

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 20 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LONNIE EUGENE LILLARD,

No. 23-35049

Petitioner-Appellant,

D.C. No. 3:22-cv-00966-SB

v.

MEMORANDUM*

DEWAYNE HENDRIX, Warden, FCI
Sheridan,

Respondent-Appellee.

AMADOR SANCHEZ MENDOZA, AKA
Amador Sanchez,

No. 23-35059

Petitioner-Appellant,

D.C. No. 3:22-cv-00559-SB

v.

DEWAYNE HENDRIX, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon
Stacie F. Beckerman, Magistrate Judge, Presiding

Submitted June 6, 2024**

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision

Portland, Oregon

Before: RAWLINSON, FORREST, and SUNG, Circuit Judges.

Lonnie Lillard and Amador Mendoza¹ appeal the magistrate judge's denial of the consolidated 28 U.S.C. § 2241 habeas petitions filed by current and former individuals in custody at the Federal Correctional Institution Sheridan ("FCI Sheridan") (together, "Petitioners"). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

The district court correctly dismissed Petitioners' petitions for lack of jurisdiction because their conditions of confinement claims are not cognizable in habeas. *See Pinson v. Carvajal*, 69 F.4th 1059, 1068–69 (9th Cir. 2023), *cert. denied sub nom. Sands v. Bradley*, 144 S. Ct. 1382 (2024). In *Pinson*, we acknowledged that there may be "circumstances when a challenge to the conditions of confinement is properly brought in a petition for writ of habeas corpus," but concluded that the facts alleged failed to establish that "no set of conditions exist that would cure the constitutional violations." *Id.* at 1075. The facts alleged by Petitioners here are materially indistinguishable from those alleged in *Pinson*.

The district court did not err by dismissing Petitioners' habeas petition without assessing whether Petitioners stated viable non-habeas claims in the

without oral argument. *See Fed. R. App. P.* 34(a)(2).

¹ Appellants concede that Mendoza's appeal is moot because he was released from federal custody on October 20, 2023.

alternative. Petitioners repeatedly disavowed bringing non-habeas claims, argued that they need not comply with the Prison Litigation Reform Act specifically because they were bringing their claims under habeas, and relied on the Administrative Procedure Act and Declaratory Judgment Act solely as bases for granting injunctive and declaratory relief “while the petition [was] pending.” Although a district court has discretion to convert a habeas petition into a civil rights action in certain circumstances, *see id.* at 1075–76, Petitioners abandon any such argument on appeal.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN PHILIP STIRLING,

Case No. 3:20-cv-00712-SB

Petitioner,

OPINION AND ORDER

v.

JOSIAS SALAZAR, Warden, FCI
Sheridan,

Respondent.

BECKERMAN, U.S. Magistrate Judge.

Petitioner John Philip Stirling (“Stirling”) and nearly 200 current or former individuals in custody at Federal Correctional Institution (“FCI”) Sheridan (“Sheridan”) (together, “Petitioners”), bring this consolidated habeas corpus proceeding pursuant to [28 U.S.C. § 2241](#) (“Section 2241”). Petitioners allege that the dangers presented by the unprecedented COVID-19 pandemic, combined with the Federal Bureau of Prisons’ (“BOP”) insufficient response to the ongoing crisis, render their continued confinement unconstitutional in violation of the Eighth Amendment. (Am. Compl. Pet. Writ Habeas Corpus (“Am. Pet.”) (ECF No. 16) at 16-22.¹)

¹ The Court uses the ECF-assigned pagination when citing the parties’ filings.

Respondent² asserts that he has taken adequate and appropriate measures to mitigate the effects of COVID-19 at Sheridan. However, he argues that before reaching the merits of Petitioners' habeas claims, the Court must first resolve a threshold jurisdictional question to determine whether a petition for writ of habeas corpus is the proper vehicle by which an individual in custody may seek release based on an assertion that prison conditions are so unsafe that continued incarceration violates the Eighth Amendment. (Resp. Am. Pet. (ECF No. 35) at 8-12, 13-16.) That question is now before the Court. (*See* Resp't Renewed Resp. Am. Pet. Writ Habeas Corpus & Renewed Request Ruling Jurisdictional Issues (ECF No. 107) ("Resp't Renewed Resp.") at 2-5.)

The parties have consented to proceed before a magistrate judge under [28 U.S.C. § 636\(c\)](#). (ECF No. 43.) For the reasons explained below, the Court dismisses the Amended Complaint and Petition for Writ of Habeas Corpus (ECF No. 16) and denies as moot all pending motions.

BACKGROUND

The rise of COVID-19 marked a "once-in-a-century public health crisis." *Wilson v. Ponce*, 465 F. Supp. 3d 1037, 1039 (C.D. Cal. 2020), *appeal dismissed*, No. 20-55760, 2020 WL 6293689 (9th Cir. 2020). The virus quickly found its way into jails, prisons, and other detention facilities in the United States, and corrections officials imposed various measures to prevent and control transmission among incarcerated populations. Although the measures Respondent imposed at Sheridan avoided the tragic death tolls at other prisons, Petitioners allege that the harshness of the protective measures violated the Eighth Amendment and therefore the Court

² Josias Salazar was the acting warden at the time Stirling filed his original petition. Sheridan's current warden, DeWayne Hendrix, assumed responsibility for Sheridan's operations on December 7, 2020. (Joint Status Report dated Dec. 18, 2020 (ECF No. 54) at 1 n.1.)

must now release Petitioners from custody. The Court provides a summary of this litigation to explain why the Court is just now evaluating the threshold jurisdictional issue after over two years of litigation.

On April 30, 2020, Stirling, a pretrial detainee at Sheridan, filed a *pro se* petition for writ of habeas corpus in this Court, naming the BOP, Sheridan Federal Detention Center (“Sheridan FDC”), and “Sheridan FDC Staff” as respondents. Stirling alleged in the petition that Sheridan officials were “needlessly exposing [him] to [COVID]-19” by housing newly incarcerated or transferred individuals in his unit without first placing them in quarantine; by refusing to wear appropriate protective equipment such as masks and gloves; and by keeping Sheridan residents “illegally . . . under lockdown for [nineteen] days cut off[f] from phones, showers, email and quality food.” (Pet. (ECF No. 1) at 2-3.) Troubled by Stirling’s allegations, the Court appointed the Federal Public Defender (“FPD”) to represent Stirling and directed the FPD to file an amended petition naming Stirling’s current custodian as the respondent. (ECF No. 4.)

On June 30, 2020, the FPD filed an “Amended Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus” (the “amended petition”) on Stirling’s behalf, who by then was serving a forty-month term of imprisonment.³ Stirling alleged in the amended petition that the BOP had failed to “de-densify its facilities” to ensure adequate social distancing and instead had kept Sheridan residents in their cells for up to twenty-three hours a day, sometimes three to a cell; canceled educational and rehabilitative programs; curtailed outside communications; served poor-quality food; reduced access to medical care; and spread

³ Stirling was sentenced to forty months in prison on May 21, 2020, after pleading guilty to one count of violating 46 U.S.C. § 70503(a)(1) and 70506(a), and 21 U.S.C. §§ 8960(b)(1)(H) and 962(a), Maritime Drug Law Enforcement Act and Conspiracy to Distribute Methamphetamine. *See United States v. Stirling*, No. 3:19-cr-00150-MO (ECF No. 113) (D. Or. May 21, 2020).

misinformation about pandemic response measures. (Am. Pet. at 2.) Stirling further alleged that the BOP had failed to establish “consistent and effective safeguards”—such as universal testing of Sheridan residents and staff, access to personal protective equipment, effective quarantine procedures, and heightened sanitation protocols—to protect individuals in its custody against COVID-19. (*Id.* at 2.) Stirling claimed that, in light of the BOP’s decision to use lockdowns instead of de-densifying Sheridan and the risk that he might nevertheless contract COVID-19, there were “no conditions of confinement at Sheridan [that could] meet constitutional requirements” and therefore the Eighth Amendment required his immediate release. (*Id.* at 17-22.)

Stirling also requested in the amended petition interim injunctive relief in the form of a temporary restraining order (“TRO”) and permanent injunction to “(1) prohibit the BOP from bringing new inmates into the FDC Sheridan until the warden has demonstrated adequate testing and safety protocols to ensure the coronavirus is not introduced through arrivals; and (2) to prohibit [Stirling’s] transportation out of the FDC Sheridan until the Warden can demonstrate the transportation, any place of quarantine, and the designated facility will be safe and subject him to infection from the coronavirus.” (*Id.* at 23.) Stirling requested that if the court could not immediately grant the writ, the court should enter an order of enlargement allowing him to serve his sentence in the community “until the conditions at Sheridan can be rendered safe” and order court-mandated fact-finding of the actual conditions at Sheridan. (*Id.* at 24.)

In light of Stirling’s request for immediate injunctive relief, this case was reassigned to a district judge on July 6, 2020. (ECF No. 19.) At a hearing on July 22, 2020,⁴ the district judge

⁴ Prior to the hearing, the parties agreed that Respondent would not transfer Stirling out of Sheridan before July 28, 2020 and would provide the FPD and the Court with at least seven days’ notice if he planned to transfer Stirling at any point thereafter. The district judge issued an

noted that it was unclear whether Stirling intended to proceed with civil rights or habeas claims, and that Stirling’s request for a TRO barring new detainees from entering Sheridan was “not the sort of relief we would typically see in a habeas order.” (Tr. (ECF No. 44) at 7:5-15, 47:3-10.) The FPD clarified that Stirling intended to proceed in habeas and argued that his request for injunctive relief was proper. (*Id.* at 43:13-20, 48:11-51:2.) Turning to the merits of Stirling’s request, the district judge considered the evidence in the record and determined that Stirling failed to show “a likelihood of success or even serious questions going to the merits” on his Eighth Amendment claims. (*Id.* at 52:23-53:5.) The district judge thus denied Stirling’s request for a TRO but authorized expedited discovery concerning the conditions at Sheridan. (*Id.* 53:3-22.)

Soon thereafter, the district judge ordered Respondent to show cause why the Court should not grant relief. (Or. Show Cause (ECF No. 34) at 1.) Respondent filed a response on August 18, 2020, arguing that the Court should dismiss the amended petition because Stirling’s claim is not cognizable in habeas and instead arises under the Prison Litigation Reform Act (“PLRA”). (Resp. Am. Pet. (ECF No. 35) at 1.) Respondent further argued that even if Stirling’s claim could proceed in habeas, Stirling is not entitled to relief because his claim is unexhausted and lacks merit. (*Id.*) In support, Respondent submitted extensive documentation describing the protocols and mitigation measures in place to prevent and control the spread of COVID-19 at Sheridan.

order memorializing that agreement on July 8, 2020. (ECF No. 25.) Respondent also provided the FPD and the Court with detailed information about the then-current protocols for screening and testing for COVID-19 for individuals in custody, staff, transfers, and anyone else entering and exiting Sheridan; the number of tests administered to individuals in custody and staff; the rate of positive tests; and all other measures in place to mitigate the spread of COVID-19 at Sheridan. (Status Report dated July 10, 2020 (ECF No. 26).)

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The case was reassigned to this Court on September 24, 2020, in light of the parties' full consent to the jurisdiction of a magistrate judge. (ECF No. 40.) Although the district judge had set an initial briefing schedule, the parties agreed to stay further briefing pending completion of discovery and, in the interim, to work cooperatively to address issues at Sheridan as they arose. (Joint Status Report dated Oct. 16. 2020 (ECF No. 46) ¶ 5.) Hoping to foster cooperation that might more quickly and effectively address the conditions at Sheridan, the Court allowed the parties flexibility in fashioning a case management schedule to accommodate their efforts. Thereafter, the parties relayed their progress to the Court in periodic status reports that detailed the changing conditions at Sheridan.

Meanwhile, dozens of additional individuals in custody at Sheridan filed similar habeas petitions "challenging the fact of . . . confinement under the circumstances of the COVID-19 pandemic and in particular the extended lockdown and the life-threatening conditions." (See, e.g., *Bodner v. Salazar*, No. 3:20-cv-01743-SB, Pet. (ECF No. 1) at 2.) Each new petition "incorporate[d] by reference and adopt[ed] the pleadings" in *Stirling*, with some petitioners submitting individualized allegations concerning their personal health risks and experiences in lockdown. (*Id.* at 2, 10-13.) Many petitioners, however, simply adopted *Stirling*'s general allegations without claiming that they personally were at high risk or that the conditions at Sheridan posed a specific danger to their individual health. In response to the influx of new petitions, and upon agreement by the parties, the Court ordered "all pending and future habeas petitions filed by individuals in custody at Sheridan relating to modified prison operations during the COVID-19 pandemic" to be consolidated with *Stirling*, and ordered that the Court will

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resolve all threshold legal and factual issues in the consolidated action.⁵ (Consolidation Or. (ECF No. 50) at 2.)

By December 2020, Respondent reported that Sheridan was operating under “modified conditions designed to ensure physical distancing . . . while maintaining institutional safety goals.” (Joint Status Report dated Dec. 18, 2020 (ECF No. 54) ¶ 2(e).) Such operations typically allowed for Sheridan residents to be out of their cells and in common areas for more than seven hours per day, with lockdown conditions occurring only “on occasion” to combat an increase in COVID-19 infections or for disciplinary purposes. (*Id.*) Respondent also reported that he had created a separate COVID-19 isolation unit within Sheridan, had discontinued the use of triple bunk cells, and had reduced the Sheridan population to 1,438 residents, down from 1,787 in April 2020. (*Id.* ¶¶ 2(d), (f).)

A new wave of COVID-19 infections struck Sheridan toward the end of December 2020, but began to recede in January 2021. (Joint Status Report dated Jan. 8, 2021 (ECF No. 57) ¶ 1(a).) None of those infected had to be placed on a ventilator or died from the disease, but Petitioners lodged “frantic complaints” with the FPD about the harsh conditions imposed to control the outbreak. (*Id.* ¶ 2(a).) Specifically, Petitioners reported “[m]ental and physical distress from prolonged lockdown in cells; fears that the coronavirus is not being adequately controlled; physical harm from lack of medical care due to staff shortages or perceived lack of compassion; unsafe and inhumane conditions in the gym where ill inmates are relegated; and lack of adequate food.” (*Id.* ¶¶ 1(c), 2(a).) Although Respondent did not concede the veracity of

⁵ The Court ordered that petitions filed by post-sentencing petitioners would be consolidated with *Stirling*, and that petitions filed by pretrial detainees would be consolidated with another case filed by a petitioner in pretrial detention at the time of filing, *Lander v. Salazar*, 3:20-cv-01379-SB, that incorporated the *Stirling* allegations.

these complaints, he later acknowledged that “relatively harsher” conditions were necessary to ensure physical distancing to “minimize the incidence and spread of COVID-19” in Sheridan.

(*Id.* ¶ 1(a) n.1; Joint Status Report dated Mar. 12, 2021 (ECF No. 66) ¶ 6.)

On February 5, 2021, Respondent reported that Sheridan had received its first allotment of the newly released COVID-19 vaccine, and that Sheridan had already administered the first dose to over three hundred residents and staff. (Joint Status Report dated Feb. 5, 2021 (ECF No. 62) ¶ 1(f).) Over the next five months, Sheridan received five more vaccine allotments, each of which Respondent distributed pursuant to BOP clinical guidance. (*See* Decl. of Amanda Huston (ECF No. 66-1); Resp’t Suppl. Status Report dated July 22, 2021 (ECF No. 69) ¶ 3.) By July 2021, all Sheridan residents who were “medically eligible ha[d] been offered vaccination[,]” and 1,050 residents and 197 staff members were fully vaccinated. (*Id.*)

Sheridan experienced another COVID-19 outbreak in August 2021. (Resp’t Suppl. Status Report dated Aug. 12, 2021 (ECF No. 71) ¶ 1.) In a status report filed on August 12, 2021, Respondent acknowledged that the surge in positive cases had required the imposition of new restrictions that included a temporary suspension of recreation and the placement of two housing units on quarantine status. (*Id.* ¶ 6.) Respondent noted that despite the relative harshness of the modified operations, Sheridan residents still had ready access to medical care, including mental health services, and could utilize the BOP’s administrative remedy system to voice any concerns. (*Id.* ¶¶ 6-7.)

The next day, on August 13, 2021, the FPD filed a supplemental status report requesting “emergency measures to assess medical care, improve communication, acknowledge harm, and decrease the psychic stress of . . . confinement” at Sheridan. (Pet’r’s Status Report dated Aug. 13, 2021 (ECF No. 72) at 1.) The FPD asserted that while Respondent had “actively responded”

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to individual and systemic concerns raised by Petitioners throughout the litigation, such efforts had been limited by “the reality of the pandemic” and the need to use lockdowns to control COVID-19 outbreaks. (*Id.* at 1-2.) Detailing the frequent emails received from demoralized Sheridan residents, the FPD concluded that the “16 months of pandemic conditions ha[d] taken their toll” and no longer could be “remedied through the incremental steps of addressing inmate concerns one-by-one.” (*Id.* at 3, 7.)

Petitioners then moved, pursuant to Federal Rule of Civil Procedure 34(a)(2), to compel Respondent to allow a team to enter Sheridan to inspect the conditions, to speak confidentially with incarcerated individuals and staff, to review records, and to obtain evidence in support of Petitioners’ habeas claims. (See Notice of Entry on Land (ECF No. 80-1).) Respondent objected, arguing that the inspection would impose an undue burden in light of the pandemic; the irrelevance of such discovery to the dispositive threshold questions of law regarding the Court’s subject matter jurisdiction; the requests were duplicative of informal and formal discovery already conducted and could be obtained through more convenient and less burdensome sources; and requests to record and photograph Sheridan facilities violated BOP regulations. (Discovery Or. (ECF No. 83) at 2.)

Following a hearing, the Court granted in part Petitioners’ motion to compel a Rule 34(a)(2) inspection, noting that the district judge had allowed Petitioners to conduct discovery on conditions at Sheridan and that additional value could be gained from “allowing an expert or investigator to inspect the current conditions of confinement” at Sheridan. (*Id.* at 5.) The Court thus authorized a limited inspection of Sheridan’s facilities but denied as unduly burdensome Petitioners’ request for unlimited access to Sheridan’s residents, staff, and records. (*Id.* at 4-5.)

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The limited inspection occurred on September 17, 2021. (Pet'r's Status Report dated Oct. 8, 2021 (ECF No. 89) at 1.) After the inspection, the FPD lodged with this Court the inspection team's findings, which reportedly "corroborated the dismal conditions described" by Sheridan residents. (*Id.* at 1-2; Suppl. Ex. 1 to Pet'r's Status Report of Oct. 8, 2021 (ECF No. 92).) The FPD noted that Petitioners intended to submit additional discovery requests as soon as possible and requested that the Court set a briefing schedule after Respondent provided a response to those requests. (ECF No. 89 at 2.) Respondent agreed to provide further discovery and noted that the parties would work together to determine a briefing schedule as Petitioners' operative petition now contained "dated information." (Resp't Suppl. Status Report dated Oct. 13, 2021 (ECF No. 93) ¶ 9.)

In the months that followed, in-person social and legal visitation, programming, and recreational activities resumed at Sheridan. (Resp't Supp. Status Report dated Oct. 27, 2021 (ECF No. 94) ¶ 6.) In addition, all housing units were removed from quarantine status and began moving toward pre-pandemic operations. (*Id.*) Although the emergence of the Omicron variant in January 2022 prompted the temporary suspension of in-person visitation, Sheridan maintained the less restrictive modified operations during the ensuing outbreak.⁶ (Resp't Suppl. Status Report dated Jan. 19, 2022 (ECF No. 96) ¶ 5.)

On February 4, 2022, Petitioners notified the Court that the parties' ongoing collaborative efforts, although "fruitful" in individual cases, fell short of achieving "systemic reform" at Sheridan and that judicial intervention likely was needed to move this case forward. (Pet'r's

⁶ Despite the unprecedented communicability of the Omicron variant, Respondent reported that as of January 18, 2022, the outbreak consisted of only fifty-seven active cases among Sheridan residents and ten active cases among staff. (Resp't Suppl. Status Report dated Jan. 19, 2022, ¶¶ 1-2.) None required placement on a ventilator or hospitalization. (*Id.*)

Status Report dated Feb. 4, 2022 (ECF No. 98) at 1.) The same day, the parties discussed with the Court the possibility of resolving Petitioners' claims through settlement negotiations, but the FPD later determined that it could not consent to a settlement on behalf of the many petitioners joined to this litigation. (Joint Status Report dated Feb. 10, 2022 (ECF No. 102) at 2.) The parties instead proposed a new case management schedule that anticipated a forthcoming motion to dismiss by Respondent and further briefing as needed, the close of fact discovery by July 2022, and the close of expert discovery by October 2022. (*Id.* at 3.)

On March 8, 2022, the FPD moved for emergency interim relief on behalf of Petitioner Jeffrey Reed Green. (*See Green v. Hendrix*, No. 3:22-cv-00086-SB, Emergency Mot. Hr'g Req. Interim Relief (ECF No. 7).) The FPD asserted that Mr. Green's prostate cancer had gone untreated due to the deliberate indifference of officials at Sheridan and FCI Victorville, and that Mr. Green required immediate "release from custody for medical evaluation and treatment." (*Id.*) Respondent "strongly dispute[d] Mr. Green's characterization of the lack of care as well as the [FPD's] continued characterization of 'dire' conditions at . . . Sheridan[,]" and argued that release was neither appropriate nor permissible in this consolidated habeas action. (*Id.*, Resp't Resp. Emergency Mot. Interim Relief (ECF No. 16) at 2-3.) After oral argument and additional status hearings, the Court denied as moot the request for emergency interim relief because Mr. Green's sentencing judge in the District of Alaska had granted him compassionate release pursuant to 18 U.S.C. § 3852(c)(1)(A). (ECF No. 27.)

On June 21, 2022, Respondent filed a renewed response to the amended petition, reasserting his request that the Court rule on the jurisdictional issues raised in his original response. (Resp't Renewed Resp. at 1-2.) Respondent noted that although he had been willing to work with Petitioners and had provided regular information and discovery concerning the

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pandemic conditions at Sheridan, the BOP was having to “spend[] valuable resources responding to extensive discovery requests with no end in sight.” (*Id.* at 2.) Because Petitioners no longer wished to work toward improving conditions at Sheridan and instead sought only release from custody, Respondent urged the Court to bring this litigation to a close. (*Id.*) The Court ordered Petitioners to file a reply in support of the amended petition and proposed findings of fact by July 29, 2022. (ECF No. 108.)

On July 27, 2022, Petitioners requested an extension of time to file their reply and proposed findings of fact, which the Court granted. (ECF No. 111.) Three days later, on July 31, 2022, the FPD filed an emergency motion for an order appointing a special master to investigate an “institutional shakedown” conducted by “BOP employees . . . brought to . . . Sheridan from out of the District” that allegedly resulted in the destruction of personal property, harassment of Sheridan residents, and physical injury. (Emergency Mot. App’t Special Master & Related Or. (ECF No. 113) at 3-5.) The FPD asserted that the alleged shakedown was in retaliation for this litigation, and argued that the communications from Sheridan residents about this event “provide[d] an immediate basis for this Court’s investigatory and remedial action.” (*Id.* at 6.)

On August 4, 2022, the Court denied the emergency motion, explaining that it lacked jurisdiction over the Petitioners’ retaliation claims because they challenged conditions of confinement that were “separate and distinct” from the issues allegedly giving rise to habeas jurisdiction in this case.⁷ (ECF No. 121.) Petitioners then moved for reconsideration, arguing that

⁷ The Court denied the emergency motion without waiting for Respondent to file a response because counsel for Respondent was unavailable during the week Petitioners filed the emergency motion, it was clear that the Court lacked jurisdiction to consider the Petitioners’ retaliation claims, Petitioners did not cite any persuasive evidence that the “shakedown” was related to this litigation or targeted at Petitioners aside from the assumptions of a few Sheridan residents, and the Court wanted to ensure that any Sheridan residents who suffered loss of

“the practical consequences” of this Court’s decision summarily to “deny petitioners a forum in habeas corpus for retaliation based on their exercise of habeas corpus rights are dire and an abdication of the Court’s ability to fairly adjudicate the cases before it.” (Mot. Reconsideration Summ. Denial Emergency Mot. (ECF No. 123) at 2.)

After further briefing by both parties, the Court held oral argument on September 22, 2022 on the jurisdictional issues raised in Respondent’s renewed response, as well as Petitioners’ motion for reconsideration.⁸ (ECF No. 138.) The Court thereafter took the pending motions under advisement.

DISCUSSION

Respondent moves to dismiss the amended petition for lack of jurisdiction, arguing that Petitioners’ claims are not cognizable in habeas because they challenge the conditions of Petitioners’ confinement rather than the legality of their convictions or sentences. (Resp. Am. Pet. at 8-11.) Respondent asserts that Petitioners’ claims instead arise under the PLRA, and that other remedies short of release are available to address the allegedly unconstitutional conditions at Sheridan. (*Id.* at 10-12; Renewed Resp. at 8-11.)

“Federal law opens two main avenues to relief on complaints related to imprisonment”—a petition for writ of habeas corpus and a civil rights complaint. *Muhammad v. Close*, 540 U.S. 749, 750 (2004). The Supreme Court has made it clear that “the essence of habeas corpus is an attack by a person in custody upon the legality of that custody” and that “the traditional function

property or injury could timely file grievances in accordance with BOP administrative procedures without waiting for the Court’s written opinion on the motion.

⁸ The Court also addressed at oral argument Respondent’s motion to stay further filings pending decision on the jurisdictional issues (ECF No. 128) and motion to strike Petitioners’ proposing findings of fact and conclusions of law (ECF No. 135).

of the writ is to secure . . . release[.]” *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

“Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus[.]” *Muhammad*, 540 U.S. at 750 (citing *Preiser*, 411 U.S. at 500); *see also* *Nelson v. Campbell*, 541 US. 637, 643 (2004) (explaining that “where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence[,]” such claims “fall within the ‘core’ of habeas corpus”). Thus, a claim should proceed in habeas only if the petitioner’s success on that claim would “necessarily demonstrate the invalidity of [his] confinement or its duration.” *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

By contrast, a civil rights action is the “proper remedy” if an individual in custody “is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody.” *Preiser*, 411 U.S. at 499. Conditions-of-confinement claims are those which “allege[] unconstitutional treatment . . . while in confinement” (*id.*), and the remedy “usually is an award of damages or an order for injunctive relief that requires the institution to cure the constitutional violations.” *Jackson v. Twin Falls Cnty. Jail*, No. 1:21-cv-00017-DCN, 2021 WL 1202336, at *2 (D. Idaho Mar. 29, 2021). “[C]onstitutional claims that merely challenge the conditions of . . . confinement, whether the [individual] seeks monetary or injunctive relief, fall outside of [the] core [of habeas corpus]” and should be raised as a civil rights claim “in the first instance.” *Nelson*, 541 U.S. at 643; *see also* *Hill v. McDonough*, 547 U.S. 573, 579 (2006) (instructing that an “inmate’s challenge to the circumstances of his confinement” may be brought in a civil rights action).

Since the start of the COVID-19 pandemic, hundreds of individuals in federal and state custody have sought habeas-based release to escape pandemic conditions inside prisons, jails, and detention facilities. Despite these numerous lawsuits, “[t]he question of whether . . . actions

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[brought by individuals in custody] asserting violations of their constitutional rights based on the COVID-19 pandemic properly may sound in habeas, versus civil rights, is an open one, with the case law in flux.” *William v. Jenkins*, No. CV 21-1456-DMG (GJS), 2021 WL 765567, at *8 (C.D. Cal. Feb. 24, 2021). To date, the Supreme Court has not had occasion to consider whether claims challenging pandemic conditions fall within the core of habeas corpus, and to date the Ninth Circuit has declined to resolve the issue. *See Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020) (per curiam) (declining to consider the availability of habeas review for claims challenging conditions of confinement during the COVID-19 pandemic “because, separately from their habeas petition, Plaintiffs brought a class action complaint for declaratory and injunctive relief seeking to remedy allegedly unconstitutional conditions at [the detention facility]”); *see also Green v. Jenkins*, 859 F. App’x 186, 187 (9th Cir. 2021) (expressing “no opinion as to whether [petitioner] may file a [Section] 2241 habeas petition seeking his immediate release based on conditions at FCI Terminal Island”).

Absent controlling Supreme Court or Ninth Circuit precedent, many district courts in the Ninth Circuit have concluded that claims premised on the dangers posed by COVID-19 are not cognizable in habeas, even when the relief sought is release. *See Luna v. Engleman*, No. 2:22-cv-02627-JWH (GJS), 2022 WL 1211911, at *3-5 (C.D. Cal. Apr. 25, 2022) (holding that a claim “based on the BOP’s asserted failure to provide adequate social distancing measures, adequate testing, its adherence to a herd immunity policy, and its failure to adhere to mask and vaccine mandates and CDC guidelines” is “a classic conditions-of-confinement claim that does not implicate the fact or duration of Petitioner’s confinement” and therefore “may not be considered on Section 2241 habeas review”); *Miller v. Ponce*, No. CV 21-06985-MCS (DFM), 2022 WL 943056, at *2 (C.D. Cal. Feb. 8, 2022) (concluding that because the petitioner did “not challenge

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his conviction or sentence but rather [sought] release based on the ‘conditions of confinement’ created by the COVID-19 pandemic,” his allegations “sound in civil rights, not in habeas”); *Carranza v. Koehn*, No. 2:20-cv-01586-GMN-DJA, 2020 WL 6119515, at *5 (D. Nev. Oct. 16, 2020) (concluding that “this does not appear to be a habeas case” where federal pretrial detainees alleged that the conditions of their confinement placed them in “excessive danger” from COVID-19); *Alvarez v. Larose*, 445 F. Supp. 3d 861, 865-68 (S.D. Cal. 2020) (explaining that the plaintiffs’ claims relating to COVID-19 “would not exist *but for* their current conditions of confinement” and therefore could not, “under any good faith calculus, . . . be characterized as a habeas corpus proceeding challenging the fact or duration of confinement in prison”) (simplified).

A few district courts, however, have held that habeas jurisdiction may be proper under Section 2241 when a petitioner’s COVID-19 claims challenge “the fact and duration of . . . confinement on the basis that no set of conditions of confinement under the present circumstances could be constitutional.” *Torres v. Milusnic*, 472 F. Supp. 3d 713, 726 (C.D. Cal. 2020); *see also Sekerke v. Gore*, No. 20-CV-1998 JLS (MSB), 2021 WL 3604169, at *7 (S.D. Cal. Aug. 13, 2021) (holding that “[i]n the specific context of the deadly COVID-19 pandemic, when a prisoner claims his detention is unconstitutional in light of the dangers presented by COVID-19 combined with the petitioner’s particular circumstances and that petitioner further contends there are ‘no set of conditions’ that could possibly make his custody constitutional, a petition for habeas corpus is the proper vehicle for challenging that custody”); *Nickerson v. Broomfield*, No. 20-06326 EJD (PR), 2021 WL 3934477, at *2 (N.D. Cal. Feb. 11, 2021) (stating that “[w]hen a[n] [individual in custody] seeks his release from custody rather than the implementation of procedures or safeguards at the prison to ameliorate the allegedly

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unconstitutional situation—as for example, when he seeks release because the risk of contracting C[OVID]-19 in the prison is so great that there are no conditions sufficient to eliminate the constitutional violation—he can proceed in a habeas action because the fact that he seeks release puts his petition ‘at the heart of habeas corpus’’’); *Gutierrez-Lopez v. Figueroa*, 462 F. Supp. 3d 973, 983 (D. Ariz. 2020) (concluding that “[b]ecause Petitioner claims that her continued detention under the present conditions is unconstitutional and that her immediate release is the only effective remedy . . . , [her] claims can be viewed as challenging the fact, not simply the conditions of her confinement”).

Petitioners present the same argument for habeas jurisdiction that these other district courts in this circuit have found persuasive. Specifically, Petitioners allege that because they seek release and allege that there are no conditions of confinement that are or could be constitutionally sufficient to protect them from COVID-19, they challenge the fact, and not simply the conditions, of their confinement. (Pet’r’s Br. at 3-6.) Petitioners urge the Court to allow their claims to proceed on this theory, arguing, among other things, that doing so is not inconsistent with the Supreme Court’s jurisprudence differentiating habeas and civil rights actions. (*Id.* at 6-13.)

Although the Court is sympathetic to Petitioners’ difficult experiences at Sheridan during the pandemic, the Court cannot conclude that merely alleging that no conditions of confinement could satisfy the Eighth Amendment is sufficient to confer habeas jurisdiction under circumstances such as those present here. *See Jackson v. City of Twin Falls & Idaho Dep’t of Corr.*, No. 1:21-cv-00013-BLW, 2021 WL 982307, at *3 (D. Idaho Mar. 16, 2021) (“Merely alleging that no conditions of confinement could possibly satisfy the Eighth Amendment—an allegation which every inmate could throw into any habeas corpus petition—does not magically

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transform the nature of a conditions-of-confinement claim.”). Petitioners insist that they are challenging the fact of their confinement, but they do not allege that their convictions or sentences are invalid in the first instance or that they are being held in excess of a lawfully imposed term of imprisonment. Instead, Petitioners allege that the harsh conditions at Sheridan place them at risk of serious harm from COVID-19, allegations premised on the conditions, and not the validity, of their confinement. *See Wilson*, 465 F. Supp. 3d at 1048 (holding that petitioners’ COVID-19 claims were not cognizable in habeas because they “ultimately [were] premised on the conditions of confinement”). Indeed, Petitioners’ claims “would not exist *but for* [the] current conditions” at Sheridan. *Alvarez*, 445 F. Supp. 3d at 866. Petitioners’ argument that habeas jurisdiction exists simply because they allege that nothing short of their release may remedy the unconstitutional conditions at Sheridan thus improperly “conflates the nature of relief with the substance of the claim.”⁹ *Id.*; *see also Jackson*, 2021 WL 982307, at *3 (holding that “[r]equesting release as the remedy for unconstitutional prison conditions does not render the substantive conditions-of-confinement claim a challenge to the fact of an inmate’s confinement”); *Acevedo v. Capra*, 545 F. Supp. 3d 107, 115 (S.D.N.Y. 2021) (explaining that the “[p]etitioners’ focus on the remedy they seek, rather than the nature of their claim, is procedurally untenable” because “[i]t would require a court to determine, at the very outset of a lawsuit, whether there are remedies short of release that could cure the alleged constitutional

⁹ Petitioners’ reliance on *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), *Cheek v. Warden of Fed. Med. Ctr.*, 835 F. App’x 737 (5th Cir. 2020), and *Hope v. Warden York Cnty. Prison*, 972 F.3d 310 (3d Cir. 2020)—each of which similarly emphasizes the nature of the requested relief rather than the substance of the claim in recognizing that COVID-19 claims may be cognizable on habeas review—is therefore misplaced. *See Jackson*, 2021 WL 982307, at *3 (rejecting the Sixth Circuit’s analysis in *Wilson* because it “improperly conflates the nature of relief with the substance of the claim” and “ignores that a variety of orders short of release can bring a prison into Eighth Amendment compliance with respect to the pandemic”).

violation”). Given the specific factual allegations on which Petitioners’ claims rely here—allegations that exclusively concern the conditions at Sheridan—the Court concludes that this case cannot, “under any good faith calculus,” be characterized as a habeas proceeding challenging the fact of Petitioners’ confinement.¹⁰ *Alvarez*, 445 F. Supp. 3d at 866; *see also Jackson*, 2021 WL 982307, at *4 (concluding that “the nature of the claim itself—not the relief sought—ultimately determines whether a claim may be asserted in a habeas petition”).

That the Supreme Court appears to have left open the possibility that individuals in federal custody may, in some circumstances, challenge the conditions of their confinement under Section 2241 does not save Petitioners’ claims here.¹¹ *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862-63 (2017) (noting that for challenges to “large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners[,]” the Court has “left open the

¹⁰ Petitioners alleged in the amended petition that the BOP could do more to improve conditions to protect them from COVID-19, by establishing “consistent and effective safeguards” to control the spread of the disease, prohibiting further transfers into Sheridan, and mandating specific cleaning and social distancing protocols. (Am. Pet. at 2-3.) The FPD also acknowledged at the hearing before the district judge that Stirling’s conditions could be rendered constitutional if “[t]he number[] [of individuals in custody at Sheridan] [is] substantially lessened.” (Tr. 25:16-21.) Thus, even if the Court found Petitioners’ theory of habeas jurisdiction persuasive, they do not plausibly allege in the amended petition that there are no conditions short of release that would be constitutionally adequate to protect them from COVID-19 at Sheridan. *See Alvarez*, 445 F. Supp. 3d at 867 (disagreeing with the argument that no set of conditions would be constitutionally sufficient because, “[a]s Plaintiffs allege in their Complaint, a significant reduction in population, an increase in sanitation, and compliance with CDC guidelines for detention facilities would eliminate considerable risk of . . . inmates contracting COVID-19”).

¹¹ The Ninth Circuit similarly has declined to resolve whether habeas jurisdiction extends to conditions-of-confinement claims by individuals in federal custody. *See Nettles v. Grounds*, 830 F.3d 922, 927, 931 n.6, 935 (9th Cir. 2016) (holding that a civil rights action under 42 U.S.C. § 1983 “is the exclusive vehicle for claims brought by [individuals in] state [custody] that are not within the core of habeas corpus”—that is, claims that “would not necessarily lead to [the individual’s] immediate or earlier release from confinement”—but declining to consider whether the same is true for individuals in federal custody).

question whether [federal detainees] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus”). Other courts have recognized that COVID-19 conditions of confinement do not rise to the level of potential habeas relief the Supreme Court anticipated in *Abbasi*:

... Petitioners' Eighth Amendment claims [seeking release from federal confinement to remedy conditions created by the pandemic] sound more in the nature of the type of habeas claim the Supreme Court in *Preiser* hypothesized, but has yet to recognize: '[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal.' The Supreme Court resurrected this idea more recently in *Abbasi*. Yet, although the petitioners in *Abbasi* alleged [that] they were held in tiny, empty, constantly lighted cells for over 23 hours per day without basic hygiene, and subjected to physical abuse, including broken bones, and verbal abuse, including sexual and religious insults, the Supreme Court did not find it was such a case for habeas relief 'to remove the restraints making the custody illegal.' The Court's decision is telling of just how extraordinary the case must be for habeas jurisdiction to lie before a prisoner may be released from lawful custody based on a condition of confinement.

Wragg v. Ortiz, 462 F. Supp. 3d 476, 504-05 (D.N.J. 2020) (quoting *Abbasi*, 137 S. Ct. at 1853).

Thus, even assuming federal conditions-of-confinement claims may properly sound in habeas under certain extraordinary circumstances, a close reading of *Abbasi* suggests that “the remedy is a narrow one that would not apply” to Petitioners’ COVID-related claims here. *Luna*, 2022 WL 1211911, at *5; see also *Weibel v. Von Blanckensee*, No. CV-20-00341-TUC-JAS (DTF), 2021 WL 5507517, at *3 (D. Ariz. Aug. 13, 2021) (acknowledging that *Abbasi* “neither explicitly nor implicitly foreclosed the use of habeas corpus for conditions-of-confinement claims[,]” but concluding that claims concerning “lack of masks, cleaning solution, laundry service, ability to socially distance,” and other COVID-19 conditions are not cognizable in habeas); *Camillo-Amisano v. Ponce*, No. 2:21-cv-00072-ODW-JDE, 2021 WL 3377237, at *2 (C.D. Cal. June 22, 2021) (noting that “even if it were permissible for a federal prisoner to raise a conditions of confinement claim under Section 2241,” a case challenging pandemic conditions “is not one of

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those ‘exceptional’ cases warranting habeas jurisdiction” and “the relief being sought is simply not what lawyers or judges think of as habeas, even under [Section] 2241”) (simplified); *Lustig v. Warden, FCI Lompoc*, No. CV 20-3708-SB (AGR), 2021 WL 1164493, at *1-2 (C.D. Cal. Jan. 1, 2021) (finding “no reason to depart from the reasoning” of district court cases declining to extend habeas jurisdiction to COVID-19 claims under *Abbasi*); *Wilson*, 465 F. Supp. 3d at 1049 (explaining that “[a]lthough the Supreme Court has not entirely foreclosed habeas relief [on federal conditions-of-confinement claims], a careful reading of the Supreme Court cases suggests that habeas cannot be stretched this far, as explained in *Wragg*”); *Wragg*, 462 F. Supp. 3d at 504 (declining to find case challenging COVID-19 conditions under Section 2241 “to be that ‘extraordinary case’ where [the district court] should expand habeas jurisdiction, more extraordinary than even *Abbasi*, where the Supreme Court did not see fit to extend habeas jurisdiction over a conditions of confinement claim involving outright alleged physical abuse of prisoners who were not serving a sentence upon conviction of a crime”).

While the Court acknowledges that, conceptually, there could be a policy in a federal prison that could result in no combination of conditions sufficient to render custody in that facility constitutional such that habeas relief is appropriate under *Abbasi*, no court has ever actually so found. This is not the appropriate case of first impression, especially where Petitioners acknowledge in the amended petition that there are measures Respondent could take short of release to improve conditions during the COVID-19 pandemic (e.g., prohibiting further transfers into Sheridan, and mandating specific cleaning and social distancing protocols). *See Camillo-Amisano*, 2021 WL 3377237, at *5 (concluding that the petitioner’s claims could not be brought under Section 2241 because “[c]ontrary to Petitioner’s contentions, other relief is available to address his concerns, including injunctive relief ordering the Prison to take

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preventative measures to reduce the risk of COVID-19 spreading”); *see also Adelman v. Warden or Acting Warden, Lompoc-FCI*, No. 2:21-cv-04336-JAK (GJS), 2021 WL 2379402, at *7 (C.D. Cal. June 10, 2021) (finding persuasive those cases concluding that habeas jurisdiction is unavailable to address COVID-19 conditions because “[i]t is possible that there is relief that could be fashioned short of release”).

Finally, the evolution of compassionate release during the COVID-19 pandemic has clearly demonstrated that habeas relief is not the only option available to Petitioners to remedy the alleged deprivations they assert here. Compassionate release has provided available relief to petitioners with special individual circumstances justifying early release from custody during the pandemic. Indeed, the FPD has assisted over 155 individuals serving federal sentences, including Mr. Stirling and Mr. Green, to obtain compassionate release from federal custody during the course of this litigation. (*See Maxine Bernstein, Judge Grants Compassionate Release to Convicted Bank Robber, Calls his Time at Oregon’s Federal Prison ‘Excruciating Experience’*, OREGONLIVE (May 6, 2022, 4:48 PM), <https://www.oregonlive.com/crime/2022/05/judge-grants-compassionate-release-to-convicted-bank-robber-calls-his-time-at-oregons-federal-prison-excruciating-experience.html> (last visited Nov. 15, 2022); U.S. Sentencing Commission Compassionate Release Data Report, FY2020-21, Tab. 2 (reflecting that the District of Oregon granted 63.2% of compassionate release motions, the second highest percentage of any federal district), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20220509-Compassionate- Release.pdf?utm_medium=email&utm_source=govdelivery (last visited Nov. 15, 2022); *see also United States v. Stirling*, No. 3:19-cr-00150-MO (D. Or.), ECF No. 154; *United States v. Green*, 3:16-cr-00063-SLG (D. Alaska), ECF No. 208.

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In addition to the compassionate release remedy, a civil rights action under the PLRA also provides for the relief Petitioners seek here. Prospective injunctive relief is available under the PLRA “if it ‘extend[s] no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.’” *Plata v. Newsom*, 445 F. Supp. 3d 557, 561 (N.D. Cal. 2020) (quoting 18 U.S.C. § 3626(a)(1)(A)). Further, individuals in custody may obtain release under the PLRA via a prisoner release order issued by a three-judge panel if less intrusive relief fails to remedy the deprivation. 18 U.S.C. § 3626(a)(3)(A), (B). If individuals in federal custody first exhaust their administrative remedies, they may challenge the same conditions of confinement Petitioners challenge here by filing a civil rights action under the PLRA. *See Alvarez*, 445 F. Supp. 3d at 866 (explaining that the plaintiffs’ COVID-19-related habeas claim “is . . . based on confinement conditions” and therefore falls within the purview of the PLRA).

For all of these reasons, the Court agrees with the weight of authority in this circuit and concludes that claims challenging prison conditions created by the COVID-19 pandemic are not cognizable under Section 2241, even if the petitioner seeks release from custody. Specifically, the allegations in the amended petition do not “support a finding that immediate release from an existing, valid conviction and sentence imposed by another federal court is the only relief appropriate here and that only habeas review will suffice.” *Luna*, 2022 WL 1211911, at *5. Adopting Petitioners’ arguments to the contrary would “risk . . . turning [Section 2241] into a general civil rights statute by the mere expedient of a petitioner seeking that release remedy, among other remedies, in every habeas action in which conditions of confinement are at issue, e.g., poor medical treatment, unsanitary conditions, overcrowding, assaultive environment, and so forth.” *Harrison v. Broomfield*, No. 2:20-cv-01838, 2020 WL 5797871, at *2 (E.D. Cal. Sept. 29, 2020). Petitioners’ claims are not cognizable in habeas, and therefore this Court lacks

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jurisdiction under Section 2241 to adjudicate Petitioners' claims and must dismiss the amended petition.¹²

CONCLUSION

For the reasons stated, the Court DISMISSES the Amended Complaint and Petition for Writ of Habeas Corpus (ECF No. 16), with prejudice, and DENIES AS MOOT all pending motions.¹³ The Court also DISMISSES all of the related petitions for writ of habeas corpus consolidated under this case number and under *Lander v. Salazar*, No. 3:20-cv-01379-SB.¹⁴

IT IS SO ORDERED.

DATED this 15th day of November, 2022.



HON. STACIE F. BECKERMAN
United States Magistrate Judge

¹² Although the Court does not reach the merits of Petitioners' claims, it notes that as of the date of this opinion, the COVID-19 vaccine and associated booster vaccines are widely available, there is only one confirmed active COVID-19 case at Sheridan, and the facility has returned to a Level 2 "modified" operational level. (See FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/institutions/she/>) (last visited Nov. 15, 2022). Regardless of the label of the claims underlying Petitioners' request for immediate release, it is clear that the release of all Petitioners from federal custody at this time is not necessary to address any alleged unconstitutional conditions of confinement related to COVID-19.

¹³ The Court sealed Petitioners' proposed findings of fact and conclusions of law (attached as Exhibit A to Petitioners' response to Respondent's motion to stay), pending resolution of the motion to stay. (ECF No. 137.) Now that the Court has denied as moot Respondent's motion to stay, the Court unseals Exhibit A (ECF No. 134-1). The Court authorized Petitioners to file proposed findings of fact (see ECF No. 108), and the FPD put a great deal of work into investigating and documenting conditions at Sheridan, from Petitioners' standpoint, over the relevant time period. Respondent has not had an opportunity to respond to the proposed findings of fact and the Court does not adopt Petitioners' proposed findings, but the document is an important part of the record of this case.

¹⁴ See *Lander* Consolidation Order (ECF No. 7) (ordering that the Court will resolve all threshold legal and factual issues in *Stirling*, with the exception of any issues relating only to pretrial detainee petitioners, which the Court will address separately in *Lander*). The Court's jurisdictional analysis herein applies to both post-conviction and pretrial detainee petitioners.

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEP 5 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LONNIE EUGENE LILLARD,

Petitioner-Appellant,

v.

DEWAYNE HENDRIX, Warden, FCI
Sheridan,

Respondent-Appellee.

No. 23-35049

D.C. No. 3:22-cv-00966-SB
District of Oregon,
Portland

ORDER

AMADOR SANCHEZ MENDOZA, AKA
Amador Sanchez,

Petitioner-

Appellant,

v.

DEWAYNE HENDRIX, Warden,

Respondent-

Appellee.

No. 23-35059

D.C. No. 3:22-cv-00559-SB

Before: RAWLINSON, FORREST, and SUNG, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc (Dkt. 57). The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is DENIED.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOHN PHILIP STIRLING,

Petitioner,

v.

**JOSIAS SALAZAR, Warden, FCI
Sheridan,**

Defendant-Respondent.

Case No. 3:20-cv-00712-SB

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND PETITION FOR WRIT
OF HABEAS CORPUS**

INTRODUCTION

Whether through indifference or incompetence, the Federal Bureau of Prisons is endangering the lives of individuals entrusted to its care by failing to establish consistent and effective safeguards to protect them from the coronavirus and by subjecting them to conditions of confinement so harsh that mental and physical health are impaired. More than eighty federal inmates have died from COVID-19, thousands others have been sickened, yet the Bureau fails to follow the directives of the Attorney General and health authorities to de-densify its facilities in order to allow for safe distance between prisoners and lower staff-to-inmate ratios. Instead, since March 31, the Bureau has instituted increasingly draconian lockdown measures, confining pretrial detainees and convicted inmates in small cells for up to 23 hours per day, and at times up to 72 hours straight; triple-bunking some inmates in two-person cells; sharply curtailing contact with family and friends; cancelling educational and rehabilitative programs; eliminating or reducing needed medical care; and providing misinformation that frightens, destabilizes, and demoralizes, including quarantining inmates for transfer to home confinement, then revoking the transfers without explanation.

The Bureau increases the risk of infection for all inmates in a number of ways: by failing to test all current inmates for COVID-19; transporting inmates into and out of facilities without testing for COVID-19; allowing guards to enter without being tested and to wear the same gloves, masks and uniforms as they rotate through areas of the compound; and failing to provide sufficient cleaning materials needed to disinfect surfaces to avoid infection. While a national emergency like the pandemic justifies emergency measures, the Bureau's resort to a continuing lockdown, now more than 80 days running, and its inability to protect inmates from COVID-19 with or without the lockdown, results in custody that violates the laws and Constitution of the United States.

PAGE 1. AMENDED COMPLAINT

Because no conditions of confinement would be constitutionally sufficient to protect Mr. Stirling from COVID-19 within the Federal Detention Center at Sheridan, Oregon, where he is housed, Mr. Stirling seeks a writ of habeas corpus under 28 U.S.C. § 2241 ordering his release from unlawful custody. While the petition is pending, Mr. Stirling seeks declaratory and injunctive relief in the form of orders (1) prohibiting the Warden from accepting further detainees to the Federal Detention Center in Sheridan, Oregon, where he is housed, until the Warden can demonstrate that adequate quarantining and testing of the new arrivals assures that they are not infected with the coronavirus; (2) prohibiting Mr. Stirling's transfer out of the Federal Detention Center to any other BOP facility until the Warden can demonstrate that sufficient measures exist to protect him from infection with the coronavirus during both transportation and at the new facility; (3) mandating specific cleaning and social distancing protocols be implemented; and (3) mandating enlargement of his custody to allow serve of his sentence in the community rather than within the Federal Detention Center, until or if the lockdown has been lifted and safe conditions restored. Mr. Stirling further seeks court-mandated fact-finding on the conditions at FCI Sheridan as an interim measure to inform the decision in this case.

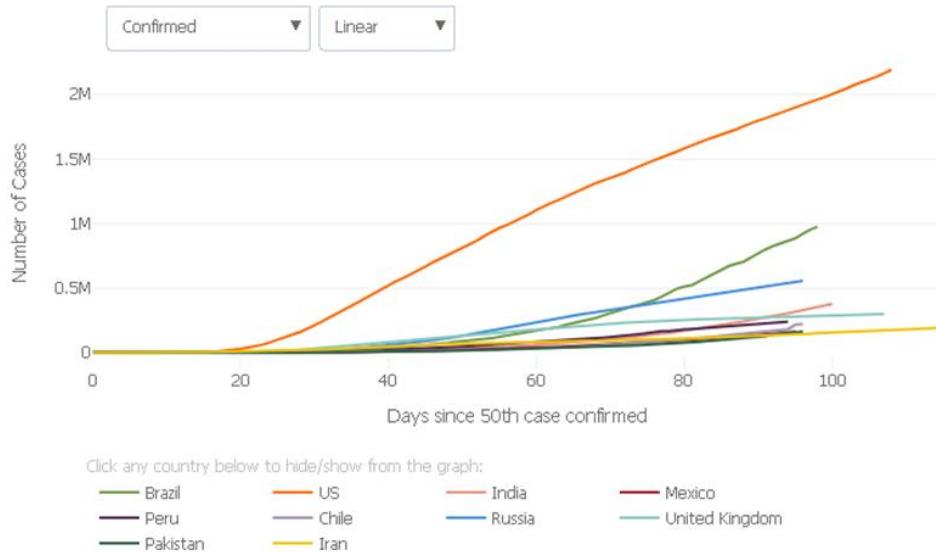
STATEMENT OF FACTS

I. Background

1.1 The novel coronavirus that causes COVID-19 has led to a global pandemic. As of June 29, 2020, more than 10 million people have been infected with the virus worldwide, and 504,936 have died.¹ A quarter of those deaths have occurred within the United States. The

¹ Johns Hopkins Medical Center, Coronavirus resource center, <https://coronavirus.jhu.edu/> (last accessed June 29, 2020, 9:22 p.m.)

devastating and rapid spread of the virus in the United States is evident in graphs that show the cumulative cases since the 50th day after the first case.²



1.2 The spread of the virus within prisons has been no less dramatic. There have been at least 75,000 people infected in U.S. prisons and jails, and at least 657 inmates and workers have died.³ Since the first known COVID-related death of an inmate on March 29, 2020, at least 548 prisoners in state and federal custody have died of COVID.⁴ The Bureau of Prisons acknowledges

² *Id.* Because the epidemic began at different times in different countries, viewing each country's curve from the same starting point allows an easier comparison among countries. The starting point for this chart is the day on which the 50th case was confirmed in each country, with the trend lines following the number of days since that event.

³ The New York Times, *Coronavirus in The U.S.: Latest Map and Case Count*, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters> (last accessed June 29, 2020).

⁴ The Marshall Project, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last accessed June 29, 2020).

89 inmate deaths directly attributed to COVID-19, a figure that does not include either deaths at private federal prisons or deaths of inmates after they are discharged from prison.⁵

1.3 According to the Centers for Disease Control and Prevention, people who suffer from certain underlying medical conditions face an elevated risk of complications if they contract COVID-19. The conditions causing higher risk include chronic lung disease, moderate to severe asthma, serious heart conditions, chronic kidney disease, liver disease, diabetes, compromised immune systems, and severe obesity.⁶ Those aged 65 and over are also at higher risk.

1.4 In order to slow the spread of the virus and to save lives, the CDC issued a series of guidelines recommending “social distancing” of at least six feet of distance between people, frequent hand-washing, use of alcohol-based disinfectants, and wearing of masks.⁷ New reports indicate that remaining in proximity to others, in closed indoor spaces with limited air circulation, poses increased risk of coronavirus infection.⁸

⁵ Death total from Bureau of Prisons website, <https://www.bop.gov/coronavirus/> (last accessed June 29, 2020). The site acknowledges that private prisons are not included in the count. For an example of an unreported death of an inmate after discharge, see <https://www.nytimes.com/2020/06/15/obituaries/alan-hurwitz-dead-coronavirus.html>. The BOP did not issue a press release to report his death. See https://www.bop.gov/resources/press_releases.jsp

⁶ Ctrs. for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html> (last accessed June 19, 2020).

⁷ Ctrs. for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last accessed June 19, 2020) (“[K]eeping space between you and others is one of the best tools we have to avoid being exposed to this virus and slowing its spread locally and across the country and world.”)

⁸ <https://www.businessinsider.com/coronavirus-risk-higher-tight-indoor-spaces-with-little-air-flow-2020-5>

1.5 Specifically relating to prisons, the CDC has noted the increased risk factors for spread of the coronavirus:

- Incarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced.
- There are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including daily staff ingress and egress; transfer of incarcerated/detained persons between facilities and systems.
- Options for medical isolation of COVID-19 cases are limited and vary depending on the type and size of facility, as well as the current level of available capacity, which is partly based on medical isolation needs for other conditions.
- Adequate levels of custody and healthcare staffing must be maintained to ensure safe operation of the facility, and options to practice social distancing through work alternatives such as working from home or reduced/alternate schedules are limited for many staff roles.
- Because limited outside information is available to many incarcerated/detained persons, unease and misinformation regarding the potential for COVID-19 spread may be high, potentially creating security and morale challenges.
- The ability of incarcerated/detained persons to exercise disease prevention measures (e.g., frequent handwashing) may be limited and is determined by the supplies provided in the facility and by security considerations. Many facilities restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants.
- Incarcerated/detained persons and staff may have medical conditions that increase their risk of severe disease from COVID-19.⁹

⁹ Ctrs. for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last accessed June 29, 2020)

1.6 The CDC has issued guidance urging prison administrators to take action to prevent overcrowding of correctional and detention facilities.¹⁰ According to CDC guidelines, only two measures are known to be effective in reducing the spread of this disease: (1) diligent “social or physical distancing,” which involves keeping at least six feet of space between people to avoid transmission of the virus, and (2) vigilant hygiene practices, including frequently washing hands and regularly disinfecting surfaces. Physical distancing is a necessary predicate for hygiene practices to have any meaningful impact.¹¹

1.7 As the spread of the coronavirus escalated, Congress passed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, which modified 18 U.S.C. § 3624(c) to enable the Bureau to allow greater use of home confinement and reduce crowding at prisons during the COVID-19 emergency.

1.8 As the spread of the coronavirus escalated, Attorney General Barr issued memoranda on March 26 and April 3, directing the Bureau of Prisons to decrease prison populations by transferring medically at-risk prisoners to home confinement.¹² The Attorney General

¹⁰ Ctrs. for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in CORRECTIONAL AND DETENTION FACILITIES (CDC GUIDANCE)* (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last accessed June 29, 2020).

¹¹ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>

¹² Office of the Attorney General, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), <https://www.justice.gov/file/1262731/download>. Office of the Attorney General, Increasing Use of Home Confinement as Institutions Most Affected by COVID-19 (Apr. 3, 2020), <https://www.justice.gov/file/1266661/download>.

acknowledged that “emergency conditions are materially affecting the functioning of the Bureau of Prisons,” and that due to the rapid spread of COVID-19, “time is of the essence.” He directed the Bureau “to move vulnerable inmates out” of specific institutions suffering from infection and also out of facilities facing similarly serious problems.

1.9 As the spread of the coronavirus escalated, numerous public officials, doctors, and members of Congress issued increasingly urgent calls for the Bureau of Prisons to de-densify its facilities in order to allow adequate distance among incarcerated inmates. On March 23, 2020, a bipartisan group of fourteen U.S. Senators sent a letter to U.S. Attorney General Barr and BOP Director Carvajal to express their “serious concern for the health and wellbeing of federal prison staff and prisoners . . . especially those who are most vulnerable to infection.”¹³ The Senators wrote that they reviewed the BOP’s COVID-19 Action Plan and noted that it did not include any measures to protect the most vulnerable staff and prisoners. The Senators urged the Department of Justice and the BOP to release to home confinement certain individuals who were elderly, ill, or incarcerated for non-violent offenses and were near release. Two hundred faculty members associated with Johns Hopkins School of Public Health expressed “urgent concern” about the spread of COVID-19 in prisons, jails, and juvenile detention centers.¹⁴ The doctors detailed the

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<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>

¹⁴ <https://bioethics.jhu.edu/wp-content/uploads/2019/10/Johns-Hopkins-faculty-letter-on-COVID-19-jails-and-prisons.pdf>.

many reasons that crowded detention facilities would pose serious health risks for inmates and staff alike.¹⁵

1.10 Despite the calls to de-densify prisons by releasing the most vulnerable, the Bureau has not released large numbers of at-risk inmates. The Federal Correctional Institution at Sheridan, Oregon, for example, housed 1,787 inmates in its three facilities as of April 14, 2020.¹⁶ Two and a half months later, the population had dropped by fewer than 170 inmates, to 1,619.¹⁷

1.11 Although the CDC warned that moving inmates among facilities could spread the coronavirus, the Bureau slowed but never halted inmate transportation.¹⁸ On May 23, 2020, despite the exponential spread of the virus within federal prisons, the Bureau announced it would resume greater transportation of inmates.¹⁹ The Bureau decided to transport newly-sentenced inmates to one of three “quarantine sites” – FCC Yazoo City, Missouri; FCC Victorville, California; and FTC Oklahoma City, Oklahoma. The proposed plan is to test inmates for coronavirus before they are moved to their designated Bureau facility.

¹⁵ See also Declaration of Dr. Homer Venters, filed in *Fraihat v. ICE*, No. 19-cv-01546-JGB (C.D. Cal. Mar. 24, 2020), attached as Exhibit 2 (describing requirements for safety of detainees in federal immigration custody).

¹⁶ Of those, 1,264 inmates and detainees were at the FCI or the detention center, and 523 were at the camp. Bureau of Prisons website, <https://www.bop.gov/locations/institutions/she/> (accessed April 14, 2020).

¹⁷ The camp population decreased to 456 inmates, while 1,163 inmates were in custody at the FCI & FDC. <https://www.bop.gov/locations/institutions/she/> (accessed June 29, 2020)

¹⁸ Bureau of Prisons website, https://www.bop.gov/coronavirus/covid19_status.jsp (last accessed June 19, 2020).

¹⁹ Bureau of Prisons website, https://www.bop.gov/resources/news/pdfs/20200527_press_release_inmate_movement.pdf (last accessed June 19, 2020).

1.12 Safe transportation of inmates would require a level of preparation, training, and staffing that the Bureau has not demonstrated in its response to COVID-19. As one medical expert opined when assessing safe transportation of immigration detainees, “transferring large numbers of detained people between facilities to cohort symptomatic and asymptomatic people will increase the spread of COVID-19 infection throughout geographic areas.”²⁰

II. Conditions for Sheridan Detainees

2.1 On March 31, 2020, the Bureau announced a 14-day lockdown of all inmates within federal prisons.²¹ A press release explained that “for a 14-day period, inmates in every institution will be secured in their assigned cells/quarters to decrease the spread of the virus.” The Bureau pledged to review the decision to confine inmates in cells after 14 days to determine if modified operations could be resumed.²² On April 14, 2020, the Bureau extended the lockdown order, and it has never been lifted.²³

2.2 Inmates at the Sheridan FDC report that, since the lockdown started, they have been held in cells for 23 hours per day, and sometimes for up to 72 hours straight, without release. As Petitioner John Stirling described on April 20, 2020 (ECF 1):

²⁰ Ex. 2, Declaration of Dr. Homer Venters, ¶ 18, filed in *Fraihat v. ICE*, No. 19-cv-01546-JGB (C.D. Cal. Mar. 24, 2020).

²¹ Bureau of Prisons website, https://www.bop.gov/resources/news/pdfs/20200331_press_release_action_plan_5.pdf (last accessed June 19, 2020).

²² *Id.*

²³ Bureau of Prisons website, https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf

We have illegally been under lockdown for 19 days. Cut off from phones, showers, email and quality food. 4 hours out in 14 days only.

No Phones. The BOP increased phone time from 300 to 500 minutes /month. But we are locked down and can not use it.

2.3 Other inmates at FDC Sheridan report that, for months, they have been given only one hour out of their cell, twice a day.²⁴ On weekends they are locked in from Friday until Monday. they have difficulty reaching family members by phone or email because, in the limited time they have out of their cell, the lines for the phones and computers are long.²⁵

2.4 On May 25, an inmate reported that “management is allowing for approximately 70+ inmates to be released from their cells for 2 ½ hours per day. There are no social distancing measures being enforced and most all inmates are in very close proximity to each other during that 2 ½ hours. The facility has issued face masks but the staff are not enforcing the wearing of them and almost all inmates on the cell-block where I am housed do not wear them.”²⁶

2.5 During the lockdown, conditions have become less sanitary than before.²⁷ Inmates report they are out of toilet paper. Trash is not collected from cells while inmates are locked down. Inmates are permitted a shower only every three days. Laundry has been reduced to once per week. Inmates receive no or insufficient cleaning supplies. As petitioner Stirling described, “Cleaning and masks is a joke. We have no bleach.” (ECF 1, p. 9).

²⁴ Ex. 1, Declaration of Investigator Courtney Withycombe.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

2.6 During the lockdown, the quality of food has deteriorated. Inmates report receiving “baloney sandwiches” day after day.²⁸

2.7 Two weeks after the lockdown went into effect, one inmate at the Sheridan FDC committed suicide.²⁹ Inmates report that two other detainees engaged in acts of self-harm while locked in their cells, one reportedly slashing his neck.³⁰ Other inmates report they are stressed and feel poor physically due to cramped conditions, lack of fresh air, lack of exercise, and poor food. Some inmates reportedly contemplated or started hunger strikes.³¹

2.8 The Bureau does not acknowledge any COVID-19 cases at Sheridan, in any of the three facilities. According to the BOP website, 150 inmates at Sheridan have been tested so far for COVID-19, and none were positive. Twelve tests are pending.³²

2.9 Inmates report being frightened of contracting the virus at Sheridan. As one inmate with underlying health issues wrote:

I currently live in daily fear that if COVID-19 were to reach my unit at FCI Sheridan, it would be a certain death sentence for me.

These people here refuse to help me. I've been very sick for the last 4 months and still have not helped me. I sent many paper requests concerning my lungs and only

²⁸ Ex. 1, Declaration of Investigator Courtney Withycombe.

²⁹ <https://www.oregonlive.com/coronavirus/2020/04/ors-federal-public-defender-lockdown-at-federal-prison-to-avoid-spread-of-coronavirus-is-becoming-overwhelming-for-some-inmates.html>

³⁰ Ex. 1, Declaration of Investigator Courtney Withycombe. For photos of lockdown food in a Texas prison, see The Marshall Project, *Ewww, What Is That*, (May 11, 2020) <https://www.themarshallproject.org/2020/05/11/ewwww-what-is-that>

³¹ *Id.*

³² Bureau of Prisons website, <https://www.bop.gov/coronavirus/> (last accessed June 29, 2020).

one response, that said I would be seen soon. That was over a month ago and still have not been seen. I've sent 7 electronic requests begging for help, and not one response! I've made them aware that I'm having trouble breathing, and that I've passed out because I can't breath[e] and still they won't help me.

2.10 Another inmate described seeing inmates with symptoms being taken away, and having the guards imply the cause was COVID-19:

This morning an inmate who lives 10 feet from me in the next cube in the same over-crowded wing was taken out to the hospital for shortness of breath and coughing and we were told simply "don't touch his stuff if you want to live" by one of the correctional officers. A number of other inmates are getting cold symptoms the last couple of days. Everybody is afraid to report their symptoms because they do not want to be put into isolation with no access to contact their families at all, when they think they only have a cold. This is scary. I know that if I am exposed, I will very likely not survive or will have permanent damage. The quarantine area here is a joke does not provide protection at all, as the same staff walk through the quarantine area just as regularly as they walk through the non-quarantine areas.

2.11 Inmates receive misinformation, and clear statements by the Bureau are retracted or reversed with no explanation. One inmate was incorrectly told that, because he would be released to home confinement, he should not file a motion for compassionate release because the two could interfere with each other.³³ He asked his attorney to withdraw his compassionate release motion as a result.

2.12 Other inmates at Sheridan were told they were getting released, and they were sent into quarantine, only to learn later that they would not get released. Some had already alerted their families they were coming home. As one spouse writes:

I want you to know what is happening there. I am truly bothered by my husband's stories of how those who are already in quarantine at the Sheridan Camp are being sent back to the general population after spending almost a month or so inside.

³³ Ex. 1, Declaration of Investigator Courtney Withycombe.

Another wife has shared with me that her husband was already in quarantine for twelve days, but was sent back for no apparent reason. Yesterday, May 26, he shared that two other men were kicked out of quarantine. Most of them were sent out because they found out they had no underlying conditions, one was sent back because the Probation Officer could no longer entertain another inmate. Another man was in quarantine for 30 days, but was sent back because they neglected to file his papers. I am not too sure what are the other reasons for these men being sent back to general population. It demoralizes the inmates who are all hoping to finally be reunited with their families.

Many of them including my husband was called to sign documents for release. I also sent the documents of the designated visitor who will be picking him up, I waited for his Probation Officer to come and inspect our home, and my husband was able to finish all his Release Preparation Program (RPP) classes. But until this day, they have not been called to provide a release date or any update of some sort. My husband had the courage to approach his Case Manager to ask for an update, but he was told that he was not even on the list in the first place; it did not make sense. This discouraged him to keep moving forward. I, on the other hand, will continue fighting for my husband and for those who are significantly affected by how things are run in the camp.³⁴

2.13 The harmful effect of misinformation has been noted at other BOP facilities as well.

Nationally, inmates in minimum security facilities were reported to be “at the breaking point” from the lockdown, the lack of communication, and the fear and uncertainty from changing BOP policies.³⁵

2.14 Communication with attorneys is also limited. Attorneys report that legal mail, which ordinarily should be opened in the inmate’s presence, now is simply opened by prison guards on their own and delivered to the locked-in client.³⁶ Clients have severely limited time to

³⁴ Ex. 1, Declaration of Investigator Courtney Withycombe.

³⁵ Walter Pavlo, *Minimum Security Inmates Locked In Cells For Quarantine Are At Breaking Point*, Forbes (May 6, 2020) <https://www.forbes.com/sites/walterpavlo/2020/05/06/minimum-security-inmates-locked-in-cells-for-quarantine-are-at-breaking-point/#247911441a66>

³⁶ *Id.*

use the attorney phone to make calls. As a result, accurate and current information on the conditions at Sheridan is difficult to obtain.

2.15 Inmates are worried that newly arriving inmates will bring the virus to them. As Mr. Stirling wrote: “The prison keep putting 10 people that are from outside this prison in my unit under what the captain says is ‘quarantine.’ Sheridan prison staff are endangering my life with new entries.” (ECF 1, p. 2). He asked that they “keep new arrivals out. … They bring 16 new prisoners from another prison in here.” (ECF 1, p. 8). He reported 10 new people arrived on April 16, 2020, and six more were expected. The new prisoners were “being quarantined” right in their unit. (ECF 1, p. 6-8).

III. Parties

3.1 Petitioner John Stirling is a 66-year old man who is detained at the Sheridan FDC. After being sentenced on May 21, 2020, to 40 months of custody, he has not yet been designated to another facility for service of his sentence. He fears that, as a newly-sentenced inmate, he will be transported out of Oregon to a quarantine facility, and may be exposed during the travel to inmates infected by the coronavirus. Mr. Stirling suffers from advanced diabetes and requires two injections of medication daily. An x-ray notes lung scarring, and medical reports include a tuberculosis diagnosis. He falls within the category of individuals considered at high risk for serious complications if infected with the coronavirus.

3.2 Josias Salazar is the Warden of FCI Sheridan and is named in his official capacity as a custodian of Mr. Stirling.

IV. Jurisdiction and Venue

4.1 The Court has subject-matter jurisdiction over this Petition pursuant to 28 U.S.C. § 1331 (federal question), 5 U.S.C. §§ 702 & 706 of the Administrative Procedure Act, 28 U.S.C.

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§ 2241 (habeas corpus) and Article I, § 9, cl. 2 of the United States Constitution (Suspension Clause). In addition, the Court has jurisdiction to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

4.2 Venue is proper in the District of Oregon pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events and omissions giving rise to these claims occurred and continues to occur in this district. This Court has personal jurisdiction over Warden Salazar because at all times relevant to this action, he has been employed at FCI Sheridan in Sheridan, Oregon, and all the actions and omissions at issue occurred at Sheridan.

V. Statement of Law

A. In Light Of The Bureau's Decision To Use Severe Lockdown As The Alternative To De-Densifying Its Facilities, No Conditions Of Confinement At FCI Sheridan Would Meet Eighth Amendment And Due Process Requirements And Mr. Stirling's Writ of Habeas Corpus Should Be Granted.

Under 28 U.S.C. § 2241, a person in custody in violation of the laws and Constitution of the United States is entitled to summary relief and disposition as “law and justice require” under 28 U.S.C. § 2243. The Government violates the Eighth Amendment if it confines a criminal detainee in unsafe conditions. *Helling v. McKinney*, 509 U.S. 25, 32 (1993). Punishment without full compliance with the Fifth and Sixth Amendments violates the right to due process of law. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 68 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000); *Gideon v. Wainwright*, 372 U.S. 335, 344- 45 (1963).

Mr. Stirling is unlawfully detained and should be granted summary habeas corpus relief because his detention violates the laws and Constitution of the United States. *See Boumediene v. Bush*, 549 U.S. 1328, 1330 (2007) (“the ‘province’ of the Great Writ, ‘shaped to guarantee the most fundamental of all rights, is to provide an effective *and speedy* instrument by which

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judicial inquiry may be had into the legality of the detention of a person.”” (emphasis in *Boumediene*) (quoting *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968)). Because Mr. Stirling challenges the fact of his confinement under the circumstances of the COVID pandemic and seeks release, habeas relief is proper. *See, e.g., Wilson v. Williams*, No. 20-3447, 2020 WL 3056217, at *5 (6th Cir. June 9, 2020) (petition under 2241 is proper vehicle for inmates challenging fact of confinement in light of COVID-19); *Martinez-Brooks v. Easter*, No. 3:20-CV-00569, 2020 WL 2405350, at *16 (D. Conn. May 12, 2020) (“Because Petitioners contend that the Eighth Amendment violation inheres in their incarceration at Danbury FCI and cannot be remedied unless they are removed from that setting, Petitioners are challenging the fact—or “existence”—of their confinement” and 2241 provides the proper vehicle for relief). A “hybrid” habeas petition may challenge both the conditions and execution of a sentence. *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (noting “[s]ome cases are hybrids.”)

1. *The Bureau’s Failure to Take Needed Steps to De-Densify The Prison and To Mitigate Transmission of COVID-19 Constitutes Deliberate Indifference to Mr. Stirling’s Serious Medical Needs In Violation Of Due Process And The Eighth Amendment.*

The respondents are violating Mr. Stirling’s Due Process and Eighth Amendment rights by continuing to incarcerate him in conditions that place him at substantial risk of serious harm from transmission of an infectious and deadly disease, especially considering his vulnerable medical condition. The Due Process Clause of the Fifth Amendment forbids the government from depriving a person of life, liberty, or property without due process of law. U.S. Const. amend. V. The protection applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Constitutional protections for individuals confined by the state, whether civilly or

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criminally, include the right to reasonable safety and medical care. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see also Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (“[T]he right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause.” (citation omitted)).

“The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.” *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). The State’s duty to protect arises “from the limitation which it has imposed on [the detainee’s] freedom to act on his own behalf.” *Id.*; *see also Estelle*, 429 U.S. at 103 (“An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.”).

Although sentenced as punishment to the custody of the BOP, Mr. Stirling retains his Eighth Amendment right to be free from cruel and unusual punishment. *See Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012). Given the decision of the Bureau to lock down every inmate rather than de-densify, and because that strategy nevertheless risks exposing Mr. Stirling to infection from the coronavirus, no conditions of confinement at Sheridan can meet constitutional requirements.

Under the Eighth Amendment, the Government must provide criminal detainees with basic human needs, including reasonable safety. *Helling v. McKinney*, 509 U.S. 25, 32 (1993). The Government violates the Eighth Amendment if it confines a criminal detainee in unsafe conditions. *See Helling*, 509 U.S. at 33. Moreover, the Government may not “ignore a condition of

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confinement that is sure or very likely to cause serious illness.” *See Helling*, 509 U.S. at 32. “That the Eighth Amendment protects against future harm to inmates is not a novel proposition.” *Helling*, 509 U.S. at 33. The Supreme Court stated clearly: “[T]he Eighth Amendment protects [prisoners] against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering[.]” *Helling*, 509 U.S. at 33. Indeed, the Court concluded that, where prisoners in punitive isolation were crowded into cells and some of them had infectious maladies, “the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed.” *Helling*, 509 U.S. at 33.

The Ninth Circuit employs a two-part test in assessing whether prison officials have violated the Eighth Amendment by way of deliberate indifference to the medical needs of inmates: (1) the plaintiff must show “a serious medical need by demonstrating that failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain”; and (2) the defendants’ “response to the need” must have been “deliberately indifferent.” *Wilhelm*, 680 F.3d at 1122 (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)). Government officials act with deliberate indifference when they “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” even when “the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33.

As *Helling* established, this Court need not “await a tragic event” at Sheridan to find that the respondents are maintaining unconstitutional conditions of confinement. *Id.* at 32-33. The tragic events are already unfolding in prisons around the country, as inmates are sickened and die

in federal care. Mr. Stirling has a constitutional right to be free from conditions of confinement that “pose an unreasonable risk of serious damage to [his] future health.” *Id.* at 35.

The threat of exposure to a deadly infectious disease such as COVID-19 and subsequent mistreatment due to lack of medical resources constitutes a serious risk to health, particularly for someone with unique vulnerability to COVID-19. *See Helling*, 509 U.S. at 34 (noting with approval Eighth Amendment claims based on exposure to serious contagious diseases); *Unknown Parties v. Johnson*, No. cv-15-00250, 2016 WL 8188563, at *15 (D. Ariz. Nov. 18, 2016), *aff’d sub nom, Doe v. Kelly*, 878 F.3d 710 (finding evidence of medical risks associated with . . . being exposed to communicable diseases” adequate to establish irreparable harm under the Eighth Amendment); *Castillo v. Barr*, ____ F.Supp. 3d ___, 2020 WL 1502864, at *5 (C.D. Cal. Mar. 27, 2020) (in civil detainment context, ruling that officials could not “be deliberately indifferent to the potential exposure of civil detainees to a serious, communicable disease on the ground that the complaining detainee shows no serious current symptoms, or ignore a condition of confinement that is more than very likely to cause a serious illness”).

Mr. Stirling is entitled to protections from conditions of confinement that create a serious risk to health or safety, including through release from custody when necessary. *Brown v. Plata*, 563 U.S. 493, 531–32 (2011) (upholding lower court’s order releasing people from state prison even though release was based on prospect of future harm caused by prison overcrowding); *see also Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (correctional official violates Eighth Amendment by consciously failing to prevent “a substantial risk of serious harm”).

Mr. Stirling has demonstrated a “serious medical need” that is unmet by the BOP and that could result in significant injury. His age and his underlying condition of advanced diabetes indisputably place him within the category of high-risk individuals identified by the CDC as likely

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to experience greater harm if infected by the coronavirus. By locking him in a unit with inmates who have not been tested for the coronavirus and by maintaining a high population of inmates that ensures crowding around phones, in showers, and in common areas, when released from cells, the BOP places him at risk for exposure to a life-threatening disease. The deliberate indifference of BOP personnel is also evident in that they have resumed transportation of newly-sentenced inmates, regardless of health risk; they have failed to utilize authority to de-densify the Sheridan facility in order to allow distance between inmates; and they have failed to conduct adequate testing or to provide adequate cleaning materials to allow inmates to take precautions to remain safe. The writ should be granted. To the extent further evidence is needed, Mr. Stirling requests an evidentiary hearing.

2. *The Bureau's Continuing Extension Of The 14-Day Lockdown To Now Over 80 Days Violates Due Process And The Eighth Amendment.*

“The Constitution ‘does not mandate comfortable prisons,’ but neither does it permit inhumane ones, and ... ‘the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.’ ” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal citations omitted). “A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” *Id.* at 828.

Confining prisoners to small cells for long stretches of time; triple-bunking some inmates within those cells; providing inadequate nutrition as a result of sack food delivery; obstructing contact with family and the outside world; eliminating the ability to exercise; and creating unsanitary conditions in the time of a pandemic through limited showers and laundry, results in inhumane conditions. “When people are locked into cells alone, for most of the day, they quickly

experience psychological distress that manifests in self-harm and suicidality.”³⁷ Moreover, these efforts to lock detained people into cells may worsen, not improve, Sheridan’s infection control efforts, because the rapid response required for mental and physical health emergencies may bring contamination into units from influx of emergency staff.

Mr. Stirling asserts he has experienced physical and mental harm as a result of the continuing lockdown. The uncertainty of the length of the lockdown itself causes mental distress. Moreover, placing the full prison on lockdown subjects him to potential harm because, during the hour that inmates are released, they are more volatile in their competition for scarce phone and shower and resources. Because a continuing lockdown appears to be the Bureau’s chosen response to the pandemic, which shows no signs of abating, Mr. Stirling asserts the indefinite lockdown violates his rights to Due Process and under the Eighth Amendment. Release should be granted.

3. *Request For Injunctive Relief*

Individuals may sue to enjoin constitutional violations, either directly under the Constitution or under the Administrative Procedure Act. *See Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019) (“Plaintiffs may bring their challenge through an equitable action to enjoin unconstitutional official conduct, or under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, as a challenge to a final agency decision that is alleged to violate the Constitution, or both.”); *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (“If the court finds the Eighth Amendment’s subjective and objective requirements satisfied” with regard to a federal prisoner, “it may grant appropriate injunctive relief.”).

³⁷ Ex. 2, Declaration of Dr. Homer Venters, ¶ 10.

Mr. Stirling requests a temporary restraining order and a permanent injunction to (1) prohibit the BOP from bringing new inmates into the FDC Sheridan until the warden has demonstrated adequate testing and safety protocols to ensure the coronavirus is not introduced through the arrivals; and (2) to prohibit his transportation out of the FDC Sheridan until the Warden can demonstrate the transportation, any place of quarantine, and the designated facility will be safe and not subject him to infection from the coronavirus.

Mr. Stirling is entitled to a temporary restraining order if he can show: (1) a likelihood of success on the merits; (2) that he is likely to suffer irreparable harm in the absence of relief; (3) the balance of equities tip in his favor; and (4) an injunction is in the public's interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit's sliding scale approach, a stronger showing of one element may offset a weaker showing of another. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). Accordingly, Mr. Stirling is entitled to a temporary restraining order if "serious questions going to the merits [are] raised and the balance of hardships tips sharply in [his] favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

Mr. Stirling has established that there is more than a mere likelihood of success on the merits. *See Winter*, 555 U.S. at 20. He has established that he is likely to suffer irreparable harm in the absence of relief because the deprivation of constitutional rights unquestionably constitutes irreparable injury. *See Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017). The balance of the equities tip sharply in his favor. He faces irreparable harm to constitutional rights and health. Indeed, there is no harm to the Government when a court prevents the Government from engaging in unlawful practices. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

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Finally, the injunctive relief sought here is in the public's best interest. The public has a critical interest in preventing the further spread of the coronavirus. An outbreak at FCI Sheridan would require use of hospital resources in the community and create stress for the medical infrastructure.

4. Request For Interim Relief

To the extent the writ cannot be immediately granted, Mr. Stirling seeks an order of enlargement, under which his sentence could be served in the community until the conditions at Sheridan can be rendered safe. See *LaDuke v. Nelson*, 762 F.2d 1318, 1330-31 (9th Cir. 1985), modified, 796 F.2d 309 (9th Cir. 1986); *Martinez-Brooks v. Easter*, No. 3:20-CV-00569, 2020 WL 2405350, at *16 (D. Conn. May 12, 2020) (granting order of enlargement for certain inmates at FCI Danbury in light of pandemic).³⁸

Further, as an interim measure, Mr. Stirling further seeks court-mandated fact-finding, under Court supervision, of the actual conditions at FCI Sheridan. Because access to information is restricted, Mr. Stirling experiences stress from his belief that inmates and staff are, in fact, infected by the coronavirus and that insufficient measures have been taken to protect the health and safety of inmates. Just as other courts have ordered inspections of federal facilities and frequent status reports, Mr. Stirling seeks court-ordered data collection here. See, e.g., *In re Coronavirus/COVID-19 Pandemic, Administrative Order* No. 2020-14 (EDNY Apr. 2, 2020) (Ex. 4) (requiring bi-monthly status updates regarding 1) protocols for screening & testing inmates, staff, and others enter or leaving each facility; 2) the number of inmates tested and the number of

³⁸ The attached declaration of Professor Judith Resnik as Exhibit 3 provides historical and legal analysis of the court's enlargement authority.

positive tests; 3) the number of staff and other correctional workers testing positive; and 4) “[a]ll efforts undertaken to mitigate the spread of COVID-19”); *Gomes v. Department of Homeland Security*, Order, Case No. 20-cv-453, Dkt No. 123 at 56-61 (D.N.H. May 14, 2020) (Ex. 5) (ordering report concerning detailed issues related to testing and mitigation measures in local jail holding federal detainees); *Urdaneta v. Keeton*, Order, Case No. 20-cv-654, Dkt. No. 52 at 22 (Ex. 6) (D. Ariz. May 11, 2020) (soliciting proposed measures from parties to ensure adequate health standards in federal detention facility including placement in single-occupancy cell, meals delivered to cell; free, unlimited PPE, hygiene supplies, and disinfectant; requiring all staff to wear PPE; and requiring testing).

CONCLUSION

For the foregoing reasons, the Court should grant the writ of habeas corpus and order release, and if further proceedings are needed, order injunctive and interim relief.

Respectfully submitted this 29th day of June, 2020.

/s/ Lisa Hay
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PAGE 24. AMENDED COMPLAINT

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

**JOHN PHILIP STIRLING; STEVEN
WAYNE LANDER,**

Petitioners,

v.

**DEWAYNE HENDRIX, Warden,
FCI Sheridan,**

Respondent.

**Case No. 3:20-cv-00712-SB
3:20-cv-01379-SB**

**PETITIONERS' PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

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Introduction

In response to the pandemic, the BOP has chosen a strategy of extensive confinement and reduction of services that places the weight of the pandemic response on prisoners to such an extent that overall conditions at FCI Sheridan have violated both the Eighth Amendment's prohibition against cruel and unusual punishment and the Fifth Amendment's guarantees of due process. The BOP's pandemic response has included inhumane periods of confinement in small cells and unresolved staffing shortages leading to grossly inadequate medical, dental, and mental health care and severe limits on 1) time outside; 2) the provision of adequate food; 3) contact with families; and 4) programs for rehabilitation. The effect on mental and physical health of incarcerated people has been devastating. Repeated waves of coronavirus infections, and the long-term effects of isolation, indeterminate confinement, and deprivation, have pushed residents at FCI Sheridan to the breaking point. Their pleas for help, reaching even the point of a hunger strike, have been met largely with indifference and at times violent retaliation. One person committed suicide; at least five others have died from medical ailments. Based on the proposed findings of fact below, this Court should conclude that the Warden has violated the Eighth Amendment rights of convicted detainees and the Due Process rights of pretrial detainees at FCI Sheridan, and that the evidence demonstrates that, in light of the pattern of constitutional violation over the last two years, no conditions of confinement at Sheridan can comply with the Constitution.

Petitioners seek relief from the constitutional violations in the form of (1) release from custody; (2) transfer to less restrictive confinement in the community; (3) reduction in the term of imprisonment to take into consideration the harsher conditions of confinement that have prevailed since April of 2020; and (4) declaratory judgment regarding the harsh conditions endured.

Page 1. PETITIONERS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Exhibit A to Petitioner's Response to ECF 128
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Procedural Background

On April 20, 2020, petitioner John Stirling filed a petition under 28 U.S.C. § 2241 for habeas relief from unconstitutional confinement at FCI Sheridan.¹ He alleged that the Warden was endangering his life and those of others by needlessly exposing them to the coronavirus; that he and others had been locked in their cells for 14 days straight with only 4 hours out; that they could not reach their family and friends during the few hours of release; and that they were cut off from phone, email, showers, and adequate food.² He said his administrative remedy requests were “not answered at all.” He requested release because death, “either mentally or by the corona-19” was “inevitable” otherwise.

Mr. Stirling referred to his petition as “a class action of sorts,” and a number of incarcerated people began filing the same petition, often with their personal experiences added.³ The Court appointed the Federal Public Defender to represent Mr. Stirling, and later each of the other petitioners.⁴ At the time he filed his petition, Mr. Stirling was a pretrial detainee housed at the Federal Detention Center (FDC).⁵ Shortly after filing, he was sentenced to the custody of the Bureau of Prisons and moved from detainee status to prisoner.

¹ ECF 1. Throughout these pleadings, “FCI Sheridan” refers to the entire BOP compound in Sheridan, Oregon, which the Warden oversees. The federal detention center is referred to as “the FDC,” the medium security correctional institution is referred to as “the FCI,” and the federal camp is “the Camp.”

² ECF 1 at 2-8.

³ ECF 2 (Stirling affidavit); Pet. Ex. 8 (compilation of statements in 188 filed habeas petitions, from July 2020 through July 2022).

⁴ ECF 4.

⁵ See *U.S. v. Stirling*, 3:19-cr-00150-MO-1 (D. OR), ECF 111 (sentencing held May 21, 2020).

At a status conference on October 2, 2020, the parties discussed a discovery schedule and case management for the Stirling case and related cases.⁶ The Court had previously ordered broad discovery, including specifics about protocols to prevent and test for the spread of COVID.⁷ The parties then filed a joint status report in which they agreed to “serial discovery” to allow for faster updates, and further agreed to consolidate responses to the cases because the petitions raised “common legal and factual issues related to the execution of sentences under the conditions at FCI Sheridan in light of the BOP’s modified prison operations during the COVID-19 pandemic.”⁸ Although Mr. Stirling had been both a pretrial detainee and an incarcerated person during the time span of the pending petition, the parties selected another habeas case, *Lander v. Cooper*, 3:20-cv-01379-SB, to represent pretrial detainees in the litigation.⁹ Although perhaps unnecessary, the joint proposal was to file pleadings in the *Stirling* and *Lander* cases as representative of post-sentencing petitioners and pretrial detainees.¹⁰ This pleading is filed in accordance with that agreement.

⁶ ECF 45 (minute order).

⁷ ECF 24 (minute order, Simon, J.); ECF 44, p 53 (Transcript of hearing held July 22, 2020).

⁸ ECF 46 (joint status report)

⁹ *Id.*

¹⁰ *Id.*

Page 3. PETITIONERS’ PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Proposed Findings of Fact

I. The Pandemic Created Emergency Conditions That Materially Affected The Functioning Of The Federal Prisons And Resulted In Significant Restrictions On Incarcerated People.

On March 13, 2020, the President of the United States declared a national emergency due to COVID-19.¹¹ Ten days later, the Centers for Disease Control and Prevention (CDC) acknowledged that correctional and detention facilities “present[ed] unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors.”¹² The CDC noted that many detention conditions created a heightened risk of danger to detainees due to insufficient quarantine space, insufficient on-site medical capability, highly congregational environments, and limited ability of incarcerated people to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing).¹³ As the transmission rate increased exponentially and the death rate in the country soared, ordinary institutional structures were strained to the breaking point and the word “apocalyptic” did not seem an overstatement.¹⁴ Within

¹¹ *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, The White House (Mar. 13, 2020) (<https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>).

¹² *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control (Mar. 23, 2020), (https://www.ncchc.org/wp-content/uploads/CDC_Correctional_Facility_Guidance_032720.pdf).

¹³ *Id.*

¹⁴ See, e.g., The New York Times, *13 Deaths in a Day: An ‘Apocalyptic’ Coronavirus Surge at an N.Y.C. Hospital* (Published March 25, 2020; updated April 14, 2020), available at (<https://www.nytimes.com/2020/03/25/nyregion/nyc-coronavirus-hospitals.html> (last viewed Sept. 3, 2022) (noting “refrigerated truck has been stationed outside to hold the bodies of the dead”)).

three months, there were at least 70,000 people infected in U.S. prisons and jails, and at least 627 inmates and workers had died.¹⁵

The Attorney General issued memoranda directing the Bureau of Prisons to decrease prison populations by transferring medically at-risk prisoners to home confinement, and he acknowledged that “emergency conditions are materially affecting the functioning of the Bureau of Prisons.”¹⁶ He directed the Bureau “to move vulnerable inmates out” of federal prisons. *Id.* On March 31, 2020, the Federal Bureau of Prisons issued an order securing prison residents in their assigned cells and limited outside access to the prison for two weeks in order to stop the spread of the virus.¹⁷ The lockdown, referred to as “enhanced modified operations,” was extended through May 18, 2020.¹⁸ Individual federal prisons were directed to allow limited group gatherings of prison residents, “to the extent practical,” for showers, commissary, laundry, telephone, and email

¹⁵ The New York Times, *Coronavirus in The U.S.: Latest Map and Case Count*, (<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#clusters>) (last accessed Sept. 3, 2022); The Marshall Project, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>) (last accessed Sept. 3, 2022).

¹⁶ Office of the Attorney General, *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), (<https://www.justice.gov/file/1262731/download>). Office of the Attorney General, *Increasing Use of Home Confinement as Institutions Most Affected by COVID-19* (Apr. 3, 2020), (<https://www.justice.gov/file/1266661/download>).

¹⁷ Bureau of Prisons website, (https://www.bop.gov/resources/news/pdfs/20200331_press_release_action_plan_5.pdf) (last accessed Sept. 3, 2022).

¹⁸ Bureau of Prisons website, Bureau of Prisons website, ([Bureau of Prisons website, https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf](https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf)) (last accessed June 19, 2020).

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access.¹⁹ Some form of modified operations has continued throughout the pandemic at FCI Sheridan.²⁰

II. FCI Sheridan Has Been Affected By Waves Of Coronavirus Infections That Have Caused Intense Fear And Distress Among Incarcerated People.

After an initial four-month period when the coronavirus was feared but not detected at Sheridan, residents and staff began to fall sick.²¹ People in custody expressed significant fear and uncertainty about the virus in those first months, believing that both staff and incoming detainees were likely carrying the deadly virus into the prison:

I have been in a corrective unit with the quarantine inmates. They are not testing anyone, but a couple chosen few. There is no way to social distance, we all share the same phones, computers, toilets, showers, etc. Staff pick and choose when they were their masks and I'm afraid of getting the virus from staff constantly. We have no ways to work because of quarantine unit is unable to work. I cannot program school, or any type of rehabilitating programs. Only sit in a unit day in and day out in constant fear of the facility and pandemic.²²

Another person wrote: “I do not want to die here. 4 prisoners and 2 guards now have the COVID-19 and like other prisons it will spread here rapidly. Please help me.”²³

I started to be in fear for my safety from the COVID-19 virus because of the lack of proper medical response to the virus and the overall 3rd-world conditions here at Sheridan. We have to beg the staff for basic human needs such as toilet paper and hand soap. I feel like the warden here at Sheridan has put my life in danger of

¹⁹ Bureau of Prisons website, (https://www.bop.gov/resources/news/pdfs/20200331_press_release_action_plan_5.pdf) (last accessed June 19, 2020).

²⁰ See Petitioner Ex. 9.

²¹ See ECF 31, p. 2 (the Warden reporting first positive Covid tests in July).

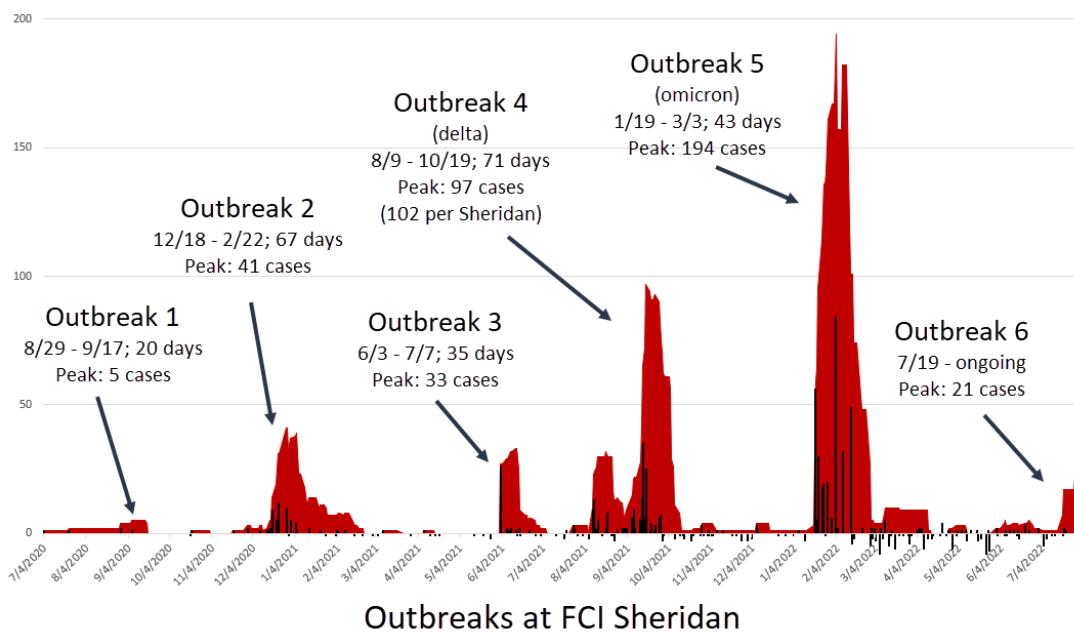
²² See Petitioner Ex. 8 (petition 20-cv-1261 filed 7/30/2020).

²³ See Petitioner Ex. 8 (petition 20-cv-1257 filed 7/29/20).

contracting COVID-19 because of the conditions here at Sheridan federal detention center.²⁴

Other habeas petitioners echoed these concerns.²⁵

Based on the BOP national website's reported numbers and those provided by the government in discovery, FCI Sheridan has experienced six waves of infection:



Although no Covid-related deaths have been reported by the Warden, the BOP website lists two deaths, and the Warden acknowledges that some residents were hospitalized with Covid infections.²⁶ People in custody saw others in their unit being removed due to Covid and feared a higher death toll. As an example, in May of 2020, one person in custody reported:

²⁴ Petitioner Ex. 8 (petition 20-cv-1714 filed 10/2/2020).

²⁵ Petitioner Ex. 8 at 1-42.

²⁶ See <https://www.bop.gov/coronavirus/> (BOP website reporting 2 inmate deaths from Covid at FCI Sheridan) (last accessed Aug. 12, 2022); ECF 68 at 2 (inmate hospitalized).

This morning an inmate who lives 10 feet from me in the next cube in the same overcrowded wing was taken out to the hospital for shortness of breath and coughing and we were told simply ‘don’t touch his stuff if you want to live’ by one of the correctional officers. A number of other inmates are getting cold symptoms the last couple of days. Everybody is afraid to report their symptoms because they do not want to be put into isolation with no access to contact their families....[t]his is scary. I know that if I am exposed, I will very likely not survive or will have permanent damage.²⁷

The lack of information about how to stay safe and the possible lethal effects of the virus affected people in custody at FCI Sheridan just as in the outside world.²⁸ Incarcerated people expressed fear, confusion, extreme angst, hunger, desperation for news of loved ones, and physical and emotional stress during these early months of the lockdown. Petitioner John Stirling wrote in his *pro se* habeas petition on April 17, 2020, that the FDC residents had been locked in their cells for 14 days straight, with only a total of 4 hours out.²⁹ He reported that 40 residents were standing in line for the 6 available phones when they got out, and there was not sufficient time for most to call their loved ones. He worried that unmasked prison guards and newly arriving detainees would infect him with the virus, and that he was at risk of death. He pleaded for cleaning supplies.

²⁷ See Petitioner Ex. 1 at 4.

²⁸ See, e.g., New York Times, *Fear of Covid-19 Leads Other Patients To Decline Needed Treatment* (May 25, 2020) (<https://www.nytimes.com/2020/05/25/health/coronavirus-cancer-heart-treatment.html?searchResultPosition=5>), New York Times, *Young Adults Report Rising Levels Of Anxiety, Depression During Pandemic* (August 13, 2020) (<https://www.nytimes.com/2020/08/13/health/Covid-mental-health-anxiety.html?searchResultPosition=10>).

²⁹ See ECF 1 at 7 (pro se habeas petition).

The widespread alarm and despair is made vivid in the more than 200 federal habeas petitions filed over the course of the pandemic.³⁰ For over two years, individuals in custody at the FCI, the Camp, and the FDC, wrote in to describe their desperation and to plea for help. As examples, in July, petitioner B.T. wrote:

I am quarantined during these strep throat conditions. It has happened 4x in the last 130 days. I am locked up 24/7 for weeks & weeks. I was designated to Terminal Island pre-COVID-19 but now I am on endless lockdown. I was getting 1 phone call every 8 days. I can not talk to my family and it is horrible, depressing and mentally unbearable. People around me have attempted suicide. 1 man cut his throat with a razor another 2 their legs and arms. 1 hanged himself and died due to being locked up all the time.

Pro Se habeas petition in 20-cv-01257 (July 29, 2020).³¹ In December, G.O. wrote:

I feel I am dying. I have been removed from the lives of my family and friends. I cannot exercise and have not seen the sun since April 1 2020. They took 1 COVID test mixed it up and then lost it and then threatened me until I took a second test. They said I would be lockdown for 28 days with no showers or phone call.

Pro Se habeas petition in 20-cv-02245 (December 23, 2020).³² In August of 2021:

I've fought off many stressful days of suicidal thoughts, fear of death, fear that the virus would wipe out staff and leave me stranded in my cell without food. Days upon days of cold sandwiches (Bologna, 1 slice), food that was supposed to be warm, ice cold, lack of shower and hygiene products, and clean laundry to name a few.

Pro Se habeas petition in 21-cv-01180 (August 11, 2021).

This has been one of the hardest years in my entire life. I had very little if not completely lost contact with my loved ones, not knowing if they've been all right during this pandemic has caused severe stress and anxiety along with feelings of hopelessness and uncertainty. I also have endured watching on two different occasions two inmates attempt suicide one cut his wrist and was just a couple pints

³⁰ See Petitioner Ex. 8 (compilation of personal statements in 188 filed habeas petitions, from July 2020 through July 2022).

³¹ See Petitioner Ex. 8 at 3.

³² *Id.* at 10.

way from dying another actually hung himself and died. These things have left me emotionally and mentally scared.

Pro Se habeas petition in 21-cv-1547 (October 25, 2021).

The 188 statements under oath in the filed petitions that contained personal statements (compiled in Petitioner's Exhibit 8), combined with the statements made over the course of the pandemic to the FPD investigator (Petitioner's Exhibit 1) and in letters and responses to questionnaires (Petitioner's Exhibit 4), provide overwhelming evidence that people incarcerated at FCI Sheridan experienced the pandemic as a terrifying and uncontrolled force that caused psychological and physical distress.

III. The Warden Confined People In Small Cells For Lengthy, Indeterminate Periods Without Adequate Access To Essential Services, Resulting In Psychological and Physical Harms.

The harm experienced by incarcerated people at FCI Sheridan during the pandemic was grossly exacerbated by the Warden's choice to use lengthy confinement in small cells as a primary response to the virus. The reduction in essential services that the Warden authorized or tolerated added to the harm.

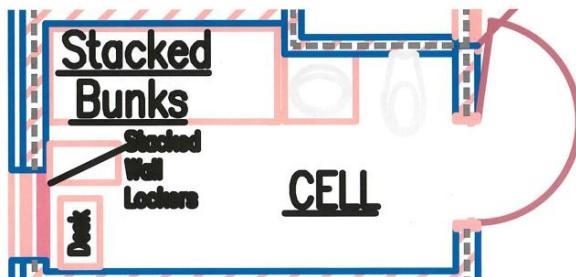
A. The Cells at FCI Sheridan Are Small.

The cells at FCI Sheridan are not designed for long-term, uninterrupted occupancy. The size of standard cells at the FCI range from 90 square feet, to approximately 118 square feet, although some are up to 130 square feet.³³ The cells generally contain a bunk bed, a small desk, a sink, an uncovered toilet, and two wall lockers for storage of personnel property.³⁴ As the

³³ See Petitioner Ex. 5 at 39.

³⁴ *Id.*

diagram and photos demonstrate, living space in the cells is tight; there are no showers; and it would be difficult to exercise. In the following diagram of a standard cell provided by The Warden in discovery, the fixed furnishings occupy more than one-third of the available floor space:



At the FDC, where pretrial detainees are held, the cells are even smaller. According to The Warden, standard cells at the FDC are approximately 81 square feet, with similar furniture.³⁵ The Warden admits that for an eight-month period between April and November 2022, there was a shortage of available cell space which caused the Warden to house three inmates in some cells.³⁶ In those cells, the third bed was two mattresses stacked on the floor.³⁷ The Warden admits the number of these triple-bunked cells varied, never exceeded 10 per day (30 affected inmates), and averaged 5 a day (15 affected inmates).³⁸ When inmates were housed three to a cell, the third bed was next to the toilet and rolled up during the day.³⁹

³⁵ *Id.*

³⁶ *Id.* at 30.

³⁷ *Id.*

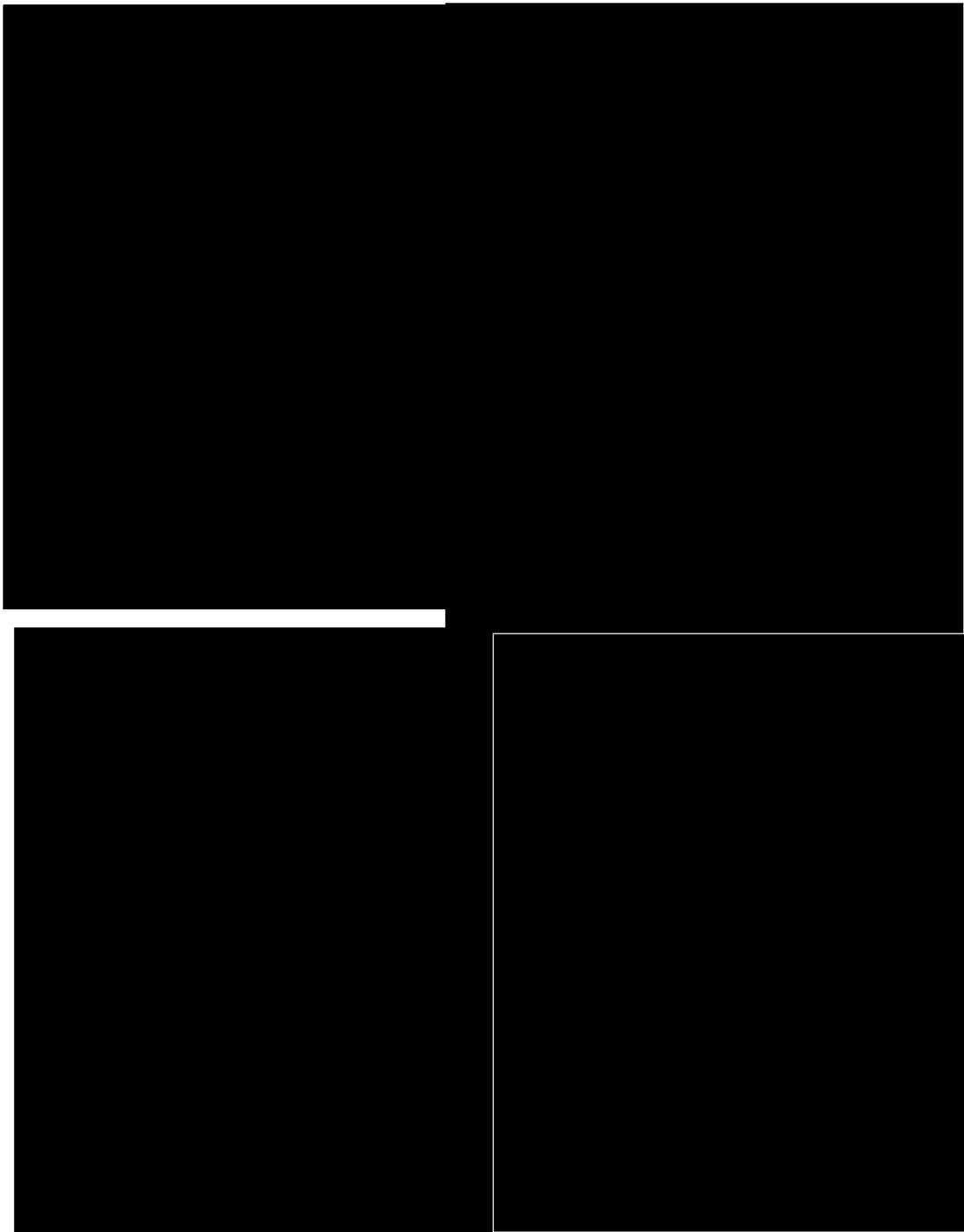
³⁸ Petitioner Ex. 5 at 30.

³⁹ Petitioner Ex. 3 at 17.

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Inspectors viewed and photographed cells in September 2021. The first photo below shows an unoccupied FDC cell, and the next three show the cramped space when belongings, or two adult men and their belongings, are also in the cell.



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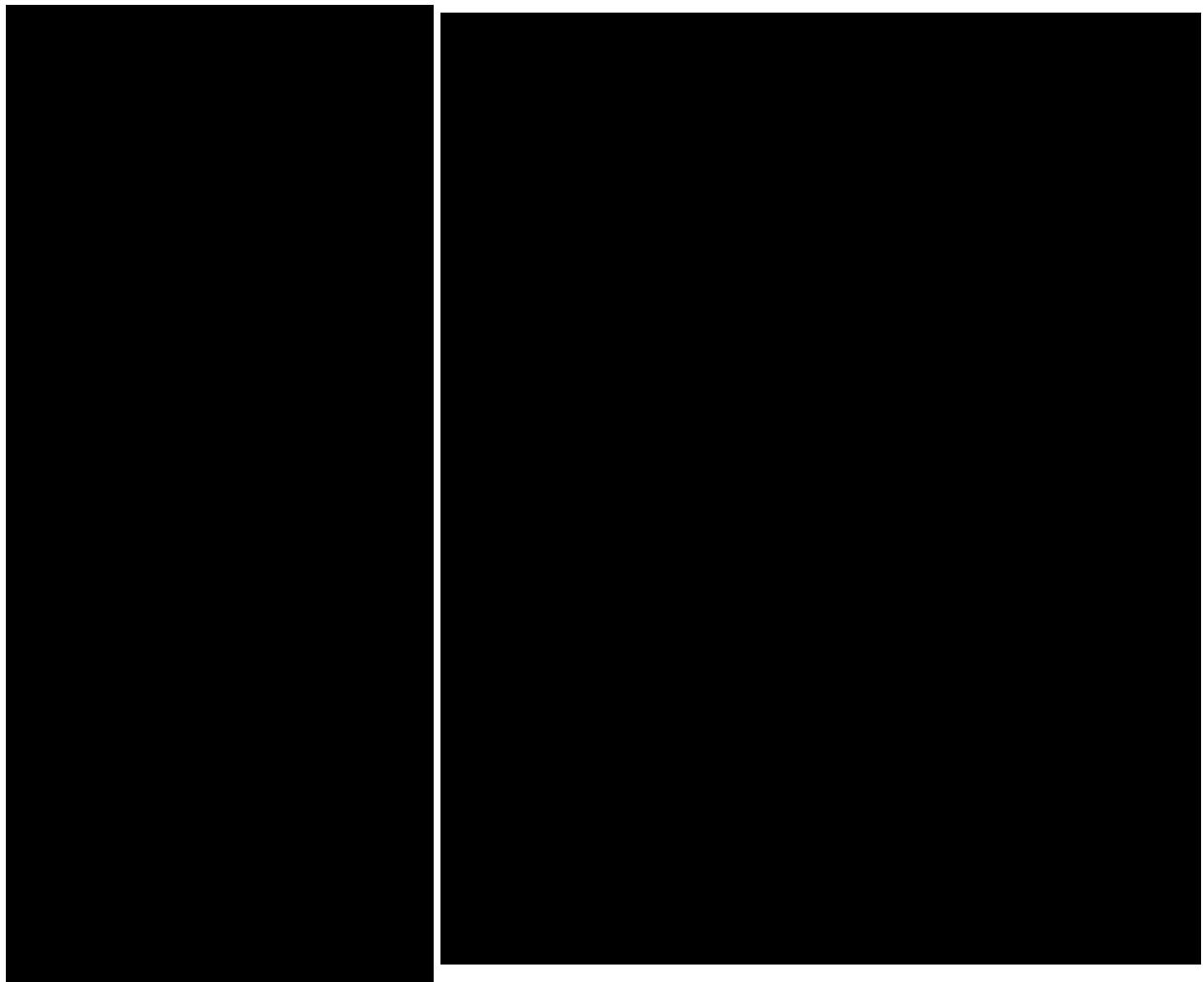
[Exhibit A to Petitioner's Response to ECF 128](#)
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Photos of cells at FCI Sheridan.⁴⁰

As the photos make clear, the cells provide limited natural light through a narrow window, and limited floor space for movement. These small cells may not even comply with international human rights standards, which require a minimum of 3 square meters (32 square feet) of floor space per detainee in multi-occupancy accommodations. *See, e.g., Mursic v. Croatia*, (2017) 65 E.H.R.R. 1 at 2 (noting the minimum detention standards under the European Convention on Human Rights, article 3, which prohibits inhumane or degrading treatment of prisoners). Because the lockers, bunkbeds, toilet and sink appear to take up over 20 square feet of floor space, the available floor space person is less than 32 square feet in the FDC.

Images of incarcerated people at the FCI pressing their faces against the celldoors' tiny windows (photos below) are haunting when the context of long term confinement is understood. During the FPD inspection of Sheridan in September of 2021, one inmate at the FCI extended a message written on envelopes out of his cell door to the inspection team. "How many more days until we can shower," he wrote (photo below).

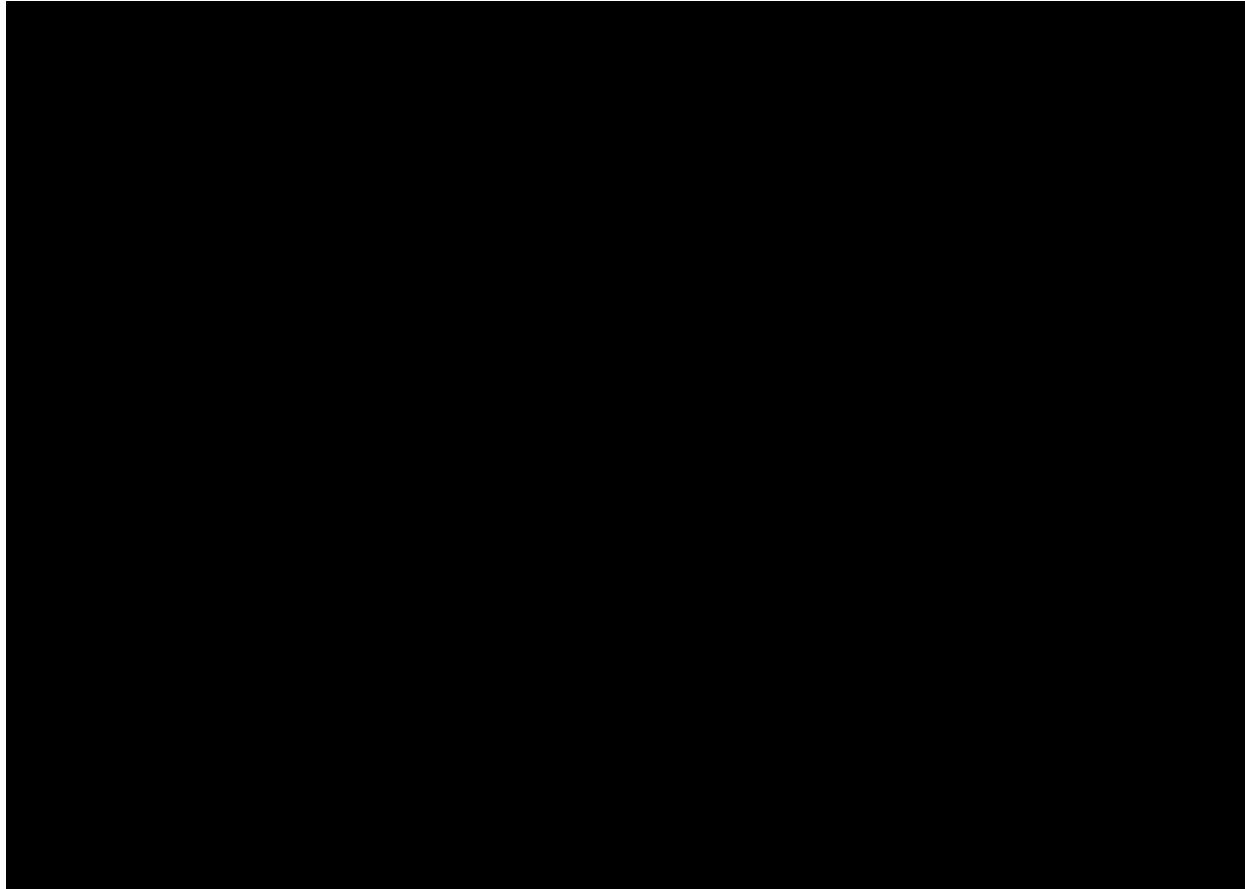
⁴⁰ Three photos of cells redacted pending receipt of government approval for use.



The isolation and cramped confinement at the FCI is powerfully demonstrated in a photo of faces pressed into the tiny, interior window of cells:

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The undisputed evidence shows that people incarcerated at the FCI and the FDC are held in small cells with extremely limited floor space, open toilets, and limited natural light.

B. The Warden Confined People in Small Cells for Lengthy and Indeterminate Periods.

The length and nature of the Covid-19 lockdowns at Sheridan have been extensive. In some instances, the lockdowns seemed arbitrary and unrelated to the pandemic, as they did not correlate with the spread of Covid-19 within the prison or in the community. People in custody believed the lockdowns often reflected staffing shortages rather than a necessary step to prevent Covid-19 transmission.

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1. FCI Lockdown

Beginning in March of 2020, the FCI was locked down, subjecting each person to conditions similar to solitary confinement. The Warden admitted that for the first 12 months of the pandemic, “the majority of inmates at the FCI have been locked in their cells around 20 hours per day.”⁴¹ Additionally, a small minority were locked in their cells for more than 22 hours per day when quarantining or infected.⁴² The Warden explained that in March of 2020, FCI Sheridan implemented restrictions on individuals’ movement “to ensure physical distancing and minimize the incidence of Covid-19.”⁴³ These measures resulted in “conditions of confinement at FCI Sheridan that are relatively harsher due to restrictions on inmate movement.”⁴⁴

Eighteen months after the start of the pandemic, these restricted confinement measures remained in effect, as the Warden acknowledged.⁴⁵ Although there were short periods of greater freedom, these could be abruptly terminated at any moment. For example, the FCI implemented new restrictions in August of 2021, including a temporary suspension on recreation, and placed two entire units in quarantine status at that time.⁴⁶ Throughout the first 18 month period and the months to follow, residents at the FCI experienced extremely harsh conditions of confinement due

⁴¹ See Petitioner Ex. 5 at 42.

⁴² *Id.*

⁴³ See ECF 67 at 4 (Gov’t supplemental status report) (May 10, 2021).

⁴⁴ *Id.*

⁴⁵ See ECF 71 at 4 (Gov’t supplemental status report) (August 12, 2021).

⁴⁶ See ECF 71 at 4 (Gov’t supplemental status report) (August 12, 2021).

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to these lockdowns.⁴⁷ The erratic, indefinite, and seemingly indiscriminate nature of the confinement contributed to the distress the lockdowns caused, as the quotes below demonstrate.

One resident, A.W. wrote:

The Sheridan administration would have you believe that they've been oscillating between open and closed compound, lockdowns and normal operations, but this is a misrepresentation. We've been locked down for 2 years. The only difference has been whether and to what extent we can use the dayroom or sometimes go outside for an hour or two.⁴⁸

J.M. expressed the same sentiment:

Before the most recent covid wave, conditions here changed constantly. Sometimes we were out 15 minutes a day a few cells at a time. Other times we were out for an hour with 10-12 cells out at a time. If there were no active cases, we were out of our cells half a day by tier, or both tiers were out all day together. To me, the decision on what kind of lockdown we were on felt like it had more to do with staff convenience ... Prison is a stressful place without a pandemic and even more so with the constant changing lockdowns, the loss of contact visits, malfunctioning telephones, and no end in sight...I don't think there has been a day in the last two years where I haven't had a moment of becoming overwhelmed and tearing up.⁴⁹

Another resident, who resided in the 4B unit of the FCI, kept a log of how he experienced the lockdowns during the first 18 months of the pandemic:

⁴⁷ Petitioner Ex. 9.

⁴⁸ Petitioner Ex. 4 at 71(A.W. Questionnaire).

⁴⁹ *Id.* at 111 (Questionnaire).

Mar 4B

Mar. 13, 2020 - Compound Segregates, No Religious Service, No Visits, No Programming

No Recreation

3/23 - lockdown (cold meals) 3/24 - No time out (cold meals)

3/25 - 1 hot meal a day (no time out)

3/26 - 3/27 - 10 min to shower each day

3/28 - 3/30 - No time out 3/31 - 4/4 - 1 hr (excluding workouts till 5/26)

4/8 - began getting 2 hot meals a day 4/12 outside Rec available 1x a week

6/9 - 8/28 - 2 hrs 4/12 outside Rec available 1x a week

8/28 - 9/3 - lockdown, no time out

9/3 - 11/19 - 4 hrs

11/19 - 12/7 - 30 min every 3 days

12/7 - 12/20 - 1 hr

12/20 - 2/8/21 - 30 min every 3 days (30 days - 7 1/2 hrs out) (12/23 diagnose

2/8 - 2/12 - 1/2 hour daily w/ covid, quarantined

2/12 - 2/18 - 1 hr daily in Gym, till Jan 5/21)

2/18 - 3 hrs

(Sometime before March 2021 we were out all day but still segregated to our own unit)

4/7 - lockdown

4/10 - 4/23 - 30 min daily

4/24 - off lockdown still segregated (Religious Service & Visits Cont'd)

5/4 - housing Unit 2b lockdown (Religious Service & Visits Cancelled)

5/8 - half compound lockdown

5/20 - 2a (housing Unit) off lockdown

6/30 - lockdown 9/31 - no time out 9/1 - 15 min out

9/2 - Now - 30 min a day

As his log demonstrates, the amount of time out of cell varied considerably and often fell below

the minimum 2 hours that the Warden implied was continually afforded.

Another example of inconsistent lockdown times at the FCI can be seen in January of 2022, almost two years into the pandemic. During this time, the Warden claimed that the FCI units were

not quarantined. Rather, movements were by unit and programming was still running by unit.⁵⁰ However, library logs provided by the Warden from January of 2022 show many days where there were no visitors, presumably due to lockdown. Some dates in January 2022 explicitly have “Covid Lockdown” written on them.⁵¹

In response to discovery requests, the Warden provided memoranda that detailed planned changes in the lockdown procedures, but declined to provide tallies or statements of the actual time out of cells, on weekdays or weekends.⁵² Attached as Exhibit 9 is a summary of the planned time out of cells as indicated by a chronological reading of the memoranda. The exhibit demonstrates that, although custody times varied, people in custody at the FCI were repeatedly confined to their cells for more than 20 hours per day, throughout the course of the pandemic.

2. Federal Detention Center Lockdown

Similar issues were experienced by pretrial detainees at the FDC in both the J1 and J2 units. In response to a specific question about the FDC, the Warden admitted that for the first year of the pandemic, the majority of inmates “have been locked in their cells around 20 hours per day,” but added that, regarding even longer times in cells, the “number of inmates quarantining or in isolation has changed daily but has never amounted to a majority of inmates at the FDC.”⁵³ As

⁵⁰ See ECF 95 at 3 (Gov’t supplemental status report) (January 11, 2022).

⁵¹ See Petitioner Ex. 5 at 335 (Library Logs).

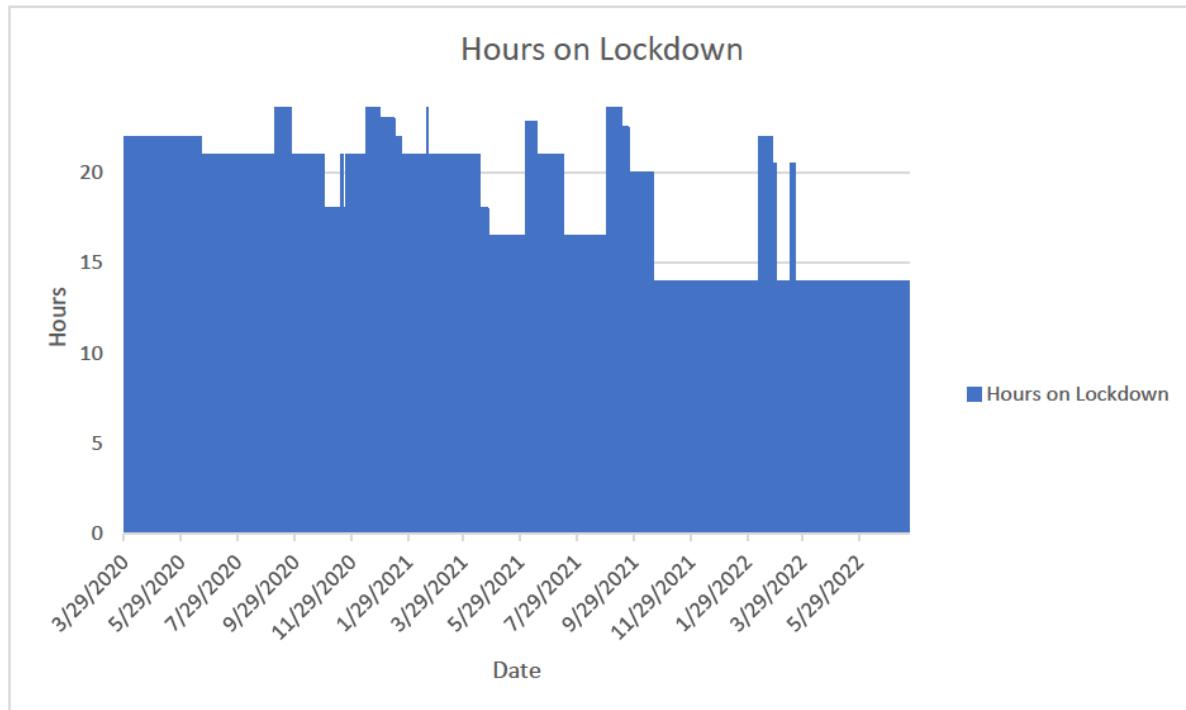
⁵² See Petitioner Ex. 5 at 72 (objecting to a request for tallies and responding “inmates are confined in their cells at various times each day, including weekends, for various reasons including inmate counts, sleep and security incidents. Subject to and without waiving his objections, Respondent admits that at certain times during the relevant time period, the amount of time permitted outside of cells changed on a daily basis.”)

⁵³ Petitioner Ex. 5 at 43 (Response to Interrogatories).

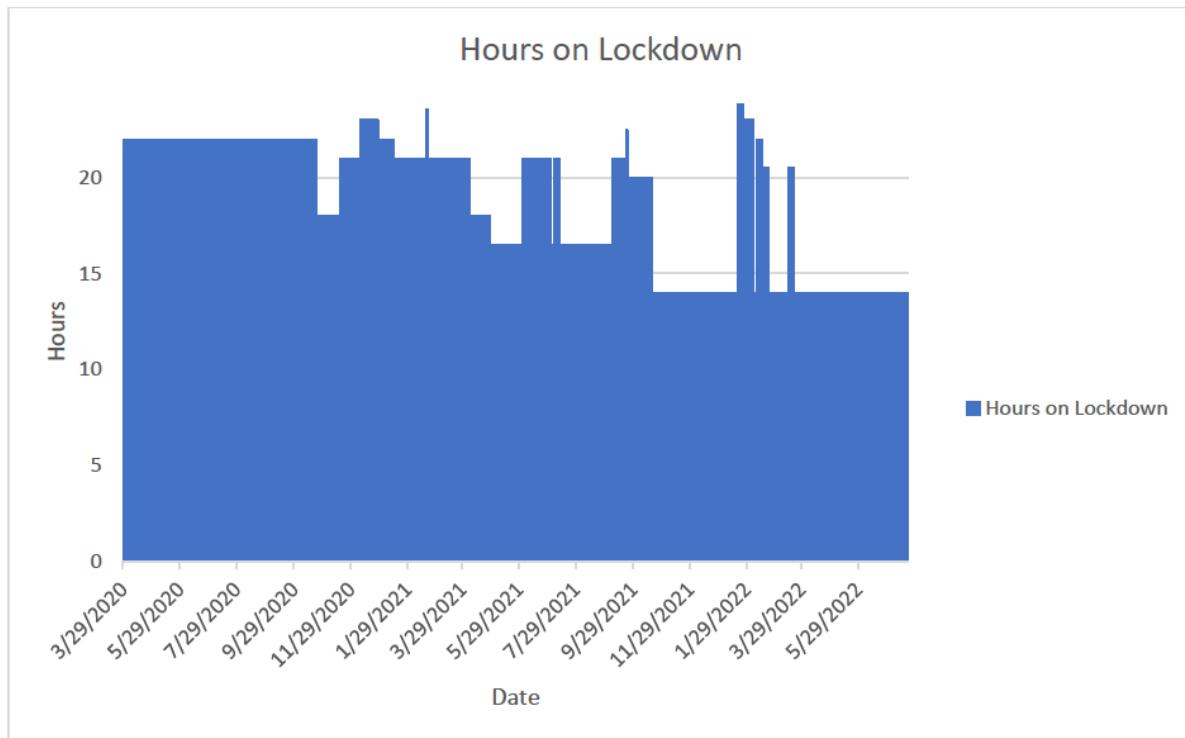
described in section III. C below, inmates in quarantine or isolation sometimes were confined for 72 hours straight without getting out of their cells.

The timeline and duration of lockdowns at the FDC as presented in memoranda provided by the Warden illustrate the unpredictable nature of these measures.⁵⁴ The amount of time individuals were allowed out of their cells varied week to week, sometimes day to day, and ranged from 60 minutes to 10 hours. The following graphs details the lockdown times over the course of the pandemic in each unit based on the memoranda provided by the Warden:

J1 Graph



⁵⁴ See Pet. Ex. 9

J2 Graph

The memoranda reveal seemingly arbitrary fluctuations of confinement at times. Specific examples of this include:

- In the J1 unit on November 17, 2020, time out of cell was 6 hours. The next day it was cut to 3 hours. The following day, November 19, it was raised again to 6 hours. Four days later it was cut again to 3 hours.⁵⁵
- In the J2 unit on February 6, 2022, time out of cells was increased from 1 hour to 10 hours. Three days later, it was cut back to 2 hours. Six days later, on February 15, 2022, time out of cell was raised to 3-4 hours.⁵⁶

⁵⁵ See Petitioner Ex. 2 at 13-19.

⁵⁶ See Petitioner Ex. 2 at 609-613.

People in custody experienced angst and isolation from both the lockdowns and the randomness of when they would be released. Numerous individuals reported that the posted schedules were not followed, particularly on the weekends.

In his petition T.R. wrote:

These lockdowns are horrible to say the least. I've been isolated to my cell for months on end only allowed out for 15 minutes a day causing me to make a choice whether I want to shower or use the phone and email cause its not enough time to do all. We are let out each day at different times making it super hard to reach family to check on their safety.⁵⁷

Petitions from those detained in J1 and J2 reflect the experience: "lockdown all the time"⁵⁸; "[i]n the last five months we have been allowed outside eight times with no equipment"⁵⁹; "I can't call my family or my attorney because we are on 23 ½ hour lockdown"⁶⁰; "[l]ast week we were not even given a shower for 8 days."⁶¹

C. Lockdowns Took a Psychological Toll on Petitioners.

The first person accounts of the physical and psychological effects of the lockdowns are harrowing. Many petitioners experienced psychological distress from the isolation:

- I suffer from PTSD, depression, and panic disorder. Every one of these symptoms has been heightened to very high levels. It has brought me to a very bad place in my head. I now struggle with suicide thoughts. I have been hospitalized for this before. We have no help here and are always locked down. I have no support group at all. This has been more than devastating to me.⁶²

⁵⁷ Petitioner Ex. 8 at 36 (petition 22-cv-0370 filed 3/7/2022).

⁵⁸ Petitioner Ex. 8 at 2 (C.W.) (petition 20-cv-1242 filed 7/28/2020).

⁵⁹ *Id.*

⁶⁰ Petitioner Ex. 8 at 6 (S.C) (petition 20-cv-1671 filed 9/25/2020).

⁶¹ *Id.*

⁶² Petitioner Ex. 8 at 9 (J.W.) (petition 20-cv-2104 filed 12/3/2020).

- These last few months have been severely crippling in mental health issues exacerbated by lockdowns, inability to communicate with loved ones. Stress and anxiety due to the constant possibility of COVID-19 contraction and possible death as a result. I have never been so removed from my family and friendships, until Covid protocols and lockdowns. My physical health has deteriorated due to inability for outside reception time and or any exercise time. Mentally it was extremely difficult due to lockdowns causing severe mental issues such as panic attacks, anxiety attacks and severe depression.⁶³
- The stress and around the clock confinement are starting to play on my mental state. I have started to have panic attacks and my asthma attacks have been more frequent. We are being given sack lunches at all meals 3 times a day. Last week we were not even given a shower for 8 days. I am in a constant state of panic & stress over being infected by COVID-19 and with my medical conditions it's not good. I have not even been convicted of a crime yet but I am looking at a potential death sentence being here.⁶⁴
- This has been one of the hardest years in my entire life. I had very little if not completely lost contact with my loved ones, not knowing if they've been all right during this pandemic has caused severe stress and anxiety along with feelings of hopelessness and uncertainty. I also have endured watching on two different occasions two inmates attempt suicide one cut his wrist and was just a couple pints way from dying another actually hung himself and died. These things have left me emotionally and mentally scared.⁶⁵

One inmate reported witnessing a man slash himself “because he could not stand being locked up this long.”⁶⁶ The man who slashed himself was then allowed out of his cell for 3-4 hours a day while everyone else remained locked up:

Everyone looking out their window see's this and realizes you only need to cut yourself to get out of your cell. Sure enough yesterday a much worse thing happen and a man across from us slit his throat very bad. Blood was spurting like a fountain out of his throat. The untrained guard yelled at his door ‘Put pressure on it’ Then

⁶³ Petitioner Ex. 8 at 31 (H.A.) (petition 21-cv-1745 filed 12/3/2021).

⁶⁴ Petitioner Ex. 8 at 6 (S.C.) (petition 20-cv-1671 filed 9/25/2020).

⁶⁵ Petitioner Ex. 8 at 28 (P.K.) (petition 21-cv-1547 filed 10/25/2021).

⁶⁶ Petitioner Ex. 1 at 5.

ran away somewhere never attempting to enter his cell to stop the bleeding at all. 20 guards and such came in including captain, assistant warden, an evidence gather team camera's, on and on. Not one of them wearing mask and most not gloves now contaminating the whole unit.⁶⁷

This is just a small sample of the many tales of psychological distress caused by the lockdowns. These personal experiences are consistent with well-established understanding of the effects of solitary confinement on the human psyche.

Dr. Stewart Grassian, a M.D. psychiatrist with expertise in the psychiatric effects of conditions of confinement, reviewed discovery and first person accounts of the lockdown durations and procedures at FCI Sheridan.⁶⁸ He also interviewed several detainees by video.⁶⁹ Dr. Grassian found that “the conditions of lockdown are basically those of solitary confinement, conditions involving severe restriction of environmental and social stimulation.⁷⁰ He explained that these conditions “have a profoundly deleterious effect on mental functioning.”⁷¹ As Dr. Grassian details in his declaration, solitary confinement is known to cause: impairments in thinking, concentration, and memory; perceptual disturbances; perceptual distortions, illusions and hallucinations; affective disturbances, depression and anxiety; disturbances of thought content; problems with

⁶⁷ *Id.*

⁶⁸ Pet. Ex. 3 at 8-30.

⁶⁹ *Id.*

⁷⁰ Petitioner Ex. 3 at 21.

⁷¹ *Id.*

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impulse control.⁷² Inmates reported to Dr. Grassian thoughts of self-harm, panic attacks, and claustrophobia.⁷³

That many inmates were confined along with another inmate does not alleviate these concerns. Instead, “it is very dangerous to have two inmates share a cell” in “any situation of cell confinement during almost the entire day.” Dr. Grassian related that “double bunking of inmates confined to their cell for almost the entirely [sic] day has become increasingly rare in prisons.”⁷⁴ The practice is rare because the typical response to such confinement is “[m]utual tension, irritability and paranoia” which have “not uncommonly led to violence or even death.”⁷⁵

Dr. Grassian provided an expert opinion that the extended and indeterminate lockdowns at FCI Sheridan were harmful, leaving inmates feeling “helpless” with an “impaired sense of self-worth and personal agency.”⁷⁶ He concluded that the “severe restriction of environmental and social stimulation” had a “severely deleterious effect on the population.”⁷⁷ The Warden has known of the lockdowns since they began and has received reports from residents of the harmful effects.⁷⁸

⁷² *Id.* at 23-28.

⁷³ *Id.*

⁷⁴ Petitioner Ex. 3 at 16-17.

⁷⁵ *Id.* at 16.

⁷⁶ *Id.* at 29.

⁷⁷ *Id.* at 30.

⁷⁸ E.g., Petitioner’s Ex. 8 at 10 (“I have attempted to communicate my concerns about the effects of the lockdown to custody staff, line staff and executive staff, including both the main and assistant health services administrators, our satellite operations officers, counselors, case and unit managers, asst wardens and wardens. In nearly all cases I am told nothing could be done to change conditions, that the restrictions are in response to the Governor’s restrictions or that things are being done in the interest of protecting my health or safety.”).

D. The Warden's Use Of Lengthy Quarantine Cohorts Caused Harm To The Confined Residents.

Restrictive lockdowns were especially difficult for those in “quarantine cohorts,” which were used to isolate groups of people who arrived together at the facility and also those who were scheduled to leave together.⁷⁹ The required quarantine period was 14 days, after which the cohort would be tested for Covid, but the Warden acknowledged that the length of quarantine could “vary.”⁸⁰ If someone in the cohort tested positive after the 14 days, the quarantine would be reset.⁸¹ If someone new was added to the group, or if “[a]ny inmate or contraband from another non-quarantine unit or wing . . . enter[ed] the quarantine area such as by door or window, everyone in the group had to restart their quarantine.⁸² If the expected transportation out of FCI Sheridan did not materialize (whether due to weather conditions, changed schedules, or lack of placements at the designated facility), the quarantine was “unfortunately” prolonged.⁸³ As a result, many people

⁷⁹ See ECF 66-2 at 4-5 (Prater Declaration).

⁸⁰ *Id.* at 3.

⁸¹ ECF 66-2 at 18 (BOP Guidance from Dec. 21, 2020 “If quarantined as a cohort, the 14-day quarantine period must be reset to zero if an inmate in the cohort become symptomatic or new inmates are added to the quarantine”).

⁸² Petitioner Ex. 5 at 147.

⁸³ See ECF 66-2 at 5-6 (Supplemental Status Report by Josias Salazar, Declaration of Daniel Prater) (“Unfortunately, a variety of circumstances has led to a number of last-minute cancellations of scheduled inmate bus and airlift movements. In the past six months, temporary inmate movement and designation moratoriums at multiple BOP institutions, including FCI Sheridan, due to the COVID-19 pandemic, a national lockdown invoked due to a security situation at the U.S. Capitol, and inclement weather, have resulted in multiple cancellations of inmate movements. . .Until recently, standard operating practice, when an inmate movement was cancelled, was to keep the scheduled inmate on quarantine to facilitate placement on the first available transport.).

spent far longer than 14 days in quarantine, and the time for some groups was reported to exceed 60 days.⁸⁴

One petitioner recorded that he had been quarantined five times for five and half of the last 8 months. He felt like a “dog in a cage”:

Conditions and Confinement
Relief Please

1½ hours out A week
6½ hours a month 30 days
5th Quarantine

3 week
4 week
5 week
5 week (5½ months out of 8 months)

Hardly enough time to shower and make a call!

NO Law Library
NO Library
ISolation.

No Programs

feel like Dog in a cage

85

⁸⁴ Petitioner Ex. 8 at 3 (“We have not been outside in months and some people locked up 60 days awaiting a transfer to another prison that never comes.”), 3 (“I was on a 39 day quarantine”), 4 (“I have been designated to a California BOP facility was on quarantine for 40 days, then took off quarantine, because elevated Covid-19 cases”), 9 (“I have been in quarantine 3 times for a total of 67 days”).

⁸⁵ Petitioner Ex. 1 at 28.

The lengthy, indeterminate time in quarantine caused anguish because the quarantine cohorts experienced the most restrictive confinement. They were locked into their cells without *any time* out except a scheduled 30-minute shower every other day, or even every third day:

Quarantine Cohorts-(Follow M-W-F schedule/ Evening only) Staff will release in controlled cohorts only, for a minimum of 30 minutes per cohort.

6:50pm-7:20pm Cell 104, 126, 127, 201, 202
 7:40pm-8:10pm Cell 133
 8:30pm-9:00pm Cell 101, 102, 103, 105, 106

Quarantine Cohorts-(Follow Tues-Thurs-Sat schedule/ Evening only) Staff will release in controlled cohorts only, for a minimum of 30 minutes per cohort.

6:50pm-7:20pm Cell 203, 205, 206, 207
 7:40pm-8:10pm Cell
 8:30pm-9:00pm Cell

In other words, people were routinely locked in small cells for 72 hours straight (Friday to Monday, or Saturday to Tuesday) or 48 hours straight, as the planned response to managing the population in custody during the pandemic.

The cells were cramped. The quarantine cells in J3 were some of the smallest available, with a slit for a window and sometimes three beds, as this photo shows:



At times, between April and November of 2020, the number of people needing quarantine at the FDC was so high that mattresses were put on the floor to accommodate a third occupant in cells without a third bed.⁸⁶ This occurred in five to ten cells at a time. For those arriving at FCI Sheridan, quarantine time was an especially difficult introduction to the prison because, without access to the commissary, they were unable to purchase any supplies to use while locked in. They lacked essential items like shoes, toothpaste, toothbrush, aspirin, and soap.

Both those who experienced lengthy quarantines and those who witnessed them wrote to the FPD in distress. Although the writers did not clearly distinguish “quarantine cohorts” from

⁸⁶ See Petitioner Ex. 5 at 30 (“between April 2020 and November 2020, the Warden faced a shortage of available cell space at the FDC. In response, the Warden used a small number of FDC cells (approximately five) to house three inmate for a limited time.”); (“[T]he third bed consisted of a mattress on top of another mattress that was on top of the floor.”).

quarantine in the gym, or even from quarantine when entire units were locked down, the clear message was that quarantine lockdowns were harsh, dehumanizing, and physically harmful.

- I was on a 39 day quarantine and only allowed 5 min phone, 5 min shower. I only got that after 72 hours. Sometimes it was a week. Once I was forced by these racists to go 8 days without a shower and told instead to use the sink. This whole quarantine and specially the 39 days was very inhumane. I am being murdered here by this warden and staff. Please do not let them kill me like they have my ancestors for centuries.⁸⁷
- Bologna sandwiches every day. It's like being in a hole. My mental and physical health is in constant threat and jeopardy in here. I have been in a corrective unit with the quarantine inmates. They are not testing anyone, but a couple chosen few. There is no way to social distance, we all share the same phones, computers, toilets, showers, etc. Staff pick and choose when they were their masks and I'm afraid of getting the virus from staff constantly. We have no way to work because of quarantine unit is unable to work. I cannot program school, or any type of rehabilitating programs. Only sit in a unit day in and day out in constant fear of the facility and pandemic.⁸⁸

After the FPD raised alarm over the length of time that people were locked in quarantine cells, the Warden changed the policy about not releasing people from quarantine when transportation was cancelled.⁸⁹

IV. The Warden Housed People Ill With Covid In A Crowded Gymnasium That Was Not Equipped To Meet The Essential Needs of People Detained There.

During several points during pandemic, the FCI inmate gymnasium was used as a housing location for people incarcerated at the FCI who became ill with Covid-19.⁹⁰ In a December 2020

⁸⁷ Petitioner Ex. 8 at 3 (petition 20-cv-1257 filed 7/29/2020).

⁸⁸ *Id.*

⁸⁹ The FPD raised concerns about the length of time people were confined in cells in a joint status report filed January 8, 2021. ECF 57 at 3. In March, the Warden reported that the policy of extended quarantine had changed "recently." ECF 15-2 at 4.

⁹⁰ See Petitioner Ex. 5 at 31.

status report to the court, the Warden referred to the gym as a “newly created isolation unit” for people ill with Covid-19.⁹¹ By January 2021, people in custody were urgently reaching out to the Federal Public Defender to report that the “isolation unit” was in fact the gymnasium; that sick individuals in the gym were ignored; that staff were afraid to enter the gym; that people were sleeping on mats on the floor; that a mop closet had been converted to a single shower; and that sometimes the people held there were forgotten or skipped for meals.⁹²

The FPD moved for an inspection of FCI Sheridan, in part due to use of the gym for people ill with Covid-19.⁹³ By the time of the inspection in September 2021, the Warden had obtained cots for people in the gym, but the room remained crowded, with inadequate toilet and shower access. Counsel for the Warden took photographs of the gym immediately before the inspection, revealing the crowded conditions:

⁹¹ ECF 55 at 2 (status report December 28, 2020).

⁹² ECF 57 at 4 (petitioner’s section of joint status report).

⁹³ See ECF 80 at 4.

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On the day before the FPD inspection on September 16, 2021, the government indicated that the Covid-19 positive numbers had increased significantly, and a number of people had to be moved from the gym, which was at capacity (60). The inspection team was unable to see the gym at its most crowded. The FPD investigator on the inspection team described the following:

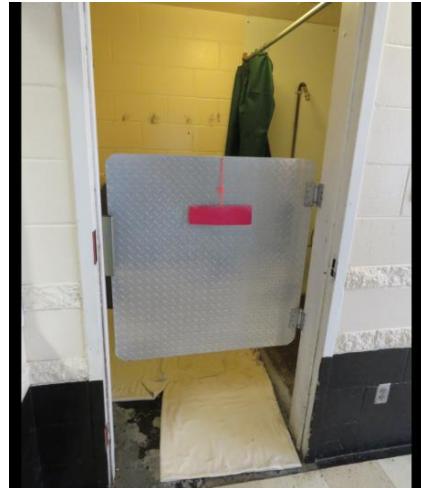
a number of people had to be moved from the gym, which was at capacity (60). I took some non-objection photographs of one of the two available restrooms (the other was occupied) and the only shower area, which had been converted from a closet. In my opinion, the bathroom and shower facilities were insufficient for the needs of such a large number of sick people. Federal Public Defender Lisa Hay told me that some of the people she spoke to reported difficulty in getting some of the sick COVID patients to the shower facility because they are infirm or in a wheelchair and getting to the shower requires going up the gym stairs. We have also received reports of problems getting medical care for those in the gym, and lack of ready access to drinking water. Inmates previously reported that the only available water for all of the people housed in the gym was through the small sink in the bathroom, pictured below, where inmates also washed their hands. When asked about access to drinking water, the BOP staff showed us two large, plastic water vessels that were awaiting a refill in an outside area. There were no drinking

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cups visible. The water containers were a new addition according to information we received from inmates after the inspection.”⁹⁴

The only shower for the people housed in the gym was a converted utility closet:



A second investigator filed a declaration relating individual experiences in the gym:

- An inmate stated that he got sick a few days ago and tested positive for COVID-19. He has been quarantined on a plastic mat on the floor of the gymnasium. He says there are about 50 other men in the gym with them. They all share the same bathroom and telephone.⁹⁵
- On September 10, 2021, I received a call from an inmate concerned about another inmate in the gym. He stated the other inmate arrived last night into the gym around 10 PM after having returned from the hospital. The inmate was supposed to have an inhaler, but it has not been given to them. They were given a cot last night without a mattress on it. The inmate was able to get a mattress a few hours later. This inmate could not get up to take vitals or to get his own food. Other inmates have been helping him get his food and have secured a wheelchair so he can go to the bathroom. The inmate has a fever of 103 and they are worried about him.⁹⁶

⁹⁴ ECF 89-2.

⁹⁵ See Petitioner Ex. 1 at 17.

⁹⁶ *Id.*

After participating in the inspection of FCI Sheridan in September 2021, Dr. Michael T. Puerini, a correctional medical expert, found the use of the gym sub-standard.⁹⁷ Specifically, the care of potentially seriously ill patients in the facility gym was “a clear breach of patient confidentiality and promotes sub-standard care.” Dr. Puerini found that some of the patients housed there were seemingly quite ill, having only recently been released from the hospital. He reported that the gym appeared extremely understaffed, as no healthcare staff were seen during the inspection. He also noted that patients who needed to use wheelchairs were not able to utilize the inadequate restroom facilities provided to the ill patients housed in the gym.⁹⁸

Individuals who were kept in the gym at different points during the pandemic reported similar conditions. One individual wrote: “When they took me out of my cell and put me in that gym it was very disgusting. We had very poor medical attention and no hygiene and were treated like we had the plague. Like this is where we had to go to die. This was very stressful and scary for me. Staff was very disrespectful to us [there].”⁹⁹

The gym continued to be used as a quarantine unit through 2022.¹⁰⁰

⁹⁷ See Petitioner Ex. 3 at 3 (Report of Dr. Puerini).

⁹⁸ *Id.*

⁹⁹ See Petitioner Ex 4 at 6 (D.M. Questionnaire).

¹⁰⁰ See ECF 104 at 2 (Status Report February 23, 2022).

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V. The Warden Tolerated Widespread and Ongoing Deprivations of Basic Necessities of Life For Incarcerated People.

The Warden’s choice to use lockdowns as one of the primary responses to the pandemic deprived those incarcerated at FCI Sheridan of the basic necessities of life.¹⁰¹ The long days in confinement were made unbearable by untreated medical issues, disregard of acute psychological distress, sparingly little contact with the outside world, and substandard food. The Warden continued these policies with knowledge of, and in deliberate indifference to, the suffering of FCI Sheridan’s many residents.

A. Deficiencies in The Provision of Mental Health Services

The harsh effects of the pandemic lockdowns have been exacerbated by the lack of mental health services at Sheridan. Many individuals at Sheridan report not being seen by a mental health professional for over two years.

Sheridan is a Mental Health Care Level III facility, a designation reserved for facilities that detain many people who experience “significant mental health issues requiring regular therapeutic contact with a psychologist.”¹⁰² According to one BOP publication, FCI Sheridan houses approximately 75 people who require level II care, and approximately 30 who require level III

¹⁰¹ Other options for response included reducing the prison population size to allow for single cell housing, or creating cohorts of vaccinated individuals and housing them together, without confining them to cells or reducing services. This approach would also require vaccinated staff.

¹⁰² See U.S. Dept. of Justice BOP, *Doctoral Psychology Internship* 2022-2023, (https://www.bop.gov/jobs/docs/she_internship_brochure_2022.pdf) at 8

care.¹⁰³ Approximately 10% of the population at FCI Sheridan are prescribed psychiatric medication.¹⁰⁴

The BOP Program Statement for Treatment and Care of Inmates with Mental Illness provides definitions for different levels of care. According to the program statement, Mental Health Care Level II requires “[e]vidence-based psychosocial interventions on at least a monthly basis” and “if group treatment is offered it [is] to occur at least every other week, to provide continuity of care.”¹⁰⁵ Mental Health Care Level III requires “[e]vidence-based psychosocial interventions on at least a weekly basis...provided via enhanced outpatient care or on a scheduled basis consistent with a residential Psychology Treatment Program.”¹⁰⁶

The BOP Program Statement tasks an institution with identifying problems and strategies to mitigate the potentially negative effects a correctional environment can have on those with mental illness.¹⁰⁷ Examples of problems include cellmate conflicts, and work and/or leisure time deficits.¹⁰⁸ These are the exact issues that became more prevalent since the beginning of lockdowns. Many of those incarcerated have reported such issues, such as J.T.¹⁰⁹ He stated that

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See U.S. Dept. of Justice BOP, Program Statement: *Treatment and Care of Inmates with Mental Illness*, (https://www.bop.gov/policy/progstat/5310_16.pdf) at 10

¹⁰⁶ *Id.*

¹⁰⁷ See U.S. Dept. of Justice BOP, Program Statement: *Treatment and Care of Inmates with Mental Illness*, (https://www.bop.gov/policy/progstat/5310_16.pdf) at 14.

¹⁰⁸ See U.S. Dept. of Justice BOP, Program Statement: *Treatment and Care of Inmates with Mental Illness*, (https://www.bop.gov/policy/progstat/5310_16.pdf) at 14.

¹⁰⁹ See Petitioner Ex. 4 at 68 (J.T. Questionnaire),

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his “cellmate has mental issues, including anxiety and seizures” and that they “were not getting along.” A unit manager ignored J.T. when he voiced concerns over his cellmate’s mental health and potential conflict between the two of them. Later, J.T. and his cellmate got into a fight. J.T. felt that his “life was in danger” and reported that prison staff threatened to send both him and his cellmate to the SHU or transfer them to another facility.¹¹⁰

Dr. Stuart Grassian described similar incidents he learned of through interviews with people incarcerated at the FDC where medical and psychological concerns were ignored or met with threats from staff. For example, he reported that “staff [threatened] to send [an] inmate to ‘the Hole’ if he continued to complain.”¹¹¹ Dr. Grassian reported that these kinds of incidents left people “with an impaired sense of self-worth and personal agency,” and that the kind of helplessness experienced by those incarcerated at Sheridan was “humiliating and demoralizing.”¹¹² Dr. Grassian additionally wrote that “[i]nmates [he] interviewed spoke of feeling like hurting themselves while locked in their cell.”¹¹³ Multiple statements from others incarcerated throughout the pandemic indicate a similar dynamic of need, neglect or aggression from staff, and a subsequent worsened mental state.¹¹⁴

¹¹⁰ See Petitioner Ex. 4 at 68 (J.T. Questionnaire).

¹¹¹ See ECF 72-2 at 22 (Declaration of Dr. Grassian).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See, e.g., Petitioner Ex. 8 at 1-42 (compiled petition statements); Petitioner Ex. 4 at 119-139 (compiled questionnaire responses).

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The BOP Program Statement details strategies for mitigating the negative impacts of incarceration on those experiencing mental illness or distress. Strategies include facilitating social supports, housing accommodations, and meaningful ways to spend time.¹¹⁵ Those incarcerated at FCI Sheridan report that these strategies were not implemented during this time period.

T.R. stated “[m]y mental health is wrecked...I’m not allowed to see, hug, kiss, or hold my family due to COVID.”¹¹⁶ A.F stated: “The mental stress from all this is becoming unbearable. This isolation has caused me mental and emotional distress.”¹¹⁷ S.K. stated “[n]obody asked about how our/my mental health was. In fact, I never saw anyone from the psychiatry department all throughout the pandemic.”¹¹⁸ T.W. stated that he is on medication but that the mental health staff have never checked on him or had any type of contact with him.¹¹⁹ K.C. described an incident where officers harassed a prisoner, leading to an attempted suicide on November 27, 2021.¹²⁰ Others describe mental stress as “unbearable”:

¹¹⁵ See U.S. Dept. of Justice BOP, Program Statement: *Treatment and Care of Inmates with Mental Illness*, (https://www.bop.gov/policy/progstat/5310_16.pdf) at 14.

¹¹⁶ See Petitioner Ex. 4 at 64 (T.R. letter).

¹¹⁷ *Id.* at 36 (A.F. Letter).

¹¹⁸ *Id.* at 49 (S.K. Questionnaire).

¹¹⁹ *Id.* at 79 (T.W.1 Questionnaire).

¹²⁰ *Id.* at 26 (K.C. Declaration).

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7) The Mental stress from all this is becoming unbearable. This isolation has caused me mental and emotional distress and is affecting my daily activities such as rest, eating, fatigued. I didn't plea to be treated this way. And when I say Plea, I meant ~~blame~~ Plea Guilty to my Federal Offense

Letter from Incarcerated Person.¹²¹

Dr. Jennifer Hunter, a Staff Psychologist at Sheridan, acknowledged an increase in requests for psychological services during the pandemic and admitted to obstacles to providing care during quarantine periods. Dr. Hunter also stated: "Our judgment about urgency of need occasionally differs from the inmate's perception. In cases where the inmate will be expected to wait for services, every effort is made to inform them of the anticipated delay in services."¹²² Dr. Hunter did not provide any examples of efforts made to communicate about delays in services, nor did she provide any details as to how staff determine urgency of need, or the number of staff available to meet that need. In response to discovery requests about non-medical staff at FCI Sheridan, the Warden declined to identify by position the staff members, thus it is not possible to establish the actual number of mental health professionals at FCI Sheridan.¹²³

¹²¹ See Petitioner Ex. 4 at 36 (A.F. Letter).

¹²² See ECF 66-3 at 3-4 (Declaration of Dr. Jennifer Hunter).

¹²³ Petitioner Ex. 5 at 36 (responding to request to identify non-medical staff by position with total numbers: "FCI Sheridan employed 285 non-medical staff in February 2020. Respondent further answers that FCI Sheridan employed 296 non-medical staff in August 2020 and, today [April 2021], FCI Sheridan employs 299 non-medical staff.").

Dr. Hunter stated that people can request services and are educated about how to send requests, but she did not address what happens after a request is submitted.¹²⁴ Dr. Hunter described that “all cells within the FDC are equipped with a ‘duress’ button” that may be pressed when an inmate has a “grievous psychological concern, such as suicidal ideation.”¹²⁵ According to Dr. Hunter, should an inmate press the duress button “all FDC staff are trained to respond to the emergency and take appropriate action.”¹²⁶ Dr. Hunter described making rounds “to make contact with as many inmates as possible in the housing unit to check on the inmate’s current mental health status and make a note of any concerns.” Dr. Hunter did not indicate how many people she was typically able to contact on these rounds. Dr. Hunter stated that these checks “are typically conducted through the slot in the cell door for quarantined inmates.”¹²⁷

J.B. described his experience trying to receive treatment. He sent a cop-out from a computer but no one ever saw him.¹²⁸ K.J. wrote that people had been unable to receive services upon request.¹²⁹ D.B. noted “there are no counseling/psych services that are truly available” and that he has “noticed more altercations” as a result of heightened stress and lack of services.¹³⁰ Additionally, M.A. wrote that there has been no effort taken by the prison to mitigate the

¹²⁴ *Id.* at 4.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Petitioner Ex. 4 at 22 (J.B. Questionnaire).

¹²⁹ *Id.* at 44 (J.K. Questionnaire).

¹³⁰ *Id.* at 15 (D.B. Questionnaire).

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psychological effects of lockdowns.¹³¹ D.C. observed that psychology services were nonexistent.

¹³² J.W. wrote that the situation made him suicidal:

Being away from family is very difficult. My nearest family member is 3500 miles away. I suffer from PTSD, depression, and panic disorder. Every one of these symptoms has been heightened to very high levels. It has brought me to a very bad place in my head. I now struggle with suicide thoughts. I have been hospitalized for this before. We have no help here and are always locked down. I have no support group at all. This has been more than devastating to me.¹³³

Another inmate wrote that the prison refused to prescribe the medicine that he had used to manage his anxiety disorder, leading to extreme psychological distress, and ultimately, a suicide attempt:

I have been here since the beginning of the covid pandemic 4/1/20. On 4/13/20 I attempted suicide by using a razor blade to slice both sides of my neck. My anxiety is outta control. They refused to prescribe me my ADHA meds and anxiety meds when I got here. They haven't substituted anything at this point. I don't even want to come out of my cell. I'm losing my mind here!¹³⁴

The BOP program statement has specific policies related to restrictive housing.¹³⁵ Regardless of an incarcerated person's designated mental health care level, the facility is to conduct diagnostic assessments, suicide risk assessments, and crisis intervention for someone placed in restrictive housing such as SHU or SMU.¹³⁶ Assessments and care are to "be conducted

¹³¹ *Id.* at 10 (M.A.2 Questionnaire).

¹³² *Id.* at 28 (D.C Questionnaire).

¹³³ Petitioner Ex. 8 at 9 (petition 20-cv-2104 filed 12/3/2020).

¹³⁴ Petitioner Ex. 4 at 125.

¹³⁵ See U.S. Dept. of Justice BOP, Program Statement: *Treatment and Care of Inmates with Mental Illness*, (<https://www.nytimes.com/2020/08/13/health/Covid-mental-health-anxiety.html?searchResultPosition=10.>) at 15.

¹³⁶ *Id.*

in a private area,” to the extent possible.¹³⁷ The program statement acknowledges that mental health “may deteriorate during a restrictive housing placement,” which creates additional needs for mitigation strategies.¹³⁸ The BOP identified this heightened risk as inherent to restrictive housing.

Dr. Grassian described the conditions of lockdown at Sheridan as “[sharing] characteristics of solitary confinement, including severe restriction of environmental and social stimulation” which he concluded, “to a reasonable degree of medical certainty...are having a severely deleterious effect on the population.”¹³⁹ This assessment aligns with the experiences described by those incarcerated during the pandemic. For example, K.C. stated that lockdown “feels more like solitary confinement” with “no recreation or outside recreation to exercise,” no classes, and limited medical treatment.¹⁴⁰ The heightened risks of restrictive housing call for mitigation strategies even for those who have not been identified as needing a certain level of mental health care.

The Psychology Department at Sheridan has a Suicide Prevention Program that is meant to staff psychologists for crisis intervention and suicide prevention assessments and treatment.¹⁴¹ After the inspection of Sheridan in September 2021, Dr. Michael T. Puerini, found that “[t]here

¹³⁷ *Id.*

¹³⁸ See U.S. Dept. of Justice BOP, Program Statement: *Treatment and Care of Inmates with Mental Illness*, (https://www.bop.gov/policy/progstat/5310_16.pdf) at 16.

¹³⁹ See ECF 72-2 at 23 (Supplement Status Report by Petitioners Declaration of Dr. Grassian).

¹⁴⁰ See Petitioner Ex. 4 at 25 (K.C. Declaration).

¹⁴¹ See U.S. Dept. of Justice BOP, *Doctoral Psychology Internship 2022 2023*, (https://www.bop.gov/jobs/docs/she_internship_brochure_2022.pdf) at 9

was no evidence of routine monitoring of suicidal inmates by custody and/or healthcare staff. This is clearly a breach of usual, nationally promulgated standards of care.”¹⁴²

Throughout the pandemic, the conditions at Sheridan exacerbated the risks associated with mental illness in carceral settings. In the face of heightened risks, the facility maintained a policy of severe confinement that limited the interaction incarcerated people could have with support systems. Since March 2020, one individual has committed suicide while detained at FCI Sheridan.¹⁴³ During the years 2016-2019, zero individuals committed suicide while detained at FCI Sheridan.¹⁴⁴

J.W. and G.G.’s declarations both provide instances where FCI Sheridan did not fulfill the requirements associated with any tier of mental health care described in the BOP program statement. For example, after completely changing J.W.’s medication regimen in April and increasing the dose in August, medical staff never saw J.W. again for mental health issues.¹⁴⁵

Other incarcerated people experienced similar failures in service. G.G. wrote on March 17, 2022:

I am a Mental Health Care Level 3 inmate. By policy, I am supposed to be seen by someone in Psychology services ONCE A WEEK. I have not been seen in MONTHS, and I am not alone. Psychology staff won’t even respond to electronic mail, and we haven’t even had groups in over a month either. Why be at a Care Level 3 prison if you don’t receive care level 3 services. What should I do? I fear retaliation if I file a BP-9.¹⁴⁶

¹⁴² See Petitioner Ex. 3 at 4.

¹⁴³ ECF 78 (August 26 2021, Status report).

¹⁴⁴ Petitioner Ex. 5 at 37.

¹⁴⁵ See 3:2018-cr-00599 ECF 154

¹⁴⁶ Petitioner Ex. 1 at 58.

Similarly, T.W. wrote that he is a Mental Health Care Level 3 inmate who went months without being seen individually by a mental health care provider.¹⁴⁷ The combination of extreme isolation with the lack of adequate screening and mental health treatment had devastating effects on this already vulnerable population.

B. Delays and Denial of Critical Medical Services

Medical care at Sheridan has been severely disrupted during the pandemic. Even when individuals were seen in the facility, they experienced delays in scheduling of outside appointments, procedures, and follow up care. The inadequate treatment, delays, and denials of medical care have caused substantial suffering for those at Sheridan.

Substandard medical care is documented in the declarations of the FPD investigator who reviewed emails and correspondence and received calls from people incarcerated at Sheridan.¹⁴⁸ Expert opinions of medical professionals who reviewed one or more medical files of residents at FCI Sheridan corroborate these reports.¹⁴⁹ Problems have arisen due to staffing concerns and because residents locked in cells are unable to access needed medical care.

In response to discovery requests, the Warden indicated that FCI Sheridan employed 18 medical staff in February 2020, 18 medical staff in August 2020, and 20 medical staff in April 2021.¹⁵⁰ A chart described the various positions:

¹⁴⁷ See Petitioner Ex. 4 at 80 (T.W. Questionnaire)

¹⁴⁸ Petitioner Ex. 1.

¹⁴⁹ Petitioner Ex. 3.

¹⁵⁰ See Petitioner Ex. 5 at 35.

PHS

PHARMACIST	[REDACTED]	3	[REDACTED]
NURSE-OTHER	[REDACTED]	1	(Pending Position Change to IOP)
NURSE	[REDACTED]	1	[REDACTED]
OTHER HEALTH SERV (IOP)	[REDACTED]	1	VACANT
DENTAL	[REDACTED]	1	[REDACTED]
HLTH SVCS ADMINISTRATOR	[REDACTED]	1	[REDACTED]

S&E

CLERK	1	[REDACTED]
MEDICAL OFFICERS	2	[REDACTED]
NURSE	2	[REDACTED]
NURSE PRACTITIONER	2	(1 VACANT)
HEALTH TECHNICIAN	4	[REDACTED]
IOP NURSE	1	[REDACTED]
PHARMACY TECHNICIAN	1	[REDACTED]
ASST. HSA	1	[REDACTED]
MEDICAL RECORDS TECH	2	[REDACTED]
DENTAL OFFICER	1	[REDACTED]
DENTAL ASSISTANT	1	[REDACTED]

Gov't Discovery Production.¹⁵¹ The Warden declined to provide the qualifications of those who occupied these positions, or the hours they were on site.¹⁵²

This staff is inadequate to meet the medical needs of the population at Sheridan, for at least two reasons. First, an expert in corrections health care, Dr. Puerini, who participated in the inspection of Sheridan and reviewed selected records, questioned whether the primary physician was "present on site often enough to be able to conduct his assigned duties."¹⁵³ After a detailed review of medical records of six patients at Sheridan, a second expert, Dr. Marc Stern, forcefully

¹⁵¹ *Id.* at 353

¹⁵² Petitioner Ex. 5 at 35.

¹⁵³ Petitioner Ex. 3 at 4 (report of Dr. Michael Puerini).

opined that certain staff were not qualified to provide the assessments and treatments they did.¹⁵⁴ Dr. Stern found that incarcerated individuals with “complex medical histories and complaints” were not being seen by the facility’s physician, but rather by laypersons lacking the requisite medical credentials.¹⁵⁵ In his report, Dr. Stern designated these individuals as “Persons Referring to Themselves as Paramedics” (PRTPs), noting that they have been routinely engaged to provide medical care to patients incarcerated at the prison.¹⁵⁶ Under Oregon law, these individuals are functionally “unlicensed laypersons”—neither physicians, as required in medically complex cases, nor Mid-Level Providers (MLPs), as required for general patient care.¹⁵⁷ Nevertheless, the prison has customarily retained their services to “engage with patients who have symptoms of an undiagnosed problem, independently question the patient to obtain a history of the symptoms and related medical conditions, conduct a physical examination to obtain observable signs of disease, use that information to form a diagnosis, and then order a treatment plan.”¹⁵⁸ This practice not only deviates from community standards of care, but according to Dr. Stern’s extensive correctional medicine experience is unheard of: “after more than 20 years specializing in correctional medicine, familiar with the practice of medicine in hundreds of jails and prisons around the country, I never

¹⁵⁴ See Petitioner Ex. 3 (report of Dr Stern).

¹⁵⁵ *Id.* at 49.

¹⁵⁶ *Id.* at 46.

¹⁵⁷ *Id.* at 47.

¹⁵⁸ *Id.*

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encountered a facility which engaged paramedics in the capacity they are engaged at FCI Sheridan.”¹⁵⁹

There is good reason that other correctional institutions do not rely on PRTPs to diagnose and treat disease. The practice has placed many patients incarcerated at FCI Sheridan “at significant risk of serious harm, including the risk of death.”¹⁶⁰ Dr. Stern found that at least one medical examination managed “wholly independently by the PRTP” put a patient “at significant risk of death and likely contributed to a delay in the diagnosis and treatment of prostate cancer.”¹⁶¹ In that case, the facility’s physician neither “conducted a contemporaneous consultation nor a post-hoc review and co-signing” of the PRTP’s work.¹⁶²

Even if licensed physicians were providing adequate direction to PRTPs, however, Dr. Stern concluded that their “supervision alone [could not] backfill the extreme deficiencies in the knowledge and skills of PRTPs” at FCI Sheridan.¹⁶³ Dr. Stern found that “the majority of supervision” is “post-hoc,” and usually consists of a physician review and co-signature of PRTP-prepared medical records.¹⁶⁴ In some cases, a physician did not co-sign on a PRTP-recommended treatment plan for three days, rendering the patient “subject to the independent and sole judgment

¹⁵⁹ *Id.* at 50 (“I know of no-prehospital, non-emergency setting in the community where paramedics independently evaluate, diagnose, treat, and release to home, patients who present with illnesses of unknown cause.”)

¹⁶⁰ *Id.*

¹⁶¹ *See* Petitioner Ex. 3 at 40.

¹⁶² *Id.* at 49.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

of the PRTP” for extended periods of time.¹⁶⁵ When physicians did review PRTP records, they “failed to identify and remedy the often serious and sometimes life-threatening deficiencies in the PRTP’s work” in almost every case Dr. Stern reviewed.¹⁶⁶ To that end, he concluded that physician supervision at FCI Sheridan was “clinically worthless,” consisting of “little more than rubber stamps of dangerous care.”¹⁶⁷

Even if the staff were present and medically qualified, incarcerated people at Sheridan are at risk for substandard medical care due to systemic barriers tolerated by the Warden during the pandemic. Dr. Puerini found that “inmate-patients do not even have minimal access to care.”¹⁶⁸ He found that “[r]equests are not triaged on a daily basis by healthcare professionals.”¹⁶⁹ Indeed, the Warden acknowledged this lack of daily care. In a court pleading, a health care assistant described the triage system implemented in July 2021. It provided for review of health complaints only four days per week.¹⁷⁰ For those in quarantine status, individuals had to give these requests to housing unit staff or place them in a box located at the housing unit office. At the FDC, Health Services staff were assigned to collect paper requests daily by walking through the housing units

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Petitioner Ex. 3 at 4.

¹⁶⁹ *See* Petitioner Ex. 3 at 3.

¹⁷⁰ *See* ECF 77 at 2 (Declaration of Marcie Morgan).

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J1 & J2.¹⁷¹ Many people in custody at the FDC said, however, that staff were not available to accept these forms.

Access to health care for patients in isolation or quarantine has been been inadequate. Dr. Puerini concluded, after inspecting the prison and seeing ill people unattended in the gym, that using “an understaffed gymnasium (no healthcare staff were seen) as an infirmary is simply irresponsible.”¹⁷² BOP standards require all facilities to implement local “procedures and control systems” to provide “medical and psychiatric care” to patients housed in Special Housing Units (SHU).¹⁷³ Special housing units are one form of isolating people in custody and removing them from ordinary routines. Isolation and quarantine units have a similar effect. But the Inspection of FCI Sheridan found that “[i]nmates housed in isolation or quarantine” were not receiving the “regular and routine” care that they require of healthcare staff.¹⁷⁴ Likewise, BOP standards require staff to “take particular care to monitor any inmate who is a potential suicide risk.”¹⁷⁵ Dr. Puerini noted that inmates were assigned to monitor suicidal inmates.¹⁷⁶

Gauging the responsiveness of Sheridan’s medical care during the pandemic has proven difficult. Dr. Puerini found the documentation system at FCI Sheridan insufficient, noting that “[t]here is inadequate documentation of when a patient submits a request for care, when a nurse

¹⁷¹ Id.

¹⁷² Petitioner Ex. 3 at 3.

¹⁷³ See ECF 39-1, BOP Program Statement - Patient Care, Ex. 1 at 17.

¹⁷⁴ See Petitioner Ex. 3 at 4.

¹⁷⁵ See ECF 39-1, BOP Program Statement - Patient Care, Ex. 1 at 18.

¹⁷⁶ See Petitioner Ex. 3 at 4.

triges that request, and how long it takes for a nurse or physician to adequately evaluate the medical problem.”¹⁷⁷ In cases where documentation did exist, Dr. Puerini found that some responses to “patients’ clinical concerns do not happen within 24 hours, as is the current standard of care.”¹⁷⁸

The tolerated lack of adequate medical care has caused extreme suffering among incarcerated people. One particularly egregious example of many brought to the attention of the FPD is the denial and delay of medical care suffered by J.G.¹⁷⁹ J.G. is a 64-year-old man with prostate cancer and acute renal failure necessitating kidney dialysis. J.G. suffered from incontinence causing him to defecate on himself, and he reported having to resort to tearing up sheets because he could not get enough cleaning materials during the lockdown. When J.G. arrived at Sheridan, his Health Services Inmate Intra-System Transfer indicated that he had an enlarged prostate and under “pending UR committee action” a urology appointment was listed. He was initially evaluated by a “PRTP” and no follow up care was scheduled. After submitting several cop-outs himself, J.G. was taken to a urologist in January who found his situation “very concerning for prostate cancer... he needs a prostate biopsy asap.” Despite this, the physician at Sheridan put in the request for the prostate biopsy but labeled it priority: “routine” and set a target date of over two months away in later in March. On February 12, 2022, J.G. again asked to be seen because he was unable to urinate for the past 24 hours, was in pain and had been vomiting for the past four days. He was taken to the emergency room and was admitted with a urinary obstruction,

¹⁷⁷ See Petitioner Ex. 3 at 4.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* 6-7.

hydronephrosis, hyperkalemia, and kidney infection likely due to prostate cancer. The Federal Public Defender retained an expert, Dr. Jill Ginsburg, to review his medical records. Dr. Ginsberg expressed deep concern over the level of medical care provided:

“It is unclear yet whether [J.G.] will have lasting kidney damage as a result of the delay in diagnosing his renal failure. He almost certainly has advanced prostate cancer and may have been denied life-saving treatment as a result of the delay in responding to his escalating medical complaints.”

J.G. was later affirmatively diagnosed with advanced prostate cancer.

Other individuals report issues ranging from untreated infections and rashes, ongoing seizures, lack of necessary surgeries and physical therapy, as well concerns that long-term illnesses such as diabetes and hypertension are not being adequately monitored.¹⁸⁰ In petitions, declarations, and letters, residents have continuously begged for medical care. In the responses to the approximately 200 questionnaires sent by petitioners’ counsel in March 2022, 71 individuals wrote of urgent medical needs that were not being addressed. Just a sample of these experiences paint a desperate picture:

- I am going blind in my eyes and I have yet to received medical care. I’m supposed to receive injections in both of my eyes at least once a month. Medical does not care and I’m afraid of going blind. . . I have tried to get help from medical. I have sent numerous cop-outs about my eyes and have been ignored. I asked my case manager what I should do, and he told me it’s out of his hands. I asked him “so what if I go blind?” and he said “well you will have a big check coming”. I asked nurse Anderson what I should do and he said “don’t send any more cop-outs”. So I said “what if I go completely blind?” and he said “well you will get compensated.”¹⁸¹
- the medical has gotten so bad that my cell mate has diabetes and has hammer toe. he developed a sore on one of his toes and put in multiple cop-outs for medical attention. all of the staff said he would be seen. a smell started to

¹⁸⁰ See Petitioner Ex. 1 at 76-90.

¹⁸¹ Petitioner Ex. 8 at 30.

develop of death, rot, and almonds. staff was notified and medical came down and said the he would be seen. he has been charge 2\$ multiple times and has never seen a provider (i.e... doctor) and proceeded to cut off the rotten part of his toe his self with a broken razor and notified medical staff as to his actions and their response was “hardcore!” i don’t understand why medical staff here doesn’t display any kind of ethics or is being held accountable for their actions.¹⁸²

- I have a toenail infected so badly with a fungus that, in additon to constant pain and discomfort, is now cuasing angry rashes to develp on and near the skin in that area. Despite repeated requests for treatment, this issue remains untreated.¹⁸³
- I’ve hit the emergency button in the middle of the night with extreme abdomen pain and been denied medical attention. The guards said ‘no medical staff is here.’ These people should be arrested.¹⁸⁴
- Since contracting Covid-19 here at FCI Sheridan, I have been labeled and ordered by BOP medical as “wheelchair bound” I still have breathing issues, chest pain, severe nausea/vomit, and pain in my legs. I have been prescribed 5 medications but have only received 1. I have been provided NO physical therapy and my legs have ‘deconditioned.’ I have been in a wheelchair now for 7 months with no help. Even my counseling/psychology request are ignored. I have obviously been depressed/frustrated with my medical negligence and handicap.¹⁸⁵
- Any time you ask unit staff, Sgt, Lt, or medical staff for help with any issue or problem they tell you flat out no or I don’t have time for you. The typical answer for any questions or problem we may have is “That’s above my pay grade” or “if you don’t like what’s going on we can make room in the hole for you.”¹⁸⁶
- Sent numerous kites or request forms or cop-outs to medical for my medical conditions! With no response! I haven’t had my blood pressure meds since I’ve arrived at Sheridan. Haven’t; been given a physical or received any medical treatment and my legs have now turned purple. I just keep sending out requests

¹⁸² Petitioner Ex. 1 at 39.

¹⁸³ See Petitioner Ex. 4 at 80 (T.W. Questionnaire).

¹⁸⁴ Petitioner Ex. 4 at 8.

¹⁸⁵ Petitioner Ex. 4 at 13.

¹⁸⁶ Petitioner Ex. 8 at 6 (petition 20-cv-1671 filed 9/25/2020).

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to see medical and get no response and the guards just keep telling me to send in request forms called cop-outs. I'm like a hamster on a wheel getting nowhere but sick and my risk gets higher every day.¹⁸⁷

- We were told that medical is not seeing anyone unless you're bleeding out - nothing got done for us¹⁸⁸
- Basic medical care ignored. (Dates of requests- 6/30, 7/13, 8/12, 9/3, 9/8, 9/9, 9/13, 9/24, 9/28, 9/30, 10/4, 10/8, 10/9- all ignored by medical staff copies made available.¹⁸⁹
- I've been asking for dental care for several years to no avail. Same with medical care. I've stopped asking. That's what your records don't record, all the people that just gave up trying to get medical. There's dozens of people around here that have knee injuries and broken fingers they've had to set themselves, staph infections, you name it. They know the medical's more trouble than it's worth and pushing too hard will get your cell torn up in retaliation anyways.¹⁹⁰

In summary, access to quality medical care at FCI Sheridan during the pandemic has been inadequate and threatens the long-term health of the individuals in its patient population. The medical unit is understaffed and relies on unlicensed practitioners as the primary points of contact for many individuals. In the instances when they are able to submit requests, many patients have not seen responses at all. Serious medical conditions have gone untreated. The result has been substandard health care with life-threatening consequences.

C. Delays and Denial of Dental and Optometry Care

Numerous individuals have reported that Sheridan did not have an available dentist for over two years. Since the beginning of the pandemic an FPD investigator has received at least one

¹⁸⁷ *Id.* at 9.

¹⁸⁸ *Id.* at 19.

¹⁸⁹ Petitioner Ex. 4 at 33.

¹⁹⁰ Petitioner Ex. 4 at 97.

phone call a day about medical or dental neglect.¹⁹¹ Dozens of people responded to a questionnaire sent in March of 2022 reporting broken teeth, unfilled cavities, undelivered dentures, delayed root canals, and the lack of routine care for years:

- I haven't saw dental since I got to FCI Sheridan in March 2021.¹⁹²
- I have 2 upper teeth with dental decay. It is too late probably to save. Since we have no preventative dental care. It's not right we have to lose our teeth since they can't take care of us.¹⁹³
- There is NO Dental here unless it's a life or death situation.¹⁹⁴
- I repeatedly ask for dental help. I can't chew and need dentures but they just keep telling me I'm on the list.¹⁹⁵
- I have been on a waiting list to have my teeth cleaned of 3 years in June. I have asked to be seen about a cavity that has been sensitive to hot and cold but was told no dental procedures unless it's an extraction¹⁹⁶
- Currently I am being denied emergency and basic dental care while experiencing severe pain and possible infection.¹⁹⁷

¹⁹¹ See Petitioner Ex. 1 at 61.

¹⁹² Petitioner Ex. 4 at 18.

¹⁹³ *Id.* at 27.

¹⁹⁴ *Id.* at 43.

¹⁹⁵ *Id.* at 88.

¹⁹⁶ *Id.* at 48.

¹⁹⁷ *Id.* at 31.

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Some individuals have been waiting for dentures for years. For example, T.D. sought emergency dental care for over a year and half.¹⁹⁸ He reported that in about October of 2019, he was informed that, due to the condition of his teeth, the best course of action would be to remove and replace all his remaining teeth with dentures. Mouth impressions were made and he was told that a full denture mouth plate would arrive within the next 6 months. He did not receive the dentures. Because he lacks teeth, he requires liquid diet meals. He has choked on occasion because he could not properly chew his food. He has made numerous dental and medical requests which have gone unanswered and filed administrative grievance forms to no avail. To this day he does not have dentures.¹⁹⁹

Similarly, those that need glasses have been unable to receive the care they need.

- “I have not been able to see an optometrist for my glasses in almost 4 years and am still waiting. My prescription is outdated and I have noticed my vision getting worse and worse. I’ve been on a ‘list’ since I’ve been here.”²⁰⁰
- “I’ve been here over a year trying to get glasses because I’m blind.”²⁰¹
- “Been without my glasses for over a year because they have no optometrist.”²⁰²
- “I have an optometry appointment I have been waiting for since 10/20/2020.”²⁰³

¹⁹⁸ See Petitioner Ex. 1 at 53, 79-80.

¹⁹⁹ *Id.*

²⁰⁰ Petitioner Ex. 8 at 17 (petition 21-cv-0716 filed 5/10/2021).

²⁰¹ *Id.* at 39.

²⁰² Petitioner Ex. 4 at 6.

²⁰³ *Id.* at 18 (response to March 2022 questionnaire).

For those that rely on glasses, the lack of optometric care interferes with their ability to engage in their legal cases, utilize the prison grievance process, correspond with their family, and participate in educational programs.

D. Grossly Inadequate Hygiene and Sanitation

As the pandemic took hold, prison officials were advised to focus on “reinforcing hygiene practices “and “intensifying cleaning and disinfecting of the facility.”²⁰⁴ On April 1, 2020, in an Advisory to the Inmate Population, the BOP stated it was undertaking procedures to stop the spread of the virus including:

- A high level of sanitation and hygiene efforts is critical in all areas, especially in cells. Cleaning supplies will be provided to the inmate population. Staff have increased the sanitation efforts throughout the institution.
- Avoid touching your face; wash your hands frequently with soap and water; sneeze/cough in your sleeve or in a tissue and discard it.

Gov’t Production of Documents in Discovery.²⁰⁵

Despite the importance of hygiene and cleanliness, inmates were denied the supplies necessary to keep themselves safe.²⁰⁶ The conditions described would be appalling at any time, but are especially frightening during a pandemic:

²⁰⁴ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control (Mar. 23, 2020), (https://www.ncchc.org/wp-content/uploads/CDC_Correctional_Facility_Guidance_032720.pdf) at 5.

²⁰⁵ Petitioner Ex. 5 at 150.

²⁰⁶ See Covid-19 Science Update, Office of the Chief Medical Officer, CDC Covid-19 Response, and the CDC Library, Atlanta Georgia, Sept. 8, 2020 (available at: https://www.cdc.gov/library/covid19/pdf/2020-09_08-Science-Update_FINAL_public-v2.pdf) (“hand hygiene is critical in preventing fecal-oral (via contact with respiratory mucosa) transmission”).

- On September 22, 2021, an inmate called me at 7:04 am, he said he had been locked up since the last time I spoke with him and he that he freaked out in his cell last night and this morning. He said he was screaming & yelling and hitting the walls to get out as he couldn't do it anymore and he needed out. But no one came. He said he hadn't seen a guard in days. He said the only reason he is out right now was that an orderly came and let him out. He told me has had diarrhea the last couple of days and didn't know if that was a sign of COVID but he couldn't understand why they would put him in here with people that have it when he didn't have it. He also said he had NO TOILET PAPER, he said he told the orderly what was going on and the orderly got a half of roll of Toilet Paper from his cell.²⁰⁷
- But lately I spend every night standing over the toilet dripping cause I can't pee.. And if I go to sleep, I pee the bed. And we have no way to get clean laundry in here anymore cause they took our washers and driers - so I reek of pee and have no way to do anything about it.. Not to mention - I'm in CONSTANT PAIN... I'm so worried - cause I have been sleeping on my toilet for the past week and it sucks..and I think I'm gonna die..²⁰⁸
- A client reported to an investigator that there was no toilet paper at all and he was 'having to use dirty laundry' for toilet paper. Clean laundry was no longer provided. Inmates had access to showers only once every three days a week.²⁰⁹
- An inmate in J1 reported that they hadn't had soap since they were given one bar at the beginning of the pandemic. No toilet paper had been passed out in a month.²¹⁰
- I have been able to exchange dirty, soiled or contaminated masks twice in 9 months.²¹¹
- Inmates reported instances of garbage being uncollected and food trays not

²⁰⁷ Petitioner Ex. 1 at 31-32 (attorney report).

²⁰⁸ Petitioner Ex. 1 at 41.

²⁰⁹ *Id.* at 3.

²¹⁰ *Id.*

²¹¹ Petitioner Ex. 8 at 10 (petition 20-cv-2243 filed 12/22/2020).

being picked up, so that food residues rotted in the cell, creating foul odors. One inmate stated that meal trays were not picked up for six days, by which time there were maggots living inside the Styrofoam tray.²¹²

- An inmate relayed that he hasn't had clean laundry in two weeks, that the only hygiene products that have come around in a couple of weeks were a small amount of soap to share with his cell mate, and one toothbrush between the two of them.²¹³
- the kitchen is disgusting and verbal complaints are made by the inmates that work in there. rats run around all day and night shitting on dishes and cookware. there is currently no soap in the kitchen to clean and sanitize ANYTHING. so they just spray with water alone and call it a win...not ok. food items such as cake and other baked goods are left unsecured over night to have rats piss and excrement all over them and they are served to the general population in the morning or after 2 days...absolutely disgusting.²¹⁴

At a time when public health officials were urging attention to hygiene in the broader population and specifically in congregate settings, the petitioners were denied consistent and adequate access to hygiene and sanitation.

E. Inadequate Access to Running Water and Drinking Water

The United Nations has declared that “[t]he human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”²¹⁵ At times throughout the pandemic, groups of inmates were denied access to adequate water for drinking, washing hands, and toileting. As previously discussed in Section IV, up to 60 people

²¹² Petitioner Ex. 3 at 14.

²¹³ Petitioner Ex. 1 at 12.

²¹⁴ Petitioner Ex. 1 at 49.

²¹⁵ U.N. Committee on Economic, Social, and Cultural Rights (CESCR), General Comment 15, The right to water (Art. 11 and 12 of the Covenant) (available at: <https://www.refworld.org/docid/4538838d11.html>).

were confined in the gymnasium with two toilets, one shower, and one sink.²¹⁶ “The sink is next to the toilet and is used for washing their hands as well as getting drinking water.”²¹⁷ During the inspection of FCI Sheridan, there were “two large, plastic water vessels that were awaiting a refill in an outside area” and “no drinking cups visible.”²¹⁸ According to inmates, the water containers were a new addition.²¹⁹

There were multiple reports that in the summer of 2020 a water main broke in Units 3A and 3B affecting 256 men. The men waited five days in squalid conditions while inmate workers fixed the issue:

- 5 days of no showers, hand washing, flushing toilets, feces and uring piling up and overflowing out of the toilet in the room you have to sleep and eat in.²²⁰
- We were forced to live in a cell with another man, urinating and defecating several times a day into a bucket (since that’s essentially what a toilet is, if it can’t flush) with no way to wash our hands, no way to take a shower or clean yourself, for 5 days.²²¹
- At one time our building was without water for like 5-6 day. We couldn’t flush the toilets wash our hands and the only gave us 2 16oz water bottle to drink plus no showers when they did get the water tank we had to flush our toilets with buckets of water and shower with cold water.²²²

²¹⁶ ECF 89-2 at 34.

²¹⁷ *Id.*

²¹⁸ ECF 89-1 at 7.

²¹⁹ *Id.*

²²⁰ Petitioner Ex. 4 at 11.

²²¹ *Id.* at 76.

²²² *Id.* at 112.

Safe management of human waste is largely taken for granted in the United States, but open toilets pose a risk for transmission of Covid-19:

In the latest public guidance, the World Health Organization (WHO 2020c) highlighted the importance of safely managing human sanitary wastes, which included the prevention of aerosolized fecal matter, fecal contamination on hands, and fecal sludge management during the current pandemic. The WHO interim guidance also suggested that, where possible, individual toilet or latrine should be provided to suspected or confirmed individuals to reduce the risks of COVID-19 infection via human fecal matter.²²³

There are several other reports of lack of water:

- today is day one that i don't have a working sink in my cell which mean that when we are locked down for any amount of time that myself and my cellmate do NOT have access to any form of drinking water. I notified the unit officer first thing this morning when it started. nothing was done about it all day even though i repeatedly asked for water while locked down during fog count at 2pm through standing count at 4pm. the fact that i have to suffer in my cell though the night with no access to drinking water other than my toilet is unacceptable.
- At one point they went 4 weeks with no water. The guards came around once a week with water buckets to flush their toilets.²²⁴
- I was locked in my cell for over a month without any running water. We had to use pitchers to flush our toilets. I had no access to any running hot water.²²⁵

“The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”²²⁶

²²³ Shiyi Sun & Jie Han, Open Defecation and squat toilets, an overlooked risk of fecal transmission of COVID-19 and other pathogens in developing countries, *Environ Chem Lett.* 2021; 19(2) (available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7700112/>).

²²⁴ Petitioner Ex. 1 at 74.

²²⁵ Petitioner Ex. 8 at 10 (petition 21-cv-0625 filed 4/26/2021).

²²⁶ U.N. Committee on Economic, Social, and Cultural Rights (CESCR), General Comment 15, The right to water (Art. 11 and 12 of the Covenant) (available at: <https://www.refworld.org/docid/4538838d11.html>).

F. Restriction on Religious Activities

Early in the pandemic it was announced that “All Education, Religious Service, Barber Shop, and Recreation Areas will remain locked until further notice. Outdoor Worship areas are out of bounds.”²²⁷ The rolling lockdowns and restrictions prevented congregate worship. One inmate reported that the chapel would be opened for RDAP meetings but locked and not available for religious services on Sundays.²²⁸ “We asked the chaplin multiple times if we could have religious meeti[ngs], he said no. Go away. The covid justification made no sense.”²²⁹ Inmates report that even after a year of the pandemic, religious services are still curtailed. Petitioner K.C., for example, reported in April of 2021 that religious activity was “still on hold.”²³⁰ Another inmate reported that though the solitary confinement has been lifted, they still have “[n]o access to religious services.”²³¹ Lack of religious services continued into September of 2021:

²²⁷ Petitioner Ex. 5 at 98 (April 9, 2020 COVID 19 Response Plan); 156 (June 2, 2020); 166 (June 3, 2020)

²²⁸ Petitioner Ex. 4 at 131.

²²⁹ *Id.*

²³⁰ Petitioner Ex. 4 at 24.

²³¹ *Id.* at 50.

SPIRITUAL HEALTH

I AM CATHOLIC. CATHOLICS BELIEVE THAT THE CHURCH IS MORE THAN A MERE INSTITUTION, ITS AN ESSENTIAL DIMENSION AND ASPECT OF SPIRITUAL LIFE. THE WAY THAT CATHOLICS WORSHIP - FROM KNEELING TO BURNING INCENSE, TO USING PHYSICAL, TANGIBLE SYMBOLS IN CEREMONIES IS AT THE CENTER OF THE RELATIONSHIP. THE PRIEST OR A REPRESENTATIVE FROM THE CATHOLIC CHURCH WOULD VISIT, TAKE CONFESSION, CONDUCT MASS AND MOST IMPORTANLY ADMINISTER RECEIVING THE HOLY EUCHARIST EVER WEDNESDAY NIGHT WHEN THE PRISON WAS OPEN. DURING THE ENTIRE LOCKDOWN THERE HAS BEEN NO REPRESENTATIVES ALLOWED INTO TO THE PRISON. THERE IS A RESTRICTION ON RELIGIOUS EXERCISE SINCE THE BEGINNING OF THE LOCKDOWN TO PRESENT DAY, SEPTEMBER 4, 2021.

Inmate Letter of September, 2021.²³² And as late as March of 2022, residents were reporting that there were no visits from the chaplain still, which felt like “3 years”:

This has been going on for 3 years now. There has been no outdoor activities time. The lack of psychology or chaplain services to come by and check up on our well being is non existance. No classes or rehab programs to better ourselves and

Questionnaire response of March 2022.²³³

²³² *Id.* at 57.

²³³ Petitioner Ex. 4 at 28.

The right to worship is a fundamental right and at a time when men were isolated, deprived of human contact, restricted in their ability to communicate with their families, the inability to seek solace from religious worship was harmful.

G. Lack of Exercise and Recreation

1. FCI Recreation

Recreation during the pandemic was severely restricted. In March of 2020, during early coronavirus awareness but before the lockdown was implemented, each unit at the FCI was scheduled to have two hours split between recreation and commissary each day.²³⁴ Then during the first six weeks of the lockdown, residents were kept entirely in their cells, with no recreation.²³⁵ A new schedule was announced on May 13, 2020, “to begin minimal programming at FCI Sheridan.”²³⁶ Under this new procedure each group of cells was to be afforded one hour of outside recreation each week. It is unclear if this truly began in May or instead in June, as Captain James Galberth emailed that the same procedure outlined in the May 13th memo would begin on June 9, 2020.²³⁷

In August of 2020, a new recreation schedule was announced that allowed for one hour of recreation twice a week.²³⁸ It was also announced that educational programs would resume August 17, 2020, and that “additional programming may be added in the coming weeks as long as we

²³⁴ See ECF 38-3, Ex. C at 2 (Keller Declaration).

²³⁵ Petitioner Ex. 6 at 306.

²³⁶ ECF 38-3, Ex. C at 12 (Keller Declaration).

²³⁷ ECF 38-3, Ex. C at 11 (Keller Declaration).

²³⁸ See Petitioner Ex. 5 at 174-176.

remain unaffected by the Covid-19 virus.” In August this was the “action plan,” but it is unclear if it was implemented at Sheridan. This plan made clear that institutions with active Covid-19 cases could make exceptions to this plan, and Sheridan began experiencing its first covid-19 outbreak in late August of 2020.²³⁹

In October and November of 2020, the Warden implemented plans to allow residents out on recreation by tier and then by unit, but on November 19, 2020, all programming and outside recreation was again suspended.²⁴⁰ The suspension continued into December of 2020.²⁴¹ This conflicts with the Warden’s filing on December 18, 2020, which stated that “[t]ypically, inmates are allowed out of their cells into the common areas for more than seven (7) hours per day, from approximately 8:00 a.m. to 3:30 p.m., Monday through Friday.”²⁴² Beginning on February 22, 2021, and continuing to March, recreation was an hour and thirty minutes 3 times a week, consisting of only outdoor recreation.²⁴³

At some point after February, outdoor recreation was canceled. A memo on September 2, 2021, stated that “outside recreation remains closed.”²⁴⁴ This memo also confirmed that religious services were suspended, and that education was conducting GED testing only.²⁴⁵

²³⁹ See ECF 38-3, Ex. B at 3 (Phase Nine Action Plan).

²⁴⁰ Petitioner Ex. 5 at 178-195.

²⁴¹ *Id.* at 178-195.

²⁴² See ECF 54 at 3 (Joint Status Report).

²⁴³ See Petitioner Ex. 5 at 197-213.

²⁴⁴ See Petitioner Ex. 5 at 350.

²⁴⁵ *Id.*

The state of recreation is unclear for the rest of fall and winter of 2021. However, on March 14, 2022, the recreation schedule was set at an hour and half of recreation each day of the week.²⁴⁶

Also beginning March 2022, in addition to GED classes, each unit was offered an hour and a half of First Step Act programming a week, at which the time they would also have access to the law library.²⁴⁷

RECREATION, COMMISSARY, & PILL LINE SCHEDULE (PHASE 10)

Recreation Plan for Mar 7 +

RECREATION	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
7:20 - 8:50 AM	2A	3A	2B	4B	2A
8:50 - 10:20 AM	2B	3B	2A	4A	2B
10:30 -12:00 PM	Lunch	Meal	And	Orderlies	Cleaning
11:30 – 1:00 PM	3A	1A	1B	3B	1A
1:00 – 2:30 PM	3B	1B	1A	3A	1B
3:00 – 3:45 PM	Units	Secured	And	Orderlies	Cleaning
6:00 – 7:30 PM	4A	4B	4A	4A OR 4B FS WORKERS	4B
Photo Program			Inmate photos	Inmate photos	
Commissary					
AM Shopping	4B	<u>2A</u>	<u>3A</u>	<u>1A</u>	<u>SHU</u>
PM Shopping	4A	<u>2B</u>	<u>3B</u>	<u>1B</u>	

Gov't Discovery Production.²⁴⁸

2. FDC Recreation

Recreation has also been severely limited at the FDC. After almost total lockdown, beginning in April 2020, Unit Officers would unlock one range (quarter) at a time and allow individuals to use showers, phones, emails, and exercise on the flats. At the end of the hour, the

²⁴⁶ *Id.* at 302-06.

²⁴⁷ *See* Petitioner Ex. 5 at 311.

²⁴⁸ *See* Petitioner Ex. 5 at 215.

unit officer locked the range back into their cells.²⁴⁹ There was no outside recreation.²⁵⁰ Weekend modified operations at the FDC consisted of individuals remaining in their cells at all times, with the exception of orderlies cleaning and showers provided for quarantine cells. Officers secured the phone room, computer room, and did not allow orderlies to participate in physical recreation during cleaning sessions.²⁵¹ On February 18, 2021, J1 and J2 were afforded 3 hours of combined outdoor recreation and commissary per week.²⁵² As of June 2022, the government asserts that First Step Act programming was taking place with at least one program for each need area occurring, but the frequency of classes had been reduced due to the current Level 3 Modified Operations.²⁵³ The schedule of recreation for those in quarantine cohorts was even more limited, providing for only one hour per day out of cells.²⁵⁴

SUBJECT: FDC Covid-19 Unit Procedures for J-2

Inmates will be afforded 60 minutes for recreation, shower, utilize legal/inmate phones, and use Trulinks Monday-Sunday. Only groups of ten inmates out in Unit at one time.

Structure and basic outline to follow: Orderlies will perform sanitation of showers, phones, and computers in between all cohort movement. Range 5, cells 111-115 are the Unit Orderlies

Cohort rotation by Cell/Day

TIME	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
7:00am-8:00am	111-115	209-213	214-217	218-227	228-232	233-239	111-115
8:20am-9:20am	209-213	214-217	218-227	228-232	233-239	115-209	209-213
9:40am-10:40am	214-217	218-227	228-232	233-239	111-115	209-213	214-217
12:00pm-1:00pm	218-227	228-232	233-239	111-115	209-213	214-217	218-227
1:20pm-2:20pm	228-232	233-239	111-115	209-213	214-207	218-227	228-232
2:40pm-3:40pm	233-239	111-115	209-213	214-217	218-227	228-232	233-239

²⁴⁹ See Petitioner Ex. 5 at 86.

²⁵⁰ *Id.* at 91.

²⁵¹ See Petitioner Ex. 5 at 110.

²⁵² See Petitioner Ex. 2 at 386.

²⁵³ See ECF 106 at 3.

²⁵⁴ See Petitioner Ex. 2 at 362.

Despite the official schedule of limited programming, many individuals report that while some programming has been available for sign up, in practice these programs often do not take place due to lack of staff, or that programs consist of worksheet packets. One incarcerated person wrote “Prior to Covid I was taking classes four times a week, now I’m lucky if I can attend one single hour class a week.”²⁵⁵ Another explained: “There is one single program (Quarterly: Anger Management) with a total of 5 people in it in my unit of 128 people, that meets for one hour a week.”²⁵⁶ Others report that while they are enrolled in RDAP, the class rarely meets. For example, C.D. wrote on May 9, 2022 “Ive been in RDAP over a year and still have not been put in the program.”²⁵⁷ “Programs are not running and we go to outside rec once per week, maybe twice, depending on commissary...It’s very difficult to rehabilitate yourself whithout family support and access to programs.”²⁵⁸

The documented plans for recreation and programming were minimal. Many of those incarcerated at Sheridan claim that even these plans were not followed. K.C. explained in his declaration from November of 2021: “We’ve been locked down now for almost 2 years and it feels more like solitary conferment ‘maximum security’...We have no recreation or outside recreation to exercise, no classes.”²⁵⁹ M.F., who arrived at Sheridan in March in 2021, also reported that he

²⁵⁵ See Petitioner Ex. 4 at 101 (B.G. Questionnaire).

²⁵⁶ *Id.* at 72 (A.W.1 Questionnaire).

²⁵⁷ See Petitioner Ex. 1 at 57.

²⁵⁸ See Petitioner Ex. 4 at 42 (P.H. Questionnaire).

²⁵⁹ *Id.* at 25 (K.C. Declaration).

was in almost 24 hour lockdown with no recreation.²⁶⁰ “We’re allowed outside once a day now, surprisingly. But there’s still no programs to get some sort of productive schedule, they only run one token program in the unit once a week...one time, they brought up to the gym for three hours on a weekend and watched a DVD, and the instructor said we’d be receiving credit for two 16-hour classes during that single 3-hour period, so that’s cool for cooking the books for FSA credit, but not for actually getting a program.”²⁶¹

PHYSICAL HEALTH

WE HAVE BEEN ON MODIFIED MOVEMENT AND LOCKDOWN FOR OVER SIXTEEN (16) MONTHS, THIS FALLS FAR OUTSIDE THE EXPECTED PARAMETERS OF MY SENTENCE. WE EXPERIENCE LITTLE TO NO PHYSICAL ACTIVITY AND NEXT TO ZERO SUNLIGHT DURING LOCK DOWN PERIODS. THE PRISON STORE SHUTS

Inmate Letter.²⁶²

3. Lack of Recreation and Time Outside Exacerbated the Effects of Lockdown.

With no, or limited, recreation or time outside, there was little respite from the monotony of isolation and quarantine. Dr. Grassian described that during lockdowns, “inmates were housed in their cell for virtually the entire day, with very little opportunity for exercise or outdoor recreation.”²⁶³ As a whole, inmates reported severe restrictions on out-of-cell or outdoor time.²⁶⁴

²⁶⁰ *Id.* at 32 (M.F. Declaration).

²⁶¹ See Petitioner Ex. 4 at 96 (E.C. Questionnaire).

²⁶² *Id.* at 56 (J.M. Letter)

²⁶³ Petitioner Ex. 3 at 12.

²⁶⁴ *Id.*

“Inmates reported that much of this out of cell activity took place indoors, in a dayroom that was too crowded to allow for proper social distancing, and that for the first four months of the pandemic, there was no opportunity at all to be outside, in the fresh air.”²⁶⁵ Once outdoor recreation resumed, the opportunities had been so “severely curtailed” that “basically the inmates are reduced to walking in circles in the outdoor yard.”²⁶⁶ Though the exact amount of time spent inside without access to recreation or outside time varies by inmate, unit, and date, both government discovery and personal accounts confirm that inmates were severely restricted in their ability to spend time in recreation or outside.

- Just now starting rec, but haven’t had any outside time in seven months.²⁶⁷
- We have not been allowed outside in months.²⁶⁸
- We never or very rarely see or are exposed to any kind of sunlight or rec.²⁶⁹
- In the last five months we have been allowed outside eight times with no equipment.²⁷⁰

The lack of recreation or outside time in combination with the other deprivations of lockdown had a deleterious effect on the physical, mental, and emotional health of inmates.

²⁶⁵ *Id.* at 13.

²⁶⁶ *Id.*

²⁶⁷ Petitioner Ex. 4 at 129.

²⁶⁸ Petitioner Ex. 4 at 135.

²⁶⁹ *Id.* at 135.

²⁷⁰ Petitioner Ex. 8 at 2 (petition 20-cv-1242 filed 7/28/2020).

- This covid stuff has really took a lot out of me, my mental state of mind. Being on lockdown all the time with no fresh air, sunlight, not being able to walk around, being cooped up with someone you don't know for months at a time.²⁷¹
- My mental health has been fragile with so much time kept in a cell & physically there is nothing to do. We also are not allowed to go outside rec area.²⁷²
- I have diabetes. I cannot go outside to rec to exercise. My mental health has become an issue but only because of covid.²⁷³
- My physical health has deteriorated due to inability for outside reception time and or any exercise time. Mentally it was extremely difficult due to lockdowns causing severe mental issus such as panic attacks, anxiety attcks and severe depression.²⁷⁴
- I'm 22 years old and I still have my whole life ahead of me so keeping me locked up in a cell 24 hours with 15 minutes to shower and use the phone is destroying my mental health. It really feels like I'm a dog in a cage. I have not been outside to smell the fresh air in weeks. . . no one seems to care how we feel and what we are going through.²⁷⁵

H. Minimal Communication with Family

At the start of the pandemic in March 2020, social visits were fully suspended, and they only resumed on February 27, 2021.²⁷⁶ The Warden announced that visitations would again resume in July 2021, suggesting an additional suspension in prior months between February and July.²⁷⁷

²⁷¹ Petitioner Ex. 4 at 123.

²⁷² Petitioner Ex. 8 at 3 (petition 20-cv-1353 filed 8/3/2020).

²⁷³ Petitioner Ex. 4 at 138.

²⁷⁴ Petitioner Ex. 8 at 31(petition 21-cv-1745 filed 12/3/2021).

²⁷⁵ *Id.* at 25.

²⁷⁶ *See* Petitioner Ex. 5 at 207.

²⁷⁷ *See* Petitioner Ex. 5 at 272.

After several individuals tested positive for Covid-19 in August of 2021, FCI Sheridan again suspended all social visits,²⁷⁸ which did not resume for a full two months.²⁷⁹ In response to the Omicron surge of early 2022, FCI Sheridan implemented a full lockdown.²⁸⁰ While FCI Sheridan transitioned to modified operations after nine days,²⁸¹ it took six weeks to resume social visitation.²⁸² Social visitation was suspended again by June of 2022 and resumed in July.²⁸³ One man recounted that his family came all the way from Iowa to see him in June but the prison was locked down and he was not able to visit them.²⁸⁴ Another shared that “[t]he worst part for me is no visits. And I lost my wife of 33 years and never got to say goodbye.”²⁸⁵ In total, there were nearly eighteen months of the pandemic during which FCI prohibited all social visits.

In its initial response to the pandemic, FCI Sheridan reduced phone access to five minutes each day,²⁸⁶ with incoming individuals subjected to fourteen-day lockdowns that included no phone access at all.²⁸⁷ It was only in May 2020 that individuals at FCI resumed access to phones

²⁷⁸ *Id.* at 278

²⁷⁹ *Id.* at 283

²⁸⁰ *Id.* at 294.

²⁸¹ *Id.* at 246.

²⁸² *See* Petitioner Ex. 5 at 298.

²⁸³ *See* ECF 106, 110.

²⁸⁴ Petitioner Ex. 4 at 19.

²⁸⁵ Petitioner Ex. 4 at 125.

²⁸⁶ *See* Petitioner Ex. 5 at 92.

²⁸⁷ *Id.* at 81.

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during their breakfast or lunch hour.²⁸⁸ In contrast, quarantined individuals at FDC had no access to phones for the first month of the pandemic, after which they received only ten minutes every three days.²⁸⁹ With little time out of their cell and limited phones, “phone line are long and not everyone can use them.”²⁹⁰ Beginning June 2, 2020, individuals at FDC were afforded a total of sixty minutes three times per week to shower, utilize legal and inmate phones, and use email.²⁹¹ As one man put it, “[t]he phone call are free but it don’t help when you have 126 people in a unit and only four phones and a limited time out of your cell. So you have to pick between a shower or a phone call.”²⁹²

On December 30, 2021, all mail processed for delivery and all mail received, including books, were burned.²⁹³ Many individuals lost legal documents as well as things from their family for the holidays.²⁹⁴ On March 21, 2022, all mail was burned again.²⁹⁵ The repeated burning of mail had an acute effect because calls and social visits had been restricted for so long and mail was the only reliable means of communication for those at Sheridan. Many individuals contacted the federal defender office related to the mail burnings. For example, on March 23, 2022, S.L wrote:

²⁸⁸ *Id.* at 152.

²⁸⁹ See Petitioner Ex. 5 at 130-146.

²⁹⁰ Petitioner Ex. 4 at 19.

²⁹¹ *Id.* at 155.

²⁹² Petitioner Ex. 4 at 100.

²⁹³ *Id.* at 301.

²⁹⁴ Petitioner Ex. 4 at 125.

²⁹⁵ *Id.* at 351.

"i recently filed a 2241 with the clerk of court to try for my first step credits- because of the pandemic. im sure you heard but they burned our mail again! ive been expecting a response from the clerk of court. how do i get them to resend the response??? i dont have anything on when it was sent in my records. how do we keep from them burning our mail constantly? there was never any problems with the mailroom before they went to the policy of copying everything. cant we just go back to what works?"²⁹⁶

FCI Sheridan has not maintained consistent access to legal services. Legal phones are sometimes unavailable.²⁹⁷ When clients follow formal processes for raising concerns about undelivered legal mail, they may be ignored.²⁹⁸

The inability to maintain contact with loved ones while the world was gripped by a deadly pandemic was excruciating. Inmates suffered losses in their family, both due to the pandemic and other causes. Restrictions on communication prevented them from talking to their families during these difficult times. As one man related:

²⁹⁶ See Petitioner Ex. 1 at 56.

²⁹⁷ See Petitioner Ex. 4 at 64 -65 (T.R. Declaration).

²⁹⁸ *Id.* at 32 (M.F. Declaration).

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My mom passed away early on in this, and I was left alone and isolated, often times unable to regularly communicate with other family members about what's going on "out there." Being left "in the dark" due to repeated and constant restrictions and lockdowns has left me feeling alone, helpless, hopeless, and worthless.

Response to questionnaire mailed March, 2022.²⁹⁹

Another man answered that the most difficult experience throughout the pandemic and the lockdowns was "not being able to call home when my daughter and grandchild passed away." Ex. 4 at 111. For another man, delays in handing out mail meant he did not get a letter from his mother until it was too late to respond, she had died 17 days earlier.³⁰⁰ Families, too, struggled to know whether their incarcerated loved ones were healthy and safe. "An inmate related that when a family member called to inquire about a loved one, the family member who called was only told that the inmate was alive, no further information was provided."³⁰¹

Even when visits opened up, visitation was strictly controlled and socially distanced. Visitors were not allowed to use the restrooms. One man describes the pain of seeing but not being

²⁹⁹ Petitioner Ex. 4 at 86. *See also* Petitioner Ex. 4 at 19 ("My mother passed away on 1/23/22 I couldn't get on the phone to talk to my family").

³⁰⁰ Petitioner Ex. 4 at 125 ("They were behind handing mail out. I got a letter from my mother postmarked 1/10/22. I got it on 2/9/22. 40 days later and 17 days after my mother died.").

³⁰¹ Petitioner Ex. 3 at 14.

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able to hug his seven-year old son and his young son's struggle to make it through the visit without a bathroom break³⁰²:

— The loss of visits. My family lives close and I had visits often, I have a young child and it was very healing for the both of us to be able to see each other often.

When visits returned (briefly) they were social distanced. The visitors were not allowed to use the ~~rest~~ bathrooms in visiting so if a visitor needed to go to the bathroom the visit was ended. It was very painful for me to watch my child wriggle in his seat because he had to go to the bathroom but didn't want to end our visit.

I did not get to hug my son at all during his 7th year of life and I don't know if I'll be able to in his 8th. We are both vaccinated. Why can't we hug?

At a time when living in prison was so difficult, prison officials unnecessarily denied inmates the succor of contact and communion with their families.

³⁰² Petitioner Ex. 4 at 120.

I. Substandard Food and Inadequate Nutrition

Of the 71 survey responses received by the federal public defender, at least 47 complained of the food they were served.³⁰³ The reports are strikingly consistent and corroborate each other. Many complained that they received cold sandwiches (baloney or peanut butter) three times a day for weeks.³⁰⁴ Food was at times raw, frozen, or out of date.³⁰⁵ Many described the portion sizes as inadequate.³⁰⁶ Religious or medical diets were not accommodated.³⁰⁷ Those with a view into the kitchen described the food as contaminated by rodent feces.³⁰⁸

³⁰³ See Petitioner Ex. 4 at 119-39.

³⁰⁴ See, e.g., Petitioner Ex. 4 at 133 (“Three baloney sandwiches a day”; “The food was just bologna and two slices of bread every meal”), 135 (“food was one bologna sandwich three times a day! Food SUCKED! No Nutrition! Bread and baolnna!”).

³⁰⁵ Petitioner Ex. 8 at 11 (“The food is gross, it comes, late, raw!”); Petitioners Ex. 4 at 119 (“Also for food we only received sandwhiches half frozen”), 124 (“We eat sack lunches with frozen bread, meat, etc. for a whole month.”), 125 (“The most difficult for me was receiving frozen sanwhches and expired food.”).

³⁰⁶ See, e.g., Petitioner Ex. 4 at 134 (“Meals were sack lunches. Then later one hot meal a day; Sack lunches until 2 weeks ago; . . . all times going to bed hungry”), 137 (“The food was cold meals, sack lunches-or what they call, box lunches. No way these meals could be an adult serving. Always hungry.”), 131 (Food has been cut into very small portions and so bad it’s barely edible and honestly a lot of times I just go without because I can’t stomach it and I’ve gotten food poisoning three times from the meat, and once from the tuna very badly.”).

³⁰⁷ Petitioner Ex. 4 at 130 (“I have been told I did not get a kosher meal because of staff shortages”); 133 (“I was denied my religious halal meals”); 135 (“I was given a special diet for s[t]omach issues and still haven’t received any special meals after numerous requests.”); 121 (“Being fat-shamed by staff and laughed at when requesting a ‘heart-healthy’ tray option and told by food service that it’s all heart healthy-take a tray.”).

³⁰⁸ See, e.g., Petitioner Ex. 4 at 34 (“Being a food service worker here and having to witness the mice infested kitchen, the violations of so many health and safety codes in there. Mice in the vegetables, mice in the dry cereal, mice in the dish washer, mice in the canned food.”), 131 (“I worked in kitchen and they serve bread that the mice have been on or had ‘rat poop’ on one piece, but they just throw that piece away and serve the rest of it.”); 131 (“There’s also lots of rats/mice in the kitchen”); 138 (“Mice everywhere in housing units and mice all over the kitchen”).

J. Mistreatment by Prison Officials

In addition to the above described deliberate indifference to the needs of the inmate population, the communications from inmates at FCI Sheridan contain troubling reports of mistreatment by prison staff. Recent events of July 2022 are documented in the Emergency Motion (ECF 113) showing physical violence, gratuitous destruction of property, and verbal abuse of inmates. There are other reports throughout the pandemic of mistreatment, for example:

- Just a few days ago two officers that work these units together find amusing to stress this one particular inmate out by constantly harassing him and singling him out because they believe him to be the lesser of a threat to them. Well on Nov. 27th 2021, this inmate name [H.M.] became the subject of these two offices by pressing him everyday and that following night inmate [H.M.] attempted to kill his self by hanging. And to me that makes these two officers criminals and dangerous.³⁰⁹
- We are allowed to walk to pill line now. On my way back Office Kezar said out loud that ‘. . .they should hurry up and die, these diabetics, cripples and fat fuckers.’ (I am a diabetic and overweight.) I felt very offended and hurt by it.³¹⁰

This mistreatment, in combination with the other hardships, made lockdown difficult to endure.

VI. Deaths at Sheridan During the Pandemic

The Warden declined to provide in discovery the number of deaths at Sheridan in the five years that preceded the pandemic, but affirmed that “from March 2020 through March 2022, six inmates have died while in the custody of FCI Sheridan.”³¹¹ An additional inmate is known to have

³⁰⁹ Petitioner Ex. 4 at 26.

³¹⁰ Petitioner Ex. 4 at 128.

³¹¹ Petitioner Ex. 5 at 59 (Response to Interrogatories).

died after March 2022, bringing the death toll to at least seven. The known deceased are Brian Cluff, Kyle Batt, James Toms, Ikaika Chung, Chad Noziska, and Dylan Jardin.³¹²

A. Brain Cluff

On April 13, 2020, Brian Cluff died in custody due to suicide.³¹³ As noted above, during the start of the pandemic, the extreme lockdown caused many residents at Sheridan to experience trauma, and some attempted suicide. Others described suicidal thoughts as a result of the lockdown. During the five years preceding the pandemic, FCI Sheridan had no suicides.³¹⁴

B. Kyle Batt

On March 12, 2021, Kyle Batt died while in a community hospital where he had been admitted earlier in the day to receive treatment for seizures. The Warden reported that his death was not due to coronavirus; rather, autopsy results indicated cause of death was asphyxiation due to seizure.³¹⁵

An FPD investigator spoke with Mr. Batt's mother who stated that her son required medication for seizures, but in the autopsy report there is no mention of any anti-seizure medication in the blood taken.³¹⁶ She had heard from three different inmates that her son had been asking for his medication, but had not received it. In October of 2021, an FPD investigator received an email

³¹² See Petitioner Ex 7 (investigation memos summarizing reports from inmates and families about the six deceased).

³¹³ See ECF 78 at 2.

³¹⁴ Petitioner Ex. 5 at 37 ("During the years 2016-2019, zero inmates committed suicide while detained at FCI Sheridan.").

³¹⁵ See ECF 78 at 2.

³¹⁶ See Petitioner Ex.7 at 2.

that stated: “he had a seizure and they wouldn’t open the door to help him and he had been requesting his seizure meds and they said they didn’t have the pharmacist to fill em or the time due to covid.”³¹⁷

C. James Toms

James Toms, age 52, died at Sheridan on December 26, 2021. According to his family, no cause of death was listed on the death certificate.³¹⁸ An FPD investigator heard from several residents at Sheridan after his passing about his requests for medical care. One resident wrote:

He had been asking medical staff for months to see him about the blood he was coughing up but they never did anything for him. He made it to the lobby once to address his concerns and ask if he could see a specialist, and while he was there he was coughing up blood in the office. They still didn’t do anything for him.³¹⁹

Another wrote:

My recently departed cell-mate, Toms, had multiple conditions which he was not receiving adequate treatment for, including COPD and acid reflux. He had written several e-mail and paper requests to the medical staff asking to be seen by a specialist to determine the cause of the blood he was coughing up daily. I’m aware that he was in the lobby of the medical annex coughing up blood, which he showed to them, and their response was that they would ‘try’ to get him in to see a specialist.³²⁰

D. Chad Noziska

Chad Noziska, age 47, died on April 15, 2021, in a community hospital. On February 1, 2021, Mr. Noziska tested positive for COVID-19. Ten days later, he was taken to a local hospital

³¹⁷ *Id.* at 1.

³¹⁸ *See* Petitioner Ex. 7 at 3.

³¹⁹ *Id.* at 4.

³²⁰ Petitioner Ex. 7 at 4.

for treatment for shortness of breath, nausea, and vomiting.³²¹ He returned to Sheridan three days later. On February 22, 2021, he was deemed recovered from COVID-19 in accordance with CDC guidelines.³²²

On April 2, 2021, Mr. Noziska was transported to a local hospital for treatment for abdominal pain. In a press release the BOP stated “He remained hospitalized until Thursday, April 15, 2021, when Mr. Noziska, who had long-term, pre-existing medical conditions which the CDC lists as risk factors for developing more severe COVID-19 disease, was pronounced deceased by hospital staff.”³²³ The Warden reported that the autopsy results indicated cause of death was “complications of intra-abdominal abscess due to a prior episode of necrotizing pancreatitis.”³²⁴ It is unclear what medical attention Mr. Noziska received at Sheridan for the abscess before he was hospitalized.

E. Ikaika Chung

Ikaika Chung, age 42, died on August 12, 2021, in a community hospital after arriving earlier that day.³²⁵ The government reported he was transported “to receive treatment for low blood sugar, low blood pressure, and tachycardia.”³²⁶ Mr. Chung previously tested positive for COVID-19 on December 29, 2020 and was deemed recovered from COVID-19 in accordance with

³²¹ Petitioner Ex. 7 at 11.

³²² See ECF 67, Ex. A.

³²³ *Id.*

³²⁴ See Petitioner Ex. 7 at 11.

³²⁵ See Petitioner Ex. 7 at 6.

³²⁶ ECF 74 at 2, n1.

CDC guidelines on January 25, 2021.³²⁷ He was transported to the local hospital eight months later on August 12, 2021. In a press release, the BOP stated “Mr. Chung, who had pre-existing medical conditions which the CDC lists as risk factors for developing more severe COVID-19 disease, was pronounced deceased by hospital staff.”³²⁸ The government reported in a filing in this case that FCI Sheridan did not believe Mr. Chung’s death was due to Covid-19.³²⁹

Before Mr. Chung’s death, an inmate had emailed to the Federal Public Defender to beg for help for him:

i have to get this message to the federal defenders of Oregon. inmate ikaika chung 68118-298 has a medical problem where he is delirious, cant walk cuz his legs are swollen beyond the scope of "normal edema", he has spoke to multiple staff and medical personal who specifically are nurse heidt, emt santalino, unit staff of 4a. he needs immediate medical attention and they are refusing to do ANYTHING to change his current medical status. he NEEDS HELP. he cant walk on his own and needs help distinguishing clothing from bedding because he isn't of a normal state of mind.³³⁰

The Federal Defender provided this urgent information to the Warden’s counsel at 10:00 a.m. on August 12.³³¹ The email response received from the government later that day reported that Sheridan health services “confirmed that he can access medical care. … If the situation is exigent, he should have a call button in his cell to alert staff to the medical concerns.”³³² Mr. Chung was taken to the hospital and died that day.

³²⁷ See ECF 74, Ex 1.

³²⁸ *Id.*

³²⁹ See ECF 74 at 2.

³³⁰ Petitioner Ex. 7 at 6.

³³¹ *Id.*

³³² *Id.*

The FPD investigator reached out to the person who originally had emailed for help for Mr. Chung. He reported an extreme indifference to Mr. Chung's medical situation:

inmate chung has been to seen medical multiple times (4+) over the past 3 weeks with continuing swelling of his leg and deteriorating health. i cant say for certain what was discussed between his health care provider and him other than that nothing was been done about anything. he wasn't able to walk to chow so we (inmates) found a "extra" wheel chair and was using it to shuttle him to chow so that he could eat. no staff would have a food tray brought down to him. i got progressively worse the past 3 days to where he was confused and didn't know what year it was or could tell the difference between a pillow and a sweater. inmates informed medical (nurse/emt heidt) when she was in the unit delivering to other inmate and was asked to look in on inmate chung. she said that and i quote "he does look like he is going to die today."(3 inmates will sign sworn statements to this).then we were told that he didn't need assistance and that "we" were not e.m.t.'s. after demanding to the unit officer that he NEEDS help. c/o verdin called medical and spoke to medical staff singh. signh stated that could he wait till later? inmates pushed him up there against signh's directive to staff. heidt said when the inmates arrived at medical started yelling that she said that she told them not to come up to medical no one could help him and does she look like dr grasely. when the health care provider asked chung what date it was he said 1998 and he didn't know where he was....inmate Michaels 16463-028 stayed with him until ambulance came. i hope he is ok. i know that we are prisoners but it is like living in a 3rd world country here.³³³

F. Dylan Jardin

Dylan Jardin, age 25, died of an accidental overdose at the Sheridan Camp on June 28, 2022.³³⁴ Mr. Jardin's mother reported that the BOP notified her that two staff administered life saving acts, but other inmates informed her that Sheridan did not or would not give him NARCAN and that two army medics who are in custody actually tried to save him.³³⁵ His mother also reported

³³³ Petitioner Ex. 7 at 6.

³³⁴ See Petitioner Ex. 7 at 8.

³³⁵ *Id.*

that the medical examiner stated her son had a leaky valve in his heart and high blood pressure. She did not know what medical treatment he had received.

VII. The Warden Has Failed To Maintain Procedures Essential To The Protection Of Constitutional Rights.

As with the deficiencies in medical, mental health, dental care, and other basic necessities, the Warden has allowed other essential services to lapse or fail. The administrative remedies process is broken. Mail service has been disrupted, and petitioners have not had access to the law library during much of the pandemic.

A. The Administrative Remedy Program Has Not Worked As Required.

Although the Warden asserts that the BOP's administrative remedy program has not been disrupted during the pandemic, the experience of residents at FCI Sheridan contradicts this assertion.³³⁶ The procedure is complicated and requires the availability of staff within the units to

³³⁶ ECF 66-2 at 2-3 (Declaration of Daniel Prater) (“In the event an inmate desires to file a written formal complaint, the BOP’s Administrative Remedy Program enables an inmate can seek review of any complaint regarding any aspect of his confinement. See 28 C.F.R. § 542.10 through § 542.19. There have been no disruptions to this formal complaint program as a result of the COVID-19 pandemic.”); ECF 76 (Declaration of DeWayne Hendrix, Aug. 24, 2021) (“The BOP Administrative Remedy Program remains available to inmates to address their concerns.”).

receive the written grievances.³³⁷ Residents stated in sworn petitions that the process was not available or not functioning.³³⁸ As examples:

- I have requested numerous times putting in paper cop-outs as well as computer, the computer ones erased with no response and the paper ones were never answered or sent back to me.³³⁹
- I have sent in some BP8 all the way to BP10 and all I get is because of COVID nothing they can do. Or I am scheduled to be seen.³⁴⁰
- I was denied a telephone court hearing regarding parental rights. I put in electronic cop-outs as well as written to case managers and counselors and was ignored. I put in 3 cop-outs so I could call in and counselors and unit managers ignored me. I'm locked down 23 1/2 hours a day and I'm going crazy.³⁴¹
- Everything here is inconsistent - you ask one staff member a question and they say "no problem, I'll handle that for you" and nothing gets done. You send hand-written cop-outs and electronic requests to staff and they largely go unanswered.³⁴²

³³⁷ ECF 37 (Declaration of Jamie Lum) ("The inmate must first seek informal resolution of the issue through the institution's staff. *Id.* § 542.13. The informal resolution form is colloquially referred to as a BP-8. If dissatisfied with the informal response, the inmate must then formally complain to the institution's warden by filing a BP-9. *Id.* § 542.14. If the warden denies the inmate a remedy, the inmate may appeal the denial of relief to the Regional Director of the region in which he is confined. *Id.* § 542.15(a). Finally, if the Regional Director denies relief, the inmate may appeal to BOP's General Counsel in Washington, D.C. *Id.* Exhaustion of administrative remedies does not occur until the inmate has requested and been denied relief at all levels of BOP. *Id.* Administrative exhaustion permits BOP to develop a factual record, apply its expertise, and provides an opportunity for BOP to correct its own mistakes."

³³⁸ Petitioner Ex. 8.

³³⁹ Petitioner Ex. 8 at 13 (petition 21-cv-0616 filed 4/23/2021).

³⁴⁰ *Id.* at 12.

³⁴¹ *Id.* at 11.

³⁴² *Id.* at 4.

- I have asked orally, I have asked by informal request by BP9. I have been told by all staff and counselors “I can’t help you”. I have not received 1 reply to over 10 written requests for help. They do nothing.³⁴³

In later questionnaire responses in March 2022 about the conditions at FCI Sheridan, people in custody continued to describe a complete breakdown in the administrative remedy process. The problems are corroborated by their consistency: lack of access to forms, missing forms, no responses.

- I’ve asked for BP-8 forms and they always say they don’t have any. Somebody was able to get copies of a bunch of BP-8s and I filled one out after the water broke and turned it in, but it disappeared and I never got a response. BP-9 forms have carbon copies of stuff on them so you have to get them from the guards, and you get the same thing ‘I don’t have one right now, put an egg in your shoe and beat it.’³⁴⁴
- Due to my attempt to file a lawsuit against FCI Sheridan my request for BP-8, 9, etc have been denied. Correctional Counselor Cray refuses to give my any and has threatened and acted on retaliation. . . I tried to have others get me forms (BP forms) but they were rejected for no BP-8 (which again has to go through Correctional Counselor Cray). I have even tried to file a ‘Sensitive BP-9’ and still no luck. Was told staff threats are not sensitive and to start at BP-8, which I can’t get.³⁴⁵
- I’ve filed numerous BP-8 forms for various issues that I’ve mentioned here and they simply never respond. Then when you file a BP-9 they say you didn’t provide a BP-8 so it’s denied. The administrative remedy system is a joke. And staff refuses to supply the forms anyways.³⁴⁶
- I wanted to file a BP-8 on the lack of religious services, but I couldn’t find a form. Eventually somebody made copies of the 8, since it’s just regular paper, unlike the BP-9 and 10 or 11. I filled it out and turned it in and never heard back. Staff doesn’t remember ever getting it. If I file the 9 they just respond that

³⁴³ *Id.* at 1.

³⁴⁴ Petitioner Ex. 4 at 12.

³⁴⁵ *Id.* at 17.

³⁴⁶ Petitioner Ex. 4 at 77.

I didn't give my response to the 8. The whole pandemic there's been no attempt to supply religious programs, and when I file on it, my BP-8 goes in the round file.³⁴⁷

As a whole, the inmate accounts show that the administrative remedy system is not functionally available to grieve problems at the institution because either the inmates cannot get the forms, will not get a response, or are so demoralized from not being heard that they have given up.

No. Much like the sick call requests, often times, the grievance is simply ignored and not responded to at all, resulting in a "why bother" state of mind. Here at FCI Sheridan, I have been Made to feel like I am so worthless that I shouldn't even have a voice.

Questionnaire response.³⁴⁸

B. Mail Service Has Been Unreliable and Disrupted, Interfering With The Right To Counsel.

As detailed above at Section V.I the lockdowns at FCI Sheridan have disrupted the ability of those housed inside to communicate with the outside world, including by mail. In addition to the issues described above, many inmates described a lack of confidential treatment of attorney mail including delivery of mail by other inmates, attorney-client privileged mail opened outside the presence of the client, and emails to attorneys and investigators read by staff.³⁴⁹ There were

³⁴⁷ Petitioner Ex. 4 at 101.

³⁴⁸ Petitioner Ex. 4 at 85.

³⁴⁹ Petitioner Ex. 1 at 2, 11.

reports of delayed mail delivery, unusually low volume of mail, and refusal of mail.³⁵⁰ Many attributed these problems to only one person being assigned to work in the mailroom.³⁵¹

C. Library Access Has Been Limited.

On April 1, 2020 in an Advisory to the Inmate Population regarding COVID-19 the BOP stated it was undertaking procedures to stop the spread of the virus. This included restriction on access to the library. Inmates were advised that³⁵²:

- Inmates with an imminent court deadline should work through their Unit Team for access to the law library.

³⁵⁰ Petitioner Ex. 1 at 48 (“WE HAVENT HAD MAIL IN OVER TWO WEEKS NOW,NOTHING.ITS NEVER BEEN THIS BAD UNTELL THEY STARTED PHOTO COPYING EVERYTHING THAT COMES IN.PICTUERS COME UP MISSING,THINGS GET SENT BACK AND THEY DONT TELL YOU WHY OR ANYTHING”), 42 (“the unit received 3 pieces of mail today after a weekend. not normal. they are refusing to process our mail.”).

³⁵¹ Petitioner Ex. 1 at 57 (correspondence dated 2/17/2022 from C.J.) (“This has been going on for many months and it is not getting any better. When my wife called here, she spoke to the gentleman working in the mail room, and he said that there’s only one staff member in the mail room, and he doesn’t have time to process the mail.”); Petitioner Ex. 4 at 76 (“they have one guy working in the mail-room, and somebody gets the genius idea to have him scan and copy all our mail. Now it often never gets to us . . .”).

³⁵² Petitioner Ex. 5 at 150.

Yet, access to the library was curtailed by lockdowns,³⁵³ schedule conflicts,³⁵⁴ and removal of law library materials from unit computers.³⁵⁵ As one inmate summed up the problem, “we can’t do legal research to help ourselves or get a legal form like power of attorney or dismiss a warrant or detainer. We are stuck here living in a concrete box.”³⁵⁶

Proposed Conclusions of Law

I. The Warden’s Deliberate Indifference to Confinement With Extreme Deprivation That Risks Serious Harm Violates the Eighth Amendment.

“Underlying the Eighth Amendment is the fundamental premise that prisoners are not to be treated as less than human beings.” *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979).

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.

³⁵³ Petitioner Ex. 1 at 60 (“I let the court know that we are LOCKDOWN in our Unit 24/7 with no access to the law library or anything legal papers and the administration remedy's are unavailable to us. the prison grievance papers are unavailable to us” (sent 3/2/2022 T.A.)).

³⁵⁴ Petitioner Ex. 1 at 45 (“Also they have scheduled First Step Act programming in psychology at the same time as our law library slot, so we have to choose between documenting an FSA refusal or not litigating our cases.”); 46 (“They are now allowing each unit only 1 hour a week in the Edu. Dept. where the main law library is, first 20 inmates only. I have my RESOLVE PTSD trauma treatment program at that time on Thursday we are assigned to go, so I have not been able to go at all and I have open cases.”).

³⁵⁵ Petitioner Ex. 1 at 45 (“the officials deactivated the law library button on the computers down in the unit, that we have access to every day. . . We are virtually NEVER allowed to leave the housing units. This was our ONLY access to legal materials.”), 46 (“THE COMPUTERS IN THE UNIT NO LONGER HAVE LEXIS AVAILABLE WE ARE NOW BEING LIMITED TO ONCE A WEEK ACCESS TO LEGAL RESEARCH AN HOUR AT A TIME. THIS COMPLETELY HINDERS ANY AND ALL OF US WHOM HAVE ONGOING LEGAL ISSUES.”).

³⁵⁶ Petitioner Ex. 4 at 29.

Brown v. Plata, 563 U.S. 493, 510 (2011). In order to establish a violation of the Eighth Amendment, a prisoner must show 1) a prison official’s “deliberate indifference” to 2) a “sufficiently serious . . . denial of the minimal civilized measure of life’s necessities” or “conditions posing a substantial risk of serious harm.” *Farmer v. Brennan*, 511 U.S. 825, 834-35 (1994).

The deliberate indifference standard is a subjective standard which “[i]es] somewhere between the poles of negligence at one end and purpose or knowledge at the other.” *Id.* at 836. “It is . . . fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.” *Id.* In order to establish deliberate indifference, a petitioner must prove that the official “knows of and disregards an excessive risk to inmate health and safety.” *Id.* Deliberate indifference may be established by circumstantial evidence or “a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Farmer*, 511 U.S. at 842. There is ample evidence in the existing record that the prison officials here were aware of the effect of their policies on the mental, emotional, and physical well-being of the prisoners at FCI Sheridan. Prisoner complaints were laid out in filed petitions (see Petitioner Ex. 8), in court filings by the federal public defender office that included expert opinions, and by grievances and other written complaints within the prison.

Whether there is a sufficiently serious deprivation of basic needs, or a substantial risk of serious harm is an objective test. The question is “contextual and responsive to ‘contemporary standards of decency.’” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Because incarceration “takes from prisoners the means to provide for their own needs[,] [p]risoners are dependent on the State for food, clothing, and necessary medical care.” *Brown*, 563 at 510. Basic necessities also include

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“light, heat, ventilation, sanitation, clothing and a proper diet.” *Chandler v. Baird*, 926 F.2d 1057, 1065 (11th Cir. 1991). “[S]ome form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates.” *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979). “A prohibition on outdoor exercise of six weeks is a ‘sufficiently serious’ deprivation to support an Eighth Amendment claim.” *Thomas v. Ponder*, 611 F.3d 1144, 1151 (9th Cir. 2020). In addition to exercise, “social interaction, and environmental stimulation [are] basic human needs subject to deprivation.” *Harvard v. Inch*, 411 F. Supp.3d 1220, 1239 (N.D. Fla. 2019) (collecting cases). The State is likewise obligated to provide for “mental health needs.” *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991)). Another “basic human need” is “reasonable safety.” *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993).

The failure to provide for basic needs is “incompatible with the concept of human dignity and has no place in civilized society.” *Brown*, 563 U.S. at 510. When the “government fails to fulfill this obligation” it is an “Eighth Amendment violation.” *Id.* The “deprivation alleged must be, objectively, ‘sufficiently serious,’” and “a prison official’s act or omission must result in the denial of ‘minimal civilized measures of life’s necessities.’” *Farmer*, 511 U.S. at 834. “To be sufficiently serious, the deprivation must be extreme—meaning that it poses a serious or significant physical or emotional injury resulting from the challenged conditions, or a substantial risk of such serious harm resulting from. . . exposure to the challenged conditions.” *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) (internal quotations and citations omitted).

In determining whether there is a substantial risk of serious harm it is appropriate to consider the cumulative effect of the deprivations. “The distinguishing aspects of . . . penitentiary life must be considered together. . . those things exist in combination; each affects the other; and taken together they have a cumulative impact on the inmates regardless of their status.” *Holt v.*

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Server, 309 F. Supp. 362, 373 (E.D. Ark. 1970). “Some conditions of confinement may establish an Eighth Amendment violation ‘in combination’ when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise.” *Wilson v. Seiter*, 501 U.S. 294, 304-05 (1991). “Unsanitary conditions, especially when coupled with other mutually enforcing conditions, such as poor ventilation and lack of hygienic items (in particular, toilet paper), can rise to the level of an objective deprivation.” *Darnell v. Pineiro*, 849 F.3d 17, 30 (2d Cir. 2017). *See also Willey v. Kirkpatrick*, 801 F.3d 51, 66-68 (2d Cir. 2015) (collecting cases and discussing application of the Eighth Amendment to claims alleging exposure to human waste and finding that the “qualitative offense to a prisoner’s dignity should be given due consideration.”).

In sum, the objective prong asks whether “the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health which includes the risk of serious damage to physical and mental soundness.” *Darnell*, 849 F.3d at 29 (internal quotations and citations omitted). Based on the factual evidence presented above, the Court should find that the combined harms suffered by those at FCI Sheridan during the COVID-19 pandemic unreasonably risked their mental, emotional, and physical health in violation of the Eighth Amendment..

II. The Warden Is Violating the Due Process Rights Of Pretrial Detainees To Reasonably Safe Detention Without Punishment.

“The Fifth Amendment requires the government to provide conditions of reasonable health and safety to people in its custody.” *Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020). The government violates the Due Process Clause if it fails to provide detainees with “food, clothing, shelter, medical care, and reasonable safety.” *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). In determining whether a pretrial detention violates due process,

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the “proper inquiry is whether those conditions amount to punishment of the detainee.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The due process right is at least as protective as the Eighth Amendment. *Id.* at 545 (“pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners”). The right to “personal security” is a “‘historic liberty interest’ protected substantively by the Due Process Clause.” *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) and citing *Hutto v. Finney*, 437 U.S. 678 (1978)). The conditions at FCI Sheridan endured by detainees, who are legally innocent, were characteristic of some of the most severe forms of punishment, and accordingly violated their rights to due process.

Unlike the deliberate indifference standard, “the appropriate standard for a pretrial detainee’s excessive force claim is solely an objective one.” *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015). That standard can be met “by showing that the actions are not ‘rationally related to a legitimate nonpunitive governmental purpose’ or that the actions ‘appear excessive in relation to that purpose.’” *Id.* at 398 (quoting *Bell*, 441 U.S. at 561). Where an emergency or exigency causes force or coercive measures, “a fourteenth amendment violation occurs in this context where prison officers continue to employ force or other coercive measures after the necessity for such coercive action has ceased.” *Ort v. White*, 813 F.2d 318, 327 (11th Cir. 1987); *see also Hope*, 536 U.S. at 743 (citing with approval *Ort* for the proposition that a deprivation may violate due process if it continues past what is necessary to obtain compliance with a prison rule or continued to the point of severity that the prisoner’s health was at risk). Though there was a legitimate nonpunitive purpose to prevent exposure of the detainee population to COVID-19, the manner in which FCI Sheridan attempted to accomplish that purpose was excessive and there were other, nonpunitive

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methods available. As the Eighth Amendment standard has been satisfied, the due process violation, on these facts, has been easily established.

III. The Remedy For Constitutional Violations May Include Release From Custody, Reduction Of Sentences, Transfer To Less Restrictive Custody, Or Declaratory Judgment.

When a prisoner challenges “the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.” *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). The writ of habeas corpus extends to people who are in custody in violation of the U.S. Constitution. 28 U.S.C. § 2241(c)(3). The Court is authorized to “dispose of the matter as law and justice require.” 28 U.S.C. § 2243. Where “a petitioner has established a right to relief from some unlawful aspect of ‘custody’ in the broad sense, modern federal habeas corpus practice has moved towards full realization of the statute’s ‘law and justice’ command and has recognized a wide variety of appropriate remedial orders.” 2 Federal Habeas Corpus Practice and Procedure § 33.1 (2021).

Two and a half years into the pandemic, the Warden continues to confine people at Sheridan in conditions that violate the Constitution, despite all efforts of advocacy. As there appear to be no conditions that will allow the petitioners to be held safely at FCI Sheridan during the COVID-19 pandemic, the Court may order release, reduction in sentence, transfer to less restrictive confinement, or provide declaratory relief.

A. Release

Federal habeas is the “exclusive remedy” for a prisoner seeking release from custody. *Skinner v. Switzer*, 562 U.S. 521, 533-34 (2011). “[W]hen the judicial power to issue habeas corpus properly is invoked the judicial officers must have adequate authority to make a determination in

light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008). The Supreme Court has left the door open to a habeas action alleging that conditions of confinement render otherwise lawful custody unconstitutional. *Preiser*, 411 U.S. at 499 ("When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making custody illegal"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862-63 (2017) ("[W]e have left open the question whether [detainees] might be able to challenge their confinement conditions via a petition for habeas corpus").

Given the undisputed confinement of the majority of people at Sheridan in small cells for at least 20 hours per day for a year, the Warden's knowledge of and tolerance of the incarceration, and the demonstrated harms that flow from that decision, the Court should find that constitutional confinement of the petitioners at FCI Sheridan during a pandemic is impossible. In his article *When the Conditions are the Confinement: Eighth Amendment Habeas Claims During COVID-19*, 90 U. Cin. L. Rev. 1 (2021), Professor Michael L. Zuckerman offers the helpful analogy of prisoners held in a prison under which a sinkhole has just opened. The prison is filling with water, and some will certainly drown. "In the COVID-19 cases, like the sinkhole scenario, the 'condition' that violates the Eighth Amendment is the condition of being held in that particular prison, pure and simple. The only solution is release from that prison—a classic habeas remedy, in other words." *Id.* at 40. The record of the pandemic proves that FCI Sheridan is incapable of responding to the pandemic in a manner that preserves the basic necessities of human life, and thus release is warranted. If the Court issues this ruling of law in the consolidated cases, counsel will propose a release plan in each individual case.

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B. Reduction in Sentence

If the Warden counters petitioner's proposed factual findings with credible evidence that the cruel hardship conditions at FCI Sheridan have been ameliorated since the last provision of discovery, and that most restrictions resulting from the pandemic have ended, the Court may conclude that wholesale release at this point is unnecessary. In that case, the Court may properly find that a reduction in sentence is nevertheless warranted. Habeas corpus is "above all, an adaptable remedy," and its "precise application and scope change[] depending upon the circumstances." *Boumediene*, 553 U.S. at 779. This power allows the Court to reduce a sentence. *See Dasher v. AG*, 574 F.3d 1310, 1318 (11th Cir. 2009) (modifying petitioner's sentence to time served "without disturbing the judgment of conviction"). Recognizing the hardships endured by the prisoners since April of 2020, the Court can order that those imprisoned at FCI Sheridan during this time period receive three days credit for each day served. *See* ECF 21 at 2 (Petitioner request that "each day of custody since the pandemic lockdown began should be credited as three days of the imposed sentence"); *see also United States v. Giddings*, 740 F.2d 770, 772 (9th Cir. 1984) (explaining that claims for credit against a sentence for time spent in custody are properly brought under 28 U.S.C. § 2241).

A reduction in sentence is grounded in equitable considerations. *See Schlup v. Delo*, 513 U.S. 298, 319 ("habeas corpus is, at its core, an equitable remedy"). The equities favor added credit because absent the draconian lockdowns and the restrictions on programming, many would have been able to advance their release date. As one prisoner aptly explained, the lockdowns have extended prison for many and "everyone lost something dear":

There's a lot of people who are having to spend more time in prison due to these lockdowns / lack of staff. People who should have been done with RDAP already, but aren't even in the program yet because they're running at diminished capacity. People who should be home already because of their FSA credits but aren't because the case manager screwed up their eligibility/PATTERN. For a lot of people, if they got a year off for this lawsuit, they'll just be getting back what they lost from this institution's incompetance. And even the ones that didn't, and I think they're almost in the minority, everyone lost something dear. Friends of mine lost family members while they were locked in a cell, some have permanent injuries because this place didn't treat them in time. Don't let these people get away with this. Let the losers win for once and bring some justice into this world, they've almost given up hope that anyone cares.

Response to questionnaire mailed March 2022.³⁵⁷

Many petitioners complained of loss of access to RDAP classes and the inability to take advantage of the First Step Act.³⁵⁸ "Conceptually, any habeas remedy should put the [petitioner] back in the position he would have been in if the . . . [constitutional] violation never occurred."

Nunes v. Mueller, 350 F.3d 1045, 1057 (9th Cir. 2003) (internal quotation and citation omitted).

³⁵⁷ Petitioner Ex. 4 at 101.

³⁵⁸ See, e.g., Petitioner Ex. 8 at 9 ("I cannot attend my ACE classes where we earn a lot of our good time credits or RDAP class."), 14 ("I haven't been able to attend any First Step Act classes as qualified for and part of my sentencing agreement. I also have been unable to do classes that would help me deal with my mental and physical health."), 15 ("I have been unable to do classes that would help me deal with my mental and physical health as well as programs that qualify me for the First Step Act."), 18 ("I was also told by the case manager that due to the pandemic, implementation of the First Sept Act has been postponed until 2022. Because of this, none of us have been able to earn First Step Act credits towards an earlier release.").

Others lost things that are harder to quantify—like the ability to say goodbye to one’s dying mother³⁵⁹ or wife of 33 years,³⁶⁰ or to hug his son during his 7th year of life.³⁶¹

Because of the number of petitioners, it would be difficult for the Court to calculate with precision the time owed to each petitioner under the proposed calculation. However, there is support in the law for approximation of remedies. For example, in the context of loss in white collar cases, the sentencing guidelines permit a court to “assess the evidence and estimate the loss based upon that evidence.” U.S.S.G. § 2B1.1 Application Note 3(C). The estimate need only be reasonable. *See United States v. Laurienti*, 611 F.3d 530, 558 (9th Cir. 2010) (finding the loss calculation need not be made with “absolute precision; rather, it need only make a reasonable estimate of the loss based on the available information”). In the analogous situation of restitution, statutory law and case law permit the court to “reach an expeditious, reasonable determination by resolving uncertainties with a view toward achieving fairness to the victim.” *United States v. Gordon*, 393 F.3d 1044, 1054–55 (9th Cir. 2004), abrogated on other grounds by *Lagos v. United States*, 138 S. Ct. 1684 (2018). Even prison sentences can be based on estimates and approximations, as occurs when courts estimate likely drug quantity in order to establish an offense level under the Guidelines. See U.S.S.G. § 2D1.1 Application Note 5 (allowing courts to “approximate the quantity of the controlled substance.”). As habeas is meant to be a “faster and more direct route to relief than a suit for money damages,” *Ziglar*, 137 S. Ct. at 1863, the Court

³⁵⁹ Petitioner Ex. 4 at 125.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 120.

may in its application of the equitable and adaptable remedy of habeas, reduce the sentences of the petitioners based on its determination of fairness.

C. *Transfer to Less Restrictive Confinement*

Where a prisoner seeks “what can fairly be described as a quantum change in the level of custody—whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation—then habeas corpus is his remedy.” *Graham v. Broglin*, 922 F.2d 379, 380 (7th Cir. 1991) (Posner, J.). In light of the dehumanizing conditions endured by the petitioners at FCI Sheridan, the Court may use its enlargement power to order the petitioners confined in or transferred to less restrictive custody. *See Zuckerman, supra*, at 57-59. “This form of relief is not the same as ‘a release order,’ given that the prisoner “remains in custody[,] even as the place of custody is changed and thus ‘enlarged’ from a particular prison to a hospital, halfway house, a person’s home, or other setting.” *Id.* at 58 (quoting Declaration of Professor Judith Resnik filed in *Money v. Pritzker*, 453 F.Supp.3d 1103 (N.D. Ill. 2020) (No. 1:20-cv-02094), ECF No. 24-3).

In this case, enlargement could take the form of a general court order that residents at Sheridan may not be confined in cells for more than 12 hours per day unless the length and necessity for the confinement is reported to the Court within 24 hours. Further, after issuing a general ruling in the consolidated cases that enlargement is an available remedy for the constitutional violations, the Court could review submissions in individual cases where petitioners seek enlargement to the community based on individual facts in their case, including the need to obtain medical or mental health treatment for serious conditions exacerbated by the circumstances of custody during the pandemic.

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D. Declaratory Judgment

In addition to the above requested relief, the Court should issue a declaratory judgment that the conditions at FCI Sheridan, from April 2020 to the present (or an earlier date demonstrated by the Warden), deprived residents of basic necessities in a manner that created a substantial risk to their mental, emotional, and physical health in violation of the Eighth Amendment and the Due Process Clause. The Court is authorized under 28 U.S.C. § 2201 to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” The Declaratory Judgment Act permits courts to determine controversies even when the litigants may not require a remedy such as damages or an injunction. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937).

Because the rights of the petitioners are at issue in this case, the Court has jurisdiction to enter a declaratory judgment. *Cf. Calderon v. Ashmus*, 523 U.S. 740, 746 (finding no present controversy and therefore declaratory judgment improper, but reasoning declaratory judgments are appropriate where the “controversy could have been completely resolved by the declaratory judgment sought by the plaintiff”). Such judgment would benefit the petitioners in the event the Court orders any relief short of release. A declaratory judgment by this Court would aid the petitioners in seeking other relief, for example compassionate release, a sentence reduction under the First Step Act, or a modification of supervised release.

Under 18 U.S.C. § 3582, courts are permitted to order a sentence reduction when “extraordinary and compelling reasons warrant such a reduction.” That section allows courts to consider “developments that take place after the first sentencing” that “produce[] unfairness to the defendant.” *Setser v. United States*, 566 U.S. 231, 242 (2012). In addition, the First Step Act empowers district courts to consider intervening changes of law and fact in determining whether

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a sentence reduction is warranted. *Concepcion v. United States*, 142 S.Ct. 2389, 2396 (2022). Specifically, courts have found a defendant's prison record (good or bad) to be appropriate considerations in adjudicating First Step Act motions. *Id.* at 2402-03. Whether the petitioners' imprisonment has been harsher than envisioned when they were sentenced may be a compelling basis for a sentence reduction. Even petitioners who endured the lockdown at FCI Sheridan but are no longer imprisoned may be able to seek to modify or reduce their term of supervised release under 18 U.S.C. § 3583(e)(2) on the grounds that the "interests of justice" warrant such reduction. *See Johnson v. United States*, 529 U.S. 53, 60 (2000). A declaratory judgment by a court familiar with the facts will ease the burden both on those seeking sentence reductions and on the courts reviewing them. While the reviewing court "is not required to be persuaded" by the argument, *Concepcion*, 142 S. Ct. at 2404, a declaratory judgment will assist in the presentation and review of that basis for a sentence reduction.

Conclusion

When a prison has denied inmates the necessities required to maintain human dignity, "the courts have a responsibility to remedy the resulting Eighth Amendment violation." *Brown*, 563 U.S. at 511. While courts must be sensitive to government interests and the difficult tasks faced by prison administrators, "[c]ourts nevertheless must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners." *Id.* (internal citations and quotations omitted). "[J]udicial intervention is *indispensable* if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons." *Rhodes v. Chapman*, 452 U.S. 337, 354 (1981) (Brennan, J. concurring).

This is such a case where judicial intervention is indispensable. The combination of indignities and harms has deprived prisoners and detainees at FCI Sheridan of the basic necessities

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of life in violation of the Eighth Amendment and the Due Process Clause. Those who have experienced these conditions have continuously communicated through all available means – letters, phone calls, emails, and through family – to alert the Court and the community to these various injuries. While there are more than 200 individual stories in evidence of the hardships endured over the past two and a half years, common themes of dehumanization, mental anguish, and desperation of the whole prison emerge:

- They cram us in our cells and treat us like we are the virus, like we did something to cause the lockdowns.³⁶²
- Just being punished because of covid and are all hungry and mentally sick from the constint lockdowns w/no interaction w/ people, programing, recreation we get and have nothing no voice just sickness and stress³⁶³
- Can not stress how sick I am every day and the pain i feel at times and to be ignored like i don't even exist is mind numbing and makes me have no faith in another human being. I am almost to the point of laying down and just saying fuck it and hope for the best ? i have been healthy and sound of mind this whole prison term but know I am broke and need help³⁶⁴
- Still on lockdown. No exercise. No fresh air. No commissary, etc, etc., Even the family dog gets to go outside for daily walks. Not us, it's over a month. I feel like one of the animals in the SPCA commercial.³⁶⁵
- This is too much. I know these things take years to settle and I want to see this thru beyond my release. This is wrong. This is beyond 8th amendment. I will never be the same after almost 2 full years in semi-isolation.³⁶⁶

³⁶² *Id.* at 66.

³⁶³ Petitioner Ex. 1 at 28.

³⁶⁴ Petitioner Ex. 1 at 53.

³⁶⁵ Petitioner Ex. 1 at 60 (sent 2/23/2022 D.F.).

³⁶⁶ Petitioner Ex. 4 at 92.

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“The ‘touchstone’ of the Eighth Amendment inquiry is ‘the effect upon the imprisoned.’” *Rhodes*, 452 at 366 (Brennan, J. concurring). After reviewing the desperate pleas from those housed within FCI Sheridan since April of 2020, the Court cannot doubt that the human cost has been severe and extensive. Relief is warranted.

Respectfully submitted this _____

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On the Brief

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