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.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION
FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

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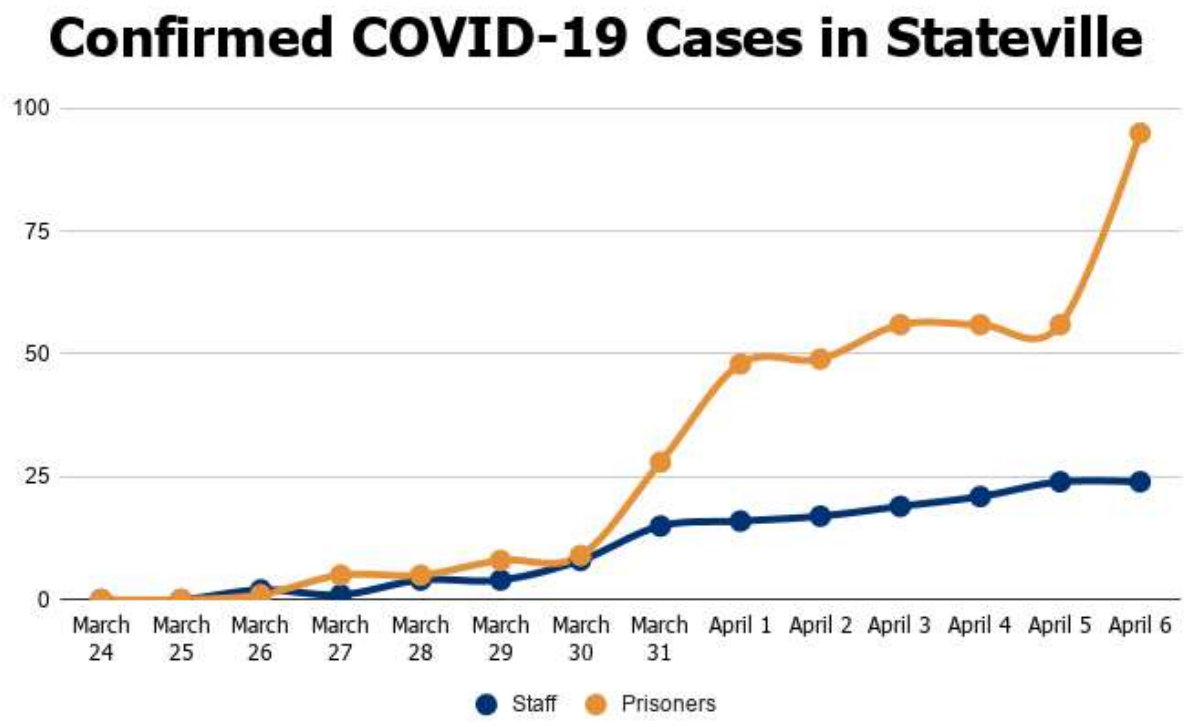
Rather than confront the grave danger that thousands of sick and elderly people in IDOC's custody are currently facing, defendants present the Court with misleading, inaccurate, and incomplete argument and urge the Court to do nothing. Most notably, defendants repeatedly mischaracterize the relief plaintiffs are seeking, suggesting that plaintiffs seek to unleash a tsunami of dangerous "felons" on unwitting communities, when in reality no such thing is true. Defendants also assert that they cannot possibly be found deliberately indifferent to plaintiffs because they have taken some minimal action to benefit some prisoners, but that the law does not support that conclusion. Finally, defendants completely fail to consider the public's strong interest in avoiding clusters of COVID-19 outbreaks in Illinois prisons, the effects of which could be catastrophic on prison communities. As explained in further detail below, defendants' arguments are unavailing, and plaintiffs' motion should be granted.

I. Defendants' List of Steps They Are Taking In Response to COVID-19 Demonstrates Why Subclasses 1 and 2 Need Relief From This Court

At the outset, defendants ask the Court to take judicial notice of a long series of bullet points, *see* Doc. 26 at 3-6, that they claim demonstrate that they are acting "quickly and aggressively to combat COVID-19." While plaintiffs acknowledge that defendants are taking many of the actions they list, defendants are simply not moving quickly or broadly enough protect members of the plaintiff class from the high risk of serious (and possibly fatal) harm they face as the COVID-19 spreads through the prison system. At this point, defendants have transferred only 515 prisoners inside of prison facilities, a number that is less than 2% of the Illinois prison population.[1]

[1] Defendants also use the figure 1,000 people released, but that is misleading. They refer to the drop in the total prison population from March 2 through April 6. *See* Doc. 26 at 4. The fact is that most of this drop simply reflects the natural fluctuation in prison population as new prisoners arrive and old prisoners are released in the ordinary course.

In the meantime, the number of confirmed COVID-19 cases among people in the custody of IDOC has mushroomed from zero cases on March 25 to 101 cases on April 6, and the rate of increase continues to climb; the very day defendants filed their brief, the number of confirmed cases among prisoners skyrocketed from 62 to 101, by far the largest increase to date. None of this is surprising, as defendants themselves have acknowledged, and at this rate, by next week, the number of new COVID-19 cases among prisoners will outstrip the number of releases. What the defendants list of "actions" demonstrates is not that they are acting expeditiously to protect plaintiffs, but rather that Court's intervention is necessary to prod the defendants to act more quickly, to prevent a looming humanitarian disaster in our prisons of unprecedented proportions. The graph below reflects IDOC's reported cases from Stateville alone over the past several days, portending a bleak future.



According to the *New York Times*, Stateville Correctional Center has the twelfth-largest known cluster of COVID-19 cases in the country. *See* Exhibit A (Coronavirus in the US: Latest Map and Case Count, N.Y. Times, *visited* April 8, 2020).

Throughout their brief, defendants attack plaintiffs for not supporting their motion with evidence (which of course, plaintiffs actually did, with a series of sworn declarations from nationally recognized experts, among other things), yet defendants provide no evidence at all to support any of their assertions about what they are doing. Many of the defendants' assertions are vague, misleading, or overstated, and certainly not susceptible to being judicially noticed.

The most glaring example is defendants' assertion that the Prisoner Review Board (PRB) continues to hold hearings on alleged parole violations, Doc. 26 at 5. In fact, the PRB canceled its parole revocation hearings at Stateville last week and has provided no information about whether those hearings will be rescheduled. *See* Exhibit B (Adam Kaney declaration). Stateville is where the vast majority of parolees are held pending their hearings. This cancellation means that parolees are confined to IDOC based solely on allegations, without any determination of whether those allegations are true, and even if true, whether the violations are sufficiently serious to warrant revocation of parole. These individuals now face a serious risk of harm solely, which is exactly what deliberate indifference looks like.

Similarly, defendants tout the fact that the Governor continues to review and grant commutation petitions, *see* Doc. 26 at 3, yet they cite only one example of an individual released to parole who had been convicted of possession of marijuana. One petition (or even a handful of petitions) granted comes nowhere near meeting the scope of the emergency. Furthermore, defendants admit, *see* Doc. 26 at 5, that the PRB cancelled its April clemency docket in its entirety. And whatever clemency petitions may be granted will almost certainly be only for those

prisoners fortunate enough to have a legal advocate lobbying individually on their behalf. Most prisoners are not so lucky.

More generally, defendants fail to provide the Court with any details regarding their alleged efforts to protect members of the plaintiff class. They provide no detail as to how many people have been released using each of the mechanisms they discuss, what criteria they are applying, how many people are reviewing prisoners for release, how many prisoners are in the pool of people they are reviewing, how that pool was selected, how long they expect the process to take, or whether there is any prospect that the rate of release will increase over the next few days. They also provide no explanation for why people like named plaintiffs William Richard and Carl Reed are still in IDOC custody—both are extremely medically vulnerable, are near the end of their sentences, and have safe homes waiting for them in the community. Without these details, what the defendants have provided is a list of the mechanisms they *could* use to protect members of the putative plaintiff class from harm, rather than evidence that they actually *are* protecting plaintiffs.

Illinois law provides defendants with the tools they need to protect plaintiffs from serious risk of harm. However, what their laundry list of tools, coupled with the paucity of results, demonstrates is the desperate need for the court to intervene to prod the defendants to actually make use of these tools to protect as many of the plaintiffs as possible—and particularly the members of subclasses 1 and 2 which are the subject of the motion currently before the Court—before it is too late.

II. Plaintiffs' Motion for a TRO/PI Should Be Granted

Defendants' attacks on the currently-pending motion are based largely on strawman arguments, without regard to the fact that the relief plaintiffs seek on the pending TRO/PI motion

is limited. As plaintiff has explained in prior briefing, the currently-pending motion seeks relief on behalf of subclasses 1 and 2 only. *See* Doc. 24. Likewise, plaintiffs do *not* ask this Court to put every member of these subclasses out on the street without individualized safety assessments. To the contrary, plaintiff have proposed a remedial plan, *see* Doc. 24-1, that affords defendants significant deference to make safety assessments and approve host sites. With that reality in mind, plaintiffs address defendants' specific arguments below.

A. Subclasses 1 and 2 Are Likely To Succeed on The Merits of Their Claims

Defendants advance three sets of arguments as to the likelihood that plaintiffs will succeed on the merits of their claims. First, defendants contend that plaintiffs' claims are procedurally barred. Second, defendants contend that plaintiffs' Eighth Amendment claim fails because plaintiffs cannot establish deliberate indifference. Third, defendants contend that plaintiffs' Americans with Disabilities Act (ADA) claim fails. Defendants are wrong on each of these points, as plaintiffs explain.

1. The Claims of Subclasses 1 and 2 are Not Procedurally Barred

At the outset, defendants argue that several procedural hurdles block plaintiffs' claims entirely, but careful examination shows that these hurdles either do not exist at all or else plaintiffs easily clear them.

a. Subclasses 1 and 2 Do Not Seek a § 3626 "Prisoner Release Order"

Defendants' first argument is that plaintiffs have not and cannot meet the requirements for obtaining a "prisoner release order" as that term is defined in 18 U.S.C. § 3626. For all the reasons plaintiffs already set forth in prior briefing, *see* Doc. 24, which plaintiffs incorporate by reference, plaintiffs are not seeking a "prisoner release order." Without repeating all of those arguments here, plaintiffs make only a few points in reply.

First, this case is not about prison overcrowding. Defendants use the word "crowding" as if this statute is simply referencing congregate settings. That is not correct; overcrowding refers to facilities housing more people than they have the capacity to house, such as that which ultimately resulted in the *Brown v. Plata* case, as well as significant litigation throughout the 1980s/90s challenging unconstitutional conditions of confinement that result from overcrowding and caused federal courts to order population caps as a remedy. In contrast, here, the facilities where plaintiffs are housed are all operating within their operational capacity (according to IDOC's own website), including Stateville. The issue is not overcrowding, but the inherent congregate, or communal, nature of prison housing and daily life activities which, like nursing homes, make them susceptible to contagion.

Contrary to defendants' argument, Doc. 26 at 14, the three-judge panel did not hold otherwise in its decision last week in *Plata v. Newsom*, No. 01 C 1351. *See* Exhibit C (Apr. 4, 2020 Order), Doc. 361. In that case, the plaintiffs asked their existing three judge court, which has been in place for at least a decade, to modify the existing order to require further population reductions to protect against the threat of the coronavirus. The court declined to do so, not for the reasons defendants argue, but because modifying the existing order was only allowable as needed to remedy the underlying constitutional violations that the original order addressed. Preventive measures responsive to the outbreak do not, however, relate to the overcrowding orders, "but rather new relief based on the new threat of harm posed by COVID-19." *Id.* at 7. The court went on to explain, "the harm Plaintiffs face is not dependent on the existence of a constitutionally inadequate health care delivery system is strong evidence that it is rooted in a

significantly different underlying cause than what was before us in the prior three-judge court proceedings." *Id.* at 8.[2]

Second, defendants' argument about the application of section 3626 mischaracterizes plaintiffs' request for relief. As already explained, plaintiffs do not seek an order immediately releasing 16,000 people from IDOC custody. Instead they seek a process through which IDOC expeditiously evaluates subclass members for medical furlough and then uses its discretion to transfer those subclass members who are particularly vulnerable to COVID-19 and who can safely quarantine in their home communities. *See* Doc. 24-1.

b. The Claims of Subclasses 1 and 2 are not *Heck* Barred

Defendants next contend that plaintiffs' claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). This argument misunderstands the *Heck* case line and misconstrues the relief sought by subclasses 1 and 2. Because these subclasses do not seek relief from any criminal conviction or speedier release from custody, their suits are not barred by *Heck*. Instead, their requests to be removed temporarily from highly dangerous settings where their health and lives are in imminent danger are classic conditions of confinement suits, which the Supreme Court's decision in *Muhammad v. Close* makes clear are not barred by *Heck*. *See Muhammad v. Close*, 540 U.S. 749 (2004).

A brief review of the *Heck* case line illustrates why the relief sought by the subclasses is not barred. Starting with *Preiser v. Rodriguez*, the Supreme Court held that when a state prisoner challenges "the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." 411 U.S. 475, 500 (1973). The

[2] Also noteworthy is that as of the time of this decision, the California DOC was planning to release around 6,500 prisoners over the coming weeks. *Id.* at 6.

Court's concern throughout the whole *Heck* case line is that the types of relief typically sought via habeas corpus cannot be sought via section 1983 prior to favorable termination of the criminal case. Specifically, there are two types of relief typically sought via habeas corpus that are barred in section 1983 actions by the *Heck* case line: (1) relief from a criminal conviction; and (2) speedier release from custody. *See Heck*, 512 U.S. at 484-85 (extending *Preiser* to damages actions "challenging the validity of outstanding criminal judgments . . . that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement"); *Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (extending the rule to prison disciplinary proceedings, where the section 1983 suit "necessarily impl[ies] the invalidity of the punishment imposed").

Defendants assert that plaintiffs "are challenging the *fact* of their current confinement," Doc. 26 at 18, but to characterize the relief sought by the subclasses that way misconstrues the scope of *Heck*, the relief sought by the Plaintiffs, or both. When the Supreme Court says repeatedly in the *Heck* case line that plaintiffs cannot use section 1983 to challenge the "fact or duration" of their confinement, it plainly means that section 1983 cannot be used to set aside an extant criminal (or disciplinary) judgment or to secure a speedier release from ongoing custody. It does not mean that all suits that relate to the fact of confinement are barred by *Heck*, a point the Court made crystal clear in *Muhammad v. Close*, 540 U.S. 749 (2004), which summarized the rule as follows:

> In *Heck* . . . we held that where success in a prisoner's section 1983 damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.
>
> * * *
>
> *Heck*'s requirement to resort to state litigation and federal habeas before § 1983 is not, however, implicated by a prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence.

Id. at 751. Accordingly, where a suit challenges the conditions of prison confinement—and not the validity of a conviction or the length of custody—the *Heck* bar simply does not apply. *See Savory v. Cannon*, 947 F.3d 409, 422-23 (7th Cir. 2020) (en banc) (discussing *Muhammad* and reaffirming that section 1983 challenges "related only to the conditions of confinement and that do[] not implicate the validity of the underlying conviction or the duration of the sentence . . . is not subject to *Heck*'s favorable termination requirement").

Here plaintiffs challenge only the conditions of their confinement. They contend that if they are not furloughed or moved out of the congregate prison population during this emergency, they will suffer catastrophic health consequences, including death. Critically, they do not seek relief from the underlying criminal judgments that are the basis for their incarceration or any adverse disciplinary ruling. Nor do they seek speedier release from custody. Properly construed, the relief requested if granted will not require this Court to set aside any state criminal conviction or shorten any state custody. Because the relief that plaintiffs seek does not necessarily require invalidation of their criminal convictions or any shortening of their ongoing sentence, *Heck* does not apply, just as the *Heck* bar did not apply to bar the suits in *Muhammad*, *Nelson v. Campbell*, 541 U.S. 637 (2004), *Wilkinson v. Dotson*, 544 U.S. 74 (2005), and *Skinner v. Switzer*, 562 U.S. 521 (2011).

Defendants' argument that cases seeking medical furloughs are barred by *Heck* would eliminate large portions of this Court's docket. The plurality of cases filed by prisoners in Illinois include a claim about lack of proper medical care. In many of those cases, the relief sought is referral to an outside specialist, an operation, or hospitalization for some other procedure. Each such outside hospitalization is a "medical furlough" as the prisoner is temporarily somewhere other than an IDOC prison for medical purposes. The relief sought in the current motion is no

different in kind (although the relief is sought for a class, rather than an individual). Plaintiffs seek nothing more than a process through which they can be evaluated for temporary relocation to a site where they can practice social distancing, isolation, shelter in place, and all of the other requirements established by defendant Pritzker and others as means of staying safe and slowing the spread of the coronavirus. If defendants' arguments were accepted, every prisoner who sought outside medical treatment would be required to file a federal habeas corpus action. That is not what *Heck* requires.

None of the cases cited by defendants say otherwise. The Seventh Circuit sitting *en banc* recently reiterated the rule of *Muhammad*, reaffirming its decisions that hold that a challenge to conditions of confinement that does not spell invalidation of a conviction or speedier release from custody is not barred by *Heck*. *Savory*, 947 F.3d at 422-23.

Defendants' reliance on *Graham v. Broglin*, 922 F.2d 379, 380-81 (7th Cir. 1991) is misplaced. In *Graham*, the court held that a prisoner suit brought to "shorten the term of [] imprisonment" must be brought under habeas corpus, because the prisoner "is challenging the state's custody over him." 922 F.2d 379, 380-81 (7th Cir. 1991). But, if a prisoner is seeking a different "location or environment," section 1983 is proper. *Id.* at 381. In other words, *Graham* supports plaintiffs' position, not defendants' position. Defendants' reliance on *Pischke v. Litscher*, 178 F.3d 497 (7th Cir. 1999) is likewise misplaced. Doc. 26 at 20. In *Pischke*, prisoners challenged a Wisconsin statute allowing the state to transfer them to private prisons in other states. The court held that prisoners should use section 1983, and not habeas corpus, to challenge the transfer between prisons, unless they are challenging a change in restriction that amounted to "a quantum change in the level of custody." *Id.* at 499-500 (*quoting Graham*, 922 F.2d at 381); *see also Moran v. Sondalle*, 218 F.3d 647, 650 (7th Cir. 2000) (holding that inmates must use

Section 1983 to challenge transfer to out-of-state prisons because they are not challenging "their convictions, their sentences, or administrative orders revoking good-time credits or equivalent sentence-shortening devices"). Compare this with *Gonzalez-Fuentes v. Molina*, where habeas corpus was the appropriate path to relief because the plaintiffs were challenging the fact of their incarceration, specifically, their reincarceration. 607 F.3d 864, 873 (1st Cir. 2010).

Analyzing the requested relief of plaintiffs in subclasses 1 and 2 makes clear that they do not seek to shorten the duration or fact of their custody. They do not challenge convictions, sentences, or orders against them, nor does their challenge require an inquiry into the validity of their custody—they challenge the conditions. The very nature of confinement in a congregate environment like an IDOC prison will not allow plaintiffs to properly mitigate the spread of COVID-19.

Defendants fault plaintiffs for not seeking a remedy that would improve conditions inside of prisons, *see* Doc. 26 at 21, but plaintiffs have adduced ample evidence to show there is simply no way to make conditions safe within the congregate prison setting, *see e.g.*, Doc. 9 at 41-43. Karen McCarron, a prisoner at Logan Correctional Center who has an M.D. provides a concrete illustration of the problem inside her living quarters. *See* Exhibit D (McCarron declaration). McCarron lives in a housing unit with approximately 60 other women, many of whom are sick or elderly. *Id.* They live in dorms, with 4-6 women sleeping in one room, and all 60 women sharing the same set of toilets and showers. *Id.* As McCarron explains, people at Logan want to do their part to help "flatten the curve" of infection, but they are simply not able to do so on account of the congregate living environment. *Id.* When COVID-19 reaches Logan, it will spread rapidly, and the sick and elderly women with whom she lives will face a very serious risk of illness and death. *Id.* Plaintiffs' section 1983 claim rests on these unsafe conditions and is not *Heck*-barred.

c. *Rizzo* Abstention Does Not Apply

Defendants further argue that this Court should abstain from granting relief under *Rizzo v. Goode*, 423 U.S. 362 (1976). To make this argument, defendants overstate *Rizzo*'s holding and grossly mischaracterize the relief plaintiffs seek.

In *Rizzo*, the Supreme Court reversed the district court's complete "overhaul" of a police department's internal disciplinary procedures. *Id.* at 373. The Court found that the proof of liability amounted a few isolated cases of misconduct by individual officers, which in no way justified a complete overhaul of the department under federal court supervision. *Id.*

There is no comparison between this case and the isolated instances of misconduct by individual police officers found in *Rizzo.* In this case, plaintiffs do not allege that a few correctional officers failed to wear protective masks, or failed to take appropriate measures to prevent transmission of the coronavirus. Rather, plaintiffs allege a statewide failure by the top state officials to protect prisoners from a crisis of unprecedented proportions. The evidence of this failure is largely undisputed. Two prisoners have died at Stateville; the number of prisoners with confirmed cases of COVID-19 has exploded even in the five days since plaintiffs filed this case. While the parties have been drafting briefs, the first confirmed cases have appeared among prisoners at Logan and Pontiac, and the virus is now confirmed to have breached the walls of Menard. If nothing is done, the disaster at Stateville will be repeated at prison after prison across the state. This is nothing like *Rizzo.*

Defendants also misstate the relief sought by plaintiffs. There is no comparison between Plaintiffs' narrowly drawn request for relief in this case and the sweeping changes mandated by the district court in *Rizzo.* Plaintiffs do not seek to place IDOC under the supervision of this Court. Plaintiffs do not seek any change at all in Illinois law, the Illinois Administrative Code, or

any of IDOC's Administrative Directives. Rather, plaintiffs have carefully narrowed their subclasses, their requests for relief, and most relevantly, the instant motion, to mirror the paths for relief established by state law. All plaintiffs seek is a rebalancing of the way defendants exercise their discretion under the existing law and procedures, to ensure that plaintiffs' constitutional right to be protected from the substantial risk of harm (including potentially death) posed by the coronavirus pandemic is preserved. *See* Doc. 24-1 (Plaintiffs' Proposed Remedial Plan). But plaintiffs' proposed plan is just an example of how the defendants could comply with their constitutional obligation. Defendants may well have other means which would be equally effective, which they are free to proffer to the Court. Further, the proposed plan affords defendants the opportunity to make legitimate safety assessments and to transfer only those who have approved host sites. *Id.* Thus, the plan in no way "bypass[es]" the State's interest and expertise, as defendants claim it would. Doc. 26 at 24 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)). What defendants cannot do is continue along the path they are on, slowly transferring or releasing only a handful of prisoners, leaving almost the entire plaintiff class exposed to an imminent deadly threat.

Plaintiffs' requested relief fully complies with the mandate of *Rizzo*, which has since been codified in the Prison Litigation Reform Act and decisions of the Seventh Circuit. The PLRA requires that an injunction be "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. §3626(a)(1)(A). The PLRA further prevents federal courts from entering injunctions which would require government officials to violate state law. 18 U.S.C. §3626(a)(1)(B). The relief proposed by plaintiffs in this case carefully adheres to these mandates. *See also Westefer v. Neal*, 682 F.3d 679 (7th Cir. 2012) (cautioning district courts that

prison officials should be given an opportunity to draft remedial plans once a court finds a constitutional violation). Again, plaintiffs have carefully adhered to this admonition. While they have submitted a proposed remedial plan, it is only a suggestion of the type of relief they believe would remedy the constitutional violation. Defendants may well have alternative plans which would protect plaintiffs' constitutional rights and the Court should consider any such plans.

Since *Rizzo*, numerous courts have issued orders requiring prison officials to take action to protect prisoners' constitutional rights.[3] The U.S. Supreme Court even affirmed an order requiring prison officials in California to release prisoners in *Plata v. Brown*, 563 U.S. 493 (2011). Clearly, *Rizzo* does not stand for the proposition asserted by defendants, that the federal courts can no longer intervene to force prison officials to protect the rights of prisoners.

Tellingly, defendants cite only a single Seventh Circuit case where *Rizzo* has been invoked to bar injunctive relief, *Courthouse News Services v. Brown*, 908 F.3d 1063, 1071 (7th Cir. 2018).[4] *Courthouse News* concerned an injunction won by journalists to force the Clerk of

[3] *See Mitchell v. Baker*, No. 13-cv-0860-MJR-SCW, 2015 U.S. Dist. LEXIS 6689 (S.D. Ill. Jan. 21, 2015) (granting preliminary injunctive relief to a prisoner seeking a transfer); *Reaves v. Dep't of Corr.*, 392 F. Supp. 3d 195, 209-10 (D. Mass. 2019) (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); *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).

[4] Defendants point to district court opinions rejecting prisoner transfers to support their contention that this Court should decline to grant injunctive relief pursuant to *Rizzo*. In each of these cases, however, the court made only a passing reference to *Rizzo* before rejecting otherwise deficient claims. *See Boykin v. Fischer*, No. 16-CV-50160, 2019 WL 6117580, at *14 (N.D. Ill. Nov. 18, 2019) (plaintiff offered no evidence that his assignment to a psychiatric unit violated his constitutional rights); *Cornille v. Lashbrook*, No. 19-CV-002, 2019 WL 366562, at *6 (S.D. Ill. Jan 30, 2019) (plaintiff's vague claims of physical and mental harm from double celling were

the Circuit Court of Cook County to release filings to the public immediately—a course of action incompatible with the state court's standing order, *see id.* at 1067. *Courthouse News* has no application here. This case concerns imminent risk to the lives of medically vulnerable people in IDOC custody. Plaintiffs are not asking this Court to tell a state court system how to operate, nor are plaintiffs asking this Court to direct IDOC to take action inconsistent with its own rules. Neither *Rizzo* nor *Courthouse News* preclude the relief plaintiff seeks.

d. Defendants Will Lose an Exhaustion Affirmative Defense

Finally, defendants argue that plaintiffs' motion should be denied because they do not and cannot allege that they exhausted their administrative remedies. This argument is a non-starter. First and foremost, plaintiffs have no obligation to plead exhaustion—failure to exhaust is an affirmative defense that defendants have the burden of pleading and proving. *Kaba v. Stepp*, 458 F.3d 678, 681 (7th Cir. 2006). Furthermore, even if defendants were to assert a failure to exhaust defense, it would fail.

To comply with the PLRA's exhaustion requirement, prisoners must follow the prison's established grievance process. *See Woodford v. Ngo*, 548 U.S. 81, 88-90 (2006); *Maddox v. Love*, 655 F.3d 709, 721 (7th Cir. 2011) ("The 'applicable procedural rules' that a prisoner must properly exhaust are defined not by the PLRA, but by the prison grievance process itself."). A prisoner is required to exhaust only the remedies that are actually available to them. *Ross v. Blake*, 136 S. Ct. 1850 (2016); *Hernandez v. Dart*, 814 F.3d 836, 842 (7th Cir. 2016). The unavailability of the grievance process "lifts the PLRA exhaustion requirement entirely and

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inadequate to justify a grant of a TRO); *Conway v. Wagnor*, No. 19-CV-036, 2019 WL 183903, at *1-2 (S.D. Ill. Jan. 14, 2019) (TRO not warranted because plaintiff did not allege that he was not currently receiving treatment at the facility from which he sought transfer nor explain why immediate treatment was warranted, among other deficiencies); *Boykin v. Dixon Mental Health Servs.*, No. 16-CV-50160, 2018 WL 8806095, at *3 (N.D. Ill. Oct.15, 2018) (preliminary injunction denied because plaintiff demonstrated low likelihood of success on the merits).

provides immediate entry into federal court." *Ramirez v. Young*, 906 F.3d 530, 539 (7th Cir. 2018) (quoting *Hernandez*, 814 F.3d at 840).

Illinois regulations expressly prohibit use of the grievance process to address the kinds of placement matters at issue in this case: "The grievance procedure shall *not* be utilized for complaints regarding decisions that have been rendered by the Director, such as, but not limited to, facility placement, awards of supplemental sentence credit or transfer denials, or decisions that are outside the authority of the Department, such as parole decisions, clemency or orders regarding length of sentence." 20 Ill. Admin. Code § 504.810(b) (emphasis added). Under Illinois rules, transfers and placements are non-grievable, period. No grievance process was available to plaintiffs, and there is no legitimate exhaustion issue in this case.

2. Subclasses 1 and 2 Have Pled a Plausible Eighth Amendment Claim

a. Deliberate Indifference Does Not Require Plaintiffs To Prove Defendants Subjectively Intend to Harm Them

In order to prevail on their Eighth Amendment claim, plaintiffs must show that they face an objectively serious risk of harm, that defendants acted with deliberate indifference to that risk. *Greeno v. Daley*, 414 F. 3d 645, 653 (7th Cir. 2005); *see also Gray v. Hardy*, 826 F.3d 1000, 1005 (7th Cir. 2016). There is no dispute in this case about the objectively serious risks posed by COVID-19 to those in custody—particularly subclasses 1 and 2 who are medically vulnerable due to age or medical condition. Likewise, there is no dispute defendants' awareness of that risk.

Defendants contend that plaintiffs' lawsuit amounts to a disagreement about their response. But there is virtually no disagreement about the appropriate action here: those who are medically and chronologically vulnerable must be transferred to a place where they can self-isolate. The Governor's April 6 Executive Order demonstrates his awareness of—and agreement with—this fact. Exhibit E (Executive Order 2020-21). Leaving prisoners locked in small cells,

often with cellmates, in congregate settings where they cannot engage in social distancing and must rely on staff for all aspects of daily life is, in the era of COVID-19, is akin to leaving them in a cell with a cobra. As the Seventh Circuit has stated, if prison officials place a prisoner in a cell when "they know that there is a cobra there or at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference." *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 788 (7th Cir. 1995).

Notably, deliberate indifference does *not* require plaintiffs to prove that defendants intend them harm, or even know that harm is a certain result. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996); *Dixon v. County of Cook*, 819 F.3d 343, 350 (7th Cir. 2016). The test instead requires a showing that the defendant is actually aware of and disregarded an obvious risk to the plaintiff's health or safety. *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016). In injunctive cases like this one, deliberate indifference "should be determined in light of the prison authorities' current attitudes and conduct . . . ." *Farmer*, 511 U.S. at 827; *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

b. The Continued Placement of Medically Vulnerable Plaintiffs in Highly Dangerous Settings Where Safety and Health Standards Cannot Be Achieved Meets the Deliberate Indifference Standard

Respondents argue that they cannot possibly be deliberately indifferent to Petitioners' risk of harm from COVID-19—the subjective component of the deliberate indifference analysis—because they have begun to review and furlough or transfer a very small number of IDOC prisoners. *See* Doc. 26 at 6. But defendants' contention that they are taking *some* small action does not defeat plaintiffs' claims of deliberate indifference when, by their own admission, such action has not meaningfully reduced the imminent risk of harm that subclasses 1 and 2—all of whom remain in custody—face because of the IDOC's inability to implement CDC Guidance.

See Gray, 826 F.3d at 1009 ("[k]nowingly persisting in an approach that does not make a dent in the problem is evidence from which a jury could infer deliberate indifference").

In the very unique circumstances of this case, the Governor's own orders admit that the prison environment inherently puts people in subclasses 1 and 2 at risk. And yet defendants have re-located only a small percentage of class members, leaving thousands more in need of an urgent response. While the situation at hand is unique, it fits precisely into the well-established Eighth Amendment jurisprudence of deliberate indifference.

In *LaBrec v. Walker*, 948 F.3d 836, 843 (7th Cir. 2020), the Seventh Circuit explained that courts assessing the deliberate indifference of defendants must look to "the circumstances as a whole . . . ." The risk of harm may come from "a single source or multiple sources," and it is thus irrelevant "whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Sinn v. Lemmon*, 911 F.3d 412, 421 (7th Cir. 2018); *see also Farmer v. Brennan*, 511 U.S. 825, 842 (1994). What matters instead is whether defendants know of the risk (which they do), and whether their response meaningfully responds to that risk (which it does not).

Defendants' deliberate indifference to the plight of those most vulnerable in our prison population is demonstrated by the continued placement—despite the availability of relocation options—of thousands of vulnerable people. For example, William Richard and his oxygen tank remain in a 4-person 12-foot x 15-foot cell, relying on a chain of other people—both staff and prison workers—to prepare and deliver his meals and medications, each a point of contact, and potential infection, along the way. The CDC, however, recommends that people with asthma not

even share household items like cups and towels.[5] Those kinds of limitations on limitations on shared contact are not possible in correctional settings. Plaintiffs not only share physical spaces that often do not allow for social distancing, but daily operations of the facilities involve countless points of contact among numerous people, including staff who come daily.

Plaintiffs are essentially "sitting ducks," whose terms of incarcerations risk becoming death sentences if defendants do not change course to expedite and substantially increase the relocation processes. By doing so, Defendants are "persist[ing] in a course of treatment known to be ineffective." *Petties*, 836 F.3d at 730. *See also Gray v. Hardy*, 826 F.3d 1000, 1009 (7th Cir. 2016) ("Knowingly persisting in an approach that does not make a dent in the problem is evidence from which a jury could infer deliberate indifference."); *Sellers v. Henman*, 41 F.3d 1100, 1103 (7th Cir. 1994) ("The more negligent acts they commit in a circumscribed interval, the likelier it is that they know they are creating *some* risk, and if the negligence is sufficiently widespread relative to the prison population the cumulative risk to an individual prisoner may be excessive"); *see also Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983) (in systemic cases, "as a practical matter, 'deliberate indifference' can be evidenced by 'repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff' or it can be demonstrated by 'proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.'"). Continuation of these inadequate efforts is analogous to giving aspirin to the patient at risk of appendicitis and returning him to his cell, *Sherrod v. Lingle*, 223 F.3d 605, 612

[5] CDC, COVID-19, People Who Need Extra Precautions, People with Moderate to Severe Asthma, available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html

(7th Cir. 2000), or continuing to treat severe vomiting with antacids over three years, *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005).

c. The Court Need Not, and Cannot, Wait for the Named Plaintiffs to Test Positive for COVID-19 to Act

Defendants also assert that plaintiffs cannot establish deliberate indifference because none of them has tested positive for COVID-19. Doc. 26 at 27. This assertion is wholly without merit. It is well-established that an Eight Amendment claim can be founded upon risk of future harm, especially where the harm is certain and imminent. In *Helling*, a plaintiff alleged that he was assigned to a cell with another inmate who smoked five packs of cigarettes per day. *Helling v. McKinney*, 509 U.S. 25, 28 (1993). At issue was whether this exposure to environmental tobacco smoke (ETS) could constitute a valid claim under the Eighth Amendment, even though the plaintiff had not yet suffered harm. *Id.* at 30. The Supreme Court upheld the decision of the Court of Appeals, finding that the plaintiff stated "a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health." *Id.* at 35. *Helling* has also contaminated water, *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001); *see also id.* 472 (probabilistic for future harm can form the basis of an Eighth Amendment claim).

It is widely understood that COVID-19 is a highly contagious disease that spreads rapidly in congregate settings--indeed it is the entire basis for the Governor's currently-pending shelter-in-place order. The fact that the individual named plaintiffs do not yet have COVID-19 does defeat their Eighth Amendment claim.

3. Subclass 1 Has Pled a Plausible ADA Claim

Unlike the Eighth Amendment claim, the Americans with Disabilities Act (ADA) does not require any finding of intent for the Court to act to remedy the discriminatory treatment of

people with disabilities through injunctive relief. *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 846-47 (7th Cir. 1999). Here, the prohibited discrimination is occurring in two ways, regardless of the Defendants' subjective intentions: first, people with disabilities (due to underlying medical conditions) are disparately impacted by the IDOC's practice of maintaining their placement in dangerous settings; and, second, IDOC has denied and continues to deny a reasonable accommodation that is available but not being fully utilized to protect medically vulnerable class members.

People with underlying medical conditions are at significant risk to the COVID-19 virus and the state has acknowledged that the conditions inherent to prisons make it difficult, if not impossible, to effectively mitigate or prevent the virus's spread once it enters a prison—as is tragically occurring at Stateville where the numbers of confirmed cases have soared from a handful to over a hundred in the course of a week. Defendants concede that IDOC has mechanisms available which would be more effective at protecting against the significant risk of harm (including furlough), but it has only utilized them for a very small percentage. Plaintiffs remain stranded in conditions that now jeopardize their lives. The fact that IDOC has not taken the requisite action for Plaintiffs demonstrates a more than plausible violation of the ADA.

a. Plaintiffs are Otherwise Qualified

The term "qualified individual with a disability" is specifically defined in the statute as "an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Plaintiffs easily satisfy the otherwise qualified standard. The relevant service or program—as explained in plaintiffs' opening brief—is IDOC's program/service of providing safe custody.

Ignoring the service of "providing safe custody" in the pleading, defendants reframe the relevant program/service as furlough and argue that plaintiffs are not otherwise qualified despite the significant medical needs. Defendants' argument is wrong on the law and the facts. While a furlough is a program/service of the IDOC in a general sense, it is not the specific one at issue here; rather, it is the method of accommodation available to IDOC. That said, even if furlough was the program/service in question, defendants' argument remains a non-starter because, as a factual matter, plaintiffs easily qualify for the program/service of furlough.

i. Members of Subclass 1 are Otherwise Qualified for the IDOC Program/Service at Issue: Safe Custody

The issue challenged by plaintiffs is IDOC's failure to take the requisite action to ensure the safety of individuals within its custody and control; thus, the appropriate program/service to consider is IDOC's program/service of providing safe custody.[6] A "program or activity" under Title II "applies to anything a public entity does." *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002) (cautioning against "needless hair splitting arguments" and holding that Title II of the ADA applies to "anything a public entity does").

There is no reason to redefine the program/service at issue here. The Supreme Court has cautioned against defining the scope of a public benefit so as to avoid questions of discriminatory effects. In *Alexander v. Choate*, 469 U.S. 287, 301 (1985), a case brought under the ADA's predecessor the Rehabilitation Act, the Supreme Court in a unanimous decision

[6] Indeed, the stated mission of IDOC is to "[t]o serve justice in Illinois and increase public safety by promoting positive change in offender behavior, operating successful reentry programs, and reducing victimization." Among the ways that IDOC pursues its mission is to offer a program of "safe, secure, and humane correctional facilities" in which "[s]afety is at the forefront of agency operations with an emphasis on frontline staff to protect and control inmates." *See* IDOC Agency Overview, https://www2.illinois.gov/idoc/aboutus/Pages/IDOCOverview.aspx

explained that when assessing the benefit at issue, caution should be taken to ensure that the "benefit [is not] defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *See also id.* at n.21 (citing with approval the government's statement that "[a]ntidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit").

Moreover, ensuring the safety of individuals has been recognized as a requirement under Title II of the ADA, as well as a service, program or activity. *See, e.g.*, *Arenas v. Georgia Dep't of Corr.*, 2018 WL 988099, at *8 (S.D. Ga. Feb. 20, 2018) (denying motion to dismiss regarding plaintiff's request for an appropriate cell assignment to access the prison's benefits/services of "safe housing"); *Cox v. Mass. Dep't of Corr.*, 18 F. Supp. 3d 38, 46 (D. Mass. 2014) (plaintiff properly alleged an ADA claim for the denial of "the benefits of the facility ('safe' housing and supervision)").

Defendants do not – and cannot – dispute that they are responsible for the program/service of safe custody of individuals within its control. Thus, members of subclass 1 are "qualified individuals with disabilities" by virtue of their current incarceration.[7]

ii. Plaintiffs are also "Otherwise Qualified" and Eligible for Medical Furlough

Plaintiffs are eligible for furlough under the statute, both before and after the Governor's April 6, 2020 Executive Order. *See* Exhibit E (Executive Order 2020-21). The statute sets forth a range of purposes for which IDOC may place an individual on furlough, including to obtain medical services not otherwise available. 730 ILCS 5/3-11-1(a)(2). Plaintiffs meet the statutory

[7] Defendants do not dispute that plaintiffs are individuals with disabilities within the meaning of the ADA, as set forth in Plaintiffs' Complaint, at ¶ 122. *See* 42 U.S.C. § 12102(1); *see also* 28 C.F.R. § 35.104.

requirement (even prior to the amendment by Executive Order) in two ways. First, due to the current COVID-19 pandemic, increased social distancing, as well as rigorous cleaning and hygiene practices are all an essential component of the medical care standards for people with these conditions – standards that cannot be effectively achieved in their current settings.[8] Therefore, medical furlough is appropriately utilized to allow them to comply with standards of care (treatment) for these medical conditions. Second, by definition, members of subclass 1 all have significant medical conditions for which they require ongoing medical treatment. Due to the pandemic IDOC is currently limited in its ability to provide care (not to mention the ongoing staffing shortages or denials of care that have plagued the system for years). *See* Doc. 1, Complaint ¶¶ 86-89. IDOC warned class members days ago that their medical resources were already "stretched thin." *See* Doc. 1-10.

Moreover, with the April 6 Executive Order, all members of subclass 1 are eligible for medical furlough regardless of whether they are currently receiving medical treatment for their conditions, because it specifically allows for the use of furlough for any medical purpose for exactly this reason, to allow medical furloughs for the medically vulnerable population more broadly due the specific limitations of the prison system. *See* Exhibit E. As a result, each of the named plaintiffs for subclass 1 are all "qualified individuals with disabilities" for the medical furlough program. *See* Doc. 1, Complaint ¶¶ 93-101 (describing medical circumstances of James Money, William Richard, Gerald Reed, Tewkunzi Green, Danny Labosette, Amber Watters, Carl Reed, and Carl "Tay Tay" Tate).

[8] Northwestern Medicine, High Risk Conditions and COVID-19, at https://www.nm.org/conditions-and-care-areas/infectious-disease/covid-19/high-risk-conditions

b. Disparate Impact

Subclass 1 is defined to conform to the CDC's findings as to medical vulnerability based on specific underlying medical conditions; therefore, all subclass members fall into these established high-risk categories. Moreover, outside of this litigation, the Governor has admitted to the increased vulnerability of this subclass. The April 6 Executive Order plainly acknowledges the disparate impact of the incarcerated population of medically vulnerable people, which defendants nonetheless dispute in these pleadings.

> WHEREAS certain populations are at a higher risk of experiencing more severe illness as a result of COVID-19, including older adults and people with serious chronic health conditions such as heart disease, lung disease, or other conditions;
>
> WHEREAS, the Illinois Department of Corrections (IDOC) currently has a population of more than 36,000 . . . the vast majority of whom, because of their close proximity and contact with each other . . . are especially vulnerable to contacting and spreading COVID-19

Exhibit E; *see also* Doc. 1, Complaint, at ¶ 73 (quoting March 26, 2020 press briefing, including that "certain populations are at a higher risk of experiencing more severe illness as a result of COVID-19, including older adults and people who have serious chronic health conditions, such as heart disease, diabetes, lung disease or other mental or physical conditions.").

Nonetheless, defendants here challenge the existence of a disparate impact on people with these underlying conditions, arguing that more detailed statistical evidence is required. While plaintiffs disagree that is more required, the statistical evidence showing disparate impact is readily available.

The CDC is issuing Morbidity and Mortality Reports with detailed data and statistical analysis, summarized here:

> The percentage of COVID-19 patients with at least one underlying health condition or risk factor was higher among those requiring intensive care unit (ICU) admission (358 of 457, 78%) and those requiring hospitalization without ICU admission (732 of 1,037,

> 71%) than that among those who were not hospitalized (1,388 of 5,143, 27%). The most commonly reported conditions were diabetes mellitus, chronic lung disease, and cardiovascular disease. These preliminary findings suggest that in the United States, persons with underlying health conditions or other recognized risk factors for severe outcomes from respiratory infections appear to be at a higher risk for severe disease from COVID-19 than are persons without these conditions. . . . These results are consistent with findings from China and Italy, which suggest that patients with underlying health conditions and risk factors, including, but not limited to, diabetes mellitus, hypertension, COPD, coronary artery disease, cerebrovascular disease, chronic renal disease, and smoking, might be at higher risk for severe disease or death from COVID-19 (3,4).

The Morbidity and Mortality Reports also include detailed tables showing the data for each specific condition.[9] In New York, 4,089 of the 4,758 deaths were of patients with at least one other chronic disease, including hypertension in 55% of deaths and diabetes which was diagnosed in 1,755 deaths (about 37% of the cases).[10] Again, because plaintiffs have defined the class as premised on the CDC's findings of vulnerability due to underlying medical conditions, this is sufficient evidence of disparate impact.

c. Plaintiffs State a Meritorious Discrimination Claim for Failure to Accommodate

Incarceration in an Illinois prison is not intended to be a death sentence. For reasons outside of IDOC's control—the COVID-19 pandemic—IDOC's program/service of providing safe custody is not available to people in subclass 1 without the provision of reasonable accommodations. Due to age and underlying medical conditions, members of subclass 1 face two related obstacles to their safety. First, most are at heightened risk to contract COVID-19, due to underlying medical conditions or to immune suppressing drugs taken to address medical

[9] CDC COVID-19 Response Team: Morbidity and Mortality Weekly Report, "Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 — United States, February 12–March 28, 2020.

[10] USA Today, New data on New York coronavirus deaths: Most had these underlying illnesses; 61% were men https://www.usatoday.com/story/news/health/2020/04/07/new-york-coronavirus-deaths-data-shows-most-had-underlying-illnesses/2960151001/ (Apr. 7, 2020)

conditions. Second, all are at extremely heightened risk to experience a more severe case of COVID-19 due to underlying medical conditions.

To provide the service or program of safe custody, IDOC normally houses those in custody in one of the 28 facilities around the state. However, because of current conditions, it can no longer do so. The Governor's April 6 Executive Order acknowledged:

> WHEREAS certain populations are at a higher risk of experiencing more severe illness as a result of COVID-19, including older adults and people with serious chronic health conditions such as heart disease, lung disease, or other conditions;
>
> WHEREAS, the Illinois Department of Corrections (IDOC) currently has a population of more than 36,000 . . . the vast majority of whom, because of their close proximity and contact with each other . . . are especially vulnerable to contacting and spreading COVID-19; and
>
> WHEREAS, the IDOC currently has limited housing capacity to isolate and quarantine inmates who present as symptomatic of, or test positive for COVID-19"

Exhibit E. If the IDOC does not have sufficient housing to appropriately quarantine those who actually developed symptoms and confirmed cases, they certainly do not have the capacity to provide the level of quarantine needed to protect these medically vulnerable class members in the event of an outbreak in their facilities.

As a result, defendants must provide medically vulnerable class members with the reasonable accommodation of medical furlough. 28 C.F.R. §§ 35.130(b)(7) ("public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."). Contrary to defendants' argument, the failure to provide an accommodation needed to prevent the disparate impact on Plaintiffs is itself discrimination based on disability. Direct, or intentional, discrimination is not the only form of discrimination

prohibited by the ADA. *See Alexander v. Choate*, 469 U.S. 287, 297 & n. 12 (1985) (Congress recognized that discrimination on the basis of a disability is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference--of benign neglect.").Thus, equally violative of the statute is the failure to make reasonable modifications or accommodations that would allow people with disabilities to participate in the same programs in which nondisabled people participate. As defendants themselves note, plaintiffs "may establish discrimination by presenting evidence that the defendant intentionally acted on the basis of the disability, the defendant refused to provide a reasonable modification, **or** the defendant's denial of benefits disproportionately impacts disabled people." Doc. 26 at 31, citing *Culvahouse v. City of LaPorte*, 679 F. Supp. 2d 931, 937 (N.D. Ind. 2009).

Moreover, allowing subclass members the accommodation of participating in an existing program is not a "fundamental alteration." *Radaszewski v. Maram*, 383 F.3d 599, 609-611 (7th Cir. 2004) (explaining that Title II of the ADA "may well require the State to make reasonable modifications to the form of existing services" … but that "a State is not obliged to create entirely new services" or fundamentally alter the substance of the services it provides). Plaintiffs do not ask defendants to create a new program or to change eligibility criteria for a program. Likewise, defendants' contention that it would be an undue burden to fully utilize this accommodation for our most vulnerable class members cannot be accepted. This accommodation is needed to save lives, and will further also serve to decrease the risk to other prisoners, to prison staff, and to the surrounding communities. *See e.g. Radaszewski*, 383 F.3d at 613-14 (explaining that while the initial cost of community based care, even if greater than cost of institutionalized care, is not enough to establish fundamental alteration: "If every alteration in a

program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed.").

In sum, plaintiffs have demonstrated a likelihood to succeed on the merits of their Eighth Amendment and ADA claims.

B. Plaintiffs Have Demonstrated That They Face Irreparable Harm

Defendants' next argument, that plaintiffs have not demonstrated irreparable harm, is preposterous. They argue that Plaintiffs have only demonstrated "the possibility that a substantial risk might arise from COVID-19 generally, not that any named plaintiff faces a particular probable harm." Doc 26 at 34. Defendants are simply wrong. At least two prisoners have already died from COVID-19. Currently 110 prisoners are infected with the virus in 7 different correctional centers—including 95 prisoners at Stateville. And 70 staff from 13 different correctional centers are infected. It is not just possible that more prisoners will contract COVID-19, it is certain. And as described in detail above, if members of subclasses 1 and 2—and in particular named Plaintiffs Money, Richard, Gerald Reed, Green, Labosette, Carl Reed, and Tate—contract the virus, they will likely suffer severe illness or death because of their age and/or serious underlying medical conditions. There is no doubt that the risk of severe illness or death constitutes irreparable harm. *See, e.g.*, *Jones'El v. Burge*, 164 F. Supp. 2d 1096, 1123 (W.D. Wis. 2001) ("Put more specifically, pain, suffering and the risk of death constitute irreparable harm sufficient to support a preliminary injunction in prison cases." (internal quotation marks omitted)); *Flynn v. Doyle*, 630 F. Supp. 2d 987, 993 (E.D. Wis. 2009) (granting a preliminary injunction in a prison medical care case where the irreparable harm constituted continued medication errors and delays, which will result in life-threatening risks, the exacerbation of chronic and acute serious medical conditions, and unnecessary pain and suffering); *Farnam v.*

Walker, 593 F. Supp. 2d 1000, 1012-13 (C.D. Ill. 2009) (finding irreparable harm where a doctor testified that "the care the plaintiff was receiving at Graham, if continued, would significantly decrease the quality as well as the quantity of the plaintiff's life").

The named plaintiffs do not have to wait until they contract the virus to demonstrate irreparable harm and request relief. As defendants recognize, the risk of irreparable injury simply has to be "likely" in the absence of an injunction. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017). Here it is certainly likely that when the virus enters the named plaintiffs' prisons—indeed it has already entered Stateville NRC where Gerald Reed is housed, Logan where Green and Watters are housed, Graham where Carl Reed is housed, and Danville where Tate is housed—and inevitably begins to spread due to the congregate environment of prisons and the highly contagious nature of the virus, they are at risk of contracting COVID-19 and becoming severely ill and/or dying. Defendants' reliance on *Orr v. Shicker*, -- F.3d --, 2020 WL 1329659 (7th Cir. 2020) is misplaced, as that case involved the hepatitis C virus (HCV), which the court noted "is a slow-moving disease and that rates of progression vary between individuals," and that "sometimes hepatitis C does not progress for years in patients who do not undergo treatment." *Id*. at *9 (finding that given the nature of HCV and the fact that IDOC was treating inmates with HCV, the individual plaintiffs did not show that the treatment protocol would likely cause them irreparable harm). Here, COVID-19 is very different from HCV—particularly because COVID-19 is much more contagious, the rates of infection are higher, the symptoms can escalate very quickly, and entire medical systems are becoming overwhelmed by critically ill COVID-19 patients. COVID-19 is uniquely and extremely dangerous to members of subclasses 1 and 2.

The Seventh Circuit has explained that a prisoner faces a substantial risk of harm when prison officials place a prisoner in a cell in which "they know that there is a cobra there or at least that there is a high probability of a cobra there." *Brown v. Budz*, 398 F.3d 904, 911 (7th Cir. 2005) (citation omitted). Here, COVID-19 is the hypothetical cobra and the named plaintiffs and members of subclasses 1 and 2 face a substantial risk of getting bit by the cobra. Accordingly, the named plaintiffs and members of subclasses 1 and 2 clearly face irreparable harm if injunctive relief is not granted.

C. The Balance of Equities Weighs in Favor of Plaintiffs

Defendants' argument that the balance of harms weighs in their favor is likewise unavailing. Yet again relying on a straw man argument, defendants assert that plaintiffs seek to have thousands of dangerous people cast out onto the street to wreak havoc in their communities. Doc. 26 at 35. Plaintiffs request no such thing. Plaintiffs seek transfer of prisoners severe illness or death from exposure to COVID-19 on account of underlying medical issues or age to their homes via medical furlough.[11] These prisoners would be subject to a risk assessment and host site approval and would remain in the custody of the IDOC, under restrictions set by the IDOC, including, for example, electronic monitoring. Doc. 24-1. Defendants' safety concerns are significantly overstated.[12]

In addition to wrongly speculating about the danger plaintiffs present to the public, defendant completely overlook the risks posed to the public without relief from this court.

[11] Throughout their brief, defendants assert that plaintiffs are seeking to release 16,000 prisoners. While the estimated number of people in each of subclasses 1 and 2 adds up to 16,000, the number of prisoners seeking relief is actually much lower. As defendants are aware, there is significant overlap in these subclasses.

[12] Many of the individuals in subclasses 1 and 2 are also within a year of their out dates (and fall into one or more of subclasses 3-6), which further weakens the defendants' position relating to safety concerns. Defendants will be hard-pressed to articulate a safety concern to justify refusing furlough to those already scheduled for release in the near future.

Prisons are not closed environments. As the outbreak at Stateville shows, the rapid spread of COVID-19 in congregate correctional settings completely overwhelmed the local hospital, prompting a local official to declare the situation a "disaster." Furthermore, COVID-19 infection in IDOC has not been limited only to prisoners. As of April 8, 2020, there are 39 confirmed cases among Stateville staff, and that number is on the rise, and more than 10 IDOC facilities have at least one confirmed staff case.

It is only a matter of time before the situation at Stateville replicates in prison communities throughout the state. Unfortunately for those communities, they do not enjoy the same medical resources as the communities near Stateville. The chart below shows the number of ICU beds in communities surrounding just a few of IDOC's facilities.[13]

Correctional Center	Prison Population	Local Population	Total ICU Beds in the Area
Graham	1,919	6,156 (Hillsboro)	4
Lawrence	2,166	5326 (Sumner)	12
Dixon	2,051	17,253 (Dixon)	14
Danville	1,724	33,158 (Danville)	20
Menard	2,213	10,727 (Chester)	23
Shawnee	1,682	4,496 (Vienna)	26

[13] Hospital bed data obtained from Illinois Department of Public Health, Inventory of Health Care Facilities and Services and Need Determinations (2019), available at https://www2.illinois.gov/sites/hfsrb/InventoriesData/HealthCareFacilities/Documents/Hospital%20Inventory%202019%20E.pdf

Logan	1,657	15,473 (Lincoln)	105
Stateville	2,674	23,511 (Crest Hill)	115

Defendants completely ignore the strong public interest in preventing these local communities and their hospitals from becoming overburdened with COVID-19 cases. It is not possible to flatten the curve outside of prisons if it is not also flattened inside prisons. As defendants fail to acknowledge, it is not only the health and welfare of prisoners at stake, but also the health and welfare of those who live and work in the surrounding communities. The balance of equities weighs in favor of granting the relief that plaintiffs seek.

III. The Court Should Preliminarily Certify Subclasses 1 and 2

Defendants do not dispute that subclasses 1 and 2 satisfy the numerosity and adequacy requirements of Federal Rule of Civil Procedure 23. Instead, in an attempt to defeat plaintiffs' request for preliminary class certification, defendants argue that plaintiffs' have proffered insufficient evidence to meet their burden and that the putative class lacks commonality and typicality. These arguments fail—and ignore that subclasses one and two request only preliminary certification/and or class wide injunctive relief.

A. Plaintiffs Seek Preliminary Class Certification for the Limited Purpose of Ensuring that Emergency Relief Benefits Each Member of Subclasses 1 and 2

At this time, plaintiffs do not seek a final order from this Court certifying the putative class and each subclass. Instead, plaintiffs seek a mechanism to ensure that any emergency relief this Court orders benefits members of subclasses 1 and 2. When confronting the issue of class certification in the context of a motion for preliminary injunction, courts generally take one of two approaches. The first approach is to "provisionally" or "preliminarily" certify a class. The

second approach is to use the court's equitable powers to order class-wide relief. Either approach would satisfy the Plaintiffs' request here.

Courts regularly certify classes on a provisional or preliminary basis when granting a preliminary injunction or a temporary restraining order. *See Lee v. Orr*, 2013 WL 6490577, at *2 (N.D. Ill. 2013) (quoting *Newberg on Class Actions*) ("The court may conditionally certify the class or otherwise order a broad preliminary injunction, without a formal class ruling, under its general equity powers. The lack of formal class certification does not create an obstacle to class wide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons.") (quoting *Ill. League of Advocates for the Developmentally Disabled v. Ill. Dept. of Human Services*, 2013 WL 3287145, at *3 (N.D. Ill. 2013), subsequent determination, 2013 WL 3776962 (N.D. Ill. 2013)) (internal quotation marks omitted). The Ninth Circuit explicitly approved of this practice when it upheld a district court's decision to provisionally certify a class and issue a preliminary injunction in litigation related to the Telephone Consumer Protection Act. *See Meyer v. Portfolio Recovery Associates*, LLC, 707 F.3d 1036, 1043 (9th Cir. 2012) (finding the plain language of FRCP 23(b)(2) permits provisional class certification). *See also Ligon v. City of New York*, 288 F.R.D. 72 (S.D.N.Y. 2013) (granting preliminary injunction class certification to a class of plaintiffs challenging police practices in New York City); *Morrison v. Heckler*, 602 F. Supp. 1485, 1485-86 (D.C. Minn. 1985) (preliminarily certifying a class and granting a temporary restraining order in litigation concerning public benefits); *Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984) (certifying a plaintiff and defendant class concurrently with issuing a preliminary injunction).

Courts also regularly grant class-wide relief through a preliminary injunction, without making explicit findings related to Rule 23. "Under appropriate circumstances, a court may grant

preliminary injunctive relief in favor of putative class members before class certification, and correspondingly, assess the harm to putative class members when considering the preliminary injunction motion." 2 *Newberg on Class Actions* § 4:30 (5th ed.). Numerous courts have taken this path when granting a class-wide preliminary injunctive relief. *See Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 433 (6th Cir. 2012) (there is nothing improper about a preliminary injunction preceding a ruling on class certification); *Fish v. Kobach*, 189 F. Supp. 3d 1107, 1148 n.163 (D. Kan. 2016) (stating, in context of a class action challenge to Kansas motor voter statute, that "case law supports this Court's authority to issue class-wide injunctive relief based on its general equity powers before deciding the class certification motion"); *Abdi v. Duke*, 280 F. Supp. 3d 373, 400 (W.D.N.Y. 2017) (granting a class-wide injunction where named plaintiffs demonstrated irreparable harm and that those harms were representative of putative class members); *Rodriguez v. Providence Community Corrections*, *Inc.*, 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015) (a district court may award appropriate class-wide injunctive relief prior to a formal ruling on the class certification issue based upon either a conditional certification of the class or its general equity powers).

B. Plaintiffs Have Proffered Sufficient Evidence To Carry Their Burden Under Rule 23

Defendants assert that the plaintiffs "have presented no actual evidence" about the proposed class and that on this basis alone, the Court should deny their request for preliminary class certification. Defendants also attempt to attack the evidence plaintiffs present as "inadmissible hearsay." Doc 26 at 37. Not only does this argument misrepresent Plaintiff's filings, it also ignores the "well-established rule that hearsay is admissible in preliminary injunction hearings." *See SEC v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48 (2d Cir. 2004) (affirming the district court's grant of

preliminary injunctive relief in favor of the putative class, which the district court granted in reliance on affidavits from unnamed plaintiffs); *FTC v. Lifewatch Inc.*, 176 F. Supp. 3d 757, 761-62 (N.D. Ill. 2016) ("Affidavits and other hearsay materials are often received in preliminary injunction proceedings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding.").

Subclass 1 is defined as "people who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19, including but 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 75 ILCS 5/3-11-1." Subclass 2 is comprised of people who are medically vulnerable to COVID-19 because they are 55 years of age and older and who are eligible for medical furlough pursuant to 75 ILCS 5/3-11-1.

In support of their request to preliminarily certify these subclasses, plaintiffs request that the Court take judicial notice of a number of well-established facts, specifically: (1) World Health Organization data demonstrating people in these subclasses have a significantly increased

chance of dying if they contract COVID-19;[14] (2) United States Department of Justice Data regarding the increased prevalence of medical vulnerabilities among people in prison;[15] and (3) the IDOC's own data establishing that there are 4,807 people in its custody who are 55 or older.[16] *See* Fed. R. Evid. 201 ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").[17]

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[14] Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), World Health Organization (Feb. 28, 2020), at 12, *available at* https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf (last visited Apr. 1, 2020).

[15] Laura M. Marushack et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, U.S. Dept. of Justice (2014).

[16] Population Data Sets, Illinois Department of Corrections, available at https://www2.illinois.gov/idoc/reportsandstatistics/Pages/PopulationDataSets.aspx

[17] Plaintiffs further request that this Court take judicial notice of the numerous federal district decisions finding the subclasses' ages and medical conditions created a heighted risk of serious health consequences or even death if infected with COVID-19 and that there exists a high risk of contracting COVID-19 in correctional facilities. *See United States v. Perez*, 2020 WL 1546422, at *4 (S.D.N.Y. 2020) (ordering a prisoner's early release after finding that a prisoner's recent surgeries compromised his immune system, where he was housed in a small cell and he could not "protect himself from the spread of a dangerous and highly contagious virus.); *United States v. Ramos*, 2020 WL 1478307, at *1 (D. Mass. 2020) (ordering the release of a detainee who had asthma and diabetes from a facility where there were no known cases of COVID-19 after finding that "it is not possible for a medically vulnerable inmate such as Mr. Ramos to isolate himself in this institutional setting as recommended by the CDC); *United States v. Rodriguez*, 2020 WL 1627331, at *8 (E.D. Pa. 2020) (finding that "prisons are ill-equipped to prevent the spread of COVID-19" and ordering the release of a prisoner with diabetes); *United States v. Fellela*, 2020 WL 1457877, at *1 (D. Conn. 2020) (releasing from custody a 62-year-old, overweight detainee after finding that "all levels of government nationwide have recently taken drastic measures in light of the COVID-19 pandemic to promote "social distancing" and to prohibit the congregation of large numbers of people with one another. But, as is true for most jails and prisons, the conditions of confinement at Wyatt are not compatible with these safeguards."); *United States v. Cubie*, 2020 WL 1669400, at *2 (E.D. Wis. 2020) (releasing 54 year old prisoner because of the threat of COVID-19); *Basank v. Decker*, 2020 WL 1481503, at *3 (S.D.N.Y. 2020) (ordering the release of immigrant detainees who asthma, diabetes, heart disease, hypertension and obesity after taking judicial notice that "for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality" and that COVID-19 presents a "health risk. . .of constitutional significance—for inmates who are elderly or have underlying illnesses."); *Thakker et al v. Doll*, 2020 WL 1671563, at *7 (M.D. Pa. 2020) (releasing from detention immigrant petitioners who were over

With regard to information about the named plaintiffs and putative class, attached to Plaintiffs' Motion for a Preliminary Injunction, *see* Doc. 9-11 (and attached here as Exhibit F), are a number of declarations from the families of putative class members. These declarations set forth the health conditions class members live with including asthma,[18] and hypertension[19] the prevalence of people in prison exhibiting symptoms of COVID-19,[20] and the inability to socially distance in prison.[21] Family members also assert that they would welcome their loved one into their homes upon a grant of medical furlough.[22]

Declarations from the family members of named plaintiffs are also attached to this motion describing the named plaintiffs' medical conditions which include hypertension,[23]

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50 and/or had hypertension, kidney failure, diabetes, hepatitis b, anemia, and leukemia after finding that the nature of "detention facilities makes them uniquely vulnerable to the rapid spread of highly contagious diseases like COVID-19" and that petitioners' continued detention may end in "catastrophic results."); *Jones et al, v Wolf et al.*, 2020 WL 1643857, at *8 (W.D.N.Y. 2020) (taking "judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality."); *United States v. Davis*, 2020 WL 1529158, at *6 (D. Md. 2020) (releasing a pretrial detainee with bronchitis upon finding that "incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant's release to home confinement."); *Malam v. Adducci,*, 2020 WL 1672662, at *8 (E.D. Mich. 2020) (releasing a 56-year-old immigrant detainee after finding *inter alia* that "petitioner's involuntary interaction with purportedly asymptomatic guards who rotate shifts is also a significant exposure factor.")

[18] Declaration of Amy Cochran (mother of putative class member Brice Mixon, Shawnee Correctional Center) at 1; Declaration of Beverly Bennet (mother of putative class member Jamal Bennett, Centralia Correctional Center) at 1; Declaration of LaTonya Jenkins Lucas (mother of putative class member Frank Sykes, Stateville Correctional Center) at 1.

[19] Declaration of Ohlibamah Clark (finance of putative class member Duane Moore, Dixon Correctional Center) at 1.

[20] Declaration of Carla Felton (partner of putative class member Carlvosier Smith, Stateville Correctional Center) at 1.

[21] Declaration of Kaye Thomas (wife of putative class member Luther Thomas, Big Muddy Correctional Center) at 1; Declaration of Sharon Gray (mother of putative class member John Shores, Hill Correctional Center) at 1.

[22] Thomas Dec at 1; Jenkins-Lucas Dec at 1; Clark Dec at 1; Gray Dec at 1; Bennet Dec at 1.

[23] Declaration of Prestina Tate (sister of named plaintiff Carl Tay Tay Tate, Danville Correctional Center) at 1.

diabetes,[24] Hepatitis C[25] and cancer.[26] Each family member declarant affirms that they have a space in their homes for their currently incarcerated loved one to safely quarantine upon release and that they will support their loved one in complying with IDOC supervision requirements and obtaining medical care.[27]

Defendants have custody and control over each of the named plaintiffs as well as all of the medical and other records that corroborate the allegations counsel has made about them. Defendants can access and verify the contents of those records themselves, and plaintiffs' counsel is prepared to elicit testimony from each of the named class representatives at the preliminary injunction hearing. Plaintiffs hereby requests that defendants make each of the named plaintiffs available to testify by telephone at the hearing.[28]

Plaintiffs' evidence is sufficient to support a finding of preliminary class certification—particularly because this evidence demonstrates the significant harm the putative subclasses will face in the absence of class wide relief. *See Doe v. Trump*, 418 F. Supp. 3d 573, 604 (D. Or. 2019) ("Having putative class members suffer [an] alleged irreparable harm merely because the preliminary injunction had to be litigated in an expedited fashion before class certification could be fully litigated is contrary to the purposes behind class actions and preliminary injunctive relief.").

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[24] Declaration of Kim Reed (sister of named Plaintiff Carl Reed, Graham Correctional Center at 1.

[25] Declaration of Valerie Ott (mother of named plaintiff Danny Labosette, Robinson Correctional Center) at 1.

[26] Declaration of Patty Best (fiancee of named Plaintiff James Money, Illinois River Correctional Center) at 1.

[27] Tate Dec at 1; Reed Dec at 1; Best Dec at 1; Ott Dec at 1; Declaration of LaDonna Sipes (mother of named Plaintiff Amber Watters, Logan Correctional Center) at 1; Declaration of Siovhan Tucker (niece of named Plaintiffs Gerald Reed, Northern Reception Center) at 1; Declaration of Sarah Wild (family friend of Gerald Reed, Northern Reception Center at 1.

[28] If the Court prefers, plaintiff can file motions for writs to secure plaintiffs' phone appearances.

C. Plaintiffs Meet the Commonality and Typicality Requirements of Rule 23

Defendants argue that factual variances between members of the subclasses undermine the Plaintiffs' assertion that their claims share a common question that drive the resolution of the litigation and that the named plaintiffs' injuries are atypical. *See* Doc. 26 at 38. These arguments hinge on defendants' mischaracterization of plaintiffs' position. As noted repeatedly, plaintiffs do not seek a blanket release order. *See* Doc. 24-1 (Plaintiffs' Proposed Remedial Plan).

In an attempt to defeat commonality, the defendants describe a list of individualized factors that IDOC should consider prior to making a decision about a class member's eligibility for medical furlough. Doc 26 at 38. The plaintiffs agree that some evaluation regarding individuals' health and safety which balances public safety concerns must occur prior to any determination regarding medical furlough. The fact that, after an evaluation, some class members may be suitable for furlough while others may have to remain in IDOC's physical custody does not destroy commonality. The commonality requirement does not require perfect uniformity. *See e.g.*, *Robert L. Meinders D.C., Ltd v. Emery Wilson Corp.*, 2016 WL 3402621, at *4 (S.D. Ill. June 21, 2016) ("'Rule 23(a)(2) does not demand that every member of the class have an identical claim,' and some degree of factual variation will not defeat commonality") (quoting *Spano v. The Boeing Co*., 633 F.3d 574, 585 (7th Cir. 2011)); *Rench v. TD Bank, N.A.*, 2018 WL 264121, at *3 (S.D. Ill. Jan. 2, 2018) (same); *Braggs v. Dunn*, 317 F.R.D. 634, 656 (M.D. Ala. 2016). Further, the individualized nature of the relief plaintiffs seek is entirely consistent with Rule 23. *See DL v. D.C.*, 860 F.3d 713, 726 (D.C. Cir. 2017) (certifying a subclass of special education students under Rule 23(b)(2) when they sued for individualized assessments and educational programming to meet their specific needs because a single injunction was suitable to

"provide relief to each member of the class" (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011)); *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (approving certification for a class of individuals detained without bond hearings and seeking injunctive relief in the form of individual bond hearings even though some members of the class may not have been entitled to this relief and may not have suffered an actually cognizable injury); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896 (7th Cir. 1999) (approving class certification in race discrimination case where plaintiffs sought individualized relief in the form of back pay); *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997) (approving the certification of a Title VII class action for plaintiffs seeking individualized monetary relief in the form of back pay and front pay); *Franco-Gonzales v. Napolitano*, No. CV 10-02211 DMG DTBX, 2011 WL 11705815, at *14-15 (C.D. Cal. Nov. 21, 2011) (certifying a class of individuals in Department of Homeland Security custody alleging inadequate procedures in place to assess the mental competence of aliens in custody and provide them with safeguards even though relief would "vary based on the circumstances" of each case); *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 601 (N.D. Cal. 2015) (finding certification of an injunctive and declaratory relief class under Rule 23(b)(2) proper even though relief "might differ from individual to individual" because the class sought a "uniform relief from a common policy that… applies to all class members"); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 388 (D. Colo. 1993) (certifying a "medical monitoring class" seeking relief for damages from radioactive and nonradioactive substances when relief would be based on "the individualized nature of each individual's claim").

The claims of the named plaintiffs are also typical of the subclasses they seek to represent. Named Plaintiffs and the members of the putative class meet the typicality requirement because they have all suffered from the same violations of their constitutional rights. *See* Rule 23(a)(3).

Each named plaintiff here has a heighted chance of becoming critically ill or dying if they contract COVID-19 and each is currently subjected to a substantial risk of harm because of the IDOC's failure to act with urgency regarding the medical furlough related evaluations and determinations. This is sufficient to satisfy typicality. *See Oshana v. Coca-Cola, Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (typicality is "meant to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large" (internal quotations omitted)). Certain factual distinctions between named plaintiffs and the class members do not defeat typicality. *See Young v. Cnty of Cook*, No. 06 C 552, 2007 WL 1238920, at *6 (N.D. Ill. Apr. 25, 2007) ("The likelihood of some range of variations in how different groups of new detainees were treated does not undermine the fact that the claims of each class share common factual basis and legal theories."); *Phipps v. Sheriff of Cook Ctny*, 249 F.R.D. 298, 301 (N.D. Ill. 2008) ("That the particular conditions may differ slightly from one cell block to the next, or that there are factual distinctions between the actual injuries suffered by the [the named plaintiff] and the class members, does not defeat typicality under Rule 23(a)(3).").

Plaintiffs have demonstrated that their class claims present common questions susceptible to class-wide resolution, that those common questions predominate over individualized ones, and that the experience of the named plaintiffs is typical of the class, and defendants do not dispute that the proposed class is sufficiently numerous and adequately represented by class counsel. Accordingly, this Court should grant plaintiffs' request to preliminarily certify the class and grant class-wide relief should the Court approve plaintiffs' motion for a temporary restraining order or preliminary injunction.

Dated: April 8, 2020

Respectfully submitted,

/s/Elizabeth Mazur
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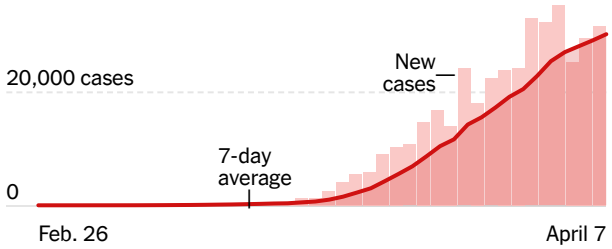
CERTIFICATE OF SERVICE

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



TOTAL CASES
397,754
DEATHS
12,956

Coronavirus in the U.S.: Latest Map and Case Count

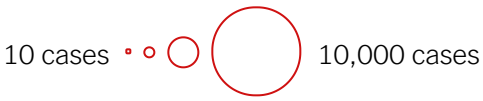
By The New York Times Updated April 8, 2020, 8:17 A.M. E.T.

Map | Cases by state
New cases | Tips
Latest news »

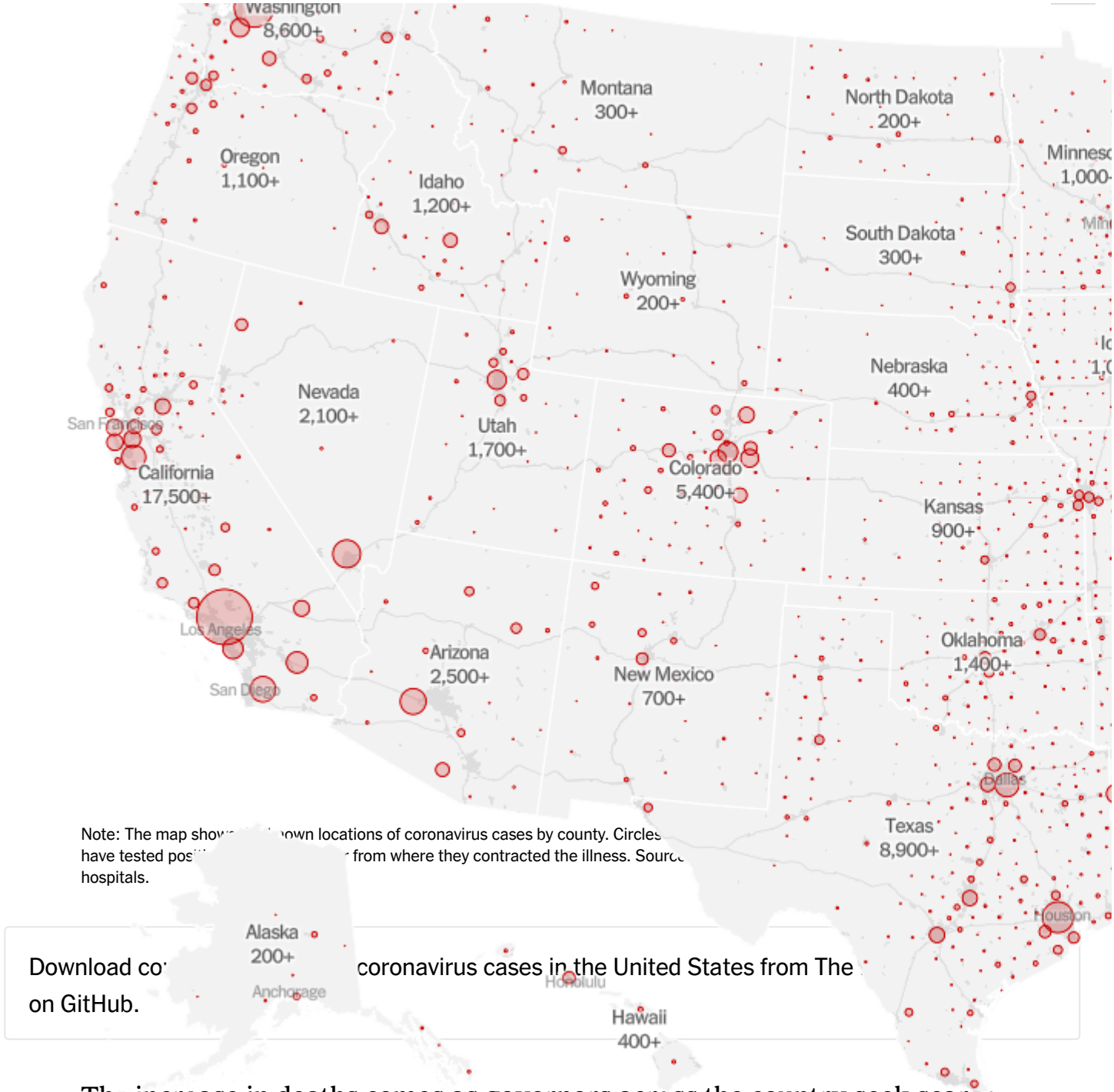
More than 12,000 people with the coronavirus have now died in the United States, according to a New York Times database. The country's death toll, which now far exceeds the number of people known to have died from the virus in China, doubled from 5,000 to 10,000 in fewer than five days.

Confirmed cases in the United States

Total cases | Deaths | Per capita



Zoom and tap on map for more detail



Note: The map shows known locations of coronavirus cases by county. Circles have tested positive from where they contracted the illness. Source: hospitals.

Download coronavirus cases in the United States from The on GitHub.

The increase in deaths comes as governors across the country seek scarce ventilators and as police officers issue citations to residents who ignore orders to stay home. With infection rates expected to continue rising, Americans have been urged to wear face coverings in public, convention centers have been converted into makeshift medical centers and some states have released prisoners in an effort to limit the spread.

As of Wednesday morning, at least 397,754 people across every state, plus Washington, D.C., and four U.S. territories, have tested positive for the virus, according to a New York Times database.

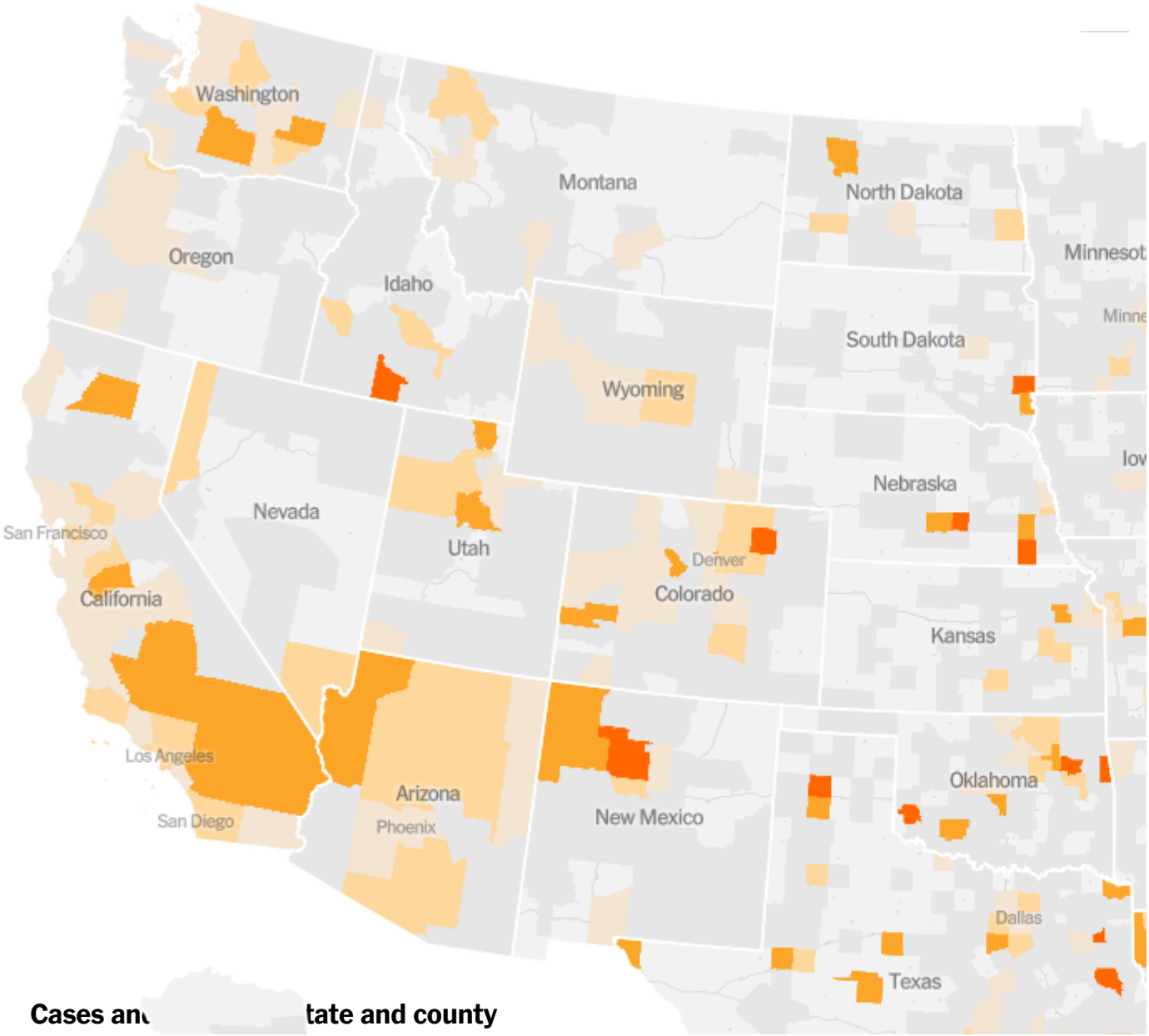
The outbreak in this country, which now has the highest number of known cases in the world, looks vastly different than it did a month or even a week ago. At the start of March, with extremely limited testing available, only 70 cases had been reported in the United States, most of them tied to overseas travel. And since the start of April, the number of deaths has grown by thousands, driven in part by doublings in death totals in Indiana, Florida and other states.

Where cases are rising fastest

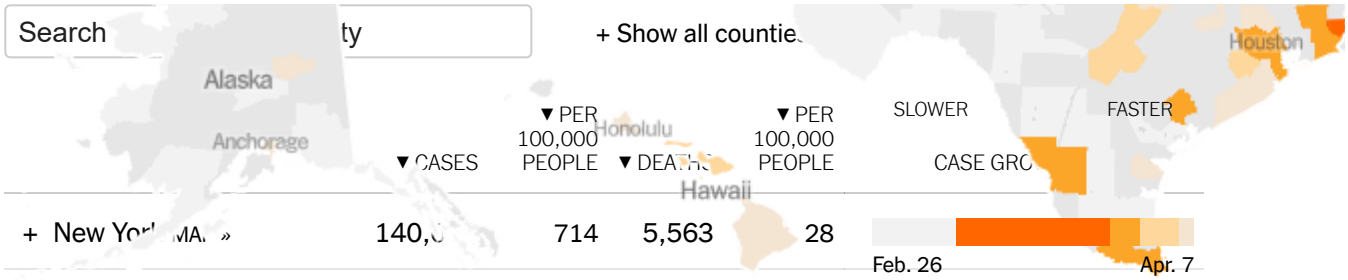
Cases currently doubling every ...

3 days | 5 days | 7 days | Fewer than 20 cases | No cases reported

Zoom and tap on map for more detail



Cases an tate and county



	▼ CASES	▼ PER 100,000 PEOPLE	▼ DEATHS	▼ PER 100,000 PEOPLE	SLOWER CASE GROWTH FASTER
+ New York MAP »	140,[illegible]	714	5,563	28	
+ New Jersey MAP »	44,416	500	1,232	14	
+ Michigan MAP »	18,852	189	845	8	
+ California MAP »	17,540	45	447	1	
+ Louisiana MAP »	16,284	349	582	12	
+ Massachusetts MAP »	15,202	223	356	5	
+ Florida MAP »	14,739	72	295	1	
+ Pennsylvania MAP »	14,582	114	240	2	
+ Illinois MAP »	13,549	106	384	3	
+ Georgia MAP »	9,156	89	348	3	

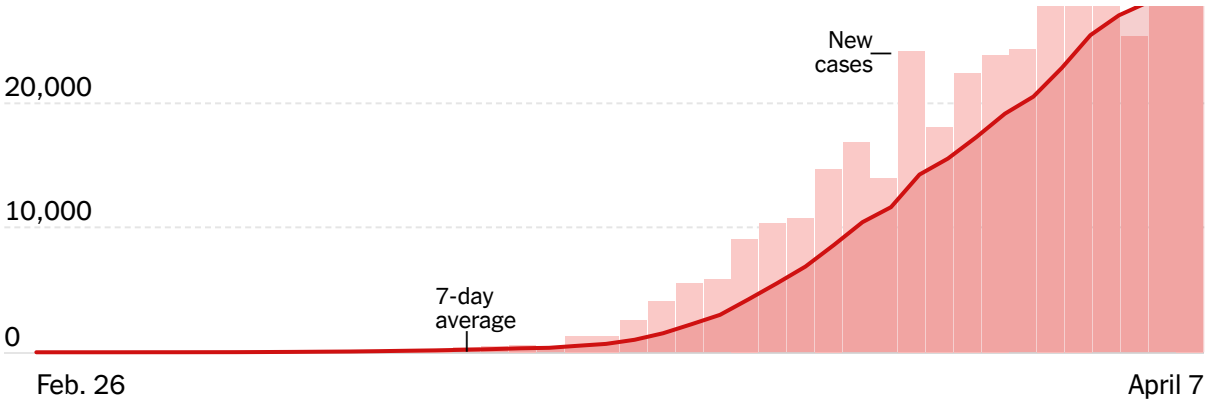
Show all

Notes: Growth rate shows how frequently the number of cases has doubled over the past week. Growth rate not shown for counties with less than 20 cases.

See our live coverage of the coronavirus outbreak for the latest news.

As the number of known cases reached into the hundreds, then the thousands, then the hundreds of thousands, life all over the country has changed in profound ways. Malls, salons and dine-in restaurants have been forced to close. The Kentucky Derby, the Indy 500 and baseball's Opening Day were postponed. Some states have told people arriving from elsewhere to quarantine themselves. Others have warned that the pause on public life will likely last weeks more, and that the worst of the pandemic is still to come.

New reported cases by day in the United States



The New York Times is engaged in a comprehensive effort to track the details of every confirmed case in the United States, collecting information from federal, state and local officials around the clock. The numbers in this article are being updated several times a day based on the latest information our journalists are gathering from around the country. The Times has made that data public in hopes of helping researchers and policymakers as they seek to slow the pandemic and prevent future ones.

See our maps tracking the coronavirus outbreak around the world.

New York: 140,000 cases have been identified.

No state has been hit harder than New York, which accounts for about half the country's coronavirus-related deaths and where new cases continue to be reported each day by the thousands. With hospitals stretched thin and medical equipment in short supply, the state has turned to Oregon and China for emergency shipments of ventilators.

State health officials anticipated particularly heavy mortality rates this week, and Tuesday's total of 731 deaths was the highest of any day so far. "Behind every one of those numbers is an individual, is a family, is a mother, is a father, is a brother, is a sister," Gov. Andrew M. Cuomo said at a news conference Tuesday. "So, a lot of pain again today."

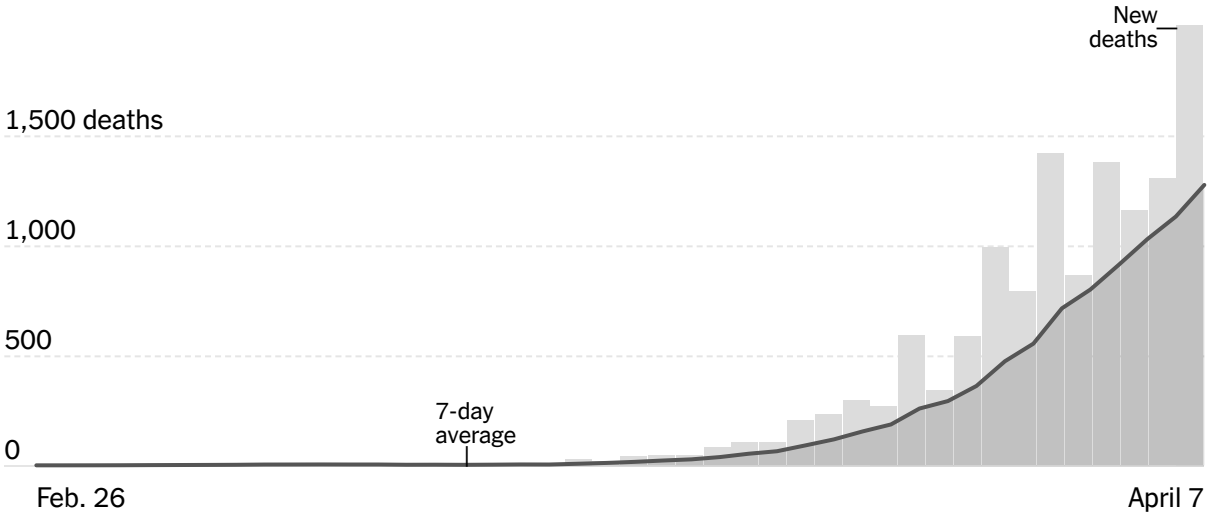
People with the virus have died in more than 20 New York counties, including more than 230 victims each in Nassau, Suffolk and Westchester Counties. But New York City has faced the worst, with thousands of known cases in each borough. The city's mayor, Bill de Blasio, compared the pandemic to "many Katrinas." A Manhattan convention center began

accepting patients. A Navy hospital ship was docked in the city. A field hospital had been set up in Central Park, and another was planned for a cathedral.

“This is going to be a reality where you are going to have many cities and states simultaneously in crisis, needing health care professionals, needing ventilators,” Mr. de Blasio said on MSNBC’s “AM Joy.”

Though New York has had by far the most cases, other Northeastern states have also seen their case totals increase rapidly. New Jersey now has the second-highest number of known cases in the country. In Massachusetts, more than 2,000 new cases were announced over the weekend. In Connecticut, more than 200 people have died.

New reported deaths by day in the United States



See how the rate of deaths has changed over time in different states and countries.

In America’s nursing homes, outbreaks grow.

Across the country, a pattern has played out with tragic consistency: Someone gets sick in a nursing home. Soon, several residents and employees have the coronavirus. The New York Times has identified more than 2,240 cases of the coronavirus associated with nursing homes or long-term care facilities across the nation.

Older people and those with underlying health problems are most vulnerable to Covid-19, making the consequences of a nursing home outbreak especially devastating. At least 37 deaths have been linked to an outbreak at the Life Care nursing facility in Kirkland, Wash. Many of the victims were in their 80s or 90s.

In New Orleans and Fort Lauderdale, Fla., multiple deaths have been tied to senior centers. In Wisconsin, the National Guard was sent to a long-term care facility where three people have died. Similar outbreaks have been reported in Texas, in South Dakota and in Anderson, Ind., where officials said Monday that 11 residents had died.

Though many of the first coronavirus cases in the United States were tied to overseas travel, localized outbreaks have become increasingly common. New clusters in nursing homes and other settings, including a meatpacking plant in Iowa and a shipyard in Virginia, are emerging each day. Public health officials often are unable to identify how people are becoming ill. The table below shows known cases for which Times journalists have been able to identify how the virus was contracted or a connection to other cases.

CASES CONNECTED TO	CASES
Cook County Jail; Chicago	387
Aboard the U.S.S. Theodore Roosevelt; Guam	230
Travel within the U.S.	188
Travel overseas	178
Life Care nursing facility; Kirkland, Wash.	129
Community in New Rochelle, N.Y.	119
Canterbury Rehabilitation Healthcare Center; Henrico, Va.	118
Gallatin Center for Rehabilitation and Healing; Gallatin, Tenn.	115
Biogen conference in Boston	109
Parnall Correctional Facility; Jackson, Mich.	103
Pleasant View Nursing Home; Mount Airy, Md.	98

CASES CONNECTED TO	CASES
Stateville Correctional Center; Crest Hill, Ill.	93
Southeast Nursing and Rehabilitation Center; San Antonio	87
The Resort at Texas City nursing home; Texas City, Texas	83
Denton State Supported Living Center; Denton, Texas	73
Golden Crest Nursing Centre; North Providence, R.I.	59
Federal Medical Center prison facility; Butner, N.C.	57
Cedar Mountain Post Acute Care Facility; Yucaipa, Calif.	57
Macomb Correctional Facility; Lenox, Mich.	55
Oak Hill Center nursing home; Pawtucket, R.I.	54
Travel in Egypt	52
Frontier Health & Rehabilitation; St. Charles, Mo.	50
Birchwood Terrace rehabilitation center; Burlington, Vt.	48
Regency Canyon Lakes rehabilitation and nursing; Kennewick, Wash.	45
Signature HealthCARE long-term care; Cookeville, Tenn.	44
Careage of Whidbey; Coupeville, Wash.	44
Adviniacare long-term care; Wilmington, Mass.	44
Federal Correctional Complex; Oakdale, La.	43
Diamond Princess cruise ship	43
Long-term care facility; Willowbrook, Ill.	42
Lambeth House senior living facility; New Orleans	42
Life Care Center of Burlington; Burlington, Kan.	41
Briarwood Nursing Home and Rehab; Little Rock, Ark.	41
Life Care nursing; Richland, Wash.	40
Federal Correctional Institution; Danbury, Conn.	40
Travel in Italy	39

CASES CONNECTED TO	CASES
Greenville Health and Rehabilitation; Greenville, Ohio	39
Father Baker Manor Nursing Home; Orchard Park, N.Y.	39
First Assembly of God; Greers Ferry, Ark.	37
Metron long-term care; Cedar Springs, Mich.	36
Federal Correctional Complex; Lompoc, Calif.	35
Peconic Landing long-term care; Greenport, N.Y.	34
Healthcare rehabilitation/assisted living facility; Harris county, Texas	34
Shuksan Healthcare Center; Bellingham, Wash.	32
Lakeland Correctional Facility; Coldwater, Mich.	31
Family of Caring nursing home; Montclair, N.J.	31
Extended Care Hospital of Riverside	30
Sundale Rehabilitation and Long-Term Care; Morgantown, W.Va.	29
St. Joseph's Senior Nursing Home; Woodbridge, N.J.	29
Spring break trip from Austin, Texas, to Mexico	28
Federal Correctional Complex; Yazoo City, Miss.	28
Canyon Springs Post-Acute nursing and rehabilitation; San Jose, Calif.	28
Skagit Valley Chorale practice; Mount Vernon, Wash.	27
Orinda Care medical center; Orinda, Calif.	27
Douglas County Health Center; Omaha	27
Women's Huron Valley Correctional Facility; Ypsilanti, Mich.	26
Victoria Manor long-term care; Cape May, N.J.	26
Mennonite Home Communities senior center; Lancaster, Pa.	26
Fairacres Manor long-term care; Greeley, Colo.	26
Benchmark Senior Living at Ridgefield Crossings; Ridgefield, Conn.	26
Tyson Foods meatpacking plant; Columbus Junction, Iowa	25

CASES CONNECTED TO	CASES
Sunrise View Assisted Living; Everett, Wash.	25
Post Acute Medical Specialty Hospital of Victoria North; Victoria, Texas	25
La Vida Llena long-term care; Albuquerque, N.M.	25
Mitchell Manor nursing and rehabilitation; Mitchell, La.	24
Riverbend Post Acute Care Center; Kansas City, Kan.	23
Carter House assisted living; Blair, Neb.	23
Federal Correctional Complex; Forrest City, Ark.	22
Heritage Specialty Care; Cedar Rapids, Iowa	21
Grand Princess cruise in March	21
Grand Princess cruise in February	21
Atria Willow Wood assisted living; Fort Lauderdale, Fla.	21
Josephine Caring Community; Stanwood, Wash.	18
A. Holly Patterson Extended Care Facility; Uniondale, N.Y.	18
Lansing Correctional Facility; Lansing, Kan.	17
Virginia Correctional Center for Women, Goochland; Goochland, VA	16
Soldiers' Home in Holyoke; Holyoke, Mass.	16
Laurel Brook Rehabilitation and Healthcare Center; Mt. Laurel, N.J.	16
Edward C. Allworth Veterans' Home; Lebanon, Ore.	16
Travel in China	15
Green River Correctional Complex; Central City, Ky.	14
Bethany Pointe Health, Anderson, Ind.	14
United States Penitentiary; Atlanta	13
Rolling Meadows Senior Living facility; Taylorville, Ill.	13
Federal Correctional Institution Elkton; Lisbon, Ohio	13
Covenant Living at Windsor Park long-term care; Carol Stream, Ill.	13

CASES CONNECTED TO	CASES
Carlton Senior Living; Pleasant Hill, Calif.	13
Bonaventure of Tri-Cities senior care; Richland, Wash.	13
Upper Valley Medical Center; Troy, Ohio	12
Heartis Arlington assisted living and memory care; Arlington, Texas	12
California Institution for Men prison; Chino, Calif.	12
Detroit Reentry Center; Detroit	11

Show less

The growth in cases of unknown origin has signaled to public health officials that Americans are being exposed to the virus at work, at shopping centers and in travel hubs, prompting calls for people to stay home. Among recent deaths: a bus driver in Detroit, a parks worker in Kansas and a Chicago police officer.

Midwestern cities face new onslaught

When the coronavirus began spreading in the United States, the vast majority of cases were in coastal states. Illinois and Wisconsin had only a few cases. Michigan, Missouri and Ohio had none.

In just a few weeks, the virus has raced inland, with thousands of known cases in Midwestern urban centers and deaths being announced by the dozens.

In Detroit, more than 5,400 cases have been identified and at least 220 people have died. At least 49 deaths and 1,300 cases have been reported in Milwaukee County, Wis. In St. Louis, which had no known cases in mid-March, two more deaths were announced on Sunday. And in Chicago, where an infant is among at least 135 people who have died, there are more than 5,500 cases, ventilators might soon run out and a lakefront convention center has been prepared to accept patients if hospitals reach capacity.

"This is a facility that we stood up because the human population is susceptible to this virus at a scale never before seen in our lifetimes,," Gov. J.B. Pritzker of Illinois said recently after touring the convention center hospital.

Police departments face an invisible threat

While workers in many industries have stopped going to the office, police officers have continued their daily patrols, even in the hardest-hit areas.

As the outbreak has grown, so, too, has the number of officers infected with the coronavirus in cities like Detroit, where at least two police employees have died from the virus, many more have been infected and others have been told to self-isolate.

"Some have been quarantined and want to come back to work," Chief James Craig of the Detroit police said about his officers recently, a few days before he also tested positive for the virus. "These are the same people, let's not forget, who when they are going to a dangerous situation like shots being fired, they're running toward the danger. This is no different."

The effect on law enforcement officers has been widespread. In Aurora, Ill., the police chief was infected with the virus. In New Jersey, at least 700 police officers and state troopers have tested positive. So have dozens of police officers in Nassau County, N.Y., and dozens more in Chicago, where an undercover narcotics officer died after contracting the virus.

"For first responders, you just don't often have the opportunity to isolate," said Dermot F. Shea, the police commissioner in New York City, whose department has lost two civilian workers and a detective to the coronavirus.

Louisiana: Deaths and cases continue to grow

At the start of March, with large outbreaks already reported on both coasts, officials in Louisiana had not yet identified a single case of the coronavirus. But in the weeks since, the state has been pummeled. At least 16,000 Louisianans had been infected and at least 582 had died.

Louisiana announced more than 70 new deaths on Tuesday, for a total of 588, a number that had more than doubled in a week. More than 1,900 people were hospitalized in the state, including more than 500 on ventilators, Gov. John Bel Edwards said at a news conference on Tuesday.

Yet he said that new hospital admissions were down, a promising sign.

“We believe we might be starting to see the beginning of the flattening of the curve,” he said on Monday. "The fear is I'm telling people that, and they will say, the task at hand is accomplished, we can go back to doing whatever it is that we normally do, behaving as we normally would."

"That is exactly the wrong answer," he said. "If we started flattening the curve, it is only because of the mitigation measures, it is only because of the social distancing and the improved hygiene practices."

He said it was too soon to know whether the state had peaked and he urged people to be vigilant about following the statewide stay-at-home order. "This is not the time to become lax and ease up," he said.

Across the country, hundreds of counties are reporting cases of the illness. Here is a list of cases Times journalists have collected. Cases in New York City and Kansas City, Mo., both of which span several counties, are grouped together.

Hot spots: Counties with the highest number of cases per resident

COUNTY	▼ CASES	▼ PER 100,000 PEOPLE	SLOWER FASTER CASE GROWTH RATE
Blaine, Idaho	428	1,946	Feb. 26 Apr. 7
Rockland, N.Y.	5,990	1,851	
Westchester, N.Y.	14,804	1,528	
Orleans, La.	4,942	1,268	
Nassau, N.Y.	16,610	1,224	
Randolph, Ga.	83	1,171	
Dougherty, Ga.	973	1,069	
Suffolk, N.Y.	15,561	1,046	

COUNTY	▼ CASES	▼ PER 100,000 PEOPLE	SLOWER CASE GROWTH RATE FASTER
Terrell, Ga.	92	1,038	
St. John the Baptist, La.	415	955	

Show all

Note: Table includes the top counties with at least 20 reported cases when adjusted for population.

Outbreaks in jails and prison could be hard to contain

At the county jail in Chicago, at least 291 cases involving inmates and staff members have been tied to the virus. In South Dakota, several inmates escaped from a women's prison after someone there tested positive. In the federal system, at least 174 inmates and prison workers across the country have tested positive for the virus. At least seven federal inmates have died, mainly in Louisiana. So have state prisoners in Illinois, Massachusetts and Michigan.

The New York Times has spoken with more than a dozen workers in the federal Bureau of Prisons in recent days who have said that federal prisons are ill-prepared for a coronavirus outbreak. Many lack basic supplies, like masks, hand sanitizer and soap.

"We do not have enough gloves," said a prison employee at the U.S. Penitentiary in Atlanta, where a cluster of coronavirus cases has appeared, involving at least two inmates and one staff member. The worker spoke on the condition of anonymity for fear of retaliation from the Bureau of Prisons. "We do not have enough masks; we do not have the supplies needed to deal with this. We don't have enough space to properly quarantine inmates."

Tracking the Coronavirus

World | United States | Deaths by country and state | Growth rates in U.S. cities | Stay-at-home orders by state

State by state

Alabama Alaska Arizona

Arkansas	Maryland	Oregon
California	Massachusetts	Pennsylvania
Colorado	Michigan	Puerto Rico
Connecticut	Minnesota	Rhode Island
Delaware	Mississippi	South Carolina
District of Columbia	Missouri	South Dakota
Florida	Montana	Tennessee
Georgia	Nebraska	Texas
Hawaii	Nevada	Utah
Idaho	New Hampshire	Vermont
Illinois	New Jersey	Virginia
Indiana	New Mexico	Washington
Iowa	New York	West Virginia
Kansas	North Carolina	Wisconsin
Kentucky	North Dakota	Wyoming
Louisiana	Ohio	
Maine	Oklahoma	

What You Can Do

Experts' understanding of how the virus spreads is still limited, but there are four factors that most likely play a role: how close you get; how long you are near the person; whether that person projects viral droplets on you; and how much you touch your face.

If your community is affected, you can help reduce your risk and do your part to protect others by following some basic steps:

- **Wash your hands!** Scrub with soap and water for at least 20 seconds, and then dry them with a clean towel or let them air dry.
- **Keep distance from sick people.** Try to stay six feet away from anybody showing flu- or cold-like symptoms, and don't go to work if you're sick.
- **Prepare your family, and communicate your plan about evacuations, resources and supplies.** Experts suggest stocking at least a 30-day supply of any needed prescriptions. Consider doing the same for food staples, laundry detergent and diapers, if you have small children.

Here's a complete guide on how you can prepare for the coronavirus outbreak.

Note: Data are based on reports by states and counties at the time of publication. Local governments may revise reported numbers as they get new information. Some deaths may be reported by officials in two different jurisdictions. When possible, deaths have been reported here in the jurisdiction where the death occurred. Read more about this data here. While the first known case in the United States was announced on Jan. 21, charts show cases since Feb. 26, when American public health officials first identified community transmission of the virus.

*Cases in New York City and Kansas City, Mo., both of which span several counties, are grouped together. Cases in a state that have been reported without a specific county are listed as county "unknown."

Population data from Census Bureau.

By Sarah Almukhtar, Aliza Aufrichtig, Matthew Bloch, Keith Collins, Amy Harmon, Rich Harris, Jon Huang, Danielle Ivory, K.K. Rebecca Lai, Allison McCann, Richard A. Oppel Jr., Jugal K. Patel, Anjali Singhvi, Charlie Smart, Mitch Smith, Derek Watkins, Timothy Williams, Jin Wu and Karen Yourish. · Reporting was contributed by Jordan Allen, Jeff Arnold, Mike Baker, Samone Blair, Nicholas Bogel-Burroughs, Maddie Burakoff, Christopher Calabrese, Robert Chiarito, Matt Craig, Brandon Dupré, John Eligon, Timmy Facciola, Matt Furber, Lauryn Higgins, Jake Holland, Jon Huang, Danya Issawi, Jacob LaGesse, Patricia Mazzei, Jesse McKinley, Miles McKinley, Sarah Mervosh, Andrea Michelson, Steven Moity, Thomas Gibbons-Neff, Richard A. Oppel Jr., Azi Paybarah, Sean Plambeck, Scott Reinhard, Thomas Rivas, Alison Saldanha, Alex Schwartz, Libby Seline, Anjali Singhvi, Alex Traub, Maura Turcotte, Tracey Tully, Lisa Waananen Jones, Amy Schoenfeld Walker and Jeremy White. · Data acquisition and additional work contributed by Will Houp, Andrew Chavez, Michael Strickland, Tiff Fehr, Miles Watkins, Josh Williams, Albert Sun, Shelly Seroussi, Nina Pavlich, Carmen Cincotti, Ben Smithgall, Andrew Fischer, Rachel Shorey, Blacki Migliozzi, Alastair Coote, Steven Speicher and Michael Robles.

Declaration of Adam Kaney

1. I am an adult over 18 years of age with personal knowledge of the facts stated in this declaration.

2. I am an attorney at Cabrini Green Legal Aid (CGLA) in Chicago, Illinois. As part of my job duties, I routinely represent alleged parole violators at parole revocation hearings at Stateville NRC.

3. I was assigned to represent three alleged parole violators scheduled for hearings on March 31, 2020. To my knowledge, each of these three alleged parole violators were in custody at Stateville NRC.

4. The March 31, 2020 hearings were scheduled to take place via WebEx, an online teleconference system.

5. That morning, there were technical difficulties in getting the parolees connected to the WebEx meeting.

6. We actually began one of the hearings by having a few witnesses join in by telephone to testify on behalf of one of our clients in an attempt to expedite the process while they tried to get the connection at the IDOC facility.

7. After some time had passed, I was informed that IDOC was still having technical difficulties and I was asked to agree to reschedule the hearing for the following morning, April 1, 2020.

8. I agreed to this request, and the hearing ended.

9. Within the next 30 minutes, I received a call from one of the office administrators for the PRB notifying me that the hearing would not proceed on April 1 as planned and that I would be notified when the hearings were going to be rescheduled.

10. As of today, I still have not received any information regarding the new hearing date.

11. As of the date of this Declaration, I have run an IDOC inmate search and confirmed that the clients that CGLA was appointed to represent in parole revocation hearings on March 31, 2020 are still in custody.

Pursuant to 28 U.S.C § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: April 8, 2020

Adam Kaney

IN THE UNITED STATES DISTRICT COURTS

FOR THE EASTERN DISTRICT OF CALIFORNIA

AND THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES

PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

RALPH COLEMAN, et al., Plaintiffs, v. GAVIN NEWSOM, et al., Defendants.	Case No. 2:90-cv-0520 KJM DB P **THREE-JUDGE COURT**
MARCIANO PLATA, et al., Plaintiff, v. GAVIN NEWSOM, et al., Defendants.	Case No. 01-cv-01351-JST **THREE-JUDGE COURT** **ORDER DENYING PLAINTIFFS' EMERGENCY MOTION TO MODIFY POPULATION REDUCTION ORDER**

Before: WARDLAW, Circuit Judge, MUELLER, Chief District Judge, and TIGAR, District Judge

We are living in unprecedented times. The spread of COVID-19 is a global crisis, a crisis that is heightened in the most vulnerable groups among us. One such group is before us today. Plaintiffs, two classes of inmates incarcerated in California state prisons, have filed a motion asking us to order the state to release an unspecified, but significant, number of prisoners so that the prison population can be reduced to a level sufficient to allow physical distancing to prevent the spread of COVID-19—which, in Plaintiffs' view, requires that prisoners who live in dorm-style environments be housed six feet apart from one another. ECF No. 3219/6522.[1]

While we cannot know with certainty due to the pathogenesis of the virus, it appears that

[1] All filings in this Three-Judge Court are included in the individual docket sheets of both *Plata v. Newsom*, No. 01-cv-01351-JST (N.D. Cal.), and *Coleman v. Newsom*, No. 2:90-cv-0520 KJM DB P (E.D. Cal.). The Court cites to the docket number of *Plata* first, then *Coleman*.

COVID-19 has not yet surged in California's prisons. Thus far, only thirteen inmates have confirmed cases of the disease. Cal. Dep't of Corr. & Rehab., *Population COVID-19 Tracking*, https://www.cdcr.ca.gov/covid19/population-status-tracking/ (last visited Apr. 4, 2020). And, to their credit, Defendants[2] have already taken steps to combat the virus, including taking measures to reduce the prison population. But given the undisputed risk of further contagion in a carceral environment,[3] Plaintiffs' desire to maximize the reduction in the state's prison population is understandable.

We conclude, however, that under Federal Rule of Civil Procedure 60(b)(5) and the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626, Plaintiffs' emergency motion for relief based on COVID-19 is not properly before us. This three-judge court was first convened in 2007 to consider a different issue: whether a release of prisoners was necessary to remedy California's structural failure to provide constitutionally adequate medical and mental health care services to inmates incarcerated in the state's prisons. We are therefore bound to deny Plaintiffs' motion. However, we do so without prejudice to Plaintiffs' seeking relief in a procedurally appropriate forum, including the individual *Coleman* and/or *Plata* courts.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

Given the exigency of the circumstances before us, we provide only a brief procedural history here.[4] The proceedings before this three-judge court began long ago as two separate cases: *Coleman*, filed in 1990 in the Eastern District of California, alleged that Defendants were failing to provide constitutionally adequate mental health care services to inmates with serious mental disorders. *Plata*, filed in 2001 in the Northern District of California, alleged that Defendants were

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[2] Defendants are various California state officials, including Governor Gavin Newsom.

[3] *See, e.g.*, *167 Inmates at Cook County Jail Confirmed Positive for COVID-19*, Chi. Sun Times (Apr. 1, 2020), https://chicago.suntimes.com/coronavirus/2020/4/1/21203767/cook-county-jail-coronavirus-positive-covid-19 (reporting that 167 pre-trial detainees housed at the Cook County, Ill. jail tested positive for COVID-19 over a ten-day span).

[4] The history of these proceedings is chronicled more thoroughly in a 2009 order of our court, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal./N.D. Cal. 2009), and the Supreme Court's decision in *Brown v. Plata*, 563 U.S. 493 (2011).

failing to provide constitutionally adequate medical care.

The individual *Coleman* and *Plata* courts entered numerous remedial orders, including appointing a Special Master to oversee remedial efforts in *Coleman* and a Receiver to take control of the medical care delivery system in *Plata*. These measures failed to cure the constitutional deficiencies, and in 2007, both courts concluded that, absent a reduction in the state prison population—which was then almost double the prison system's design capacity—Defendants would never be able to deliver constitutionally adequate medical and mental health care.

Because they were not individually empowered to order a release of prisoners from California's prisons, the *Plata* and *Coleman* courts granted Plaintiffs' separate motions to convene a three-judge court to consider the issue. *See* 18 U.S.C. § 3626(a)(3)(B) (providing that a prisoner release order can be entered only by a three-judge court). The Chief Judge of the United States Court of Appeals for the Ninth Circuit appointed this three-judge court in both cases to determine whether a release order was appropriate.[5] *See Brown v. Plata*, 563 U.S. 493, 500 (2011) ("Because the two cases are interrelated, their limited consolidation for this purpose has a certain utility in avoiding conflicting decrees and aiding judicial consideration and enforcement.").

After holding a fourteen-day trial, we concluded that a significant reduction in the state prison population was the only way to bring Defendants into compliance with their constitutional obligations to provide adequate medical and mental health care services. *See generally Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal./N.D. Cal. 2009) ("*Coleman I*"). We therefore ordered Defendants to reduce California's prison population to 137.5% design capacity within two years. *Id.* at 970.

Defendants appealed, and the Supreme Court affirmed.[6] *Plata*, 563 U.S. 493. The Court held that the PLRA's requirements for entering a prisoner release order were satisfied, *see* 18

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[5] The original members of the three-judge court, the Hon. Stephen Reinhardt, Circuit Judge; the Hon. Lawrence K. Karlton, District Judge; and the Hon. Thelton E. Henderson, District Judge, have since been replaced by its current members: the Hon. Kim McLane Wardlaw, Circuit Judge; the Hon. Kimberly J. Mueller, Chief District Judge; and the Hon. Jon S. Tigar, District Judge.

[6] By statute, a three-judge district court order granting a permanent injunction may be appealed directly to the Supreme Court. 28 U.S.C. § 1253.

U.S.C. § 3626, and that there was ample evidence supporting our conclusion that crowding was the primary cause of the constitutional violations in California's delivery of medical and mental health services in its prison system. *Plata*, 563 U.S. at 517–530. It also concluded that the 137.5% population cap we ordered was "narrowly drawn, extend[ed] no further than necessary to correct the violation of [the] federal right, and [was] the least intrusive means necessary to correct the violation," and that we gave appropriate "substantial weight" to public safety, as the PLRA requires. *Id.* at 530–41; *see* 18 U.S.C. § 3626(a). At the same time, the Supreme Court recognized our ability to modify our remedial order as necessary:

> The three-judge court, however, retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion. "The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." *New York State Assn. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (C.A.2 1983) (Friendly, J.). A court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order. *Id.*, at 969–971. Experience may teach the necessity for modification or amendment of an earlier decree. To that end, the three-judge court must remain open to a showing or demonstration by either party that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection.

Plata, 563 U.S. at 542–43.

Two years after the Supreme Court affirmed our prison population reduction order, Defendants asked us to terminate that order even though they had not yet complied with it. *Coleman v. Brown*, 922 F. Supp. 2d 1004, 1008 (E.D. Cal./N.D. Cal. 2013) ("*Coleman II*"). Plaintiffs filed a cross-motion asking us to impose institution-specific population caps to supplement the system-wide 137.5% cap that we had already ordered. *Id.* We denied both requests. *Id.* We concluded, among other things, that Defendants had failed to demonstrate that they could provide constitutionally adequate medical and mental health care with a prison population that exceeded 137.5% design capacity. *Id.* at 1034–43. At the same time, we concluded that Plaintiffs' request for institution-specific caps was premature because, until Defendants met the systemwide 137.5% cap, it was difficult to determine whether additional relief was necessary. *Id.* at 1048.

In 2015, Defendants succeeded, for the first time, in reducing the statewide prison population to less than 137.5% design capacity. The population has remained below that benchmark ever since.[7] Since that time, we have largely stepped back as the individual *Coleman* and *Plata* courts have continued to work to ensure that California provides constitutionally adequate medical and mental health services to its inmates.

B. Plaintiffs' Emergency Motion Based on COVID-19

On March 25, 2020, Plaintiffs filed the motion currently before us, which they have styled as an "Emergency Motion to Modify Population Reduction Order." ECF No. 3219/6522. The motion asks us to order Defendants to release to parole or post-release community supervision certain categories of inmates, including those who are scheduled to parole within a year and are either (a) low risk, as determined by the California Department of Corrections and Rehabilitation's (CDCR) risk assessment tool or (b) serving time for a non-violent offense. *Id.* at 27. Plaintiffs also ask us to require Defendants to release or relocate inmates who, because of their age or other medical conditions, are at a high risk of developing a severe form of COVID-19. *Id.* at 27–28. While Plaintiffs have not put forth a specific number of inmates that they believe should be released, they argued at the April 2, 2020 telephonic hearing on this motion that Defendants must release as many inmates as would be required to allow all remaining inmates to practice physical distancing, especially those who reside in crowded dorm housing.

Although the current record is unclear as to when Defendants began planning a response to COVID-19, they started implementing preventive measures at least as of March 11, 2020, when normal visiting at CDCR institutions was canceled statewide, fact sheets and posters on the pandemic were delivered to the inmate population, and additional hand-sanitizing dispenser stations were ordered. ECF No. 3241-1/6553-1. CDCR has activated "a centrally-located command center where CDCR and CCHCS [California Correctional Health Care Services] experts monitor information, prepare for known and unknown events, and exchange information centrally

[7] As of the most recent status report filed with us on March 16, 2020, California's prison population is at 134.4% design capacity. ECF No. 3213/6502 at 2.

in order to make decisions and provide guidance quickly." ECF No. 3240/6553-2 ¶ 4 (Gipson Decl.). The center's "goal is to implement measures and strategies to protect inmates and staff during the COVID-19 pandemic and to enhance social distancing and housing options during this time." *Id.*

On March 24, 2020, California Governor Gavin Newsom issued an executive order directing CDCR to suspend admission of inmates to state custody for 30 days, with the possibility that the suspension would be extended for an additional 30 days. ECF No. 3241/6553 ¶ 4 (Diaz Decl.). On March 30, 2020, CDCR Secretary Ralph Diaz announced that release would be accelerated for inmates who have less than sixty days remaining on their sentence, are not serving a term of incarceration for a violent felony or a domestic violence offense, and are not required to register as a sex offender. *Id.* ¶ 5. These last two measures are expected to result in an approximately 6,500-person reduction in the prison population over the coming weeks.[8] *Id.* ¶¶ 4–7.

Defendants oppose Plaintiffs' motion, arguing both that their response to COVID-19 so far has been constitutionally sufficient, and that the motion is not properly before this three-judge court because the relief it seeks is, in substance, a *new* prisoner release order, rather than a modification of our 2009 order imposing the 137.5% population cap. ECF No. 3235/6552.

II. DISCUSSION

Whether Plaintiffs' motion is properly viewed as a modification request is a critical question. For one, it bears on whether the motion is properly before our three-judge court. But even if the motion were properly before us, the PLRA places significant restrictions on a federal court's authority to order the release of prisoners as a remedy for a constitutional violation. *See* 18 U.S.C. § 3626. For example, a prisoner release order may be entered only if "(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has

[8] Defendants have also taken additional steps to combat COVID-19, including but not limited to transferring approximately 500 inmates out of dorm housing, suspending transfers between facilities, and conducting temperature checks and symptom screenings of all individuals entering the prisons. *E.g.*, ECF No. 3240/6553-2 ¶¶ 6–11.

had a reasonable amount of time to comply with the previous court orders." *Id.* § 3626(a)(3)(A)(i)–(ii). Plaintiffs argue that our 2009 order imposing the 137.5% population cap satisfies the PLRA's requirement of a prior order for less intrusive relief. ECF No. 3219/6522 at 31–32. If, however, the relief they seek is not actually a modification of the 2009 order but rather *new* relief based on the *new* threat of harm posed by COVID-19, Plaintiffs likely cannot satisfy the prior order requirement at this point because there have not yet been any orders requiring Defendants to take measures short of release to address the threat of the virus; nor have Defendants had a reasonable time in which to comply.[9]

In arguing that their motion properly seeks to modify our 2009 order imposing the population cap, Plaintiffs rely on Federal Rule of Civil Procedure 60(b)(5), which grants courts authority to "relieve a party . . . from a final judgment" if "applying it prospectively is no longer equitable." We have previously recognized that Rule 60(b)(5) may provide us with authority to modify our 2009 order in appropriate circumstances. *Coleman II*, 922 F. Supp. 2d at 1025–27 (citing *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992)). But we may only modify the order to the extent necessary to ensure that the remedial structure remains tailored to cure the constitutional violations previously found by the *Coleman* and *Plata* courts. *See id.* at 1048 (refusing to modify the 2009 order because it was not yet clear whether the 137.5% design capacity cap would be sufficient to cure the constitutional defects in Defendants' prison health care system). Rule 60(b)(5) does not provide us with free-standing authority to remedy any harm Defendants may inflict upon Plaintiffs, regardless of whether it is tethered to the previous findings of structural constitutional shortcomings in the delivery of medical and mental health care. *Cf. Parsons v. Ryan*, 912 F.3d 486, 501 (9th Cir. 2018) (explaining that a modification of relief was appropriate because it was not issued "in response to new violations of federal rights").

Plaintiffs argue that the potential harm posed by COVID-19 is attributable to the constitutional violations that have been previously found in these cases because "[p]reventing the spread of a dangerous, contagious illness is plainly a requirement of an adequate medical care

[9] We recognize that what is reasonable in ordinary times may be quite different from what is reasonable in these extraordinary times.

system." ECF No. 3248/6558 at 3–4. As a general matter, we agree that the Eighth Amendment requires Defendants to take adequate steps to curb the spread of disease within the prison system. Indeed, disease control is one of the areas in which the *Plata* court previously concluded that Defendants fell short. *See Coleman I*, 922 F. Supp. 2d at 896. For example, the *Plata* court previously found that the prison intake process, "which was designed to allow medical staff to identify inmates' medical issues, including communicable diseases, . . . was woefully inadequate." *Id.* (describing a finding of the *Plata* court in *Plata v. Schwarzenegger*, No. 01-1351-TEH, 2005 WL 2932254, at *12 (N.D. Cal. Oct. 3, 2005)). It also found that exam tables and counter tops where prisoners with infectious diseases were treated "were not routinely disinfected or sanitized." *See id.* at 896 (quoting *Plata*, 2005 WL 2932253, at *14); *see also Plata*, 563 U.S. at 508 (citing this fact in affirming the population cap order). Still, Defendants' inability to control disease was only one symptom of an overall failure to provide inmates with access to constitutionally adequate health care services.

Here, however, the impetus for the release order Plaintiffs seek is different from the overarching structural violations underlying the 2009 population reduction order. The specific harm Plaintiffs allege is not caused by constitutional shortcomings in Defendants' ability to provide medical and mental health services. Indeed, Plaintiffs' own expert acknowledges that California's inmates would still face a substantial risk of harm from COVID-19 "even if the health care delivery system were constitutionally adequate." ECF No. 3219-4/6524 ¶ 19 (Stern Decl.). That the harm Plaintiffs face is not dependent on the existence of a constitutionally inadequate health care delivery system is strong evidence that it is rooted in a significantly different underlying cause than what was before us in the prior three-judge court proceedings.

While the threat posed by COVID-19 is undoubtedly medical, the particular risks the disease poses to prisoners are primarily a function of the contagiousness of the virus and the nature of incarceration. There is no vaccine for COVID-19. Thus far, the only way to stop its spread is through preventive measures—principal among them maintaining physical distancing sufficient to hinder airborne person-to-person transmission. *See* ECF No. 3221-1/6259-1 at 109 (CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*

Correctional and Detention Facilities) (describing physical distancing as a "cornerstone" of reducing transmission of COVID-19). Creating physical distancing is uniquely difficult in a congregate environment like a prison.[10] *Id.* But crucially, this is a problem shared by *all* prisons, not just those with foundering health care delivery systems. *See id.* at 107–10.

That is not to say that Defendants have no constitutional obligation to take steps to prevent the spread of COVID-19 within California's prisons. Defendants themselves acknowledge that the virus presents a "substantial risk of serious harm" and that the Eighth Amendment therefore requires them to take reasonable measures to abate that risk. ECF No. 3235/6552 at 17; *see Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (noting that prison officials may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year"). But we conclude that any constitutional violation in Defendants' current response to the COVID-19 crisis is different, in both nature and degree, from the violations underlying the 2009 population cap order. That order was never intended to prepare Defendants to confront this unprecedented pandemic. Nor could it have, given that the entire world was unprepared for the onslaught of the COVID-19 virus.

We therefore conclude that to the extent Plaintiffs can establish a constitutional violation based on the threat posed by COVID-19, it must be based on shortcomings in Defendants' response to the virus, not on the longstanding systemic constitutional deficiencies in California's prison health care delivery system. Because Plaintiffs' motion seeks a release order to redress a different constitutional injury than those previously found in the *Coleman* and *Plata* proceedings, that relief cannot be granted through a modification to our prior remedial order.

There is precedent within these proceedings for our conclusion that requests for disease-specific relief generally require a new Eighth Amendment analysis. In 2013, the *Plata* plaintiffs brought a motion asking the court to order the transfer of classes of inmates who were particularly at risk of developing a severe form of Valley Fever—an illness spread by airborne fungal spores—

[10] Because the merits of Plaintiffs' motion are not properly before us, we make no findings as to what level of physical distancing might be constitutionally required in a carceral environment.

out of the prisons where the disease was most prevalent. *Plata v. Brown*, No. 01-cv-1351-TEH, 2013 WL 3200587, at *1 (N.D. Cal. Jun. 24, 2013). The plaintiffs did not bring their motion under Rule 60(b)(5), nor did the *Plata* court treat it as a modification request. Instead, the court analyzed whether Defendants' specific responses to the threats posed by Valley Fever were sufficient to satisfy the Eighth Amendment. *Id.* at *10–12. After concluding that they were not, the *Plata* court granted the plaintiffs' transfer request, tailoring the scope of relief to the contours of the specific Eighth Amendment violation implicated by Defendants' inadequate Valley Fever response. *Id.* at *10–13.

The Supreme Court's discussion of our ability to modify the 2009 population cap order confirms our conclusion that the remedy Plaintiffs now seek goes to a different constitutional injury than what has been litigated previously. In describing the scope of our modification authority, the Court explained that it may be appropriate to grant Defendants more time in which to come into compliance with the 137.5% cap if it were necessary to allow the state to develop systems for identifying inmates whose release was least likely to jeopardize public safety. *Plata*, 563 U.S. at 544. It noted such an extension could be conditioned on Defendants' "ability to meet interim benchmarks for improvement in the provision of medical and mental health care." *Id.* The Court also explained that as Defendants made progress in reducing the prison population, it might become apparent "that further population reductions are not necessary or less urgent than previously believed." *Id.* In those circumstances, it could be appropriate to consider whether to extend or modify the requirements of the population cap order. *Id.*

In short, the Supreme Court contemplated that we could adjust our remedial order to ensure that it remained appropriately tailored to its original goal: reducing the prison population to a level sufficient, but no lower than necessary, to allow Defendants to deliver constitutionally adequate medical and mental health care services.[11] *See id.* at 530 (explaining that prospective relief with respect to prison conditions must be "narrowly drawn" and "extend[] no further than

[11] The Court's modification ruling also encompassed the situation where Defendants reached the 137.5% goal but were still unable to provide constitutionally adequate medical care. *Plata*, 563 U.S. at 543. We have no doubt that under that scenario, we would have the power to reduce the percentage of the design capacity cap further.

necessary to correct the violation"). We do not believe that the Court envisaged us "modifying" our judgment to require an additional reduction in the prison population to respond to a unique threat posed by a specific virus that could not have been foreseen only a few months ago, much less at the time of the 2009 population cap order. Our discretion to modify our prior orders is not boundless.

The cases relied on by Plaintiffs only reinforce our view that the motion before us is not an appropriate modification request. In *Parsons v. Ryan*, the plaintiff class entered into a settlement agreement with prison officials that required them to achieve at least 75 percent compliance with several "health care performance measures," including that they provide inmates with health care services within twenty-four hours after a request was first made. 912 F.3d at 493–94, 499. The prison system's compliance rate with this performance measure was abysmal—as low as 34 percent—and after failed efforts to improve compliance, the district court issued an order requiring the defendants to use community health services (i.e., services outside the prisons) to provide the required care. *Id.* at 499. On appeal, the defendants argued that the PLRA required the district court to "make *new* findings of a constitutional violation" before entering the new remedial order. *Id.* at 501. The Ninth Circuit rejected the argument. It concluded that the district court's order merely implemented a new means of curing the same constitutional violation upon which the original settlement agreement had rested—failure to provide care within a reasonable time period—and that it was therefore a proper modification of the prior remedial order. *Id.*

Similarly, in *Armstrong v. Brown*, 768 F.3d 975 (9th Cir. 2014), the district court entered an injunction that required California prison officials to "track the record of each institution and the conduct of individual staff members" who were not complying with a remedial plan to cure systemic violations of the Americans with Disabilities Act and the Rehabilitation Act. *Id.* at 978. The vague language of the injunction created problems. The defendants contended that it required them to track only substantiated allegations of noncompliance whereas the plaintiffs argued that it required tracking and investigation of *all* alleged violations. *Id.* at 978–79. In response, the district court issued a new injunction that both clarified that the defendants were required to track all allegations—substantiated or not—and added dispute resolution procedures, including a

provision that allowed plaintiffs' counsel to review the state's investigations of allegations of noncompliance. *Id.* at 979. The defendants appealed the modified injunction, and the Ninth Circuit affirmed. While noting that the relief ordered by the district court might have been unduly intrusive had it been implemented as an initial remedy, the Ninth Circuit concluded that "the level of intrusiveness [was] acceptable based on the history and circumstances of the case"—namely that the district court "ha[d] attempted narrower, less intrusive alternatives—and those alternatives ha[d] failed." *Id.* at 986.

Plaintiffs argue that, as in *Parsons* and *Armstrong*, more intrusive measures are necessary here because the 137.5% population cap is insufficient to allow Defendants to implement the physical distancing measures they believe are necessary to prevent the spread of COVID-19. ECF No. 3248/6558 at 4–5. But this argument elides the fact that the population cap order *was never intended* to put Defendants in a position to confront the unique threat posed by this once-in-a-century virus. Thus, this is not a case like *Parsons* and *Armstrong* where a district court implemented progressively more intrusive measures to remedy the same, well-understood constitutional violation that formed the basis for the original remedial order. *See Parsons*, 912 F.3d at 499; *Armstrong*, 768 F.3d at 978–79, 986. Instead, Defendants ask us to alter a decade-old order to address a new alleged constitutional violation—an inadequate response to a specific virus—that our prior order was never designed to address. This request falls outside the scope of our equitable modification authority.

Our order today does not leave Plaintiffs without options for seeking relief. While we must deny their motion as currently procedurally improper, we do so without prejudice to their bringing their request for relief in an appropriate forum. As with the Valley Fever motion in *Plata*, and as was done in the original *Coleman* and *Plata* litigation, Plaintiffs may go before a single judge to press their claim that Defendants' response to the COVID-19 pandemic is constitutionally inadequate. For example, if they believe that the response violates Plaintiffs' right to adequate medical care, they may seek relief before the individual *Plata* court. Likewise, Plaintiffs may seek relief before the individual *Coleman* court if they believe that Defendants' response to COVID-19 is preventing the delivery of adequate mental health care. If a single-judge

court finds a constitutional violation, it may order Defendants to take steps short of release necessary to remedy that violation. And if that less intrusive relief proves inadequate, Plaintiffs may request, or the district court may order sua sponte, the convening of a three-judge court to determine whether a release order is appropriate. *See* 18 U.S.C. § 3626(a)(3).

III. CONCLUSION

We take no satisfaction in turning away Plaintiffs' motion without reaching the important question of whether Defendants have implemented constitutionally adequate measures to protect the inmates of California's prisons from the serious threat posed by this unparalleled pandemic. But we are bound by Federal Rule of Civil Procedure 60(b)(5) and the PLRA to reach this conclusion.

We emphasize that Defendants have broad authority to voluntarily take steps that may prevent the life-threatening spread of COVID-19 within their prisons, and we recognize the deference that is due to prison authorities to determine which additional measures must be taken to avoid catastrophic results. *See Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Defendants have represented to us that they are continuously evaluating what more they can do to protect the inmates within their prisons, and we urge them to leave no stone unturned. It is likely that only through significant effort will California's prisons be able to minimize the spread of COVID-19.

* * *

For the foregoing reasons, Plaintiffs' emergency motion for modification of our 2009 population reduction order is **DENIED** without prejudice to pursuing relief in a procedurally appropriate forum, including in the individual *Coleman* and/or *Plata* courts.

IT IS SO ORDERED.

Dated: April 4, 2020

MUELLER, Chief District Judge, concurring:

I join in the court's conclusion that Plaintiffs have not met their burden of demonstrating they qualify for the relief they seek under Federal Rule of Civil Procedure 60(b)(5), assuming without deciding that as the prevailing party previously they may rely on the rule for affirmative relief. *See, e.g.*, *In re Von Borstel*, No. 01-42235-elp7, 2011 WL 477817, at *4 (Bankr. D. Or. Feb. 3, 2011) ("The rule does not say that 'a losing' party may obtain relief; it says 'a' party." Thus, a prevailing party may use Fed. R. Civ. P. 60(b) to seek to set aside a judgment on the ground that the judgment should have provided additional relief." (citing *United States for Use & Benefit of Familian Nw., Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952 (9th Cir. 1994))); *but see Cano v. Baker*, 435 F.3d 1337, 1340 (11th Cir. 2006) ("The equitable purpose of Rule 60(b) cannot be to 'relieve' a party from her own lawsuit in which she had prevailed three decades earlier." (citation omitted)). The court's conclusion in this respect is sufficient to resolve the motion before us.

I respectfully do not join in the court's analysis or determination that Plaintiffs' motion arises out of an Eighth Amendment claim entirely distinct from the claims over which this court has continuing jurisdiction. This court previously found, after extended evidentiary proceedings, that "crowding generates unsanitary conditions, overwhelms the infrastructure of existing prisons, and increases the risk that infectious diseases will spread." *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 931 (E.D. Cal. 2009) ("*Coleman I*") (citing Nov. 9, 2007 Scott Report ¶¶ 17–24, ECF No. 1528/3058). In so finding, this court credited multiple experts who opined that prison crowding was a contributor to great vulnerability in the face of outbreak and spread of infectious disease. *Id*. (referencing opinions that "crowding 'contributes to the difficulties of healthcare delivery by virtue of the fact that it increases the incidence of illnesses, [and] infectious disease'"); *id.* (quoting Rep. Tr. at 257:15–22, ECF No. 1832/3541-2, for opinion of Dr. Jeffrey A. Beard that, while prisons may not always be incubators for disease, "they could be if your population densities get so intense," including "if you have a gymnasium that you triple bunk and put hundreds and hundreds of people in a closed dense area"); *id*. ("Until CDCR reduces its population, it will remain highly vulnerable to outbreaks of communicable diseases, including

staph infections, tuberculosis and influenza." (quoting Nov. 9, 2007 Shansky Report ¶ 135, ECF No. 1527/3057)).

Moreover, this court retained jurisdiction to determine whether the remedy it had ordered proved durable. *See Coleman v. Brown*, 952 F. Supp. 2d 901, 934 (E.D.Cal./N.D.Cal. 2013). Even though the prison population for some time has remained below the cap this court previously set, Defendants have not achieved the durability of remedy required for this court's role to cease. The current circumstances appear to expose, in stark terms, the potential need to revisit the current population cap. Even as I do not believe Plaintiffs' motion grounded in Rule 60(b)(5) can be granted, I am inclined to think this court retains broad equitable powers that might permit some reconsideration of the current cap in light of the unprecedented exigent circumstances here. Those circumstances, as is undisputed, present potentially grave risks to members of the Plaintiff classes, as well as to correctional staff and the communities in which they reside, as a result of the COVID-19 pandemic and its impact on the delivery of medical and mental health care in the state prisons. It is undisputed that the delivery of care, to date, remains below constitutional minima. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1987) ("As we explained in *Milliken v. Bradley*, 433 U.S. 267, 281 [ ], state and local authorities have primary responsibility for curing constitutional violations. If, however [those] authorities fail in their affirmative obligations . . . judicial authority may be invoked. Once invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." (internal quotation marks and citation omitted)).

At the same time, it is clear that a prisoner release order under the PLRA is a remedy of last resort and neither Plaintiff class has formally sought focused relief from their individual courts, a condition precedent to issuance of a prisoner release order. *See* 18 U.S.C. § 3626(a)(3)(A); *see also Coleman I*, 922 F. Supp. 2d at 918. Given the availability of expedited proceedings before those district courts to immediately exhaust the possibility of inmate transfers and relocations to secure facilities to achieve constitutionally acceptable conditions for the Plaintiff classes, those proceedings must be invoked first.

With these observations, I join in the decision to deny Plaintiffs' motion without prejudice.

DECLARATION OF KAREN McCARRON
April 7, 2020

1. My name is Karen McCarron and I currently reside at Logan Correctional Center in Lincoln, Illinois. I have been at Logan since March 2013. Prior to being incarcerated, I earned an M.D. from Southern Illinois University and practiced as a doctor for 11 years.

2. I currently reside in Housing Unit 6, where many older and disabled prisoners reside.

3. I have also worked as an ADA worker, helping to take care of elderly and disabled prisoners in the facility. Many of the people I have worked with as an ADA worker have serious medical conditions such as diabetes, hypertension, severe osteoarthritis, blindness, Huntington's disease, heart failure, atrial fibrillation, seizures, Parkinson's, obesity, and cancer. Part of my job is to help them access medical care at Logan. I often take people to medical appointments and encourage them to share information that I know is important with their medical providers. Through this work, I have developed an understanding of how the medical system works at Logan.

4. Based on my medical training and experience, I am deeply concerned about Logan's ability to manage COVID-19.

5. Medical advice issued by the Center for Disease Control and other leading health organizations call for precautions such as social distancing and frequent hand washing with soap and water in order to help prevent the spread of the virus. Across the country, colleges and universities with dormitories and similar living arrangements have shut down based on the simple fact that social distancing is impossible in congregate settings.

6. Here at Logan, it is impossible to follow the CDC's advice about social distancing and frequent hand washing. We live in dormitory-style housing, with four to six women per room.

7. About 60 women share a bathroom, which contains 3 working toilets, 4 sinks, and 4 showers. Using these facilities, it is impossible to social distance. Sinks are often out of order or do not produce hot water, making it impossible for so many women to maintain proper hand hygiene.

8. Although there are not yet any confirmed cases of COVID-19 at Logan, it will inevitably come and spread quickly through the facility. Based on media reports, I believe that anywhere between 40-80% of the population will become positive, possibly even more given the congregate setting that we live in. While those of us at Logan want to do our part to help "flatten the curve" of infection, we are simply not able to do so on account of the congregate living environment and inadequate sanitation.

9. Many of the women who I live with are medically vulnerable to COVID-19. Without naming names, I know many women over 55 and many have medical conditions that make them vulnerable to COVID-19, including cancer, diabetes, hypertension, obesity, asthma, chronic obstructive pulmonary disease, heart conditions, including heart failure, Parkinson's, difficulty swallowing, lupus, genetic immunodeficiency, and multiple sclerosis. If these women are exposed, there is a good chance they will need to be on ventilator and many will likely die. To my knowledge, the infirmary has fewer than a dozen beds and only three isolation rooms. I believe that based on physical space alone, the infirmary could not handle more than 17 patients who require infirmary-level care. Moreover, even without COVID-19, the beds in the infirmary are ordinarily full of patients who require care.

10. Nor do I believe staffing is adequate to care for the widespread illness COVID-19 will cause once it arrives at Logan. The infirmary is staffed by only one certified nursing assistant and one to two nurses. There is also one doctor responsible for providing care not only to the patients in the infirmary, but to all of the approximately 1,700 women at Logan. Even if a housing unit is converted to house COVID-19-positive inmates, it is not a medical facility and lacks the equipment, sanitation, staffing, and layout necessary to save lives.

11. I gave this statement over the phone to Sarah Blair, an attorney from Uptown People's Law Center, on March 31, 2020 and gave my verbal consent for Ms. Blair to electronically sign this statement on my behalf on March 31, 2020.

12. I read and reviewed this statement on April 7, 2020, and swear under penalty of perjury that the statement is accurate and true.

/s/ Karen McCarron

Karen McCarron
#R82817
Logan Corr. Center

STATE OF ILLINOIS

EXECUTIVE DEPARTMENT

SPRINGFIELD, ILLINOIS

April 6, 2020

EXECUTIVE ORDER 2020-21

EXECUTIVE ORDER IN RESPONSE TO COVID-19
(COVID-19 EXECUTIVE ORDER NO. 19)

WHEREAS, I, JB Pritzker, Governor of Illinois, declared all counties in the State of Illinois as a disaster area on March 9, 2020 (First Gubernatorial Disaster Proclamation) in response to the outbreak of Coronavirus Disease 2019 (COVID-19); and,

WHEREAS, I again declared all counties in the State of Illinois as a disaster area on April 1, 2020 (Second Gubernatorial Disaster Proclamation, and, together with the First Gubernatorial Disaster Proclamation, the Gubernatorial Disaster Proclamations) in response to the exponential spread of COVID-19; and,

WHEREAS, in a short period of time, COVID-19 has rapidly spread throughout Illinois, necessitating updated and more stringent guidance from federal, state, and local public health officials; and,

WHEREAS, for the preservation of public health and safety throughout Illinois, and to ensure that our healthcare delivery system is capable of serving those who are sick, I find it necessary to take additional significant measures consistent with public health guidance to slow and stop the spread of COVID-19; and,

WHEREAS, social distancing, which consists of maintaining at least a six-foot distance between people, is the paramount strategy for minimizing the spread of COVID-19 in our communities; and,

WHEREAS, certain populations are at a higher risk of experiencing more severe illness as a result of COVID-19, including older adults and people who have serious chronic health conditions such as heart disease, diabetes, lung disease or other conditions; and,

WHEREAS, the Illinois Department of Corrections (IDOC) currently has a population of more than 36,000 male and female inmates in 28 facilities, the vast majority of whom, because of their close proximity and contact with each other in housing units and dining halls, are especially vulnerable to contracting and spreading COVID-19; and,

WHEREAS, the IDOC currently has limited housing capacity to isolate and quarantine inmates who present as symptomatic of, or test positive for, COVID-19; and,

WHEREAS, to ensure that the Director of the IDOC may take all necessary steps, consistent with public health guidance, to prevent the spread of COVID-19 in the IDOC facilities and provide necessary healthcare to those impacted by COVID-19, it is critical to provide the Director with discretion to use medical furloughs to allow medically vulnerable inmates to temporarily leave IDOC facilities, when necessary and appropriate and taking into account the health and safety of the inmate, as well as the health and safety of other inmates and staff in IDOC facilities and the community;

THEREFORE, by the powers vested in me as the Governor of the State of Illinois, and pursuant to Sections 7(1), 7(2), 7(8), and 7(12) of the Illinois Emergency Management Agency Act, 20 ILCS 3305, I hereby order the following, effective immediately and for the remainder of the duration of the Gubernatorial Disaster Proclamations:

Section 1. The following provisions of the Illinois Unified Code of Corrections, 730 ILCS 5/3-11-11, allowing for the furlough of IDOC inmates are hereby suspended as follows: (a) as set forth in Section (a), providing the allowable time period for furloughs, the phrase "for a period of time not to exceed 14 days", is suspended and furlough periods shall be allowed for up to the duration of the Gubernatorial Disaster Proclamations as determined by the Director of IDOC; and (b) as set forth in Section (a)(2), the phrase "to obtain medical, psychiatric or psychological services when adequate services are not otherwise available" shall be suspended and furloughs for medical, psychiatric or psychological purposes shall be allowed at the Director's discretion and consistent with the guidance of the IDOC Acting Medical Director.

Section 2. The IDOC shall file emergency rules as needed to effectuate the intent of this Executive Order.

JB Pritzker, Governor

Issued by the Governor April 6, 2020
Filed by the Secretary of State April 6, 2020

FILED
INDEX DEPARTMENT
APR 06 2020
IN THE OFFICE OF
SECRETARY OF STATE

Declaration of LaDonna Sipes

I, LaDonna Sipes, declare as follows:

1. My date of birth is [redacted] and I live at [redacted]

2. My daughter, Amber Watters, is currently housed at Logan Correctional Center.

3. I am willing to allow Amber to live with me and safely quarantine. I live in a single-family home, so Amber will not be in close physical contact with others.

4. I am able and willing to help Amber comply with any and all requirements required by the IDOC for the duration of Amber's home confinement.

5. Prior to being incarcerated, Amber was in a bad car accident where she broke her back. Amber is awaiting therapy needed to fully recover.

6. Amber could easily access my primary care physician located in Palestine for medical treatment if needed.

I declare under penalty of perjury that the forgoing is true and correct.

LaDonna Sipes
(electronic signature)

Declaration of Valerie Ott

I, Valerie Ott, declare as follows:

1. My name is Valerie Ott and my date of birth is [redacted] I live at [redacted] I am active and in good health.

2. My son, Danny Labosette, is currently housed at Robinson Correctional Center in Robinson, Illinois. He is 56 years old and is a double amputee. He also has Hepatitis C.

3. If Danny is released or transferred, I would welcome him into my home, which is retrofitted to accommodate wheelchairs. He would be able to safely quarantine there, and I have been following all of the social distancing guidelines. My home is on five acres of land in a rural area, so Danny would be able to avoid contact with anyone.

4. I would be able to facilitate any requirements of Danny's release or transfer, including regular check ins and staying in the house if necessary. He would also be able to comply with all laws and IDOC requirements while living with me.

5. There are two medical clinics in Mayl where Danny could receive treatment, and I would be able to provide transportation for him.

I declare under penalty of perjury that the foregoing is true and correct.

Valerie Ott
(electronic signature)

Declaration of Prestina Tate

I, Prestina Tate, declare as follows:

1. My name is Prestina Tate and my date of birth is [redacted] My address is [redacted]

2. My brother, Carl Tate, is currently housed in Danville Correctional Center. Carl suffers from hypertension and has to take medication for it.

3. If Carl is released or transferred, I would welcome him into my home. He would be able to safely quarantine there, and I have been following all of the social distancing guidelines.

4. I would be able to help Carl comply with any conditions of his release or transfer, like regularly checking in with IDOC or staying in the house if that he what is required. When he is living with me, Carl will be able to comply with all laws and all of IDOC's requirements.

5. Like Carl, I also suffer from hypertension and see a doctor for it. If Carl is able to come and live with me, I can help connect him to my doctor so that he can continue receiving treatment and get the medication that he takes. I will be able to facilitate transportation so that Carl can get to the doctor.

I declare under penalty of perjury that the forgoing is true and correct.

Prestina Tate
(signed electronically)

Declaration of Patty Best

I, Patty Best, declare as follows:

1. My name is Patty Best. My date of birth is [redacted], and I currently reside at [redacted]

2. James Money will live with me if he is medically furloughed.I have been preparing for his potential transfer. In August 2019, a parole officer came to my current address and approved my home as a host site for James. On April 6, I called the parole office to clarify that my home would need a landline for James's electronic monitoring. I have scheduled an appointment on April 9 for that landline to be installed. My home is also a safe place for James to live, given his medical needs. I stay at home and do not work, reducing the potential for bringing the virus into my home and reducing the possibility that, if James has been exposed, it will be brought into the community.

3. I am fully capable and willing to assist James in complying with the terms of his furlough. I will help with regular calls, will ensure he will stay in the home and will comply with all IDOC requirements. James is planning on keeping his doctors at SIU Medicine who are familiar with his unique medical situation: Dr. Jakoby, Dr. Sharma, and dDr. Rao. I am also eager to schedule his appointments with these doctors. Because I am James's legal power of attorney, I will schedule these appointments as soon as possible, if furloughed.

4. James has a unique medical situation and is threatened in more than one way by remaining in IDOC custody. James is not only immunocompromised, but his cancer is currently untreated and at risk of progressing without treatment. James has stage three metastatic papillary thyroid cancer. James was diagnosed in 2016. He has had five surgeries, most recently in January 2020. In January, they removed one of the parathyroids. Eighty of his lymph nodes that contain cancer have been removed in addition to a full thyroidectomy. They need to keep removing cancer as it continues to grow in his thyroid bedding. Because his body rejected radiation, the next step was to start chemotherapy. However, because of the COVID-19 lockdown, IDOC cancelled his chemotherapy appointment in March 2020. James needs chemotherapy to avoid another surgery.

I declare under penalty of perjury that the foregoing is true and correct.

Patty Best

(signed electronically)

Declaration of Sarah Wild

I, Sarah Wild, declare as follows:

1. My name is Sarah Wild. My date of birth is [redacted], and I currently reside at [redacted]

2. If he is released or placed on furlough, I am available to provide any support necessary for my dear friend Gerald Reed. Whatever it takes, I would do it.

3. I will be able to provide him with groceries or any other support he may need so that he can quarantine following his release or furlough. I am able to transport him to any medical appointments he might have/pick up his prescription medications. I can assist in arranging any benefits he might need. I am able to facilitate any requirements of Gerald's release or furlough.

4. Gerald has a large community of people ready and willing to do whatever they can to support him. He is a member of the Chicago Alliance Against Racist and Political Repression, a group that has been actively campaigning for his release for years. He has support from the Chicago Torture Justice Center, and a large network of individual supporters from Chicago to London, UK. I am confident that, whatever his needs, Gerald will be taken care of.

I declare under penalty of perjury that the foregoing is true and correct.

Sarah Wild
(electronic signature)

Declaration of Siovhan Tucker

I, Siovhan Tucker, declare as follows:

1. My name is Shiovhan Tucker. My date of birth is [redacted], and I currently reside at [redacted].

2. My uncle, Gerald Reed, can live with me if he is released or furloughed, where he can safely quarantine for any time period necessary. I have a spare bedroom where Gerald could stay immediately.

3. I am able to facilitate any requirements of Gerald's release or furlough. I will make sure he is able to comply with all the laws and IDOC requirements while living with me, including ensuring that he stays in the house and is able to make regular call-ins.

I declare under penalty of perjury that the foregoing is true and correct.

Siovhan Tucker
(electronic signature)

Declaration of Kim Reed

I, Kim Reed, declare as follows:

1. My date of birth is [redacted] and I live at [redacted]
2. My brother, Carl Reed, is currently housed at Graham Correctional Center.
3. I am willing to allow Carl to live with me and safely quarantine. I live in a single-family home, so Carl will not be in close physical contact with others.
4. I am able and willing to help Carl comply with any and all requirements required by the IDOC for the duration of Carl's home confinement.
5. Carl is diabetic and undergoing dialysis for a liver condition.
6. Carl has access to medical treatment for both conditions through Cook County Hospital.

I declare under penalty of perjury that the forgoing is true and correct.

Kim Reed
(electronic signature)