoners to donate their own soap to fill the dispensers. *Id.* Even today, many of the dispensers are empty because any soap provided by the prison runs out immediately. *Id.* People confined in the main facility are now provided two small bottles of soap per month—barely more than what a person can carry on an airplane. Anyone unable to afford additional soap at the commissary must rely on this meager ration to shower, wash their hands throughout the day, and do their best to disinfect surfaces in their shared living spaces. *Id.* Beyond the belated and limited provision of masks, prisoners are given no other personal protective equipment or cleaning supplies. They have not been provided gloves, detergents, or other sanitizing agents, and some people rely on toilet paper and water to wipe down surfaces they touch. Wragg Decl. ¶ 17.

Rather than acknowledge that they cannot manage the COVID-19 outbreak at Fort Dix, Respondents have refused to exercise their authority to release people at high risk from infection, which would protect both the most vulnerable individuals and reduce exposure risk for anyone left behind. Scronic Decl. ¶ 28; Bogdan Decl. ¶ 12. Petitioners have been told their requests for home confinement are denied on

bases not stated in the Attorney General memos, which directed the BOP to “immediately maximize appropriate transfers to home confinement,” Borden Decl. Ex. 46, including those who have not served 50 percent of their sentence. *See* Scronic Decl. ¶ 28; Bogdan Decl. ¶ 12.

Today—more than seven weeks after the WHO declared a global pandemic, a month after Fort Dix’s first confirmed positive case, and 26 days after the Attorney General directed the BOP to immediately begin releasing people to home confinement from prisons with outbreaks—the number of prisoners that Fort Dix has used its power to release into home confinement remains zero. Pet. ¶ 99. Meanwhile, and inevitably, the number of infected people at Fort Dix continues to climb, most recently to an official tally of 43 prisoners and staff testing positive. Borden Decl. Ex. 31. But, given COVID-19’s highly contagious nature and the BOP’s limited administration of tests, the true number of infections is surely exponentially higher. Borden Decl. Ex. 56. As Dr. Goldenson warns: “The infection rate will increase substantially before it starts to diminish without major interventions. The number at risk for death is substantial.” Goldenson Decl. ¶ 36.

**E. Petitioners Are At Grave Risk Of Harm Because Of Their Unique Vulnerability To Serious Illness Or Death From Contracting COVID-19**

COVID-19 poses imminent and serious risk to the Petitioners because of their age, their health, or both. Petitioner Troy Wragg is classified as a BOP “chronic

care inmate.” Wragg Decl. ¶ 2. He has epilepsy and suffers from grand-mal seizures that can be so violent and debilitating that he has broken bones during them. *Id.* ¶ 3. He has had more than a dozen seizures while at Fort Dix, including most recently on April 26. *Id.* ¶ 4. In some patients, COVID-19 makes individuals more prone to such seizures. *Id.* ¶ 5. In addition, Petitioner Wragg has hypertension and a heart condition, for which he takes three daily medications. *Id.* ¶ 6. He had a heart attack in 2012. *Id.* ¶ 6. Finally, he is vulnerable to COVID-19 as a person with Myasthenia Gravis, a chronic autoimmune neuromuscular disease. *Id.* ¶ 7. His medical conditions make him especially vulnerable to COVID-19.

Petitioner Michael Scronic has a history of skin cancer, childhood asthma and steroidal medication use, and abnormal heart symptoms. Scronic Decl. ¶ 2. He had a tumor removed from his chest in 1991 and was instructed to return to a pathologist periodically, and in 2018, had Mohs Micrographic surgery to remove another tumor on his chest. *Id.* Pathologists diagnosed him with skin cancer. *Id.* Throughout childhood, he had recurring serious asthma attacks, had to have the house sterilized, slept with a vaporizing tent over his bed, and for years used steroidal inhalers. Finally, his medical records from his last physical before his incarceration show a heart murmur, heart palpitations, elevated blood pressure, and shortness of breath. *Id.* All these conditions make Petitioner Scronic especially vulnerable to COVID-19.

Petitioner Leonard Bogdan, at 68 years old, is vulnerable to COVID-19 from his age alone. Bogdan Decl. ¶ 2. Additionally, he has serious medical conditions that classify him as a BOP “chronic care inmate.” *Id.* Since his incarceration at Fort Dix, he developed a nodule on his thyroid, diagnosed as potentially cancerous, which causes a rapid heart rate for which he takes twice daily medications. *Id.* He has heart disease—“bifascicular bundle branch block”—which impacts the valves of his heart, as well as hypertension, high cholesterol, and “actinic keratosis” skin cancer. *Id.* Finally, he has extensive physical disability due to a severe case of scoliosis, which causes contortion of his ribcage and impacts his organs. *Id.* As a result, he has chronic shortness of breath and displacement of the kidneys. *Id.* For a combination of these conditions, at least four times per year he receives treatment at various regional hospitals and specialists. *Id.* ¶ 3. The combination of his age and extensive medical issues makes him especially vulnerable to COVID-19.

Finally, Petitioner Eliezer Soto-Concepcion takes daily medications for a heart condition and high blood pressure. Soto-Concepcion Decl. ¶ 2. He also has a nervous system condition that causes his hands to shake and has been told he has clogged arteries. *Id.* Over the last 13 years, he has been hospitalized three times following heart attacks. *Id.* As a result of these conditions, he is especially vulnerable to COVID-19.

## ARGUMENT

### **I. THE COURT SHOULD TEMPORARILY ENLARGE PETITIONERS' CUSTODY**

To obtain a preliminary injunction, a plaintiff “must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “The standard for granting a temporary restraining order is the same as the standard for granting a preliminary injunction.” *Kongtcheu v. Secaucus Healthcare Ctr., LLC*, 2014 WL 2436048, at \*2 (D.N.J. May 30, 2014). All four factors weigh strongly in favor of Petitioners.

Courts across the country have recognized the unprecedented nature of COVID-19 and issued preliminary injunctions or temporary restraining orders for the immediate release of medically vulnerable people in prisons or other forms of detention, including in this District. *See, e.g., Cristian A.R.*, 2020 WL 2092616, at \*14–15 (ordering immediate release of medically vulnerable ICE detainees from Hudson County Correctional Facility (“Hudson”) and Bergen County Jail (“Bergen”) in New Jersey); *Durel B. v. Decker*, 20-cv-3430-KM, 2020 WL 1922140, at \*1 (D.N.J. Apr. 21, 2020) (McNulty, J.) (ordering release for medically vulnerable detainee at Hudson); *Leandro R.P. v. Decker*, 20-cv-3853-KM, 2020 WL 1889791, at \*9 (D.N.J. Apr. 17, 2020) (McNulty, J.) (same); *Anthony W. v. Anderson*, 20-cv-



3704-BRM, 2020 WL 2121118, at \*11 (D.N.J. Apr. 17, 2020) (Martinotti, J.) (ordering release for medically vulnerable detainees at Essex County Correctional Facility (“Essex”) and Elizabeth County Detention Center in New Jersey); *Rafael L.O. v. Tsoukaris*, No. 20-cv-341 (JMV), 2020 WL 1808843, at \*8–9 (D.N.J. Apr. 9, 2020) (Vazquez, J.) (ordering release for medically vulnerable detainees at Essex); *Thakker*, 2020 WL 1671563, at \*9–10 (ordering release at Pennsylvania facilities); *Basank v. Decker*, 2020 WL 1481503, at \*1 (S.D.N.Y. Mar. 26, 2020) (ordering release at Hudson and Bergen); *Avendaño Hernandez v. Decker*, 20-cv-1589 (JPO), 2020 WL 1547459, at \*4 (S.D.N.Y. Mar. 31, 2020) (ordering release at Hudson); Order at 1–2, *Grant v. Decker*, 20-cv-2946-AKH, ECF No. 18 (S.D.N.Y. Apr. 17, 2020) (ordering release at Hudson); *Barbecho v. Decker*, 20-cv-2821-AJN, 2020 WL 1876328, at \*1 (S.D.N.Y. Apr. 15, 2020) (ordering release at Bergen); *Coronel v. Decker*, 2020 WL 1487274, at \*1 (S.D.N.Y. Mar. 27, 2020) (ordering release including at Bergen); *Castillo v. Barr*, 2020 WL 1502864, at \*6 (C.D. Cal. Mar. 27, 2020) (ordering release at California facility); Amended Opinion and Order at 44–45, *Malam v. Adducci*, 20-10829 (JEL), 2020 WL 1672662, at \*14 (E.D. Mich. Apr. 6, 2020) (ordering release at Michigan facility); *Amaya-Cruz v. Adducci*, 20-cv-789, 2020 WL 1903123, at \*2–3 (N.D. Ohio Apr. 18, 2020) (ordering release at Ohio facility).

Here, because Petitioners meet the criteria for emergency relief, they respectfully ask that this Court join this growing consensus and issue a preliminary injunction ordering immediate, temporary enlargement of custody.

**A. Petitioners’ Eighth Amendment Claim Is Likely To Succeed On The Merits**

“It is cruel and unusual punishment to hold convicted criminals in unsafe conditions.” *Helling*, 509 U.S. at 33 (internal quotation marks omitted). The Eighth Amendment of the United States Constitution guarantees all incarcerated persons “humane conditions of confinement.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citations omitted). “Deliberate indifference to [the] serious medical needs of prisoners” runs afoul of this essential guarantee. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). The Constitution is thus violated when the evidence “show[s] (i) a serious medical need, and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need.” *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 582 (3d Cir. 2003) (citing *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999)).

The ongoing outbreak of COVID-19 at Fort Dix presents exactly the sort of dangerous situation “for which the Eighth Amendment require[s] a remedy.” *See Helling*, 509 U.S. at 33. The continued incarceration of medically vulnerable people at Fort Dix, despite ongoing exposure to a ravaging infection that causes permanent injuries and death, is the exact “unreasonable risk of serious damage to [a prisoner’s]

future health” that the Eight Amendment prohibits. *Id.* at 35. In *Helling*, the Supreme Court explained that an unconstitutional level of risk existed when prisoners were confined with other prisoners who “had infectious maladies such as hepatitis and venereal disease.” *Id.* at 33. As the Court explained, it did not matter that some prisoners were not yet infected. “We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate’s current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.” *Id.* The Court made clear its rulings would apply with equal (if not greater) force in cases where a communicable disease like COVID-19 had breached prison walls like at Fort Dix. “[P]rison officials,” the Court observed, are not permitted to ignore “the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.” *Id.*

**1. This Court Has Jurisdiction Under § 2241 Because Petitioners Challenge The Fact Of Their Confinement**

Petitioners seek redress under § 2241 because it is the fact of their confinement that creates the constitutional violation. 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 Eighth Amendment. 28 U.S.C. § 2241(c)(3). “[H]abeas has been found to be the proper vehicle for challenging ‘the fact or length of confinement[.]’” *Camacho Lopez v. Lowe*, No. 3:20-cv-563, 2020

WL 1689874, at \*4 (M.D. Pa. Apr. 7, 2020), *as amended* (Apr. 9, 2020) (quoting *Tedford v. Hepting*, 990 F.2d 745, 748 (3d Cir. 1993)). Because Petitioners ultimately seek release as a remedy for custody that violates the Eighth Amendment, they challenge the *fact* of their confinement, rather than *the conditions* of their confinement. The Complaint therefore sounds in habeas corpus. As the Sixth Circuit confirmed just days ago, in denying a motion to stay an order under § 2241 granting enlargement to medically vulnerable federal prisoners, “[w]here a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner’s claim as challenging the fact of the confinement.” Order at 3, *Wilson v. Williams*, No. 20-3447, ECF No. 23-1 (6th Cir. May 4, 2020).<sup>6</sup>

Petitioners’ claim here is thus 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 under 42 U.S.C. Section 1983 is that habeas actions “involve

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<sup>6</sup> In *Livas v. Myers*, No. 20-cv-0422, 2020 WL 1939583 (W.D. La. Apr. 22, 2020), a District Court found that, in the Fifth Circuit, no cases “allow[ed] conditions of confinement claims to be brought under § 2241,” though the court left open that such a claim was “theoretically possible.” *Id.* at \*8. Nevertheless, the District Court denied habeas relief in part because “Petitioners do not and cannot contend that their imprisonment or custody itself is unlawful.” *Id.* at \*7. *Livas* is not controlling and is distinguishable, as Petitioners here very much contend that their continued imprisonment at Fort Dix is unconstitutional.

someone's liberty, rather than mere civil liability.” *Davis v. Fechtel*, 150 F.3d 486, 490 (5th Cir. 1998) (citations omitted).

Accordingly, although here Petitioners challenge the fact of their confinement, the Court would have jurisdiction even if it construed the challenge as one to conditions of custody. Petitions under § 2241 have long provided a remedy for prisoners to challenge conditions of custody 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 properly filed under § 2241 to include challenges to prison conditions). COVID-19 affects the fact and execution of Petitioners’ sentences in profound ways. And because the conditions amount to unconstitutional custody, Petitioners ultimately seek release rather than merely transfer within the BOP. Petitioners are thus unlike the petitioner in *Cardona*, who was denied relief because he did not challenge the fact of his confinement or seek relief that would affect the duration of his confinement. See *Cardona*, 681 F.3d at 537. The analogous case is *Woodall*, which held that a petition seeking transfer to a halfway house properly arose in habeas because it affected the location of the sentence and fact of confinement. *Woodall*, 432 F.3d at 238. However the Court construes Petitioners’ claim for release, then, that claim is cognizable under § 2241.

## **2. Petitioners Have Shown That COVID-19 Is A Serious Medical Crisis**

The risk of contracting COVID-19 constitutes an “unsafe, life-threatening condition” for Petitioners and the Class. *Helling*, 509 U.S. at 33. The Petition and accompanying declarations detail the incredible danger that the virus poses. COVID-19 is a “serious disease” with “up to 35 times the fatality associated with influenza infection.” Goldenson Decl. ¶ 8. Furthermore, COVID-19 is extremely contagious. Indeed, the virus’ infection rate is estimated at “2.4-3.8, meaning that each newly infected person is estimated to infect on average 3 additional persons.” *Id.* at ¶ 14. Only the Spanish Flu of 1918 has been estimated to have a higher infection rate. *Id.* Part of the reason for COVID-19’s high infection rate is the fact that it is easily spread by individuals who do not exhibit any symptoms. *Id.* at ¶ 14. Thus, even prisoners who appear healthy may transmit the disease to large groups of people. *Id.* For medically vulnerable people, such exposure carries enormous risk. *Id.* at ¶ 40. People face a fatality rate rising above 5% when they have “pre-existing medical conditions including cardiovascular disease, respiratory disease, diabetes, and immune compromise.” *Id.* ¶ 9. Indeed, courts have noted that medically vulnerable people “may have up to a 20% chance of death if they contract COVID-19.” *Cristian A.R.*, 2020 WL 2092616, at \*10; *see also Jose D. M. v. Barr*, No. CV

20-4031 (KM), 2020 WL 1969893, at \*5 (D.N.J. Apr. 24, 2020) (same). Put differently, the odds of survival for vulnerable prisoners “are worse than a game of ‘Russian roulette.’” *Cristian A.R.*, 2020 WL 2092616, at \*10.

For these reasons, courts within the Third Circuit and across the country have recognized that COVID-19 presents a substantial risk to health and wellbeing of prisoners. *See, e.g., Thakker*, 2020 WL 1671563 at \*8 n.15 (“COVID-19 has been shown to spread in the matter of a single day and would well prove deadly for Petitioners. Such a risk is objectively ‘sufficiently serious.’”); *Basank v. Decker*, 2020 WL 1481503, at \*5 (same); *Hernandez*, 2020 WL 1547459, at \*2 (same); *Coronel*, 2020 WL 1487274, at \*4 (same). As explained by one District Court:

Petitioners [medically vulnerable prisoners] obviously satisfy [the substantial harm] component. At this moment a deadly virus is spreading amongst [the prison’s] population and staff. For infected inmates, the virus can lead to pneumonia. In the worse pneumonia cases, COVID-19 victims suffer diminishing oxygen absorption, with resulting organ failure leading to death. Victims choke to death. While not every inmate who contracts the virus will die, [medically vulnerable prisoners] are at a much greater risk of doing so. They have a very serious medical need to be protected from the virus.

*Wilson*, 2020 WL 1940882, at \*8. All of these considerations apply equally to the risk of COVID-19 at Fort Dix. Petitioners thus have a substantial likelihood of success in ultimately proving that COVID-19 poses a constitutes a “unsafe, life-threatening condition.” *Helling*, 509 U.S. at 33.

**3. Petitioners Have Shown Respondents' Deliberate Indifference To The Serious Risk Created By The COVID-19 Pandemic**

Petitioners also have a substantial likelihood of success in showing that Respondents have been deliberately indifferent to the serious medical needs of medically vulnerable prisoners at Fort Dix. Deliberate indifference exists when the government has “knowledge of a serious risk of harm” and yet “fail[s] to take reasonably available measures to reduce or eliminate that risk.” *Berg v. Cty. of Allegheny*, 219 F.3d 261, 275 (3d Cir. 2000) (citations omitted).

Here, Respondents have been on notice for months of the extraordinarily dangerous risk created by the COVID-19 pandemic. On March 9, in response to the then-emerging coronavirus outbreak, the Governor of New Jersey signed an Executive Order declaring a State of Emergency and a Public Health Emergency in New Jersey. Borden Decl. Ex. 10. On March 22, in response to the “dangers posed by the Coronavirus,” the New Jersey Supreme Court ordered the presumptive release of all people currently serving a county jail sentence, an order that resulted in the release of hundreds of people. *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Consent Order, No. 084230 (N.J. Mar. 22, 2020), available at <https://www.njcourts.gov/notices/2020/n200323a.pdf>. And, beginning in late March, Attorney General Bill Barr began to issue guidance to the Bureau of Prisons regarding the rapidly accelerating COVID-19 crisis. As the Attorney General noted,



“we are experiencing significant levels of infection at several of our facilities.” Borden Decl. Ex. 46. These facts, along with others addressed in the Petition, show Respondents were well aware of the serious risk posed by COVID-19, having been alerted to it by the CDC, the Attorney General, BOP guidance, widespread news reporting, and the ongoing outbreak at BOP facilities including Fort Dix itself.

The Petition also makes clear that the Respondents are unable to take steps necessary to protect medically vulnerable prisoners from the risk of COVID-19 infection. In his April 3 memorandum, Attorney General Barr identified the most reasonable measure to eliminate the risk of COVID-19 infections: release of medically vulnerable prisoners to home confinement. *Id.* As the Attorney General explained, “[w]e have to move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of these institutions.” *Id.* Recognizing that “it is clear that time is of the essence,” the Attorney General also directed Respondents to “implement this Memorandum as quickly as possible.” *Id.* In making this determination, the Attorney General directed Respondents to assess a prisoner’s fitness for release based on a selection of criteria identified in a prior memorandum, which included the “age and vulnerability of the inmate to COVID-19” as well as the “security level of the facility currently holding the inmate, with priority given to inmates residing in low and minimum security facilities.” *Id.*

Even in the face of this guidance from the Attorney General, Respondents have not taken steps sufficient to protect Petitioners from the grave risks that are present every moment they remain at Fort Dix. Respondent Ortiz has recklessly failed to follow or implement CDC guidance or directives from Attorney General Barr or the BOP. Despite the Attorney General's clear directive that home confinement should occur "as quickly as possible," and the fact that Fort Dix houses numerous medically vulnerable prisoners designated as low or minimum custody status, Fort Dix has not released any prisoners to home confinement. Pet. ¶ 99. There is thus a substantial likelihood that Petitioners will be successful in showing Respondents were deliberately indifferent to the risk posed by COVID-19 to vulnerable prisoners.

**B. Petitioners Will Suffer Irreparable Harm Absent A Preliminary Injunction**

There can be little doubt that continued imprisonment at Fort Dix will "more likely than not" result in irreparable harm to Petitioners. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017); *see also Thakker*, 2020 WL 1671563, at \*3 (collecting cases recognizing the irreparable harm posed by COVID-19).

COVID-19 is a highly contagious virus that is estimated to be 35 times deadlier than the seasonal flu. Goldenson Decl. ¶ 8. The virus is typically accompanied by fever, cough, and shortness of breath. Goldenson Decl. ¶ 15. But for medically

vulnerable people, the virus is often much worse. Fefferman Decl. ¶¶ 17–26. Infection can cause permanent loss of respiratory capacity, damage to the heart and other organs, and death. Borden Decl. Ex. 8. As such, exposure to the virus is precisely the type of “harm which cannot be redressed by a legal or an equitable remedy following a trial.” *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989); *see also Johnson v. Wetzel*, 209 F. Supp. 3d 766, 781 (M.D. Pa. 2016) (noting that the deterioration of a prisoner’s health constitutes “harm of such an irreversible character that prospective judgment would be inadequate to make the moving party whole”).

The risk of irreparable harm that the virus poses to medically vulnerable people is exacerbated at Fort Dix. Goldenson Decl. ¶ 36; Fefferman Decl. ¶ 22. Indeed, the conditions inherent in detention facilities have been described as “‘ideal incubation conditions’ for COVID-19.” *Thakker*, 2020 WL 1671563, at \*5. And because of its structure, Fort Dix is even more dangerous than many other federal prisons. Borden Decl. Exs. 54, 55. Lodging is in dorms or in 200 to 300-person buildings, which requires prisoners at the Camp and in most of the main facility rooms to sleep in bunks several feet away from one another. Scronic Decl. ¶ 4; Bogdan Decl. ¶ 7. Bathrooms, TV rooms, and other spaces beyond the dorms are communal. Bogdan Decl. ¶ 7. Compounding the structural problems at Fort Dix is its general lack of necessary supplies. Respondents have not only failed to make personal protective

equipment available; they have failed to provide for prisoners' basic hygiene. Wragg Decl. ¶¶ 11, 77; Scronic Decl. ¶ 6. It is impossible for even the most careful prisoners at Fort Dix to protect themselves.

Given the close quarters, the high rate of COVID-19 community spread, Petitioners' unique vulnerability on account of their age and/or medical conditions, and Respondents' inability to change key factors of custody at Fort Dix, "[i]t is more than mere speculation that the virus will continue to spread and pose a danger to inmates" if immediate action is not taken. *Wilson*, 2020 WL 1940882, at \*9. As such, Petitioners' claim that they are detained in poor health while facing "the inexorable progression of a global pandemic creeping across our nation" is one that is "rooted in imminent, irreparable harm." *Thakker*, 2020 WL 1671563, at \*3. Indeed, "[t]here can be no injury more irreparable." *Id.* a \*4.

### **C. Equity And The Public Interest Favor Petitioners**

Finally, both the balance of equities and the public interest weigh heavily in Petitioners' favor.

*First*, Petitioners' requested relief of temporary enlargement of custody is the only feasible way to protect Petitioners from the "COVID-19 deathtrap" that Fort Dix has become. Goldenson Decl. ¶ 36. As discussed above, Respondents cannot meaningfully mitigate the imminent and irreparable harm that COVID-19 presents to Petitioners; Fort Dix's physical design and current population size make social

distancing and self-quarantining—the only effective means of preventing COVID-19 transmission—impossible. Scronic Decl. ¶ 4; Bogdan Decl. ¶ 7. Critically, this requested relief would not harm any of Respondents’ legitimate interests. BOP classifies Petitioners as low- and minimum-custody level, indicating that they pose little threat to public safety. Wragg Decl. ¶ 1; Scronic Decl. ¶ 1; Bogdan Decl. ¶ 1; Soto-Conception Decl. ¶ 1; *see also Thakker*, 2020 WL 2025384 at \*9–10 (recognizing the “weighty public interest in preventing future crime,” but finding the petitioner presented “very little risk to the public good in his continued release”). Moreover, any such risk can be adequately protected through the Court’s imposition of specific, reasonable conditions of release. *Cristian A.R.*, 2020 WL 2092616 at \*13 (concluding that the government’s “legitimate interest in ensuring that Petitioners do not flee and in protecting the public” would be adequately addressed “in fashioning appropriate conditions of release for each prisoner”); *Leandro R.P.*, 2020 WL 1899791 at \*8–9 (finding same government interest “can be appropriately addressed by releasing Petitioner to home confinement and subject to electronic monitoring”); *Kevin M.A.*, 2020 WL 2092791, at \* 10 (finding government’s and immigration detainee’s “interest can be appropriately balanced by releasing Petitioner to strict conditions including home confinement, as well as electronic and telephonic monitoring”). The balance of equities thus strongly tips in Petitioners’ favor.

*Second*, Petitioners' requested relief furthers the public interest by vindicating Petitioners' constitutional rights. Petitioners have demonstrated a substantial likelihood that Respondents' inability to contain COVID-19 within Fort Dix constitutes deliberate indifference in violation of the Eighth Amendment, and "it is *always* in the public interest to ensure that any prisoner litigation affecting fundamental liberty interests comport with the requirements of due process." *Boone v. Brown*, No. 05-cv-750-AET, 2005 WL 2006997, at \*15 (D.N.J. Aug. 22, 2005) (emphasis added).

*Third*, Petitioners' requested relief additionally furthers the public interest by providing public health benefits to Fort Dix staff and to the community at large. Removing Petitioners from Fort Dix would "provid[e] more space for effective social distancing," thereby impeding the transmission of COVID-19 to remaining prisoners and staff members. Order at 11, *Hope v. Doll*, No. 20-cv-562-JEJ, ECF No. 11 at 11 (M.D. Pa. Apr. 7, 2020) (Jones, J.). This, in turn, would render local hospitals "less overwhelmed by potential [Fort Dix prisoner] COVID-19 cases" and reduce the "risk that [Fort Dix] staff will carry the virus into their homes and communities." *Id.* at 13; *see also* Goldenson Decl. ¶ 36 (absent changes, "the infection in FCI Fort Dix would not stay limited to the facility, but would worsen infection rates in the broader community."). These benefits are clearly in the public's best interest. *Thakker*, 2020 WL 1671563 at \*9 ("Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest, and the release of [] fragile

Petitioners from confinement is one step further in a positive direction.”). Enlargement of custody here is thus in the public interest.

## **II. THE COURT SHOULD ORDER RELIEF ON A CLASS-WIDE BASIS**

Petitioners may pursue habeas corpus relief on behalf of the Class because they assert common facts in support of a request for declaratory and injunctive relief. Although “the usual habeas corpus case relates only to the individual petitioner and to his unique problem,” *Mead v. Parker*, 464 F.2d 1108, 1112-1113 (9th Cir. 1972), “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,” *id.* at 1113. 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 where requiring individual petitions would result in needlessly duplicative litigation. *See Streicher v. Prescott*, 103 F.R.D. 559, 561–62 (D.D.C. 1984).

The Court need not wait to make a class certification determination before ordering emergency relief on a class-wide basis. *Gooch v. Life Investors Ins. Co. of*

*Am.*, 672 F.3d 402, 433 (6th Cir. 2012) (“[T]here is nothing improper about a preliminary injunction preceding a ruling on class certification”); *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1005 n.4 (9th Cir. 2020) (“The government does not challenge the district court’s provisional certification of the class for purposes of the preliminary injunction. We have approved provisional class certification for purposes of preliminary injunction proceedings.”); *Lee v. Orr*, 13-cv-8718-SJC, 2013 WL 5490577 at \*2 (N.D. Ill. Dec. 10, 2013) (“District courts have the power to order injunctive relief covering potential class members prior to class certification. . . . The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons.” (internal quotation marks omitted)). Time is of the essence, and the Class here meets the Rule 23(a) factors for treatment as a conditional class.

*First*, the Class is numerous. Fed. R. Civ. P. 23(a)(1). Although only Respondents know the true number of medically vulnerable prisoners at Fort Dix, they very likely number in the many hundreds.

*Second*, with regard to commonality, Fed. R. Civ. P. 23(a)(2), Petitioners’ claims “depend upon a common contention” that is “capable of classwide resolution,” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011): whether Respondents’ failure adequately to protect prisoners at Fort Dix violates the Eighth Amendment. *Cf. Farmer*, 511 U.S. at 843–44 (prison officials cannot “escape



liability for deliberate indifference” simply because they cannot “guess beforehand precisely who” might be harmed); *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (similar).

*Third*, Petitioners’ claims are typical of the Class, Fed. R. Civ. P. 23(a)(3), because the claims “arise[] from the same . . . practice or course of conduct that gives rise to the claims of other class members” and are “based on the same legal theory.” *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007).

Finally, Petitioners satisfy adequacy. Fed. R. Civ. P. 23(a)(4). They are “part of the class and possess the same interest and suffer the same injury as the class members.” *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997) (internal quotation marks omitted). All medically vulnerable prisoners at Fort Dix face a common harm, caused by Respondents’ deliberate indifference, and all have a common interest in seeing that harm remedied. Nor should the Court have “concerns as to the competency of class counsel in prosecuting this action on behalf of the Class.” *In re Rent-Way Sec. Litig.*, 218 F.R.D. 101, 115 (W.D. Penn. 2003). Because the Rule 23 factors are satisfied, the Court may grant emergency relief to the Class.

### **CONCLUSION**

Absent this Court’s immediate intervention, Petitioners and the Class will remain at imminent risk of serious illness or death from COVID-19 as a result of their unconstitutional confinement at Fort Dix. For the reasons explained herein, the

Court should order immediate, temporary enlargement of custody for Petitioners and the Class.

Dated: May 6, 2020

Respectfully submitted,

By:  /s/ Tess Borden

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*\*Petition for admission  
pro hac vice pending*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

TROY WRAGG, MICHAEL SCRONIC,  
LEONARD BOGDAN, and ELIEZER SOTO-  
CONCEPCION, individually and on behalf of  
all others similarly situated,

*Petitioners,*

v.

DAVID E. ORTIZ, in his capacity as Warden  
of the Federal Correctional Institution, Fort Dix,  
and MICHAEL CARVAJAL, in his capacity as  
Director of the Bureau of Prisons,

*Respondents.*

Civil Action No. 1:20-cv-05496-RMB

**DECLARATION OF TESS BORDEN**

I, Tess Borden, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct to the best of my knowledge:

1. I am an attorney at the American Civil Liberties Union of New Jersey Foundation, and counsel for Petitioners.
2. Attached hereto as Exhibit A is a true and correct copy of a document that I obtained from an attorney who has a client incarcerated at Fort Dix. On information and belief, it is the document described by Petitioner Scronic in Paragraph 11 of his declaration filed on May 4, 2020.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 6, 2020

/s/ Tess Borden  
Tess Borden  
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of New Jersey Foundation  
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# Exhibit A

**NOTICE TO THE INMATE POPULATION**

**DATE:** April 11, 2020  
**FROM:** D. Ortiz, Warden  
**SUBJECT:** **Protecting Yourself and Others**

In order to maintain the health of staff and inmates, the following is expected from ALL inmates:

- Wash hands with soap and water for at least 20 seconds.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Clean and disinfect all surfaces with the approved chemical.
- Cover your cough/sneeze with tissue, immediately throw tissue in the trash and wash your hands.
- **Wear your surgical face masks!** Since Social Distancing is not possible in this environment, masks will help keep you and others from spreading viruses.
- Report symptoms (coughing, sneezing, fever, fatigue, etc.) to Health Services and/or any staff.

We ALL must do our part in protecting ourselves and others from spreading COVID-19!



**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

TROY WRAGG, MICHAEL SCRONIC,  
LEONARD BOGDAN, and  
ELIEZER SOTO-CONCEPCION,  
individually and on behalf of  
all others similarly situated,

*Petitioners,*

v.

DAVID E. ORTIZ, in his capacity as Warden  
of the Federal Correctional Institution, Fort  
Dix, and MICHAEL CARVAJAL, in his  
capacity as Director of the Bureau of Prisons,

*Respondents.*

Case No. 20-cv-5496-RMB

**[PROPOSED] ORDER**

**[PROPOSED] PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. P. 65, and having reviewed Petitioners' Notice of Motion for Preliminary Injunction, the Memorandum of Law in Support of their Motion, and any response thereto, the Court HEREBY ORDERS that:

1. The motion is granted because Petitioners have demonstrated that they will suffer irreparable harm from their continued confinement; that they are substantially likely to prevail on their claim that their continued imprisonment at Fort Dix violates the Eighth Amendment; that the balance of equities and public interest tip in favor of a preliminary injunction; and that immediate, temporary enlargement of custody is an appropriate and necessary remedy;

2. The custody of Petitioners and all Class members shall be temporarily enlarged, with adequate precautionary public health and safety measures, during the pendency of the petition for a writ of habeas corpus;
3. Respondents are ordered within two (2) days of the date of entry of this Order to produce an initial list of people at Fort Dix who are over the age of 50 and/or have underlying health conditions that make them vulnerable to COVID-19, as defined in Petitioners' Petition and Memorandum of Law in Support of the Motion for Preliminary Injunction;
4. Following identification, the Court orders Respondents to evaluate each Class member's eligibility for transfer out of Fort Dix through any means, including but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two (2) weeks. In undertaking this evaluation, Respondents will prioritize the review by the medical threat level. For example, older inmates with heart, pulmonary, diabetes or immunity risks should receive review priority over Class members who are younger;
5. Any Class members transferred out of Fort Dix may not be returned to the facility until the threat of the virus is abated or until a vaccine is available and Fort Dix obtains sufficient vaccine supplies to vaccinate its population, whichever occurs first;
6. Respondents shall comply with the Constitution for any members of the Class who remain at Fort Dix while temporary enlargements are being effectuated and/or during the pendency of the petition; and
7. Temporary enlargements of custody shall remain pending further order of this Court.



IT IS SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
Hon. Renee Marie Bumb, U.S.D.J.