IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MONEY, *et al.*,	)	
	)	
Plaintiffs,	)	No. 20 cv 2093
v.	)	
	)	
PRITZKER, *et al.*,	)	
	)	
Defendants.	)	

MONEY, *et al.*,	)	
	)	
Petitioners,	)	No. 20 cv 2094
v.	)	
	)	
JEFFREYS,	)	
	)	
Respondent.	)	

PLAINTIFFS' SUBMISSION ON THE
APPLICABILITY AND EFFECT OF 18 U.S.C. § 3626

The COVID-19 pandemic presents an unprecedented—and hopefully never to be repeated—threat to the lives of people worldwide. Those of us who live outside of prisons have turned our lives upside down to protect ourselves, our families, and our communities from this dangerous threat. People who live inside of prisons, however, cannot do the same. COVID-19 has made its way into Illinois' prisons, is already wreaking deadly havoc inside Stateville Correctional Center, and is just getting through the door at major downstate facilities like Logan, Menard, Danville, Sheridan, and Graham Correctional Centers. These prisons can be analogized to buildings on fire: the fire is sure to spread, and certain people within these facilities are especially susceptible to getting burned. These people need this Court's urgent intervention to get them out—even if just on a temporary basis—so that they can survive this crisis.

Procedural Background

On April 2, 2020, Plaintiffs James Money, *et al.*, filed two separate actions concerning the COVID-19 crisis in the Illinois Department of Corrections (IDOC). *Money et al. v. Pritzer et al*, No. 20 cv 2093, is a Section 1983 action that seeks certification of six separate subclasses with different relief sought for each class. Broadly speaking, Subclasses 1 and 2 consist of medically vulnerable prisoners who seek furlough pursuant to the Illinois prisoner furlough statute so that they can follow guidelines issued by the Centers for Disease Control ("CDC") during the COVID-19 crisis, which they cannot do inside of IDOC prison walls. Subclasses 3-5 seek transfer to home confinement during the COVID-19 crisis pursuant to various Illinois statutes that allow home confinement for certain groups of prisoners. Subclass 6 seeks an award of 180 days sentencing credit, allowed under Illinois law, for prisoners within 180 days of release. *Money et al. v. Jeffreys*, No. 20 cv 2094, is an emergency petition for writs of habeas corpus that seeks relief parallel to that sought in the Section 1983 matter.

The same day, Plaintiffs also filed an emergency motion for a TRO/PI in the Section 1983 matter. *See Money v. Pritzker*, No. 20 cv 2093, Doc. 9. That motion seeks preliminary certification of Plaintiffs' Subclasses 1 and 2 and an order transferring those individuals to their homes or other approved placement to self-isolate via temporary medical furlough while remaining in the custody and control of IDOC. *Id.* The filed TRO/PI does not include, at this stage, relief for Subclasses 3-6.

On April 4, 2020, the Court directed Plaintiffs to supplement their TRO/PI motion to "provide their position regarding the applicability and effect of 18 U.S.C. § 3626 to their lawsuit and, in particular, to the relief they are requesting in the TRO/PI motion." *Money v. Pritzker*, No. 20 cv 2093, Doc. 22.

As Plaintiffs describe in further detail below, 18 U.S.C. § 3626 applies to their Section 1983 suit, but it has no application to the habeas action. Furthermore, the relief that Plaintiffs seek in the Section 1983 TRO/PI motion—placement of Subclasses 1 and 2 on medical furlough—does not implicate § 3626(a)(3) because it does not seek a prisoner release order. Plaintiffs request for relief also satisfies § 3626(1) and (2) because it is narrowly tailored to correct violations of federal rights.

I. The Relevant Provisions of 18 U.S.C. § 3626

Requests for relief under 18 U.S.C § 3626 are governed by Subsection (a) of that statute, which contains three core provisions: Subsection (1) governs all prospective relief, Subsection (2) governs preliminary injunctions and temporary restraining orders, and Subsection (3) governs "prisoner release order[s]."

Subsection (1) requires that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a

particular plaintiff or plaintiffs," *id.* at (a)(1)(A), and instructs courts to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief" when considering whether "such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.* Further, the section prohibits courts from ordering a state official to exceed her authority under state law unless doing so is required by federal law to protect a federal right and no other relief will do so. *Id.* at (a)(1)(B). Courts refer to these requirements as the "needs-narrowness-intrusiveness" test. *E.g.*, *Fields v. Smith*, 653 F.3d 550, 558 (7th Cir. 2011).

Subsection (2) applies the narrow-tailoring requirements of Subsection (1) to requests for preliminary injunctions and temporary restraining orders, and further requires that all such relief "shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) [that the relief be narrowly tailored and minimally intrusive] . . . and makes the order final before the expiration of the 90-day period." *Id.* at (a)(2).

Finally, Subsection (3) governs "prisoner release order[s]." A "prisoner release order" is defined as "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." *Id.* at (g)(4). Subsection (3) imposes substantive and procedural requirements on prisoner release orders, including the appointment of a three-judge district court for any release order that involve remedies for overcrowding.

II. Plaintiffs' TRO/PI Motion Does Not Seek a "Prisoner Release Order" Under 18 U.S.C. § 3626(a)(3)

Plaintiffs' TRO/PI motion seeks specific, narrowly tailored relief that does not implicate the release order provisions of the PLRA. The motion seeks relief for Subclasses 1 and 2 only:

medically vulnerable and over-55 people in IDOC custody who can be furloughed under 730 ILCS 5/3-11-1. In more concrete terms, Plaintiffs propose a remedial plan requiring the IDOC to: (1) identify eligible subclass members; (2) evaluate whether their transfer to medical furlough (or home detention, if IDOC prefers) would implicate public safety concerns and thus render them ineligible for furlough or detention; and (3) medically furlough (or transfer to home detention, if IDOC prefers) all eligible subclass members. *See e.g.*, Ex. A, Plaintiffs' Draft Remedial Plan.

Plaintiffs' requested relief is not a "prisoner release order" within the meaning of § 3626(a)(3) for three independent reasons. First, as discussed in Subsection A below, Plaintiffs do not request that IDOC release them from custody, but rather that IDOC act with urgency to identify, evaluate, and relocate appropriate and eligible class members. Individuals transferred to medical furlough or home detention as a result of IDOC's evaluations and determinations would remain in the custody and control of the IDOC and the IDOC would be free to impose restrictions pursuant to 730 ILCS 5/3-11-1 or 730 ILCS 5/5-8A-3. Second, as discussed in Subsection B below, the PLRA limits release orders by federal courts to remedy overcrowding. That provision is not implicated in this case, which does not relate to overcrowding but rather to the unique circumstance of a highly contagious virus that puts the lives of class members at increased risk so long as they are held in a prison setting. Third, as explained in Subsection C, even if there were ambiguity about whether § 3626(a)(3) reaches Plaintiffs' circumstances, the constitutional avoidance doctrine would require this Court to resolve the ambiguity in Plaintiffs' favor. To the extent that § 3626(a)(3) would deny relief, it would be unconstitutional as applied.[1]

[1] Plaintiffs' other proposed subclasses likewise do not seek a PLRA "prisoner release order." Just as medical furlough does not implicate § 3626(a)(1)(3), neither does transfer to home confinement. Plaintiffs can further address the applicability of § 3626(a)(1)(3) to Subclasses 3-6 at a later stage. The currently-pending TRO/PI motion does not seek relief for these subclasses.

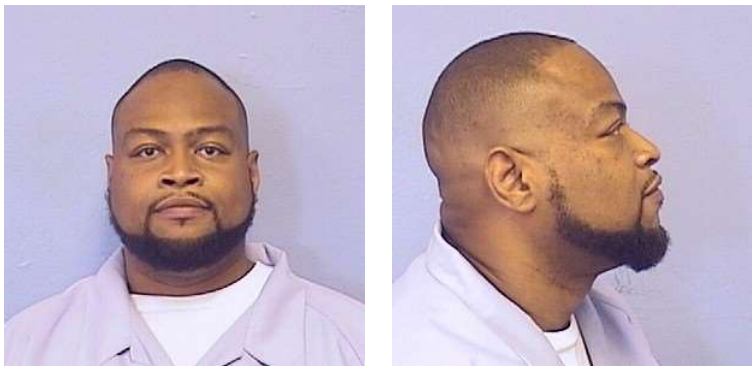
A. Plaintiffs Do Not Seek a Release Order, But Rather a Process to Mitigate the Threat of COVID-19 for Medically Vulnerable Prisoners, Evaluate Their Suitability for Medical Furlough, and Transfer Eligible Prisoners

By its very terms, 18 U.S.C. § 3626(a)(3) applies only to an order "that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." § 3626(g)(4). Plaintiffs do not seek either of these things. Rather, they seek a process through which subclass members eligible for medical furlough will be identified and evaluated based on a balancing of public safety and public health needs, and transferred accordingly.

The plain language of Illinois' prison furlough statute defines a furlough not as release from confinement or custody, but as an extension of "the limits of the place of confinement of a committed person under prescribed conditions." 730 ILCS 5/3-11-1. Consistent with this concept, the Illinois Administrative Code treats prisoners on medical furlough as "committed persons," governed by the Code's "Authorized Absence" provisions. *See* 20 Ill. Admin. Code § 530.40. Prisoners on furlough are considered to remain under confinement for a variety of purposes, including election law and public benefits law. *See* 10 ILCS 5/3-5 ("Confinement . . . shall include any person convicted and imprisoned but granted a furlough as provided by Section 3-11-1 of the Unified Code of Corrections . . ."); Social Security Administration (SSA) Program Operations Manual System (POMS) PR 06805.016 Illinois ("a prisoner is considered 'confined' [] or 'a resident of a public institution' [] even if he is granted and/or released on a furlough, for purposes of suspension of benefits to prisoners").

When transferred, these Plaintiffs will still remain in IDOC custody, though their location will have changed. By way of illustration, all of the IDOC prisoners who have COVID-19 and are on ventilators at outside hospitals are on "medical furlough" status. Although not inside of a

specific correctional center, these people are still indisputably still in IDOC custody, as is clear from the IDOC profile of one these men, below:



K77218 - WILSON, JOSEPH

Parent Institution:	STATEVILLE CORRECTIONAL CENTER
Offender Status:	MEDICAL FURLOUGH
Location:	FURLOUGH

IDOC still considers furloughed or transferred prisoners as being within the IDOC population, just as it would for someone who resides in the community on electronic monitoring or who resides behind prison walls. Recent data shows that IDOC has approximately 1500-1700 prisoners on medical furlough status at any given time. *See* Ex. B, IDOC, Operations and Management Report (OMR) Key Variables Fiscal Year 2020, 1.

The custodial status of furloughed prisoners is set forth in the nature and duration of furloughs: the statute contemplates temporary relocation to "(2) to obtain medical, psychiatric or psychological services when adequate services are not otherwise available." 730 ILCS 5/3-11-1(a)(2). Given the unique threat posed by COVID-19, furlough to a home setting—where social distancing, the only established approved mechanism to avoid infection, can be practiced—falls within the scope of the furlough statute. Once the threat posed by COVID-19 has been contained or mitigated, IDOC can recall these individuals back to correctional centers. Indeed, the medical furloughs Plaintiffs seek are necessarily temporary. 730 ILCS 5/3-11-1(a)(2) (authorizing IDOC

to furlough a prisoner for a limited period of time for medical reasons). Plaintiffs do not seek a release from custody, and § 3626(a)(3) does not apply.

B. The PLRA's Release Order Requirements for Mass Prisoner Releases and Population Caps Are Inapplicable Here

Although Plaintiffs do not seek a prisoner release order within the meaning of the PLRA, even if they did, because they do not seek a remedy for overcrowding, the circumstances of today's pandemic are outside the scope of § 3626(a)(3). Both the plain language of the statute as a whole and the legislative history demonstrate that this provision is specific to federal court orders remedying violations primarily caused by overcrowding. *See* 18 U.S.C. § 3626(a)(3)(e) (limiting release orders to where "crowding is the primary cause of the violation of a Federal right"). The House Report accompanying the PLRA explained that it was intended to govern court imposed "prison caps." H.R. Rep. No. 104-21, p.25 (1995).

Nothing in the PLRA displaces district courts' "broad equitable powers to order the transfer of inmates to facilities better equipped to provide for their medical needs." *Reaves v. Dep't of Corr.*, 392 F. Supp. 3d 195, 209-10 (D. Mass. 2019) (citing *Johnson v. Harris*, 479 F. Supp. 333, 337-38 (S.D.N.Y. 1979) (ordering prison to either transfer prisoner to facility equipped to provide for his medical needs or to ensure he is provided with adequate care as remedy for prison's deliberate indifference to his serious medical needs); *see also United States v. Wallen*, 177 F. Supp. 2d 455, 458 (D. Md. 2001) (ordering transfer of pretrial detainee to a hospital since "the Marshal's Service cannot assure this Court that it will provide the medical care that the Constitution mandates so long as he is held at MCAC"); *see also* ABA Standards for Criminal Justice, 23-6.2 (3d ed. 2011) ("A prisoner who requires care not available in the correctional facility should be transferred to a hospital or other appropriate place for care."); *cf. Murphy v. Lane*, 833 F.2d 106 (7th Cir. 1987) (allowing plaintiff's claim for retaliatory transfer

to go forward based on prison officials' transfer of plaintiff to prison more poorly-equipped to handle his psychiatric needs).

For more than two decades, district courts have found that § 3626(a)(3) does not apply to orders remedying violations of federal rights other than overcrowding, even where that order requires prisoners to be moved out of their current facilities. In *Doe v. Younger*, No. 91-187 (E.D. Ky. Sept. 4, 1996), Op. and Order (attached as Ex. C) at 10-12, the district court banned the housing of juveniles for more than 15 days in jail, where conditions were unacceptable for children. The court held that this was not a prisoner release order under the PLRA, even where it had the effect of reducing the number of children in the facility: "[T]he court's order does not direct the release of any child. It is undisputed that counties . . . often house juveniles in need of a secure facility in other counties. In fact, such transfers from facilities in one county to facilities in another county or even another state are extremely common. Indeed, the Kentucky Juvenile Code specifically contemplates such transfers."

In a case directly on point to the present situation, *Plata v. Brown*, No. C01-1351, 2013 WL 3200587, at *9 (N.D. Cal. June 24, 2013), the court was faced with the sweeping transmission of coccidioidomycosis, or Valley Fever, "an infectious disease caused by inhalation of a fungus," in certain prisons within the California state prison system. *Plata*, at *2. The court granted an exclusionary order for medically vulnerable prisoners, rejecting the defendants' argument that the PLRA barred the requested relief unless issued by a three-judge court:

> Here, looking at the [PLRA] statute as a whole requires reading the definition of "prisoner release order" in conjunction with the requirements for entering one. One such requirement is that a three judge court must determine, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right," before it can enter a prisoner release order. 18 U.S.C. § 3626(a)(3)(E)(i). Consequently, adopting Defendants' interpretation of "prisoner release order" would mean that a court could only order that prisoners be transferred from one prison to another if overcrowding were the primary cause of the violation of those prisoners' rights, and not if any other reason were

> causing the violation. Defendants have failed to point to anything in the legislative history that indicates an intent to limit the protection of inmates' constitutional rights in this manner . . . .

Id. at *9.

In the context of the relief requested here, the PLRA's legislative history review is not an academic exercise, but an imperative affirmation of this court's broad equitable authority to order relief for Subclasses One and Two. "'A statute should not be construed to displace courts' traditional equitable powers '[a]bsent the clearest command to the contrary.'" *Plata*, 2013 WL 3200587, at * 9 (citing *Gilmore v. California*, 220 F.3d 987, 997 n.12 (9th Cir. 2000), and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." (quotation marks and citations omitted)). As the PLRA's legislative history demonstrates, Congress did not intend to limit courts' ability to move or transfer prisoners as a result of other (non-crowding) constitutional violations—including those presented here. *See Reaves*, 404 F. Supp. 3d at 523 ("Accepting Defendants' argument would mean that the only way a district court can order the release of a prisoner is for a violation of his constitutional rights where overcrowding caused the violation, but not if any other reason caused the violation. Defendants have failed to present anything in the legislative history which evidences Congressional intent to limit the protection of inmates' constitutional rights in this way—presumably because there is no such history.").

As both the *Doe* and *Plata* courts concluded, the PLRA does not preclude court orders to transfer medically vulnerable prisoners, which is the relief Plaintiffs seek here. *See*, *e.g.*, *Plata*, 2013 WL 3200587, at *9 ("Sponsors of the PLRA were especially concerned with courts setting 'population caps' and ordering the release of inmates as a sanction for prison administrators'

failure to comply with the terms of consent decrees designed to eliminate overcrowding.") (citing *Gilmore*, 220 F.3d at 998 n.14); *Doe v. Younger*, attached as Ex. C, at 11 ("After reviewing the substantive provisions concerning prisoner release orders and the legislative history underlying this provision of the PLRA, it is clear that the prisoner release order provisions are directed at prison caps, *i.e.*, orders directing the release of inmates housed in a particular institution once that institution houses more than a specific number of persons. This is not that kind of case."). Senators who supported § 3626's restrictions did so explicitly in response to federal courts that were "dictat[ing] prison population size and order[ing] excess prisoners released." 142 Cong. Rec. S10576-02, 1996 WL 522797 (remarks of Sen. Abraham). The record evinces the overriding intent to limit the capacity of federal judges to impose "prison population cap[s]." 141 Cong. Rec. S14414 (daily ed. Sept. 27, 1995) (remarks of Sen. Dole) ("Perhaps the most pernicious form of micromanagement is the so-called prison population cap . . . . By establishing tough new conditions that a Federal court must meet before issuing a prison cap order, this bill will slam-shut the revolving prison door."); *see also* 142 Cong. Rec. S3703-01, 1996 WL 188576 (remarks of Sen. Abraham) (the purpose of the PLRA was to end such judicial orders as "a program of wholesale releases of up to 600 criminal defendants per week to keep the prison population down to what the judge considers an appropriate level"); Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. Miami Race & Soc. Just. L. Rev. 1, 27-28 (2016) (collecting congressional testimonies and reports identifying federal court-imposed prison population caps as the target of the PLRA).

Plaintiffs do not seek such mass release orders or population caps. Instead, Plaintiffs seek an expedited, individualized review and re-location of those people who are medically vulnerable and more likely to have serious complications or to die if they contract COVID-19.

The purpose of this expedited review is to evaluate their suitability for medical furlough or home detention—not release from IDOC custody. No court has ever held that relief of such deferential nature is in conflict with § 3626(a)(3).

C. The Doctrine of Constitutional Avoidance Requires the Court to Interpret § 3626 Consistently With the Relief Sought by Plaintiffs

Even if there were ambiguity about whether § 3626(a)(3) applies to the relief Plaintiffs seek, the doctrine of constitutional avoidance requires resolving that ambiguity in Plaintiffs' favor. If § 3626(a)(3) is interpreted to preclude, or even to delay, relief sought by Plaintiffs in the face of an undisputed imminent risk of serious illness or death arising from a deadly virus, this provision would be unconstitutional as applied. Such an interpretation would unlawfully prevent courts from ordering relief urgently needed to protect prisoners' lives and federal rights in the face of an unprecedented pandemic, and must be avoided. *See Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting U*nited States ex rel. Attorney General v. Delaware & Hudson Co*., 213 U.S. 366 (1909)) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); *Gilmore v. California*, 220 F.3d 987, 998 (9th Cir. 2000) ("The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.") (citing *DeBartolo Corp v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

In the unique circumstances of the COVID-19 pandemic, requiring the § 3626(a)(3) procedures and precluding relief because Plaintiffs' have not alleged that their rights are violated due to overcrowding, would be unconstitutional. Defendants here are well aware of the

immediate risks to Plaintiffs' lives and health from remaining in the congregate setting of prisons. *See* ECF No. 1, Complaint, ¶¶ 43-44. Every day of delay does not merely delay relief but increases the risk. At least two prisoners have already died. Reading the PLRA to prevent the courts from acting here would be unconstitutional, or at a minimum, raises serious constitutional concerns. *Jones*, 529 U.S. at 857 (courts should avoid statutory constructions that raise "grave and doubtful constitutional questions") (internal quotation marks and citation omitted).

III. The Relief Plaintiffs Seek in the Section 1983 Matter Satisfies the "Needs-Narrowness-Intrusiveness" Requirements of § 3626(a)(1) & (a)(2)

The urgency of the risk posed to medically vulnerable Plaintiffs by COVID-19 cannot be overstated. Continued incarceration of Plaintiffs in Subclasses 1 and 2 puts them at substantial risk of imminent contraction of and death from COVID-19, in violation of the Eighth Amendment and the Americans with Disabilities Act.

Under the PLRA, any injunctive remedy must satisfy the "needs-narrowness-intrusiveness requirement." *See Fields v. Smith*, 653 F.3d 550, 558 (7th Cir. 2011). That means that a district court issuing a preliminary injunction must find that the relief (1) is narrowly drawn, (2) extends no further than necessary to correct the harm requiring preliminary relief, and (3) is the least intrusive means necessary to correct that harm. 18 U.S.C. § 3626(a)(2). The court must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief." *Id.* The "needs-narrowness-intrusiveness" requirement is case-specific and "must be undertaken in light of both the magnitude of existing constitutional violations and the available alternative remedies." *Morales Feliciano v. Rullan*, 378 F.3d 42, 54 (1st Cir. 2004); *see also Brown v. Plata*, 563 U.S. 493, 531 (2011) ("Narrow tailoring requires a fit between the remedy's ends and the means chosen to accomplish those ends . . . . The scope of the remedy must be proportional to the scope of the

violation, and the order must extend no further than necessary to remedy the violation."). The unique circumstances of the COVID-19 pandemic, and the particular risks it poses for the medically vulnerable, requires immediate furlough or transfer for Subclasses 1 and 2.

Accordingly, this Court must order IDOC to implement a process similar to one included in Sections 1 and 2 of in the Plaintiffs' proposed Draft Remedial Plan, so that subclass members who pose no risk to public safety are transferred from facilities where the chances of contracting COVID-19 are incredibly high, to community placements where they can safely quarantine while remaining in IDOC custody. *Cf. Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (prison official can be liable "for denying humane conditions of confinement" where "he knows inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."); *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016) ("If a risk from a particular course of medical treatment (or lack thereof) is obvious enough, a factfinder can infer that a prison official knew about it and disregarded it." (citations omitted).

A. Relief Sought by Plaintiffs is Narrowly Drawn

The relief proposed in Plaintiffs' Draft Remedial Plan is narrowly drawn both in scope and in substance. While Plaintiffs' Section 1983 action is brought on behalf of all prisoners in the IDOC and six cognizable subclasses, they see preliminary relief for two subclasses only: those who are medically vulnerable due to age, and those who are vulnerable due to preexisting medical conditions. Urgent action is required to protect the lives of these prisoners by preemptively removing them from prison facilities before they contract COVID-19.

The relief itself is also narrowly tailored to meet the particular characteristics and circumstances of the COVID-19 pandemic. As detailed more fully in Plaintiffs' complaint, standards from the CDC and other public health experts indicate that all individuals, but

particularly those who are medically vulnerable, should avoid close contact with people who are sick or who are or may be contagious even if asymptomatic. *See* ECF No. 1, Complaint, ¶¶ 31-33. In Illinois prisons, Defendants have admitted that all aspects of daily life take place in a congregate setting making social distancing impossible. *See id.* ¶¶ 43-44. The only way for Defendants to ensure that medically vulnerable prisoners can keep their distance from others is by transferring them to a different environment.

B. Relief Sought by Plaintiffs Does Not Extend Further Than Necessary to Correct the Violation of their Federal Rights

The preliminary injunctive relief sought by Plaintiffs does not extend further than necessary to correct the constitutional violation at issue, given the nature of the violations of federal law and IDOC's inability to remedy the serious risk of harm in any other way. While the court's order for relief must be deliberately narrow to minimize intrusion into correctional operations, the relief ordered must also be sufficient to fulfill its function of remedying the violations at hand. *See Brown*, 563 U.S. at 511 ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."). Here, the violations at hand include imminent risk of contracting COVID-19, which could lead to serious medical complications and death. The only adequate remedy for medically vulnerable prisoners is medical furlough or transfer.

The very nature of Illinois prisons renders IDOC incapable of protecting the medically vulnerable subclasses from COVID-19's spread if they remain within IDOC facilities. Illinois' Director of Public Health has admitted that IDOC facilities do not have enough individual cells to isolate prisoners with confirmed cases of the virus, and that prisons "pose unique challenges in stopping the spread of disease and protecting the health of individuals who live and work there." *See* ECF No. 1, Complaint, ¶ 43. If confirmed cases cannot be successfully quarantined within

IDOC facilities, the only way the IDOC can protect the lives of these vulnerable individuals is by immediately furloughing or transferring them to a site outside the prison.

This Court cannot not wait for the virus to spread to each IDOC facility before identifying eligible class members and granting them medical furlough. *Cf. Skinner v. Uphoff*, 234 F. Supp. 2d 1208, 1218 (D. Wyo. 2002) ("Of course, the remedy ordered by this Court shall extend no further than necessary to correct the violation of the Federal right, but if it is necessary to enact systemic and prophylactic measures in order to correct the violations found to exist in this instance, the Court may do so."). Once this dangerous virus enters the prison, it will spread rapidly from prisoner to prisoner and among staff. Catastrophe already has struck at Stateville, where the number of confirmed COVID-19 cases has grown exponentially in just a matter of days, sickening dozens of prisoners and staff and killing at least two prisoners. COVID-19 cases have now been confirmed among staff or prisoners at Stateville NRC, Menard, Logan, Danville, Sheridan, Graham, Joliet Treatment Center, and Kewanee. Action must be taken now to prevent devastation throughout prisons and prison communities across the state.

C. The Relief Sought is the Least Intrusive Means to Remedy the Violation

Plaintiffs' proposed relief wholly respects the discretion of the IDOC and requires relocation only for those individuals who have medical vulnerabilities to COVID-19 and pose no threat to public safety. This relief is authorized by state law and is the least intrusive means to protect the life and rights of the medically vulnerable Plaintiff subclasses.

The Illinois legislature created medical furlough as a mechanism to allow for temporary change in confinement under special circumstances, and one would be hard pressed to find a more dire special circumstance than the current global pandemic. Under Illinois' medical furlough statute, the IDOC is authorized to "extend the limits of the place of confinement of a

committed person under prescribed conditions, so that he may leave such place on a furlough." 730 ILCS 5/3-11-1(a). The COVID-19 pandemic has already claimed the lives of at least two Illinois prisoners and sent more than a dozen to a hospital intensive care unit. Medical furlough is an appropriately tailored remedy to protect the lives of prisoners who are most at risk of death from COVID-19 due to their age and preexisting medical conditions.

IV. PLRA Has No Application to Petitions for Writs of Habeas Corpus

Petitioners request emergency action in their request for writs of habeas corpus; as in the Section 1983 suit, Petitioners seek immediate furlough or transfer of Subclasses 1 and 2. The PLRA has no application to a habeas petition. *Walker v. O'Brien*, 216 F.3d 626, 634 (7th Cir. 2000) ("[W]e conclude that cases properly brought under §§ 2241 or 2254 as habeas corpus petitions are not subject to the PLRA. In so doing, we bring this circuit into line with all of our sister circuits who have ruled on the matter.") (citing *Davis v. Fechtel*, 150 F.3d 486, 488-90 (5th Cir. 1998); *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811-12 (10th Cir. 1997); *Blair-Bey v. Quick*, 151 F.3d 1036, 1039-41 (D.C. Cir. 1998)); *see also Greyer v. Ill. Dep't of Corr.*, 933 F.3d 871, 878 (7th Cir. 2019) (observing that "habeas corpus petitions do not give rise to a strike under the PLRA"). This conclusion is fully supported by the two separate statutory schemes enacted by Congress to govern § 1983 actions (the PLRA) and habeas petitions (the Anti-Terrorism and Effective Death Penalty Act). *See Blair-Bey*, 151 F.3d at 1041 (noting that the PLRA and AEDPA were enacted two days apart, "strongly suggest[ing] that Congress intended to make its changes to habeas proceedings via the AEDPA, and to alter procedure in prisoner civil rights litigation in the PLRA").

Dated: April 6, 2020

Respectfully submitted,

/s/Elizabeth Mazur
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CERTIFICATE OF SERVICE

I, Elizabeth Mazur, an attorney, certify that I served this pleading on all counsel of record by filing it through CMECF system.

/s/Elizabeth Mazur

PLAINTIFF'S DRAFT PROPOSED REMEDIAL PLAN RELATED TO THEIR REQUEST FOR A TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

1. **IDENTIFICATION OF INDIVIDUALS ELIGIBLE FOR IMMEDIATE TRANSFER TO FURLOUGH OR HOME DETENTION**: Within three days of the date of the order, the Illinois Department of Corrections will identify all people in the physical custody of IDOC and who are vulnerable due to underlying medical condition or age, within these categories:
    i. People who have a pre-existing condition and have an increased risk of serious harm or death from COVID-19 as result of that condition. Pre-existing conditions include but are not limited to people with respiratory conditions including chronic lung disease or moderate to severe asthma; people with heart disease or other heart conditions; people who are immunocompromised as a result of cancer, HIV/AIDS, or any other condition or related to treatment for a medical condition; people with chronic liver or kidney disease or renal failure (including hepatitis and dialysis patients); people with diabetes, epilepsy, hypertension, blood disorders (including sickle cell disease), inherited metabolic disorders; people who have had or are at risk of stroke; and people with any other condition specifically identified by CDC either now or in the future as being a particular risk for severe illness and/or death caused by COVID-19, and who are eligible for medical furlough pursuant to 730 ILCS 5/3-11-1.
    ii. People who are medically vulnerable and have an increased risk of serious harm or death from COVID-19 because they are 55 years of age and older and who are eligible for medical furlough pursuant to 730 ILCS 5/3-11-1.

    Within three days of identifying individuals eligible for furlough, or transfer, IDOC shall collect information from each individual for identifying potential host sites.

2. Within 7 days of the date of this order, the IDOC will use its discretion to transfer individuals identified pursuant to the above to medical furlough or home detention:

    Every person identified pursuant to paragraph 1 of this order with an available host site will be removed from the correctional center via the mechanism determined by IDOC as most appropriate (such as medical furlough or transfer to home detention) unless the IDOC determines, with the approval of the special master, that an individual's furlough or transfer would pose a substantial danger to the physical safety of an identifiable person or persons that outweighs the threat to the individual's health and the public health threat posed by their continued incarceration. Assessment of the safety risk must be based on an

individualized analysis, and not categorical exclusions (except those excluded offenses for furlough or transfer mechanisms under the law). In the event that the IDOC rejects a furlough or transfer to home detention to any person identified in Paragraph 1, IDOC will document their justification with specific and individualized concerns including those related to the individual's institutional history and background.

3. **FORMATION OF THE COVID-19 EMERGENCY RECORD REVIEW TASK FORCE.** Class Counsel will, at IDOC's request, form a Task Force comprised of up to 150 pro-bono attorneys, legal assistants, social workers, law students and other qualified individuals, who report to the Special Master. The purpose of the Task Force is to assist the IDOC in conducting the record review necessary to effectuate the terms of this Order. The Task Force will function as follows:
    a. Class Counsel will work with the IDOC to recruit qualified Task Force Members, who have demonstrated high ethical standards and the requisite skills needed to contribute to the Task Force;
    b. IDOC will execute the required agreements to allow the Task Force to access and review the relevant records. This may include, but is not limited to, submitting an Agreed Order to this Court that will permit Task Force Members to review protected health information as permitted by the Health Insurance Portability and Accountability Act of 1996 Public Law 104-191 (1996) ("HIPPA"). Task Force Members shall work under the supervision and control of the Special Master and shall be required to execute requisite confidentiality agreements;
    c. Task Force members shall prepare one to two page summaries of the files of each individual reviewed regarding the individual's medical condition, current disability, institutional record, relevant history and background. These summaries will be based on a form developed jointly by Class Counsel and the IDOC;
    d. The Class Counsel and the IDOC shall collaborate on the form and content of Task Force member training. No Task Force member shall begin their record review without first completing this training;
    e. IDOC will rely on the Task Force summaries to review each individual and make the decision required pursuant to ¶ 2. Nothing in this Agreed Order limits the IDOC's authority to order furlough, transfer to home detention and/or release prior to the completion of any task force summary or separate from the process required by this Order.

4. **Appointment of a Special Master**. The Parties agree to the appointment of a Special Master, to be jointly selected by the parties. The Special Master shall have extensive experience in management and a general familiarity with corrections and/or the justice system and/or the public health system. The Special Master shall have the discretion to consult with individuals with expertise in corrections, public safety and public health, as needed. The Special Master shall have the following responsibilities:

a. Reviewing IDOC's denial of medical furlough to any medically vulnerable person on the basis of public safety concerns. If the special master disagrees with the IDOC's determination, the IDOC shall grant the individual medical furlough;
b. At the request of the IDOC, making recommendations about transfer, or furlough decision for any individual or groups of individuals;
c. Managing and overseeing the work of the Task Force, to include but not limited to establishing strict timelines and instituting quality control procedures;
d. Collaborating with Class Counsel to develop and distribute resources related to housing and public benefits for those who are furloughed pursuant to the terms of this Order and to deploy any resources and or/knowledge Class Counsel can offer to mitigate practical and logistical barriers.
e. Managing the IDOC host site approval process for all class members and ensuring that the process is efficient, fair and comports to the requirements of this Order.

5. **CLASS COUNSEL ACCESS AND REPORTING**. The IDOC shall provide to Class Counsel the names, IDOC numbers and facilities of every person in IDOC custody who is eligible for release, transfer and medical furlough under the terms of this Order, and shall provide Class Counsel with the names of any such person who it deems not eligible for relief under Paragraph 2 for any reason, including lack of a host site. The IDOC will further provide Class Counsel with the names and prisoner IDOC numbers of all people medically furloughed and/or transferred to home detention pursuant to this Order every 48 hours. The IDOC and Class Counsel will collaborate to seek and necessary HIPPA related orders from the Court to facilitate information sharing.

ILLINOIS DEPARTMENT OF CORRECTIONS
Operations and Management Report (OMR) Key Variables
Fiscal Year 2020

OMR Key Variable	JUL 2019	AUG 2019	SEPT 2019	OCT 2019	NOV 2019	DEC 2019
Total Use of Chemical Agents	84	79	79	68	72	73
Use of Chemical Agent	65	55	62	57	54	53
Use of Chemical Agent - Offender Self Harm	19	24	17	11	18	20
Cell Extractions	41	29	23	25	14	15
Activation of Tactical Teams	118	57	79	88	32	91
Total Vehicle Searches	3,322	2,817	2,849	3,003	2,952	3,030
Total Non Staff Vehicle Searches	2,579	2,164	2,105	2,087	2,032	2,032
Total Staff Vehicle Searches	743	653	744	916	920	998
Vehicle Searches Resulting in Arrests	0	1	0	0	0	0
Visitor Restrictions	11	15	6	12	11	5
Total Lockdown Days	65	45	68	40	23	46
Incident Based Lockdown Days	48	36	62	40	17	17
Administrative Based Lockdown Days	17	9	6	0	6	29
Segregation Sentences: Reductions / Cuts - Number of Offenders	189	175	159	180	136	143
Segregation Sentences: Reductions / Cuts - Number of Days	5,522	5,849	5,346	13,037	3,432	7,044
Temporary Confinement Placements	787	790	694	876	778	786
Temporary Confinement End-of-Month Count	216	267	272	308	273	272
Investigative Status Placements	388	401	381	411	356	370
Investigative Status End-of-Month Count	127	136	127	145	115	136
Disciplinary Segregation Placements	645	573	590	642	610	603
Disciplinary Segregation Status End-of-Month Count	903	904	900	913	876	792
Administrative Segregation Placements	14	3	8	8	12	24
Administrative Segregation Status End-of-Month Count	134	111	109	102	110	120
Double-Celling Denials Issued by the Warden	72	51	80	97	70	51
Vulnerables	336	348	350	339	358	347
Predators	230	242	246	238	248	227
Vulnerable and Predator	79	83	81	78	78	75
Disciplinary Transfers of Inmates	153	111	151	106	98	65
Total Deaths	10	2	11	13	6	13
Expected Deaths	8	2	8	8	3	7
Unexpected Deaths	2	0	3	5	3	6
Offender Sick Calls	49,343	47,556	49,257	48,709	43,077	41,976
Hunger Strikes	160	141	114	129	143	122
Total Off-Site Emergency Room Visits	231	195	212	185	190	205
Total Off-Site Medical Furloughs	1,763	1,736	1,557	1,788	1,671	1,721
Number of Offenders Housed in Outside Hospitals	110	127	141	127	105	131

Prepared by Planning and Research

Number of Days Housed in Outside Hospitals	387	498	603	610	563	598
Physical Health - Average Daily Censes for Infirmary Services	260	266	273	271	280	286
Infirmary Average Daily Census - Acute	174	186	182	186	180	116
Infirmary Average Daily Census - Chronic	167	183	187	196	195	204
Total Number of Admissions to the Infirmary	370	393	390	394	348	339
Infirmary - End-of-Month Count in Permanent Housing	136	135	151	149	165	159
Pregnancies	11	13	12	7	8	6
Births	1	2	1	5	1	1
Mental Health - Caseload	12,020	12,071	12,372	12,706	12,694	12,887
Seriously Mentally Ill Caseload	4,931	4,888	4,973	4,887	4,841	4,756
Total Crisis Watch Observations	742	693	648	567	566	628
Crisis Watch - Continuous Watch Status	72	89	69	44	43	50
Crisis Watch - Suicide Watch Status	341	302	285	248	233	303
Crisis Watch - Offenders on Close Supervision Status	159	153	163	131	138	140
Crisis Watch - Offenders on Periodic Check Status	170	149	131	147	152	135
Suicide Ideation	415	386	382	290	297	345
Suicide Attempt	22	33	27	23	27	25
Inmate Self Harm	156	85	82	81	73	62
Suicides	0	0	0	1	1	1
Total Staff	11,604	11,635	11,861	11,765	11,874	11,355
Total Staff Security	8,863	8,868	9,018	8,962	9,064	8,621
Total Staff Non Security	2,741	2,767	2,843	2,803	2,810	2,734
Total Staff Non DOC	1,683	1,460	1,643	1,591	1,643	1,566
END OF MONTH POPULATION/ADULT FACILITIES ONLY	***38,238***	***38,244***	***38,135***	***38,003***	***37,798***	***37,291***

Note: The OMR is in Draft and Confidential status;
they sometimes change after administrative review.
Source: Operations and Management Report

Non-DOC Staff refers to the number of non-DOC (non-GRF) staff at the end of the month assigned to work at the facility, including contractors, Office of Adult Education, and ICI funded staff. Also includes drug treatment staff (TASC or similar), Educators and Vocational Instructors (through local Colleges or Office of Adult Education), regular Health Service providers (not those on PRN status only), etc. Does not include volunteers or vendors performing routine maintenance or service contracts (fire marshal, elevator inspectors, vending machine service persons, etc.).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 91-187

JOHN DOE, ET AL PLAINTIFFS

VS. OPINION AND ORDER

DON YOUNGER, ET AL DEFENDANTS

This matter is before the court on defendant Kenton County's motion to alter, amend and vacate this court's July 26, 1996 judgment and to stay the execution of that judgment (doc. #450), the motion of defendants Paul Patton and Doug Sapp to alter or amend the court's July 26, 1996 judgment (doc. #459), and the stipulated motion for an extension of time to file a petition for attorneys' fees (doc. #459). A telephonic hearing was held on these motions on August 29, 1996. For the reasons set forth below, Kenton County's motion to alter or amend is granted as to which juveniles are exempt from the 15 day limitation on length of stay, but the remainder of Kenton County's motion is denied. The motion of defendants Governor Paul Patton and Doug Sapp is denied in its entirety, and the stipulated motion for an extension of time to file a petition for attorneys' fees is granted.

Plaintiffs initiated this civil rights class action pursuant to 42 U.S.C. §1983. They challenge the constitutionality of the conditions of their confinement at the Kenton County Detention Center (KCDC) in Covington, Kentucky. After considering all

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evidence presented during a three day trial to the bench and considering all arguments made in post-trial briefs filed by the parties, the court entered its findings of fact and conclusions of law as well as an amended judgment on July 26, 1996. The parties seek alteration of portions of these documents.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WILL BE AMENDED CONCERNING THE EXEMPTION FROM THE 15 DAY LIMITATION ON LENGTH OF STAY

This case requires the court to balance significant conflicting interests -- the due process rights of incarcerated juveniles, the public's right to have juvenile crime and misbehavior addressed, and the separation of federal and state powers. As explained in the court's findings of fact and conclusions of law, the Kenton County Detention Center is clearly substandard in many respects. However, in the view of the court the conditions at the KCDC become unconstitutional and thus justify court intervention only when a juvenile is subjected to those substandard conditions for an extended period of time. To that end, the court imposed a time limit on the length of incarceration in this facility for juveniles who do not have the benefit of adult procedural protections, stating:

> Plaintiffs ask the court to close this institution. After careful reflection, the court has concluded that such an extreme act would violate the principles of judicial restraint and federalism. But the court has also concluded that confining a juvenile there for an extended period -- more than fifteen (15) days, unless there is probable cause to believe that the juvenile can be treated as an adult charged with a crime -- is punishment without due process of the law. What one can

> bear for a short period can be intolerable if prolonged.

Doc. #447 at 2. The court's amended judgment provides, "That, effective **August 15, 1996,** no juvenile not indicted for or convicted of a crime as an adult shall be held in the present Kenton County Detention Center for more than **fifteen (15) days.**" Doc. #449 at 1.

In its motion to alter or amend the judgment, Kenton County states, for the first time, that, given the procedures prescribed by the Kentucky Revised Code concerning youthful offenders, it is impossible to judicially determine whether a juvenile will be treated as an adult charged with a crime within fifteen days of the juvenile's initial incarceration at the KCDC. For this reason, Kenton County asks the court to revise its language concerning which juveniles are exempt from the fifteen day limit on length of incarceration at the KCDC.

In making its motion, Kenton County repeatedly sarcastically states that the court was "simply wrong" in concluding that juveniles who have not been charged with a crime and who have not been afforded the rights of those who are so charged are being held for lengthy periods in the KCDC. This statement is itself not only "simply wrong" but demonstrates a profound ignorance of the law of this case.[1]

It is fundamental that proceedings against juveniles, even

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[1] The court suggests that if one is going to be disrespectful, one ought to at least do his homework.

juveniles who have allegedly been in contempt of court, are not criminal proceedings. See, e.g., In re Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); Young v. Knight, 329 S.W.2d 195 (Ky. 1959); Alexander S. v. Boyd, 876 F. Supp. 773 (D.S.C. 1995). As the Supreme Court explained:

> The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.

Kent, 383 U.S. at 544 (emphasis added). More recently, the Kentucky Supreme Court has echoed those views, stating:

> It has been a principle theory of juvenile law that an individual should not be stigmatized with a criminal record for acts committed during minority. By providing young people with treatment oriented facilities rather than simple punishment, antisocial behavior can be modified and the offenders will develop as law abiding citizens. However, such treatment does limit the constitutional rights that are traditionally provided for adult offenders. Juvenile offenders are not afforded all the constitutional rights that adult offenders receive. They are afforded only the right to fair treatment. . . . The Kentucky juvenile justice system reflects this philosophy.

Jefferson County Department for Human Services v. Carter, 795 S.W.2d 59, 61 (Ky. 1990)(footnote and citations omitted)(emphasis added).

Even so basic a work as American Jurisprudence 2d, a primer of

American law, in the very first section of its article on Juvenile Courts notes the following basic principles:

> The purpose of juvenile court legislation is to provide for the disposition of delinquent, dependent, neglected, and abandoned children by providing a complete scheme for treatment thereof including the creation of a juvenile court which will investigate and try to rehabilitate minors.
>
> With respect to the delinquent child, the philosophy of juvenile court laws is that the juvenile is to be considered and treated not as a criminal, but as a person requiring care, education, and protection. A fundamental aim of juvenile court laws is the prevention of delinquency of children. Consequently, such laws are not punitive, but are corrective and protective in that their purpose is to make good citizens of potentially bad ones. In other words, the welfare of the child lies at the very foundation of the statutory scheme.

47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 1 (1995) (emphasis added).

As the above authorities and many others make abundantly clear, it is a trade-off. Juveniles may be deprived of some constitutional rights, such as the right to a jury trial and a speedy and public trial, because they are not being punished but treated. Therefore, all juveniles, except those being proceeded against as adults, have not even been accused of crimes. Again, this is so basic that one doubts if contrary assertions are made in good faith.[2]

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[2] Certainly, denial of these basics would not be "warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2).

The gravamen of this court's opinion is that detention at the KCDC for more than fifteen (15) days is punishment. Therefore, no juvenile may be so punished except those being proceeded against as adults.

Thus, in determining whether juveniles could constitutionally be housed in the substandard KCDC facility, the court protected those children who are not afforded the additional procedural rights available to adults. In keeping with the notion that federal courts have the authority only to require the constitutional minimum--not to impose their views of an ideal facility, the court elected to limit the length that any juvenile not ultimately protected by adult procedural rules may be incarcerated in the KCDC.

In Kentucky, a juvenile is protected by adult procedural requirements only if he is proceeded against as a "youthful offender." A "youthful offender" is a person who is transferred to Circuit Court to be indicted, tried and sentenced as an adult pursuant to KRS Chapter 640 and who is subsequently convicted in Circuit Court. KRS 600.020(52). To be eligible for treatment as a youthful offender, a juvenile must be accused of committing certain serious crimes.[3]

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[3]Those eligible to proceed as youthful offenders under KRS Chapter 640 include:
(a) a child charged with a capital offense, Class A felony or Class B felony who was at least fourteen years old at the time of the alleged commission of the offense (KRS 635.020(2));
(b) a child charged with a Class C or Class D felony who was at least sixteen years old at the time of the alleged commission of the offense and who previously had been found to have committed

The procedures by which it is determined that a child will be proceeded against as a youthful offender are contained in the Kentucky Unified Juvenile Code. To initiate these procedures, the county attorney must make a motion before the District Court to transfer the child to Circuit Court for treatment as a youthful offender. KRS 635.020 and KRS 640.010(2).[4] The District Court then conducts a transfer hearing pursuant to KRS 640.010. At that hearing, the District Court determines whether there is probable cause to believe that the child committed an offense and whether all age or other requirements for treatment as a youthful offender have been satisfied. KRS 640.010(2)(a). The District Court then considers a number of other factors concerning the circumstances surrounding the offense, the child, and the public and determines whether the child should be transferred to Circuit Court for treatment as a youthful offender. KRS 640.010(2)(b).

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felony offenses on two separate occasions (KRS 635.020(3));
(c) a child charged with a felony in which a firearm was used in the commission of the offense who was at least fourteen years old at the time of the alleged commission of the offense (KRS 635.020(4));
(d) a child charged with a felony who previously had been convicted as a youthful offender (KRS 635.020(5)); and
(e) a person who is at least eighteen years old and is charged with a felony that occurred prior to his eighteenth birthday (KRS 635.020(7)).

[4]In the case of a child charged with a felony in which a firearm was used and who is at least fourteen years old at the time of the alleged offense, KRS 635.020(4) provides for automatic treatment as a youthful offender. However, it appears from the language of KRS 640.010(1) and (2) that the county attorney must file a motion to transfer the child to Circuit Court in order to trigger the hearing that results in the automatic transfer.

Due to the serious consequences associated with treatment as a youthful offender, it is common for the child's attorney to seek additional time for investigation and preparation prior to the transfer hearing. At the telephonic hearing, the County Attorney, Garry Edmondson, personally orally certified to this court that all motions for transfer to the Circuit Court for treatment as a youthful offender are and will be made in the good faith belief that the facts support such a transfer. He also said he could make the necessary good faith determination within the 15 days.

Based upon the County Attorney's representation and the fact that it is impossible to ensure that a transfer hearing will commence within 15 days of incarceration without infringing the juvenile's right to adequate preparation and investigation, the court concludes that its July 26, 1996 findings of fact and conclusions of law and amended judgment should be modified to state:

> Confining a juvenile in the Kenton County Detention Center for an extended period of time -- more than fifteen (15) days unless the prosecutor has, in good faith, filed a motion to transfer the juvenile to Circuit Court for treatment as a youthful offender -- is punishment without due process of law.

Any statements contained in the court's July 26, 1996 findings of fact and conclusions of law or in the court's amended judgment filed that same day that are inconsistent with this statement shall be vacated.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WILL BE AMENDED TO TRACK LANGUAGE REQUIRED BY THE PRISON LITIGATION REFORM ACT OF 1995

In its motion to alter or amend, Kenton County contends that the court did not make specific findings required by the recently enacted Prison Litigation Reform Act of 1995, and, therefore, Kenton County is entitled to immediate release from the prospective relief provided by this court's July 26, 1996 amended judgment. Kenton County's argument is without merit.

The Prison Litigation Reform Act of 1995 provides, in part:

> The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C.A. §3626(a)(1)(A) (1996). The Act further provides for termination of prospective relief if the court fails to make such findings. 18 U.S.C. §3626(b)(2).

The court fully complied with the PLRA in its July 26, 1996 findings of fact and conclusions of law by paraphrasing the required findings. However, in an abundance of caution and in an effort to avoid any misunderstanding, the court hereby amends its July 26, 1996 findings of fact and conclusions of law to specifically state:

> This court finds that the prospective relief ordered in this case is narrowly drawn, extends no further than necessary to correct the current and ongoing violation of the plaintiffs' Federal constitutional right to the due process of law, and is the least intrusive means necessary to correct the violation of that Federal right. The court has given substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by this relief. This finding is made in accordance with the

Prison Litigation Reform Act of 1995, 18 U.S.C. §3626(a)(1).

THE COURT'S AMENDED JUDGMENT IS NOT A "PRISONER RELEASE ORDER" WITHIN THE MEANING OF THE PLRA

Kenton County's final contention is that the court's July 26, 1996 amended judgment constitutes a "prisoner release order" as used in the PLRA, 18 U.S.C. §3626(a)(3). Therefore, according to Kenton County, the order in question can be entered only by a three-judge panel and only after a previously entered order for less intrusive relief has failed to remedy the constitutional deprivation. This contention is without merit.

The PLRA defines "prisoner release order" as "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C.A. §3626(g)(4)(1996). This definition must be read in conjunction with the substantive provisions concerning prisoner release orders and in view of the legislative history underlying those provisions.

To enter a prisoner release order, under the PLRA, a three-judge panel must find by clear and convincing evidence that: "(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C.A. §3626(a)(3)(E)(1996). In addition, the House Judiciary Committee's report provides:

> Subsection (a)(2): Prison <u>population</u> <u>reduction</u> relief

> This subsection makes prison caps the remedy of last resort, permitting a cap to be imposed only if the prisoner proves: 1) that crowding is the "primary" cause of the federal violation; and 2) that no other remedy will cure the violation. These requirements are imposed in recognition of the severe, adverse effects of prison caps and the accompanying prisoner releases relied on to meet the caps.
>
> * * *
>
> By requiring that a plaintiff inmate prove an actual violation of his constitutional rights based on the alleged overcrowding, this subsection will end the current practice of imposing prison caps when inmates have complained about the prison conditions but the presiding judge has made absolutely no finding of unconstitutionality or even held any trial on the allegations. In ordering or approving these caps, some judges now oversee <u>huge programs of releases to keep the prison population down</u> to whatever that judge considers an appropriate level.

House Committee on the Judiciary, Violent Criminal Incarceration Act of 1995, H.R. Rep. No. 21, 104th Congress, 1st Session, p. 25 (1995) (emphasis added).

After reviewing the substantive provisions concerning prisoner release orders and the legislative history underlying this provision of the PLRA, it is clear that the prisoner release order provisions are directed at prison caps, i.e., orders directing the release of inmates housed in a particular institution once that institution houses more than a specific number of persons. This is not that kind of case.

In the case at bar, the court ordered that children--other than those for whom the county attorney has filed a motion for transfer to Circuit Court as a youthful offender--not be incarcerated in the barren KCDC for more than 15 days. The court's

order does not impose a cap on the number of children incarcerated at the KCDC--it limits only the amount of time in which any particular child may be held under the substandard conditions present in the KCDC.

In addition, the court's order does not direct the release of any child. It is undisputed that counties, including Kenton County, often house juveniles in need of a secure facility in other counties. In fact, such transfers from facilities in one county to facilities in another county or even another state are extremely common. Indeed, the Kentucky Juvenile Code specifically contemplates such transfers. See, e.g., KRS 605.090 and KRS 615.030. Kenton County remains free to transfer juveniles in danger of exceeding the fifteen day limit from the KCDC to any other juvenile facility that is appropriate. Accordingly, the court's order does not come within the prisoner release order provision of the PLRA.

THE COMMONWEALTH DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT IS DENIED

Defendants Paul Patton, Governor of the Commonwealth of Kentucky and Doug Sapp, Commissioner of the Kentucky Department of Corrections (collectively "the Commonwealth defendants") raise three contentions in their motion to alter or amend the court's July 26, 1996 findings of fact and conclusions of law.

First, the Commonwealth defendants object to the court's referring to "state" officials, contending that the County officials have primary authority to operate the detention center.

For purposes of clarification, the court notes that "state" is used in the section 1983 sense of officials acting under color of state law and this included the Commonwealth defendants and the County defendants. In addition, the Commonwealth defendants' objection does not affect the court's judgment in this case.

Second, the Commonwealth defendants contend that the Commissioner of the Kentucky Department of Corrections does not "supervise" the KCDC, but they admit that the Commissioner has the authority to "monitor" and "inspect" the KCDC. This objection seems to be a simple matter of semantics and does not require any action on the part of the court. During the telephone conference concerning the motions to alter or amend judgment, counsel for the Commonwealth defendants indicated that she was concerned about the use of the word "supervise" because such supervision may have an effect on liability for the plaintiffs' attorneys' fees. As the court stated during the telephone conference, nothing in the findings of fact and conclusions of law is intended to imply a ruling concerning an attorneys' fee petition.

Finally, the Commonwealth defendants take issue with the court's statement that the defendants have not "produced any documentary evidence that these alternatives [to complete sprinkler suppression] were considered under the Codes FSES system or that they were ever approved by the state fire marshal." See doc. #447 at 28. As the court specifically reserved ruling on the fire safety issue until a court-appointed fire expert could be retained,

there is no need to revisit the evidence surrounding the fire safety issue at this time.

Therefore, the court being advised,

IT IS HEREBY ORDERED as follows:

1. That Kenton County's motion to alter, amend and vacate judgment (doc. #450-1) be, and it is, hereby **granted** as to the determination of what juveniles are exempt from the fifteen day limitation period. The court's July 26, 1996 findings of fact and conclusions of law and amended judgment are hereby modified to state:

> Confining a juvenile in the Kenton County Detention Center for an extended period of time -- more than fifteen (15) days unless the prosecutor has, in good faith, filed a motion to transfer the juvenile to Circuit Court for treatment as a youthful offender -- is punishment without due process of law.

Any statements contained in the court's July 26, 1996 findings of fact and conclusions of law or in the court's amended judgment filed that same day that are inconsistent with this statement are hereby vacated;

2. That the court's July 26, 1996 findings of fact and conclusions of law are hereby amended to specifically state:

> This court finds that the prospective relief ordered in this case is narrowly drawn, extends no further than necessary to correct the current and ongoing violation of the plaintiffs' Federal constitutional right to the due process of law, and is the least intrusive means necessary to correct the violation of that Federal right. The court has given substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by this relief. This finding is made in accordance with the

Prison Litigation Reform Act of 1995, 18 U.S.C. §3626(a)(1);

3. That the remainder of Kenton County's motion to alter, amend and vacate judgment (doc. #450-1) be, and it is, hereby **denied**;

4. That Kenton County's motion for stay of execution of judgment (doc. #450-2) be, and it is, hereby **denied** as moot;

5. That the motion of defendants Governor Paul Patton and Doug Sapp to alter or amend judgment (doc. #459) be, and it is, hereby **denied**; and

6. That the stipulated motion for an extension of time in which to file a petition for attorneys' fees until **October 15, 1996** (doc. #456) be, and it is, hereby **granted**.

This 4th day of September, 1996.

William O. Bertelsman

WILLIAM O. BERTELSMAN, CHIEF JUDGE

F I L E C O P Y

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
September 4, 1996

Case Number: 2:91-cv-00187

Barbara W. Jones

Keith D. Hardison

R. Thaddeus Keal

James M. Burd

Garry L. Edmondson

Shannon Wilber

James Bell

Kimberly A. Brooks

Mark I. Soler

Joseph U. Meyer

John Jay Fossett

E. D. Klatte

Barbara D. Bonar

Certificate of Mailing by _____.