

INTRODUCTION

A safe and effective COVID-19 vaccine might be available for widespread administration in the United States as soon as the spring or early summer of 2021. This is welcome news for a pandemic-weary public. At present, however, the pandemic rages on.

More than 62 million people have contracted COVID-19 worldwide and almost a million and a half have died. See <https://coronavirus.jhu.edu/> (11/28/20). In the U.S., more than 13 million people have tested positive and more than 265,000 have died. There were 205,557 new cases on November 27th, a record daily high, and roughly 1,500 Americans died every day last week—one death each minute of the day. See <https://coronavirus.jhu.edu/region/united-states> (11/28/20). In October there were 1.9 million new cases, a monthly record that was doubled in November. www.nytimes.com/live/2020/11/28/world/covid-19-coronavirus?referringSource=articleShare.

The situation is equally dire in Indiana. Almost 325,000 people have tested positive, more than 5,590 people have died, and thousands more are testing positive every day. See <https://coronavirus.jhu.edu/region/us/indiana> (11/28/20). With winter approaching, the number of cases has been “significantly and steadily increasing,” prompting Governor Holcomb to impose stricter measures to “counter the spread” of COVID-19, including “social distancing” requirements and limits on how many people may convene “in a single space.” See Executive Order 20-48 at 2, 6, 8-9, www.in.gov/gov/files/Executive_Order_20-48_Color-Coded_County_Assessments.pdf (11/13/20). Hospitalizations are “at an all-time high,” *id.*, threatening the overall healthcare system in Indiana and taking a heavy mental and physical toll on doctors, nurses, and other frontline responders. And things are expected to get much worse following the Thanksgiving holiday.

One of the hardest hit counties in Indiana is Vigo County, home of federal prison complex FCC Terre Haute. Almost 6,500 people have tested positive (including numerous staff and inmates from the prison), but the actual number of infections is likely much higher: most of the county’s residents have not been tested, and the 7-day positivity rate is around 17%. See <https://www.coronavirus.in.gov/2393.htm> (11/28/20). Roughly 100 additional county residents are testing positive daily, and at least 91 have already died. *Id.*

Because of the “rising number of cases,” the Vigo County Health Department recently rented “four refrigerated semi-trailers” to serve as a temporary morgue.¹ And Union Hospital “has no available beds.”² “We were preparing for D-Day,” said one hospital official, and “now, we are seeing it.”³

Against this backdrop, and with no urgency to do so, Attorney General William Barr and the Federal Bureau of Prisons have scheduled five executions at FCC Terre Haute in December and January. See https://www.bop.gov/resources/federal_executions_info.jsp. Each execution will result in large numbers of people from across the country coming to Terre Haute, where they will interact with members of the local community at hotels and restaurants, interact with each other and prison staff when they go to the prison, and then congregate in small, confined spaces in the prison as the executions are carried out.

This poses an enormous health risk not only to the individuals who are involved in the executions, but to every inmate in the prison’s general population, all the prison’s employees (who are as concerned as the inmates),⁴ and the hundreds if not thousands of individuals outside the prison who subsequently interact with people who attended or assisted with the executions or are in the general prison population. [See generally Filing No. 13-1 at 17-18, ¶¶ 52-63]. The requested preliminary injunctive relief will prevent this enormous risk.

¹ See “Vigo County orders refrigerated trucks for bodies,” Tribune-Star (Nov. 13, 2020) (available at https://www.tribstar.com/news/vigo-county-orders-refrigerated-trucks-for-bodies/article_a200de04-25c7-11eb-92b9-277611899579.html).

² See “Union Hospital ‘busting at the seams,’” Tribune-Star (Nov. 11, 2020) (available at https://www.tribstar.com/news/union-hospital-busting-at-the-seams/article_875999d4-245e-11eb-96d5-f36cec887c70.html).

³ See *id.*

⁴ See “Union Reps Raise Concerns about Safety Inside Federal Prison Amid Outbreak,” www.wthitv.com/content/news/Union-reps-raise-concerns-about-safety-inside-federal-prison-amid-outbreak-569141811.html (“Union leaders ... say inmates are still coming in and out of the [Terre Haute] facility unnecessarily and it’s putting employees and the public at risk. AFGI Local 720 President Kenny Swick says, ‘It’s very confined spaces ... and when we get sickness that comes in, it goes through that place like wildfire.’”).

And a delay in the executions will not undermine prison operations or otherwise harm the Defendants in any meaningful way. To the contrary, the Attorney General has acknowledged that the federal government has “an obligation to protect BOP personnel and the people in BOP custody” and “must do the best [it] can to minimize the risk of COVID-19 to those in [its] custody, while also minimizing the risk to the public.”⁵ Similarly, the BOP has stated that its “highest priority” is to “do everything we can to mitigate the spread of COVID-19 in our facilities.”⁶ Delaying the executions clearly falls within the scope of “doing everything we can” to “mitigate the spread of COVID-19” and “protect BOP personnel and the people in BOP custody.”

Nor will postponing the executions harm the interests of the victims’ families. Assuming they even support capital punishment, family members would rightly be concerned about their own health and safety if they attended an execution during the pandemic, with large numbers of active infections in the prison, in Vigo County, and across the country. *See Peterson v. Barr*, 965 F.3d 549, 551 (7th Cir. 2020). Moreover, family members surely would not want the executions to become “super-spreader” events that endanger innocent third-parties in and out of the prison.

STATEMENT OF FACTS

I. There Is No Urgency To Carry Out Further Executions.

Three federal executions took place in the U.S. between 1957 and 2020. Historical Information, Capital Punishment, www.bop.gov/about/history/federal_executions.jsp. There were no federal executions in the 1960s, 1970s, 1980s, 1990s, or 2010s; there were two in 2001; and there was one in 2003, which was the last federal execution prior to this year. *Id.*

⁵ Mem. for Director of Bureau Prisons from the Attorney General re Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic, at 2 (March 26, 2020), <https://www.justice.gov/file/1262731/download>; see also Mem. for Director of Bureau of Prisons from the Attorney General re Increasing Use of Home Confinement at Institutions Most Affected by COVID-19, at 1, 3 (April 3, 2020) (stating that the BOP has a “profound obligation to protect the health and safety of all inmates,” and that he “strongly believe[s] we should do everything we can to protect the inmates in our care”), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf.

⁶ BOP Modified Operations at 1 (updated Oct. 8, 2020), www.bop.gov/coronavirus/covid19_status.jsp.

The criminal justice system functioned effectively throughout these decades, despite the absence of any federal executions or their infrequency. It will continue to function effectively if further executions are delayed during the pending pandemic, just as this Court and other parts of the legal system have continued to function while temporarily restricting in-person interactions.

II. The Defendants’ Pre-COVID Decision To Resume Federal Executions.

This country’s longstanding hiatus on federal executions ended soon after William Barr became Attorney General. In July 2019—prior to the onset of the COVID-19 global pandemic—Attorney General Barr directed the BOP to adopt an Addendum to the Federal Execution Protocol, thereby “clearing the way for the federal government to resume capital punishment after a nearly two-decade lapse...” See DOJ Press Release, <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>.

Five executions were scheduled for December 2019 and January 2020. The executions were stayed for various lengths of time because of litigation involving the execution protocol, *see generally In re Fed. Bureau of Prisons’ Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020), but the Defendants have managed to carry out those executions and three more in 2020—three in July, two in August, two in September, and one last week. *See* BOP Historical Information, *supra*. More federal executions have taken place over a four-week period in 2020 than occurred in the United States in the prior 66 years.

Defendants scheduled two more executions for the week of December 6, 2020. *See* https://www.bop.gov/resources/federal_executions_info.jsp (11/24/20). Lisa Montgomery was scheduled to be executed on December 8, for crimes she committed in 2004.⁷ However, the U.S.

⁷ According to a summary prepared by advocates of Ms. Montgomery: “Lisa was arrested on December 17, 2004 and sentenced to death on October 22, 2007 for the murder of Bobbie Jo Stinnett. [S]he killed Ms. Stinnett, who was pregnant, in order to claim [Ms. Stinnett’s] baby as her own. To understand Lisa’s crime—for which she has taken full responsibility—it is necessary to tell the story of Lisa’s life leading up to the offense.” *See* <https://www.deathpenaltyworldwide.org/project/savelisa/>. “Lisa is a survivor of child abuse, domestic violence, incest, multiple rapes, and child sex trafficking. Lisa’s mother sexually trafficked her starting when she was a small child, including allowing her to be gang raped by adult men on multiple occasions and telling Lisa she had to ‘earn her keep.’ Her years of torture at the hands of caregivers, documented brain damage, and severe mental illness have severed her connection with reality...” *Id.*

District Court for the District of Columbia recently enjoined Attorney General Barr from executing Ms. Montgomery “before December 31” because her attorneys contracted severe cases of COVID-19 when visiting Ms. Montgomery in the Texas federal prison where she is now held, preventing them from presenting a “petition for a reprieve or commutation of sentence to the President.” See Memorandum Opinion at 9 (Dkt. No. 19) and Order at 1 (Dkt. No. 20), *Montgomery v. Barr*, Civil Action No. 20-3261 (D.D.C. Nov. 19, 2020). The Attorney General has rescheduled Ms. Montgomery’s execution to January 12, 2020. See Notice of Rescheduled Execution Date (Dkt. No. 21), *Montgomery v. Barr, supra*. If the execution were carried out, Ms. Montgomery would be the first woman executed by the federal government since Ethel Rosenberg was executed in 1953.

Brandon Bernard is scheduled to be executed on December 10, for crimes he committed in 1999.⁸ He was 18 years old when the crimes were committed, which is the minimum age at which the death penalty may be imposed,⁹ and five of the nine surviving members of his jury either fully supported his clemency petition or are not opposed to having his death sentence commuted to life in prison without parole.¹⁰

⁸ According to a summary prepared by advocates for Mr. Bernard: “The offense happened in Killeen, Texas, in June 1999, when five Black adolescents (ranging in age from 15 to 19 years) planned a carjacking and robbery that went horribly awry. Brandon is not innocent, and the crime is tragic – it resulted in the deaths of two good Samaritans, Todd and Stacie Bagley, who were white. But while Brandon’s role might warrant very severe punishment, it does not warrant a death sentence. Brandon was not present when the carjacking was initiated, having wandered to a nearby store to play video games. Brandon was absent from most of the events during the carjacking, robbery, and mistreatment of the Bagleys. Brandon also did not shoot anyone (both Bagleys were shot by co-defendant Christopher Vialva, who has been executed for leading the crime). Three of the other participants – who were equally or more responsible for the crime – received prison sentences that ranged from 20 to 35 years. Two of those individuals have completed their sentences and been released from custody, and the third is scheduled for release about ten years from now.” See <https://www.helpsavebrandon.com/casesummary>.

⁹ See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that executing offenders who were younger than 18 when the crime occurred violates the 8th and 14th Amendments of the U.S. Constitution).

¹⁰ See <https://www.helpsavebrandon.com/jurors-who-now-support-saving-brandon>.

The American Bar Association,¹¹ members of Congress,¹² and others have called upon the government to postpone pending executions because of the enormous health risks they create. The Defendants, however, have refused to do so, choosing instead to schedule *more* executions. The Justice Department recently announced that three additional executions are now scheduled in the coming weeks: one on December 11th, one on January 14th, and one on January 15th.

III. The Dangers Posed By Carrying Out Executions During The COVID-19 Pandemic.

COVID-19 is a highly contagious and deadly disease. [Filing No. 13-1 at 3-9, ¶¶ 8-18]. In less than a year, more than 13 million people in the United States have tested positive and more than 265,000 people have suffered COVID-related deaths.¹³ “The high mortality rate may continue or worsen in coming weeks, as public health experts say sharp increases in case numbers are followed a few weeks later by increases in hospitalizations, which are then followed weeks later by increases in deaths.”¹⁴ Indiana has recently seen “single-day records of reported cases.”¹⁵

COVID-19 can lead to respiratory failure, permanent lung, heart, or neurological damage, or death, among a number of other serious complications. The disease is spread through respiratory droplets. Social distancing helps, but the only measure that fully prevents infection is avoiding contact with others.

¹¹ See Letter from ABA President Patricia Lee Refo to President Donald J. Trump (Nov. 12, 2020) (urging postponement of the executions because of the “alarming surge in COVID-19 cases nationwide,” and noting the risks presented to the health and safety of prisoners and their counsel, as well as prison staff); https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/fed-executions-letter-111220.pdf.

¹² See, e.g., Letter from the Congressional Black Caucus to Attorney General William Barr (Nov. 17, 2020) (urging postponement and noting a “causal link” between executions held earlier this year and “COVID-19 surges”), https://cbc.house.gov/uploadedfiles/cbc_letter_to_ag_barr_on_pending_executions.pdf.

¹³ See Johns Hopkins Univ. COVID-19 Data Center, <https://coronavirus.jhu.edu/> (11/22/20); CDC, Covid Data Tracker, <https://www.cdc.gov/covid-data-tracker/#cases> (11/22/20).

¹⁴ See Indianapolis Star, “If Indiana were a country, our COVID-19 mortality rate would be 35th worst in the world,” <https://www.indystar.com/story/news/health/2020/11/18/covid-indiana-death-rate-coronavirus-ranks-35th-world/6338823002/> (11/18/20).

¹⁵ See *id.*

Not surprisingly, prisons have proven to be hotspots for COVID-19 outbreaks, and some of the largest outbreaks in the country have occurred in prisons.¹⁶ Prisons pose unique risks for spread because prisoners and staff cannot appropriately practice social distancing, prisons lack adequate personal protective equipment, and prisons are often poorly ventilated—all factors that facilitate the transmission of COVID-19. [Filing No. 13-1 at 9-13, ¶¶ 19-34].¹⁷ The “challenges include crowded dormitories, shared lavatories, limited medical and isolation resources, daily entry and exit of staff members and visitors, continual introduction of newly incarcerated or detained persons, and transport of incarcerated or detained persons in multi-person vehicles for court-related, medical, or security reasons.”¹⁸ Compounding the problem, prisoners “have a high prevalence of chronic diseases, increasing their risk for severe COVID-19–associated illness....”¹⁹ Men appear to be at a greater risk of death from COVID-19,²⁰ and all of the individuals incarcerated at FCC Terre Haute are men.

¹⁶ See “San Quentin Prison was Free of the Virus. One Decision Fueled an Outbreak.,” N.Y. Times (June 30, 2020) (available at www.nytimes.com/2020/06/30/us/san-quentin-prison-coronavirus.html); see also “‘They’re Praying Nobody Dies’: 240 Prisoners Sick With COVID Inside Fort Dix Prison,” N.Y. Public Radio, <https://gothamist.com/news/240-prisoners-sick-with-covid-inside-fort-dix-prison> (noting that 18 staff members also tested positive, and that transfers from another prison were a suspected cause) (Nov. 19, 2020); “92% of [Westville, Indiana] inmates tested are positive for COVID-19, group says; Lake County officials report three more coronavirus deaths,” Chicago Tribune (April 22, 2020), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-corona-update-st-0423-20200422-zmkdmb2k6ncbnkh7zc6nxxzasa-story.html>.

¹⁷ See also R. Rubin, “The Challenge of Preventing COVID-19 Spread in Correctional Facilities,” J. of the Am. Med. Ass’n, Vol. 323, No. 18 (May 12, 2020); Research Letter, “COVID-19 Cases and Deaths in Federal and State Prisons,” J. of the Am. Med. Ass’n, Vol. 324, No. 6, at 602 -03 (Aug. 11, 2020) (noting that, as of June 6, 2020, there had been at least 42,107 cases of COVID-19 and 510 deaths among federal and state prisoners, and that the infection rate for prisoners “was 5.5 times higher than the US population case rate” and is escalating more rapidly than in the general population.

¹⁸ “COVID-19 in Correctional and Detention Facilities — United States, February-April 2020,” <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm> (May 15, 2020).

¹⁹ “Mass Testing for SARS-CoV-2 in 16 Prisons and Jails — Six Jurisdictions, United States, April–May 2020,” <https://www.cdc.gov/mmwr/volumes/69/wr/mm6933a3.htm> (Aug. 21, 2020).

²⁰ See Derek M. Griffith, Ph.D. *et al.*, “Men and COVID-19: A Biopsychosocial Approach to Understanding Sex Differences in Mortality and Recommendations for Practice and Policy Interventions,” *Prev. Chronic Dis.* (July 16, 2020), available at https://www.cdc.gov/pcd/issues/2020/20_0247.htm (last visited Nov. 23, 2020).

The extreme danger that COVID presents to staff, inmates and anyone spending any amount of time inside a prison is confirmed by a report recently posted on the CDC website involving a 20-year-old correctional officer who contracted COVID-19 and suffered multiple health complications despite the use of masks, limits on “close contact,” and other safety measures:

Although the correctional officer never spent 15 consecutive minutes within 6 feet of an IDP [(prisoner)] with COVID-19, numerous brief (approximately 1-minute) encounters that cumulatively exceeded 15 minutes did occur. During his 8-hour shift on July 28, the correctional officer was within 6 feet of an infectious IDP an estimated 22 times while the cell door was open, for an estimated 17 total minutes of cumulative exposure. IDPs wore microfiber cloth masks during most interactions with the correctional officer that occurred outside a cell.... During all interactions, the correctional officer wore a microfiber cloth mask, gown, and eye protection (goggles) [and gloves during most interactions].... [A]dditional interactions might have occurred....

The correctional officer reported no other known close contact exposures to persons with COVID-19 outside work and no travel outside Vermont during the 14 days preceding illness onset. COVID-19 cumulative incidence ... where the correctional facility is located was relatively low at the time of the investigation (20 cases per 100,000 persons), suggesting that his most likely exposures occurred in the correctional facility through multiple brief encounters (not initially considered to meet VDH’s definition of close contact exposure) with IDPs who later received a positive SARS-CoV-2 test result.

“COVID-19 in a Correctional Facility Employee Following Multiple Brief Exposures to Persons with COVID-19,” <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6943e1-H.pdf>.

Inmates and correctional officers likely do not agree on much. They agree, however, that government officials are not doing enough to prevent the spread of COVID-19 in and near prisons.²¹ The BOP has posted information on its website regarding the incidence of COVID-19 in federal prisons. While likely incomplete in material respects, it confirms the outsized risks that COVID-19 presents to the prison population as compared to members of the general public:

²¹ See OSHA Complaint on Behalf of Federal Prison Workers (March 30, 2020) (asserting that BOP’s “actions and inactions” are “proliferating the spread of a known and deadly contagion both within our prison system and to our surrounding communities,” which will “result in death and severe health complications and/or possible life-long disabilities”) [Filing No. 13-14 at 4].

11/27/2020 - The BOP has **124,994** federal inmates in BOP-managed institutions and **14,038** in community-based facilities. The BOP staff complement is approximately **36,000**. There are **4,523 federal inmates** and **1,381 BOP staff** who have confirmed positive test results ... nationwide. Currently, **19,775** inmates and **1,843** staff have recovered. There have been **145** federal inmate deaths and **2** BOP staff member deaths attributed to COVID-19 disease. Of the inmate deaths, **4** occurred while on home confinement.

COVID-19 Cases, <https://www.bop.gov/coronavirus/index.jsp> (11/28/20) (original emphasis).

The first COVID case at FCC Terre Haute was reported on May 16, 2020.²² Since then, at least three inmates have died and many more inmates and staff have contracted the disease. [See, e.g., Filing No. 13-26 at 2-3, ¶¶ 4-6 (describing inmate’s experience contracting COVID in FCC Terre Haute, including the masks he was provided, the limited medical care he received, and the numerous inmates and staff he interacted with while positive); [Filing No. 13-15 at 5-7, ¶¶ 17-26 (describing the death of a fellow inmate)]. According to the BOP, at least 88 inmates and 16 staff members are currently positive for COVID-19 at FCC Terre Haute (as of 11/27/20), an additional 261 prisoners and 40 staff members had the virus but recovered, and three prisoners have died. <https://www.bop.gov/coronavirus/index.jsp> (11/28/20). It is not clear, however, how many inmates and staff have been tested or how the BOP decides to treat a death as COVID-related. Therefore, the number of cases and deaths is likely higher than reported on the BOP website.

To “mitigate the spread of COVID-19,” Defendants restricted movement in and out of BOP prisons at the start of the pandemic.²³ Under this policy, BOP systematically canceled previously scheduled visits and refused to schedule future visits for both contact and non-contact meetings, including at Terre Haute. In April, BOP issued a memorandum reporting that stopping visits had a “major impact” on keeping staff, prisoners, visitors, and the community at large safe from

²² Tribune Star, “Case of COVID-19 Infection Reported at Federal Prison in Terre Haute” www.tribstar.com/news/case-of-covid-19-infection-reported-at-federal-prison-in-terre-haute/article_85a075ee-9940-11ea-87fe-fb3a2398734d.html) (May 18, 2020).

²³ See Federal Bureau of Prisons, “BOP Implementing Modified Operations,” www.bop.gov/coronavirus/covid19_status.jsp; and Federal Bureau of Prisons, “Updates to BOP COVID-19 Action Plan,” www.bop.gov/resources/news/20200319_covid19_update.jsp.

COVID-19.²⁴ Other measures have also been implemented by BOP, including at Terre Haute, *see* https://www.bop.gov/coronavirus/covid19_status.jsp, but nothing is as effective a tool for limiting the spread of COVID-19 as preventing in-person contact.

According to the federal Centers for Disease Control and Prevention (“CDC”), restrictions on the non-essential movement of inmates and visitors into and out of prisons is a key component of managing the transmission of COVID-19 in prisons and in the communities where they are located. *See* CDC, *Interim Guidance on Management of Coronavirus Disease in Correctional and Detention Facilities* at 9, 13-14, 15, 24 (updated Oct. 21, 2020), attached as Exhibit 9 to the Declaration of Shelby Rampolo [Filing No. 13-12]; *see also* CDC, *FAQs for Correctional and Detention Facilities* at 3-7, “How to prevent the spread of COVID-19 within my facility or from the local community into my facility” (noting various “operational actions” that a prison should take if “COVID-19 is known to be spreading in the local community close to your facility, but there are no confirmed cases among people who are incarcerated, staff, or visitors who have been inside the facility within the past 14 days,” including suspending visitation and “not allow[ing] non-essential vendors, volunteers, or tours into the facility”); *and* “How to manage a confirmed COVID-19 case in the facility” (stating that a prison should “Suspend group gatherings” and “Suspend visitation or offer non-contact visitation only” if “there is *a case* of COVID-19” in the facility) (emphasis added), attached as Exhibit 10 to the Rampolo Decl. [Filing No. 13-13].

These commonsense recommendations are similar to the steps this Court has implemented to reduce the spread of COVID-19, many of which involve temporarily restricting the movement of people in and out of the Court. Relying upon “guidance from a variety of sources including the [CDC] and federal, state, and local public health authorities to determine what operations are appropriate given the health risks caused by the pandemic,” the Court recently made the following findings in imposing updated limitations for courthouse operations:

²⁴ *See* Mem. for Inmate Families and Friends from M. Carvajal, Director, Federal Bureau of Prisons (Apr. 21, 2020), www.bop.gov/resources/news/pdfs/202004211_memo_to_inmate_families_and_friends.pdf.

- A. The significant health risks presented by the pandemic continue;
- B. In many locations in the United States, including Indiana, there are signs of increased coronavirus spread and evidence of resurgence;
- C. Large gatherings of people exacerbate community spread and put attending individuals at greater risk of exposure to COVID-19;
- D. In the immediate future, it will not be reasonably possible to summon a pool of potential jurors and conduct a jury trial in person in a manner that does not expose potential jurors, counsel, court staff, and litigants to substantial and unacceptable health risks, specifically, the danger of becoming infected with COVID-19;
- E. For an extended time, it is likely that a significant number of potential jurors may request that their service on a jury be deferred or excused for reasons related to COVID-19;
- F. The effects of COVID-19 may be significantly mitigated by temporarily modifying Court operations; and
- G. Good cause exists to modify Court operations....

See General Order, *In The Matter Of: Continued Court Operations Under The Exigent Circumstances Created By Covid-19 And Related Coronavirus* (S.D. Ind. Nov. 13, 2020).

IV. The Physical Layout And Conditions At FCC Terre Haute.

FCC Terre Haute consists of three separate complexes, differentiated by the level of security. [Filing No. 13-3 at ¶ 7, No. 13-8 at 7]. The complexes include (1) a U.S. Penitentiary (USP), a high security complex; (2) a Federal Correctional Institution (FCI), a medium level complex; and (3) a Satellite Prison Camp (SPS), a minimum-security level complex. *Id.* FCC Terre Haute also contains a “weapons range, training center, maintenance buildings, garage, power house, warehouses, UNICOR warehouses, execution complex, and staff housing.” *Id.*

BOP staff and inmates have daily contact in all three complexes. Suppliers and other vendors come to the complex on a regular basis, and although visitation policies have been altered due to COVID-19, each inmate is permitted at least two visits a month with two visitors at a time.

USP Terre Haute has six general population units that are designed as a “bow-tie” with two floors for non-death row inmates and a Special Confinement Unit (SCU) for death-row inmates. [Filing No. 13-3 at ¶ 7, No. 13-8 at 7-8]. In addition to these living quarters, there are

dining facilities, health services, maintenance shops, commissary, a UNICOR factory, and an inmate visiting area. [Filing No. 13-3 at ¶ 7, No. 13-8 at 8]. USP has a rated capacity of 910 inmates. [Filing No. 13-3 at ¶ 7, No. 13-8 at 7].

FCI Terre Haute has ten housing units with a rated capacity of 560 inmates. [Filing No. 13-3 at ¶ 7, No. 13-8 at 8]. It also has a dining facility, health services, maintenance shops, a commissary, and an inmate visiting area. *Id.*

SPC Terre Haute has a main building that includes living quarters, a dining room and a gym. *Id.* There are eight dormitory-style housing units, with a total rated capacity of 324 inmates. [Filing No. 13-3 at ¶ 7, No. 13-8 at 9]. The units contain 2-man, 8-man, and 12-man rooms. *Id.*

All of the three complexes within FCC Terre Haute provide environments in which COVID-19 can easily spread among inmates and staff. [Filing No. 13-1 at 13-16, ¶¶ 38-51]. The risks are significantly enhanced, however, because two of the three complexes have more inmates than their rated capacities. According to an audit conducted in May 2019, the USP has a rated capacity of 910 inmates, and the FCI has a rated capacity of 560 inmates. [Filing No. 13-3 at ¶ 7, No. 13-8 at 7, 8]. However, the USP currently houses 1,269 inmates (359 more than its rated capacity), and the FCI currently houses 875 inmates (350 more than its rated capacity). [Filing No. 13-3 at ¶¶ 8, 9; No. 13-9 at 1; No. 13-10 at 1]. “An exceeded rated capacity is concerning in normal times; now, it is a deadly condition.” [Filing No. 13-1 at 15-16, ¶¶ 46-51].

Plaintiffs Ryan Smith and Brandon Holm reside in the C-Dorm of the overcrowded FCI complex. [Filing No. 13-15 at 3, ¶ 4, and Filing No. 13-21 at 3, ¶ 4]. Social distancing is impossible in the cells and in the communal facilities, and it not uncommon for inmates to interact with individuals who have recently tested positive. [Filing No. 13-15 at 6-11, ¶¶ 21, 30, 36, 41, 43; Filing No. 13-21 at 5-6, ¶¶ 15, 20, 21]. They report that the rate of positive COVID cases in their dorm has been as high as 70% to 80%, leading to at least one traumatizing death that both Plaintiffs witnessed (Tim Hocutt, who died shortly after two executions were held at the prison); they also say that more inmates have died from COVID at the prison than BOP has reported. [Filing No. 13-15 at 5-7, ¶¶ 17-28, 34; Filing No. 13-21 at 4-5, ¶¶ 13, 14].

There is a lack of proper protective equipment at FCC Terre Haute, the condition of the shower and restroom facilities do not promote handwashing and cleansing by inmates, and soap supplies are limited. [Filing No. 13-15 at 7-9, ¶¶ 29, 31-33, 35; Filing No. 13-16; Filing No. 13-21 at 5-7, ¶¶ 16-19, 22, 23; Filing No. 13-22]. Plaintiffs have been provided with cloth masks sewn by fellow inmates, but inmates have been required to use the same mask for weeks if not months at a time, and the use of masks within the prison is inconsistent at best. [Filing No. 13-15 at 10, ¶ 42; Filing No. 13-21 at 5-6, ¶¶ 18, 19; Filing No. 13-26 at 4-5, ¶ 12].

Given all these factors, it is no surprise that there are at least 104 positive COVID cases within FCC Terre Haute right now, involving inmates and staff, or that Mr. Smith and Mr. Holm—both of whom have pre-existing medical conditions—live in “constant fear” that they will contract COVID-19 and die. [Filing No. 13-15 at 3-5, ¶¶ 9-15, 44; Filing No. 13-21 at 3-4, 7, ¶¶ 9-12, 24]. As a union representative for prison staff members put it in expressing his concern about the situation at FCC Terre Haute, “when we get sickness that comes in, it goes through that place like wildfire.” *See* n.4 *supra*.

V. Carrying Out Additional Executions At The Present Time Would Unnecessarily Subject Plaintiffs, Prison Staff, The Local Community, And Other Members Of The General Public To Significant Health Risks, Including Death.

The BOP’s execution protocol anticipates the involvement of large numbers of individuals in each execution at FCC Terre Haute. [Filing No. 13-3, No. 6]. An “execution team” consisting of some 40, geographically disbursed BOP staff members will spend several days at the prison before each execution preparing. [Filing No. 13-3 at ¶ 6, No. 13-7 at ¶ 5]. Another team of roughly 50 BOP employees will also travel to Terre Haute from other prisons (which might be experiencing COVID outbreaks). [Filing No. 13-3 at ¶ 6, No. 13-7 at ¶ 10]. These teams will be assisted by approximately 100 BOP staff, including those pulled from normal duties at FCC Terre Haute, who will provide security and support for each execution. [Filing No. 13-3 at ¶ 6, No. 13-17 at ¶ 8].

The individuals who converge in Terre Haute to participate in the executions will stay in local hotels or homes, eat in local restaurants, and use local transportation. [Filing No. 13-3 ¶ 4,

No. 13-5 at ¶ 2]. Many will travel by air or other public transit. Any of these individuals could easily have been infected with COVID-19 at home, on planes, in airports or hotels, at their BOP regional facilities, or in their communities more broadly. They will then convene and intermingle in small enclosed spaces with staff from FCC Terre Haute—which has numerous known COVID-19 cases among its inmates and staff—for group training, practices, meetings, and on-site work.

Large numbers of media will likely attend each execution, also from around the country and also staying in the local community before going to the prison, where they will be subjected to in-person screening escorts and security details. The media participate in a Media Orientation at the institution prior to the execution, [Filing No. 13-3 at ¶ 5, No. 13-6 at 39], and on the day of the execution will be contained within a single Media Center, *id.*

Demonstrators also attend executions and likewise might come to Terre Haute from across the country, interacting with other individuals on the way here and when they arrive, and again when they return home. For the execution that occurred on November 20th, “demonstrators FOR capital punishment” were asked to “assemble at the Fairbanks Park” for processing and “demonstrators AGAINST capital punishment” were asked to “assemble at MSA Softball”; the processing was scheduled to last an hour and a half; each set of protesters was then to be “transported to FCC Terre Haute via van,” wearing masks and after having had their temperatures taken (if transportation protocols were followed)—but certainly not in a position to socially distance and with no reliable means of knowing if they were positive for the disease.²⁵

The execution facility, sometimes referred to as the “Death House,” is a small, single story building on the Terre Haute grounds. [Filing No. 13-3 at ¶ 4, No. 13-5 at ¶¶ 4, 5]. In addition to the 40 members of the execution team, federal regulations direct the attendance of up to 24 witnesses to the execution: six individuals selected by the death row prisoner, including their spiritual advisor and legal team, eight citizen witnesses, including members of the victim’s family, and ten members of the press. *See* 28 C.F.R. § 26.4(c)(3)-(4). Thus, the execution facility

²⁵ *See* Fed’l Bureau of Prisons, FCC Terre Haute, “Information for Demonstrators,” https://www.bop.gov/resources/pdfs/information_for_demonstrators_hall_20201119.pdf.

is expected to hold, in close quarters, the 40-member execution team, up to 24 witnesses, the death row prisoner, and an unspecified and uncapped number of attorneys of the Department of Justice. Again, many of these individuals will have traveled great distances, including by plane or other public transit, and stayed in local hotels or homes to be present on the day of the execution.

The witnesses to the execution and prison staff will be shuttled together in vans to the execution facility from a designated location in accordance with USP protocol. [Filing No. 13-3 at ¶ 4, No. 13-5 at ¶ 9]. In the days leading up to the execution, attorneys may be required to visit with their client in the Death House. [Filing No. 13-3 at ¶ 4, No. 13-5 at ¶¶ 6,7]. During the execution itself, witnesses are grouped into four separate viewing rooms—one for media; one for the victim’s family members; one for attorneys, the prisoner’s loved ones, and his or her spiritual advisor; and one for government officials. [Filing No. 13-3 at ¶ 4, No. 13-5 at ¶ 9]. It is not possible to socially distance in these cramped viewing rooms. *Id.* Additionally, those in the viewing rooms cannot see or be seen by the prisoner unless they are inches from the Plexiglass that separates the witnesses from the prisoner. *Id.* Consequently, observers in every viewing room stand “shoulder-to-shoulder pressed up against the glass.” *Id.*

The inability to ensure social distancing when carrying out executions, and the numerous opportunities for the disease to spread in connection with the execution process, are reflected in Dr. Goldenson’s declaration (*e.g.*, ¶¶ 54-60, 63). They are also reflected in the declaration of Yusuf Nur, a professor at Indiana University Kokomo who (1) served as spiritual adviser for Orlando Hall, (2) witnessed Mr. Hall’s execution at FCC Terre Haute on November 19th, and (3) ***tested positive this past weekend for COVID-19***, having almost certainly contracted the disease in connection with Mr. Hall’s execution. [Filing No. 13-29 at ¶¶ 2, 25-30].

Mr. Nur’s declaration describes the numerous interactions he had over the course of two days, starting with a visit with Mr. Hall at the prison on the morning of the execution and ending the next day in the small, dark and windowless basement of a local funeral home with Mr. Hall’s two sons, an employee from the funeral home, and three dead bodies (in addition to Mr. Hall’s). [Filing No. 13-29 at ¶¶ 3-24]. During those two days, Mr. Nur closely interacted with multiple

prison employees, two Chaplains, the mother of one of Mr. Hall's children and two friends of Mr. Hall (one from Indianapolis and one from Texas) who joined Mr. Nur as witnesses to the execution, at least one van driver (who drove Mr. Nur, the three other witnesses, two prison employees, and the prison Chaplain in a van from the Sheriff's office downtown to the prison—a ride of some 15 minutes, with the windows all rolled up), and an employee at the funeral home. [*Id.*]

At the prison grounds, Mr. Nur went through an extensive security process in a building on the grounds, while other witnesses waited together in a waiting area with the security escorts. [Filing No. 13-29 at ¶ 6]. They were then driven to another building and taken to a small, windowless room (approximately 12' x 12'), where Mr. Nur waited with the other witnesses for approximately five hours, sitting at a small table (5' x 3') and occasionally interacting with prison staff who came in with updates or brought snacks and beverages into the room. [*Id.* at ¶¶ 7, 8].

One of the Chaplains then retrieved Mr. Nur and drove him to the building where the execution chamber is housed, a drive of some 15 minutes with the security checks. [*Id.* at ¶ 9]. There, Mr. Nur waited roughly 15 minutes in an even smaller, windowless room (approximately 6' x 4') that looked into the execution chamber, with two prison employees. [*Id.* at ¶ 10].

Mr. Nur was then taken into the execution chamber by a person who he understood to be a high-ranking prison official. [*Id.* at ¶ 11]. The other two prison employees remained in the small ante-room and were joined by the witnesses who had accompanied Mr. Nur to the prison. [*Id.*] The prison employees wore masks, but they were often worn below their noses. [*Id.*]

The execution chamber was approximately 10'x12' and contained Mr. Hall (on the gurney), Mr. Nur, the official who escorted Mr. Nur into the chamber, and two executioners, neither of whom wore a mask. [*Id.* at ¶ 15]. One of the executioners shouted out announcements, presumably for the individuals in the ante-rooms that looked into the execution chamber, and the other talked by phone to the individual administering the lethal injection. *Id.* The executioners were approximately four feet from Mr. Nur prior to Mr. Hall's death and closer afterwards, when Mr. Nur put his hands on Mr. Hall's body to pray (a prayer that was interrupted by one of the

executioners, who told him to stop praying). [Id. at ¶¶ 15-17]. Mr. Nur was in the execution room with the two executioners and the prison official for approximately 15 minutes. [Id. at ¶ 16].

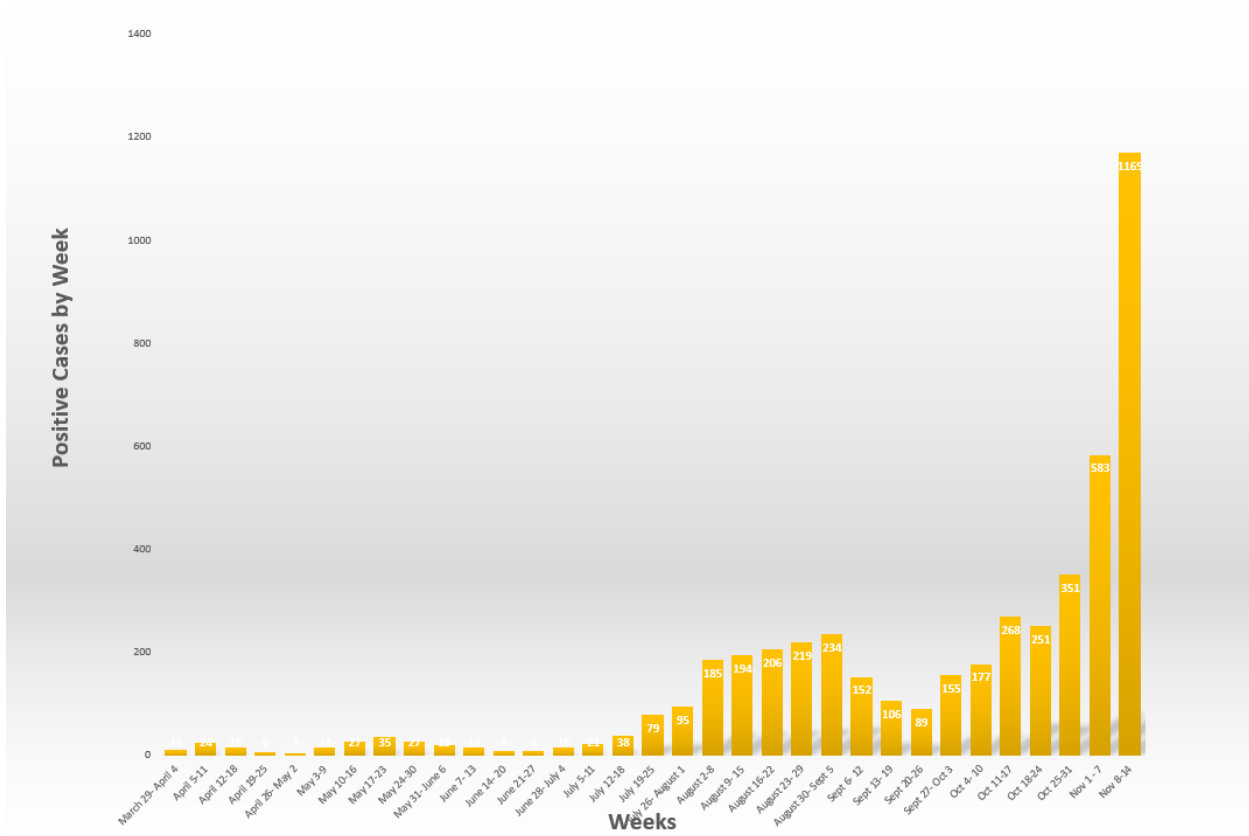
On November 29, Mr. Nur received a positive test result for COVID-19. [Id. at ¶¶ 25-30].

Mr. Nur, of course, was but one of the individuals involved in the elaborate execution process, and Mr. Hall is but one of the executions that has been scheduled by the Defendants. Each execution brings its own group of counsel, spiritual advisers and family members of the person being executed; victim family members; media witnesses; demonstrators; and government employees from all over the country, who interact with each other and with BOP staff inside and outside the prison and with members of the community outside the prison. Each of the scheduled executions thus presents an enormous risk of becoming a COVID-19 super-spreader event, which endangers the Plaintiffs, everyone involved in the executions, the Terre Haute community, and the broader public. [Filing No. 13-1 at 13, 17-20, ¶¶ 35-37, 52-63].

Not surprisingly, BOP records reflect spikes in COVID cases at FCC Terre Haute after the executions in August and September of this year. [Filing No. 13-27, at 2-3, ¶¶ 2-5; Filing No. 13-1 at 18-19, ¶¶ 60-62]. This is consistent with information from the Vigo County Health Department, which reported 26 positive cases at FCI Terre Haute between August 23 and August 29. Three executions took place that week. The next week, there were 88 positive cases at FCI Terre Haute (Aug. 30-Sept. 5), followed by another 32 the next week (Sept. 6-12) and another 37 the week after that. While the absolute numbers were not as large, a similar progression was seen in the weeks following the executions on September 22 and 24: that week there were 2 positive cases at FCI Terre Haute; the next week there were 7 new cases (Sept. 27-Oct. 3), the next week 8 more (Oct. 4-10), and the next week 19 more positive cases (Oct. 11-19). *See generally* <https://www.facebook.com/vigocountyhd/photos/pcb.4885966584776927/4885962581443994/?type=3&theater> (posted Nov. 13, 2020).

COVID cases also increased in the broader community after the executions, as shown by comparing the data in the chart below of positive cases in Vigo County with the dates on which executions were held at FCC Terre Haute, also shown below:

Positive COVID 19 Cases



Positive cases in Vigo County, Indiana, as posted on the Vigo County Health Dep’t Facebook page on 11/18/20, <https://www.facebook.com/vigocountyhd/photos/a.672332946140333/4907360055970913/?type=3&theater>.

Executions Held in 2020 at USP Terre Haute:

- 7/14/2020:** Daniel Lewis Lee
- 7/16/2020:** Wesley Ira Purkey
- 7/17/2020:** Dustin Lee Honken
- 8/26/2020:** Lezmond Charles Mitchell
- 8/28/2020:** Keith Dwayne Nelson
- 9/22/2020:** William Emmett Lecroy, Jr.
- 9/24/2020:** Christopher Andre Vialva
- 11/19/2020:** Orlando Cordia Hall

The chart also illustrates how much the number of new positive cases in Vigo County has exploded since October.

Notably, the executions in July, August and September occurred before the recent surges in positive cases, hospitalizations and deaths that are being seen nationwide and in Indiana. This suggests that even greater spikes can be anticipated if executions are held in December and January, as currently scheduled.

Given this data, how dangerous COVID-19 is, all the CDC warnings about limiting inmates and visitors going in and out of prisons during outbreaks, and the Attorney General's and the BOP's stated commitment to do "all we can" to protect inmates and staff in federal prisons from COVID-19, it is difficult to imagine that the Defendants would proceed with additional executions at the present time. And this significant and deadly public health risk is being created even though there is *no urgency* to proceed with the executions.

As the editorial board of a local paper concisely stated, "now [is] not the time for executions," regardless of whether you are "for or against capital punishment."²⁶

ARGUMENT

Each of the four factors for granting a preliminary injunction supports the Plaintiffs.

First, Plaintiffs are likely to prevail on the merits of their claim(s). "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Continuing to hold federal executions at FCC Terre Haute during a raging pandemic, with no legitimate urgency to do so, constitutes deliberate indifference to a known risk of serious harm and violates the Plaintiffs' rights under the Eighth Amendment.

²⁶ Tribune Star Editorial Board, "With pandemic raging, now not the time for executions," https://www.tribstar.com/opinion/editorials/tribune-star-editorial-with-pandemic-raging-now-not-the-time-for-executions/article_72098498-c2e0-11ea-80b7-eb8eb7549927.html; see also Indianapolis Star, "Op-ed: As COVID-19 flares behind bars, now's not the time for more Terre Haute Executions," <https://www.indystar.com/story/opinion/2020/07/08/op-ed-coronavirus-flares-behind-bars-now-not-time-executions/5389249002/>.

Second, without injunctive relief, the Plaintiffs' constitutional rights will be violated, which constitutes irreparable harm. In addition, absent injunctive relief, one or more of the Plaintiffs would likely contract COVID-19 (an outcome that otherwise could have been avoided), resulting in serious health complications or death. That also constitutes irreparable harm.

Third, the balance of equities favors the Plaintiffs. Defendants have a general interest in carrying out sentences that are to be implemented by the federal government. That general interest, however, is not unduly harmed by delaying further executions until the pandemic is under control, and it is outweighed in all events by the risk of significant harm to Plaintiffs if executions continue at the present time.

Fourth, injunctive relief serves the public interest. There can be no real dispute that bringing scores of individuals to Indiana from around the country, allowing them to interact with others in and out of the prison, and then putting them in confined spaces within the prison to effectuate executions will increase the risk of COVID-19 transmission to all involved. [Filing No. 13-1 at 17-20, ¶¶ 52-63]. That is not in the public interest. The public interest is served not by rushing to implement executions on arbitrary dates during a public health emergency, thereby jeopardizing the health and welfare of hundreds if not thousands of individuals, but by granting preliminary injunctive relief that postpones the planned executions.

I. The Legal Standard For Preliminary Injunctive Relief.

To obtain a preliminary injunction, a plaintiff must demonstrate that (1) his claims are likely to succeed on the merits; (2) he would likely suffer irreparable harm without the injunction; (3) the “balance of equities” tips in his favor; and (4) the injunction would be “in the public interest.” *See Whole Woman’s Health All. v. Hill*, 937 F.3d 864, 875 (7th Cir. 2019) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)).

The Seventh Circuit “‘employs a sliding scale approach’ for this balancing: if a plaintiff is more likely to win, the balance of harms can weigh less heavily in its favor, but the less likely a plaintiff is to win[,] the more that balance would need to weigh in its favor.” *GEFT Outdoors, LLC v. City of Westfield*, 922 F. 3d 357, 364 (7th Cir. 2019) (citation omitted). Where a plaintiff

risks suffering substantial harm absent an injunction, as here, the plaintiff's burden regarding likelihood of success is to show that "its claim has some likelihood of success on the merits." *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018).

II. Plaintiffs Are Likely To Succeed On The Merits.

A. Applicable Eighth Amendment Legal Standard

Under the Eighth Amendment, the government must "take reasonable measures to guarantee the safety of the inmates" under their care. *Hudson v. Palmer*, 468 U.S. 516, 526-27 (1984). "[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer*, 511 U.S. at 833.

Two requirements must be met to establish a violation of the Eighth Amendment, one objective and one subjective. "First, the deprivation alleged must be, objectively, 'sufficiently serious' For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* at 834 (citations omitted). Second, "a prison official must have a 'sufficiently culpable state of mind,'" which in the present context means a state of mind "of 'deliberate indifference' to inmate health or safety." *Id.* (citation omitted).

A prison official acts with deliberate indifference in violation of the Eighth Amendment if he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Id.* at 837. "[A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842.

When such a showing is made, the claimant "does not have to await consummation of the threatened injury to obtain preventive relief." *Id.* at 845 (citation omitted); *see also Helling v.*

McKinney, 509 U.S. 25, 33 (1993) (“It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”).

B. Conducting Executions in the Midst of the COVID-19 Pandemic Despite Knowing the Substantial Risk of Serious Harm to Plaintiffs Violates the Eighth Amendment.

“That the Eighth Amendment protects against future harm to inmates is not a novel proposition. The Amendment, as [the Supreme Court has] said, requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’” *Helling*, 509 U.S. at 33 (1993) (holding that inmate stated “a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of [second-hand smoke] that pose an unreasonable risk of serious damage to his future health”).

Stated in terms applicable to the facts of this case, “correctional officials have an affirmative obligation to protect inmates from infectious diseases.” *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996). Holding executions at FCC Terre Haute despite knowing (a) the enormous health risks posed by COVID-19 and (b) the likelihood that additional cases of the disease will result from conducting such executions constitutes deliberate indifference to inmate safety in violation of the Eighth Amendment.

The objective prong of an Eighth Amendment violation “is easily satisfied,” as it is well known that the “COVID-19 virus creates a substantial risk of serious harm leading to pneumonia, respiratory failure, or death.” *Wilson v. Williams*, 961 F.3d 829, 840 (6th Cir. 2020); *Torres v. Milusinic*, 2020 WL 4197285, *9 (C.D. Cal. July 14, 2020) (objective prong of 8th Amendment claim satisfied by federal inmates alleging unconstitutional conditions of confinement in light of risks posed by COVID-19) (class certified on a provisional basis, and preliminary injunction granted requiring defendants to expedite their review of prisoners for compassionate release).

The subjective prong is also easily satisfied. There can be no dispute that the Defendants have “knowledge of a substantial risk of serious harm” to Plaintiffs if they contract COVID, and that bringing individuals in and out of the prison in the midst of this escalating pandemic drastically

increases the risk that one or more Plaintiffs will contract the disease. *See supra* at 7-19. The only remaining question is whether the Defendants have “responded reasonably to this risk.” *Farmer*, 511 U.S. at 844. They have not. The BOP has adopted various measures in response to the dangers that COVID-19 presents, *see* https://www.bop.gov/coronavirus/covid19_status.jsp, but those measures have not stemmed the tide of infections, illness and death within federal prisons. *See Wilson*, 961 F.3d at 848 (noting that the BOP’s “multiphase action plan” “sounds good on paper” but has been “far less impressive than its title suggests” in “keeping the inmates safe”) (Cole, C.J., concurring in part and dissenting in part). And the efficacy of those measures is significantly undermined by holding executions while the pandemic continues.

In conducting further executions, Defendants will be ignoring the CDC’s recommendation that, when responding to known outbreaks in or outside of the prison, the prisons should restrict the movement of individuals between the prison and the local communities. Here, there are 104 known cases of active infection at the current time in FCC Terre Haute involving inmates and staff, *see* p. 10 *supra*, and there are hundreds if not thousands of known active cases in the communities surrounding the prison, with hundreds more being diagnosed daily.

Defendants will also be ignoring Governor Holcomb’s declaration of a public health emergency throughout the State of Indiana and the measures he recently put in place to “counter the spread” of COVID-19. Those measures include enhanced “social distancing” requirements,²⁷ and limiting how many people convene “in a single space.” For counties designated as Orange because of the number of positive cases in the county, no more than 50 individuals may be present at an event “in a single space, indoors or outdoors, at the same time;” for counties designated as Red, the limit is 25 persons.²⁸ Vigo County is currently designated Orange but has teetered on Red at various points. *See* <https://www.coronavirus.in.gov/2393.htm> (11/19/20).

²⁷ *See* Executive Order 20-48, *supra*, at 4 (“Every individual with the State of Indiana shall engage in social distancing with all other individuals, unless they are members of a single household. The phrase ‘social distancing’ means maintaining at least six (6) feet of distance from other individuals or, in the event six (6) feet is not possible, use of a barrier to separate individuals or members of a single household from others.”)

²⁸ *See id.* at 8-9

Prisons certainly face many challenges in trying to contain the spread of COVID-19 in their facilities. However, given the current public health crisis, it is not reasonable for Defendants to refuse to take an action that they know would significantly reduce the risk of spreading the disease within the Terre Haute prison: stop holding executions until the pandemic is under control, thereby preventing hundreds of potentially positive individuals from interacting with one another and causing further outbreaks in and out of the prison. There is no urgency to proceed with additional executions at this particular time.

Ignoring CDC recommendations and the recommendations of local authorities during a public health emergency does not constitute a reasonable response to a known health risk. CDC guidelines “provide the authoritative source of guidance on prevention and safety mechanisms for a novel coronavirus in a historic global pandemic where public health standards are emerging and changing.” *Mays v. Dart*, 974 F.3d 810, 823 (7th Cir. 2020) (affirming in part and vacating in part a preliminary injunction entered in favor of pretrial detainees who challenged their close living conditions during the pandemic). Plaintiffs’ Eighth Amendment rights will be violated if executions continue at the present time.

III. Plaintiffs Are Likely To Suffer Irreparable Harm If The Executions Continue.

As shown above, the Plaintiffs’ Eighth Amendment rights will be violated if the Defendants hold additional executions in deliberate indifference to the risk of substantial harm that doing so presents for Plaintiffs. Such a constitutional violation constitutes irreparable harm. *See, e.g., Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978).

If the executions proceed, it is likely that multiple plaintiffs will contract COVID-19 and suffer significant health issues, when they would not have done so without the executions being held. That harm would also be irreparable. *See Roman v. Wolf*, 977 F.3d 935, 944 (9th Cir. 2020) (“The district court also correctly concluded that Plaintiffs were likely to suffer irreparable harm absent relief given COVID-19’s high mortality rate.”) (affirming in part and vacating in part a preliminary injunction entered in favor of immigration detainees who challenged the federal

government's alleged failure to implement necessary protective measures during the COVID-19 pandemic); *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 447 (D. Conn. 2020) ("Courts across the country have concluded that the risk of contracting COVID-19 as a result of unsafe conditions of confinement constitutes irreparable harm.") (citations omitted) (granting in part and denying in part a motion for a TRO filed by federal prisoners who alleged that their 8th Amendment rights were violated by the prison's failure to use adequate safety measure to protect them from COVID and failure to transfer them to home confinement by way of compassionate release).

IV. The Irreparable Harm Threatening Plaintiffs Outweighs Any Harm To Defendants.

The "balance of equities" in this case decidedly tips in favor of the Plaintiffs. *See Whole Woman's Health Alliance*, 937 F.3d at 875. There is no need to carry out executions in the midst of a global, newly resurgent pandemic. The Defendants have a general interest in seeing a sentence carried out, but the dates they have chosen for executions are not tied to any mandatory deadlines or other fixed constraints. An injunction that postpones execution dates therefore will cause no meaningful harm to Defendants.

V. The Requested Preliminary Injunctive Relief Would Further The Public Interest.

The public interest factor often receives only passing consideration in analyzing whether a preliminary injunction is warranted. That should not happen here. While the public interest factor cannot alone support a preliminary injunction, it is clearly important in a case like this, where the other relevant factors also support preliminary injunctive relief.

The public has the strongest possible interest in having government officials take all reasonable steps available to avoid contributing to the deadly consequences of an ongoing pandemic. FCC Terre Haute is already a COVID-19 hot spot. It is located in a county that is experiencing alarming numbers of new COVID-19 cases every day. Continuing to carry out executions at this time, with no legitimate urgency to do so, endangers all inmates in the general prison population, attorneys and family members who come to see them, prison staff and their families, the visitors who attend an execution from elsewhere, and members of the broader general

public who subsequently come in contact with individuals who are in or have visited the prison. [See, e.g., Filing No. 13-1 at 13, 19-20, ¶¶ 35-37, 63]. “Not only prisoners, but the safety of prison guards and the general public will be protected by a preliminary injunction.” *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002) (public interest was served by granting a preliminary injunction).

The public also has an interest in seeing Constitutional rights protected. *See Preston*, 589 F.2d at 303 n.3 (protecting Constitutional rights “certainly would serve the public interest”).

CONCLUSION

We have lost almost five times as many Americans to COVID-19 as the number of Americans killed in the 11-year Vietnam War. There is no defensible reason for the Defendants to risk unnecessarily increasing the COVID death toll by holding additional executions.

To avoid that result and to protect the Plaintiffs’ rights under the Eighth Amendment, the Court should enjoin the Defendants from conducting further executions until Plaintiffs have received an effective vaccine and COVID-19 no longer jeopardizes their health and their lives.

Dated: November 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2020, a copy of the foregoing document was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the court's electronic filing system. Parties may access this filing through the court's system, including to:

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I further certify that on November 30, 2020, a copy of the foregoing document was mailed, by first-class U.S. Mail, postage prepaid and properly addressed to the following:

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