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May 11, 2020

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
Washington, DC 20150

The Honorable Charles Schumer  
Minority Leader  
United States Senate  
Washington, DC 20501

The Honorable Nancy Pelosi  
Speaker  
United States House of Representatives  
Washington, DC 20515

The Honorable Kevin McCarthy  
Minority Leader  
United States House of Representatives  
Washington, DC 20151

Dear Members of Congress:

We are grateful for the continued interest in the views of the Federal Public and Community Defenders (“Federal Defenders”) by Congress during the COVID-19 crisis. Federal Defenders and other counsel appointed under the Criminal Justice Act represent 90 percent of all federal defendants. We write because vulnerable individuals in federal detention need your help to protect them from serious illness or death. The following measures would provide badly needed relief:

- A presumption of release under the Bail Reform Act, absent clear and convincing evidence that a person poses a specific threat of violence;
- Broader tools to enable courts to release or transfer—even temporarily—individuals already sentenced, including broader authority to modify existing sentences, grant furloughs, and grant compassionate release; and
- Ongoing, universal testing for all incarcerated individuals and staff, including at private-contract facilities.

We are grateful that on March 27, 2020, Congress unanimously passed the CARES Act, which authorized Attorney General (AG) William P. Barr to expand dramatically the use of home confinement to protect vulnerable individuals from COVID-19.<sup>1</sup> This measure recognized the public-health consensus that reducing the population of prisons and jails is the only way to avert a

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<sup>1</sup> See *Coronavirus Aid, Relief, and Economic Security Act*, H.R. 748 § 6002 at Div. B, Tit. II, Sec. 12003(b)(2)(2020) (“CARES Act”).

humanitarian crisis.<sup>2</sup> But despite promises to take “aggressive”<sup>3</sup> action and “move with dispatch”<sup>4</sup> to stop the spread of COVID-19, the Department of Justice (DOJ) and the Federal Bureau of Prisons (BOP) have made little use of these authorities to reduce prison populations and enable social distancing. Nor have they developed a coherent strategy to protect those in their care or employ.

The death of 30-year-old Andrea Circle Bear on April 28, 2020—four weeks after giving birth to her daughter while on a ventilator—is emblematic of the tragedy unfolding under AG Barr’s watch.<sup>5</sup> On March 20, 2020, Ms. Circle Bear was several months into a two-year sentence for a low-level drug offense, when the United States Marshals transported her from Winner City Jail in South Dakota to FMC Carswell in Texas via its notoriously harsh transport system.<sup>6</sup> She was also in the eighth month of a high-risk pregnancy. Eleven days later she began exhibiting severe symptoms of COVID-19 and was taken to a local hospital where she was placed on a ventilator. The next day her baby was born by emergency cesarean section. Less than a month later, Ms. Circle Bear died from COVID-19.

As Senator Richard Durbin concluded: “Simply put, this tragic death was preventable.”<sup>7</sup> At every turn, DOJ and BOP made choices that contributed to Ms. Circle Bear’s death and put her unborn child at risk. BOP was aware that she was at extremely high risk of death if she contracted COVID-19 because of her medical condition and late term pregnancy. Yet they did nothing to ameliorate that risk; indeed, they exacerbated it. If BOP was making responsible use of its authority to release people, Ms. Circle Bear would not have been in custody—much less transferred a thousand miles away in a manner that did not protect her from contracting a fatal disease.

DOJ and BOP’s failures also endangered staff and the surrounding community. The President of the FMC Carswell correctional officer union wrote Senator John Cornyn on April 7, 2020, to blow the whistle on BOP. She reported that seven staff members had contact with Ms. Circle Bear while she was symptomatic, but before test results confirmed she had COVID-19.<sup>8</sup> The staff had “not

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<sup>2</sup> See Letter from David Patton, *et al.*, to Hon. William P. Barr at 5-6 (Apr. 1, 2020) (“April 1 Federal Defender Letter”), <https://bit.ly/35N8GZy>; see also Letter from David Patton, *et al.*, to Hon. William P. Barr at 1 (“Mar. 19 Federal Defender Letter”), <https://bit.ly/35NdSW4>.

<sup>3</sup> Bureau of Prisons, *Update on COVID-19 and Home Confinement* (Apr. 5, 2020), <https://bit.ly/2WGxM0v> (“April 5 BOP Guidance”).

<sup>4</sup> Mem. from Hon. William P. Barr to Michael Carvajal, Director of the Bureau of Prisons at 1 (Apr. 3, 2020) (“April 3 AG Memo”), <https://bit.ly/3ciP5eV>.

<sup>5</sup> Nicholas Bogel-Burroughs & Vanessa Swales, *Prisoner With Coronavirus Dies After Giving Birth While on Ventilator*, N.Y. Times (Apr. 29, 2020), <https://nyti.ms/3duihji>.

<sup>6</sup> See Press Release, Bureau of Prisons, *Inmate Death at FMC Carswell* (Apr. 28, 2020) (“Inmate Death at FMC Carswell”), <https://bit.ly/2L8SzVn>; see also Michael Rothenberg, *The Federal Prisoner Transit System—aka ‘Diesel Therapy’—Is Hell*, The Marshall Project (Aug. 15, 2019), <https://bit.ly/2WiAMS1>.

<sup>7</sup> See Press Release, Sen. Dick Durbin, *Statement on Death of First Female Federal Inmate Due to COVID-19* (Apr. 29, 2020), <https://bit.ly/3fx9ZsF>.

<sup>8</sup> See Letter from Regina Warren, President AFGE Local 1006 to Sen. John Cornyn (Apr. 7, 2020), <https://bit.ly/2SNPMoR> (“Whistleblower Complaint”).

been given any guidance” about what personal protection equipment (“PPE”) was available, the “process of getting [PPE],” or “when/how to use [PPE].”

This failure is no outlier. In just over a month, forty-eight individuals in BOP custody have died from COVID-19.<sup>9</sup> COVID-19 is tearing through BOP facilities; incarcerated individuals are being infected at a rate more than 6.5 times higher than in the United States.<sup>10</sup> Despite this, BOP has transferred less than 1.5 percent of the over 174,000 individuals in its custody<sup>11</sup> to the relative safety of home confinement. These cold numbers are proof of the government’s abdication of its duty. That “moral and constitutional duty,” House Judiciary Committee Chairman Jerry Nadler has explained, requires DOJ to “prevent additional deaths among those who are detained or imprisoned under our laws.”<sup>12</sup>

Congress should not be fooled by DOJ and BOP’s empty promises. Federal judges around the country have used unusually blunt terms to describe the government’s behavior: “an outrage,”<sup>13</sup> “deliberate indifference,”<sup>14</sup> “Kafkaesque,”<sup>15</sup> “illogical,”<sup>16</sup> “alarming,”<sup>17</sup> “unfathomable,”<sup>18</sup> “offends the Court,”<sup>19</sup> and “shocking[.]”<sup>20</sup>

A court-ordered inspection and evaluation last week of the Metropolitan Detention Center (MDC) in Brooklyn, the largest pretrial BOP facility in the country, laid bare DOJ and BOP’s false claims about their response to COVID-19.<sup>21</sup> The former Chief Medical Officer of New York City’s

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<sup>9</sup> Bureau of Prisons, *COVID-19 Coronavirus Page* (last visited May 10, 2020), <https://bit.ly/2SOsQpe> (“BOP COVID-19 Website”).

<sup>10</sup> Federal Defenders of New York, *BOP-Reported Positive Tests for COVID-19 Nationwide* (last visited May 11, 2020), <https://federaldefendersny.org/>.

<sup>11</sup> See Joseph Neff & Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, The Marshall Project (Apr. 25, 2020), <https://bit.ly/2LbOTCj> (“Few Federal Prisoners Released”) (reporting individuals in BOP custody at the beginning of April); BOP COVID-19 Website (last visited May 10, 2020) (2,428 inmates are on home confinement).

<sup>12</sup> See Judiciary Committee-Democrats, Facebook (Apr. 30, 2:30 PM), <https://bit.ly/2LpR45n>.

<sup>13</sup> See Stewart Bishop, *NY Judge Rips ‘Terrible’ Conditions at NYC Federal Jails*, Law360 (May 5, 2020), <https://bit.ly/2WkV3GC>.

<sup>14</sup> *Wilson v. Williams*, ---F.Supp.3d---, 2020 WL 1940882, at \*8 (N.D. Ohio Apr. 22, 2020), *appeal filed*, No. 20-3447, 2020 WL 2120814 (6th Cir. Apr. 27, 2020).

<sup>15</sup> *United States v. Sparta*, ---F. Supp. 3d---, 2020 WL 1910481, at \*1 (S.D.N.Y. Apr. 20, 2020).

<sup>16</sup> *Casey v. United States*, No. 4:18-cr-4, 2020 WL 2297184, at \*2 (E.D. Va. May 6, 2020).

<sup>17</sup> *United States v. Rodriguez*, ---F.Supp.3d---, 2020 WL 1627331, at \*9 (E.D. Pa. Apr. 1, 2020).

<sup>18</sup> See *United States v. McIndoo*, ---F.Supp.3d---, 2020 WL 2201970, at \*8 (W.D.N.Y. May 6, 2020).

<sup>19</sup> *United States v. Amarrab*, No. 17-cr-20464, 2020 WL 2220008 (E.D. Mich. May 7, 2020).

<sup>20</sup> *United States v. Reid*, No. 17-cr-00175, 2020 WL 1904598, at \*3 (N.D. Ca., Apr. 18, 2020).

<sup>21</sup> Facility Evaluation: Metropolitan Detention Center COVID-19 Response, *Chunn v. Edge*, No. 1:20-cv-01590 (E.D.N.Y. Apr. 30, 2020).

Correctional Health Services wrote in his report he was “alarmed by the facility’s failure to implement simple procedures” consistent with Centers for Disease Control and Prevention (“CDC”) guidelines, and he concluded there were “multiple systemic failures” that placed incarcerated individuals and staff at grave risk.<sup>22</sup> In response, the MDC has changed nothing.

Federal correctional officers everywhere are speaking out in the press,<sup>23</sup> a national lawsuit,<sup>24</sup> and by filing complaints with the U.S. Occupational Safety and Health Administration (“OSHA”) about insufficient PPE, non-existent social distancing, and other deviations from CDC guidance.<sup>25</sup>

Under AG Barr’s watch, DOJ and BOP have ignored Congressional oversight,<sup>26</sup> court directives,<sup>27</sup> and whistleblowers.<sup>28</sup> DOJ and BOP have failed to fulfill their obligations to the American people, or to use the powers that Congress has given them. We urge Congress to take immediate and decisive action that does not rely on DOJ or BOP’s discretion.

Congress need not throw the prison gates open. It need only provide a simple, safe, and achievable solution: responsible releases, robust testing and reporting to identify COVID-19, and adequate procedures to prevent the spread of the virus among incarcerated individuals, staff, and their communities.

## I. DOJ is Obstructing Responsible Release.

We have twice written AG Barr to urge him to use “existing authority to take immediate and decisive action to both reduce the number of people entering federal detention and release individuals who are already incarcerated,” by: 1) suspending new arrests and reducing pretrial detention; 2) accelerating and expanding transfers to community and home confinement; and, 3)

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<sup>22</sup> *Id.* ¶¶ 1, 2.

<sup>23</sup> See, e.g., Keith L. Alexander & Dan Morse, *As Virus Spreads in Jails and Prisons, Correctional Officers Fear for Themselves and their Loved Ones*, Wash. Post (May 4, 2020), <https://wapo.st/3bec9Ks>; Luke Barr, *Over 5,000 Corrections Officers Have Contracted Covid-19*, ABC News (May 5, 2020), <https://abcn.ws/2z1B8hG> (“5,000 Corrections Officers Have Contracted Covid-19”).

<sup>24</sup> See, e.g., Complaint, *Braswell v. United States*, No. 20-cv-359, ECF No. 1 (U.S. Ct. Fed. Claims, Mar. 27, 2020), <https://bit.ly/2WmaQVz>.

<sup>25</sup> See, e.g., NACDL, *NACDL – 03-31-2020 OSHA Complaint re BOP brought by Council of Prison Locals 33 Union*, <https://bit.ly/35Lcu5W> (last visited May 3, 2020) (“National OSHA Compl.”); James Call, *Correctional Officers File Complaint about Coronavirus at Federal Prison in Tallahassee*, Tallahassee Democrat (Apr. 18, 2020), <https://bit.ly/3drQ1fD> (“Correctional Officers File Complaint”).

<sup>26</sup> See April 1 Federal Defender Letter at 2 n.6; see also Letter from Hon. Jerrold Nadler & Hon. Karen Bass, to Hon. William P. Barr at 2 (Apr. 10, 2020), <https://bit.ly/2yy5nSy> (“April 10 House Judiciary Letter”); Letter from Sen. Richard J. Durbin & Chuck Grassley, to Hon. William P. Barr (Apr. 21, 2020), <https://bit.ly/2WhCvqM> (“Senate IG Letter”).

<sup>27</sup> See Respondent’s Status Report, *Wilson v. Williams*, No. 4:20-cv-794, ECF No. 49 (N.D. Oh. May 6, 2020) (BOP refusal to consider vulnerable individuals incarcerated at Elkton for furlough, despite court order to do so) (“Elkton BOP Status Report”).

<sup>28</sup> See, *supra*, n. 23-25; see also *Whistleblower Complaint*.

expanding the use of compassionate release.<sup>29</sup> Members of Congress have likewise pressed AG Barr and BOP Director Carvajal to “be as expansive as you can be regarding release.”<sup>30</sup> Neither has heeded these calls.

**Release under the Bail Reform Act.** In a memo dated April 6, 2020, AG Barr sent mixed signals to federal prosecutors on when to seek pretrial detention during the COVID-19 pandemic. Though he acknowledged the risk of detaining vulnerable individuals with underlying health conditions, in the same breath, he directed prosecutors to remain “faithful” to the Bail Reform Act and their “duty to protect the public . . . from contagion spread by someone released from our custody.”<sup>31</sup> In short: if you are unlucky enough to be exposed to COVID-19 at your detention facility, the government will oppose your release. Unsurprisingly, and in contrast with numerous state and local jurisdictions,<sup>32</sup> DOJ continues to routinely oppose release, even in cases where the defendants have serious, undisputed medical conditions. In one jurisdiction, the government has agreed to release in only 8 out of 125 cases since March 16, 2020, where release was sought under the Bail Reform Act. Because of the grave risk to the individuals the government is fighting to keep detained, the danger of increasing—rather than lowering—prison populations and the data showing that higher release rates do not lead to more crime or flight,<sup>33</sup> Congress should act to impose a presumption of release under the Bail Reform Act, absent clear and convincing evidence that the individual poses a specific threat of violence.

**Transfer to Home Confinement.** The CARES Act authorized AG Barr to expand dramatically the use of home confinement to protect vulnerable individuals from COVID-19.<sup>34</sup> But rather than act swiftly, DOJ and BOP have issued guidance and memos,<sup>35</sup> each “more confusing than the next,”<sup>36</sup> that together establish a “complex set of procedural and logistical hurdles to home confinement.”<sup>37</sup>

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<sup>29</sup> See Mar. 19 Federal Defender Letter; April 1 Federal Defender Letter.

<sup>30</sup> April 10 House Judiciary Letter.

<sup>31</sup> Mem. from the Attorney General, *Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic* (Apr. 6, 2020), <https://bit.ly/2zqMGzY> (“April 6 AG Memo”).

<sup>32</sup> March 19 Federal Defender Letter at 3 n. 8.

<sup>33</sup> *Id.* at 4 n. 10.

<sup>34</sup> See CARES Act § 6002 at Div. B, Tit. II, Sec. 12003(b)(2).

<sup>35</sup> See March 26 AG Memo; April 3 AG Memo; April 6 AG Memo; see also Apr. 22 BOP Memo; Bureau of Prisons, *Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic* (archived Apr. 18, 2020), <https://bit.ly/2yKLkNj>; April 5 BOP Guidance; Mem. from David Brewer, BOP Acting Senior Deputy Assistant Director, *Furlough and Home Confinement Additional Guidance* (undated) (archived on April 16, 2020), <https://bit.ly/3dujxCJ>.

<sup>36</sup> See Holly Harris, *Opinion: Blame the Justice Dep’t for Andrea Circle Bear’s Death*, N.Y. Times (May 3, 2020), <https://nyti.ms/2yyeNxp>.

<sup>37</sup> April 1 AG Memo at 2.

Altogether, the guidance is “muddled and arbitrary, bearing little connection to the enormity of the crisis or threat to public safety.”<sup>38</sup>

*Confused standards.* The byzantine criteria in these often contradictory memos have caused chaos and uncertainty within BOP and DOJ. For example, nearly a month after AG Barr’s first memo, the government could not explain the program in response to a federal court, citing “ongoing uncertainty surrounding the home-confinement eligibility criteria.”<sup>39</sup> That court ultimately ordered the defendant’s immediate release: “in light of [DOJ’s and BOP’s] ever-changing guidelines,” the court could “not allow” the defendant to be “endangered for one more day” in BOP custody.<sup>40</sup> Confused and contradictory standards have cruelly resulted in situations where families, informed that a loved one will be transferred to the relative safety of home, are turned away when they arrive at prison gates, and told their loved one is no longer eligible for home confinement.<sup>41</sup>

We are also concerned that these confused standards will disproportionately harm racial and ethnic minorities. On April 28, 2020, Senator Amy Klobuchar and Senator Dick Durbin, joined by fifteen other senators, wrote to Director Carvajal to “urge the [BOP] to release critical demographic data” in light of “preliminary data that has shown COVID-19’s disproportionate impact on certain populations, including racial and ethnic minorities.”<sup>42</sup> In our April 1 letter to AG Barr, we also warned that arbitrary release policies could have a racially disparate impact.<sup>43</sup> It is critical that BOP heed these calls, and promptly release demographic data to ensure racial fairness.

*Failure to act.* Certain data—produced by BOP in civil litigation—confirms that the government has not effectively reduced prison populations. For example, an Ohio court recently ordered BOP to identify immediately the most vulnerable individuals incarcerated at Elkton Federal Correctional Institution—one prison hardest hit by the COVID-19 crisis—and to then evaluate each individual’s eligibility for transfer.<sup>44</sup> Two weeks later, BOP admitted that it had moved none of the 837 identified high-risk individuals into home confinement; only five were “pending” placement”; 72 were “being

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<sup>38</sup> See Lisa Freeland, David Patton & Jon Sands, *We’ll See Many More Covid-19 Deaths in Prisons if Barr and Congress Don’t Act Now*, Wash. Post (Apr. 6, 2020), <https://wapo.st/2WFtSoN>.

<sup>39</sup> See Letter filing by United States Attorney for the S.D.N.Y., *United States v. Haena Park*, 16-cr-473, ECF No. 72 (S.D.N.Y. Apr. 24, 2020).

<sup>40</sup> *United States v. Park*, No. 16-CR-473 (RA), 2020 WL 1970603, at \*5 (S.D.N.Y. Apr. 24, 2020).

<sup>41</sup> See Neena Satija and Matt Zapotosky, *Amid Coronavirus Pandemic, Federal Inmates Get Mixed Signals About Home-Confinement Releases*, Wash. Post (Apr. 24, 2020), <https://wapo.st/3c4TvWz>; Joseph Neff and Keri Blackinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, The Marshall Project (Apr. 25, 2020), <https://bit.ly/2zdqHqUZ>; see also Decl. Dianthe Martinez Books, *Jerdine v. Barr*, 20-cv-00569, ECF No. 1-3 ¶ 26 (D. Ohio Apr. 26, 2020).

<sup>42</sup> Letter from Sen. Amy Klobuchar to Dir. Carvajal (Apr. 28, 2020), <https://bit.ly/2YQGb4a>.

<sup>43</sup> April 1 Defender Letter at 10.

<sup>44</sup> See *Wilson v. Williams*, ---F.Supp.3d---, 2020 WL 1940882, at \*10 (N.D. Ohio Apr. 22, 2020).

further evaluated”; and the remainder—760 individuals—did not qualify.<sup>45</sup> Reports from other institutions repeat the same pattern.<sup>46</sup>

*Counterproductive quarantine.* Even if a person is identified as eligible for home confinement, BOP places them in further danger with its ill-conceived, pre-transfer, 14-day quarantine policy. This policy has needlessly exposed incarcerated persons, staff, and the community to infection. That is because BOP has adopted a “group quarantine” approach in which “many inmates . . . on the cusp of relief to home confinement” are “housed together in close quarters for at least 14 days.” Individuals are not tested before being placed on quarantine, allowing the asymptomatic sick to infect the healthy.<sup>47</sup> A judge explained that “[t]his is an illogical and self-defeating policy . . . ungrounded in science, and a danger to both [the inmate] and the public health of the community.”<sup>48</sup> Last week, Senators Durbin and Grassley met with AG Barr, who assured them that “it’s possible for some low-risk inmates being released to serve a 14-day quarantine in home confinement instead of in prison.”<sup>49</sup> There is no reason to believe these words will translate into action. AG Barr made the same promise on April 3,<sup>50</sup> but weeks later, his attorneys told a court that BOP “has not and will not” consider quarantine outside of BOP.<sup>51</sup>

Due to the failure of DOJ and BOP to use their authority to decrease the prison population through responsible transfers to home confinement, Congressional action is needed to provide courts with broader tools to order the release or transfer—even temporarily—of individuals already sentenced.

**Compassionate Release.** Despite repeated Congressional directives that DOJ use compassionate release expansively during this crisis,<sup>52</sup> BOP facilities have refused to accept or review compassionate release requests<sup>53</sup> and prosecutors have adopted a nearly default opposition to release.

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<sup>45</sup> See Elkton BOP Status Report at 2.

<sup>46</sup> See, e.g., Decl. of Juan Segovia, *Livas v. Myers*, 2:20-cv-422-TAD, ECF No. 8-1 (W.D. La. Apr. 10, 2020), <https://bit.ly/2Lceyus> (Warden’s report that BOP had given FCI Oakdale a list of just 58 individuals (of 1,853) meeting the baseline criteria of release. As of April 10, 2020, only six were approved for release).

<sup>47</sup> *United States v. Scparta*, --- F. Supp. 3d ---, 2020 WL 1910481, at \*3 (S.D.N.Y. Apr. 20, 2020).

<sup>48</sup> *Id.*

<sup>49</sup> Press Release, Sen. Chuck Grassley, *Grassley, Durbin Statement Following Phone Call with AG Regarding Federal Prison System Efforts to Combat COVID-19* (May 6, 2020), <https://bit.ly/3coFBPk> (“May 6 Grassley Press Release”).

<sup>50</sup> April 3 AG Memo at 2.

<sup>51</sup> See *Scarpta*, 2020 WL 1910481, at \*1 (FCI Butner).

<sup>52</sup> Defender April 1 letter at 9 n. 57.

<sup>53</sup> See, e.g., Decl. Kenneth Cassidy, *Martinez-Brooks v. Easter*, No. 20-cv-0569, ECF No. 1 ¶¶ 18, 25 (Danbury) (Apr. 27, 2020), <https://bit.ly/3dx7g0E> (“Danbury Decl.”).

Thanks to the First Step Act of 2018 (“FSA”),<sup>54</sup> defendants no longer must depend on BOP to initiate a motion for compassionate release. This change came after BOP allowed the compassionate release program to languish for decades.<sup>55</sup> Post-FSA, defendants may file a motion directly with the court after administrative exhaustion, or the lapse of 30 days from the warden’s receipt of a request, whichever is earlier.<sup>56</sup> The waiting period, coupled with obstruction by prosecutors in the courts, have combined to prevent vulnerable defendants from obtaining critical relief during the COVID-19 crisis. While 30 days may have seemed reasonable in normal times, such a delay is intolerable for a disease that can go from asymptomatic to fatal in less than a week.<sup>57</sup>

These hurdles to relief have become nearly insurmountable during the COVID-19 crisis. Certain facilities have inexplicably refused even to accept or consider requests for relief.<sup>58</sup> Just as before, BOP refuses to file motions on defendants’ behalf: after a survey of the field, we are not aware of a single BOP-initiated motion for compassionate release during the crisis.<sup>59</sup> On the rare occasion that BOP responds to internal requests for compassionate release, it claims that COVID-19 vulnerability is not a sufficient basis for compassionate release.<sup>60</sup> BOP’s recent report in the FCI Elkton litigation demonstrates its cramped view: of the 836 individuals at heightened risk identified by BOP, it claimed that only one “met the criteria” for compassionate release.<sup>61</sup>

BOP’s obstruction has been compounded by DOJ’s opposition to nearly all compassionate release motions during this crisis. DOJ argues that the situation in BOP facilities is under control, and that people’s risk of contracting COVID-19 might *increase* if released.<sup>62</sup> The government has also disingenuously argued that compassionate release is unnecessary because of the promise of home

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<sup>54</sup> First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (2018)(amending 18 U.S.C. § 3582(c)(1)(A)).

<sup>55</sup> See, e.g., U.S. Dep’t of Justice Office of the Inspector General, *The Federal Bureau of Prisons’ Compassionate Release Program* (Apr. 2013), <https://bit.ly/2YOMm99>.

<sup>56</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>57</sup> See Cassidy McDonald, *Federal Prisons Confirm First Staff Death Linked to Coronavirus*, CBS News (Apr. 19, 2020) (describing USP Atlanta employee who died of COVID-19, after being tested, found asymptomatic, and cleared for entry to the facility less than a week earlier); *United States v. Gorai*, No. 218-CR-220, 2020 WL 1975372, at \*2 (D. Nev. Apr. 24, 2020); *United States v. Gross*, No. 15-CR-769, 2020 WL 1673244, at \*3 (S.D.N.Y. Apr. 6, 2020).

<sup>58</sup> See, e.g., *United States v. Reid*, No. 17-cr-175, 2020 WL 1904598, at \* 38 (N.D. Ca. Apr. 18, 2020); Order, *United States v. Tran*, 08-cr-197-DOC, ECF No. 405 (C.D. Cal. Apr. 10, 2020); Danbury Decl. ¶¶ 18, 25; Letter from Families Against Mandatory Minimums to AG Barr (Apr. 18, 2020), <https://bit.ly/2WgAquU>.

<sup>59</sup> Brief of Amici Curiae Ninth Circuit Federal and Community Defender Organizations in Support of Defender-Appellant, *United States v. Millage*, No. 20-30086, ECF No. 9-1, at 12 (9th Cir. Apr. 21, 2020).

<sup>60</sup> Warden Denial, *United States v. Petrossi*, 17-cr-192, SKT. 124-4 at Ex. D (M.D. Pa. Apr. 9, 2020).

<sup>61</sup> BOP Elkton Status Report at 3.

<sup>62</sup> See April 1 Letter at 6-7 n. 45; see also Gov’t Opp. at 17, *United States v. Cortez-Zelaya*, No. 17-10192, ECF No. 71 (9th Cir. May 3, 2020); Gov’t Resp. at 17-18, *United States v. Amarrab*, No. 5:17-cr-20464, ECF No. 194 (E.D. Mich. May 1, 2020); *United States v. Hammond*, No. 1:02-cr-294-BAH, ECF No. 51 (D.D.C. Apr. 16, 2020).



confinement, which rarely materializes.<sup>63</sup> We were pleased to see Senators Grassley’s and Durbin’s report that AG Barr had represented that “the COVID-19 pandemic will now be used as a basis for compassionate release.”<sup>64</sup> But neither BOP nor AG Barr have given us reason to hope that this is anything but an empty promise.

Because of this fast-moving disease, defendants should be assured quick access to courts to assess the merits of their compassionate release claims. We ask Congress to suspend the procedural exhaustion and 30-day waiting provisions of 18 U.S.C. § 3582(c)(1)(A) during this pandemic.

## **II. DOJ is Failing to Mitigate the Spread of COVID-19 and is Obfuscating the Scope of the Crisis.**

Any serious effort to combat COVID-19 requires social distancing, testing and isolation of cases, and PPE. The government’s refusal to reduce prison populations has made social distancing impossible. Testing, isolation, and PPE are thus even more critical, so BOP can effectively triage outbreaks and protect the staff and incarcerated persons who must face these dangers every day. But BOP’s testing is inadequate, and it appears to be incapable of providing sufficient PPE.

***Failure to Test.*** To hear it from DOJ and BOP, all is well and under control. In April, BOP Director Carvajal touted BOP’s “remarkably low” rate of infection, claiming that “the low number of cases to this point, in a system this large, is a testament to our effective planning and execution-to-date.”<sup>65</sup> In the 60 days since he made those remarks, the number of positive cases reported for staff and incarcerated individuals have ballooned to 4,552.<sup>66</sup> Despite this, BOP’s message remains unchanged: Just last week, Director Carvajal boasted that “only 51 of our institutions—less than half—have been affected by COVID-19,” and that “only 15 have an outbreak with more than 20 active lab-confirmed positive inmate cases.”<sup>67</sup>

Congress should not place much faith in these representations, and Senators Dick Durbin and Chuck Grassley have asked the Inspector General to confirm their accuracy.<sup>68</sup> Testing at BOP facilities varies wildly, and any facility that self-reports zero cases may simply not be testing for this

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<sup>63</sup> See, e.g., *United States v. Park*, No. 16-CR-473, 2020 WL 1970603, at \*5 (S.D.N.Y. Apr. 24, 2020).

<sup>64</sup> May 6 Grassley Press Release.

<sup>65</sup> Bureau of Prisons, *Statement from BOP Director: BOP Response to COVID-19 Pandemic* (Mar. 26, 2020), <https://bit.ly/35L9Kpt>.

<sup>66</sup> BOP COVID-19 Website (this number is a sum of *all* confirmed positive tests nationwide, including deaths, those with “active” confirmed positive test results, and those who have “recovered”) (last visited May 11, 2020).

<sup>67</sup> *Dir. M.D. Carvajal Addresses All Staff*, 3:17 (May 6, 2020), <https://bit.ly/2zIGvNM>.

<sup>68</sup> See Letter from Sen. Durbin and Sen. Grassley to DOJ Insp. Gen. Horowitz 2-3 (Apr. 21, 2020), <https://bit.ly/3cjEdgF>.

virus.<sup>69</sup> In at least one facility, BOP has declared all inmates presumptively infected, stopped testing altogether, and has refused to release infection estimates.<sup>70</sup>

Nor has BOP implemented a systemic testing and isolation protocol for staff. A BOP spokesperson confirmed this, explaining that “staff are typically tested in the community.”<sup>71</sup> There has been at least one report that BOP denied health and safety leave to a correctional officer after he tested positive for COVID-19, and instructed him to return to work if he was fever-free for 72 hours, with no testing to confirm whether he was still contagious.<sup>72</sup>

Even if the low rates of infection are accurate, they change quickly. Because of how quickly COVID-19 spreads in prison, facilities with zero cases can become deadly hotspots within a matter of days. On March 24th, Butner Medium FCI reported its first case. By April 14th, four incarcerated individuals had died and 46 were confirmed infected.<sup>73</sup> By May 9, 7 had died, and there had been 291 confirmed positive tests.<sup>74</sup> And, despite BOP’s “precautions,” the virus has now infected Butner’s medical center, which houses extremely medically vulnerable inmates. On April 3, while the outbreak was worsening, the government opposed a motion for release from the facility, citing BOP’s generic COVID-19 policies.<sup>75</sup> This pattern has repeated itself at FCI Terminal Island, Elkton, Oakdale, Fort Worth and the Metropolitan Correctional Center in Chicago.<sup>76</sup>

BOP cannot identify and isolate individuals infected with COVID-19 without large-scale testing.<sup>77</sup> Out of 2,700 tests conducted nationwide by the BOP, nearly 2,000 came back positive—roughly 70 percent.<sup>78</sup> Last week, the Council of Prison Locals (CPL) called on BOP to “immediately conduct mass testing of all employees and incarcerated people.”<sup>79</sup> CPL warned that “[a]nything less than

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<sup>69</sup> See *United States v. Asaro*, 2020 WL 1899221, at \*3 (E.D.N.Y. Apr. 17, 2020).

<sup>70</sup> Nicholas Chrastil, *Louisiana Federal Prison No Longer Testing Symptomatic Inmates for Coronavirus due to ‘Sustained Transmission,’* The LENS (Mar. 31, 2020), <https://bit.ly/2AbNA3P>.

<sup>71</sup> Barr, *5,000 Corrections Officers Have Contracted COVID-19*.

<sup>72</sup> See AFGE, *A BOP Officer Contracted Coronavirus. He was Told to Return to Work ASAP* (May 4, 2020), <https://bit.ly/35KSCjA>.

<sup>73</sup> Federal Bureau of Prisons, *BOP: COVID-19 Update* (archived copy, Apr. 14, 2020), <https://bit.ly/2LerakY>.

<sup>74</sup> BOP COVID-19 Website (last visited May 9, 2020) (number of “confirmed positive” tests is the sum of all cases reported by BOP).

<sup>75</sup> See *United States v. Rumley*, No. 4:08-cr-00005-JLK-JCH, Doc. 185, at 4-7 (W.D. Va. Apr. 3, 2020).

<sup>76</sup> See *United States v. Segal*, No. 1:18-CR-0733, Doc. 48, at 7-8 (N.D. Ill. May 4, 2020).

<sup>77</sup> See Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times (Mar. 31, 2020), <https://nyti.ms/2SKEaTm>.

<sup>78</sup> Michael Balsamo, *Over 70% of Tested Inmates in Federal Prisons have COVID-19*, AP News (Apr. 29, 2020), <https://bit.ly/2WNRsEy> (“70% of tested inmates”).

<sup>79</sup> ACLU, *ACLU and Council of Prison Locals Call for Mass Testing of All Employees and Incarcerated People as Over 5,000 Correctional Officers Test Positive for COVID-19* (May 7, 2020), <https://bit.ly/35HSz8h>.

immediate drastic action” would demonstrate a “lack of regard for the lives of tens of thousands of correctional professionals and millions of incarcerated individuals and their families.”<sup>80</sup>

BOP’s announcement on May 7, 2020 that it plans to expand testing provides little consolation.<sup>81</sup> While promising expansion, the press release does not explain the scope of the enhancement. Nor does it mention any plan to test staff. BOP practices in its contract-private prisons are similarly opaque. It took weeks for BOP to report COVID-19 cases in privately run prisons: the data was not posted on its website until May 7, 2020.<sup>82</sup> It has yet to report how many individuals incarcerated in private prisons have been tested, or how many staff have been tested or confirmed positive.

Failure to test has long-term implications. Absent robust, universal testing, incarcerated individuals cannot safely access counsel, the courts, and programming.

***Failure to Protect.*** Not only is BOP failing to identify positive cases, it is failing to prevent the spread of disease through basic measures like adequate PPE. In the CARES Act, Congress dedicated \$27 billion to purchasing PPE to protect first responders from infection.<sup>83</sup> On April 10, 2020, Director Carvajal told federal prison employees: “[L]et me assure you, we have a sufficient quantity of personal protective equipment.”<sup>84</sup> Employees around the country tell a different story.

Staff and inmates are desperate for PPE. After a serious outbreak at Lompoc USP in California, the facility “is still not receiving sufficient [PPE].”<sup>85</sup> Officers and staff are “reportedly sleeping in their cars to avoid the potential transmission of the disease to their loved ones at home.”<sup>86</sup>

Even at facilities with facemasks, “officers worry that the PPE they’ve been given isn’t adequate to protect them from daily contact with inmates, especially at facilities where dozens have tested positive.”<sup>87</sup> The union representing officers and staff at FCI Tallahassee filed an OSHA complaint because, after “[w]eeks of requests from the . . . labor union, . . . officers were supplied with what

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<sup>80</sup> *Id.*

<sup>81</sup> Bureau of Prisons, *Bureau of Prisons to Expand Rapid Testing Capabilities* (May 7, 2020), <https://bit.ly/2zjLcb1>.

<sup>82</sup> Joseph Neff, *Why Did It Take the Feds Weeks to Report COVID-19 Cases in Privately Run Prisons*, The Marshall Project (May 8, 2020), <https://bit.ly/2YMuI5F>; see also Bureau of Prisons, *Privately-Managed Prisons*, <https://bit.ly/3bITJau> (last visited May 9, 2020).

<sup>83</sup> Rep. Greg Walden, *CARES Act Delivers on our Health Care Needs in a Big Way*, The Hill (Mar. 27, 2020), <https://bit.ly/2WDSliV>.

<sup>84</sup> Michael Carvajal, *Dir. M.D. Carvajal Addresses All Staff*, 0:45 (Apr. 10, 2020).

<sup>85</sup> Letter from Rep. Carbajal, Sen. Harris, and Sen. Feinstein to Director Carvajal 1 (Apr. 21, 2020), <https://bit.ly/2Admo4P> (“Feinstein Letter”).

<sup>86</sup> *Id.* at 1.

<sup>87</sup> Balsamo, *70% of Tested Inmates*.

they call counterfeit N95 masks” that “lacked the label and design that the [CDC] says a legitimate mask should have.”<sup>88</sup>

A separate OSHA complaint filed by CPL says that BOP’s failures are “proliferating the spread of” COVID-19 “both within our prison system and to our surrounding communities,” and is “expected to result in death and severe health complications and/or possible life-long disabilities.”<sup>89</sup> Specifically, the complaint alleges that BOP has failed to provide proper PPE to staff transporting “hospitalized inmates testing positive for the virus” and that BOP has failed to provide sufficient air filtration and other controls to minimize the spread of the virus.<sup>90</sup>

We entreat Congress to take immediate action. Action to protect incarcerated individuals, prison employees, and our communities by requiring DOJ and BOP to implement basic and humane measures to prevent the spread of COVID-19 at all federal detention facilities. Action to prevent prosecutors from needlessly opposing the release of vulnerable individuals who pose no specific threat of violence. And action to allow courts to release responsibly or transfer temporarily at-risk individuals to the safety of the community.

Sincerely,

/s/

David Patton

Executive Director, Federal Defenders of New York  
Co-Chair, Federal Defender Legislative Committee

/s/

Jon Sands

Federal Public Defender for the  
District of Arizona  
Co-Chair, Federal Defender Legislative Committee

/s/

Lisa Freeland

Federal Public Defender for the  
Western District of Pennsylvania  
Chair, Defender Services Advisory Group

cc: Hon William G. Barr, Attorney General  
Mr. Michael Carvajal, Director, Federal Bureau of Prisons

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<sup>88</sup> Call, *Correctional Officers File Complaint*.

<sup>89</sup> National OSHA Compl.; see Courtney Buble, *Federal Prisons Pose ‘Imminent Danger’ in Spreading COVID-19, Union Says*, Government Executive (Apr. 6, 2020), <https://bit.ly/2YSMKDD>.

<sup>90</sup> National OSHA Compl.

Chairman Lindsay Graham, United States Senate Committee on the Judiciary  
Ranking Member Dianne Feinstein, United States Senate Committee on the Judiciary  
Sen. Joshua D. Hawley, Chair, Crime Subcommittee  
Sen. Sheldon Whitehouse, Ranking Member, Crime Subcommittee

Chairman Jerrold Nadler, United States House Committee on the Judiciary  
Ranking Member Kevin McCarthy, United States House Committee on the Judiciary  
Hon. Karen Bass, Chair, Crime Subcommittee  
Hon. John Ratcliffe, Ranking Member, Crime Subcommittee