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

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

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

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Last month, the Court "allow[ed] Petitioners to engage in limited discovery . . . to gain more information relevant to the jurisdictional question of whether 'extraordinary circumstances' exist at the FDC." Doc. 20 at 7. That discovery has revealed circumstances far beyond the ordinary, in two general categories. First, the FDC has effectively shut detainees out from accessing the courts and counsel. Respondent argued in his original Brief in Support of Motion to Dismiss, Doc. 12-2, that the only avenues for detainees to seek a judicial order of release to home confinement are the Bail Reform Act for detainees awaiting trial or sentencing, or a compassionate-release petition to the sentencing judge for sentenced detainees. As detailed below, this is a cramped, inaccurate account of the law. Even if it were correct, litigating either of those types of claims requires meaningful access to counsel and the courts. The FDC has denied such access, to an extraordinary degree. The FDC's shutdown of in-person visitation, combined with its denial of access to any meaningful alternative method of confidential communications, deprives detainees of all options for privileged communication with attorneys. Detainees cannot even effectively litigate such claims *pro se*, because the FDC has severely restricted their access to legal research and discovery materials.

Second, Respondent declared under oath, one month ago today, "To date, there are no confirmed positive cases, inmate or staff, of COVID-19." Declaration of Warden Sean Marler ("Marler Decl."), Doc. 12-5 at ¶ 4, a copy of which is attached as Exhibit 4. His assurances were wrong on both counts: a staff member had tested positive seven days earlier, and a detainee with a confirmed positive case had entered the FDC five days earlier. Respondent did not know about either confirmed case at the time because the FDC's screens for detainees, staff, and others entering the building were, and remain, dangerously porous. In addition, the FDC has taken a head-in-the-sand approach to testing, failing to administer even one test for active COVID-19

until May 13. And the FDC has failed to take crucial precautions to prevent the disease from spreading within the facility after it enters, including effective contact-tracing and hygienic practices such as social-distancing and masking. As a result, the FDC remains extraordinarily exposed to joining the sad list of prisons and jails that have experienced widespread, lethal outbreaks of COVID-19.

Both of these situations are extraordinary. Either provides an ample basis for this Court to exercise its § 2241 jurisdiction and to grant Petitioners' requested relief. *See generally Valentine v. Collier*, No. 19A1034, 590 U.S. ___, ___, 2020 U.S. LEXIS 2648, at *8-9 (U.S. May 14, 2020) (Sotomayor, J., concurring) ("It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic . . . .").

I. This Court Has Jurisdiction to Hear Petitioner's Habeas Corpus Claims

Petitioners have properly alleged habeas corpus claims under 28 U.S.C. § 2241. This Circuit, like courts around the country, has long allowed habeas corpus claims challenging the fact, duration, or execution of confinement. That longstanding practice continues today, as courts across the country hear habeas petitions—and order preliminary injunctive relief—about COVID-19 in prisons and detention centers. This Court has already held that habeas jurisdiction exists as to Petitioners Brown and Hall and their fellow pretrial detainees, and has ordered discovery to inform its exercise of that jurisdiction. To whatever extent circumstances at the time of filing did not warrant the Court's exercise of that jurisdiction, they surely do now. And regardless of circumstances, jurisdiction exists unambiguously for the claims as to Petitioner Hannigan and the more than 200 sentenced detainees at the FDC.

A. Habeas jurisdiction encompasses the pretrial Petitioners' claims

Whether this Court should exercise its jurisdiction over pretrial Petitioners' claims turns on the presence of extraordinary and compelling circumstances. *See* Doc. 20. Even if an ongoing

global pandemic—and the self-described "extraordinary actions" the FDC has taken, Doc. 12-2 at 4—does not itself amount to extraordinary circumstances, the combination of a pandemic, unprecedented restrictions on access to counsel and court, the presence of COVID-19 in the FDC, and inadequate containment measures together do. The clear and immediate threat faced by Petitioners and their fellow class members presents exactly the sort of compelling circumstance that warrants exercising jurisdiction. Respondents' technical arguments to the contrary lack support in law, and ignore the facts on the ground.

As this Court has previously written, Respondents' suggestion that "courts lack jurisdiction over pretrial § 2241 habeas petitions [] is likely mistaken." Doc. 20 at 3, n.2. This Court is correct. In fact, courts in this country, as in England, have exercised jurisdiction over habeas petitions from pretrial detainees for centuries.[1] In fact, habeas jurisdiction in America expanded outward from pretrial detainees to encompass petitions from sentenced prisoners, not vice versa. *Peyton v. Rowe*, 391 U.S. 54, 59 & n.13 (1967). The habeas statute "contemplated cases that might arise when the power thus conferred should be exercised *during the process of proceedings* instituted against the petitioner in a state court . . . ," among other circumstances. *Ex parte Royall*, 117 U.S. 241, 248 (1886) (emphasis added). Simply put, "jurisdiction to issue the writ exists in the federal courts before a judgment is rendered in a state criminal proceeding." *Moore v. DeYoung*, 515 F.2d 437, 442 (3d Cir. 1975).[2]

[1] In England, the writ upon which the American writ is modeled "had been used largely to secure the admission to bail and discharge of prisoners," which includes pretrial detainees. *Peyton v. Rowe*, 391 U.S. 54, 59 & n.12 (1967) (citing the Habeas Corpus Act of 1679, which "was concerned exclusively with providing an efficacious remedy for pretrial imprisonment").

[2] Habeas jurisdiction even encompasses petitions brought by pretrial detainees who are in custody on the date of filing, but are released on "bail pending trial" during the consideration of the petition. *Carroll v. Court of Common Pleas of Lancaster Cty.*, No. 18-cv-4959, 2019 WL

Jurisdiction over habeas petitions by state pretrial detainees should conclusively answer any question as to jurisdiction from habeas petitions by federal pretrial detainees because of the writ's evolution. Habeas jurisdiction *expanded to include* people in state custody. *See Fay v. Noia*, 372 U.S. 391, 415 (1963) (discussing "the conclusion that Congress was enlarging the habeas remedy as previously understood . . . in extending its coverage to state prisoners"). Moreover, exercise of habeas jurisdiction over the petitions of *federal* pretrial detainees implicates few of the general factors counseling against doing so over the petitions of *state* pretrial detainees. Primarily, unlike habeas petitions brought by state pretrial detainees, petitions by federal detainees implicate no comity or federalism issues. *Fay*, 372 U.S. at 417 (addressing "difficult problems concerning the relationship of the state and federal courts" as a result of that extension); *see also Moore*, 515 F.2d at 442 (discussing exhaustion for habeas petitioner in state custody as having "developed through decisional law, applying principles of federalism").[3]

In fact, exercising habeas jurisdiction over petitions from federal pretrial detainees may not even require the same level of extraordinary circumstances that justify exercising habeas jurisdiction over unexhausted petitions from state pretrial detainees. Courts considering whether to exercise habeas jurisdiction over petitions by state pretrial detainees have discussed the presence of extraordinary circumstances largely to justify overriding federalism and comity concerns. *See Moore*, 515 F.2d at 442-43 (discussing "extraordinary circumstances" in the context of it being "unseemly in our dual system of government" for federal courts to interfere with state courts in this regard); *see also Frisbee v. Collins*, 342 U.S. 519, 520-21 (1952) (noting

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6190501, at *3 & n.5 (E.D. Pa. Aug. 2, 2019) (citing *United States ex rel Wojtycha v. Hopkins*, 517 F.2d 420, 423 & n.6 (3d Cir. 1975)).

[3] *See also Cook v. Hart*, 146 U.S. 183, 194-95 (1892) (noting that "[w]hile the Federal courts have the power and may discharge the accused in advance of his trial . . . comity demands that the state courts, under whose process he is held . . . should be appealed to in the first instance").

that federal district courts should not exercise jurisdiction if there "is available State corrective process," but even then "may deviate from [the general rule] and grant relief in special circumstances."). For that reason, "special reasons may exist why this should be the rule in respect of proceedings in state courts, which are not applicable to cases in the courts of the United States . . ." *Riggins v. United States*, 199 U.S. 547, 549-50 (1905).

Nothing in *Reese* counsels otherwise. *Reese* notes that § 2241 "confers on district courts the authority to entertain applications for a writ of habeas corpus," and simply cautions that "even in cases where the habeas court has the authority to grant relief, it must consider whether this be a case in which that power ought to be exercised." *Reese v. Warden Phila. FDC*, 904 F.3d 244, 246 (3d Cir. 2018). *Reese* held that district courts should decline to exercise habeas jurisdiction over federal pretrial detainees "insofar as [the petitioner] sought to challenge the charges against him or the conduct of law-enforcement officers during arrest or interrogation, [which] he was required to do [] through pretrial motions in his criminal case." *Id.* at 247 (citing *Gov't of V.I. v. Bolones*, 427 F.2d 1135 (3d Cir. 1970) (per curiam)). Petitions challenging the fact of confinement rather than paradigmatic subjects of pretrial motions do not present the same concerns.[4]

[4] *See Johnson v. Hoy*, 227 U.S. 245, 247 (1913) (referring to a pretrial petitioner trying to attack "the constitutionality of the statute under which he was indicted," and noting an open question as to whether a pretrial habeas claim concerning excessive bail amounted to exceptional circumstances); *see also Thomas v. State of N.J.*, No. 16-cv-1436, 2016 WL 715619, *2 (D.N.J. Nov. 30, 2016) (declining to exercise the court's "pretrial habeas jurisdiction" because "no exceptional circumstances are present *and* [the] petitioner seeks to litigate the merits of a constitutional defense to a criminal charge") (emphasis added); *see also Garza-Villanueva v. McAleenan*, No. 19-cv-65, 2019 WL 2424080, *3 (S.D. Tex. Apr. 26, 2019) (declining habeas jurisdiction over a pretrial petitioner because "[p]erhaps most critically, [] his request for pretrial release was based on his ultimate defense to the crime charged. . .").

Even accepting "extraordinary and compelling" as the standard here absent federalism concerns, pretrial Petitioners still meet that standard. The list in *Moore*, cited by *Reese*, offers delay in access to courts for alternative process as one example of when extraordinary circumstances warrant exercising § 2241 jurisdiction as to pretrial detainees, and as discussed at length in section II, *infra*, obstructions to counsel and court present here delay detainees' access. Moreover, to the extent that "delay" in regular circumstances requires more time for other processes to work, the urgency presented by the COVID-19 pandemic itself amounts to an extraordinary circumstance. And even the *Moore* list itself—illustrative, not exhaustive—applies primarily to state habeas petitioners. The absence of clear delineation from the Third Circuit or other binding authority does not foreclose a global pandemic—in conjunction with the other circumstances revealed through jurisdictional discovery and discussed below—amounting to extraordinary circumstances.

The set of possible factors constituting "extraordinary and compelling circumstances," Doc. 20 at 4, include several present in this case. "Neither the Supreme Court nor [the Third Circuit] has delineated the circumstances that might qualify as exceptional in this context." *Reese*, 904 F.3d at 246 n.2. Examples of circumstances that might qualify include "delay, harassment, bad faith, or other intentional activity" by the Government. *Id*. (citing *Moore*, 515 F.2d at 447 n.12). But contrary to the Government's repeated assertions, that list is illustrative, not exhaustive. *See Lambert v. Blackwell*, 134 F.3d 506, 517 (3d Cir. 1997) (stating that while none of the enumerated *Moore* examples supported a "finding of exceptional circumstances sufficient to excuse nonexhaustion, our inquiry does not end there"). Those circumstances may also include the futility of further collateral litigation, for example. *Id.* (citing *Christy v. Horn*, 115 F.3d 201, 207 (3d Cir. 1997)).

Indeed, urgency itself is a key feature that characterizes exceptional circumstances. In *Christy*, the Third Circuit "recognize[d] that in rare cases exceptional circumstances of peculiar urgency may exist which permit a federal court to entertain an unexhausted [state habeas] claim." *Christy*, 115 F.3d at 206-07; *see also Ex parte Hawk*, 321 U.S. 114, 118 (1944) (noting that "peculiar urgency" had been "often quoted from the opinion of this Court in *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17 (1925)"). The question of whether to exercise habeas jurisdiction requires courts "to decide whether the administration of justice would be better serviced by insisting on exhaustion or by reaching the merits of the petition forthwith." *Christy*, 115 F.3d at 207 (quoting *Granberry v. Greer*, 481 U.S. 129, 131 (1987)). *Christy* rejected the idea that unusual circumstances existed in that case because "the appropriate inquiry must be whether [the risk of harm] is 'imminent.'" *Id.* at 207.[5] In addition, intentional activity – or deliberate indifference which is the case at the FDC – can be another feature of extraordinary circumstances.

As discussed at some length in section II, *infra*, extraordinary circumstances—including urgency and deliberate indifference —are present here. Petitioners have alleged, and jurisdictional discovery has confirmed, the likelihood of serious, ongoing, and imminent harms to both their physical safety and their access to counsel as well as to the courts.

[5] Urgency matters in part because the cases discussing extraordinary or exceptional circumstances primarily involve excusing state detainees' failure to exhaust state alternatives before filing in federal court. Federal pretrial detainees have no state process implicating federalism concerns, though a similar principle cautions restraint. But federal habeas petitioners also have exceptions to exhaustion where there is a likelihood of irreparable injury absent immediate judicial relief, where administrative exhaustion would be futile, or the remedy process would not serve the requirement's underlying policy goals. *Brown v. Warden Canaan USP*, 763 F. App'x 296, 297 (3d Cir. 2019); *see also Cerverizzo v. Yost*, 380 F. App'x 115, 116 (3d Cir. 2010).

B. Habeas jurisdiction encompasses the sentenced Petitioners' claims

Beyond pretrial detainees, this Court has clear jurisdiction over habeas claims by sentenced prisoners at the FDC. As Respondent must acknowledge, *Reese* applies solely to habeas claims brought by federal pretrial detainees. This Court has noted that the presence of exceptional circumstances presents a "key jurisdictional question under *Reese*" "for the pretrial detainees in Petitioners' proposed class." Doc. 20 at 6. For sentenced prisoners at the FDC—more than 200 in all, and "by and large . . . no longer represented by counsel," Doc. 25 at 3 n.2—Petitioners need not show exceptional circumstances at all.

For Petitioner Hannigan and the other sentenced prisoners at the FDC, no jurisdictional questions exist. Challenges to the "fact or duration" of a petitioner's sentence fall within this Court's habeas jurisdiction. *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 241 (3d Cir. 2005). Petitions seeking more than "a routine prison transfer," *id.*, but rather, "a quantum change in the level of custody," *Ganim v. Fed. Bureau of Prisons*, 235 F. App'x 882, 884 (3d Cir. 2007), properly arise in habeas corpus. *Id.*, *see also Briley v. Warden Fort Dix FCI*, 703 F. App'x 69, 71 (3d Cir. 2017) (affirming that district courts may consider habeas petitions seeking "more than a simple transfer"). While the petitioner in *Ganim* who merely sought transfer from one federal prison to another had not properly alleged a habeas claim under § 2241, the petitioner in *Woodall*, who sought transfer to a halfway house, had. The petitioners here, seeking "immediate release . . . to home confinement," Doc. 1 at 39, have as well.

Although Respondent has repeatedly cited *Cardona v. Bledsoe*, 681 F.3d 533 (3d Cir. 2012) to suggest that this Court cannot exercise jurisdiction over even the claims of the sentenced detainees at the FDC, Respondent is wrong. *Cardona*, which rejected jurisdiction over a § 2241 claim concerning a transfer from high security to the BOP's Special Management Unit, focused on the lack of inconsistency between the transfer and the sentencing order. *Id.* at 536.

But the Third Circuit has since clarified that habeas jurisdiction encompasses both claims by sentenced prisoners attacking the execution of sentence as inconsistent with sentencing orders, and also claims by sentenced prisoners seeking a change in custody that is "more than a simple transfer." *Mabry v. Warden Allenwood FCI Low*, 747 F. App'x 918, 919 (3d Cir. 2019) (citing *Woodall*, 432 F.3d at 241). This claim falls into the second category.

C. Courts around the country are hearing these claims in habeas jurisdiction—and ordering relief—right now

In many prison habeas petitions involving COVID-19, courts across the country have not only exercised habeas jurisdiction, but have ordered different forms of relief, including release. Many of those cases have involved courts finding "extraordinary," "exceptional," "compelling," or similar circumstances, under the standard for different claims, types of relief, or litigation postures. Although the mere threat of COVID-19 in society may not itself present exceptional circumstances, the combination of COVID-19 plus other factors has presented and does present exceptional circumstances.

First, several courts have exercised jurisdiction to hear similar class habeas petitions from people in BOP custody, seeking release. Courts have ruled that the extraordinary circumstances at other BOP facilities warrant taking steps toward responsible prisoner release sought by petitions raised in habeas jurisdiction. *See, e.g.*, *Martinez-Brooks et al. v. Easter*, No. 3:20-cv-569, 2020 WL 2405350 at *19, *30 (D. Conn. May 12, 2020); *Wilson v. Williams*, No. 20-cv-794, 2020 WL 1940882, at *6 (N.D. Ohio Apr. 22, 2020), *stay denied*, *Wilson*, No. 20-3447, ECF No. 23-1 at 3 (6th Cir. May 4, 2020). Both the *Martinez-Brooks* and *Wilson* Courts ordered BOP warden respondents to identify medically vulnerable people in their custody and to implement a process to assess people for alternative custody (including with conditions) within a reasonable time. *See Martinez-Brooks*, 2020 WL 2405350, at *32-34; *see also Wilson*, 2020 WL

1940882, at *10-11 (requiring BOP respondents to evaluate "each subclass member's eligibility for transfer out of Elkton through any means, including but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough" with conditions). Courts have also granted class-wide relief to non-federal pretrial detainees on the basis of the "nearly unprecedented challenge" presented by the pandemic joined with heightened risk and inadequate protection measures. *See e.g.*, *Carranza v. Reams*, ___ F. Supp. 3d ___, No. 20-cv-00977, 2020 WL 2320174, at *14 (D. Colo. May 11, 2020).[6] Some class-wide relief has explicitly focused on inadequate confidential access to lawyers and courts. *See Banks v. Booth*, No. 20-cv-849, 2020 WL 1914896 (D.D.C. Apr. 19, 2020) (ordering sanitation and social-distancing procedures as well as unmonitored legal calls).[7]

Second, courts within this Circuit have found extraordinary circumstances connected to COVID-19 in a variety of individual contexts. For example, courts—including this one—have granted compassionate release to prisoners based upon "extraordinary and compelling reasons" that include COVID-19 in conjunction with underlying medical conditions, a proximal release date, and rehabilitation. *United States v. Rodriguez*, ___ F. Supp. 3d. ___, 2020 WL 1627331, *2 (E.D. Pa. Apr. 1, 2020) (Brody, J.); *see also United States v. Pabron*, No. 17-cr-165, 2020 WL

[6] *See also Savino v. Souza*, No. 20-10617, 2020 WL 1703844, at *8–9 (Apr. 8, 2020) (explaining decision to consider bail for all immigration detainees held at two facilities in Massachusetts, given the "extraordinary circumstances" of "this nightmarish pandemic"); *Gayle v. Meade*, No. 20-21553, 2020 WL 2086482 (S.D. Fla. Apr. 30, 2020), *order clarified*, No. 20-21553, 2020 WL 2203576 (S.D. Fla. May 2, 2020) (ordering ICE, *inter alia*, to evaluate each named detainee for release, to brief the court on a plan to accelerate its review of "Alternatives to Detention," and provide the Court with frequent updates on housing and release of inmates); *Mays v. Dart*, No. 20-2134, 2020 WL 1987007 (N.D. Ill. Apr. 27, 2020) (ordering testing of inmates and establishing hygiene, sanitation, and social distancing requirements).

[7] *See also Zepeda Rivas v. Jennings*, No. 20-cv-2731, 2020 WL 2059848 (N.D. Cal. Apr. 29, 2020) (ordering ICE to identify all detainees at given facilities, including any health vulnerabilities and criminal case information, ensure adequate access to counsel, and to facilitate implementation of a bail application system).

2112265, *1 (E.D. Pa. May 4, 2020) (Brody, J.). The meaning of "extraordinary and compelling" in the catchall section of the compassionate release statute, like the meaning of "extraordinary" in *Reese* and *Moore*, had not previously been defined with any clarity. *See Rodriguez*, 2020 WL 1627331 at *1. While "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone" is not enough, *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020), the presence of COVID-19 already in a facility and other factors may be. Individual habeas petitions based on COVID-19 considered by district courts in the Third Circuit involve "no set formula for determining when habeas corpus relief is appropriate based on the risks from COVID-19," but consider the threat of COVID-19 in conjunction with a "non-exhaustive list of factors" that include a petitioner's medical vulnerability, exposure to COVID-19 already in the facility, the nature of the space and practices affecting the risk of exposure, and efforts made by the prison to prevent or mitigate the harm, among others. *Saillant v. Hoover*, No. 20-cv-609, 2020 WL 1891854, at *4 (M.D. Pa. Apr. 16, 2020) (acknowledging jurisdiction but declining to exercise it, and collecting cases).

Whether those courts ultimately granted writs or not, they agreed upon jurisdiction because of the nature of the circumstances at hand. "[A] claim based on the COVID-19 pandemic is exactly the sort of 'extreme case' contemplated" that justifies considering it on the merits. *Id.* at *3 (citing *Verma v. Doll*, No. 20-cv-14, 2020 WL 1814149, at *4 (M.D. Pa. Apr. 9, 2020) and *Camacho Lopez v. Lowe*, No. 20-cv-563, 2020 WL 1689874, at *5-6 (M.D. Pa. Apr. 7, 2020)). District courts have similarly exercised habeas jurisdiction even over petitions purportedly brought under the CARES Act. *See, e.g., United States v. Serfass*, 2020 WL 1874126, at *2-3 (M.D. Pa. Apr. 15, 2020) (finding the availability of habeas jurisdiction for a prisoner seeking release despite the availability of alternatives for relief, but declining to find

extraordinary circumstances because "she does not state that she has any recognized medical condition putting her at higher risk if she contracts COVID-19"); *see also United States v. Ashby*, 2020 WL 2494679, at *6 (M.D. Pa. May 14, 2020) (same).

Third, courts within this Circuit have exercised § 2241 jurisdiction to hear COVID-19 related claims in other detention contexts because of the circumstances at hand. Courts in this Circuit have, for example, ordered immediate release of medically vulnerable ICE detainees from immigration detention facilities. *See, e.g.*, *Cristian A.R. v. Decker*, No. 20-cv-3600, ECF No. 26 at 29 (ordering immediate release of medically vulnerable ICE detainees from Hudson and Bergen County Jail in New Jersey); *Durel B. v. Decker*, 20-cv-3430, ECF No. 34 at 1 (D.N.J. Apr. 21, 2020) (same, for medically vulnerable detainee at Hudson); *Leandro R.P. v. Decker*, 20-cv-3853, ECF No. 29 at 1 (D.N.J. Apr. 17, 2020) (same); *Jason Anthony W. v. Anderson*, 20-cv-3704, ECF No. 22 at 1-7 (D.N.J. Apr. 17, 2020) (same, for medically vulnerable detainees at Essex County Correctional Facility and Elizabeth County Detention Center in New Jersey); *Rafael L.O. v. Tsoukaris*, 2020 WL 1808843, at *9 (D.N.J. Apr. 9, 2020) (same, for medically vulnerable detainees at Essex).

Courts have also found extraordinary circumstances based upon the combination of COVID-19 and other factors in additional contexts. Some courts have granted bail pending ongoing proceedings under the circumstances. *See, e.g.*, *United States v. Chavol*, No. 20-50075 (9th Cir. Apr. 2, 2020) (stipulation in a FRAP(9) appeal to release on conditions); *United States v. Hector*, No. 2:18-cr-3-2, ECF 748 (W.D. Va. Mar. 27, 2020). Others, including the Third Circuit, have relied upon the extraordinary circumstances of the pandemic to delay self-surrender. *United States v. Roeder*, No. 20-1682, ___ F. App'x ___, 2020 WL 1545872 (3d Cir. Apr. 1, 2020) (reversing district court's denial of defendant's motion to delay execution of his

sentence because of the COVID-19 pandemic); *United States v. Garlock*, No. 18-CR-418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) (observing that "[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided"); *United States v. Matthaei*, No. 19-cv-243, 2020 WL 1443227, at *1 (D. Idaho Mar. 16, 2020) (extending self-surrender date by 90 days in light of pandemic). Others still have deferred ruling on existing motions for compassionate release to urge temporary furloughs "for the duration of the COVID-19 pandemic," "[i]n light of the unprecedented threat that COVID-19 poses" in combination with the individual's underlying medical conditions. *United States v. Stahl*, No. 18-cr-694, 2020 WL 1819986, at *1-2 (S.D. N.Y. Apr. 10, 2020).

Simply put, "nothing could be more extraordinary and compelling than this pandemic." *Rodriguez*, 2020 WL 1627331, at *1. But to the extent that the pandemic itself is not enough, jurisdictional discovery has revealed a host of extraordinary circumstances—including the presence of COVID-19 in the facility, unprecedented burdens on access to confidential communication with counsel, failures to prevent the incursion of COVID-19 or assess its spread within the facility, and others—that concern courts across the country and warrant this Court's exercise of jurisdiction.

II. The Circumstances in the FDC Are Extraordinary

Circumstances at the FDC are extraordinary for the approximate one thousand detainees in two key respects. First, the FDC has dramatically restricted detainees' access to counsel and the courts. Among other things, these restrictions have extraordinarily burdened detainees' ability to pursue individual relief related to the pandemic. Second, the FDC's failure to take adequate preventative and corrective measures has allowed the coronavirus to enter the facility and spread among the people inside. And its subsequent failures to test, perform meaningful or effective contact investigations, or even timely learn of positive tests conducted elsewhere

prevent anyone from knowing the full scope of the spread inside. These manifold failures place detainees at exceptional risk, which this Court can and should address by exercising its § 2241 jurisdiction on a class-wide basis.

A. FDC restrictions have placed enormous burdens on access to counsel, courts, and legal research, greatly inhibiting detainees' ability to file individual petitions at a time when they are most needed

Extraordinary and exceptional circumstances warrant exercise of § 2241 habeas jurisdiction in this matter because practically no attorney communications—confidential or otherwise—currently occur at the FDC. Similarly, because of the lockdown detainees do not have access to important discovery materials and almost all independent detainee legal research has ceased. As a result, detainees, including medically vulnerable detainees who are at great, elevated risk from COVID-19, have essentially no guidance or resources available to challenge their custody or their conditions of confinement.

Respondent does not, and cannot, dispute that these restrictions will continue for the foreseeable future at the FDC. His response is to rely on the comparatively small percentage of detainees who have filed individual motions. But the restrictions themselves are extraordinary and unprecedented, and Respondent would not have imposed them except as part of "extraordinary actions" to deal with an extraordinary situation. Doc. 12-2 at 4.[8] And Respondent cannot assure the Court that all the inmates who want to file have had the resources to do so. In short, through no fault of their own, detainees' access to counsel and other legal resources is most restricted at a time when they need it most. This unprecedented situation reflects the extraordinary and compelling circumstances necessary to provide this Court with § 2241 jurisdiction.

[8] *See also* Doc. 12-2 at 5 (referring to "the ability to take extraordinary measures and isolate from the outside world" purporting to "provide a firmer barrier against this horrible disease" for a facility that did not realize it had active COVID-19 inside of it at the time of that filing).

1. Confidential attorney-client communications are largely unavailable at the FDC.

Open and confidential access to counsel is one of the most significant legal rights in American law, and right now it practically does not exist at the FDC. The assistance of counsel "is one of the safeguards of the Sixth Amendment necessary to insure fundamental human rights of life and liberty. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)). Further, the attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1989). The privilege "protects from disclosure confidential communications made between attorneys and clients for the purpose of obtaining or providing legal assistance to the client." *In re Grand Jury Subpoena*, 223 F.3d 213, 219 (3d Cir. 2000). Such confidential disclosures are protected in order "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389.

Indeed, numerous Courts have held that the "the essence of the Sixth Amendment right is, indeed, privacy of communication with counsel." *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) (citing *Glasser v. United States*, 315 U.S. 60, 62 (1942). Accordingly, "[p]risoners have a right to confidential communication with their attorney." *Telepo v. Martin*, No. 3:08-cv-2132, 2009 WL 2476498, at *7 (M.D. Pa. Aug. 12, 2009), *aff'd*, 359 F. App'x 278 (3d Cir. 2009).

The restrictions imposed have drastically limited attorney-client communications. Before the FDC imposed its coronavirus-related restrictions, attorneys were able to visit their clients

(without scheduling or needing the Warden's prior approval) from 6:15 a.m. until 8:00 p.m. on weekdays and from 7:15 a.m. until 2:00 p.m. on weekends and federal holidays. (Deposition of Alisha Gallagher ("Gallagher Dep."), excerpts of which are attached as Exhibit 1, at 36-37). During in-person visits, attorneys could confidentially review discovery materials with their clients, including, commonly, massive electronic discovery subject to protective orders. They could share legal research, and could discuss and agree upon strategy and defenses. They could work on different motions and filings, including bail applications and modifications, compassionate-release petitions, or civil litigation concerning conditions of confinement. All of this fell under the protection of attorney-client privilege, because pre-pandemic face-to-face visits took place in private visitation rooms that did not have microphones or cameras, much less FDC staff.

The current restrictions in place at the FDC, by contrast, provide none of those protections. Since April 1, detainees have been on lockdown 23 out of 24 hours per day.[9] (Gallagher Dep. (Ex. 1) at 104). Detainees currently are released in a cohort of 20 detainees at a time for only one hour in the common area per day. *Id.* During that one hour, the 20 or so detainees rush to shower, make personal calls, use email, and perform legal work. *Id.* Because of the combination of a limited number of phones (four) and email computers (three) and legal research computers (two) and the severe time limitations, detainees have to wait in line before engaging in any of those activities. Much of the hour passes in line simply waiting to call, email, shower, or conduct legal research or discovery review. (Declaration of Anthony ("Hall Decl."), Apr. 29, 2020 at ¶ 13, a copy of which is attached as Exhibit 2). Even when detainees

[9] Just today, Respondent informed the Court that this one hour changed to 1.5 hours per day, but the number of released detainees also increased from 20 detainees (11 cells) to 30 detainees (16 cells). Doc. at 53. Substantively, the ability to access one of the limited number of phones, computers, or showers is the same and so is the waiting time.

represented by the Eastern District of Pennsylvania Federal Defender Office make calls to their attorneys using the dedicated Defender phone, the call goes to a receptionist and rarely results in a detainee talking to his or her attorney. *See* (Declaration of Myles Hannigan, Apr. 29, 2020 ("Hannigan Decl."), a copy of which is attached as Exhibit 3, at ¶ 12) (noting that Petitioner Hannigan tried to reach his attorney seven or eight times but was successful on only one occasion and that other detainees have stopped trying).

The FDC has also completely suspended attorney visits since March 13. (Marler Decl. (Ex. 4) ¶ 7). Any attorney wishing to visit a detained client now must request approval and demonstrate an "urgency and need" justifying the visit, with the Warden exercising final authority over the decision. (Gallagher Dep. (Ex. 1) at 11-12; 14:16-21). With the exception of a few meetings arranged to occur with the United States Probation Office for limited purposes, **not one attorney visit** has occurred since March 13 at the FDC. *Id.* Interposing the Warden's own judgment about the urgency and need of a visit has predictably resulted in a different standard than attorneys might use on their own—Respondent has testified that he views an "imminent need" as when an attorney had to speak with a pretrial detainee involving a criminal trial (Deposition of Warden Sean Marler ("Marler Dep."), excerpts of which are attached as Exhibit 5, at 73). Although all criminal trials have been continued, Respondent's criterion excludes attorneys who might need to consult on intervening motions for bail or release.

The abrogation of confidentiality and interpolation of the FDC into the attorney-client relationship have chilled attorney-client communications in grave and impermissible ways. Numerous defense attorneys have signed declarations expressing their frustration and concern with the FDC's restrictions. The FDC turned away Attorney Chris Furlong on March 13. Despite his self-assessed urgent need for a face-to-face meeting with his client, counsel for the BOP

denied his requests. (Declaration of Christopher Furlong ("Furlong Decl."), a copy of which is attached as Exhibit 6, ¶¶ 3-7). Similarly, attorney Michael Diamondstein emailed FDC to ask for a face-to-face visit in late March. He asked to bring hand sanitizer, disinfectant wipes, gloves, and a mask with him to the facility. (Declaration of Michael Diamondstein ("Diamondstein Decl."), a copy of which is attached as Exhibit 7, ¶¶ 8 & 13). The FDC flatly denied his request. *Id.* FDC Counsel Alisha Gallagher confirmed this denial during her deposition, but stated she denied the request only because attorney Diamondstein requested to bring "prohibited" materials into the facility. (Gallagher Dep. (Ex. 1) at 18-21). Even amid other sanitation failures, the FDC used its unchanged prohibited-items policy as a cudgel against an attorney rather than considering the feasibility of allowing attorneys to bring hand sanitizer in or otherwise changing its policies.[10]

No adequate replacement for face-to-face attorney visitation exists at the FDC. All email communications to or from detainees go through the BOP's system, TRULINCS. The BOP monitors TRULINCS, with no exceptions for attorney-client emails, and so such emails are not confidential. (Gallagher Dep. (Ex. 1) at 69:17-20). Defense attorneys and detainees alike know this, and they generally either outright refuse to send emails to clients or use TRULINCS only for non-substantive communications, such as scheduling a visit. (Furlong Decl. (Ex. 6) ¶ 12; Diamondstein Decl. (Ex. 7) ¶¶ 5-6; Hall Decl. (Ex. 2) ¶ 7; Declaration of Tim Brown ("Brown Decl."), a copy of which is attached as Exhibit 9, ¶ 7). One defense attorney attested that she

[10] The FDC has made no policy revisions or exceptions for attorneys with elevated risk factors for COVID-19. Another attorney wrote of her concern that her medical state puts her at severe risk for complications should she contract COVID-19. Because three FDC staff members had tested positive for COVID-19, she did not feel confident that FDC is virus-free or that she could visit without putting her health in jeopardy. For her own safety, she had not requested an in-person visit with her client at the FDC. (Declaration of Lynn Westcott ("Westcott Decl."), a copy of which is attached as Exhibit 8, at ¶ 4).

received all of her own TRULINCS emails to and from her client in discovery in a criminal matter. (Declaration of Rhonda Lowe ("Lowe Decl."), a copy of which is attached as Exhibit 10, ¶ 5). Given the absolute lack of confidentiality through that means of communications, monitored email communications cannot serve as an adequate substitute for in-person visits.

Telephone communications with attorneys suffer from similar problems of both limited access and non-confidentiality. As with TRULINCS, the FDC monitors calls made on the phones in the common area. (Gallagher Dep. (Ex. 1) at 53:13-15; Lowe Decl. (Ex. 10) ¶ 5). The one phone that links to the Eastern District of Pennsylvania Federal Defender Office is the only phone line that the FDC does not monitor or record. However, the close proximity of detainees on that phone to other detainees and guards in the common area—typically within earshot—means that calls on the Defender Office phone are easily overheard and therefore not confidential. And even if the calls regularly connected *and* were confidential, that line provides no alternative at all to the many detainees who have private counsel, CJA-appointed counsel, or federal defenders who work out of Delaware or New Jersey Federal Defender Offices. (Gallagher Dep. (Ex. 1) 63).

The purported alternative of scheduled legal calls through counselors' offices presents the same confidentiality problems as other monitored phone calls. The FDC states it is now allowing more attorney calls placed from a counselor's office (Doc. 28, at 11-13). Although at least unrecorded, calls placed from counselor or unit staff offices do not allow for privileged attorney-client communications, because the FDC requires the counselor or unit staff member to remain in the room for the duration of the call. (Gallagher Dep.(Ex. 1) at 80:16-21). Per FDC policy, the counselor must remain in the office for the entire call. (Marler Dep. (Ex. 5) at 56:21-57:8; Hall Decl. (Ex. 2) ¶ 31; Hannigan Decl. (Ex. 3) ¶7; Brown Decl. (Ex. 9) ¶ 8; Lowe Decl. (Ex. 10)

¶ 5). While the FDC cites security reasons for this arrangement, it ensures that these calls can never serve as confidential communications. Moreover, this policy has a chilling effect: one attorney stated that he could hear the counselor addressing his client while he was attempting to discuss sensitive information over the phone. (Diamondstein Decl. (Ex. 7) ¶ 7). Another attorney flatly stated that he does not conduct calls with his client from the counselor's office because those communications are not privileged, and he cannot speak freely. (Furlong Decl. (Ex. 6) ¶ 9-10). In such circumstances, the client cannot speak freely either, and they cannot have a meaningful discussion about strategy.

Even if those calls were confidential, the FDC does not allow them to occur at nearly the scale or frequency to make them a meaningful alternative to in-person conversations. Access to attorney-client calls from the counselor's office has inherent numerical restrictions because of the number of detainees assigned to each unit. Each counselor at the FDC is assigned to approximately 120 detainees, which means counselor-placed calls will always be in short supply. (Gallagher Dep. (Ex. 1) at 79:17–80:1). These inherent limitations cause substantial delays. One attorney had to wait *four days* after making a request in order to have a telephone call with his client. (Diamondstein Decl. (Ex. 7) ¶ 7). Additionally, one detainee's repeated requests to make an attorney call from the counselor's office have all been denied despite having urgency for the call. (Declaration of Imad Perkins ("Perkins Decl."), a copy of which is attached as Exhibit 11, at ¶¶ 4-6). When a call does occur, the counselor generally limits it to 30 minutes at the most, which does not provide enough time for most consultations. And this assumes that an attorney feels comfortable discussing a case during a non-privileged call at all. (Gallagher Dep. (Ex. 1) at 80:9-15).

Communication by mail is also a grossly inadequate substitute for in-person meetings or synchronous communication by unmonitored email or telephone calls. Inmate mail to and from the FDC is slow and unreliable, and is thus particularly ill-suited to time-sensitive, COVID-related motions for release. Particularly with new clients—a common state of representation for just-arrested pretrial detainees—mail does not allow for an attorney to learn the client's full story or to gain the client's trust. Nor does it allow the attorney to gauge her client's understanding of their communications.

The FDC has taken no steps to make attorney-client communications easier during this crisis, such as allowing calls from acoustically private locations (such as the now-disused attorney visiting rooms) or allowing unmonitored TRULINCS communications between attorneys and clients. The FDC has expanded its use of video conferencing to allow for detainee communication with the Court. (Gallagher Dep. (Ex. 1) at 86). However, it has taken no similar measures to allow video conferencing with attorneys, despite attorneys' requests. (Marler Dep.(Ex. 5) at 55:3-56:4; Furlong Decl. (Ex. 6) ¶ 6; Diamondstein (Ex. 7) ¶ 14; Gallagher Dep. (Ex. 1) 85:11-24.) Taken together, confidential and privileged attorney-client communications have all but ceased at FDC, with no forthcoming changes in the foreseeable future.

2. The FDC's lockdown inhibits meaningful access to the courts, including and especially the ability for detainees to file motions for release.

Beyond access to counsel, the FDC's restrictions and practices prevent detainees from undertaking their own motions and filings. It is longstanding black-letter law that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Ex parte Hull*, 312 U.S. 546, 549 (1941). Because the "basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom," prisons cannot deny or obstruct "access of prisoners to the courts for the purpose of presenting their complaints."

Johnson v. Avery, 393 U.S. 483, 485 (1969). Because this right is fundamental, in order to effectively participate in and prepare for legal proceedings, especially those challenging bail conditions or otherwise seeking immediate release, it is crucial that detainees have the ability to meaningfully review discovery in a confidential and time-sensitive manner. As the Supreme Court stated nearly a half-century ago, "fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 825-26, (1977), *narrowed by Lewis v. Casey*, 518 U.S. 343 (1996) (holding that the standing doctrine requires actual injury in order to prevail on a *Bounds* action). The *Bounds* Court went on to explain:

> Although it is essentially true, as petitioners argue, that a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action . . . *it hardly follows that a law library or other legal assistance is not essential to frame such documents*. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action. *If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner.*

Id. (emphasis added).

The current lockdown restrictions at FDC present stark obstacles that make reviewing discovery and conducting legal research nearly impossible. Many detainees have virtually no access to electronic discovery. In practice, all of them have only minutes per day to conduct legal research. And because all of this comes in conjunction with both restricted access to lawyers and unprecedented need to file motions to change the conditions of confinement, these restrictions effectively shut the proverbial courthouse door at a time when detainees most need to walk through it. These restrictions, like restrictions on access to counsel, call into particular question

the efficacy of Respondent's suggestions that individual motions and petitions provide a superior method of seeking relief.

a. Lockdown restrictions prevent detainees from reviewing electronic discovery on their own.

Any kind of motion to change the conditions of confinement, such as bail modification, depends on a detainee's ability to view the discovery in his or her criminal matter. Such motions for less restrictive placement require consideration of factors related to the underlying criminal allegations, including, *inter alia*, whether the detainee poses a danger to the community and whether the detainee presents a flight risk. To oppose the motion, including and especially in the instance of pre-trial detainees, the government searches the discovery materials to support an argument about the merits of the case in opposition. *See United States v. Dawara*, 2020 WL 2404898 (E.D. Pa. May 12, 2020) (denying bail motion to pre-trial detainee accused of arson based largely on the government's evidence that his acts put human life in danger and therefore presented a risk); *see also* Doc. 12-2 at 19, 47 (setting out, even in the motion to dismiss, purported reasons that the named Petitioners present risks if released). Any detainee who does not have access to discovery materials faces obstacles not only to preparing for now-continued trials, but also in preparation for motions for release.

Under its lockdown, the FDC generally limits detainees' ability to review discovery materials to that one hour period in which the detainee can make calls, email, and shower. (Declaration of Anthony Hall ("Hall Decl. II"), May 15, 2020 ¶ 3, a copy of which is attached as Exhibit 12). When not in use, detainees' electronic discovery files are maintained by the unit manager. (Gallagher Dep. (Ex. 1) 40:1-3). Detainees must get those files from their counselor if they wish to review discovery during their hour out of lockdown. (*See* Westcott Decl. (Ex. 8) ¶ 5). Accordingly, detainees' ability to review their discovery files is completely dependent on

the presence of their counselor. (*Id.*). In other words, if a detainee's counselor is unavailable, the detainee will not be able to review electronic discovery, even during the allotted hour.[11] Nor can attorneys send discovery materials to detainees via email. Beyond the enumerated confidentiality issues, as a practical matter, TRULINCS does not allow attorneys to attach documents for review, such as discovery or draft pleadings. (Furlong Decl. (Ex. 6) ¶ 15). The transmission of electronic discovery materials via U.S. mail can also be impractical, burdensome, and inefficient as electronic discovery is often voluminous and because of the inherent delays in using same. (Westcott Decl. (Ex. 8) ¶ 8). Some discovery, like audio recordings, cannot be mailed at all. Moreover, protective orders limit this as an option. (Lowe Decl. (Ex. 10) ¶6).

Put simply, detainees have been unable to substantively review discovery since the visitation lockdown began in mid-March. As one defense attorney stated: "My client has been unable to review his discovery for at least 6 weeks since the lockdown began. My client is the only defendant in his matter and, as such, is the only person able to interpret the vast discovery in his case, which spans from 2004 to approximately 2017." (*See* Westcott Decl. (Ex. 8) ¶¶ 6-7). Similarly, Petitioner Hall has not been able to review any discovery materials since the lockdown began. (Hall Decl. II (Ex. 12) ¶ 5). Such measures preclude detainees from meaningfully reviewing discovery in their cases.

b. Attorneys are unable to meaningfully and confidentially review discovery materials with their clients.

[11] The FDC claims it has recently opened a discovery room where detainees may review discovery beyond of their one daily hour out of the cell. (Gallagher Dep. (Ex.1) 94:21-224). However, the FDC has not adequately communicated the existence of such a discovery room to detainees, and the FDC has issued no criteria as to how it will determine whether a detainee can use the discovery room. (Westcott Decl. (Ex. 8) ¶ 5; Hannigan Decl., May 15, 2020, a copy of which is attached as Exhibit 17, ¶ 3; Hall Decl. II (Ex. 12) ¶ 3; Gallagher Dep. (Ex. 1) 105). Moreover, the discovery room does not have internet or printing capabilities, and use of the discovery room is limited to one hour. (Gallagher Dep. (Ex. 1) 81:1-9, 94-95, 105). Nor can the detainee review materials with his or her counsel in the discovery room.

Equally important, detainees are unable to review discovery materials with their attorneys. As an initial matter, logistics at the FDC prevent detainees from reviewing electronic discovery materials with their attorneys during counselor calls because discovery materials are not stored in the counselor's office and there is no phone is the discovery room. (Gallagher Dep. (Ex. 1) at 81:1-9; Furlong Decl. (Ex. 6) ¶ 15).

The inability for attorneys to have confidential communications, discussed above, presents further impediments when the discovery is subject to a protective order. One attorney specifically highlighted the formidable obstacles that exist in reviewing electronic discovery with his clients at FDC:

> I am unable to review these discovery materials with my clients in any meaningful confidentially protected way. For example, when speaking on a counselor's call my client does not have access to the discovery materials to review with me because they are in electronic format and the counselor is present in the room for the duration of the call. Discussing these discovery matters would be a clear violation of the Protective Order as the information discussed would be known to an unauthorized third party.

(Furlong Decl. (Ex. 6) ¶ 15). Additionally, protective orders often preclude attorneys from conveying certain discovery to clients in writing. For example, one attorney representing a client at FDC received discovery from the U.S. Attorney's Office which was subject to a protective order which contained the following provision:

> Counsel . . . shall not provide any writing to their client that discloses the discovery materials . . . This order does not prohibit counsel . . . from . . . discussing these materials at meetings with their client or from reading from or discussing these materials in telephone conversations with the client.

(Lowe Decl. (Ex. 10) ¶ 6). Indeed, Ms. Gallagher acknowledged, there is no way to review discovery materials that are under a protective order in a confidential manner without doing it in person. (Gallagher Dep. (Ex. 1) at 117-118).

c. Detainees have severely limited access to the law library or other means of conducting legal research

Although detainees hoping to prepare motions for bail or release need access to the law library to research those filings, the new extraordinary FDC restrictions prevent them from having meaningful legal research time. Each housing unit has two legal research computers. (Gallagher Dep. (Ex. 1) at 104:5-16). Before the lockdown, detainees could access those computers from 6:30am to 9:30pm. (*Id.* at 104:17-22). However, during the lockdown, detainees are able to access the legal research computers only during the time that they are permitted out of their cell each day, which again is also their only time to shower, make personal phone calls, and use email. (*Id.* at 104:5-16, 142-143; Hall Decl. (Ex. 2) ¶ 32; Hannigan Decl. (Ex. 3) ¶ 17; Brown Decl. (Ex. 9) ¶ 18). Accordingly, "[i]f anyone were to conduct legal research during that time, they would do so at the expense of showering or communicating with their family and friends" or reviewing discovery materials. (Hall Decl. (Ex. 2) ¶ 32; Hannigan Decl. (Ex. 3) ¶ 17). Indeed, one attorney noted that his client at FDC has received "no more than one hour of access to legal research materials" between mid-March and May 7, 2020. (Declaration of Jonathon Feinberg ("Feinberg Decl."), a copy of which is attached as Exhibit 13, ¶ 13).

Additionally, the FDC's own discretionary application of its new restrictions effectively bar detainees from using the law library during the lockdown. The FDC has repeatedly refused or ignored detainees' requests to access the law library during the lockdown. (Feinberg Decl. (Ex. 13) ¶ 13). In one particularly alarming case, an attorney wrote to the FDC on three separate occasions requesting that his client be given additional access to the law library, explaining his client needed to access legal resources in order to effectively participate in time-sensitive habeas litigation. (Feinberg Decl. (Ex. 13) ¶¶ 16-30). Getting nowhere, that attorney similarly wrote to the Assistant U.S. Attorney for assistance and sought intervention from the court. Despite that

attorney's repeated requests, the FDC has not allowed his client additional law-library time. (*Id.* ¶ 30). Beyond access to case research, the FDC law library also serves as the sole location to consult FDC policies and the Admissions & Orientation Handbook[12]—resources relevant to challenging the conditions of one's confinement. (Gallagher Dep. (Ex. 1) at 175). In sum, the FDC's restrictions have "substantially obstructed the access of detainees like [his client] to legal resources and ultimately their full participation in pending legal proceedings." (Feinberg Decl. (Ex. 13) ¶ 31).

d. The combination of these restrictions causes the FDC detainees to lack meaningful access to the courts

The combination of these restrictions—which started more than two months ago, which the FDC has repeatedly extended, and which have no confirmed end date—has worked to substantially impair the detainees' access to the courts at a time that the stakes could not be higher for those incarcerated. The pandemic has rendered the detainees vulnerable and the restrictions have rendered them more powerless to protect themselves from this unprecedented harm.

Obstruction of confidential attorney-client communication impairs access to courts. As one attorney noted: "For this particular client, I have engaged in significant pre-indictment litigation. However, every step of the way, we have been hamstrung by the inability to communicate." (Diamondstein Decl. (Ex. 7) ¶ 10). Another attorney, whose client is waiting for a hearing on a compassionate release motion, expressed concern that he "will not adequately be able to consult with my client in preparation for [the hearing]." (Furlong Decl. (Ex. 6) ¶ 16). Yet another attorney, whose client has a pending habeas petition, stated that his client's "inability to access the law library has impacted that attorney's ability to effectively represent his client."

[12] The FDC's Admission and Orientation Handbook provides detainees with general information regarding the rules and regulations they will encounter during confinement.

(Feinberg Decl. (Ex. 13) ¶¶ 11-13). Petitioner Hall cannot communicate with his attorney, cannot review his Pre-Sentence Report with his attorney, and cannot adequately prepare legal filings for release from confinement and other post-trial motions under the current restrictions. (Hall Decl. (Ex. 2) ¶¶ 30, 33). The lockdown has also "greatly slowed the process of [Petitioner Hannigan's] compassionate release application." (Hannigan Decl. (Ex. 3) ¶ 18).

Here, taking stock of the FDC and the severe and indefinite restrictions it has imposed, detainees have been left without access to the courts. They lack not only the critical guidance of counsel, but also the resources necessary to bring their own legal challenges to seek release from confinement. In conjunction with the unprecedented threat posed by COVID-19, the state of access to counsel and courts counsels in favor of this Court's exercise of § 2241 jurisdiction because of extraordinary and compelling circumstances.

B. The FDC's failures to keep COVID-19 from entering and spreading are also extraordinary

On April 20, in support of his Motion to Dismiss, Respondent signed a Declaration averring: "To date, there are no confirmed positive cases, inmate or staff, of COVID-19." (Doc. 12-5 at ¶ 4). Even as he signed it, he was wrong about inmates and wrong about staff. Respondent now acknowledges that a staff member tested positive for COVID-19 on April 13, (Marler Dep. (Ex. 5) at 74), and a detainee entered the FDC with an active case of COVID-19 on April 15 (Doc. 47 at 1). At least two more staff members have since tested positive. (Docs. 36 & 41). These incidents highlight serious deficiencies in the FDC's screening and testing protocols, and fatally undermine Respondent's arguments that the Court should dismiss the case because "there are no confirmed positive cases, inmate or staff, of COVID-19 [and] [n]o inmate has required testing." Doc. 12-2 at 37. Making matters worse, the FDC's poor contact-tracing and hygienic practices make a widespread COVID-19 outbreak within the facility even more likely.

The FDC's failure to take these basic and commonsense measures to prevent COVID-19 from infiltrating the FDC and spreading amounts to deliberate indifference. Courts have defined deliberate indifference to require knowledge of a serious risk of harm, *see Fuentes v. Wagner*, 206 F.3d 335, 345 n.12 (3d Cir. 2000) (defining deliberate indifference in the context of a prisoner's Eighth Amendment claim), and a failure to take reasonably available measures to reduce or eliminate that risk, *see Farmer v. Brennan*, 511 U.S. 825, 847 (1994) ("[A] prison official may be held liable under the Eighth Amendment ... only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."). Here, the FDC's actions (and lack of action) demonstrate such deliberate indifference and support the Court's exercise of § 2241 jurisdiction.

1. The FDC is not effectively screening detainees

On March 13, early in the COVID-19 crisis, the FDC implemented "Phase Two" of its response to the pandemic. (Doc. 12-5 at ¶ 17). Phase Two included a screening tool used for new detainees entering the facility. (*Id.* at ¶ 19). This tool consists of a one-page checklist, dated February 2020. It asks two yes/no questions to "assess the risk of exposure":

> Traveled from, or through, any of the locations identified by the CDC as increasing epidemiologic risk within the last 14 days?
>
> Had close contact with anyone diagnosed with the COVID-19 illness within the last 14 days?

(Deposition of Kevin Cassano ("Cassano Dep."), excerpts of which are attached as Exhibit 16, at KC-4). It instructs the screener to take no further action if the answer to both questions is "no," and the detainee is placed into quarantine without any assessment of symptoms. *Id.* Only if the answer to at least one question is yes does the screening proceed to three yes/no questions to "assess symptoms":

> Fever (*Fever may not be present in some patients, such as elderly, immunosuppressed, or taking certain medications. Fever may be subjective or objective*).
>
> Cough
>
> Shortness of Breath (SOB)

(Cassano Dep. (Ex. 16) at Exh. KC-4). If any of those three questions is answered "yes," the protocol calls for the FDC to consider certain measures, including "[p]repar[ing] for transport to a designated referral healthcare facility in coordination with the local public health authority." *Id*. Otherwise, the detainee is to be placed into quarantine in a single cell (rather than with a cellmate). *Id.*

Kevin Cassano, the FDC's Health Services Administrator, testified that this February screening tool remains in use at the FDC today. (Cassano Dep. (Ex. 16) at 64). The tool has never flagged a detainee as potentially having COVID-19 symptoms. (*Id.* at 64-65). And the FDC's continued reliance on this screening tool has several notable shortcomings, including that it fails to account for substantially updated and expanded knowledge of COVID-19 risk during months since the development of this checklist. Mr. Cassano himself acknowledged that signs and symptoms of COVID-19 are now known to include "cough, trouble speaking due to need to take a breath, stuffy nose, fever, chills, body aches, gastrointestinal symptoms[,] sore throat [and] COVID toes." (*Id.* at 69). Nevertheless, the FDC does not ask about such symptoms—a failure all the more dangerous because assessing some of the newly-connected symptoms relies more on self-reporting than externally-observable manifestations of infection such as cough or fever.

Even more remarkably, the FDC does not ask incoming detainees *whether they have tested positive for COVID-19*. No such question appears on the screening tool. The FDC did not ask it of the positive inmate who arrived on April 15, or of the facility that transferred him. (Doc.

47 at 1; Marler Dep. (Ex. 5) at 13-14). Even after learning of that incident, the FDC still does not ask whether incoming detainees have recently tested positive. (Marler Dep. (Ex. 5) at 16). And even after learning of this incident, the FDC's policy continues to be that it would place detainees transferred from other BOP facilities in the general population without quarantining them for 14 days. (*Id.* at 35.)

2. The FDC is not effectively screening staff and U.S. Probation Officers

The FDC uses a slightly more sophisticated, but still seriously deficient, screening protocol for staff and U.S. Probation Officers. This protocol involves a daily temperature check for staff members entering the building, plus a list of yes/no questions about potential COVID-19 symptoms. (Cassano Dep. (Ex. 16) at Exh. KC-3). Unlike the detainee screening tool, the staff screening tool does not ask whether the subject has had recent close contact with someone diagnosed with COVID-19. (*Compare* Cassano Dep. (Ex. 16) at Exh. KC-3 *with* KC-4). As with incoming detainees, the FDC does not ask staff to disclose whether they have tested positive for COVID-19. (Cassano Dep. (Ex. 16) at 47-48; Marler. Dep. (Ex. 5) at 84-85, 94). Consequently, although a correctional officer tested positive on April 13, the FDC did not learn of it until April 29. (Cassano Dep. (Ex. 16) at 51). Two more correctional officers tested positive earlier this month. (*Id.* at 55-58). None of the positive staff members were flagged by the FDC's screening tool. (*Id.* at 56, 58). The two more recently positive staff members were each working at the FDC just two days before being tested, and thus were likely present in the FDC while contagious. (Marler Dep. (Ex. 5) at 78-79).

The FDC uses the same staff screening tool for United States Probation Officers (USPOs). (Cassano Dep. (Ex. 16) at 42). As with detainees and staff members, the FDC does not ask USPOs whether they have themselves been tested for COVID-19. (Marler Dep. (Ex. 5) at 85). USPOs made visits to the FDC on six occasions between March 13 and April 29. Doc. 28 at

12. USPOs are at high risk for community exposure to COVID-19; as the FDC has disclosed, "[c]urrently, based on self-reporting, 43 people in the community, who are supervised by the U.S. Probation Office, have tested positive for covid-19, as have 20 of those probationers' cohabitants." (Doc. 41 at 1). In spite of this disclosure by counsel on May 5, when the FDC's Health Services Administrator testified on May 12, he was not aware that there were USPOs "in the Eastern District of Pennsylvania, who have been supervising people in the community who've tested positive for COVID-19." (Cassano Dep. (Ex. 16) at 83). He further admitted that the FDC does not ask USPOs entering the facility whether they have recently interacted with people who have COVID-19. (*Id.* at 83-84).

3. Testing in the FDC is nearly nonexistent

Although the FDC could try to stay atop the scope of any COVID-19 incursion into a congregate setting by testing widely, it does not do so. The FDC has approximately 1000 detainees and 120 daily staff, but it did not conduct a single test for active COVID-19 until approximately May 13. *See* Doc. 47 at 2.[13] It has rejected all previous detainee requests for testing. (Cassano Dep. (Ex. 16) at 68.) It also declined to test detainees who may have been in contact with the detainee who entered the facility with a diagnosed active case of COVID-19—including that detainee's *quarantine cellmate*. (Marler Dep. (Ex. 5) at 20-21). The FDC has made only sporadic efforts even to take the temperatures of all detainees. *See, e.g.*, Doc. 31-2, Brown Decl. (Ex. 9) ¶¶ 12-13. ("The only screening for COVID-19 that has occurred was on Tuesday April 21, 2020, when FDC staff went around and took every detainee's temperature. There have been no other screenings, questions or education (except for posters). I have never been asked by

[13] The FDC recently disclosed that in April it had conducted antibody tests (for previous COVID-19 infection) on 32 detainees, with one positive result. Doc. 47 at 2 & n.1. Warden Marler was unable to explain how these 32 detainees were selected. (Marler Dep. (Ex. 5) at 23-24).

any staff at FDC whether I am having symptoms of COVID-19."). The purportedly small number of confirmed positive cases at the FDC reflects solely inadequate testing, not a dearth of actual infections—and cannot serve as proof that the FDC's prevention protocols work.

The FDC need not take this struthious approach. Last month, for example, Montgomery County tested its 948 inmates, and found 177 positive cases. Jeremy Roebuck & Allison Steele, *Montgomery County's Jail Tested Every Inmate for COVID-19—And Found 30 Times More Cases Than Previously Known*, Phila. Inquirer (Apr. 28, 2020), *available at* https://www.inquirer.com/news/coronavirus-testing-montgomery-county-jail-asymptomatic-philadelphia-prisons-20200428.html. More recently, testing at a Delaware County correctional facility found that nearly half of the inmates had COVID-19 antibodies and "[a]bout 12% of the 915 tested still had active infections." Jeremy Roebuck, *Nearly Half of Inmates Tested in Delaware County's Jail Have Had the Coronavirus*, Phila. Inquirer (May 12, 2020), *available at* https://www.inquirer.com/news/coronavirus-delaware-county-jail-george-hill-covid-mass-testing-results-serology-20200512.html. These nearby, recent data points highlight the extraordinary nature of the FDC's nearly complete failure to test its detainees and staff. *See also* Max Marin, *Philly Will Now Test Everyone in Its Jails for the Coronavirus*, *Billy Penn* (May 19, 2020), https://billypenn.com/2020/05/19/philly-will-now-test-everyone-in-its-jails-for-the-coronavirus/.

The FDC has not only ignored detainee requests for testing, but has also set up a system that discourages detainees from seeking testing in the first place. A relatively small number of (rejected) formal requests for testing belie detainees and staff concerns. There are strong disincentives for detainees to request testing amidst a lockdown that already restricts detainees so thoroughly. Petitioner Tim Brown declared:

> I assume that if a detainee tells a guard that he has symptoms, he would be put in isolation and lose all privileges. I would be reluctant to speak up at the first sign of COVID-19. Instead, I would make really sure that I was sick before I had to go through that.

(Doc. 31-2, Brown Decl. (Ex. 9) ¶ 15). And Petitioner Myles Hannigan stated:

> I have heard from other detainees that there are FDC detainees who are sick from COVID-19, but they are unwilling to let any staff at the FDC know because they are afraid of the consequences. These consequences include the stigma of having the virus and going to quarantine, where a detainee could lose the one-hour out of their cell they have per day.

(Doc. 31-3, Hannigan Decl. (Ex. 3) ¶ 20).

The FDC also creates disincentives for staff members to seek out testing. The FDC permits staff members up to 80 hours of emergency sick leave, i.e., two workweeks, for coronavirus-related medical conditions and treatments, including testing. (Cassano Dep. (Ex. 16) at 48-50). But a positive test result may necessitate a leave in excess of two weeks. Indeed, each of the three staff members who have tested positive so far have been out for more than two weeks. (Marler Dep. (Ex. 5) at 76-78 (April 13 to May 1), 78-79 (April 25 to May 13), 79-80 (April 29 to May 16)).

4. Contact tracing in the FDC is inadequate and does not comply with CDC guidance

Four confirmed cases of COVID-19 among staff members and detainees eliminate any doubt about whether the virus has breached the gates of the FDC. Contact tracing is therefore critical to identifying additional cases of COVID-19 and to protecting against larger outbreaks of the virus.[14] But the FDC has failed to devise or implement any effective contact-tracing plan.

Contact tracing consists of working with an individual who has been diagnosed with COVID-19 to identify, notify, and provide support to people who may have been infected

[14] https://www.cdc.gov/coronavirus/2019-ncov/downloads/case-investigation-contact-tracing.pdf

through exposure to that individual. The process involves helping the individual "recall everyone with whom they have had close contact during the timeframe while they may have been infectious"; warning contacts of their potential exposure; providing contacts "with education, information, and support to understand their risk, what they should do to separate themselves from others who are not exposed, monitor themselves for illness, and the possibility that they could spread the infection to others even if they themselves do not feel ill"; and "encourag[ing] [contacts] to stay home and maintain social distance from others (at least 6 feet) until 14 days after their last exposure, in case they also become ill."[15] Moreover, the CDC states that contact tracing in confined spaces like prisons should be prioritized,[16] and Mr. Cassano at his deposition claimed the FDC was "following guidance set forth by the CDC."(Cassano Dep. (Ex. 16) at 54:1-2). To be effective, CDC Guidance dictates that contact tracing must be both "swift and thorough."[17] But limited jurisdictional discovery has revealed that contact tracing at the FDC is neither.

To begin, contact tracing at the FDC is fraught with delay. Because the FDC does not require staff to report positive tests (Cassano Dep. (Ex. 16) at 47:20-48:9; Marler Dep. (Ex. 5) at 82:22-83:6), and in fact may not find out for weeks, FDC cannot undertake timely contact tracing in the wake of those tests. For example, the first correctional officer to report a positive COVID-19 test had stopped reporting to work on April 13, but the FDC did not learn of the positive result until April 29 and thus did not begin contact tracing until at least 16 days after the last day of exposure at the FDC, at which point it was effectively too late to prevent further

[15] https://www.cdc.gov/coronavirus/2019-ncov/php/principles-contact-tracing.html

[16] *Id*. at 4.

[17] https://www.cdc.gov/coronavirus/2019-ncov/downloads/case-investigation-contact-tracing.pdf

spread. (Cassano Dep. (Ex. 16) at 50:13-55:15).[18] With that staff member, despite having contacted the person "numerous times" in anticipation of a positive test, the FDC did not start its contact investigation until it had the positive test confirmed. (Marler Dep. (Ex. 5) at 75:9-77:17). Likewise there was no meaningful contact tracing when a new detainee tested positive. Although the detainee entered the facility on April 15, the FDC did not realize he had COVID-19 until May 4. (May 13, 2020 letter from AUSA Landon Jones to the Court, Doc. 47).

Nor does the FDC undertake contact tracing with the thoroughness and follow-up communications spelled out in CDC guidance. Respondent unilaterally designated Mr. Cassano, the Health Services Administrator at the FDC, as "the witness who can most knowledgeably and efficiently cover all of the remaining topics identified by the Court, that is, the presence of COVID-19 in the institution and efforts to detect COVID-19 in both inmates and staff, including by testing."[19] At his deposition, Mr. Cassano explained that contact tracing at the FDC consists of the following:

> we'll review the assignment card, to see where that person worked, and we'll also make a phone call to the staff member and ask them to the best of their knowledge, from the time you started having symptoms, or if you were asymptomatic from the time you tested positive, go back 48 hours, and to the best of your recollection, have you been in close contact with any staff or inmates, and we define close contact as being within six feet for 15 minutes or longer, and all of that is -- the definition of close contact, and the 48 hours, all comes from the Centers for Disease Control guidance. (Cassano Dep. (Ex. 16) at 54:7-19).[20]

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[18] *See also* (Marler Dep. (Ex. 5) at 77:14-23). Respondent admitted that "due to the length of time that may have passed, it becomes more and more difficult to retrace steps if you will of an employee." (*Id*. at 88:18-21).

[19] 20-05-09 email from AUSA Rebecca Melley to Petitioners' counsel Linda Dale Hoffa, attached as Exhibit 14.

[20] *But see* CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Cassano Dep. (Ex. 16) at Exh. KC-1) (stating "an individual is considered a close contact if they a) have been within approximately 6 feet of a COVID-19 case for a prolonged period of time or b) have had direct contact with infectious

Identifying contacts and ensuring they do not interact with others is critical to protecting communities from further spread.[21] The FDC is not effectively doing so. For example, after a third correctional officer reported a positive COVID-19 test on May 4, the FDC determined that this person had had only one close contact in the FDC. But at deposition, Mr. Cassano was unable to testify when the close contact was informed, when the close contact was tested, or whether the close contact continued to work at the FDC while awaiting test results. (Cassano Dep. (Ex. 16) at 57:20-60:24).[22]

5. Insufficient hygienic practices in the FDC compound the screening problems

With almost no testing, screening protocols that are proven to be inadequate, and contact tracing that does not meet CDC standards, the FDC is not detecting the true presence of COVID-19 in its facility. In that context, the FDC's meager efforts to stop the spread of the virus that it failed to screen out contribute to the extraordinary circumstances at the FDC that warrant this Court's exercise of habeas jurisdiction. Limited jurisdictional discovery revealed that social distancing, masking, and disinfecting at the FDC fall far short of safe practices. Given the acknowledged penetration of COVID-19 into the FDC, these unprecedented extraordinary circumstances confirm the importance for this Court to exercise § 2241 jurisdiction.

COVID-19 spreads mainly among people who are in close contact (within about 6 feet) for a prolonged period. The CDC has stated that social distancing is one of "the best tools to

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secretions from a COVID-19 case (e.g., have been coughed on). Close contact can occur while caring for, living with, visiting, or sharing a common space with a COVID-19 case.").

[21] https://www.cdc.gov/coronavirus/2019-ncov/php/principles-contact-tracing.html

[22] Another FDC Corrections Officer also tested positive, but according to Mr. Cassano the FDC determined that officer did not have any close contacts with detainees or staff. (Cassano Dep. (Ex. 16) at 55:16-57:4).

avoid being exposed to this virus and slowing its spread." And social distancing is especially important for people who are at higher risk for severe illness from COVID-19.[23] Here, Petitioners each have made sworn statements that social distancing is not possible at the FDC—not in their cells, not when they use the phones and computers in the common area, not when they line up to wait to use the phones and email computers in the common area, not when they use the legal research computers, and not when they line up for food. In short: not anywhere. (Brown Decl. (Ex. 9) ¶¶ 6-7, 9; Hall Decl. (Ex. 2) ¶¶ 8-9, 19, 26; Hannigan Decl. (Ex. 3) ¶ 4). Even Warden Marler and Ms. Gallagher have conceded that social distancing is not possible when using the phones, email computers in the common area, and legal research computers. (Marler Dep. (Ex. 5) at 105:13-21; 111:4-17. Gallagher Dep. (Ex. 1) at 59:6-60:10; 136:1-15).[24]

The FDC also cannot dispute that detainees have close contact with a large number of individuals each day. At a minimum, detainees are in close contact with staff and the 19 other detainees in their unit who are let out for the same one hour each day.[25] And detainees who serve as orderlies, such as Petitioner Anthony Hall, have daily contact with all 110 detainees in their unit in addition to staff. (Hall Decl. (Ex. 2) ¶ ¶ 3, 5-6).

While not a substitute for social distancing, wearing face masks correctly helps prevent the spread of COVID-19. FDC policy requires all visitors and staff to wear masks and has issued one paper mask per week to each detainee. (Cassano Dep. (Ex. 16) at 84:6-20). But all three

[23] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html

[24] Although Warden Marler claims that detainees social distance while waiting in line for the phones and the computers, he also admits he typically does not make rounds while detainees are in the common area. (Marler Dep. (Ex. 5) at 104:14-105:12).

[25] And beginning on May 18, 2020, the number of detainees released at a time increased from approximately 20 detainees (11 cells) to 30 detainees (16 cells).

named Petitioners report that, contrary to FDC policy, masks are worn only intermittently by detainees, with minimal enforcement by Corrections Officers. (Brown Decl. (Ex. 9) ¶ ¶ 10-11; Hall Decl. (Ex. 2) ¶ ¶ 18-19; Hannigan Decl. (Ex. 3) ¶ 4.)[26]

Finally, the CDC recommends regular cleaning and disinfecting of commonly touched surfaces to prevent the spread of COVID-19. *E.g.*, (Cassano Dep. (Ex. 16) at Exh. KC-1 at 9). Petitioner Anthony Hall is an orderly responsible for cleaning the common area where all 110 detainees from his unit spend one hour each day in groups of 20. In his sworn statement, Mr. Hall states that telephone and computers in the common areas are not disinfected after each use and that the showers are not wiped down until the end of the day. Warden Marler does not dispute this. (Marler Dep. (Ex. 5) at 106:9-107:14). Petitioner Hall also reports that he frequently runs out of disinfectant on the weekend and has to wait until Monday to disinfect the common area. (Hall Decl. (Ex. 2) ¶¶ 14-15).

While these issues would present key concerns even if COVID-19 had not yet entered the facility, the incursion of the virus into the FDC makes these failures all the more troubling. Combined with all the other practices at the FDC, they contribute to extraordinary and compelling circumstances that support exercise of § 2241 jurisdiction.

[26] Although Warden Marler asserts that both staff and detainees wear their masks, by his own admission, he is seldom in the common areas when large groups of detainees are present. (Marler Dep. (Ex. 5) at 104:14-105:12).

III. Conclusion

For the additional reasons set forth above, and in Petitioners' April 21 Brief, this Court should deny Respondent's Motion to Dismiss the Petition and Class Action Complaint.

Respectfully submitted,

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Dated: May 20, 2020

CERTIFICATE OF SERVICE

I, Linda Dale Hoffa, do hereby certify that on the 20th of May, 2020, the Petitioners' Supplemental Brief in Opposition to Respondent's Motion to Dismiss the Petition and Class Action Complaint was filed and served through the Court's CM/ECF filing system on all parties registered to receive notice.

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