

themselves of (or exhausting) the opportunities for seeking release in their respective criminal cases under the Bail Reform Act, Petitioners filed this civil action on behalf of themselves and a putative class seeking a highly extraordinary injunction that would require Respondent immediately to release some number of detainees, that would appoint an expert to recommend who and how many more detainees to release, and that would require this Court to function as a judicial monitor regarding the conditions of a state prison.

The Petition and its highly extraordinary relief must be denied for the following multiple independent reasons:

- *First*, this Court lacks subject matter jurisdiction under the Prison Litigation Reform Act, which places strict limits on a district court’s ability to order the release of inmates and expressly precludes a single district judge from doing so. 18 U.S.C. § 3626(a)(3); *Money v. Pritzker*, No. 20-cv-2093, 2020 WL 1820660, at *1, 13 (N.D. Ill. April 10, 2020) (recognizing that, although “the issue of inmate health and safety is deserving of the highest degree of attention,” an “order imposing a court-ordered and court-managed ‘process’ for determining who should be released” from a state prison in response to the COVID-19 pandemic falls “squarely within Section 3626(a)(3)—which forbids this Court from granting it”).
- *Second*, Petitioners lack standing because they cannot establish either injury in fact or redressability. Specifically, the site-specific circumstances in this case—(1) that there are *zero* cases of COVID-19 in the detainee population, (2) that a staff member tested positive in mid-March and yet there are *still* no cases of COVID-19 in the detainee population as of April 20, (3) that units housing Petitioners are well under capacity and, indeed, two of the Petitioners have their own cells, (4) that Respondent takes a variety of precautions that reasonably provide for adequate social distancing when Petitioners are in common areas, and (5) that Petitioners do not have any medical conditions that present a higher risk for COVID-19—demonstrate that Petitioners’ alleged injury is speculative and will not be redressed by ordering their release.
- *Third*, Petitioners failed to exhaust administrative remedies—and, indeed, did not even attempt to file an emergency grievance—before filing this case, contrary to the Prison Litigation Reform Act’s mandatory exhaustion requirements. 42 U.S.C. § 1997e(a).

- *Finally*, there is no basis in law that would allow Respondent to reduce its detainee population when those detainees are subject to orders of detention, or that would allow a court-appointed expert to usurp that judicial function. Seeking those remedies in this civil case potentially abuses the writ of habeas corpus, unduly duplicates judicial efforts, and circumvents traditional remedies afforded to safeguard a criminal defendant's liberty interests.

Not only does the Petition suffer from these multiple legal defects that warrant dismissal, but it also suffers from a distorted picture of the efforts—which, to date, are entirely successful—to protect detainees at Plymouth County Correctional Facility from the threat to health and safety posed by COVID-19. Petitioners make bold accusations based on hearsay and purported experts who have never been to Plymouth County Correctional Facility or at least not recently. In the accompanying memorandum of law, based on multiple declarations of percipient witnesses, Respondent describes the numerous, comprehensive, and impressive efforts of the many public servants at Plymouth County Correctional Facility doing their level best in difficult circumstances.

WHEREFORE, Respondent respectfully requests that the Court deny the Petition and dismiss the case.

Respectfully submitted,

ANTONE MONIZ
Superintendent of the Plymouth
County Correctional Facility

By his attorneys,

ANDREW E. LELLING,
United States Attorney

By: /s/ Jason C. Weida
Jason C. Weida
Assistant U.S. Attorney
United States Attorney's Office
1 Courthouse Way, Suite 9200

Boston, Massachusetts 02210
(617) 748-3180
Jason.Weida@usdoj.gov

Dated: April 21, 2020

LOCAL RULE 7.1(a)(2) CERTIFICATION

I hereby certify that, by email on April 19 and 20, 2020, I conferred with counsel for Petitioner, who would not assent to the relief sought in this motion.

/s/ Jason C. Weida
Jason C. Weida
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANTHONY BAEZ, JONATHAN BERMUDEZ)	
JERMAINE GONSALVES, and DEDRICK)	
LINDSEY on behalf of themselves and all others)	
similarly situated,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 20-10753-LTS
)	
ANTONE MONIZ,)	Leave To File Granted
)	On April 21, 2020
Respondent.)	

**RESPONDENT ANTONE MONIZ’S MEMORANDUM OF LAW IN SUPPORT
OF HIS MOTION TO DENY PETITIONERS’ HABEAS PETITION FOR LACK OF
SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM**

ANDREW E. LELLING
United States Attorney

JASON C. WEIDA
Assistant U.S. Attorney

United States Attorney’s Office
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, Massachusetts 02210
(617) 748-3180
jason.weida@usdoj.gov

Dated: April 21, 2020

Attorneys for the Government

Respondent Antone Moniz, Superintendent of the Plymouth County Correctional Facility (“Respondent”), respectfully submits this memorandum of law in support of his motion to deny Petitioner Anthony Baez’s (“Baez”), Petitioner Jonathan Bermudez’s (“Bermudez”), Petitioner Jermaine Gonsalves’s (“Gonsalves”), and Petitioner Dedrick Lindsey’s (“Lindsey,” and collectively, “Petitioners”) Class Action Petition Seeking Writ of Habeas Corpus Under 28 U.S.C. § 2241 and Complaint for Declaratory and Injunctive Relief (the “Petition”) (Doc. # 1) for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Petitioners are federal pretrial criminal detainees charged with serious drug and gun crimes. They challenge the conditions of their confinement at the Plymouth County Correctional Facility as inadequate to address the threat to health and safety posed by COVID-19. Rather than availing themselves of (or exhausting) the opportunities for seeking release in their respective criminal cases under the Bail Reform Act, Petitioners filed this civil action on behalf of themselves and a putative class seeking a highly extraordinary injunction that would require Respondent immediately to release some number of detainees, that would appoint an expert to recommend who and how many more detainees to release, and that would require this Court to function as a judicial monitor regarding the conditions of a state prison.

The Petition and its highly extraordinary relief must be denied for the following multiple independent reasons:

- *First*, this Court lacks subject matter jurisdiction under the Prison Litigation Reform Act, which places strict limits on a district court’s ability to order the release of inmates and expressly precludes a single district judge from doing so. 18 U.S.C. § 3626(a)(3).

- *Second*, Petitioners lack standing because they cannot establish either injury in fact or redressability. Specifically, the site-specific circumstances in this case—(1) that there are *zero* cases of COVID-19 in the detainee population, (2) that a staff member tested positive in mid-March and yet there are *still* no cases of COVID-19 in the detainee population as of April 20, (3) that units housing Petitioners are well under capacity and, indeed, two of the Petitioners have their own cells, (4) that Respondent takes a variety of precautions that reasonably provide for adequate social distancing when Petitioners are in common areas, and (5) that Petitioners do not have any medical conditions that present a higher risk for COVID-19—demonstrate that Petitioners’ alleged injury is speculative and will not be redressed by ordering their release.
- *Third*, Petitioners failed to exhaust administrative remedies—and, indeed, did not even attempt to file an emergency grievance—before filing this case, contrary to the Prison Litigation Reform Act’s mandatory exhaustion requirements. 42 U.S.C. § 1997e(a).
- *Finally*, there is no basis in law that would allow Respondent to reduce its detainee population when those detainees are subject to orders of detention, or that would allow a court-appointed expert to usurp that judicial function. Seeking those remedies in this civil case potentially abuses the writ of habeas corpus, unduly duplicates judicial efforts, and circumvents traditional remedies afforded to safeguard a criminal defendant’s liberty interests.

Not only does the Petition suffer from these multiple legal defects that warrant dismissal, but it also suffers from a distorted picture of the efforts—which, to date, are entirely successful—to protect detainees at Plymouth County Correctional Facility from the threat to health and safety posed by COVID-19. Petitioners make bold accusations based on hearsay and purported experts who have never been to Plymouth County Correctional Facility or at least not recently. Below, based on multiple declarations of percipient witnesses, Respondent describes the numerous, comprehensive, and impressive efforts of the many public servants at Plymouth County Correctional Facility doing their level best in difficult circumstances.

For these and other reasons discussed below, the Court should deny the Petition.

BACKGROUND

A. COVID-19 In Massachusetts.

On March 10, 2020, Governor Charlie Baker declared a state of emergency in Massachusetts based on the 2019 novel Coronavirus (“COVID-19”) that originated in Wuhan, China.¹ As of April 20, 2020, there are 38,077 cases of COVID-19.² Of those 38,077 cases of COVID-19 in Massachusetts, 2,832 cases are in Plymouth County.³ The population of Plymouth County is around 521,202.⁴ Based on those figures, about half of one percent of the population in Plymouth County has COVID-19 (2,832 out of 521,202). The Town of Plymouth, where the Plymouth County Correctional Facility (“PCCF”) is located, has 108 cases of COVID-19.⁵ With a population of 60,803,⁶ less than 2/10th of one percent of the population of the Town of Plymouth has COVID-19 (108 out of 60,803).

B. Efforts To Prevent Exposure To COVID-19 At The Plymouth County Correctional Facility.

PCCF is a correctional facility that houses inmates and detainees, including federal pretrial criminal detainees like Petitioners here. The Plymouth County Sheriff’s Department (“Department”) operates the PCCF. *See* Decl. of Joseph D. McDonald, Jr., attached as Exhibit A

¹ *See* <https://www.mass.gov/executive-orders/no-591-declaration-of-a-state-of-emergency-to-respond-to-covid-19> (last visited Apr. 20, 2020).

² *See* <https://www.mass.gov/doc/covid-19-cases-in-massachusetts-as-of-april-19-2020/download> (last visited Apr. 20, 2020).

³ *See id.*

⁴ *See* <https://www.census.gov/quickfacts/plymouthcountymassachusetts> (last visited Apr. 20, 2020) (estimate dated July 1, 2019).

⁵ *See* <https://www.mass.gov/info-details/covid-19-cases-quarantine-and-monitoring#> covid-19-cases-in-massachusetts (last visited Apr. 20, 2020) (link to Word document on webpage).

⁶ *See* <https://www.census.gov/quickfacts/plymouthtownplymouthcountymassachusetts> (last visited Apr. 20, 2020) (estimate dated July 1, 2018).

hereto, ¶ 2. The Department has a contract with the Correctional Psychiatric Services (“CPS”) to provide comprehensive medical services to inmates and detainees at the PCCF. *See* Decl. of Lawrence Baker, M.D., attached as Exhibit B hereto, ¶ 1. The Department and CPS provide services to Petitioners pursuant to an Inter-Governmental Service Agreement (“IGA”) with the U.S. Marshals Service (“USMS”). *See* Decl. of John Sheehan, attached as Exhibit C hereto. As described below, all three entities—the Department, CPS, and USMS—have endeavored and, indeed, succeeded through the present time to prevent exposure to inmates and detainees at PCCF.

1. The Plymouth County Sheriff’s Department Has Instituted Protocols At The Plymouth County Correctional Facility To Prevent Exposure to COVID-19.

Since the onset of COVID-19, the Department has instituted strict protocols at PCCF to prevent exposure to inmates and detainees. Ex. A ¶ 6. Those protocols include the following:

- Beginning in February, the Department enhanced its inmate intake procedure to obtain additional information about travel and exposure to illness. *Id.*
- The Department has adopted treatment and detection practices consistent with guidelines from the CDC and DPH. The Department’s health services administrator is in frequent contact with DPH and consults them on the challenges facing the Department. *Id.*
- The Department suspended visits by friends, families, and volunteers. To assist with the transition, the Department arranged with its telephone vendors to provide two free calls per week. *Id.*
- The Department restricted attorney visits to non-contact. The Department disabled monitoring and recording functions for visit phones. *Id.*
- The Department has kept non-essential staff from entering PCCF, consistent with the governor’s order for executive staff. *Id.*
- The Department has ceased inmate assignments to the farm operation, community work crew, and other work details outside PCCF. *Id.*

- The Department has eliminated unnecessary movement within PCCF. *Id.*
- The Department established a housing unit for newly admitted inmates and inmates who leave and return to PCCF, to monitor for signs and symptoms of the virus. Inmates remain in the unit until they clear the incubation period. *Id.*
- The Department has worked with Trial Court officials to limit travel outside PCCF by conducting hearings by videoconference and telephone. This greatly has reduced travel to and from PCCF and resulting potential exposure. *Id.*
- The Department has changed recreation and meal schedules to provide more space in the dayrooms. Inmates and detainees in standard large and small housing units have split recreation schedules so that approximately half are permitted access to the day room at one time. The inmates and detainees have split meal periods, as well. *Id.*
- The Department maintains an aggressive cleaning schedule for the housing units and conducts daily sanitation of transportation vans. *Id.*
- The Department has educated staff and inmates on sanitation practices and proper social distancing. The Department provides soap to the inmates and detainees weekly and as needed. The Department also provides cleaning supplies. *Id.*
- The Department conducts temperature screenings for all employees, contractors, and visitors to PCCF. *Id.*
- The Department has provided surgical masks for all PCCF staff and inmates. The Department encourages all staff to wear masks while on duty. The Department encourages inmates to wear masks while out of their cells and requires them to wear masks while working or when leaving the housing unit. *Id.*
- The Department has installed hand sanitizer dispensers in every housing unit. *Id.*

2. Correctional Psychiatric Services Deployed Clinical Guidelines To Prevent Exposure to COVID-19 At The Plymouth County Correctional Facility.

In addition to the Department's protocols described above, CPS deployed a set of clinical guidelines, titled CPS Clinical Guideline for COVID-19/CORONAVIRUS ("CPS Clinical Guideline"), to educate and guide CPS staff, including the seven fulltime staff members at PCCF.⁷ Ex. B ¶¶ 6, 8. "The CPS Clinical Guideline follows the most recent guidance pertaining to correctional and detention facilities from the Centers for Disease Control and U.S. Immigration and Customs Enforcement, as well as recommendations from the Massachusetts Department of Public Health and the World Health Organization." *Id.* ¶ 8.

Among other things, the CPS Clinical Guideline provides as follows:

- The CPS Clinical Guideline lists the possible symptoms of a COVID-19 infection and states that upon identification of any of those symptoms (*i.e.*, fever, cough, shortness of breath, loss of smell or taste, sore throat, tiredness, or diarrhea) the patient should immediately be masked. *Id.* ¶ 9.
- The CPS Clinical Guideline provides that if a patient presents with fever and any other symptoms then the medical staff is to perform a rapid test for Influenza A and B. If the influenza test is negative, then medical staff is to test for COVID-19. If a COVID-19 test is positive, then staff are instructed to monitor vital signs, especially temperature and oxygen saturation twice a day; offer acetaminophen 650 mg. twice per day or as needed for coronavirus symptoms for one week; monitor the patient's respiratory status to include oxygen saturation, trouble breathing, persistent chest pain or pressure, new onset of confusion or inability to arouse and any signs of cyanosis, and nurses are to notify the on-call doctor immediately if any symptoms are present and discuss possible transport to the local emergency room; and restrict patient movement unless emergent for anyone in isolation. Any movement while in isolation requires that staff wear a mask with shield, gloves and gown. *Id.* ¶ 10.

⁷ Note that these seven fulltime CPS staff members at PCCF are *in addition to* "[t]he Department's nursing staff," which "consists of 21 full-time employees plus a nursing supervising lieutenant." Ex. A ¶ 3.

- The CPS Clinical Guideline also provides for the medical isolation of a patient with suspected COVID-19 infection be maintained until all the following criteria have been met:
 - a. For individuals who will be tested to determine if they are still contagious: the individual has been free from fever for at least 72 hours without the use of fever-reducing medications AND the individual's other symptoms have improved (e.g., cough, shortness of breath) AND the individual has tested negative in at least two consecutive respiratory specimens collected at least 24 hours apart.
 - b. For individuals who will NOT be tested to determine if they are still contagious: the individual has been free from fever for at least 72 hours without the use of fever-reducing medications AND the individual's other symptoms have improved (e.g., cough, shortness of breath) AND at least 7 days have passed since the first symptoms appeared.
 - c. For individuals who had a confirmed positive COVID-19 test but never showed symptoms: At least 7 days have passed since the date of the individual's first positive COVID-19 test AND the individual has had no subsequent illness.

Id. ¶ 11.

- The CPS Clinical Guideline provides for restriction of patients from leaving the facility while under medical isolation precautions, unless released from custody or if a transfer is necessary for medical care, infection control, lack of medical isolation space, or extenuating security concerns. *Id.* ¶ 12.

In addition to the CPS Clinical Guideline, CPS has taken the following steps:

- ***New Detainee Screening.*** Upon receiving a new detainee/inmate, medical staff screen the individuals for signs and symptoms of infection. This includes event travel history, temperature checks, taking a recent medical history and observing the individual for any signs of sickness. If an individual appears symptomatic on admission a mask is applied immediately, the individual is placed in isolation and clinical care guidelines are followed (as outlined above) thereafter. *Id.* ¶ 18.
- ***Detainee Education and Monitoring.*** Nursing staff have also been instructed to use any detainee/inmate interaction as a time to educate the detainee/inmate regarding COVID-19, including that all inmates

need to wash their hands frequently, avoid crowds and stay apart at least six feet whenever possible, and to report any shortness of breath or concerns of fever immediately to either nursing or security. Additionally, signs have been posted in all units in English, Spanish, Portuguese and Chinese, indicating that if a detainee/inmate feels sick, they should notify medical staff and have a mask applied immediately. Detainees and inmates are also being educated during medical encounters on the signs and symptoms of a COVID-19 infection. *Id.* ¶¶ 16-17.

- ***Monitoring of Vulnerable Detainees.*** CPS staff are monitoring and reviewing all detainees and inmates who are known to have chronic disease or other co-morbidities which would make them more susceptible to a COVID-19 infection. *Id.* ¶ 20.
- ***Staff Training and Supplies.*** COVID-19 health information has been posted in all units and visiting areas. Staff have access to CDC materials, including posting the link/url for the CDC website on all medical area computer equipment. A training website for CPS medical staff has been developed as well as a COVID-19 power point. Staff have access to masks, disinfectant/sanitizer and other personal protective equipment. *Id.* ¶ 15.
- ***Staff Precautions.*** CPS also is taking steps to ensure that staff do not inadvertently introduce COVID-19 into the facility by educating staff and screening them for raised temperatures or other signs of illness. Staff have been instructed not to work if they feel ill and to report any symptoms for follow up. Staff have also been educated regarding both their own protection as well as CDC guidelines for eliminating virus transmission. *Id.* ¶ 19.

3. USMS Works Closely With The Plymouth County Correctional Facility To Attend To The Medical Needs Of Pretrial Detainees In USMS Custody.

In addition to the above steps taken by the Department and CPS, USMS itself provides monitoring and guidance to the medical staff at PCCF. Specifically, USMS employs U.S. Public Health Service (“PHS”) personnel—including physicians, physician assistants, and nurses—to oversee and manage its prisoner medical program. Ex. C. ¶ 7. The PHS staff work closely with medical personnel at the IGA facilities, like PCCF, to attend to the medical needs of USMS prisoners, like Petitioners. *Id.* ¶ 7.

C. The Lack of Any COVID-19 Case Among Inmates And Detainees At The Plymouth County Correctional Facility.

There is not currently, and has never been, a case of COVID-19 in the inmate and detainee population at PCCF. Ex. A ¶ 7; Ex. B. ¶ 24; Ex. C ¶ 11. There has been one case of COVID-19 of a PCCF staff member. Ex. A ¶ 8; Ex. B. ¶ 25. That individual's last day at PCCF was March 19, 2020. The individual did not have close contact with any inmates or detainees. Ex. A ¶ 8; Ex. B. ¶ 25. The staff members that had close contact with that individual were sent home and were not permitted to return to PCCF for at least 14 days. Ex. A ¶ 8; Ex. B. ¶ 25. To date, that is the only case of COVID-19 at PCCF. Ex. A ¶¶ 7-8; Ex. B. ¶¶ 24-25.

D. Pending Criminal Cases Against Petitioners.

1. Anthony Baez.

In November 2019, Baez was indicted for an array for serious drug crimes, including conspiracy to distribute large amounts of fentanyl. *See* Doc. # 1, *United States v. Baez*, No. 4:19-cr-40049 (D. Mass.) (Hillman, J.) (charging conspiracy to distribute and possess with intent to distribute 500 grams or more of cocaine, 400 grams or more of fentanyl, 100 grams or more of heroin, and 28 grams or more of cocaine base; distribution of 40 grams or more of fentanyl and heroin, and aiding and abetting; distribution of 100 grams or more of heroin and 40 grams or more of fentanyl, and aiding and abetting; and distribution of 400 grams or more of fentanyl and 100 grams or more of heroin, and cocaine, and aiding and abetting)

On April 6, 2020, Baez moved for release based on the conditions of his confinement at PCCF and the threat to health and safety posed by COVID-19. *See* Doc. # 93, *Baez*, No. 4:19-cr-40049. On April 10, 2020, based on an individualized inquiry, Magistrate Judge Kelley denied his motion and entered an order of detention. *See* Doc. # 93, *Baez*, No. 4:19-cr-40049 (“The court is aware of the covid-19 pandemic and the problems it poses for the safety of those who are

incarcerated. In addition, Mr. Baez's four children are in the care of his mother who is reportedly overwhelmed and could use his help caring for the children. The court is very sympathetic to these concerns but is also obligated to take into consideration the risks posed to public safety of those who make a living by selling illegal drugs that endanger others' lives, and who seem not to be deterred by being arrested and punished for it."').

2. Jonathan Bermudez.

In April 2019, Bermudez, who has a prior conviction for assaulting a pregnant woman, also was indicted for serious drug crimes, including conspiracy to distribute large amounts of fentanyl. *See Doc. # 1, United States v. Bermudez*, No. 1:19-cr-10180 (D. Mass.) (Sorokin, J.) (charging conspiracy to distribute and possess with intent to distribute 400 grams or more of fentanyl and distribution of 40 grams or more of fentanyl).

On April 2, 2020, Bermudez moved, on an emergency basis, for release based on the conditions of his confinement at PCCF and the threat to health and safety posed by COVID-19. *See Doc. # 109, Bermudez*, No. 1:19-cr-10180. On April 8, 2020, after the government responded, this Court referred the motion to Magistrate Judge Dein. *See Doc. # 113, Bermudez*, No. 1:19-cr-10180. As of April 21, 2020, at the time of filing, Bermudez's emergency motion remains pending.

3. Jermaine Gonsalves.

In October 2018, Gonsalves, a career offender with multiple state and federal convictions, also was indicted for, among other things, conspiracy to distribute large amounts of fentanyl. *See Doc. # 1, United States v. Gonsalves*, No. 1:18-cr-10468 (D. Mass.) (Gorton, J.) (charging conspiracy to distribute and possess with intent to distribute 400 grams or more of fentanyl and 100 or more grams of heroin).

On March 31, 2020, Gonsalves moved for release based on the conditions of his confinement at PCCF and the threat to health and safety posed by COVID-19. *See Doc. # 381,*

Gonsalves, No. 1:18-cr-10468. On April 16, 2020, following a hearing and based on an individualized inquiry, Magistrate Judge Bowler denied his motion and reaffirmed her earlier finding that detention was warranted, but did so “without prejudice to renew if there is a change in circumstances.” *See* Doc. # 396, *Gonsalves*, No. 1:18-cr-10468 (“As to the defendants new arguments for release based on the Covid-19 outbreak, this court finds the defendant did not present any special or extraordinary circumstances. Defendant’s motion raises systematic and not particularized concerns regarding the institution where he is being held. He does not set forth any specific medical conditions that would make him more vulnerable or more at risk than other detainees at the institution. Therefore, this court finds that release is not warranted at this time. The motion is DENIED without prejudice to renew if there is a change in circumstances.”).

4. Dedrick Lindsey.

In March 2019, Lindsey, who has a long criminal history with multiple state convictions for serious drug and gun crimes (many of which serve as Armed Career Criminal predicates that subject him to a fifteen-year mandatory minimum sentence), was indicted for being a felon in possession. *See* Doc. # 1, *United States v. Lindsey*, No. 1:19-cr-10091 (D. Mass.) (Wolf, J.).

Unlike the other Petitioners, on April 3, 2019, Lindsey waived his detention hearing and requested a voluntary order of detention. *See* Doc. # 13, *Lindsey*, No. 1:19-cr-10091. On April 4, 2019, based on Lindsey’s waiver and request, Magistrate Judge Dein entered an order of detention. *See* Doc. # 15, *Lindsey*, No. 1:19-cr-10091. Also unlike the other Petitioners, Lindsey has not sought his release on the conditions of his confinement at PCCF or the threat to health and safety posed by COVID-19. *See generally Lindsey*, No. 1:19-cr-10091.

E. Petitioners’ Detention at Plymouth County Correctional Facility.

Each of the Petitioners is detained at PCCF. “Baez is assigned to Unit DS1, a small housing unit with a capacity of 62. As of April 20, the population of the unit was 34. The inmate roster

reflects that Baez was assigned to a five-man cell with two other inmates on that date.” Ex. A ¶ 9. “Bermudez is assigned to Unit H3, a large unit with a capacity of 139. As of April 20, the population of the unit was 74. The inmate roster reflects that Bermudez was in a cell by himself on that date.” *Id.* ¶ 10. “Gonsalves is assigned to Unit H1, a large unit with a capacity of 139. As of April 20, the population of the unit was 68. The inmate roster reflects that Gonsalves was in a cell by himself on that date.” *Id.* ¶ 11. “Lindsey is assigned to Unit BS1, a dormitory unit with a capacity of 60. As of April 20, the population of the unit was 10.” *Id.* ¶ 12.

When Petitioners are in the common areas of their respective units, such as during recreation and meals, the Department takes a variety of precautions. For example:

- ***Social Distancing in Common Areas.*** To permit and encourage social distancing, the security staff spread out the day room chairs in the units. The Department conducts split recreation in the standard large and small units, with each side (in the large units) or each tier (in the small units) of the unit entering the day room at different times. The split recreation periods provide much more space in the day room and offer significant opportunity for social distancing. The Department similarly provides meals for each portion of the large and small units at different times. This provides detainees multiple seating options which provide significant opportunity for social distancing. The inmates in the dormitory units continue to recreate and eat together. *Id.* ¶ 10.
- ***Sanitation.*** Multiple times each day, unit workers sanitize the units. Workers clean all tables, phones, day room chairs, showers, and cell door handles with 100 product multi-use disinfectant 256. Laundry workers clean all mop heads and cleaning rags every morning. Maintenance officers regularly use Virex spray to disinfect showers, day room chairs, tables, phones, all door handles, and railings in the morning before recreation periods begin. A cleaning crew cleans all visit rooms and sally ports with Virex fogging spray. *Id.* ¶ 11.
- ***Sanitary Supplies.*** The Department provides the detainees antibacterial soap weekly and as needed and provides the detainees the cleaning supplies they need. The Department provides toilet paper weekly and as needed. The detainees have access to the 100 product disinfectant to clean their cells. Unit workers have access to nitrex gloves for their assignments, and all inmates have access

to plastic gloves at the officer panel for cleaning. The Department runs a laundry unit to keep clothing clean. *Id.*

F. The Petition In This Case.

In the Petition, Petitioners, on behalf of themselves and a putative class of all federal pretrial criminal detainee at PCCF (which they estimate to be about 150 detainees), challenge the conditions of their confinement at PCCF as inadequate to address the threat to health and safety posed by COVID-19. Doc. # 1 ¶ 1. According to Petitioners, those conditions violate the Fifth Amendment, *id.* ¶¶ 150-62 (First Cause of Action), and the Eighth Amendment, *id.* ¶¶ 163-78 (Second Cause of Action), and require the following relief:

- an injunction that would “[r]equire Respondents to immediately take all actions to reduce the federal detainee population at PCCF by releasing a sufficient number of federal detainees from the facility in order to ensure the health and safety of all members of the Class,” *id.* at 39 (section B.1 of the prayer for relief);
- the appointment of “an expert under Federal Rule of Evidence 706 to make recommendations to the Court regarding how many and which class members to order released,” *id.* at 39 (section B.2 of the prayer for relief); and
- judicial monitoring of PCCF to ensure that the conditions of Petitioners’ confinement comply with the recommendations of their experts, *id.* at 40 (section B.4-7 of the prayer for relief).

This timely motion followed.

STANDARD OF REVIEW

Because federal courts are considered courts of limited jurisdiction, “federal jurisdiction is never presumed.” *Viqueira v. First Bank*, 140 F.3d 12, 16 (1st Cir. 1998). Rather, “the party invoking the jurisdiction of a federal court carries the burden of proving its existence.” *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995) (quoting *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 60 (1st Cir. 1993)). “Once a defendant challenges the jurisdictional basis for a claim under Rule 12(b)(1), the plaintiff bears the burden of proving jurisdiction.” *Excel Home*

Care, Inc. v. U.S. Dep't of Health & Human Servs., 316 B.R. 565, 567 (D. Mass. 2004). “In ruling on a motion to dismiss for lack of jurisdiction, ‘the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of plaintiff.’” *Id.* at 568 (quoting *Aversa v. United States*, 99 F.3d 1200, 1210 (1st Cir. 1996)). “That is not to say that this leniency eliminates the plaintiff’s burden of proving an appropriate jurisdictional basis. Indeed, a plaintiff cannot assert a proper jurisdictional basis ‘merely on unsupported conclusions or interpretations of law.’” *Id.* (quoting *Murphy*, 45 F.3d at 522).

Just as a plaintiff bears the burden of establishing subject matter jurisdiction, so too “the plaintiff bears the burden of plausibly alleging a viable cause of action” under Rule 8(a). *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016). The “‘tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.’” *Feliciano-Hernández v. Pereira-Castillo*, 663 F.3d 527, 533 (1st Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Iqbal*, 556 U.S. at 678). Rather, “‘only a complaint that states a plausible claim for relief survives a motion to dismiss’” under Rule 12(b)(6). *Id.* (quoting *Iqbal*, 556 U.S. at 679).

ARGUMENT

I. THE PETITION MUST BE DENIED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE PRISONER LITIGATION REFORM ACT BARS THE RELIEF PETITIONERS SEEK.

The government has both a significant interest in “safeguard[ing] the health and safety of those remanded [into] custody,” and an “obligation to maintain public safety and to protect victims and witnesses from threats and retaliation[.]” *See* Attorney General Barr Mem., dated Apr. 6, 2020, attached as Exhibit D hereto. In determining whether to seek detention in the first

instance, or to oppose a motion for release, the government employs an individual, case-by-base assessment that takes into account both the defendant's risk from COVID-19 and the risk that the defendant's release would pose to the public. These individualized, case-specific determinations are the only appropriate legal avenue through which Petitioners may seek release due to the threat to health and safety posed by COVID-19.

A. The Bail Reform Act And The Attorney General's April 6 Memorandum.

The Bail Reform Act ("BRA") expressly allows district courts to consider an individual defendant's health when deciding whether to detain him or her pending trial. A person charged with an offense may be released, released on conditions, or detained pending trial. 18 U.S.C. § 3142(a). In determining "whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community," the court "shall . . . take into account the available information concerning," *inter alia*, "the history and characteristics of the person, including . . . the person's . . . physical and mental condition[.]" § 3142(g)(3). District courts have statutory authority to review a magistrate judge's detention order, § 3145(b), and "inherent authority to reconsider detention decisions . . . where 'changed circumstances' support release." *United States v. Smith*, 200 F. Supp. 3d 192, 194 (D.D.C. 2016).

The Attorney General recently issued guidance to federal prosecutors concerning "Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic." Ex. D. The Attorney General's April 6 Memorandum makes clear that "the current COVID-19 pandemic requires that [prosecutors] ensure [they] are giving appropriate weight to the potential risks facing certain individual from being remanded to . . . custody." *Id.* Thus, although prosecutors' "paramount obligation" is to "[p]rotect[] the public," they must also "consider the medical risks associated with individuals being remanded into . . . custody during the COVID-19 pandemic." *Id.* at 1-2. Prosecutors "should consider not seeking detention to the same degree [they] would under normal

circumstances,” and must weigh “the risk of flight and seriousness of the offense . . . against the defendant’s vulnerability to COVID-19.” *Id.* at 2. Likewise, “these same considerations should govern [prosecutors’] litigation of motions filed by detained defendants seeking release in light of the pandemic.” *Id.* Such a defendant’s “risk from COVID-19 should be a significant factor in [each prosecutor’s] analysis[.]” *Id.*

B. The Prisoner Litigation Reform Act And Prisoner Release Orders Generally.

The Prison Litigation Reform Act (“PLRA”) places strict limits on a district court’s ability to order the release of inmates “in any civil action with respect to prison conditions,” and expressly precludes a single district judge from doing so. 18 U.S.C. § 3626(a)(3)(B). That prohibition applies to “any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison[.]” § 3626(g)(2). In non-prohibited suits, the court “may enter a temporary restraining order or an order for preliminary injunctive relief,” but such injunctive relief “must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.” § 3626(a)(2). Under the PLRA, a “prisoner release order”—which “includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison,” § 3626(g)(4)—may “be entered only by a three-judge court,” § 3626(a)(3)(B), and then only if certain conditions have been met. Among other requirements, “no court shall enter a prisoner release order unless—(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount

of time to comply with the previous court orders.” § 3626(a)(3)(A).

Congress enacted the PLRA “to oust the federal judiciary from day-to-day prison management.” *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997); *see also Benjamin v. Jacobson*, 172 F.3d 144, 182 (2d Cir. 1999) (en banc) (Calabresi, J., concurring) (“The en banc majority argues at length that Congress meant to get the federal courts out of the business of running jails, and it cites any number of congressional statements to that effect. I agree.”). “Congress intended the PLRA to revive the hands-off doctrine,” which was “a rule of judicial quiescence derived from federalism and separation of powers concerns.” *Gilmore v. California*, 220 F.3d 987, 991, 997 (9th Cir. 2000). Section 3626 thus “restrict[s] the equity jurisdiction of federal courts,” *Gilmore*, 220 F.3d at 999, and, “[b]y its terms . . . restricts the circumstances in which a court may enter an order ‘that has the purpose or effect of reducing or limiting the prison population,’” *Brown v. Plata*, 563 U.S. 493, 511 (2011). The PLRA’s “requirements ensure that the ‘last remedy’ of a population limit is not imposed ‘as a first step.’” *Id.* at 514 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)). “The release of prisoners in large numbers . . . is a matter of undoubted, grave concern.” *Id.* at 501.

C. Petitioners Must Seek Relief Under The Bail Report Act In Their Respective Criminal Cases Because The Prisoner Litigation Reform Act Precludes This Court From Reducing Or Limiting The Prison Population In This Case.

The PLRA precludes this Court from ordering the primary relief Petitioners seek here. “The authority to release prisoners as a remedy to cure a systemic violation of the Eighth Amendment is a power reserved to a three-judge district court, not a single-judge district court.” *Plata*, 563 U.S. at 500 (citing 18 U.S.C. § 3626(a)); *see* 18 U.S.C. § 3626(a)(3)(B) (“In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court[.]”). Moreover, such an order may not be entered unless “(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation

of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.” § 3626(a)(3)(A). And, even a three-judge court may order prisoners released to remedy unconstitutional prison conditions “only if the court finds by clear and convincing evidence” that “crowding in the primary cause of the violation” and “no other relief will remedy [it.]” § 3626(a)(3)(E)(i)-(ii).

Here, there can be no legitimate dispute that Petitioners’ lawsuit is a “civil action with respect to prison conditions” governed by the PLRA. The PLRA defines “civil action with respect to prison conditions” broadly to mean “any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but [that term] does not include habeas corpus proceedings challenging the fact or duration of confinement in prison[.]” § 3626(g)(2). This case neatly falls within that definition. *Id.* Although Petitioners invoke habeas corpus and 28 U.S.C. § 2241, Doc. # 1 ¶¶ 17-18, this is not a “habeas corpus proceeding[] *challenging the fact or duration of confinement in prison.*” § 3626(g)(2) (emphasis supplied). Petitioners make no claims regarding the fact or duration of their detention.⁸ Rather, Petitioners challenge the conditions of their confinement at PCCF as inadequate to address the threat to health and safety posed by COVID-19. Doc. # 1 ¶ 1. This case is thus a “civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of

⁸ See generally *Preiser v. Rodriguez*, 411 U.S. 475, 507 (1973) (Brennan, J., dissenting) (noting that “an attack on the validity of conviction or sentence is plainly directed at the fact or duration of confinement,” and that a challenge to the deprivation of good-time credits also “falls within” that definition); *Moran v. Sondalle*, 218 F.3d 647, 650-51 (7th Cir. 2000) (per curiam) (“State prisoners who want to challenge their convictions, their sentences, or administrative orders revoking good-time credits or equivalent sentence-shortening devices . . . contest the fact or duration of custody.”).

persons confined in prison” governed by the PLRA. § 3626(g)(2).

The PLRA strictly limits the relief this Court may grant. Under the PLRA, a single district court judge may not enter “a prisoner release order,” § 3626(a)(3)(B), which is broadly defined to “include[] any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison[.]” § 3626(g)(4). Therefore, to the extent Petitioners seek an injunction that would require Respondent “to reduce the federal detainee population at PCCF by releasing a sufficient number of federal detainees from the facility in order to ensure the health and safety of all members of the Class,” Doc. # 1 at 39, or for the appointment of “an expert under Federal Rule of Evidence 706 to make recommendations to the Court regarding how many and which class members to order released,” *id.*, the PLRA precludes that relief.

As another district court recently recognized, although “the issue of inmate health and safety is deserving of the highest degree of attention,” an “order imposing a court-ordered and court-managed ‘process’ for determining who should be released” from a state prison in response to the COVID-19 pandemic falls “squarely within Section 3626(a)(3)—which forbids this Court from granting it.” *Money v. Pritzker*, No. 20-cv-2093, 2020 WL 1820660, at *1, 13 (N.D. Ill. April 10, 2020). “[T]he release of inmates requires a process that gives close attention to detail, for the safety of each inmate, his or her family, and the community at large demands a sensible and individualized release plan—especially during a pandemic.” *Id.* at *1. Individual motions for release under the BRA allows judges to undertake that “inherently inmate-specific inquiry,” *id.*, and are the proper legal vehicle for Petitioners to attempt to obtain release due to health risks posed by the COVID-19 pandemic. *See also* Doc. # 3266, *Plata v. Newsom*, No. 01-cv-01351

(D.N. Cal. Apr. 17, 2020) (same).⁹

II. THE PETITION MUST BE DENIED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE PETITIONERS CANNOT ESTABLISH STANDING.

Even without the above prohibition, the Petition must be denied because Petitioners lack standing. It is fundamental that the Constitution “confers limited authority on each branch of the Federal Government.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546-47 (2016). As relevant here, the judicial power of the United States is limited to “cases” and “controversies.” U.S. Const. art. III, § 2, cl. 1. “The doctrine of standing gives meaning to these constitutional limits by ‘identify[ing] those disputes which are appropriately resolved through the judicial process.’” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Standing thus “serves to prevent the judicial process from being used to usurp the powers of the political branches.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013). The standing inquiry also focuses on whether a particular plaintiff is the proper party to challenge government conduct. *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

As the party invoking federal jurisdiction, a plaintiff must establish the three elements that constitute the “irreducible constitutional minimum” of standing: that (i) it suffered an injury in fact (ii) fairly traceable to the challenged government conduct (iii) that is likely to be redressed by a favorable judicial decision. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102-03 (1998). Moreover, a plaintiff must “demonstrate standing for each claim [it] seeks to press and for each

⁹ Petitioners’ cited cases (Doc. # 1 ¶ 59) are all inapt. Individuals who are being detained pending deportation are not “prisoners” as defined by the PLRA. *See* 18 U.S.C. § 3626(g)(3) (“[T]he term ‘prisoner’ means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program[.]”). And, examples of other federal pretrial criminal detainees released under the BRA proves Respondent’s point. As discussed above, filing individual motions under the BRA is the only appropriate way for such detainees seek release due to the health risk posed by COVID-19.

form of relief that is sought.” *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted), *remanded to Laroe Estates, Inc. v. Town of Chester*, 693 F. App’x 69 (2d Cir. 2017). The standing inquiry is “especially rigorous” where, as here, a plaintiff asks a federal court “to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.” *Raines*, 521 U.S. at 819-20.

In this case, Petitioners have established neither injury in fact nor redressability.

A. Petitioners Lack Injury In Fact Based On The Site-Specific Circumstances At The Plymouth County Correctional Facility.

To establish injury in fact, a plaintiff must first show that he or she suffered “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). Injury in fact is a “constitutional requirement” and is the “[f]irst and foremost” of standing’s three elements. *Id.* at 1547-48 (quoting *Steel Co.*, 523 U. S. 83, 103 (1998)). To be “particularized” the injury “must affect the plaintiff in a personal and individual way.” *Lujan*, 504 U.S. at 560 n.1. “Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be ‘concrete.’” *Spokeo, Inc.*, 136 S. Ct. at 1548. A “concrete” injury must be “‘*de facto*’; that is, it must actually exist[,]” that is, it must be “real,” and not “abstract.” *Id.* While “the risk of real harm” may, in some circumstances, be sufficiently concrete, “imminence . . . cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes -- that the injury is ‘*certainly impending*.’” *Lujan*, 504 U.S. at 568.

Petitioners’ alleged harm—that their detention increases the risk of harm from COVID-19—is speculative based on the site-specific circumstances at PCCF. *E.g.*, *Spokeo, Inc.*, 136 S. Ct. at 1548 (injury in fact cannot be “conjectural or hypothetical”); *Lujan*, 504 U.S. at 568 (injury in fact cannot be “speculative”). There is not currently, and has never been, a case of COVID-19

in the inmate and detainee population at PCCF. Ex. A ¶ 7; Ex. B. ¶ 24. Although there has been one case of COVID-19 of a PCCF staff member, it has been 33 days since that individual was last at PCCF. Ex. A ¶ 7; Ex. B. ¶ 24. To put that into perspective, 33 days is more than six times the median incubation period (about five days) and more than double the CDC’s recommended quarantine period (14 days). Indeed, the fact that a staff member tested positive for COVID-19 in mid-March, and yet there are zero cases of COVID-19 in the inmate and detention population as of April 20, indicates that PCCF’s efforts *are working* and that injury in fact is speculative.¹⁰

Similarly, Petitioners cannot meet the imminence requirement based on the specific facts of this particular case. *E.g., Spokeo, Inc.*, 136 S. Ct. at 1548 (injury in fact must be “actual or imminent”); *Lujan*, 504 U.S. at 568 (injury in fact must be “*certainly* impending”). None of the Petitioners in this care is held in crowded units. To the contrary, the units housing Baez, Bermudez, and Gonsalves are half empty, Ex. A ¶¶ 9-11, and Lindsey’s unit is at less than 20 percent capacity, *id.* ¶ 12. And, both Bermudez and Gonsalves have their own cells. *Id.* ¶¶ 10-11. When Petitioners are in common areas, such as during recreation and meals, PCCF takes a variety of precautions that reasonably provide for adequate social distancing. *Id.* ¶¶ 10-11. Moreover, Petitioners’ own healthcare provider attests, based on a review of their medical records and observations during detention, that none them has a medical condition that presents “a higher risk for COVID-19.” *See* Decl. of Marcia Norat, attached as Exhibit E hereto.¹¹ These facts stands in sharp contrast to Petitioners’ conjecture, and undermines their claim that the efforts to prevent

¹⁰ This is consistent with the medical opinion of CAPT Steven S. Wolf, MD, a PHS physician and the Medical Director for the USMS Prisoner Operations Division. Ex. C. ¶ 10. After reviewing Respondent’s declarations submitted in this case, Dr. Wolf opines that “PCCF is providing appropriate precautions to protect their prisoner population during the current COVID-19 pandemic.” *Id.*

¹¹ Ms. Norat is PCCF’s Health Services Administrator. Ex. E. Because her declaration contains medical information about Petitioners, it has been submitted under seal.

exposure to COVID-19 at PCCF are insufficient to the point where they require the extraordinary remedies they seek, including judicial monitoring and release of detainees.¹²

B. Petitioner’s Alleged Injury—A Heightened Risk For Serious Illness Or Death From COVID-19—Is Not Redressable By Release.

Separately, Petitioners lack standing because their alleged injury—that they are subject to a heightened risk of death from COVID-19—will not be redressed by ordering their release. “Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury.” *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.). For purposes of standing, a plaintiff’s injury is redressable where there is “a ‘substantial likelihood’ that the requested relief will remedy the alleged injury.” *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (citation omitted). Petitioners’ desired relief—release from detention—will not ameliorate their claimed heightened risk of injury or death resulting from COVID-19, nor can release prevent them from contracting COVID-19.

Petitioners offer no proof—nor is Respondent aware of any—that their release from PCCF, a facility without a single case of COVID-19 in the inmate and detainee population, into Massachusetts, which has declared a state of emergency based on the COVID-19 crisis, or anywhere else, will reduce their risk of injury or death. *See generally* Doc. # 1. Although infection rates in Plymouth County are relatively low (less than half of one percent of the population), that rate is higher than zero—the current infection rate among inmates and detainees at PCCF.

¹² These unique facts—(1) the presence of a much earlier staff case that did not result in any cases among the inmate or detainee population, (2) units at half capacity or even less, and (3) two of the Petitioners with their own cells—materially distinguishes this case from other cases seeking similar relief. For example, those circumstances did not exist in *Savino v. Souza*, No. 20-10617, 2020 WL 1703844, (D. Mass. Apr. 8, 2020), where Judge Young found that the petitioners had standing. *Id.* at *4.

Moreover, it cannot be overlooked that PCCF provides medical care at no cost to detainees, including Petitioners. By reason of their detention, Petitioners have greater access to robust medical care than many in the general public. Ordering their release from PCCF would leave Petitioners without their present access to health care and could put them at greater risk of serious complications in the event that they contract COVID-19. As Dr. Baker attests generally in his declaration:

While it is clear that a prison setting poses particular challenges from an infectious disease stand-point, the risk of infection is tempered by the degree of control we have over access to the facility. We are screening incoming detainees/inmates carefully and taking steps to isolate them as necessary. We have a highly educated and trained staff that is acutely aware of the risks posed by the pandemic. We are also providing a level of medical care to the detainees/inmates that they are unlikely to receive outside of PCCF.

Ex. B ¶ 21.

Accordingly, for both of the above reasons—(1) that Petitioners lack injury in fact, and (2) that the alleged injury is not redressable by release—the Petition must be denied for lack of standing. *E.g., Spokeo, Inc.*, 136 S. Ct. at 1548; *Steel*, 523 U.S. at 102-03; *Lujan*, 504 U.S. at 560.

III. THE PETITION MUST BE DENIED FOR FAILURE TO STATE A CLAIM BECAUSE PETITIONERS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES, AS THE PRISON LITIGATION REFORM ACT REQUIRES.

Independently, the Petition must be denied for failure to state a claim because Petitioners did not, and did not even attempt to, exhaust their administrative remedies prior to filing this lawsuit. *See Johnson v. California*, 543 U.S. 499, 528 n.1 (2005) (assuming that PRLA exhaustion is not jurisdictional); *Casanova v. Dubois*, 289 F.3d 142, 147 (1st Cir. 2002) (“Although not jurisdictional, the exhaustion requirement is nonetheless mandatory” under the PLRA).

A. Petitioners Did Not Even Attempt To Exhaust Their Administrative Remedies.

The PLRA provides that “[n]o action shall be brought with respect to prison conditions under . . . any . . . Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The PLRA’s mandatory exhaustion requirement applies to pretrial criminal detainees like Petitioners, *id.* § 1997e(h); *Acosta v. U.S. Marshals Serv.*, 445 F.3d 509, 512 (1st Cir. 2006), and, indeed, “all inmate suits about prison life,” *Porter v. Nussle*, 534 U.S. 516, 532 (2002). *See also Cutter v. Wilkinson*, 544 U.S. 709, n. 12 (2005) (similar); *Medina-Claudio v. Rodriguez-Mateo*, 292 F.3d 31, 36 (1st Cir. 2002) (same). *Accord Jackson v. District of Columbia*, 254 F.3d 262, 266 (D.C. Cir. 2001) (same); *Walker v. O’Brien*, 216 F.3d 626, 636-37 (7th Cir. 2000) (same).

In this case, the Department has a grievance procedure at PCCF that provides several ways to address disputes about the conditions of confinement. Ex. A. ¶ 16. As relevant here, the grievance procedure contains a provision for an “Emergency Grievance.” *Id.* That provision provides that “[i]f a grievance is of an emergency nature, the Responsible Personnel will immediately forward to the [Institutional Grievance Coordinator] the grievance and any accompanying documentation.” *Id.* In addition, “[t]he [Institutional Grievance Coordinator] will reply to the inmate *as soon as possible*.” *Id.* (emphasis supplied). Yet not one of the Petitioners in this case filed a grievance—emergency or otherwise—regarding their concerns that the conditions at PCCF were inadequate to address the threat to health and safety posed by COVID-19. *See* Decl. of Capt. Mark Holmes, attached as Exhibit F hereto, ¶ 4.¹³

¹³ Courts recognize that “in deciding [a] motion to dismiss for failure to exhaust, [they] may consider matters filed outside of the pleadings without converting such motion to one for summary judgment.” *Dzanku v. Brennan*, 270 F. Supp. 3d 376, 378 n.2 (D. Mass. 2017).

Because Petitioners failed to exhaust administrative remedies, the Court should deny the Petition unless Plaintiff has shown that his case fits within an exception to the exhaustion requirement. For the reasons discussed below, Petitioners have not done so (nor can they).

B. The Narrow Exceptions for Failure to Exhaust Do Not Apply Here.

Failure to exhaust may be excused only (1) where the remedy “operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates”; (2) where the administrative scheme is “so opaque that it becomes, practically speaking, incapable of use;” or (3) where “prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016). None of those three narrow exceptions applies here.

The first exception—that the process for relief was “a simple dead end”—is patently inapplicable in this case. As described above, PCCF has a robust set of grievance procedures. Ex. A ¶ 16. Because Petitioners took *no action* required under those procedures, it cannot be said that they were met “with officers unable or consistently unwilling to provide any relief.” *Ross*, 136 S. Ct. at 1859-60. The second exception—that the administrative process was “so opaque” as to become “incapable of use”—is inapplicable based on the procedures themselves, which are straightforward, especially for an “emergency grievance.” Ex. A ¶ 16. The third and final exception—that administrators inappropriately “thwart[ed]” use of the process—is inapplicable as well. Nothing in the Petition suggests that Petitioners’ pursuit of administrative remedies was hindered “through machination, misrepresentation, or intimidation.” *Ross*, 136 S. Ct. at 1859-60.

* * *

To be sure, COVID-19 presents unusual circumstances, in which decisions regarding prisoner grievances should be made expeditiously (as provided in PCCF’s grievance procedures). But permitting prisoners to ignore the PLRA’s mandatory exhaustion requirement, even in these

unusual circumstances, would frustrate Congress's objective in the PLRA to "eliminate unwarranted federal-court interference with the administration of prisons," and "reduce the quantity and improve the quality of prisoner suits." *Woodford v. Ngo*, 548 U.S.81, 93 (2006) (quoting *Porter*, 534 U.S. at 524). More problematically, permitting prisoners to ignore the PLRA's mandatory exhaustion requirement would deprive prisons of "a fair opportunity to correct their own errors," *id.* at 93, as Petitioners have done here by filing this lawsuit last Friday instead of submitting emergency grievances weeks ago. Because Petitioners failed to exhaust their administrative remedies as required by the PRLA, and because none of the exceptions to the exhaustion requirement applies in this case, the Petition should be denied. *E.g.*, *Johnson*, 543 U.S. at 528 n.1; *Casanova*, 289 F.3d at 147 (1st Cir. 2002).

IV. THE PETITION MUST BE DENIED TO THE EXTENT IT SEEKS AN INJUNCTION REQUIRING RESPONDENT TO RELEASE DETAINEES SUBJECT TO AN ORDER OF DETENTION FROM A FEDERAL COURT.

Even if Petitioners could overcome all three of the above barriers to this lawsuit (and they cannot), Respondent lacks the authority to provide the primary relief they seek in this lawsuit: their release from detention. Doc. # 1 at 39 (section B.1-2 of the prayer for relief). Although Respondent is the immediate custodian for Petitioners, they are not subject to detention by any authority of Respondent. Rather, Petitioners are subject to detention by order of the federal judges assigned in each of their pending criminal cases. *See* 18 U.S.C. § 3142. Petitioners cite no authority for the extraordinary proposition that Respondent may reduce its detainee population when those detainees are subject to valid, case-specific orders of detention from other federal judges in this district (or have requested detention, like Lindsey, resulting in an order of detention). *See* Doc. # 1 at 39 (section B.1 of the prayer for relief). Nor do Petitioners cite any authority for the equally extraordinary proposition that a court-appointed expert may usurp that judicial function

in the guise of “recommendations to the Court regarding how many and which class members to order released.” *Id.* at 39 (section B.2 of the prayer for relief).

As discussed above, the bail process is the only appropriate legal avenue through which Petitioners may seek release due to the threat to health and safety posed by COVID-19. Bail applications, which must be raised before the judge who is assigned to the detainee’s criminal case, may be made at any time. In addition to the standard motions for release by pretrial defendants, 18 U.S.C. § 3142(b), or for post-conviction release, 18 U.S.C. § 3143, or bail pending appeal, 18 U.S.C. § 3143(b)(1), a defendant may seek release under 18 U.S.C. § 3142(i), which provides that a “judicial officer may, by subsequent order, permit the temporary release of [a] person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person’s defense or for another compelling reason.” Certain extreme medical circumstances may present “compelling reasons” that could warrant a highly circumscribed release. Indeed, various applications of this type have already been made in this district. *E.g.*, Doc. # 568, *United States v. Nia-Bush Moore*, No. 18-CR-30001 (D. Mass.) (Young, J.) (denying pretrial detainee’s motion for release due to COVID-19 because her particular medical conditions were likely more safely managed by prison medical staff than in community given her history of noncompliance).

Because Petitioners may seek release at any time in their criminal cases, Respondent requests that this Court deny the Petition to the extent it seeks release here. Having Petitioners seek release (or seek release again) in their pending criminal cases would remove concerns that arise in parallel proceedings seeking the same relief, namely, judicial economy and the potential for confusion and conflicting orders. *See, e.g.*, *Gon v. Gonzales*, 534 F. Supp. 2d 118, 120 (D.D.C. 2008) (“In Gon’s criminal case, Magistrate Judge Kay ordered Gon to be detained pre-trial under

the federal bail statute. The court docket in Gon’s case reflects that he is challenging the detention order before the assigned district judge. That is the appropriate path for Gon to follow. Filing this petition, by contrast, potentially abuses the writ of habeas corpus, unduly duplicates judicial efforts, and circumvents traditional remedies afforded to safeguard Gon’s liberty interests.”).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny the Petition for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted pursuant to Rule 12(b)(1) and Rules 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

ANTONE MONIZ
Superintendent of the Plymouth
County Correctional Facility

By his attorneys,

ANDREW E. LELLING,
United States Attorney

By: /s/ Jason C. Weida
Jason C. Weida
Assistant U.S. Attorney
United States Attorney’s Office
1 Courthouse Way, Suite 9200
Boston, Massachusetts 02210
(617) 748-3180
Jason.Weida@usdoj.gov

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EXHIBIT A

DECLARATION OF SHERIFF JOSEPH D. McDONALD, JR.

I, Joseph D. McDonald, Jr., provide this declaration based on my personal knowledge, reasonable inquiry, and information obtained from records of the Plymouth County Correctional Facility maintained and relied upon by me in the regular course of business:

1. I am the Sheriff of Plymouth County. I have held that office since January of 2005. Prior to my election, I was an attorney in private practice and then an assistant district attorney. I have been an attorney since 1991.
2. The primary mission of the Sheriff's Department ("Department") is the operation of the Plymouth County Correctional Facility ("Facility"). The safety of the persons committed to the Department's care and custody, the staff, and the public is of paramount importance.
3. The Department takes very seriously its obligation to provide proper medical care to the inmates at the Facility. The Department maintains a full-time medical staff which is on duty 24-7. The Department contracts with Correctional Psychiatric Services ("CPS") to provide medical services. The contract provides for a medical doctor on site 40 hours per week, a nurse practitioner or physician's assistant on site 36 hours per week, and 24-7 on-call coverage. The contract also provides for optometry, podiatry, radiology, and diagnostic testing services. In addition, CPS provides psychiatric care, a mental health program, and a full-time health services administrator. The Department's nursing staff consists of 21 full-time employees plus a nursing supervising lieutenant. Additionally, the Department has contacts with hospitals throughout the greater Boston area to provide specialty or advanced care as needed. Beth Israel Deaconess Plymouth is located within one mile of the Facility.
4. The Department is currently and for many years has been accredited by the American Corrections Association, and has been certified in compliance with the federal Prison Rape Elimination Act.
5. With the onset of the appearance of COVID-19, in conjunction and consultation with the Massachusetts Department of Public Health ("DPH"), the Center for Disease Control ("CDC"), and other public health agencies and correctional institutions, CPS and the Department have instituted strict protocols to keep inmates, detainees, and staff safe and take all prudent measures to prevent exposure to the COVID-19 infection.
6. The Department has taken special precautions to protect inmates and staff from exposure to the Coronavirus. These precautions include:

- a. Beginning in February, the Department enhanced its inmate intake procedure to obtain additional information about travel and exposure to illness.
- b. The Department has adopted treatment and detection practices consistent with guidelines from the CDC and DPH. The Department's health services administrator is in frequent contact with DPH and consults them on the challenges facing the Department.
- c. The Department suspended visits by friends, families, and volunteers. To assist with the transition, the Department arranged with its telephone vendors to provide two free calls per week.
- d. The Department restricted attorney visits to non-contact. The Department disabled monitoring and recording functions for visit phones.
- e. The Department has kept non-essential staff from entering the Facility, consistent with the governor's order for executive staff.
- f. The Department has ceased inmate assignments to the farm operation, community work crew, and other work details outside the Facility.
- g. The Department has eliminated unnecessary movement within the Facility.
- h. The Department established a housing unit for newly admitted inmates and inmates who leave and return to the Facility, to monitor for signs and symptoms of the virus. Inmates remain in the unit until they clear the incubation period.
- i. The Department has worked with Trial Court officials to limit travel outside the Facility by conducting hearings by videoconference and telephone. This greatly has reduced travel to and from the Facility and resulting potential exposure.
- j. The Department has changed recreation and meal schedules to provide more space in the dayrooms. Inmates and detainees in standard large and small housing units have split recreation schedules so that approximately half are permitted access to the day room at one time. The inmates and detainees have split meal periods, as well.
- k. The Department maintains an aggressive cleaning schedule for the housing units and conducts daily sanitation of transportation vans.
- l. The Department has educated staff and inmates on sanitation practices and proper social distancing. The Department provides soap to the inmates

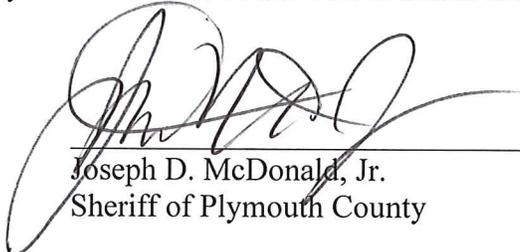
and detainees weekly and as needed. The Department also provides cleaning supplies.

- m. The Department conducts temperature screenings for all employees, contractors, and visitors to the Facility.
 - n. The Department has provided surgical masks for all Facility staff and inmates. The Department encourages all staff to wear masks while on duty. The Department encourages inmates to wear masks while out of their cells and requires them to wear masks while working or when leaving the housing unit.
 - o. The Department has installed hand sanitizer dispensers in every housing unit.
7. As of 10am on April 20, there were 702 inmates and detainees at the Facility, including 172 detainees committed to the care and custody of the United States Marshal. Not one of the inmates or detainees has tested positive for COVID-19. The Facility currently is significantly under capacity. The Facility originally was designed to house 1250 inmates, and has a maximum capacity of 1742.
8. At present time, there are 642 full-time and 235 part-time employees at the Department. Only one of those employees (a caseworker) tested positive after developing symptoms after being at the Facility on March 19. The employee has not returned to the Facility since. Consistent with guidance from DPH, the Department traced the employee's contacts within the Facility. The Department kept out of the Facility for at least 14 days all coworkers who had close contact with employee. The Department used surveillance footage to verify that the employee did not have close contact with any inmates or detainees, as the employee maintained a distance of six feet and wore a mask and gloves during all encounters.
9. According to housing reports, detainee Anthony Baez is assigned to Unit DS1, a small housing unit with a capacity of 62. As of April 20, the population of the unit was 34. The inmate roster reflects that Baez was assigned to a five-man cell with two other inmates on that date.
10. According to housing reports, detainee Jonathan Bermudez is assigned to Unit H3, a large unit with a capacity of 139. As of April 20, the population of the unit was 74. The inmate roster reflects that Bermudez was in a cell by himself on that date.
11. According to housing reports, detainee Jermaine Gonsalves is assigned to Unit H1, a large unit with a capacity of 139. As of April 20, the population of the unit was 68. The inmate roster reflects that Gonsalves was in a cell by himself on that date.

12. According to housing reports, detainee Dedrick Lindsey is assigned to Unit BS1, a dormitory unit with a capacity of 60. As of April 20, the population of the unit was 10.
13. To permit and encourage social distancing, the security staff spread out the day room chairs in the units. The Department conducts split recreation in the standard large and small units, with each side (in the large units) or each tier (in the small units) of the unit entering the day room at different times. The split recreation periods provide much more space in the day room and offer significant opportunity for social distancing. The Department similarly provides meals for each portion of the large and small units at different times. This provides detainees multiple seating options which provide significant opportunity for social distancing. The inmates in the dormitory units continue to recreate and eat together.
14. Multiple times each day, unit workers sanitize the units. Workers clean all tables, phones, day room chairs, showers, and cell door handles with 100 product multi-use disinfectant 256. Laundry workers clean all mop heads and cleaning rags every morning. Maintenance officers regularly use Virex spray to disinfect showers, day room chairs, tables, phones, all door handles, and railings in the morning before recreation periods begin. A cleaning crew cleans all visit rooms and sally ports with Virex fogging spray. The Department provides the detainees antibacterial soap weekly and as needed and provides the detainees the cleaning supplies they need. The Department provides toilet paper weekly and as needed. The detainees have access to the 100 product disinfectant to clean their cells. Unit workers have access to nitrex gloves for their assignments, and all inmates have access to plastic gloves at the officer panel for cleaning. The Department runs a laundry unit to keep clothing clean.
15. The Department has the ability to conduct COVID-19 testing on-site and has contacts with public and private laboratories which can process results.
16. The Department has an inmate grievance procedure which provides inmates the mechanism to address disputes about the conditions of confinement. The inmate grievance procedure contains a provision for an "Emergency Grievance." That provision provides that "[i]f a grievance is of an emergency nature, the Responsible Personnel will immediately forward to the [Institutional Grievance Coordinator] the grievance and any accompanying documentation." In addition, "[t]he [Institutional Grievance Coordinator] will reply to the inmate as soon as possible." A true and correct copy of the inmate grievance procedures are attached to this declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

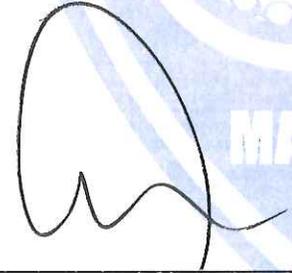
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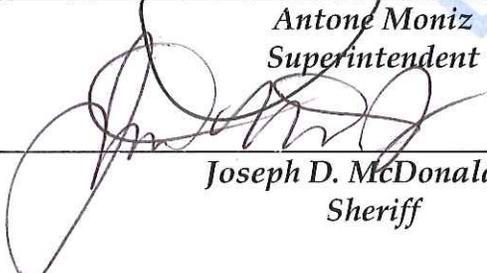
Joseph D. McDonald, Jr.
Sheriff of Plymouth County

 <p>Plymouth County Sheriff's Department Plymouth County Correctional Facility</p> <p>Joseph D. McDonald, Jr. Sheriff</p> <p>Antone Moniz Superintendent</p>	<p>PCCF</p> <p>491</p>	<p>Number of Pages</p> <p>6</p>
	<p>PROCEDURE</p>	<p>INMATE GRIEVANCE PROCEDURE</p>

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APPROVED: _____

 Antone Moniz
 Superintendent

DATE: 31 Jan 2020

APPROVED: _____

 Joseph D. McDonald Jr.
 Sheriff

DATE: 2-6-2020

I. GENERAL INFORMATION

A. Definitions

Inmate Grievance - A written complaint by an inmate concerning an incident, a condition of confinement, or the application of any institutional policy, rule or regulation for which redress is sought, not to include classification or disciplinary decisions for which there are appeal mechanisms.

Institutional Grievance Coordinator (IGC) - Staff person(s) responsible for attempting internal resolution of grievances and for coordinating the grievance procedure at the facility.

Responsible Personnel - That Supervisor responsible to oversee, manage and assume responsibility for the actions / activities which take place under his / her supervision. Responsible Personnel will include but not be limited to Managers, Directors, ADS', Captains, and Lieutenants.

B. Inmate Grievance Form

Copies of Inmate Grievance Forms (Attachment 1) will be available in the housing units. Inmates may obtain an Inmate Grievance Form from their Unit Officer.

C. No Group Grievances

No grievance will be accepted that is filed by a group, on behalf of a group or a grievance which includes more than one inmate.

1. Grievances filed on behalf of an individual, by the individual, will be accepted.

D. Emergency Grievance

If a grievance is of an emergency nature, the Responsible Personnel will immediately forward to the IGC the grievance and any accompanying documentation.

1. The IGC will reply to the inmate as soon as possible.

E. Time Periods

1. A completed Inmate Grievance Form must be submitted within ten (10) working days of the incident.
2. Time periods may be extended for both inmates and reviewers for legitimate reasons. Written notice of such extension will be given to the inmate.
3. Failure by an inmate to comply with time restrictions will terminate the grievance process.
4. Failure to render a decision within time restrictions will constitute a denial and the inmate may proceed to the next step.

F. Guarantee Against Reprisal

Inmates who file legitimate written complaints under the provisions of this procedure will not be subject to reprisal or punitive actions because of such filing.

**Plymouth County Sheriff's Department
Plymouth County Correctional Facility**

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Inmate Grievance Procedure**

II. INMATE GRIEVANCE FORM

- A. Inmates will submit completed hand written grievance forms in the locked box located in each housing unit.
1. The Manager, Director, ADS, Captain, Lieutenant or designee, as assigned, will remove all written inmate grievance forms from the locked box on a daily basis. All forms will be forwarded to the IGC for review, distribution and response.
- B. Electronic Grievance Forms will be sent directly to the IGC, via electronic mail.
1. Where available in the facility, inmates / detainees will have access to an electronic grievance. This form may be completed by the inmate / detainee, via a computer terminal in the dayroom of the unit.
 - a. Inmates will be required to use their facility pin number to access the computer.
 - b. The form will automatically complete the inmate / detainee's informational section of the form.
 - c. The inmate / detainee will complete the questions as asked on the form fill.
 - d. Once all of the questions are completed, the inmate / detainee will acknowledge and submit the form which will automatically be delivered electronically to the IGC.
- C. Upon review of the grievance the IGC will determine and forward the grievance to the Responsible Personnel for review, investigation and ultimately a response in accordance with pre-determined time limitations listed within this procedure.
1. Assignments of all grievance responses will be the responsibility of the IGC and will be determined by the Supervisor responsible for an area supervised being determined the Responsible Personnel by the IGC.
 - a.
- D. The IGC will monitor the time constraints of the policy for all forwarded electronic grievances. All time constraints responses and notifications will remain as listed in this policy / procedure.
- E. Responsible Personnel will review all grievance forms received from the IGC and when necessary, interview the inmate filing the form, interview any staff involved with or relevant to the grievance.
1. Responsible Personnel will submit, in written form, on the grievance form results of review, a recommendation and / or solution to the grievance.
 2. Responsible Personnel will, upon completion of each grievance review, forward all completed grievance forms to the IGC.
- F. Grievances regarding the Health Services Unit or Health care delivery in the facility will be forwarded for a proper response from the Health Services Administrator.
1. The Health Services Administrator and / or designee will coordinate with staff or contracted personnel to formulate a response and / or resolution.
 2. The Health Services Administrator and / or designee will complete the form and return to the IGC for further disposition.
- G. Any Inmate Grievance Form that contains multiple grievances or does not contain, at a minimum and legibly written, the date of incident, pertinent facts, any remedy requested and inmate's signature with a written explanation, will not be accepted.
1. Responsible Personnel will receive such grievance from the IGC, meet and instruct the inmate upon interview on the proper manner in which the grievance must be filed.

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2. Responsible Personnel will, upon completion of each grievance review, forward all completed grievance forms to the IGC.
- H. The IGC will note the date that a properly completed form was received. The IGC may extend the filing deadline to thirty (30) days.
- I. The IGC will investigate the grievance, the Responsible Personnel's recommendation / solution, interviewing the inmate and / or relevant staff as necessary.
- J. After an investigation of the facts, the IGC will render a decision in writing, sign the grievance form, and providing the inmate a copy and informing him of the final decision within ten (10) working days from receipt of the complaint form.
- K. All formal inmate grievances which are not approved, will include a written explanation and will clearly state any corrective actions to be taken.

III. PREA GRIEVANCES: EXHAUSTION OF ADMINISTRATIVE REMEDIES

- A. The Plymouth County Sheriff's Department shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse.
- B. The Plymouth County Sheriff's Department shall not require an inmate to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse.
- C. The Plymouth County Sheriff's Department shall ensure that—
 1. An inmate who alleges sexual abuse may submit a grievance without submitting it to a staff member who is the subject of the complaint, and
 2. Such grievance is not referred to a staff member who is the subject of the complaint.
- D. The Plymouth County Sheriff's Department shall issue a final agency decision on the merits of any portion of a grievance alleging sexual abuse within 90 days of the initial filing of the grievance.
 1. Computation of the 90-day time period shall not include time consumed by inmates in preparing any administrative appeal.
 2. The Plymouth County Sheriff's Department may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision. The Plymouth County Sheriff's Department shall notify the inmate in writing of any such extension and provide a date by which a decision will be made.
 3. At any level of the administrative process, including the final level, if the inmate does not receive a response within the time allotted for reply, including any properly noticed extension, the inmate may consider the absence of a response to be a denial at that level.
- E. Third parties, including fellow inmates, staff members, family members, attorneys, and outside advocates, shall be permitted to assist inmates in filing requests for administrative remedies relating to allegations of sexual abuse, and shall also be permitted to file such requests on behalf of inmates.
 1. If a third party files such a request on behalf of an inmate, the facility may require as a condition of processing the request that the alleged victim agree to have the request filed on his or her behalf, and may also require the alleged victim to personally pursue any subsequent steps in the administrative remedy process.
 2. If the inmate declines to have the request processed on his or her behalf, The Plymouth County Sheriff's Department shall document the inmate's decision.

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- F. The Plymouth County Sheriff's Department shall establish procedures for the filing of an emergency grievance alleging that an inmate is subject to a substantial risk of imminent sexual abuse.
1. After receiving an emergency grievance alleging an inmate is subject to a substantial risk of imminent sexual abuse, The Plymouth County Sheriff's Department shall immediately forward the grievance (or any portion thereof that alleges the substantial risk of imminent sexual abuse) to a level of review at which immediate corrective action may be taken, shall provide an initial response within 48 hours, and shall issue a final agency decision within 5 calendar days. The initial response and final agency decision shall document The Plymouth County Sheriff's Department's determination whether the inmate is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

IV. APPEAL PROCESS

- A. An inmate may appeal the IGC's decision in writing to the Superintendent or designee.
1. The original copy of the Inmate Grievance Form must accompany all appeals for review by the Superintendent or designee.
 2. An appeal must be submitted within ten (10) working days of the inmate's receipt of the IGC's decision.
- B. After noting the date of receipt on a grievance form, the Superintendent or designee will notify the IGC and conduct such investigation as is necessary.
- C. The Superintendent or designee will respond to the appeal in writing within thirty (30) working days of receipt of the original grievance and appeal.
1. Any specific corrective action to be taken will be clearly stated.
- D. ICE Detainees have a right to appeal any facility decision to ICE, a copy of the grievance and response should be included to expedite the appeal. The appeal may be directed to the ICE Agent(s) through facility mail, request procedures or in person.

V. GRIEVANCE WITHDRAWALS AND IGC RESOLUTIONS

- A. Any inmate wishing to withdraw a grievance which has been filed may do so. Both the inmate and the IGC will sign and date the Inmate Grievance Form, making the appropriate notation on the original form.
- B. Any inmate wishing to withdraw a grievance appeal should contact in writing the IGC who will notify the Superintendent of same and forward the inmate's correspondence for review.
- C. When a formal grievance has been resolved to the inmate's satisfaction prior to its final disposition by the Superintendent, the IGC will document it as resolved on the original form with the IGC's signature and date on the form.

VI. RECORD-KEEPING

The IGC will maintain a Facility Inmate Grievance Log, and a record of all inmate grievances which are appealed to the Superintendent.

- A. Originals of grievance forms, appeals and corresponding decisions will be returned to the subject inmate.
- B. Copies will be placed in the inmate's Individual Institutional Case File or DOC 6-Part Folder and maintained by the IGC, except where there is a withdrawal or resolution prior to a final decision.
- C. In the case of appeals, copies of all pertinent documents will also be sent to the Superintendent.

**Plymouth County Sheriff's Department
Plymouth County Correctional Facility**

**PCCF 491
Inmate Grievance Procedure**

- D. Grievances filed by ICE detainees will also be copied to the facility assigned ICE Agent with a corresponding notification e-mail.

VII. ADDITIONAL PROVISION FOR INMATES with A PSYCHIATRIC ILLNESS

When the inmate who has filed the grievance is diagnosed as having a psychiatric illness, the IGC will confer with the Superintendent and Health Services Administrator or institutional physician, or their designee(s) for purposes of formulating a joint recommendation.

- 1. All other requirements of this procedure are applicable.

VIII. ADDITIONAL PROVISION FOR NON-LITERATE, NON-ENGLISH SPEAKING, HANDICAPPED, OR DISABLED INMATES

Inmates who are non-literate, who cannot read or write legibly, who cannot speak or write English, or who may need assistance in preparing a grievance due to some physical or mental disability are encouraged to seek assistance from their assigned caseworker or other correctional staff member.

- A. In the event staff assistance is not available, inmate assistance under staff supervision may be used.

IX. INMATE TRANSFERS

When an inmate is transferred after a grievance has been filed but prior to its being resolved, the grievance, if still applicable, will remain the responsibility of the appropriate Plymouth County Correctional Facility staff insofar that it may be a vehicle to correct any institutional inadequacies that may exist.

X. APPLICABILITY

This procedure applies to all department employees and inmates.

XI. RESPONSIBLE STAFF

The Superintendent or designee will be responsible for implementing and monitoring this procedure.

XII. ATTACHMENT LIST

The following attachments are included with this document.

- Inmate Grievance Form
- Appointment as Grievance Officer
- Appointment as Alternative Grievance Officer

EXHIBIT B

DECLARATION OF PCCF MEDICAL DIRECTOR LAWRENCE BAKER, MD

I, Lawrence Baker, MD, being over the age of 18, hereby depose and say:

1. My name is Lawrence Baker, MD. I have held the position of Regional Medical Director for Correctional Psychiatric Services (CPS) as well as the Medical Director at Plymouth County Correctional Facility (PCCF) for 9 years. I am an employee of CPS, which has a contract with the PCCF to provide comprehensive medical services to inmates and detainees. I am also the Medical Director at Norfolk County House of Corrections and Middlesex County House of Corrections. I have held these positions since 2011.

2. As Medical Director, I am committed to providing the highest quality medical care to the detained and incarcerated population. I also provide clinical and administrative oversight of the health services staff. I have over 50 years of medical and 10 years correctional experience.

3. I have attended the following educational institutions and obtained the degrees listed:

1961 - 1965

Doctorate of Medicine

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF MEDICINE

Cleveland, OH

1957 - 1961

Bachelor of Arts in Chemistry and Zoology

OBERLIN COLLEGE Oberlin, OH

INTERNSHIP

7/1965 - 6/1966

Straight Medical BOSTON CITY HOSPITAL Boston, MA

RESIDENCY/FELLOWSHIP

7/1967 - 6/1969

Research Fellowship in Medicine (Cardiology)

TUFTS UNIVERSITY SCHOOL OF MEDICINE Boston, MA

7/1967 - 6/1969

Cardiology Research Fellowship

TUFTS CIRCULATION LABORATORY BOSTON CITY HOSPITAL Boston,

MA

7/1966 - 6/1967

Straight Medical Residency
TUFTS MEDICAL SERVICE BOSTON CITY HOSPITAL Boston, MA

In addition, I have taken various continuing medical education courses.

4. I am certified in Subspecialty Board in Cardiovascular Diseases American Board of Internal Medicine, and have active licenses in Massachusetts.

5. I have received the following honors and fellowships:

Alpha Omega Alpha Honorary Medical Society

Fellowship of the Council on Clinical Cardiology of the American Heart Association
Fellowship of the American College of Cardiology

Fellowship of the American College of Physicians

Academic Appointments:

TUFTS UNIVERSITY SCHOOL OF MEDICINE Boston, MA
1995. Appointed: Clinical Professor of Medicine Associate Clinical Professor of
Medicine Assistant Clinical Professor of Medicine. Assistant Professor of Medi-
cine Instructor in Medicine

6. CPS has 7 full time staff members at PCCF which include administrative and line medical providers and mental health staff. Currently one of our Psychiatric Nurse Practitioners is performing tele-medicine rather than in person as she has immediate family who are high risk for catching COVID-19. All other medical staff are on site.

7. All medical sick slips, representing inquiries or health concerns from detainees and inmates, are picked up once a day and detainees/inmates are seen by nursing staff within 24 hours. Mental health slips are also picked once a day and triaged. All crisis mental health detainees/inmates are seen immediately and emergent slips are addressed within 24 hours by a mental health clinician.

8. CPS drafted a document titled "CPS Clinical Guideline for COVID-19/CORONAVIRUS" ("CPS Clinical Guideline") to educate and guide CPS staff in dealing with the health issues stemming from the global coronavirus pandemic. The CPS Clinical Guideline follows the most recent guidance pertaining to correctional and detention facilities from the Centers for Disease Control and U.S. Immigration and Customs Enforcement, as well as recommendations from the Massachusetts Department of Public Health and the World Health Organization.

9. The CPS Clinical Guideline lists the possible symptoms of a COVID-19 infection and states that upon identification of any of the following symptoms, the patient should immediately be masked:

- Fever
- Cough
- Shortness of breath
- Loss of smell or taste
- Sore throat
- Tiredness
- Diarrhea

10. The CPS Clinical Guideline also provides that if a patient presents with fever and any other symptoms then the medical staff is to perform a rapid test for Influenza A and B. If the influenza test is negative, then medical staff is to test for COVID-19. If a COVID-19 test is positive, then staff are instructed to:

- a. Monitor vital signs, especially temperature and oxygen saturation twice a day;
- b. Offer acetaminophen 650 mg. twice per day or as needed for coronavirus symptoms for one week;
- c. Monitor the patient's respiratory status to include oxygen saturation, trouble breathing, persistent chest pain or pressure, new onset of confusion or inability to arouse and any signs of cyanosis. Nurses are to notify the on-call doctor immediately if any symptoms are present and discuss possible transport to the local emergency room;
- d. Restrict patient movement unless emergent for anyone in isolation. Any movement while in isolation requires that staff wear a mask with shield, gloves and gown.

11. The CPS Clinical Guideline provides that medical isolation of a patient with suspected COVID-19 infection be maintained until all the following criteria have been met:

- a. For individuals who will be tested to determine if they are still contagious:
 - The individual has been free from fever for at least 72 hours without the use of fever-reducing medications AND
 - The individual's other symptoms have improved (e.g., cough, shortness of breath) AND

- The individual has tested negative in at least two consecutive respiratory specimens collected at least 24 hours apart.
- b. For individuals who will NOT be tested to determine if they are still contagious:
- The individual has been free from fever for at least 72 hours without the use of fever-reducing medications AND
 - The individual's other symptoms have improved (e.g., cough, shortness of breath) AND
 - At least 7 days have passed since the first symptoms appeared.
- c. For individuals who had a confirmed positive COVID-19 test but never showed symptoms:
- At least 7 days have passed since the date of the individual's first positive COVID-19 test AND
 - The individual has had no subsequent illness.

12. The CPS Clinical Guideline provides for restriction of patients from leaving the facility while under medical isolation precautions, unless released from custody or if a transfer is necessary for medical care, infection control, lack of medical isolation space, or extenuating security concerns.

13. If an incarcerated/detained individual who is a COVID-19 case is released from custody during their medical isolation period, staff is instructed to contact public health to arrange for safe transport and continuation of necessary medical care and medical isolation as part of release planning.

15. COVID-19 health information has been posted in all units and visiting areas. Staff have access to CDC materials, including posting the link/url for the CDC website on all medical area computer equipment. A training website for CPS medical staff has been developed as well as a COVID-19 power point. PCCF medical staff has access to masks, disinfectant/sanitizer and other personal protective equipment.

16. Nursing staff have also been instructed to use any detainee/inmate interaction as a time to educate the detainee/inmate regarding COVID-19, including that all inmates need to wash their hands frequently, avoid crowds and stay apart at least 6 feet whenever possible, and to report any shortness of breath or concerns of fever immediately to either nursing or security.

17. Additionally, I understand that signs have been posted in all units in English, Spanish, Portuguese and Chinese, indicating that if a detainee/inmate feels sick, they should notify medical staff and have a mask applied immediately. As stated, detainees/inmates are also being educated during medical encounters on the signs and symptoms of a COVID-19 infection.

18. Upon receiving a new detainee/inmate, medical staff screen the individuals for signs and symptoms of infection. This includes event travel history, temperature checks, taking a recent medical history and observing the individual for any signs of sickness. If an individual appears symptomatic on admission a mask is applied immediately, the individual is placed in isolation and clinical care guidelines are followed (as outlined above) thereafter.

19. We are also taking steps to ensure that PCCF staff does not inadvertently introduce COVID-19 into the facility by educating staff and screening them for raised temperatures or other signs of illness. Staff have been instructed not to work if they feel ill and to report any symptoms for follow up. Staff have also been educated regarding both their own protection as well as CDC guidelines for eliminating virus transmission.

20. We are also monitoring and reviewing all detainees/inmates who are known to have chronic disease or other co-morbidities which would make them more susceptible to a COVID-19 infection.

21. While it is clear that a prison setting poses particular challenges from an infectious disease standpoint, the risk of infection is tempered by the degree of control we have over access to the facility. We are screening incoming detainees/inmates carefully and taking steps to isolate them as necessary. We have a highly educated and trained staff that is acutely aware of the risks posed by the pandemic. We are also providing a level of medical care to the detainees/inmates that they are unlikely to receive outside of PCCF.

22. I am well aware that certain medical conditions, or co-morbidities, can make an individual more susceptible to becoming sick. As stated above, we have taken extra precautions to monitor the health of any detainee or inmate known to have such a condition. In my opinion, releasing such persons without an adequate plan for alternative medical care could raise, rather than lower, the risk for those individuals.

23. I also know that not all medical conditions present the same risk for increased susceptibility to a viral infection. In this regard, an individualized approach is more appropriate than a blanket response.

24. It is clear that this pandemic presents unique challenges and that the situation is changing daily. I am confident that we are doing all that we can to reduce the risk of a COVID-19 outbreak within PCCF. Our rate of confirmed cases in the detainee/inmate population (zero to date) reflects that.

25. I was made aware that a case worker working for PCCF has tested positive for COVID-19. This is, of course, disappointing news. However, it appears that the staff member was working the first shift and had limited contact with the detainee/inmate population. I am told that she began to feel ill while not onsite. She tested positive on 3/22/2020 and her last shift at PCCF was 3/19/2020. All of her staff contacts were sent home for 14 days, and no detainees, staff or inmates have had any positive results.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 15, 2020



Lawrence Baker, MD

Regional Medical Director for CPS
Medical Director at PCCF

EXHIBIT C

DECLARATION OF ASSISTANT DIRECTOR

JOHN P. SHEEHAN

I, John P. Sheehan, Assistant Director, Prisoner Operations Division, United States Marshals Service make the following statements under oath and subject to the penalty of perjury:

1. I am employed by the U.S. Department of Justice, United States Marshals Service (USMS), and currently serve as an Assistant Director in the Prisoner Operations Division (POD). I have held this position since December 2019. I previously held the position of Deputy Assistant Director, POD, and have been employed with the USMS since June 1998.
2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other USMS employees, and information portals maintained and relied upon by USMS in the regular course of business.
3. As the USMS does not own or maintain detention facilities, the USMS must house federal prisoners in Federal Bureau of Prisons (BOP) Pretrial facilities, in State and local detention facilities pursuant to Intergovernmental Agreements (IGA), and contract jail facilities. The USMS has entered into an IGA to house federal prisoners at the Plymouth County Correctional Facility located at 26 Long Pond Rd, Plymouth, MA 02360. The IGA, is an at-will agreement that permits other federal agencies, such as Immigration & Customs Enforcement (ICE) and the BOP to house their prisoners at the facility, as needed, in exchange for a daily per diem rate.
4. An IGA is an agreement between the USMS and a state, county, or local government to provide secure custody, safekeeping, housing, subsistence, and care of USMS prisoners in accordance with all state and local laws, standards, regulations, policies, and court orders applicable to the operation of the facility. IGA facilities are required to house USMS prisoners in the manner that they house their own prisoners and in a manner that is consistent with Federal law, Federal Performance Based Detention Standards (FPBDS), and/or any other standards delineated in the agreement. While the USMS can provide assistance or advice regarding various standards, the USMS is without the authority to enforce IGA terms, and must rely on the jail's cooperation. The jail is an independent contractor and the USMS cannot control the activities within the jail or how the jail provides services.
5. As with every State or local facility used by the USMS, the USMS annually conducts an on-site review of the facility to assess its compliance with the USMS detention standards. The annual facility review is conducted by a specifically-trained Deputy U.S. Marshal.
6. IGA facilities are required to provide USMS prisoners with the same level and range of care inside the facility as that is provided to State and local detainees. Specifically, IGA facilities are required to provide medical care for USMS prisoners that is in compliance

with the provisions of USMS-Prisoner Health Care Guidance to Districts and the FPBDS.

7. The USMS employs U.S. Public Health Service (PHS) personnel -- to include physicians, physician assistants, and nurses -- to oversee and manage its prisoner medical program. The PHS staff work closely with medical personnel at the IGA facilities to attend to the medical needs of USMS prisoners. The IGA facilities are required to provide USMS prisoners with the same in-facility medical care that they provide their own prisoners. With the exception of medical care, all outside medical care must be approved by USMS PHS personnel pursuant to a request from jail medical staff.
8. In the cases of any infectious disease, IGA facilities are expected to work closely with State health departments and the Centers for Disease Control (CDC), as needed, to ensure that any infectious diseases are promptly identified and treated. All decisions concerning prisoner infectious disease treatment, including decisions to isolate and quarantine prisoners, are made at the facility level.
9. PHS staff have developed COVID-19 screening criteria for prisoners entering and departing detention facilities as well as guidelines for the safe transport of USMS prisoners to court and to medical appointments in line with CDC guidance.
10. CAPT Steven S. Wolf, MD, a PHS physician and Medical Director for the USMS Prisoner Operations Division, has reviewed declarations made by Joseph McDonald, Sheriff of Plymouth County, and Dr. Lawrence Baker, Medical Director for Plymouth County Correctional Facility (PCCF); it is his opinion that the PCCF is providing appropriate precautions to protect their prisoner population during the current COVID-19 pandemic.
11. As of April 19, 2020, USMS has the following information with respect to federal prisoners housed in the Plymouth County Correctional Facility:
 - a. The USMS currently houses 170 prisoners at the facility.
 - b. There are zero confirmed cases of COVID-19 among the USMS prisoners housed at the facility.

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

Dated: April 21, 2020



John P. Sheehan
Assistant Director
Prisoner Operations Division
United States Marshals Service

EXHIBIT D



Office of the Attorney General
Washington, D. C. 20530

April 6, 2020

MEMORANDUM FOR ALL HEADS OF DEPARTMENT COMPONENTS AND
ALL UNITED STATES ATTORNEYS

FROM:

THE ATTORNEY GENERAL

Handwritten signature of W.P. Barr in black ink.

SUBJECT:

Litigating Pre-Trial Detention Issues During the COVID-19
Pandemic

The mission of the Department of Justice is to enforce our nation's laws and to ensure the safe and fair administration of justice. We have an obligation to maintain public safety and to protect victims and witnesses from threats and retaliation, and we must also safeguard the health and safety of those remanded to our custody. As always, controlling weight should be given to public safety, and under no circumstance should those who present a risk to any person or the community be released. But the current COVID-19 pandemic requires that we also ensure we are giving appropriate weight to the potential risks facing certain individuals from being remanded to federal custody. Each case must be evaluated on its own and, where appropriate, the risks the pandemic presents should be part of your analysis, as elaborated further below.

First, the Bail Reform Act ("BRA") remains the governing statute for pretrial detention issues and you are to continue enforcing that provision according to its terms. As you know, the BRA provides that a defendant must be detained pending trial where "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e)(1).

For certain crimes, it is presumed that "no condition or combination of conditions of release will reasonably assure the appearance of the person as required and the safety of the community." 18 U.S.C. § 3142(e)(3). We should continue applying the BRA's factors and that presumption according to their terms. We simply cannot agree to anything that will put the public at risk. COVID-19 presents real risks, but so does allowing violent gang members and child predators to roam free. When you believe a defendant poses a risk to the safety of any person or the community at large, you should continue to seek remand as zealously today as you would have before the pandemic began, in accordance with the BRA's plain terms. Protecting the public from criminals is our paramount obligation.

Memorandum from the Attorney General

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Subject: Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic

Second, in applying the familiar BRA analysis, which already includes some consideration of the medical risks associated with individuals being remanded into federal custody during the COVID-19 pandemic. Even with the extensive precautions we are currently taking, each time a new person is added to a jail, it presents at least some risk to the personnel who operate that facility and to the people incarcerated therein. It also presents risk to the individual being remanded into custody² risk that is particularly acute for individuals who are vulnerable to a serious infection under the Centers for Disease Control and Prevention's³ & Guidelines.

We have an obligation to minimize these risks to the extent possible while remaining consistent with the CDC Guidelines. This means you should consider not seeking detention to the same degree we would under normal circumstances² specifically, for those defendants who have not committed serious crimes and who present little risk of flight (but no threat to the public) and who are clearly vulnerable to COVID-19 under CDC Guidelines. In this analysis, the risk of flight and seriousness of the offense should be considered. You should continue to seek detention for defendants who are charged with serious crimes and who pose a substantial risk of flight, or for defendants who would normally warrant detention under the BRA and who are not vulnerable to COVID-19 under CDC Guidelines.

Third, these same considerations should govern your litigation of motions filed by detained defendants seeking release in light of the pandemic. In these cases, the Court has already made a finding based on the evidence presented that a defendant posed a risk of flight or a danger to the community and should therefore be remanded pending trial. In assessing whether it is appropriate to revisit that determination, you should also consider the potential risk that the defendant will spread COVID-19 in his or her community upon release. Risk from COVID-19 should be a significant factor in your analysis, you should also consider any risk that releasing the defendant would pose to the public. This consideration will depend on the facts and circumstances of each defendant and the facility where he or she is being held, and you should factor this consideration into your analysis as appropriate. Our duty to protect the public extends to protecting it from contagion spread by someone released from our custody.

* * *

The factors and considerations discussed herein should guide your analysis of pretrial detention issues while the pandemic is ongoing, but what position to take in each particular case is ultimately your decision. We must adapt to the current difficult circumstances, while also ensuring that we never deviate from our duty to keep the public safe from dangerous criminals. Please exercise your discretion appropriately.

EXHIBIT E

FILED UNDER SEAL

EXHIBIT F

DECLARATION OF CAPTAIN MARK HOLMES

I, Mark Holmes, depose and state the following of my own knowledge:

1. I am a captain with the Plymouth County Sheriff's Department. I have worked for the Department full time since June of 1994. I have held the rank of captain since April of 2009. My duties include acting as the inmate grievance coordinator; managing inmate classification; and serving as a disciplinary hearing officer. Prior to my promotion to captain, I was a supervising lieutenant assigned to booking and records.
2. In my capacity as the grievance administrator, I process all grievances I receive. Copies of all processed grievances are part of the inmate's institutional "six part" file. The Department maintains a log of all grievances filed by inmates at the Facility.
3. Inmates file grievances through the inmate canteen kiosks in each housing unit. The system maintains an electronic record of each grievance along with the date and time of the filing.
4. I have reviewed the Department records of the current incarceration of the following inmates at the Plymouth County Correctional Facility: Anthony Baez; Jonathan Bermudez; Jermaine Gonsalves; and Dedrick Lindsey. In examining the Department's log of grievances as well as the electronic records of grievances, I found no record of Baez, Bermudez, or Gonsalves filing any grievances. The only grievances Lindsey filed concerned phone access and his loss of job and housing reassignment. There is no record of any of these inmates filing a grievance concerning COVID-19.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 20, 2020


Mark Holmes
Captain