

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

FAVIAN BUSBY and MICHAEL
EDGINGTON, on their own behalf and on
behalf of those similarly situated,

Plaintiffs,

V.

FLOYD BONNER, JR., in his official
capacity, and SHELBY COUNTY
SHERIFF'S OFFICE,

Defendants.

No. 20-cv-2359-SHL

ORDER ADDRESSING MOTION FOR TEMPORARY RESTRAINING ORDER

Before the Court are Plaintiffs’ Motion for Temporary Restraining Order (“TRO Motion”), (ECF No. 2), filed May 20, 2020, and Defendants’ Response, (ECF No. 27), filed May 26, 2020.

Along with this TRO Motion, Plaintiffs filed a Motion for Class Certification. (ECF No. 3.) On May 26, 2020, along with their Response to the TRO Motion, Defendants filed a Motion to Dismiss, and a Response to the Motion for Class Certification. (ECF Nos. 25, 26.) This Court denied Defendants' Motion to Dismiss and granted in part Plaintiffs' Motion for Class Certification on June 10, 2020. (ECF No. 38.)

In their TRO Motion, Plaintiffs seek urgent habeas and injunctive relief to protect medically vulnerable people and people with disabilities detained at the Shelby County Jail (“Jail”). Plaintiffs allege that their constitutional rights, under the Fourteenth Amendment, and their statutory rights, under the Americans with Disabilities Act and the Rehabilitation Act, are being violated. (ECF No. 2 at PageID 53-59.) Specifically, Plaintiffs allege that because testing,

screening, social distancing and hygiene measures are deficient at the Jail, only immediate release of medically vulnerable inmates will vindicate their constitutional and statutory rights. (*Id.* at PageID 50-51.) Furthermore, Plaintiffs allege that the confinement of medically vulnerable people in a congregate setting like the Jail is itself unconstitutional. (ECF No. 2, PageID 47.) Defendants contend in the Response that they are following all applicable standards. (ECF No. 27.)

ANALYSIS

When deciding whether to issue a temporary restraining order, courts consider whether the moving party establishes the following four factors: (1) a strong or substantial likelihood of success on the merits; (2) irreparable harm unless injunctive relief is granted; (3) that the requested relief will cause substantial harm to third parties; and (4) whether injunctive relief is in the public interest. Northeast Ohio Coal. for Homeless and Service Emps. Int'l Union v. Blackwell, 467 F.3d 999 (6th Cir. 2006). The final two factors “merge when the Government is the opposing party.” Gun Owners of Am., Inc. v. Barr, 2019 WL 1395502, at *1 (6th Cir. Mar. 25, 2019). The standard for issuing a TRO is essentially the same as for a preliminary injunction. See ABX Air, Inc. v. Int'l Bhd. of Teamsters, Airline Div., 219 F. Supp. 3d 665, 670 (S.D. Ohio 2016).

Here, the lack of a developed factual record prevents the Court from ruling on the merits. Consideration of Plaintiffs’ constitutional and statutory allegations requires a detailed examination of the facts. See, e.g., Cameron v. Bouchard, Case No. 20-1469 (6th Cir. Jun. 11, 2020) (noting that “all Eighth Amendment cases” require a “detailed examination of a distinct factual record”) (Cole, C.J., dissenting). No such record is before the Court. Plaintiffs and Defendants take divergent positions on several critical factual issues. For instance, the Parties

dispute whether inmates are socially distanced, whether appropriate cleaning procedures have been implemented and whether inmates have proper access to hygiene supplies.

While this § 2241 case is about the fact of confinement and does not challenge the conditions themselves, the Court must have more evidence as to how Plaintiffs are being housed to determine whether there exist constitutional or statutory violations. Because material facts are contested here, an evidentiary hearing must be held before injunctive relief is considered. See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 553 (6th Cir. 2007) (noting that “where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held”).

The Court is mindful that analysis of the other TRO factors may favor Plaintiffs. The exceptionally dangerous nature of the COVID-19 pandemic is lost on none. Yet, because the facts require further development to determine likelihood of success on these particular claims, a ruling on the Motion for a Temporary Restraining Order is held in abeyance. See Obama for Am. v. Husted, 697 F.3d 423, 436 (6th Cir. 2012) (“When a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor.”) (quotation marks omitted).

While further fact-finding is still necessary, the Court notes that the allegations of the lack of appropriate accommodations for at-risk inmates are disturbing. Amid this public health crisis, medically vulnerable people have been urged to take strong precautions. Yet, the vulnerable people seeking relief here are at the mercy of Jail officials as to the precautions implemented. As an example of the Court’s concern, the Class and Subclass lists filed by Defendants (ECF Nos. 43, 44 (sealed)) show that some members are being housed in dormitory-style arrangements. This Court will not hesitate to act appropriately if it finds that Defendants

have, in fact, violated medically vulnerable inmates' constitutional rights. See Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 137 (1977) (noting that a prisoner does not lose his constitutional protections "as he passes through the prison's gates").

CONCLUSION

The Court's ruling on the Motion for a Temporary Restraining Order is held in abeyance. Due to the conflicting facts presented by the Parties and pursuant to Federal Rule of Evidence 706, the Court will order an inspection of the Jail by an Independent Inspector. The Parties are hereby **ORDERED** to submit a joint recommendation for an Independent Inspector no later than **5:00 p.m. on Tuesday, June 16, 2020** as well as a proposed scope of inspection. If the Parties are unable to agree on an inspector or on the scope, each party is to propose two recommendations, along with curriculum vitae and a letter no longer than three pages, with supporting grounds for selection as well as a proposed scope. The Inspection will take place as soon as possible with the purpose of providing the Court and the Parties an independent assessment of the way in which COVID-19 is being taken into account in the Jail.

The Court will hold a hearing on **June 30, 2020 at 9:00 a.m.** to hear from the Independent Inspector on his or her findings as well as any other proof the Parties wish to offer.

IT IS SO ORDERED, this 12th day of June, 2020.

s/ Sheryl H. Lipman

SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE