UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALEXANDER GRINIS, MICHAEL GORDON, and ANGEL SOLIZ, on behalf of themselves and those similarly situated, *Petitioners*, v. STEPHEN SPAULDING, Warden of Federal Medical Center Devens, and MICHAEL CARVAJAL, Director of the Federal Bureau of Prisons, in their official capacities, *Respondents*.	No. 20-cv-10738-GAO

MEMORANDUM IN SUPPORT OF PETITIONERS' MOTION
FOR CLASS CERTIFICATION OR REPRESENTATIVE HABEAS ACTION

Background

This action is filed on behalf of a highly vulnerable putative class: prisoners held at Federal Medical Center in Devens, Massachusetts ("FMC Devens" or "Devens"), all of whom are at grave risk of contracting COVID-19 because of the life-threatening, congregate conditions under which they are confined. Common questions of both fact and law pervade this matter, and a unified remedy to ameliorate conditions by reducing the population to permit social or physical distancing would address the injury to all Class Members. Respondents[1] have acted

[1] Respondents in this action are Stephen Spaulding, Warden of FMC Devens, who has immediate custody of Petitioners and all proposed Class Members, and Michael Carvajal, Director of the Federal Bureau of Prisons, who is responsible for the safety and security of all persons, including Petitioners and all proposed Class Members, serving federal sentences at BOP facilities, including FMC Devens. Both are sued in their official capacities.

or refused to act on grounds applicable to the class as a whole, making class certification appropriate here. Specifically, Respondents have maintained a population and conditions that make it impossible to abide by the CDC's recommended physical distancing. In fact, Respondents repeatedly force class members into situations—while sleeping, eating, recreating and receiving medication—where they have no choice but to be within far less than six feet of other prisoners and staff. The requested relief seeks to alleviate these dangerously unconstitutional conditions for the entire class.

The proposed class meets the requirements of Federal Rules of Civil Procedure 23(a) and (b). The class is sufficiently numerous: more than 1,000 individuals are currently imprisoned at FMC Devens.[2] All Class Members are bound together by common questions of law and fact —whether conditions of confinement at FMC Devens unconstitutionally threaten their health and safety in the face of the lethal COVID-19 pandemic. The named Petitioners are proper class representatives because their claims are typical of the class as a whole and because they and their counsel will adequately and vigorously represent the class. Finally, Rule 23(b)(2) is satisfied here because Respondents have "acted or refused to act on grounds that apply generally to the class" by creating and maintaining conditions that put the class at imminent risk of catastrophic COVID-19 infection.

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[2] *See* https://www.bop.gov/locations/institutions/dev/.

According to the Centers for Disease Control and Prevention ("CDC"), COVID-19 is spread from person-to-person, when people are in close proximity to one another (within about 6 feet), through respiratory droplets produced when someone speaks, coughs, or sneezes, including through the touch of shared surfaces.[3] *See* Declaration of Joe Goldenson, M.D. (Apr. 14, 2020) ("Goldenson Decl.") ¶ 8.[4] There is no vaccine or cure for the illness. The only known measures that can be taken to reduce the risk of contracting COVID-19 are social distancing and scrupulous hygiene. *See id.* ¶ 16.[5] The ability to socially distance is a necessary predicate for hygiene to have any meaningful impact. *See id.* The calls to adopt these measures throughout the world have led entire nations, states, and cities to "lock down," in an extraordinary and unprecedented battle to impose physical distance between people to stop the spread of the deadly virus. *See id.*

Medical and correctional experts alike have recognized the obvious risk presented in crowded and confined environments like prisons. Incarcerated individuals "are at special risk of infection, given their living situations," and "may

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[3] *See also, e.g.,* Allison Aubrey, *The New Coronavirus Can Live on Surfaces for 2–3 Days—Here's How To Clean Them*, NPR (Mar. 14, 2020), *available at* https://www.npr.org/sections/health-shots/2020/03/14/811609026/the-new-coronavirus-can-live-on-surfaces-for-2-3-days-heres-how-to-clean-them.

[4] All declarations cited herein have been submitted as exhibits to the Memorandum in Support of Petitioners' Motion for Immediate Bail Consideration, Temporary Restraining Order, and Preliminary Injunctive Relief.

[5] CDC, *Coronavirus Disease (COVID-19): How to Protect Yourself*, (Mar. 18, 2020), *available at* https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html. ("The best way to prevent illness is to avoid being exposed to this virus.").

also be less able to participate in proactive measures to keep themselves safe."[6] *See also* Goldenson Decl. ¶¶ 17-27, 34. These risks are compounded at FMC Devens—one of just 7 administrative security federal medical centers—which houses elderly and medically vulnerable populations.

Recognizing these risks, states and municipalities have released thousands of prisoners.[7] Concerned former federal judges and United States Attorneys have urged the use of commutation in order to protect the lives of the elderly and medically vulnerable.[8] And fourteen Senators have implored the Department of Justice to release people through the compassionate release mechanism.[9] On March

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[6] "Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States," (March 2, 2020), *available at* https://bit.ly/2W9V6oS.

[7] *See* Kimberly Kindy et al., *'Disaster waiting to happen': Thousands of inmates released as jails and prisons face coronavirus threat,* Washington Post (Mar. 25, 2020), *available at* https://www.washingtonpost.com/national/disaster-waiting-to-happen-thousands-of-inmates-released-as-jails-face-coronavirus-threat/2020/03/24/761c2d84-6b8c-11ea-b313-df458622c2cc_story.html?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most

[8] Letter to President Trump by former United States Attorneys, federal judges, Assistant United States Attorneys, and DOJ lawyers and leaders (Mar. 27, 2020), *available at* https://fairandjustprosecution.org/wp-content/uploads/2020/03/Letter-to-Trump-from-DOJ-and-Judges-FINAL.pdf ; *see also* Letter to president by public health professionals (Mar. 27, 2020), *available at* https://thejusticecollaborative.com/wp-content/uploads/2020/03/Public-Health-Expert-Letter-to-Trump.pdf (asking president to commute sentences of "all elderly people" and medically vulnerable people).

[9] Letter from Senators Durbin, Grassley, et al. to Department of Justice and Bureau of Prisons (Mar. 23, 2020), *available at*

26, 2020, after urgent calls for action by public health experts, Attorney General William Barr issued a directive to the Bureau of Prisons (BOP) to "prioritize the use of home confinement as a tool for combatting the dangers that COVID-19 poses to our vulnerable inmates."[10] Among the factors AG Barr instructed the BOP to consider are "the age and vulnerability of the inmate to COVID-19" and the "security level of the facility."[11] One week later, the Attorney General issued a second directive to the BOP "expand[ing]" the group of prisoners who are eligible for home confinement based on his finding that "emergency conditions are materially affecting the functioning of the Bureau of Prisons."[12] Unfortunately, the BOP has failed to use its authority to release sufficient numbers of inmates to mitigate the COVID-19 risk. Instead, it has placed only 1,019 prisoners on home confinement

https://www.durbin.senate.gov/imo/media/doc/Letter.%20to%20DOJ%20and%20BOP%20on%20COVID-19%20and%20FSA%20provisions%20-%20final%20bipartisan%20text%20with%20signature%20blocks.pdf.

[10] Memorandum from Attorney General William Barr to Director of Bureau of Prisons, *Increasing Use of Home Confinement at Institutions Most Affected By COVID-19* (Apr. 3 2020) at 1 (describing contents of March 26 memo) [hereinafter Barr Memo 2], Exhibit 6; *see also* Memorandum from Attorney General William Barr to Director of Bureau of Prisons, *Prioritization of Home Confinement As Appropriate In Response To COVID-19 Pandemic* (Mar. 26, 2020) [hereinafter Barr Memo 1], Exhibit 5.

[11] Barr Memo 1 at 2.

[12] Barr Memo 2 at 1.

since AG Barr issued his first memorandum, on March 26, 2020, a figure representing *less than 0.5 percent* of the total inmate population in BOP.[13]

This failure flies in the face of the urgency of the situation. As of April 14, 2020, 444 federal prisoners and 248 BOP staff members, across 42 institutions, have tested positive for COVID-19.[14] Conditions at FMC Devens are fundamentally inadequate and ineffective to provide any protection against the pandemic. Prisoners are in close quarters with dozens of people—not to mention rotating staff—which makes it impossible to maintain social distance from others. *See* Declaration of Alexander Grinis (Apr. 13, 2020) ("Grinis Decl.") ¶ 7; Declaration of Angel Soliz (Apr. 13, 2020) ("Soliz Decl.") ¶¶ 7-11; Declaration of Michael Gordon (Apr. 13, 2020) ("Gordon Decl.") ¶¶ 8-16.[15] Inmates are packed together while standing in line to receive medications, food, and to move about the facility, and for "rec" time. *See* Soliz Decl. ¶¶ 10, 11; Gordon Decl. ¶¶ 9, 11-14; Grinis Decl. ¶¶ 11, 12. They sleep in cells or cubicles with at least one other inmate. *See* Gordon Decl.

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[13] *See* BOP, "Frequently Asked Questions regarding potential inmate home confinement in response to the COVID-19 pandemic," *available at* https://www.bop.gov/coronavirus/faq.jsp (last accessed Apr. 13, 2020).

[14] *See* BOP, "COVID-19 Cases," *available at* https://www.bop.gov/coronavirus/ (last accessed Apr. 13, 2020).

[15] This is especially problematic because since the virus can be spread by asymptomatic carriers, physical distance must be maintained from *all* people, including those with no symptoms. *See* CDC, *Social Distancing, Quarantine, and Isolation*, *available at* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html; *Savino v. Souza,* No. 20-10617-WGY, 2020 U.S. Dist. LEXIS 61775, *5-6 (D. Mass. April 8, 2020).

¶ 8; Grinis Decl. ¶ 7; Soliz ¶ 7. Such conditions are perfect for the spread of the virus, through both airborne droplets and common objects touched by numerous individuals within a short span of time, such as computers, phones, dining tables, and common spaces. *See* Grinis Decl. ¶¶ 7-9, 11-12; Gordon ¶¶ 7-15; Soliz Decl. ¶¶ 7, 10-11; Goldenson Decl. ¶ 34.

Numerous recent court rulings have ordered jails and prisons to decrease their incarcerated population in response to the unique and catastrophic situation posed by this virus for prisoners. *See, e.g.*, *Savino v. Hodgson*, No. 20-10617-WGY, 2020 U.S. Dist. LEXIS 61775, at *1 (D. Mass Mar. 27, 2020) (certifying class action by immigration detainees at Bristol County House of Corrections, seeking "release or implementation of social distancing and other hygienic practices recommended by infectious disease experts" and releasing detainees to ease crowding); *Basank v. Decker,* No. 20-02518-AT, 2020 U.S. Dist. LEXIS 53191, at *8-9 (S.D.N.Y. Mar. 26, 2020) (granting TRO and immediate release of ten immigrant-detainee habeas petitioners, noting "'tinderbox scenario' as COVID-19 spreads to immigration detention centers," given that "[i]t will be nearly impossible to prevent widespread infections inside the… jails … because detainees live, sleep, and use the bathroom in close proximity with others, and because '[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.'" (citations omitted)); *In re Request to Commute or Suspend County Jail Sentences*, Docket No. 84230 (N.J. Mar. 22, 2020) (releasing large class of defendants serving time in county jail "in light of the Public Health Emergency" caused by COVID-19).

I. PROPOSED CLASS DEFINITION

Petitioners propose to represent a class of all federal prisoners who are or will be in custody at FMC Devens ("Class"), including (1) a Subclass of all persons who, according to applicable CDC guidelines, are at high risk of injury or death due to COVID-19, due to their advanced age or medical condition(s) ("Medically Vulnerable Subclass");[16] and (2) a Subclass of all persons who are appropriate candidates for early transfer to home confinement ("Home Confinement Appropriate Subclass") (collectively "Subclasses").

II. PROPOSED CLASS REPRESENTATIVES

The proposed class representatives are Alexander Grinis, Michael Gordon, and Angel Soliz, all of whom are currently incarcerated at FMC Devens.

Petitioner Grinis is incarcerated in the minimum-security satellite camp at FMC Devens. *See* Grinis Decl. ¶ 1. Grinis, who is 49 years-old and has a medical history of hypertension and atypical chest pain, is at high risk of not only contracting COVID-19, but of having a severe case that leads to serious illness or death. *See id*. ¶¶ 1, 6. Grinis is an appropriate candidate for compassionate release and/or immediate transfer to home confinement. He is serving a 9-month sentence based on a conviction for making a false statement on a loan application, and the BOP has calculated his release date to be June 16, 2020. *See id*. ¶ 3. The BOP has advised Grinis that he will be released to a halfway house on or about May 21, 2020,

[16] *See* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html.

and that he will be required to spend 14 days in solitary confinement in the Special Housing Unit ("SHU") of the prison, more commonly a severe punitive sanction, as a form of quarantine prior to his release to the halfway house. *See id*. ¶ 4. On April 10, Grinis sent a request by U.S. Mail to Warden Spaulding for compassionate release or, in the alternative, transfer to home confinement. As of this filing, Grinis had received no response. *See id*. ¶ 5.

Petitioner Gordon is detained in the "H-B" unit of the medical center at FMC Devens. *See* Gordon Decl. ¶ 7. Gordon, who is 51-years old, underwent a liver transplant and is on immunosuppressant medication to keep his body from rejecting the liver.[17] *See id*. ¶¶ 3-4. In addition, he suffers from hypertension, a pulmonary embolism, and deep vein thrombosis. *See id*. ¶ 5. Because of these conditions, he is at high risk of not only contracting COVID-19, but of having a severe case that leads to serious illness or death. *See id*. ¶¶ 3-5. Gordon is an appropriate candidate for compassionate release and/or immediate transfer to home confinement. He is serving a 180-month sentence based on convictions for conspiracy to distribute marijuana, conspiracy to launder money, and money laundering. *See id*. ¶ 2. The BOP has calculated his release date to be August 18, 2027. *Id*. On April 10, 2020, Gordon submitted a request to Respondent Spaulding for compassionate release or, in the alternative, transfer to home confinement. *Id*. ¶ 19. As of this filing, Gordon has received no response. *Id*.

[17] *See* https://www.nih.gov/news-events/nih-research-matters/organ-transplants-without-life-long-drugs.

Petitioner Soliz is detained in the "J-B" unit of the Medical Center. Soliz Decl. ¶ 7. Soliz, who is 59 years old, has diabetes, requires dialysis and has had a triple bypass. *See id.* ¶¶ 2, 4. Because of these conditions, Soliz is at high risk of contracting COVID-19 and having a severe case that leads to serious illness or death. Soliz is an appropriate candidate for compassionate release and/or immediate transfer to home confinement. He is serving a 240-month sentence for conspiracy and possession with intent to distribute methamphetamine. *See id*. ¶ 3. The BOP has calculated his release date to be September 13, 2033. *See id*. Soliz submitted a request to Respondent Spaulding for compassionate release, which was denied. *See id*. ¶ 5. He pursued administrative remedies, which were also denied. *See id*.

ARGUMENT

Petitioners seek certification of the class described above, pursuant to Federal Rule of Civil Procedure 23. "By its terms, [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S.393, 398 (2010). Class certification is appropriate where the proposed class satisfies the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and at least one of the categories of Rule 23(b).

These criteria are met here, because the numerous prisoners who form the proposed class are all being held at the same institution and all face the risk of

contracting the COVID-19 virus due to their conditions of confinement. Although there are distinctions among the prisoners, they are bound by the common question "whether the government must modify the conditions of confinement" to allow for physical distancing in order to comply with the Eighth Amendment to the U.S. Constitution, making the certification of a class appropriate. *Savino*, 2020 U.S. Dist. LEXIS 61775, at *10, 21.

A. The Proposed Class Meets the Requirements of Rule 23(a).

1. The proposed class is so numerous that joinder would be impractical.

The proposed class satisfies the requirement that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The First Circuit has recognized that this is a "low threshold." *Garcia-Rubiera v. Calderon,* 570 F.3d 443, 460 (1st Cir. 2009). "[A] class size of forty or more will generally suffice in the First Circuit." *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014).

There are currently more than 1,000 inmates at FMC Devens, many of whom are unrepresented, *see id.*at 189, and lack the financial resources to bring individual claims, *Torrezani v. VIP Auto Detailing, Inc.*, 318 F.R.D. 548, 554 (D. Mass. 2017) (class certification is favored where the Court "can reasonably infer that substantially all of the class members have limited financial resources….").

Moreover, new prisoners continue to be admitted to FMC Devens, *see* Soliz Decl. ¶ 15; Grinis Decl. ¶ 16; Gordon Decl. ¶ 18, rendering the current number of detainees "merely the floor for this numerosity inquiry[,]" *Reid*, 297 F.R.D. at 189.

The fact that future prisoners form a part of the proposed class makes joinder, already an infeasible option, that much more impracticable. *See id.* at 189.

2. The proposed class representatives present issues of fact and law in common with the class.

Rule 23(a)(2) requires that "questions of law or fact" be "common to the class." Fed. R. Civ. P. 23(a)(2). Commonality requires the identification of an issue that by its nature "is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes v. Wal-Mart Stores, Inc.*, 564 U.S. 338, 350 (2011); *see also Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 28 (1st Cir. 2019). Commonality is "a low bar," *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 19 (1st Cir. 2008), which can be satisfied with a single common issue, *see Wal-Mart*, 564 U.S. at 359.

This case satisfies the commonality requirement because its resolution turns on two related questions shared by all members of the proposed class. First, do the current conditions of confinement at FMC Devens, which render social distancing impossible and significantly increase the risk of COVID-19 infection for all class members, create an unconstitutional risk of harm? And second, does the Respondents' failure to use their authority to decrease the incarcerated population to modify the conditions of confinement to enable social distancing constitute deliberate indifference? *Cf. Savino*, 2020 U.S. Dist. LEXIS 61775, at *21 (citation

omitted). This falls squarely within the kind of questions that typically satisfy commonality in class actions challenging detention conditions. *See id.*[18]

Critically, the existence of some variation between individual's specific circumstances does not defeat commonality where, as here, the central issues of the case are common across the class. *See id.* at *21 (holding "the admittedly significant variation among the Detainees does not defeat commonality or typicality" where there are common questions of law and fact); *Reid*, 297 F.R.D. at 191; *cf. Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016) (even under the more stringent standards applicable to class actions seeking damages under Rule 23(b)(3), certification is appropriate if "one or more of the central issues in the action are common to the class and can be said to predominate," even while "other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members").

Here, all class members live in the same facility—many of them literally share the same air supply—run by the same Warden, with the same staff cycling in and out. They endure the same crowded conditions caused by the Respondents'

[18] *See also Parsons v. Ryan*, 754 F.3d 657, 678, 681 (9th Cir. 2014) (finding commonality in class action challenging prison medical care policies and noting "numerous courts have concluded that the commonality requirement can be satisfied by proof of the existence of systemic policies and practices that allegedly expose inmates to a substantial risk of harm"); *Yates v. Collier,* 868 F.3d 354, 363 (5th Cir. 2017) (affirming district court's finding of commonality in class action challenging prison heat risk where court found the prison's "heat-mitigation measures—more frequent showers, cold drinking water, fans and temporary access to air-conditioned 'respite areas'—were ineffective to reduce the risk of serious harm to a constitutionally permissible level for any inmate").

failure to decrease the population at FMC Devens, including shared sleeping spaces, bathrooms, phones, and computers, as well as lines for meals, medications, and movement. *See* Soliz Decl. ¶¶ 10, 11; Gordon Decl. ¶¶ 8, 9, 11, 12; Grinis Decl. ¶¶ 11, 12. Because of these conditions, all of the prisoners are unable to practice social distancing, which the CDC recognizes as a cornerstone of avoiding COVID-19 infections and which "all other segments of society now scrupulously observe." *Savino*, 2020 U.S. Dist. Lexis 61775, at *12; *see* Gordon Decl. ¶¶ 7-12; Grinis Decl. ¶¶ 7-8, 11-12; Soliz ¶¶ 7-11; Goldenson Decl. ¶ 22. Since the start of the pandemic, Respondents have therefore continued to subject all class members to conditions that amount to "a tinder-box that is waiting to explode with a surge of COVID-19 infections." Goldenson Decl. ¶ 34.

Differences in health among members of the class do not defeat commonality because *all* inmates—along with correctional staff—face the risk of COVID-19 infection. *See Savino,* 2020 U.S. Dist. LEXIS 61775, at *21. Even though "the harm of a COVID-19 infection will generally be more serious for some petitioners than for others," commonality is satisfied because "it cannot be denied that the virus is gravely dangerous to all of us." *Id.*; *see also Parsons*, 754 F.3d at 678 (finding commonality "although a presently existing risk may ultimately result in different future harm for different inmates—ranging from no harm at all to death" because "every inmate suffers exactly the same constitutional injury when he is exposed" to a prison policy "that creates a substantial risk of serious harm").

Nor do differences in suitability for bail, compassionate release, or transfer to home confinement defeat commonality. "The question is not so much whether any particular [prisoner] should be released" but whether "the government is taking reasonable steps to identify those [prisoners] who may be released in order to protect everyone from the impending threat of mass contagion" by sufficiently reducing the population to allow for physical distancing. *Savino*, 2020 U.S. Dist. LEXIS 61775, at *23. The central, shared issue is that the density of prisoners must be reduced to prevent the spread of COVID-19 infections for all class members; it does not matter *how* the Eighth Amendment violation is remedied. *See id.*

3. The proposed class representatives' claims are typical of those of the class.

The analysis of typicality and commonality "tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *see Savino,* 2020 U.S. Dist. LEXIS 61775, at *17-24 (analyzing commonality and typicality together). But where commonality looks to the relationship among class members generally, typicality under Rule 23(a)(3) focuses on the relationship between the proposed class representatives and the rest of the class. *See George v. Nat'l Water Main Cleaning Co.*, 286 F.R.D. 168, 176 (D. Mass. 2012); *Reid*, 297 F.R.D. at 191. To satisfy Rule 23(a)(3), "a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Falcon*, 457 U.S. at 156. "'A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.'" *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 69 (D. Mass.

2005), quoting *In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 686 (S.D. Fla. 2004).

Petitioners satisfy this standard. The proposed class representatives are members of the class, and they are threatened by the same crowded conditions, including the inability to practice effective social distancing, created and maintained by Respondents. Based on the same theory of deliberate indifference, Petitioners seek the same relief as the entire class; namely, that Respondents sufficiently decrease the incarcerated population at FMC Devens to allow for effective physical distancing to mitigate the risk of COVID-19 infection. In such circumstances, the representatives' claims are "obviously typical of the claims … of the class," and satisfy Rule 23(a)(3). *Savino,* 2020 U.S. Dist. LEXIS 61775, at *21-24 (finding typicality met for class of immigrant detainees seeking relief from conditions at a single facility in the face of COVID-19).

4. The proposed class representatives and class counsel can adequately represent the class.

Finally, Petitioners and their counsel will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Two factors must be satisfied to fulfill this prerequisite: "(1) the absence of potential conflict between the named plaintiff and the class members and (2) that counsel chosen by the representative parties is qualified, experienced and able to vigorously conduct the proposed litigation." *Adair*

v. Sorenson, 134 F.R.D. 13, 18 (D. Mass. 1991) (quoting *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985) (internal quotations omitted)).

Here, "the interests of the representative party will not conflict with the interests of any of the class members," *Andrews v. Bechtel Power Corp.*, 780 F.3d 124, 130 (1st Cir. 1985), because as discussed above, those interests are aligned with a common goal of relieving population density to permit social distancing. *See Savino*, 2020 U.S. Dist. LEXIS 61775, at *23. Petitioners have alleged the same injuries, arising from the same conduct, and they seek the same injunctive and declaratory relief, which will apply to the benefit of all class members. Counsel for Petitioners are not aware of any conflicts among members of the proposed Class or between counsel and members of the proposed Class.

In addition, undersigned *pro bono* counsel are qualified, experienced, and able to vigorously conduct the proposed litigation. Petitioners are represented by Fick & Marx, LLP and the ACLU Foundation of Massachusetts. Collectively, counsel have significant experience in the areas of constitutional law, civil rights, criminal law, class action litigation, and habeas corpus actions. For the same reasons, counsel also satisfy the requirements of Rule 23(g) and should be appointed as class counsel.

B. The Proposed Class Meets the Requirements of Rule 23(b).

In addition to meeting the four requirements of Rule 23(a), Petitioners must show that the proposed class falls into one of the three defined categories of Rule 23(b). *See Reid*, 297 F.R.D. at 192. This action falls within Rule 23(b)(2), which

applies when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole." *See Savino*, 2020 U.S. Dist. LEXIS 61775, at *24 (certifying class of ICE detainees in aMassachusetts facility under Rule 23(b)(2)). Civil rights cases like this one are the "prime examples" of Rule 23(b)(2) cases, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997), where the claim asserts that the Respondents have "engaged in unlawful behavior towards a defined group[,]" *Reid*, 297 F.R.D. at 193.

The claims asserted by Petitioners satisfy these requirements. Respondents have engaged in unconstitutional behavior towards the entire class. Every member of the class is at imminent risk serious illness and possible death from COVID-19 infections due to their crowded conditions of confinement and inability to practice effective social distancing. And "a uniform remedy" could provide relief to every class member through "declaratory relief or … an injunction ordering the government to reduce crowding" at the facility. *Savino*, 2020 U.S. Dist. LEXIS 61775, at *24-25.

In the alternative, this putative class action satisfies the requirements of Rule 23(b)(1), because prosecuting hundreds of separate actions would create a risk of inconsistent or varying adjudications with respect to individual Class Members that would establish incompatible standards of conduct for Respondents.

CONCLUSION

Petitioner respectfully ask the Court to:

(1) Certify a class consisting of all prisoners who are now or will be held by Respondents at FMC Devens; with subclasses as follows:

a. A subclass of federal prisoners at FMC Devens who are medically vulnerable to severe infection and death from COVID-19 due to their age and/or medical condition ("Medically Vulnerable Subclass"); and

b. A subclass of federal prisoners at FMC Devens who are appropriate candidates for immediate transfer to home confinement ("Home Confinement Appropriate Subclass");

(2) Appoint Petitioners Alexander Grinis, Michael Gordon, and Angel Soliz as class representatives; and

(3) Appoint the undersigned counsel as class counsel.

Respectfully submitted,

ALEXANDER GRINIS, MICHAEL GORDON, ANGEL SOLIZ,
and others similarly situated,

By their attorneys,

/s/ William W. Fick

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CERTIFICATE OF SERVICE

I, William Fick, certify that I have caused the foregoing document to be served by e-mail PDF upon AUSA Ray Farquhar, Civil Chief (D. Mass.), on April 15, 2020.

Because the government declined to waive formal service under Fed. R. Civ. P. 4, on that same day, I traveled in person to a U.S. Post Office to send the document to the following recipients by certified U.S. Mail:

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