UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELLIOTT ABRAMS, **CRAIG SEEGMILLER, VINCENT GLASS, ROBERT REEVES, and LAMONT HEARD,** individually, and on behalf of all others similarly situated,

Plaintiffs,

-v-

WILLIS CHAPMAN, Warden, Macomb Correctional Facility; **NOAH NAGY**, Warden at G. Robert Cotton Correctional Facility (JCF); **MELINDA BRAMAN**, Warden, Parnall Correctional Facility (SMT); **BRYAN MORRISON**, Warden Lakeland Correctional Facility (LCF); **HEIDI WASHINGTON**, Director of the Michigan Department of Corrections, sued in their official capacities only,

Defendants.

Case No. 2:20-cv-11053-MAG-RSW
Hon. Mark A. Goldsmith
Maj. Judge R. Steven Whalen

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER & INJUNCTIVE RELIEF AND BRIEF IN SUPPORT

Plaintiffs, Elliott Abrams, Craig Seegmiller, Vincent Glass, Robert Reeves, and Lamont Heard, on behalf of themselves and all others similarly situated, by and through their counsel, Daniel E. Manville, Michigan State University Clinical Law Professor, hereby move this Court, pursuant to Fed. R. Civ. P. 65, for entry of a Temporary

Restraining Order and Injunctive Relief. As demonstrated in the following brief, Defendants have violated the Eighth Amendment to the U.S. Constitution by failing to provide Plaintiffs with reasonably safe living conditions in the face of the current COVID-19 pandemic. As a result, Plaintiffs seek entry of a temporary restraining order requiring Defendants to take additional precautions to stem the spread of the virus.

CONCISE STATEMENT OF ISSUES PRESENTED

Should the Court issue a preliminary injunction and enjoin the Defendants from subjecting inmates to the COVID-19 virus where it is refusing to comply with CDC Guidelines?

Plaintiffs Answer: Yes.

CONTROLLING AUTHORITY FOR RELIEF SOUGHT

In determining whether to grant an emergency application for a temporary restraining order, courts evaluate four factors: 1) whether the movant has a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury absent an injunction; 3) whether granting the injunction would cause substantial harm to others; and 4) whether the public interest would be served by granting the injunction. *Northeast Ohio Coal. for Homeless and Serv. Emps. Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). These four factors "are not prerequisites that must be met but are interrelated considerations that must be balanced together. For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay." *Id.*

I) INTRODUCTION

The world is in the midst of a global health pandemic. The President has declared a national emergency. Across the country, 43 states and Washington, D.C. have issued, and in some cases extended, "Shelter-in-Place" Orders. As things stand, COVID-19 has no vaccine, no treatment, and no cure. The only option to keep infections to a minimum in an effort to contain this public health emergency is to practice social distancing, proper hygiene, and intensify cleaning.

Meanwhile, as COVID-19 is spreading wildly across the country, a much quieter outbreak is occurring within the Michigan Department of Corrections ("MDOC") where inmates remain confined in crowded facilities where social distancing is virtually impossible. As a result, inmates and correctional staff alike are particularly vulnerable to serious illness and potentially even death from the COVID-19 virus.

With this in mind, Plaintiffs seek immediate class-wide relief requiring Defendants to take critical steps to provide reasonably safe living conditions in the face of the COVID-19 pandemic. Specifically, Plaintiffs seek changes to MDOC policy, as well as a change in the locations where inmates are kept in custody. These measures are not only in Plaintiffs' best interests, but also in the best interest of correctional staff and the public at large because further outbreak of this virus will infect scores of individuals across our communities.

NOTICE OF COMPLIANCE WITH LOCAL RULE 7.1(a_

Local Rule 7.1(a) requires Plaintiffs to ascertain whether this motion will be opposed. However, because this motion is being filed contemporaneously with the Complaint, there is not yet an attorney of record for Defendants in this case. Thus, pursuant to Local Rule 7.1(a)(2)(B), the undersigned counsel certifies that he was not able to obtain concurrence in the relief sought in this motion.

II) STATEMENT OF FACTS

A. COVID-19 IS SPREADING RAMPANTLY

COVID-19 is spreading exponentially in Michigan and in the United States. The risk of harm is so outrageous that President Trump proclaimed that the COVID-19 outbreak in the United States constituted a national emergency, beginning March 1, 2020. (**Ex. 1,** *Proclamation 9994*).[1] As of April 28, 2020, 1,031,290 people in the United States have contracted COVID-19, with 57,043 people dying from the virus – figures that understate its spread, as they include only those who have managed to get tested. (**Ex. 2,** *Worldometer's COVID-19*).[2] Because the virus spreads more rapidly when people are in close contact with each other, government officials in forty-three (43) states and Washington, D.C. have issued "stay-at-home" or "shelter-in-place" directives, with exceptions only for essential services like grocery shopping and trips to the pharmacy. (**Ex. 3,** *43 States Now Have Stay-At-Home Orders*).[3]

Likewise, on March 23, 2020, Michigan Governor Gretchen Whitmer issued Executive Order 2020-21 in response to the COVID-19 outbreak. (**Ex. 4,** *MI Executive Order 2020-21*).[4] The Order limited gatherings and travel, and required workers who are

1 Proclamation 9994 of March 13, 2020, https://www.federalregister.gov/documents/2020/03/18/2020-05794/declaring-a-national-emergency-concerning-the-novel-coronavirus-disease-covid-19-outbreak

2 https://www.worldometers.info/coronavirus/country/us/

3 Silverstein, Jason, "*43 States Now Have Stay-At-Home Orders For Coronavirus. These Are The 7 That Don't*" (April 6, 2020), CBS News. Available at: https://www.cbsnews.com/news/stay-at-home-orders-states/

not necessary to sustain or protect life to stay home. (*Id.*) On April 9, 2020, the Governor reaffirmed the measures set forth in Executive Order 2020-21 and extended their duration to April 30, 2020. (**Ex. 5,** *MI Executive Order 2020-42*).[5] Indeed, Michigan has become one of the global epicenters of the outbreak with a more than 37,778 reported cases and at least 3,315 deaths reported. (**Ex. 6,** *Michigan Data*). [6]

B. Detention Places Plaintiffs At Imminent Risk Of Substantial

Reducing the spread of the virus is especially challenging in prisons. This is due to a number of factors, including confined individuals' inability to protect themselves through social distancing, lack of medical and hygiene supplies, constant cycling of people through the prisons, and inadequate medical care within the prison itself. Compl. ¶¶ 7-57 and ¶¶ 96-112

In Michigan, as of April 22, 2020, 655 MDOC prisoners have tested positive for COVID-19. (**Ex. 6,** *Michigan Data*). This case count places MDOC as the sixth highest "jurisdiction" in the state, only surpassed by Genesee County (1,362), Macomb County (4,628), Oakland County (6,463), Wayne County (6,535) and Detroit City (8,026). (*Id.*) However, the growing devastation in other prisons around the country is a harbinger for

4 *Executive Order 2020-21* (COVID-19), State of Michigan (Mar. 23, 2020) https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626-,00.html)

5 *Executive Order 2020-42* (COVID-19), State of Michigan (Apr. 9, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525182--,00.html

6 *Michigan Data*, State of Michigan (Apr. 22, 2020), https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html

what almost certainly awaits MDOC if immediate safeguards are not enacted. For instance, at the Marion Correction Institution in Marion, Ohio, 1,828 inmates have tested positive, along with 109 staff members. (**Ex. 7,** *Coronavirus in Ohio: More Than 1,800 Inmates at Marion Correctional Test Positive).*[7]

C. [illegible]

Based upon the heightened risk posed by COVID-19 in prisons, public health experts and prison administrators across the country have made it abundantly clear that inmates should be released from detention facilities, not only for their own safety, but also for the safety of others.[8] In Michigan, Governor Whitmer has authorized enhanced early-release for county jails, local lockups, and juvenile detention centers in an effort to mitigate

[7] *Coronavirus in Ohio: More Than 1,800 Inmates at Marion Correctional Test Positive,* The Columbus Dispatch (Apr. 19, 2020) https://www.dispatch.com/news/20200419/coronavirus-in-ohio-more-than-1800-inmates-at-marion-correctional-test-positive

[8] *See* **Ex. 9,** *Letter from Bd. of Correction of the City of New York to Criminal Justice Leaders* (Mar. 21, 2020) (stating: "We urge you to follow your colleagues in Los Angeles County (CA), San Francisco (CA), Cook County (IL), Autauga County (AL), Augusta County (VA), Allegheny County (PA), Hamilton County (OH), Harris County (TX), Travis County (TX), and Cuyahoga County (OH), and take action now to release people from City jails.")https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf ; **Ex. 10,** Linh Ta, *Iowa's prisons will accelerate release of approved inmates to mitigate COVID-19*, Times Republican (Mar. 23, 2020), https://www.timesrepublican.com/news/todays-news/2020/03/iowas-prisons-will-accelerate-release-of-approved-inmates-to-mitigate-covid-19/ (stating, "To mitigate a possible outbreak and create more room in Iowa's overcrowded prisons, the Iowa Department of Corrections plans to expedite the release of about 700 inmates…"); **Ex. 11,** *California Chief Justice Issues Second Advisory on Emergency Relief Measures* (Mar. 20, 2020), https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures .

the COVID-19 spread. (**Ex. 8,** *Executive Order No. 2020-29*).[9] Similarly, Chief Justice Bridget M. McCormack and Executive Director of the Michigan Sheriffs' Association, Matt Saxton, have issued a joint statement urging judges and sheriffs to "use the statutory authority they have to reduce and suspend jail sentences for people who do not pose a public safety risk[,]… release far more people on their own recognizance while they await their day in court…[a]nd judges should use probation and treatment programs as jail alternatives." (**Ex. 12,** *Joint Statement*).[10]

The federal government has also acknowledged the grave threat posed by a viral outbreak in prisons and detention centers. Indeed, on March 26, 2020, Attorney General William Barr stated that the Federal Bureau of Prisons is exploring the release of at-risk prisoners to home confinement in order to reduce the overall prison population. (**Ex. 13,** *AG William Barr Pushes Expansion of Home Confinement to Reduce Prison Populations Amid Coronavirus*).[11] Likewise, DHS's subject matter experts have stressed that COVID-19 is exponentially more likely to spread in "congregate settings," such as prisons. (**Ex.**

[9] Executive Order No. 2020-29 (Apr. 26, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523422-,00.html

[10] Joint Statement (Mar. 26, 2020), https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20(003).pdf

[11] Alexander Mallin, *AG William Barr Pushes Expansion of Home Confinement to Reduce Prison Populations Amid Coronavirus*, ABC News (Mar. 26, 2020), https://abcnews.go.com/Politics/ag-william-barr-pushes-expansion-home-confinement-reduce/story?id=69816504

14, *Letter from Scott A. Allen and Josiah Rich to The Honorable Bennie Thompson at pg. 2, 3, 4, 5, 7).*[12] As such, "DHS should consider releasing all detainees in high risk medical groups, such as older people and those with chronic disease." (*Id*. at 5-6).

Because the virus spreads more rapidly when people are in close contact with each other, the Center for Disease Control ("CDC") has issued "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities." (**Ex. 15,** *CDC Guidelines*).[13] The CDC "document provides interim guidance specific for correctional facilities and detention centers during the outbreak of COVID-19, to ensure continuation of essential public services and protection of the health and safety of incarcerated and detained persons, staff, and visitors." *Id*.

The CDC notes that "[t]here are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including daily staff ingress and egress; transfer of incarcerated/detained persons between facilities and systems, to court appearances, and to outside medical visits; and visits from family, legal representatives, and other community members. Some settings, particularly jails and detention centers, have high turnover,

[12] *Letter from Scott A. Allen and Josiah Rich, to The Honorable Bennie Thompson*, Chairman, House Committee on Homeland Security (Mar. 19, 2020), https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238

[13] *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities,* Centers for Disease Control and Prevention (Apr. 18, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html

admitting new entrants daily who may have been exposed to COVID-19 in the surrounding community or other regions." *Id*. at pg. 2. The CDC further notes that "[p]ersons incarcerated/detained in a particular facility often come from a variety of locations, increasing the potential to introduce COVID-19 from different geographic areas." (*Id*.)

With regard to cleaning, the CDC emphasizes that "[e]ven if COVID-19 cases have not yet been identified inside the facility or in the surrounding community, begin implementing intensified cleaning and disinfecting procedures according to the recommendations." *Id*. at pg. 9. These measures include disinfecting objects and surfaces in common areas and cleaning shared equipment. *Id*.

In addition to disinfection practices, correctional facilities should also "[r]einforce healthy hygiene practices, and provide and continually restock hygiene supplies throughout the facility, including in bathrooms, food preparation and dining areas, intake areas, visitor entries and exits, visitation rooms and waiting rooms, common areas, medical, and staff-restricted areas (e.g., break rooms)." *Id*. at pg. 10. Moreover, inmates should also be provided with no-cost access to: Soap… Running water, and hand drying machines or disposable paper towels for hand washing… Tissues and no touch trash receptacles for disposal. *Id*.

Most importantly, detention facilities should "[i]mplement social distancing strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of the presence of symptoms)." *Id*. at pg. 11. In this

regard, inmates should be separated in common areas, recreation spaces, fining halls, during group activities, and in their cells. *Id*.

D. MDOC Has Failed To Implement Appropriate Measures To Control The Spread Of The Virus.

The MDOC acknowledges the risks involved and has allegedly enacted a number of measures to protect its inmates. (**Ex. 16,** *MDOC Response and Information on Coronavirus*).[14] However, even if the guidance set forth by the MDOC were being followed, it is wholly insufficient to adequately shield inmates from the crisis at hand.

1. Inmates Cannot Practice Social Distancing

First, social distancing is virtually impossible in a prison setting. (**Ex. 17,** *Glass Decl. at* ¶ 3). In some areas, "bunks are separated by less than six (6) feet," requiring inmates to contravene CDC Guidelines when they sleep. (**Ex. 19,** *Abrams Decl. at* ¶ 5). In addition to sleeping, in some facilities, food preparation, service and meals are communal, where inmates sit at tables just feet apart from one another. (**Ex. 20,** *Reeves Decl. at* ¶ 5; **Ex. 17,** *Glass Decl. at* ¶ 4-6). In others, prison staff makes no effort to ensure that prisoners wear face masks or keep at least six (6) feet when retrieving and returning meal trays. (**Ex. 19,** *Abrams Decl. at* ¶ 14). Indeed, MDOC spokesman, Chris Gautz, readily concedes that because inmates eat, sleep and live in closely confined quarters, they cannot achieve the social distancing needed to effectively prevent the spread of COVID-19:

[14] *MDOC Response and Information on coronavirus (COVID-19)*, (updated Apr. 16, 2020), https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronavirus-covid-19-250f43144337

> We've been practicing social distancing to the extent we can in a prison. Really anything outside of your immediate living area. If you're in a cell, obviously your bunkmate is going to be within 6 feet of you.

(**Ex. 21,** *Michigan Department of Corrections Taking Steps to Curb COVID-19*).[15]

2. Cleaning And Disinfecting Practices

Not only do inmates sleep within six feet of each other within their cells, but they also share sinks, toilets, showers, computers, telephones, microwaves, and drinking fountains, with very little disinfection between uses. (**Ex. 19,** *Abrams Decl. at* ¶ 6-11 and 16; **Ex. 22,** *Seegmiller Decl. at* ¶ 9-10; **Ex. 20,** *Reeves Decl. at* ¶ 4). Furthermore, some facilities are still operating a community laundry and most inmates only receive a change of uniform and linens twice a week. (**Ex. 19,** *Abrams Decl. at* ¶ 17). Finally, at least one inmate noted that his facility does not maintain a sufficient amount of cleaning supplies so that inmates may regularly disinfect cells, as recommended by CDC Guidelines. (**Ex. 19,** *Abrams Decl. at* ¶ 15).

3. Personal Protective Equipment (PPE)

Inmates, as a whole, are not being issued facemasks or other forms of PPE. Rather, inmates are only receiving masks *after* testing positive for COVID-19. (**Ex. 20,** *Reeves Decl. at* ¶ 7). Equally concerning is that several inmates have reported both officers and medical staff either not changing dirty PPE after use, or not wearing PPE at all. (**Ex. 19,**

[15] Cody Butler, *Michigan Department of Corrections taking steps to curb COVID-19,* WILX (Apr. 8, 2020), https://www.wilx.com/content/news/Michigan-Department-of-Corrections-taking-steps-to-curb-COVID-19-569483901.html

Abrams Decl. at ¶ 13; **Ex. 17,** *Glass Decl. at* ¶ 7; **Ex. 20,** *Reeves Decl. at* ¶ 11; **Ex. 23,** *Heard Decl. at* ¶ 7).

According to a survey conducted by Harvard University and the National Commission on Correctional Health Care, who collected data from more than 320 facilities housing approximately 10 percent of the country's inmates across 47 states (the "Harvard Study"), "The nationwide shortage of personal protective equipment (PPE) as well as ancillary supplies (such as cleaning products and thermometer probes) is also a problem for correctional health care operations." (**Ex. 24,** *Harvard Study*).[16]

4. Quarantine and Isolation

Defendants are not quarantining inmates who have exhibited symptoms or even tested positive for COVID-19. (**Ex. 17,** *Glass Decl. at* ¶ 8; **Ex. 20,** *Reeves Decl. at* ¶ 7). In fact, in Lakeland Corrections Facility Housing Unit 2-E, which is a Pole Barn, inmates were recently told by health service and prison staff that due to some inmates already testing positive in that unit and the other unit inmates in that unit already being exposed to these positive tested inmates that there was no reason to further quarantine any of

[16] *First Research Findings Measure COVID-19 Prevalence In U.S. Prisons, Jails*, Harvard Kennedy School (April 09, 2020), https://www.hks.harvard.edu/faculty-research/policy-topics/fairness-justice/first-research-findings-measure-covid-19-prevalence

the inmates. This failure to quarantine inmates is becoming the standard procedure.[17] Compl. at Introduction, pg. 4.

5. Adequate Health Care

Those who have been exposed to the virus or exhibit symptoms are not properly treated. Robert Reeves, who tested positive around March 28, 2020, is yet to see a physician, nor did he receive any information with regard to worsening symptoms "despite complaining of chest pain, coughing up blood, and having problems breathing." (**Ex. 20,** *Reeves Decl. at* ¶ 19). Rather, he was "just told it was normal and to go through it." (*Id.*)

6. Testing

Finally, Plaintiffs are seeking implementation of rapid testing as the current protocol is woefully insufficient:

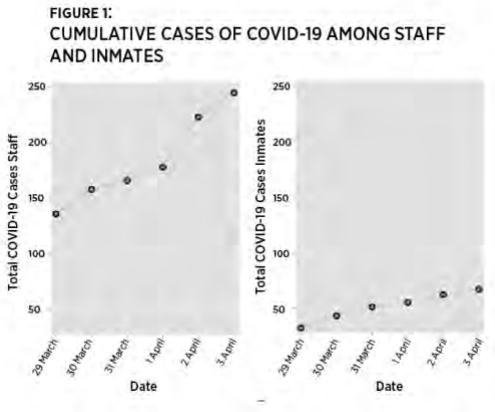
> If a prisoner has symptoms and meets the criteria for testing, the MDOC will seek permission from the local health department in the county the prison is in to conduct a test utilizing a test kit. A limited number of test kits have distributed to all MDOC facilities, but can only be used after the MDHHS authorizes the test.

(**Ex. 16,** *MDOC Response and Information on Coronavirus*).

Thus, because MDOC cannot provide widespread testing, inmates and employees are entirely unaware about who has actually contracted the disease. This is especially concerning given that prison staff regularly cycles through the facilities. As a result, it is

17 Counsel Manville was schedule to have legal telephone calls with inmates at the Cotton Prison on April 17 and then another legal call on April 20 at the Parnall Prison. These calls were canceled due to entire housing units at each of these two prisons being placed under quarantine.

impossible for inmates to avoid interaction with these individuals who may be carriers of the virus. In fact, among the key findings of the Harvard Study were that correctional staff have a higher infection rate than inmates:



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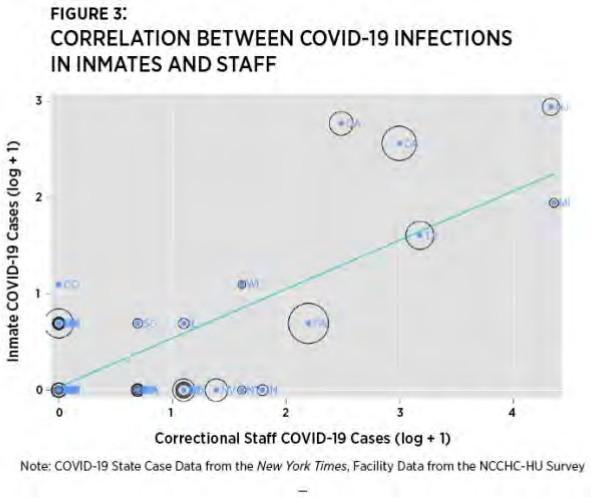

(**Ex. 24,** *Harvard Study*).

With correctional staff affected, the outbreak then spreads to the staff's family and the community. As courts have noted, "[t]he more people we crowd into [a] facility, the more we're increasing the risk to the community." *United States v. Stephens*, No. 15-cr-95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020), *see* Ex. 30.

E. CONCLUSION

In sum, so long as Plaintiffs are detained, they cannot protect themselves by practicing social distancing, nor can Defendants provide the sanitization and hygiene required to avoid infection. Additionally, inmates and staff are not being regularly tested. For these reasons, Defendants have violated the Eighth Amendment to the U.S. Constitution by failing to provide Plaintiffs with reasonably safe living conditions. As a result, Plaintiffs seeks entry of a temporary restraining order requiring Defendants to take additional precautions to stem the spread of the virus.

III) LAW & ARGUMENT

A. COURTS HAVE ISSUED PREVENTATIVE PROCEDURES TO PROTECT PRISONERS WHILE

> [T]he exponential growth of the novel coronavirus has resulted in emergency declarations by the President and the Governor, as well as governors of numerous other states. Due to the nature of this virus, the Court finds that the risk of contracting the virus in a prison environment, where at least 23 inmates have already tested positive, poses a sufficiently high risk, rendering this matter ripe for adjudication even though Plaintiff has not contracted the virus. The United States Supreme Court has held that the risk of contracting a serious disease may indeed constitute an unsafe, life-threatening condition that violates the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 33, … (1993). Further, the Supreme Court held that it would "be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.* With the clear danger posed by COVID-19 in the [prison], Plaintiff has adequately demonstrated standing. [*Marlowe v. LeBlanc*, CV 18-63-BAJ-EWD, 2020 WL 1955303, at *2 (M.D. La. Apr. 23, 2020) *see* Ex. 27.]

When determining whether to grant injunctive relief, Court analyze four (4) factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the

movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n*., 110 F.3d 318, 322 (6th Cir. 1997). The court must balance each of the four factors and "no single factor is dispositive." *City of Dearborn v. Comcast of Mich.*, 558 F. Supp. 2d 750, 754 (E.D. Mich. 2008).

Importantly, a federal courts equitable powers to enjoin unconstitutional prison conditions are not impaired by the Prison Litigation Reform Act's ("PLRA") exhaustion requirement. *FTC v. Dean Foods Co.,* 384 U.S. 597 (1966). Indeed, the Supreme Court has long recognized that federal courts possess a "traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." *Id*. at 604. As explained in *Wagner v. Taylor*, 836 F.2d 566 (D.C. Cir, 1987), "[i]f [a] court may eventually have jurisdiction of the substantive claim, the court's incidental equitable jurisdiction, despite the agency's primary jurisdiction, gives the court authority to impose a temporary restraint in order to preserve the status quo pending ripening of the claim for judicial review." *Id.* at 571. Accordingly, the Court held that although Title VII complainants must ordinarily exhaust administrative remedies before seeking judicial relief, district courts retain jurisdiction to grant interim injunctive relief where plaintiffs face irreparable injury. *Id*. at 574-576; *See also Jackson v. D.C.*, 254 F.3d 262, 268 (D.C. Cir.2001) (holding that

that "the PLRA contains nothing expressly foreclosing courts from exercising their traditional equitable power to issue injunctions to prevent irreparable injury pending exhaustion of administrative remedies."); *Marlowe v. LeBlanc*, CV 18-63-BAJ-EWD, 2020 WL 1955303, at *2 (M.D. La. Apr. 23, 2020) (cited *Jackson*, COVIC-19 prison case); *Foster v. Gueory,* 655 F.2d 1319, 1321–22 (D.C.Cir.1981) (explaining that each individual plaintiff in a class-action suit need not have pursued the available administrative remedies "if at least one member of the plaintiff class has met the filing prerequisite.")

B. DEFENDANTS ARE VIOLATING THE SURCHARGED'S 8TH AMENDMENT RIGHTS BECAUSE PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs have retained two experts in this lawsuit. Both Dr. Adam Lauring and Dr. Jeremy Young, are infectious disease specialists. The report by Dr. Lauring is attached as Ex. 25, along with his CV, and the report of Dr. Young is attached as Ex. 26, along with his CV.

Both experts are aware of the risk posed by infectious diseases in prisons is significantly higher than in the community, "both in terms of multiple risks of transmission and exposure to individuals who become infected." Ex. 25, at para. 1; Ex. 36, at para. 5. There is also the issue of adequate of cleaning supplies being provided to inmates for self-cleaning and the cleaning of surfaces. *Id*. As Dr. Lauring stated based on his review of some of the declaration of named Plaintiffs:

> The declarants attested to the fact that individuals confined have limited access to disinfectant, if at all, or basic cleaning supplies with which to clean their shared cells, shared living quarters, common areas, or high-touch surfaces. One declarant describes his only cleaning utensil as a mop. High-touch surfaces, such as light switches, door and sink knobs,

> telephones, tables, etc., should be sanitized after each use. Failure to properly sanitize shared spaces, common areas, and high- touch surfaces that detained individuals heavily use, seriously increases the risk of the spread of COVID-19 and demonstrates the MDOC's failure to take the most fundamental precautions for preventing the spread of the disease.

Ex. 25, at para. 33.

Based on the housing situation in Michigan prison system, "it is nearly impossible for jails and prisons to provide the atmosphere of "shelter in place" or "stay at home" social distancing, given the number of individuals that work in and are housed in these facilities in the current system." Ex. 25, para. 26.

These experts are familiar with prison systems and how inmates are confined within the housing units. They both are certain that the spread of COVID-19 will soon reach the pandemic levels within the Michigan prison system. "[T]he growing devastation in other prisons around the country is a harbinger for what almost certainly awaits MDOC if immediate safeguards are not enacted." Ex. 29, Para. 12.

After his review of the declarations and numerous other documents, Dr. Young found that

> Based on my understanding of the Lakeland Correctional Facility (LCF), my review of relevant materials, my experience working on public health in prisons and other correctional facilities, and my review of the relevant literature, **it is my opinion that LCF has failed to implement infection control procedures sufficient to prevent and manage a COVID-19 outbreak**. The current infection control measures in place to reduce the spread of COVID-19 at LCF are grossly inadequate, particularly considering its vulnerable population. My understanding is that many other MDOC facilities, not just LCF, are not following the appropriate measures of quarantine, social distancing, and hand hygiene necessary to

> protect inmates. These MDOC facilities include, but appear to be not limited to: Macomb Correctional Facility (MRF), G. Robert Cotton Correctional Facility (JCF), and Parnall Correctional Facility (SMT). This could result in severe harm to detained individuals, prison staff, and the broader community. The reasons for this conclusion are detailed below.

Ex. 26, at para. 22.

Both experts recommended similar steps MDOC should undertake to prevent a pandemic that can cause the deaths of many inmates and staff. These recommendations are contained in the relief section of this complaint, so they need not be repeated here. Probably the MOST important recommendation made by these experts is that MDOC must act NOW.

> It is my professional opinion that these steps are both necessary and urgent. The horizon of risk for COVID-19 in this facility is a matter of days, not weeks.

Ex. 25, Lauring, at para. 42.

> It is my professional opinion that these steps are both necessary and urgent. The horizon of risk for COVID-19 in MDOC facilities is a matter of days, not weeks. This is an imminent threat to inmates, correctional employees and their families, and the greater community.

Ex. 26, Young, at para. 28.

To demonstrate a violation of the Eighth Amendment, convicted prisoners must show that defendants were deliberately indifferent to "a substantial risk of serious harm" and that they disregarded that risk by failing to take reasonable measures. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under this rubric, there is both an objective and a subjective component. *Id*. at 835-38.

1. Objective Risk of Harm

To satisfy the objective component, the Plaintiffs must demonstrate that the constitutional deprivation was "objectively, 'sufficiently serious." *Id*. at 837-838, The Supreme Court has recognized that government authorities may be deemed "deliberately indifferent to an inmate's current health problems" where authorities "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," including "exposure of inmates to a serious, communicable disease," even when "the complaining inmate shows no serious current symptoms." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). As the Court noted, "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.*

"Objectively, the health risks posed by COVID-19 are abundantly clear." *Awshana, et al. v. Adducci*, No. 20-10699, 2020 WL 1808906, at *7 (E.D. Mich. Apr. 9, 2020), see Ex. 31. Indeed, federal courts from coast to coast, including several jurists in this very district, have routinely recognized that "[d]etention exacerbates the threat of contracting COVID-19." *United States v. Patino*, Case No. 18-20451, 2020 WL 1676766, at *3 (E.D. Mich. Apr. 6, 2020), see Ex. 32; *United States v. Kennedy*, Case No. 18-20315, 2020 WL 1493481, at *2 (E.D. Mich. Mar. 27, 2020) (describing "heightened risk of danger to detainees" noted by the CDC, because of "low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, highly congregational

environments, inability of most patients to leave the facility, and limited ability of incarcerated/detained persons to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing", *see* Ex. 33; *Miller v. United States*, Case No. 16-20222-1, 2020 WL 1814084, at *3 (E.D. Mich. Apr. 9, 2020) ("While the COVID-19 pandemic is devastating in every region it invades, prison populations are subject to heightened vulnerability"), *see* Ex. 34; *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662 (E.D. Mich. Apr. 6, 2020) (Granting the temporary restraining order and ordering immediate release from ICE custody"), *see* Ex. 35.[18]

The foregoing line of precedent reflects the emerging judicial consensus that the close proximity in detention facilities and the medical risks of the COVID-19 virus combine to present an objectively sufficiently serious medical risk to all inmates. Indeed,

[18] *See also Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877, at *1 (9th Cir. Mar. 24, 2020) (*sua sponte* ordering immediate release of immigrant petitioner "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers"), *see* **Ex**. 39; *United States v. Muniz*, 2020 WL 1540325, at *1 (S.D. Tex. March 30, 2020) (Granting Defendant's motion for compassionate release, noting "news reports of the virus's spread in detention centers within the United States … demonstrate that individuals housed within our prison systems nonetheless remain particularly vulnerable to infection [from COVID-19].") (ordering, sua sponte, extension of convicted defendant's surrender date and noting, "By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations. The chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual."), *see* **Ex.** 36; *United States v. Stephens*, No. 15-cr-95, 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020) (granting motion for reconsideration of defendant's bail conditions and releasing him from jail to home confinement, recognizing that "inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop."), **Ex**. 30; *Thakker v. Doll*, No. 20-cv-480, 2020 WL 1671563, at *6 (M.D. Pa. Mar. 31, 2020) (The Court explained that "[s]ocial distancing and proper hygiene are the *only* effective means by which we can stop the spread of COVID-19" and that the petitioners had shown that, "despite their best efforts, they cannot practice these effective preventative measures in the Facilities.") **Ex**. 29.

CDC Guidelines quite clearly reflect that COVID-19 is a highly contagious virus and have published a twenty-six (26) page manual to curb the spread of the contagion. (**Ex. 15,** *CDC Guidelines*). Those who have been infected with the virus may not become symptomatic for up to fourteen days. (*Id.* at 11). In light of these facts and the present lack of a vaccine or cure for the virus, frequent handwashing, social distancing, sanitation, and the use of PPE are the only available methods to protect against coronavirus infection. (*Id.* at 9-13).

However, affidavits submitted by Plaintiffs illustrates that inmates are being housed in congregate living situations as there are no restrictions when it comes to using the bathroom, bunking, and gathering in the cafeteria. (**Ex. 17,** *Glass Decl. at* ¶ 3-6; **Ex. 20,** *Reeves Decl. at* ¶ 5; **Ex. 19,** *Abrams Decl. at* ¶ 5 and 14). The MDOC has actually acknowledged this point, stating: "If you're in a cell, obviously your bunkmate is going to be within 6 feet of you." (**Ex. 21,** *Michigan Department of Corrections Taking Steps to Curb COVID-19*).[19] The affidavits also reflect that inmates currently lack the means to attempt to protect themselves from a potential coronavirus infection, such as an adequate supplyof soap, cleaning supplies, or with PPE such as facemasks. (**Ex. 19,** *Abrams Decl. at* ¶ 6-11 and 13-17; **Ex. 22,** *Seegmiller Decl. at* ¶ 9-10; **Ex. 20,** *Reeves Decl. at* ¶ 4, 7, and 11; **Ex. 17,** *Glass Decl. at* ¶ 7; **Ex. 23,** *Heard Decl. at* ¶ 7). Finally, the MDOC is not quarantining inmates who have exhibited symptoms, providing adequate medical

[19] Cody Butler, *Michigan Department of Corrections taking steps to curb COVID-19,* WILX (Apr. 8, 2020), https://www.wilx.com/content/news/Michigan-Department-of-Corrections-taking-steps-to-curb-COVID-19-569483901.html

treatment when they exhibit symptoms and screening its population to identify, and separate, infected inmates. (Compl. at Introduction, pg. 4; **Ex. 17,** *Glass Decl. at* ¶ 8; **Ex. 20,** *Reeves Decl. at* ¶ 7 and 19; **Ex. 16,** *MDOC Response and Information on Coronavirus*). When this compilation of evidence is taken together, the MDOC conditions significantly increase the risk that inmates will contract and spread a highly contagious, life-threatening, virus with no vaccine, effective treatment, or cure. *See Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274 at *5 (S.D.N.Y. Mar. 27, 2020) (Holding that the correctional facilities measures "do nothing to alleviate the *specific*, *serious*, and *unmet* medical needs of… [inmates]."); *see also Basank v. Decker,* No. 20-CV- 2518, 2020 U.S. Dist. LEXIS 53191, 2020 WL 1481503, at *5) (S.D.N.Y. Mar. 26, 2020) (Holding that the general measures were "patently insufficient" to protect *any* inmates from infection absent "enforcement of requisite social distancing."), *see* **Ex.** 37.

Moreover, 43 states and Washington, D.C. have issued "shelter-in-place" directives, closing public schools and non-essential businesses, banning people from eating in restaurants or even congregating in small groups, and requiring all residents to stay in their homes unless it is absolutely necessary to leave. (**Ex. 3,** *43 States Now Have Stay-At-Home Orders*). Even when they leave, people are advised to stay at least six feet from others, wear masks, avoid touching their faces, and routinely wash/sanitize their hands. The message is clear: the risk of contracting COVID-19 is objectively unprecedented.

As the Court explained in *Helling*, the Government violates the Eighth Amendment

when it confines a prison inmate in unsafe conditions and "ignore[s] a condition of confinement that is sure or very likely to cause serious illness." *Id.* at 32. In recognition that Plaintiffs cannot maintain the necessary distance from their fellow inmates, nor do they have access to the requisite supplies to adhere to the government's hygiene guidelines for preventing infection, Plaintiffs have shown a reasonable likelihood of success on their contention that current MDOC conditions creates an objectively substantial risk of serious harm in violation of the Eighth Amendment.

2. Subjective Indifference

The subjective component requires Plaintiffs to show that (1) "the official being sued subjectively perceived facts from which to infer a substantial risk to the prisoner," (2) the official "did in fact draw the inference," and (3) the official "then disregarded that risk." *Rouster v. Cty. of Saginaw,* 749 F.3d 437, 446 (6th Cir.2014). "Because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence...." *Dominguez v. Corr. Med. Servs.,* 555 F.3d 543, 550 (6th Cir. 2009) (brackets, citation, and internal quotation marks omitted).

Here, in light of the statistical evidence it cannot be seriously disputed that government officials, including Defendants, are subjectively aware of the risks posed by COVID-19. Again, as of April 22, 2020, 655 MDOC prisoners have tested positive for COVID-19, placing it as the sixth highest "jurisdiction" in the state. (**Ex. 6,** *Michigan*

Data). The disparity between MDOC and other jurisdictions clearly supports the proposition that Defendants have been made well aware that prison conditions facilitate the spread of COVID-19 and exacerbate the risk of infection for prison inmates.

In addition to the empirical data, Governor Whitmer has implemented Executive Order 2020-29, the Michigan Sheriffs' Association has issued a "Joint Statement," and the CDC has published formal Guidelines, all directly aimed at safety within correctional institutions. (**Ex. 8,** *Executive Order No. 2020-29*; **Ex. 12,** *Joint Statement*; **Ex. 15,** *CDC Guidelines*). In fact, the MDOC's own publications emphasize awareness of the COVID-19 outbreak. (**Ex. 16,** *MDOC Response and Information on Coronavirus (COVID-19)*.

The list of reasonable measures to prevent the spread of COVID-19 is well delineated and publicized: "[s]ocial distancing and proper hygiene are the only effective means by which we can stop the spread of COVID-19." *Thakker v. Doll*, No. 20-cv-480, 2020 WL 1671563 at *8. (M.D. Pa. Mar. 31, 2020), see **Ex**. 29. The CDC has stated that social distancing of at least six feet at all times is the "cornerstone of reducing transmission" of COVID-19 within detention facilities, is pushing facilities to "[p]rovide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing," and is advising that facilities must, "[s]everal times a day, clean and disinfect surfaces and objects that are frequently touched, especially in common areas." (**Ex. 15,** *CDC Guidelines at pg. 4, 8 - 10).*

Despite this knowledge, as set forth in the prior section of this briefing, Defendants

are disregarding the grave risk posed by COVID-19 by failing to provide Plaintiffs with adequate space and cleaning/disinfecting supplies necessary to allow staff and inmates to remain safe. Nor have Defendants provided timely and adequate medical care to identify, isolate, and treat people who develop symptoms. As a result, the entire class has a substantial risk of contracting COVID-19.

In sum, COVID-19 is a threat to Plaintiffs' health and safety of a magnitude unseen in history. By failing to implement basic measures recommended by healthcare experts, the CDC, and Governor Whitmer - including access to basic medical screening and treatment protocols for infectious disease, providing adequate hygiene supplies, and giving people sufficient space to social distance – Defendants are knowingly exposing Plaintiffs, correctional staff and the public at large to the lethal virus in violation of the Eighth Amendment. Accordingly, Plaintiffs have shown that they are likely to succeed on the merits of their Eighth Amendment claims.

C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT EMERGENCY

An injury will be deemed irreparable when it "is not fully compensable by monetary damages or [the] nature of the loss would make damages hard to calculate." *S. Glazer's Distributors of Ohio v. Great Lakes Brewing Co.*, 860 F. 3d 844, 852 (6th Cir. 2017). Importantly, "when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

In this case, Plaintiffs will suffer irreparable harm without a temporary restraining order. First and foremost, COVID-19 infection makes many people extremely ill and, in some people, it can be fatal. As of April 22, 2020, 198,668 people globally have been mortally injured as a result of the virus. (**Ex. 28,** *World Health Organization, Situation Report – 93*). Similarly, as of April 22, 2020, 655 MDOC inmates have tested positive for COVID-19, with 25 fatalities. (**Ex. 6,** *Michigan Data*). Indeed, there is no injury that is more irreparable than death. *See In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (Where, as here, Plaintiffs demonstrate "irreparable harm which decidedly outweighs any potential harm to the defendant," the "degree of likelihood of success required" is less, and a plaintiff need only "serious questions going to the merits.")

Moreover, the best option to keep infections to a minimum is to practice social distancing. However, the MDOC readily concedes that social distancing is not feasible: "If you're in a cell, obviously your bunkmate is going to be within 6 feet of you." (**Ex. 21,** *Michigan Department of Corrections Taking Steps to Curb COVID-19*). Thus, these grave risks to health are not an insignificant possibility for the Plaintiffs, most of whom have not been given sufficient soap, sanitizing agents, cleaning products, let alone PPE. As the Supreme Court aptly noted in *Helling*:

> It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event.

Helling, 509 U.S. at 33; *Wilson v. Gordon*, 822 F.3d 934, 958 (6th Cir. 2016) (holding that

delay in medical treatment can constitute irreparable injury and noting that "[c]ourts routinely uphold preliminary injunctions where the alleged irreparable harm involves delay in or inability to obtain medical services").

As such, being compelled to endure a highly contagious and deadly virus that has no vaccine, no treatment, and no cure, without appropriate lifesaving measures, readily satisfies irreparable injury threshold.

D. The Public Interest And Balance Of Equities Weigh In Favor Of Plaintiffs

The final factor to be considered in determining whether to enjoin Defendants is a balancing of the equities and determination of whether the public interest would be served from the issuance of an injunction. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that where the Government is the non-moving party, the third and fourth factors generally "merge" into one: "Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party."); *Malam*, No. 20-10829, 2020 WL 1672662, at *13 (stating that "the final two factors - the balance of equities and the public interest – merge, because 'the government's interest is the public interest.'"). This factor, too, points decidedly in Plaintiffs' favor.

First and foremost, the Sixth Circuit has squarely held that "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir.1994). Consequently, issuance of an injunction would serve the public interest as it would require the Defendants to

comply with CDC Guidelines and remedy the Eighth Amendment violation of Plaintiffs' constitutional rights.

Additionally, issuance of the injunction will slow the spread of the COVID-19 virus. As a result, Plaintiffs, prison staff and prison staff families will be protected from unnecessary exposure which could potentially result in serious illness and/or death. On the other hand, if MDOC continues the inadequate practices of double bunking without allowing inmates to "social distance" or ignoring basic CDC guidelines, the experts opine that the loses will be of incalculable quantity and duration. Plaintiffs' requested injunctive relief are now common-place in the free world and there is no reason they cannot be more frequently and expeditiously administered in prison.

Finally, the public interest is also best served by issuance of the injunction as it will alleviate the burden on local communities and health care infrastructure where the detention facilities are located. As one court wisely noted:

> a COVID-19 outbreak at a detention facility could result in multiple detainees- five, ten or more- being sent to the local community hospital where there may only be six or eight ventilators over a very short period. As they fill up and overwhelm ventilator resources, those ventilators become unavailable for all the usual critical illnesses. And ventilators used to treat detainees cannot be used to treat others who contract the virus. . . . In the alternate scenario where detainees are either confined in conditions facilitating 'social distancing' or are released, the tinderbox scenario of a large cohort of people getting sick all at once is less likely to occur, and the peak volume of patients hitting the community hospital would level out.

Jones v. Wolf, Case No. 20-361, 2020 WL 1643857, at *13 (W.D.N.Y. Apr. 2, 2020) (internal citations and quotations omitted), *see* **Ex.** 38.

On the other hand, if the Defendants are directed to become compliant with CDC Guidelines, then the only potential harm is economic: prison staff may have to expend additional time, and the state may have to expend additional money, to provide the information, hygiene products, cleaning agents, and medical treatment necessary to kill the virus. However, the challenges presented by a financial investment does not mean that constitutional protections fall by the wayside. Indeed, government officials are bound by constitutional requirements even when they are dealing with difficult and unfamiliar challenges to public health and safety. The government has chosen to incarcerate Plaintiffs. By making this decision, the government takes on an obligation to protect their health and safety. In turn, Defendants will also be safeguarding the health and safety of Defendants themselves, their families, prison staff and the community at large.

Ultimately, the financial burden required to reduce the substantial risk that Plaintiffs will be exposed to a deadly disease does not tip the balance in Defendants' favor because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Accordingly, the public interest would be served by issuance of a preliminary injunction requiring Defendants to implement constitutionally adequate measures to prevent the spread of COVID-19 in the MDOC.

IV) CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court GRANT this motion and issue a temporary restraining order and preliminary injunction ordering the relief requested in their motion.

Respectfully submitted,

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PROOF OF SERVICE

I, Daniel E. Manville certify, under penalty of perjury, that on April 30, 2020 , I caused a copy of the above document to be served by Email on CORI BARKMAN AND DEVIN O'DOWD, AGs in the Corrections Division, Attorney's Office due to the filing of an emergency motion for temporary restraining order and motion for class certification.

/s/ Daniel E. Manville
Daniel E. Manville

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELLIOTT ABRAMS, et al.,

Plaintiffs,

-v-

WILLIS CHAPMAN, et al.,

Defendants.

Case No. 20-cv-11053
Hon. Mark A. Goldsmith
Maj. Judge R. Steven Whalen

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Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak

A Presidential Document by the Executive Office of the President on 03/18/2020

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Proclamation 9994 of March 13, 2020

Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak

A Proclamation

In December 2019, a novel (new) coronavirus known as SARS-CoV-2 ("the virus") was first detected in Wuhan, Hubei Province, People's Republic of China, causing outbreaks of the coronavirus disease COVID-19 that has now spread globally. The Secretary of Health and Human Services (HHS) declared a public health emergency on January 31, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247 (https://www.govinfo.gov/link/uscode/42/247?type=usc&year=mostrecent&link-type=html)d), in response to COVID-19. I have taken sweeping action to control the spread of the virus in the United States, including by suspending entry of foreign nationals seeking entry who had been physically present within the prior 14 days in certain jurisdictions where COVID-19 outbreaks have occurred, including the People's Republic of China, the Islamic Republic of Iran, and the Schengen Area of Europe. The Federal Government, along with State and local governments, has taken preventive and proactive measures to slow the spread of the virus and treat those affected, including by instituting Federal quarantines for individuals evacuated from foreign nations, issuing a declaration pursuant to section 319F-3 of the Public Health Service Act (42 U.S.C. 247 (https://www.govinfo.gov/link/uscode/42/247?type=usc&year=mostrecent&link-type=html)d-6d), and releasing policies to accelerate the acquisition of personal protective equipment and streamline bringing new diagnostic capabilities to laboratories. On March 11, 2020, the World Health Organization announced that the COVID-19 outbreak can be characterized as a pandemic, as the rates of infection continue to rise in many locations around the world and across the United States.

The spread of COVID-19 within our Nation's communities threatens to strain our Nation's healthcare systems. As of March 12, 2020, 1,645 people from 47 States have been infected with the virus that causes COVID-19. It is incumbent on hospitals and medical facilities throughout the country to assess their preparedness posture and be prepared to surge capacity and capability. Additional measures, however, are needed to successfully contain and combat the virus in the United States.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 (https://www.govinfo.gov/link/uscode/50/1601?type=usc&year=mostrecent&link-type=html) *et seq.*) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. 1320 (https://www.govinfo.gov/link/uscode/42/1320?type=usc&year=mostrecent&link-type=html)b-5), do hereby find and proclaim that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020. Pursuant to this declaration, I direct as follows:

Section 1. *Emergency Authority*. The Secretary of HHS may exercise the authority under section 1135 of the SSA to temporarily waive or modify certain requirements of the Medicare, Medicaid, and State Children's Health Insurance programs and of the Health Insurance Portability and Accountability Act Privacy Rule throughout the duration of the public health emergency declared in response to the COVID-19 outbreak.

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Sec. 2. *Certification and Notice*. In exercising this authority, the Secretary of HHS shall provide certification and advance written notice to the Congress as required by section 1135(d) of the SSA (42 U.S.C. 1320 (https://www.govinfo.gov/link/uscode/42/1320?type=usc&year=mostrecent&link-type=html)b-5(d)).

Sec. 3. *General Provisions*. (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

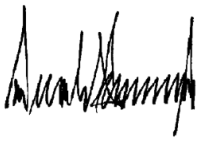
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This proclamation shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This proclamation is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I have hereunto set my hand this thirteenth day of March, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fourth.



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UNITED STATES

Last updated: April 28, 2020, 15:16 GMT

United States

Coronavirus Cases:

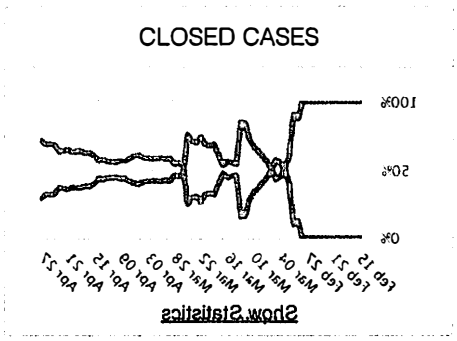
1,013,290

Deaths:

57,043

Recovered:

139,422



Learn more about Worldometer's COVID-19 data (/coronavirus/about/)

Report coronavirus cases (/report_us/)

NOTES:

In accordance with **new CDC guidelines** (/coronavirus/us-data/):

- **New York**: the numbers shown below include probable deaths (and, consequently, probable cases for the same number) as reported by New York City
- **Maryland**: includes probable deaths, as reported by the Department of Health (https://coronavirus.maryland.gov/) (Section: "COVID-19 Statistics in Maryland")
- **Wyoming**: includes probable cases, as reported by the Department of Health (https://health.wyo.gov/publichealth/infectious-disease-epidemiology-unit/disease/novel-coronavirus/covid-19-map-and-statistics/)

Exhibit 2 - Worldometer's COVID-19 date

Most state reports and dashboards (such as Texas, Pennsylvania, North Carolina, Missouri, etc.) lag behind or show incomplete data with respect to the data shown by individual counties on their official websites and dashboards, which is what we collecte and aggregate when possible to show the most updated and accurate number in the table below. We will soon publish state-level pages with graphs and the breakdown by county.

Now Yesterday Search:

USA State	Total Cases	New Cases	Total Deaths	New Deaths	Active Cases	Tot Cases/ 1M pop	Deaths/ 1M pop	Total Tests	Tests/ 1M pop	Source
USA Total	1,013,290	+2,934	57,043	+246	816,825	3,061	172	5,717,083	17,272	
New York	298,004		22,623		229,824	15,190	1,153	826,095	42,108	
New Jersey	111,188		6,044		103,873	12,519	680	227,390	25,602	
Massachusetts	56,462		3,003		45,341	8,267	440	244,887	35,854	
Illinois	45,883		1,983		43,294	3,579	155	227,628	17,754	
California	45,199	+193	1,786	+10	40,076	1,155	46	526,084	13,438	
Pennsylvania	43,155		1,860		40,603	3,374	145	203,422	15,903	
Michigan	38,210		3,407		26,461	3,837	342	163,213	16,391	
Florida	32,846	+708	1,171	+83	30,989	1,595	57	368,651	17,897	
Louisiana	27,068		1,740		8,025	5,804	373	146,989	31,518	
Connecticut	25,997		2,012		23,920	7,259	562	90,746	25,337	
Texas	25,516		672		13,674	915	24	290,517	10,418	
Georgia	24,498	+273	1,015	+21	23,452	2,379	99	127,169	12,350	
Maryland	20,113	+626	1,016	+71	17,834	3,350	169	107,785	17,954	
Ohio	16,325		753		15,452	1,402	65	119,391	10,255	
Indiana	15,961		932		15,015	2,405	140	84,476	12,727	
Virginia	14,339	+804	492	+34	12,032	1,704	58	82,753	9,835	
Colorado	13,879		706		12,614	2,509	128	66,341	11,994	
Washington	13,686		765		11,114	1,876	105	179,679	24,633	[1 (https://www.doh.wa.gov/
Tennessee	9,918		184		5,014	1,491	28	154,402	23,215	
North Carolina	9,568	+153	342	+6	7,924	942	34	112,752	11,102	
Rhode Island	7,708		233		7,133	7,295	221	55,885	52,891	
Missouri	7,239		300		6,392	1,189	49	70,932	11,647	
Arizona	6,716		275		6,371	967	40	66,543	9,579	
Alabama	6,580	+41	241	+13	6,319	1,353	50	74,359	15,285	
Mississippi	6,094		229		5,865	2,039	77	63,462	21,234	
Wisconsin	6,081		281		3,487	1,052	49	67,392	11,663	
Iowa	5,868		127		3,720	1,873	41	38,150	12,179	
South Carolina	5,613		177		1,735	1,133	36	52,145	10,522	
Nevada	4,690		219		1,824	1,605	75	47,821	16,361	

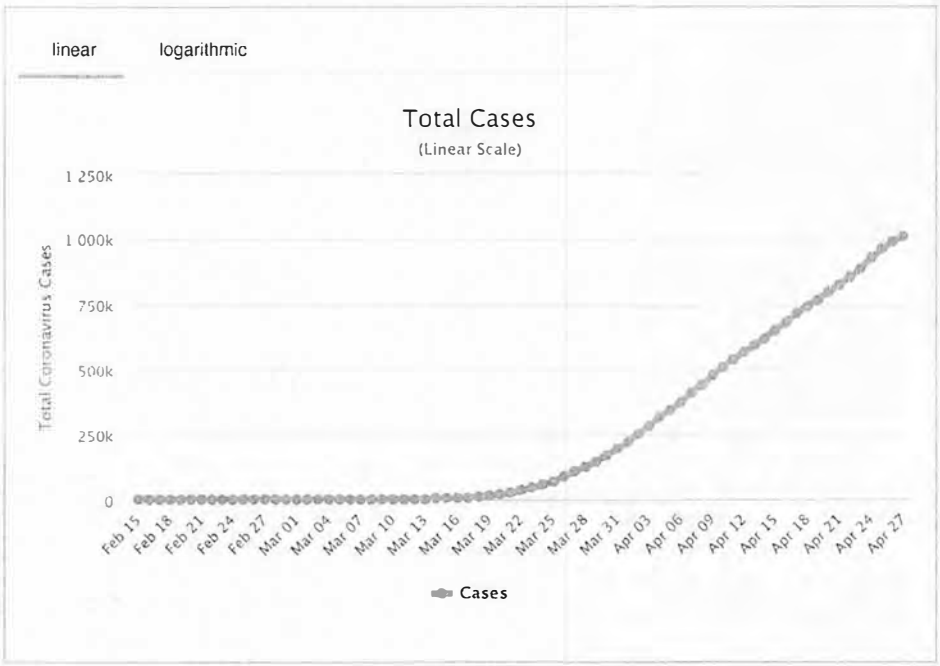
Exhibit 2 - Worldometer's COVID-19 date

Utah	4,233		41		3,804	1,390	13	100,195	32,901	
Delaware	4,162		125		3,041	4,383	132	19,616	20,659	
Kentucky	4,146		213		2,811	934	48	48,799	10,990	
District Of Columbia	3,994	+102	190	+5	3,144	5,835	278	18,885	27,590	
Minnesota	3,816		286		1,688	690	52	61,268	11,085	
Nebraska	3,358		56		3,280	1,763	29	23,772	12,480	
Kansas	3,296		122		2,671	1,133	42	25,199	8,663	
Oklahoma	3,280		197		916	837	50	53,012	13,530	
Arkansas	3,069		51		1,965	1,026	17	40,629	13,585	
New Mexico	2,823		104		2,069	1,349	50	58,803	28,103	
Oregon	2,354		92		2,262	577	23	51,198	12,543	
South Dakota	2,245		11		918	2,598	13	15,596	18,045	
New Hampshire	1,938		60		1,080	1,442	45	20,145	14,993	
Idaho	1,917		58		820	1,136	34	19,895	11,787	
West Virginia	1,077	+14	37	+1	559	589	20	43,227	23,634	
Maine	1,023		51		423	768	38	17,807	13,360	
North Dakota	942		19		573	1,252	25	22,434	29,824	
Vermont	862	+7	47		815	1,379	75	15,215	24,345	
Hawaii	607		16		98	427	11	29,247	20,567	
Wyoming	520		7		170	894	12	8,167	14,037	
Montana	449		14		83	431	13	13,033	12,511	
Alaska	345		9		118	467	12	16,256	22,012	
Guam	144	+2	5		10			605		
Northern Mariana Islands	14		2		0			45		
Puerto Rico	1,400	+11	86	+2	923	413	25	13,022	3,845	
United States Virgin Islands	59		4		4			780		
Veteran Affairs	7,001		435		6,566			83,372		
US Military	6,568		27		4,497					
Navajo Nation	1,716		59		1,657			9,753		
Federal Prisons	1,376		28		834					
Grand Princess Ship	103		3		100					
Wuhan Repatriated	3				3			3		
Diamond Princess Ship	46				46			46		

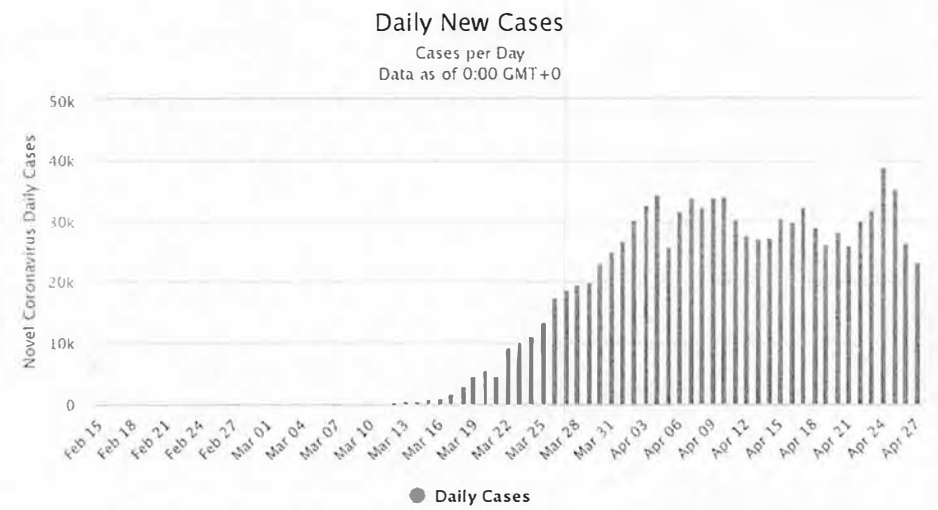
Exhibit 2 - Worldometer's COVID-19 date

Total:	1,013,290	+2,934	57,043	+246	816,825	3,061	172	5,717,083	17,272

Total Coronavirus Cases in the United States

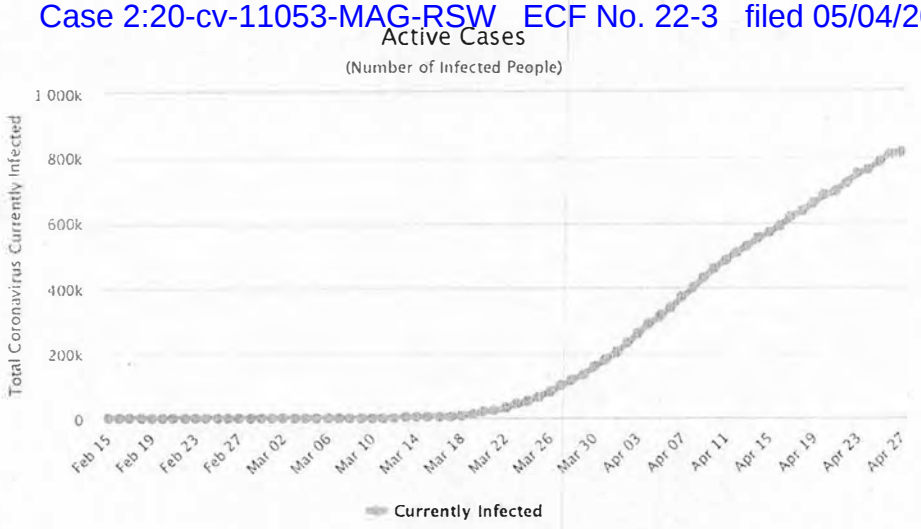


Daily New Cases in the United States

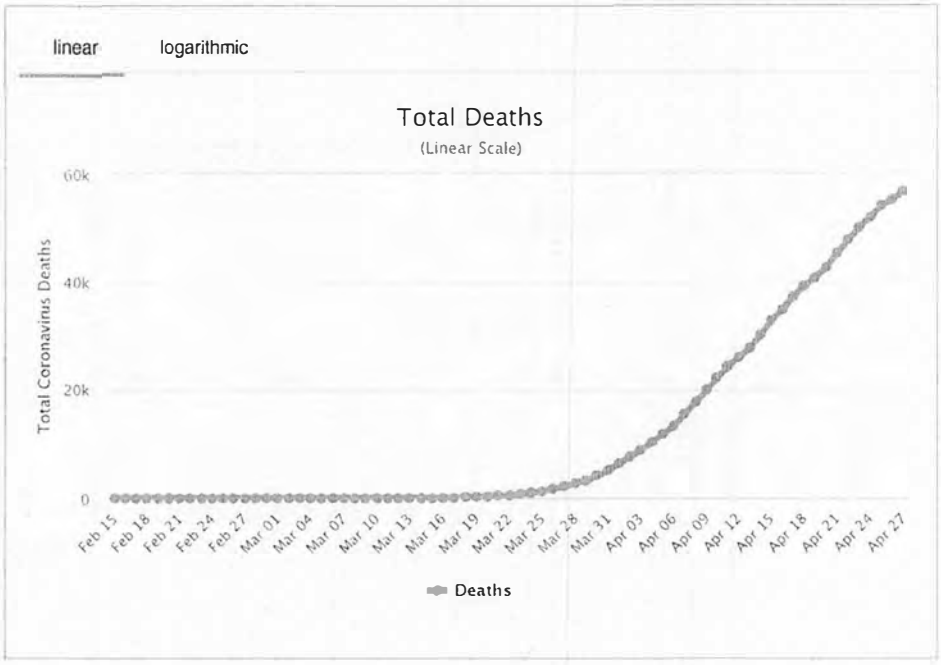


Active Cases in the United States

Exhibit 2 - Worldometer's COVID-19 date

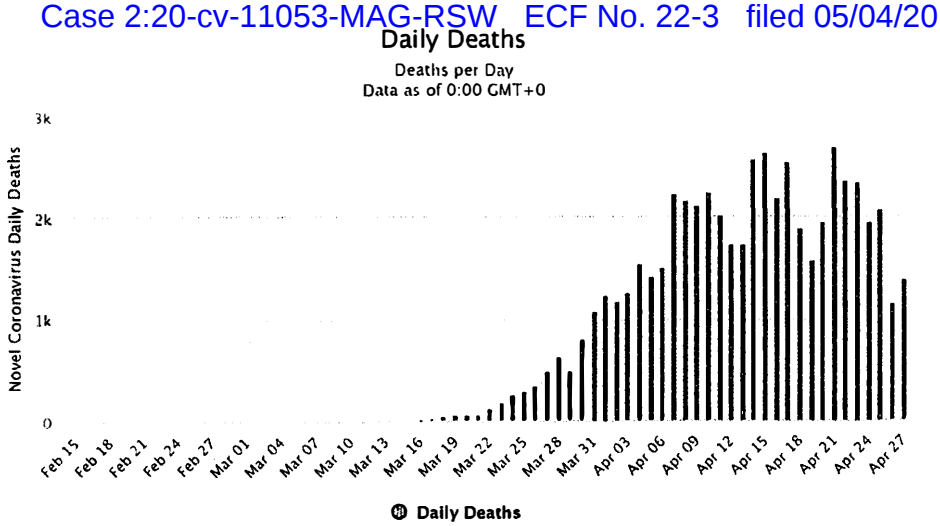


Total Coronavirus Deaths in the United States



Daily New Deaths in the United States

Exhibit 2 - Worldometer's COVID-19 date



price drop

Latest News

April 28 (GMT)

Updates

- **2934 new cases and 246 new deaths in the United States (/coronavirus/country/us/)**

April 27

April 26

April 25

April 24

April 23

April 22

View More News

Historical account of the initial stages of the epidemic in the United States

Content:

- First 20 cases in the United States
- Progression of first suspected cases
- Timeline of initial events
- Sources for the historical account

First 20 cases in the United States

Exhibit 2 - Worldometer's COVID-19 date

Information collected on the first 20 domestic cases (not including repatriated cases and Diamond Princess cruise ship evacuee cases) is presented in the table below:

State	Cases	Sex	Age	Date	Case #	Location	Source
Oregon	1			Feb. 29	17th	Washington C.	
Washington	2			Feb. 29	18,19th		
	1	M	30s	Jan. 21	1st	Snohomish	[7]
Illinois	1			Mar. 1	20th		
	1	M	60s	Jan. 30	6th	Chicago	[12]
	1	F	60s	Jan. 24	2nd	Chicago	[8]
California	2	unkn.	unkn.	Jan. 26	3rd,4th	Orange C., L.A.	[9]
	1	M	adult	Jan. 31	7th	Santa Clara C.	[17][18]
	1	F	unkn.	Feb. 2	9th	Santa Clara C.	
	1	M	57	Feb. 2	10th	San Benito C.	
	1	F	57	Feb. 2	11th	San Benito C.	
	1		65	Feb. 28	16th	Santa Clara C.	
	1			Feb. 21	13th	Humboldt C.	
	1			Feb. 21	14th	Sacramento C.	
	1			Feb. 26	15th	[Northern California]	
Massachusetts	1	M	20s	Feb. 1	8th	Boston	[16]
Arizona	1	unkn.	student	Jan. 26	5th	Maricopa County	
Wisconsin	1			Feb. 5	12th	Madison	

Patients Under Investigation (PUI) in the United States

CDC in the early stages released information regarding the number of cases and people under investigation that was updated regularly on Mondays, Wednesdays, and Fridays. Below we provide the historical reports that we were able to gather in order to track the progression in the number of suspected cases and US states involved through time in the initial stages

As of Feb. 10:

Number of U.S. States with PUI	*36*
Positive	**12**
Negative	318
Pending (specimens awaiting testing)	**68**
TOTAL	**398**

As of Feb. 7:

Number of U.S. States with PUI	*36*
Positive	**12**
Negative	225
Pending (specimens awaiting testing)	**100**
TOTAL	**337**

As of Feb. 5:

Number of U.S. States with PUI	*36*
Positive	**11**
Negative	206
Pending (specimens awaiting testing)	**76**
TOTAL	**293**

As of Feb. 3:

Number of U.S. States with PUI	*36*
Positive	**11**
Negative	167
Pending (specimens awaiting testing)	**82**
TOTAL	**260**

As of January 31:

Number of U.S. States with PUI	*36*
Positive	**6**
Negative	114
Pending (specimens awaiting testing)	**121**
TOTAL	**241**

Previously, as of January 29, there were 92 suspected cases awaiting testing.

Number of U.S. States with PUI	*36*
Positive	**5**
Negative	68
Pending (specimens awaiting testing)	**92**
TOTAL	**165**

Timeline of Events

- ⚠ On January 31, HHS declared Coronavirus a Public Health Emergency in the US (https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html)

As of Jan. 31, the Wuhan coronavirus is officially a public health emergency in the United States, Alex Azar, secretary of the US Department of Health and Human Services (HHS), announced at a White House press briefing.

- ⚠ On Jan. 31, the U.S. Centers for Disease Control and Prevention (CDC) **issued a federal quarantine for 14 days** affecting the 195 American evacuees from Wuhan, China. Starting Sunday, Feb. 2, U.S. citizens, permanent residents and immediate family who have visited China's Hubei province will undergo a **mandatory 14 days quarantine** and, if they have visited other parts of China, they would be screened at airports and asked to self-quarantine for 14 days. The last time the CDC had issued a quarantine was over 50 years ago in the 1960s, for smallpox.

- ⚠ President Donald Trump signed an order on Jan. 31 for the U.S. to **deny entry to foreign nationals who traveled to China** within the preceding two weeks, aside from the immediate family of U.S. citizens.

- On Jan. 30, the CDC had confirmed the **first case of person to person transmission in the U.S.:** [12] the husband of the Chicago, Illinois case who had returned from Wuhan, China on Jan. 13 and who tested positive for the virus on Jan. 24).

- CDC stated on Jan. 30 that "It is likely there will be more cases of 2019-nCoV reported in the U.S. in the coming days and weeks, including more person-to-person spread."[12]

- The virus had been confirmed in **5 states**.

- On Jan. 31, **New York City** health officials vehemently denied the rumor regarding a coronavirus case in the city .[13]. On Feb. 1, however, the city's health commissioner did report that there was a test being performed on a person under 40 who had returned from China, developed matching symptoms, and tested negative to the seasonal flu.

- **Most US patients had recently visited Wuhan.**

- All of the first five U.S. cases were described as **mild.**

- A study on the first US case of novel coronavirus detailed mild symptoms followed by pneumonia (https://www.cnn.com/2020/01/31/health/washington-coronavirus-study-nejm/index.html?utm_term=link&utm_medium=social&utm_content=2020-02-01T00)

U.S. Airlines suspended ALL flights between the U.S. and China

On Friday, January 31, Delta, American and United announced they would temporarily suspend all of their mainland China flights in response to the coronavirus outbreak.[14]

Prior to this January 31 announcement:

- **UNITED AIRLINES**
  on Jan. 28 had announced it would cut 24 flights between the U.S. and China for the first week of February.

- **AMERICAN AIRLINES**
  on Jan. 29 had announced it would suspend flights from Los Angeles to Shanghai and Beijing from Feb. 9 through March 27, 2020. It will maintain its flight schedules (10 daily A/R) from Dallas-Fort Worth to Shanghai and Beijing, as well as from Los Angeles and Dallas-Fort Worth to Hong Kong.

- **DELTA**
  had not adjusted its schedule of direct flights from the U.S. to China. It is the only airline with direct flights to not take action so far.

The White House was considering issuing a ban on flights between the United States and China, as of late Jan. 28[11]. Italy has announced on January 31 that it was suspending all flights to and from China following the first 2 cases of coronavirus in Italy.

Travel Alert: Do Not Travel to China

- The U.S. State Department on January 30 issued a **Level 4: Do Not Travel to China Alert (https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/china-travel-advisory.html)** [4] (the highest level of alert).

- Previously, on January 29, the advisory was set at a lower "Level 3: Reconsider Travel" advising not to travel to Hubei Province: (Level 4) and reconsider travel to the remainder of China (Level 3).

- The CDC on Jan. 28 issued a Level 3 Warning (https://wwwnc.cdc.gov/travel/notices/warning/novel-coronavirus-china), recommending that travelers **avoid all nonessential travel to China** [5].

Screening incoming passengers at 20 airports in the U.S.

On January 17, the CDC announced that 3 airports in the United States would begin screening incoming passengers from China: SFO, JFK, and LAX [6] Other 2 airports were added subsequently, and on January 28, the U.S. Department of Health and Human Services (HHS) announced that 15 additional U.S. airports (bringing the total to 20) would begin screening incoming travelers from China.

Below is the complete list of airports where screening for the 2019 Novel Coronavirus (2019-nCoV) is in place:

- Los Angeles International (LAX)
- San Francisco International (SFO)
- Chicago O'Hare
- New York JFK
- Atlanta Hartsfield-Jackson International
- Houston George Bush Intercontinental
- Dallas-Fort Worth International
- San Diego International
- Seattle-Tacoma International
- Honolulu International
- Anchorage Ted Stevens International
- Minneapolis-St. Paul International
- Detroit Metropolitan
- Miami International
- Washington Dulles International
- Philadelphia International
- Newark Liberty International
- Boston Logan International
- El Paso International
- Puerto Rico's San Juan Airport

Sources for the historical account

1. Novel Coronavirus (2019-nCoV) situation reports (https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports/) - World Health Organization (https://www.who.int/) (WHO)
2. 2019 Novel Coronavirus (2019-nCoV) in the U.S (https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html) -. U.S. Centers for Disease Control and Prevention (https://www.cdc.gov/) (CDC)
3. Symptoms of Novel Coronavirus (2019-nCoV) (https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html) - CDC
4. China Travel Advisory (https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/china-travel-advisory.html) - U.S. State Department, accessed January 31, 2020.
5. Novel Coronavirus in China - Warning - Level 3, Avoid Nonessential Travel

(https://wwwnc.cdc.gov/travel/notices/warning/novel-coronavirus-china) - CDC, January 28, 2020.
6. Public Health Screening to Begin at 3 U.S. Airports for 2019 Novel Coronavirus ("2019-nCoV") (https://www.cdc.gov/media/releases/2020/p0117-coronavirus-screening.html) - CDC January 17, 2020
7. First Travel-related Case of 2019 Novel Coronavirus Detected in United States (https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html) - CDC, January 21, 2020
8. Second Travel-related Case of 2019 Novel Coronavirus Detected in United States (https://www.cdc.gov/media/releases/2020/p0124-second-travel-coronavirus.html) - CDC, January 24, 2020
9. CDC confirms additional cases of 2019 Novel Coronavirus in United States (https://www.cdc.gov/media/releases/2020/s0126-coronavirus-new-cases.html) - CDC, January 26, 2020
10. 2019 Novel Coronavirus (2019-nCoV) in the U.S. (https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html) - CDC, Updated January 29, 2020
11. White House considers ban on flights to China amid coronavirus outbreak (https://eu.usatoday.com/story/travel/news/2020/01/28/white-house-considers-ban-china-flights-amid-coronavirus-outbreak/4602839002/) - USA Today, Jan. 28, 2020
12. CDC Confirms Person-to-Person Spread of New Coronavirus in the United States (https://www.cdc.gov/media/releases/2020/p0130-coronavirus-spread.html) - CDC Press Release, Jan. 30, 2020
13. NYC Officials Deny Report Of Coronavirus Amid Confusion (https://www.forbes.com/sites/sergeiklebnikov/2020/01/31/nyc-officials-deny-report-of-coronavirus-amid-confusion/#351e47b5652c) - Forbes, Jan. 31, 2020
14. Delta, American, United to suspend all China mainland flights as coronavirus crisis grows (https://eu.usatoday.com/story/travel/2020/01/31/coronavirus-china-flight-ban-delta-cuts-all-flights-white-house/4620989002/) - USA Today, Jan. 31, 2020
15. Secretary Azar Declares Public Health Emergency for United States for 2019 Novel Coronavirus (https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html) - U.S. Department of Health and Human Services (HHS), Jan. 31, 2020
16. Man returning from Wuhan, China is first case of 2019 Novel Coronavirus confirmed in Massachusetts (https://www.mass.gov/news/man-returning-from-wuhan-china-is-first-case-of-2019-novel-coronavirus-confirmed-in) - Massachusetts Department of Public Health, Feb. 1, 2020
17. County of Santa Clara Public Health Department Reports First Case of Novel (new) Coronavirus (https://www.sccgov.org/sites/phd/news/Pages/novel-coronavirus-1-31-2020.aspx) - Santa Clara County Public Health, Jan. 31, 2020
18. Coronavirus: First case confirmed in Santa Clara County (https://www.mercurynews.com/2020/01/31/santa-clara-coronavirus/) - Mercury News, Jan. 31. 2020

Countries:

- **China** (/coronavirus/country/china/)
- **South Korea** (/coronavirus/country/south-korea/)
- **Iran** (/coronavirus/country/iran/)
- **Italy** (/coronavirus/country/italy/)
- **Spain** (/coronavirus/country/spain/)
- **France (/coronavirus/country/france/)** (/coronavirus/country/france/)
- **United States** (/coronavirus/country/us/)

Coronavirus Worldometer Sections:

- **Coronavirus Update** (/coronavirus/)
- **Cases** (/coronavirus/coronavirus-cases/)
- **Deaths** (/coronavirus/coronavirus-death-toll/)
- **Mortality Rate** (/coronavirus/coronavirus-death-rate/)
- **Transmission Rate** (/coronavirus/#repro)
- **Incubation Period (/coronavirus/coronavirus-incubation-period/)**
- **Age, Sex, Demographics (/coronavirus/coronavirus-age-sex-demographics/)**
- **Symptoms (/coronavirus/coronavirus-symptoms/)**
- **Countries with cases: basic list (/coronavirus/countries-where-coronavirus-has-spread/) - detailed list** (/coronavirus/#countries)
- **Expert Opinions (/coronavirus/coronavirus-expert-opinions/)**

- Cases in the US (/coronavirus/usa-coronavirus/)

Exhibit 2 - Worldometer's COVID-19 date

43 states now have stay-at-home orders for coronavirus. These are the 7 that don't.

BY JASON SILVERSTEIN
UPDATED ON: APRIL 6, 2020 / 7:30 PM / CBS NEWS

It may seem like the entire United States is shutting down and staying indoors due to the coronavirus pandemic. But some parts of the country are still holding off.

As of April 6, 43 states and Washington, D.C. have issued stay-at-home or shelter-in-place directives for all residents to help contain the spread of the deadly virus. About 300 million Americans – more than 90% of the population – are under orders to stay indoors.

That leaves seven states that have not declared statewide orders, even after the U.S. has reported more than 347,000 confirmed cases across all 50 states, and more than 10,000 deaths.

Coronavirus: The Race To Respond ›

Coronavirus updates: Last COVID-19 patient discharged from U.S. Navy ship

Coronavirus hits Iowa firefighter's family with deadly consequence

Coronavirus: The pain and sorrow of dying at home

Protecting the U.S. military from coronavirus

Even in states without official stay-at-home orders, most governors have closed non-essential businesses and imposed some restrictions, such as banning large gatherings. In some cases, cities or counties have taken the initiative to go beyond statewide measures.

Those with stay-at-home orders allow several exemptions, including grocery shopping, outdoor exercise and jobs that are considered essential. Several governors who have resisted statewide orders pointed this out, saying it wasn't necessary to issue a rule that sounds more dramatic than it is.

Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, has pushed for all 50 states to have stay-at-home orders. "If you look at what's going on in this country, I just don't understand why we're not doing that," he told CNN. But Fauci said Monday he had spoken to the governors of two states without such orders, Iowa and Nebraska, and concluded that the rules they've issued are "functionally the same" as a stay-at-home mandate.

President Trump has made clear that he doesn't plan to intervene, saying he wants to let governors make decisions for their own states. "We have a thing called the Constitution, which I cherish," he said in a White House briefing on Saturday.

These are the states that still have no stay-at-home policy. All coronavirus statistics are current through the afternoon of April 6. This article will be updated as states announce new policies.

Arkansas

Governor Asa Hutchinson, a Republican, said that targeted responses to certain communities are better than a statewide order. He questioned the effectiveness of stay-at-home orders in other states, calling them "an illusion" because residents still leave home for shopping, and many even continue to go to work.

"The question is, 'Are you accomplishing anything by doing that order?'" Hutchinson said April 2.

Hutchinson also defended his decision by pointing out that Arkansas has fewer cases than many states that issued such orders.

Benton – a suburb of the state's capital and largest city, Little Rock – and surrounding Saline County issued a stay-at-home order for minors. Little Rock has a night curfew for all residents, and a youth curfew during the day.

Arkansas has reported 854 cases and 16 deaths.

Iowa

Documents released April 1 by the office of Governor Kim Reynolds, a Republican, show that the state is using a 12-point scale to decide whether to issue a stay-at-home order. The scale considers factors such as the ages of people with infections, the number of hospitalizations and the rate of long-term care outbreaks.

According to the documents, the governor would issue a statewide order if 10 points are scored on the scale – which has yet to happen. In the meantime, the governor has temporarily closed many businesses, and banned gatherings of more than 10 people. Health care professionals in Iowa have been calling for her to issue a statewide order.

Iowa has reported 946 cases and 25 deaths.

Nebraska

Governor Pete Ricketts, a Republican, said that the right approach for his state is responding county-by-county when there are signs of community spread. He noted, though, that other governors had been urging him to issue a statewide order.

So far, 56 of the state's 93 counties – covering more than 80% of its population – have enacted health measures in response to coronavirus cases.

Nebraska has reported 409 cases and 8 deaths.

North Dakota

Governor Doug Burgum, a Republican, has not issued statewide orders to stay at home, though he did temporarily close bars, restaurants, theaters, schools, and other venues and businesses.

"It's not about staying home, it's about avoiding contact," the governor said March 25, while adding that he was open to different guidance if the situation changes. He said North Dakota was "blessed" compared to other states because of its relatively low number of cases.

Even so, Burgum later expressed frustration that some people in the state were not taking social distancing seriously.

North Dakota has reported 225 cases and three deaths.

South Dakota

Governor Kristi Noem, a Republican, said statewide orders would limit the rights of individuals in her state.

"South Dakota is not New York City," she said in a press conference April 1, later urging residents "not to turn on the news and look at NYC and think that that's what Lemmon, South Dakota is going to face in a month."

"The calls to apply for a one-size-fits-all approach to this problem is herd mentality. It's not leadership."

she also suggested that following social distancing orders should be voluntary.

"The people themselves are primarily responsible for their safety," she said. "They are the ones that are entrusted with expansive freedoms. They're free to exercise their rights to work, to worship, and to play. Or to even stay at home, or to conduct social distancing."

Noem stood by her stance even after acknowledging that up to 70% of her state's population could contract the virus – and that a stay-at-home order could slow the spread.

South Dakota has reported 288 cases and four deaths.

Utah

Governor Gary Herbert, a Republican, issued a voluntary initiative to stay home, but not an official statewide order. "We think we have enough fear about this without adding to it," he said, suggesting a voluntary directive was a "more positive route."

Several counties – including Salt Lake County, the state's most populous – have issued their own stay-at-home orders. Salt Lake County Mayor Jenny Wilson called for Utah's leaders to declare a statewide rule.

Utah has reported 1,605 cases and eight deaths.

Wyoming

Governor Mark Gordon, a Republican, said March 30 he has no plans for a statewide order – though if one came, it would be "a true stay-at-home order" without multiple exemptions. Some counties and towns put out their own orders, including the popular skiing destination, Jackson.

Wyoming has reported 210 cases and no deaths.

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Executive Order 2020-21 (COVID-19)

EXECUTIVE ORDER

No. 2020-21

Temporary requirement to suspend activities that are not necessary to sustain or protect life

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. Older adults and those with chronic health conditions are at particular risk, and there is an increased risk of rapid spread of COVID-19 among persons in close proximity to one another. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of

Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945, provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible.

This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.

2. Subject to the exceptions in section 7, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.

3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention, including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

    a. For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9.

    b. For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

        Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm.

5. Businesses and operations that employ critical infrastructure workers may continue in-person operations, subject to the following conditions:

    a. Consistent with sections 8 and 9, businesses and operations must determine which of their workers are critical infrastructure workers and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Such designations, however, may be made orally until March 31, 2020 at 11:59 pm. Businesses and operations need not designate:

1. Workers in health care and public health.

2. Workers who perform necessary government activities, as described in section 6.

3. Workers and volunteers described in section 9(d).

b. In-person activities that are not necessary to sustain or protect life must be suspended until normal operations resume.

c. Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons. Those practices and measures include, but are not limited to:

1. Restricting the number of workers present on premises to no more than is strictly necessary to perform the business's or operation's critical infrastructure functions.

2. Promoting remote work to the fullest extent possible.

3. Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible, including for customers who are standing in line.

4. Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

5. Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person who is known or suspected to have COVID-19.

6. Any other social distancing practices and mitigation measures recommended by the Centers for Disease Control.

6. All in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to supporting those businesses and operations that are necessary to sustain or protect life, are suspended.

a. For purposes of this order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders.

b. Such activities also include, but are not limited to, public transit, trash pick-up and disposal, activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor recreation.

c. For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b). Workers performing such activities need not be designated.

d. Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 5(c).

7. Exceptions.

a. Individuals may leave their home or place of residence, and travel as necessary:

1. To engage in outdoor activity, including walking, hiking, running, cycling, or any other recreational activity consistent with remaining at least six feet from people from outside the individual's household.

2. To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) may leave their home for work without a designation.)

3. To conduct minimum basic operations, as described in section 4(b), after being designated to perform such work by their employers.

4. To perform necessary government activities, as described in section 6.

5. To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including procedures that, in accordance with a duly implemented nonessential procedures postponement plan, have not been postponed).

6. To obtain necessary services or supplies for themselves, their family or household members, and their vehicles. *Individuals must secure such services or supplies via delivery to the maximum extent possible*. As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences.

7. To care for a family member or a family member's pet in another household.

8. To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.

9. To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.

10. To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.

11. To work or volunteer for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

b. Individuals may also travel:

1. To return to a home or place of residence from outside this state.

2. To leave this state for a home or residence elsewhere.

3. To travel between two residences in this state.

4. As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his

guidance of March 19, 2020 on the COVID-19 response (available **here**). Such workers include some workers in each of the following sectors:

a. Health care and public health.

b. Law enforcement, public safety, and first responders.

c. Food and agriculture.

d. Energy.

e. Water and wastewater.

f. Transportation and logistics.

g. Public works.

h. Communications and information technology, including news media.

i. Other community-based government operations and essential functions.

j. Critical manufacturing.

k. Hazardous materials.

l. Financial services.

m. Chemical supply chains and safety.

n. Defense industrial base.

9. For purposes of this order, critical infrastructure workers also include:

a. Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers as defined in this order. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of critical infrastructure workers.

b. Workers at designated suppliers and distribution centers, as described below.

1. A business or operation that employs critical infrastructure workers may designate suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the work of its critical infrastructure workers.

2. Such suppliers, distribution centers, or service providers may designate workers as critical infrastructure workers *only* to the extent those workers are necessary to enable, support, or facilitate the work of the original operation's or business's critical infrastructure workers.

3. Designated suppliers, distribution centers, and service providers may in turn designate additional suppliers, distribution centers, and service providers

whose continued operation is necessary to enable, support, or facilitate the work of their critical infrastructure workers.

4. Such additional suppliers, distribution centers, and service providers may designate workers as critical infrastructure workers *only* to the extent that those workers are necessary to enable, support, or facilitate the work of the critical infrastructure workers at the supplier, distribution center, or service provider that has designated them.

5. Businesses, operations, suppliers, distribution centers, and service providers must make all designations in writing to the entities they are designating, whether by electronic message, public website, or other appropriate means. Such designations may be made orally until March 31, 2020 at 11:59 pm.

6. Businesses, operations, suppliers, distribution centers, and service providers that abuse their designation authority shall be subject to sanctions to the fullest extent of the law.

c. Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.

d. Workers and volunteers for businesses or operations (including both and religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

e. Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

10. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, a place of religious worship, when used for religious worship, is not subject to penalty under section 14.

11. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

12. This order takes effect on March 24, 2020 at 12:01 am, and continues through April 13, 2020 at 11:59 pm.

13. The governor will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, she will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health-care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

14. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Executive Order 2020-60 (COVID-19)

Executive Order 2020-59 (COVID-19)

Executive Order 2020-57 (COVID-19)

Executive Order 2020-58 (COVID-19)

Executive Order 2020-56 (COVID-19)

Executive Order 2020-55 (COVID-19)

Executive Order 2020-53 (COVID-19)

Executive Order 2020-54 (COVID-19)

Executive Order 2020-52 (COVID-19)

Executive Order 2020-51 (COVID-19)

Executive Order 2020-50 (COVID-19)

Executive Order 2020-49 (COVID-19)

Executive Order 2020-47 (COVID-19)

Executive Order 2020-44 (COVID-19)

Executive Order 2020-45 (COVID-19)

Executive Order 2020-46 (COVID-19)

Executive Order 2020-43 (COVID-19)

Executive Order 2020-48 (COVID-19)

Executive Order 2020-42 (COVID-19)

Executive Order 2020-41 (COVID-19)

Executive Order 2020-42 (COVID-19)

EXECUTIVE ORDER 2020-42 FAQs

EXECUTIVE ORDER

No. 2020-42

Temporary requirement to suspend activities that

are not necessary to sustain or protect life

Rescission of Executive Order 2020-21

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

In the three weeks that followed, the virus spread across Michigan, bringing deaths in the hundreds, confirmed cases in the thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. The order limited gatherings and travel, and required workers who are not necessary to sustain or protect life to stay home.

The measures put in place by Executive Order 2020-21 have been effective, but this virus is both aggressive and persistent: on April 8, 2020, Michigan reported 20,346 confirmed cases of COVID-19 and 959 deaths from it. To win this fight, and to protect the health and safety of our state and each other, we must be just as aggressive and persistent. Though we have all made sacrifices, we must be steadfast. Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-21, clarify them, and extend their duration to April 30, 2020. This order takes effect on April 9, 2020 at 11:59 pm. When this order takes effect, Executive Order 2020-21 is rescinded.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.

2. Subject to the exceptions in section 7 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.

3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

a. For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9 of this

order.

b. For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work.

Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 10 of this order.

5. Businesses and operations that employ critical infrastructure workers may continue in-person operations, subject to the following conditions:

a. Consistent with sections 8 and 9 of this order, businesses and operations must determine which of their workers are critical infrastructure workers and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work. Businesses and operations need not designate:

1. Workers in health care and public health.

2. Workers who perform necessary government activities, as described in section 6 of this order.

3. Workers and volunteers described in section 9(d) of this order.

b. In-person activities that are not necessary to sustain or protect life must be suspended until normal operations resume.

c. Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in section 10 of this order. Stores that are open to the public must also adhere to the rules described in section 11 of this order.

6. All in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to support those businesses and operations that are necessary to sustain or protect life, are suspended.

a. For purposes of this order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders.

b. Such activities also include, but are not limited to, public transit, trash pick-up and disposal (including recycling and composting), activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.

c. For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b) of this order. Workers performing such activities need not be designated.

d. Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 10 of this order.

7. Exceptions.

    a. Individuals may leave their home or place of residence, and travel as necessary:

        1. To engage in outdoor physical activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor physical activity includes walking, hiking, running, cycling, kayaking, canoeing, or other similar physical activity, as well as any comparable activity for those with limited mobility.

2. To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) of this order may leave their home for work without being designated.)

3. To conduct minimum basic operations, as described in section 4(b) of this order, after being designated to perform such work by their employers.

4. To perform necessary government activities, as described in section 6 of this order.

5. To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including procedures that, in accordance with a duly implemented nonessential procedures postponement plan, have not been postponed).

6. To obtain necessary services or supplies for themselves, their family or household members, their pets, and their vehicles.

A. Individuals must secure such services or supplies via delivery to the maximum extent possible. As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences. Individuals may also leave the home to drop off a vehicle to the extent permitted under section 9(i) of this order.

B. Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.

7. To care for a family member or a family member's pet in another household.

8. To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.

9. To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.

10. To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.

11. To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

12. To attend a funeral, provided that no more than 10 people are in attendance at the

funeral.

b. Individuals may also travel:

    1. To return to a home or place of residence from outside this state.

    2. To leave this state for a home or residence elsewhere.

3. Between two residences in this state, through April 10, 2020. After that date, travel between two residences is not permitted.

4. As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

c. All other travel is prohibited, including all travel to vacation rentals.

8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available **here**). This order does *not* adopt any subsequent guidance document released by this same agency.

    Consistent with the March 19, 2020 guidance document, critical infrastructure workers include some workers in each of the following sectors:

a. Health care and public health.

b. Law enforcement, public safety, and first responders.

c. Food and agriculture.

d. Energy.

e. Water and wastewater.

f. Transportation and logistics.

g. Public works.

h. Communications and information technology, including news media.

i. Other community-based government operations and essential functions.

j. Critical manufacturing.

k. Hazardous materials.

- Financial services.

m. Chemical supply chains and safety.

- Defense industrial base.

9. For purposes of this order, critical infrastructure workers also include:

a. Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of workers required to perform in-person work as permitted under this order. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.

b. Workers at suppliers, distribution centers, or service providers, as described below.

1. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

2. Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subprovision (1) of this subsection may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

3. Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

4. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.

c. Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.

d. Workers and volunteers for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

e. Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

f. Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.

g. Workers at laundromats, coin laundries, and dry cleaners.

h. Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.

i. Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.

10. Businesses, operations, and government agencies that continue in-person work must

adhere to sound social distancing practices and measures, which include but are not limited to:

a. Developing a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available **here**. Such plan must be available at company headquarters or the worksite.

b. Restricting the number of workers present on premises to no more than is strictly necessary to perform the business's, operation's, or government agency's critical infrastructure functions or its minimum basic operations.

c. Promoting remote work to the fullest extent possible.

d. Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible.

e. Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

f. Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.

g. Any other social distancing practices and mitigation measures recommended by the CDC.

11. Any store that remains open for in-person sales under section 5 or 9(f) of this order must:

a. Establish lines to regulate entry in accordance with subsections (c) and (d) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.

b. Consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.

c. For stores of less than 50,000 square feet of customer floor space, limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.

d. For stores of more than 50,000 square feet:

1. Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space. The amount of customer floor space must be calculated to exclude store areas that are closed under subprovision (2) of this subsection.

2. Close areas of the store—by cordoning them off, placing signs in aisles, posting prominent signs, removing goods from shelves, or other appropriate means—that are dedicated to the following classes of goods:

A. Carpet or flooring.

B. Furniture.

C. Garden centers and plant nurseries.

D. Paint.

3. By April 13, 2020, refrain from the advertising or promotion of goods that are not groceries, medical supplies, or items that are necessary to maintain the safety, sanitation, and basic operation of residences.

4. Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.

e. The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in subsections (c) and (d) of this section as necessary to protect the public health.

12. No one shall advertise or rent a short-term vacation property except as necessary to assist in housing a health care professional or volunteer aiding in the response to the COVID-19 crisis.

13. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, a place of religious worship, when used for religious worship, is not subject to penalty under section 17 of this order.

14. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

15. This order takes effect on April 9, 2020 at 11:59 pm and continues through April 30, 2020 at 11:59 pm. When this order takes effect, Executive Order 2020-21 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.

16. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health-care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

17. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Michigan Data

This information is updated daily at 3 p.m., with COVID-19 results included as of 10 a.m.

Confirmed COVID-19 Cases by Jurisdiction updated 4/26/2020

County	Confirmed Cases	Reported Deaths
Alcona	4	
Allegan	69	1
Alpena	60	2
Antrim	9	
Arenac	16	1
Barry	29	1
Bay	115	2
Benzie	4	
Berrien	215	14
Branch	48	2
Calhoun	202	10
Cass	26	2
Charlevoix	13	1
Cheboygan	17	1
Chippewa	2	
Clare	10	1
Clinton	109	9
Crawford	46	3
Delta	12	2
Detroit City	8613	922

- DAILY COUNTS
- LAB TESTING
- DATA ABOUT PLACES
- LONG TERM CARE FACILITIES
- CORONAVIRUS SYMPTOMS

Cumulative Total of Recovered COVID-19 Cases (as of 4/24/2020): 8,342

Note on recovery: During this response, MDHHS is reviewing vital records statistics to identify any

Dickinson	3	2
Eaton	115	5
Emmet	21	2
Genesee	1467	161
Gladwin	11	1
Gogebic	4	1
Grand Traverse	19	5
Gratiot	8	1
Hillsdale	113	14
Houghton	2	
Huron	13	
Ingham	406	9
Ionia	43	2
Iosco	33	4
Isabella	55	7
Jackson	327	16
Kalamazoo	292	11
Kalkaska	17	2
Kent	1031	32
Lake	2	
Lapeer	165	24
Leelanau	9	
Lenawee	82	
Livingston	315	14
Luce	1	
Mackinac	5	
Macomb	5203	520
Manistee	11	
Marquette	42	7
Mason	5	
Mecosta	14	1
Menominee	3	
Midland	52	3
Missaukee	15	1
Monroe	273	12
Montcalm	32	1
Montmorency	5	
Muskegon	228	13
Newaygo	15	
Oakland	6928	620

laboratory confirmed COVID-19 cases who are 30 days out from their onset of illness to represent recovery status. As the pandemic continues to impact Michigan, this pool will expand to include more cases. Recovered is defined as the number of persons with a confirmed COVID-19 diagnosis who are alive 30 days post-onset (or referral date if onset is not available). The number of persons recovered on April 24, 2020 represents COVID-19 confirmed individuals with an onset date on or prior to March 25, 2020. If an individual dies from a COVID-related cause >30 days from onset/referral, they are removed from the number of persons recovered. These numbers will be updated every Saturday.

Age Data of Overall Deceased

Average Age	74.3 years
Median Age	76 years
Age Range	5-107 years

Overall Case Fatality Rate

Statewide Confirmed Cases	9%

Cases by Sex

Sex	Percentage of Overall Cases by Sex	Percentage of Deceased Cases by Sex
Male	45%	55%
Female	54%	45%
Unknown	1%	<1%

Oceana	5	1
Ogemaw	9	
Osceola	8	
Oscoda	4	
Otsego	87	8
Ottawa	180	9
Presque Isle	10	
Roscommon	13	
Saginaw	558	43
Sanilac	34	4
Schoolcraft	3	
Shiawassee	130	7
St Clair	302	18
St Joseph	28	1
Tuscola	82	13
Van Buren	35	2
Washtenaw	1001	50
Wayne	7135	658
Wexford	8	1
MDOC*	1031	32
FCI**	81	1
Unknown	3	1
Out of State	27	1
Totals	37778	3315

Note on cumulative counts: This report is provisional and subject to change. As public health investigations of individual cases continue, there will be corrections to the status and details of referred cases that result in changes to this report. *City of Detroit and Wayne County are reported separately.*
**Michigan Department of Corrections*
***Federal Correctional Institute*

Note on the deaths: Deaths must be reported by health care providers, medical examiners/coroners, and recorded by local health departments in order to be counted.

Totals may not add to 100% due to rounding

Cases by Age

Age	Percentage of Overall Cases by Age	Percentage of Deceased Cases by Age
0 to 19	2%	<1%
20 to 29	10%	<1%
30 to 39	13%	1%
40 to 49	16%	4%
50 to 59	19%	9%
60 to 69	18%	19%
70 to 79	12%	28%
80+	11%	39%
Unknown	<1%	0%

Totals may not add to 100% due to rounding

Cases by Race

Race	Percentage of Overall Cases by Race	Percentage of Deceased Cases by Race
American Indian or Alaska Native	<1%	<1%
Asian/Pacific Islander	2%	1%
Black or African American	32%	41%
Caucasian	32%	44%
Multiple Races	7%	2%
Other	4%	2%
Unknown	22%	10%

Note on jurisdictional classification: In order to provide more accurate data, the "Other" jurisdiction category will no longer be used. Michigan Department of Corrections cases will be listed under "MDOC". Federal Correctional Institution cases will be listed under "FCI".

Note on Case Fatality Rate: The case fatality rate is the number of people who have died from causes associated with COVID-19 out of the total number of people with confirmed COVID-19 infections. It is used as one measure of illness severity. Several factors can affect this number. Until recently, COVID-19 lab testing has prioritized for hospitalized individuals due to limited testing availability. As a result, COVID-19 infections were identified more often in people who were more severely ill. This would lead to a higher case fatality rate. As more people with mild illness are tested, it is likely the case fatality rate will go down.

Totals may not add to 100% due to rounding

Cases by Hispanic/Latino Ethnicity

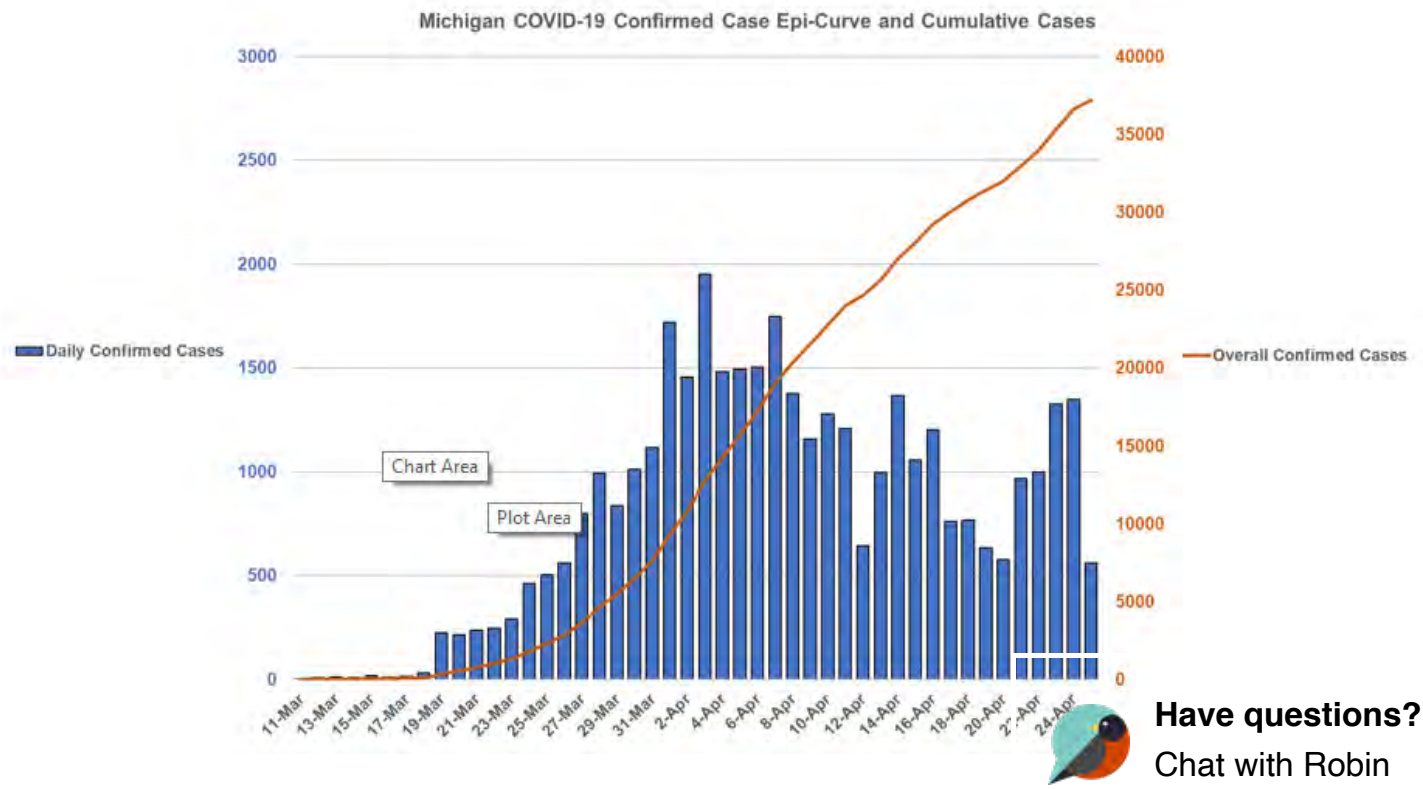
Hispanic/Latino Ethnicity	Percentage of Overall Cases by Ethnicity	Percentage of Deceased Cases by Ethnicity
Hispanic/Latino	3%	1%
Non-Hispanic Latino	58%	74%
Unknown	39%	25%

Totals may not add to 100% due to rounding

Cases by Arab Ethnicity

Arab Ethnicity	Percentage of Overall Cases by Ethnicity	Percentage of Deceased Cases by Ethnicity
Arab	1%	1%
Non-Arab	27%	25%
Unknown	72%	74%

Totals may not add to 100% due to rounding



Have questions?
Chat with Robin

The Columbus Dispatch

Coronavirus in Ohio: More than 1,800 inmates at Marion Correctional test positive

By Patrick Cooley

By Jim Woods
The Columbus Dispatch
Posted Apr 19, 2020 at 3:37 PM
Updated Apr 20, 2020 at 10:30 AM

The total number of confirmed cases of coronavirus rose to 11,602 cases on Sunday

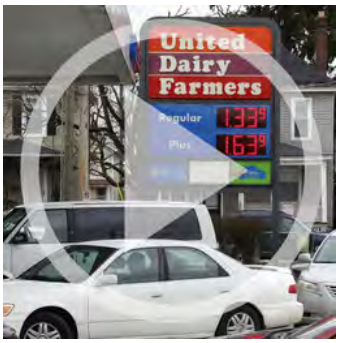
Coronavirus has overtaken a vast majority of the prison population at the Marion Correctional Institution, state officials said Sunday.

The Ohio Department of Health reported more than 1,000 newly confirmed cases of the coronavirus across the state Sunday, bringing the total of confirmed and probable cases to 11,602. With 20 additional deaths, there have been 471 confirmed and probable deaths from COVID-19, state officials said.

The number of hospitalizations rose to 2,565. Franklin County now has 1,442 confirmed cases and 30 confirmed deaths.

Much of the increase in cases has come from Ohio's prison system, as more tests have come back confirming that inmates and employees are infected.

>> This story is being provided for free as a public service to our readers during the coronavirus outbreak. You can find more stories on coronavirus here. Please support local journalism by subscribing to The Columbus Dispatch at subscribe.dispatch.com.



Overall, the state's prison system has recorded 2,426 positive results among inmates, the Ohio Department of Rehabilitation and Correction said. That number is 21% of the total confirmed cases in Ohio.

The majority of those cases are at the Marion Correctional Institution, where 1,828 inmates — 73% of the total — have tested positive for the virus, state officials say. The remaining 667 prisoners now are in quarantine. No deaths have been reported among inmates there.

Marion Correctional's staff has had 109 positive tests and one death reported.

Pickaway Correctional has 384 prisoners who have tested positive, and the number of reported deaths has increased to five, according to correction department statistics. The prison's 1,614 other inmates are in quarantine.

In addition, 64 staff members at Pickaway Correctional have tested positive.

The Franklin Medical Center in Columbus is another hot spot; 103 inmate patients there have tested positive, and there has been one death. The 393 other inmate patients there are in quarantine. Among the staff, 46 members have tested positive.

"Throughout our mass testing process, we have found many individuals who are testing positive for COVID who are asymptomatic," said JoEllen Smith, correction department spokeswoman.

Those who require additional care are being treated at hospitals near the prisons or at the Ohio State University Wexner Medical Center. The Ohio National Guard is providing medic support at Pickaway Correctional and will be sent to help at Marion Correctional as well, Smith said.

The state also has put most of its other institutions, which house more than 29,000 prisoners, in quarantine as a precaution.

Despite the increase in confirmed cases among inmates, the total seems to have leveled off in recent days. The number of deaths, though, is steadily rising.

Gov. Mike DeWine has pledged to begin reopening the state's economy in phases beginning May 1, but health experts caution that testing must be widespread before businesses in the state can fully reopen.

Ohio is able to offer only limited testing at this time.

Protesters have congregated outside the Statehouse in recent days to demand that DeWine reopen the economy, and some Republican lawmakers have joined the calls for the state to allow businesses to open again.

The governor issued a statewide stay-at-home order in March that shuttered any business deemed nonessential. Grocery stores remain open, as do restaurants that agree to offer only carryout and delivery.

In an interview with Chuck Todd on NBC's "Meet the Press" on Sunday morning, DeWine said he recognizes that protesters have a First Amendment right to speak their minds, but he has asked demonstrators to observe social distancing to avoid spreading the virus.

"They were protesting against me yesterday, and that's just fine," DeWine said. "We're going to do what we think is right, and that is try to open this economy, but do it very, very carefully."

DeWine told Todd that Ohio could double or triple testing capacity if the FDA approved a reagent needed for test kits. DeWine appeared to confirm on Twitter on Sunday that the FDA had approved the reagent, but a spokesman for the governor did not immediately respond to a request for comment.

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Executive Order 2020-29 (COVID-19)

EXECUTIVE ORDER

No. 2020-29

Temporary COVID-19 protocols for entry into Michigan Department of Corrections facilities and transfers to and from Department custody;

temporary recommended COVID-19 protocols and enhanced early-release authorization for county jails, local lockups, and juvenile detention centers

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders who work at or are incarcerated in prisons, county jails, local lockups, and juvenile detention centers across the state, it is reasonable and necessary to implement limited and temporary COVID-19-related protocols and procedures regarding entry into facilities operated by the Michigan Department of Corrections and transfers to and from the Department's custody; to recommend limited and temporary COVID-19-related protocols and measures for county jails, local lockups, and juvenile detention centers; and to temporarily suspend certain rules and procedures to facilitate the implementation of those recommendations.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. The Michigan Department of Corrections (the "Department") must continue to implement risk reduction protocols to address COVID-19 ("risk reduction protocols"), which the Department has already developed and implemented at the facilities it operates and which include the following:

a. Screening all persons arriving at or departing from a facility, including staff, incarcerated persons, vendors, and any other person entering the facility, in a manner consistent with guidelines issued by the Centers for Disease Control and Prevention ("CDC"). Such screening includes a temperature reading and obtaining information about travel and any contact with persons under investigation for COVID-19 infection.

b. Restricting all visits, except for attorney-related visits, and conducting those visits without physical contact to the extent feasible.

c. Limiting off-site appointments for incarcerated persons to only appointments for urgent or emergency medical treatment.

d. Developing and implementing protocols for incarcerated persons who display symptoms of COVID-19, including methods for evaluation and processes for testing, notification of the Department of Health and Human Services ("DHHS"), and isolation during testing, while awaiting test results, and in the event of positive test results. These protocols should be developed in consultation with local public health departments.

e. Notifying DHHS of any suspected case that meets the criteria for COVID-19 through communication with the applicable local public health department.

f. Providing, to the fullest extent possible, appropriate personal protective equipment to all staff as recommended by the CDC.

g. Conducting stringent cleaning of all areas and surfaces, including frequently touched surfaces (such as doorknobs, handles, light switches, keyboards, etc.), on a regular and ongoing basis.

h. Ensuring access to personal hygiene products for incarcerated persons and correctional staff, including soap and water sufficient for regular handwashing.

i. Ensuring that protective laundering protocols are in place.

j. Posting signage and continually educating on the importance of social distancing,

handwashing, and personal hygiene.

k. Practicing social distancing in all programs and classrooms—meaning a distance of at least six feet between people in any meeting, classroom, or other group.

- Minimizing crowding, including interactions of groups of 10 or more people, which may include scheduling more times for meal and recreation to reduce person-to-person contact.

2. To mitigate the risk of COVID-19 spreading in county jails, strict compliance with the capacity and procedural requirements regarding county jail overcrowding states of emergency in the County Jail Overcrowding Act ("CJOA"), 1982 PA 325, MCL 801.51 et seq., is temporarily suspended. While this order is in effect, all actions that would be authorized under the CJOA in the event of a declaration of a county jail overcrowding state of emergency are authorized and shall remain authorized without regard to any reduction in jail population or any other such limitations on the duration of authorization imposed by the CJOA.

3. Anyone authorized to act under section 2 of this order is strongly encouraged to consider early release for all of the following, so long as they do not pose a public safety risk:

a. Older people, people who have chronic conditions or are otherwise medically frail, people who are pregnant, and people nearing their release date.

b. Anyone who is incarcerated for a traffic violation.

c. Anyone who is incarcerated for failure to appear or failure to pay.

d. Anyone with behavioral health problems who can safely be diverted for treatment.

4. Effective immediately, all transfers into the Department's custody are temporarily suspended. Beginning seven (7) days from the effective date of this order, and no more than once every seven (7) days, a county jail or local lockup may request that the director of the Department determine that the jail or lockup has satisfactorily implemented risk reduction protocols as described in section 1 of this order. Upon inspection, if the director of the Department determines that a county jail or local lockup has satisfactorily implemented risk reduction protocols, transfers from that jail or lockup will resume in accordance with the Department's risk reduction protocols. The director of the Department may reject transfers that do not pass the screening protocol for entry into a facility operated by the Department.

5. Parole violators in the Department's custody must not be transported to or lodged in a county jail or local lockup unless the director of the Department has determined that such county jail or local lockup has satisfactorily implemented risk reduction protocols as described in section 1 of this order.

6. The State Budget Office must immediately seek a legislative transfer so that counties may be reimbursed for lodging incarcerated persons that would have been transferred into the Department's custody if not for the suspension of transfers described in section 4 of this order.

7. Juvenile detention centers are strongly encouraged to reduce the risk that those at their facilities will be exposed to COVID-19 by implementing as feasible the following measures:

a. Removing from the general population any juveniles who have COVID-19 symptoms.

b. Eliminating any form of juvenile detention or residential facility placement for juveniles unless a determination is made that a juvenile is a substantial and immediate safety risk to others.

c. Providing written and verbal communications to all juveniles at such facilities regarding COVID-19, access to medical care, and community-based support.

d. To the extent feasible, facilitating access to family, education, and legal counsel through electronic means (such as telephone calls or video conferencing) at no cost, rather than through in-person meetings.

8. Unless otherwise directed by court order, for juveniles on court-ordered probation, the use of out-of-home confinement for technical violations of probation and any requirements for in-person meetings with probation officers are temporarily suspended.

9. This order is effective immediately and continues through April 26, 2020 at 11:59 pm.

Given under my hand and the Great Seal of the State of Michigan.

BOARD OF CORRECTION
CITY OF NEW YORK
1 CENTRE STREET, RM 2213
NEW YORK, NY 10007
212 669-7900 (Office)
212 669-7980 (Fax)

March 21, 2020

Darcel Clark
Bronx District Attorney

Eric Gonzalez
Brooklyn District Attorney

Melinda Katz
Queens District Attorney

Michael McMahon
Staten Island District Attorney

Cyrus Vance
Manhattan District Attorney

Janet DiFiore
Chief Judge of the Court of Appeals and of the State of New York

Anthony Annucci
Acting Commissioner, NYS Department of Corrections and Community Supervision

Cynthia Brann
Commissioner, NYC Department of Correction

VIA EMAIL

Dear Ne. York City's Criminal Justice Leaders:

The New York City jails are facing a crisis as COVID-19 continues its march through the City. We write to urge you to act to (1) immediately remove from jail all people at high risk of dying of COVID-19 infection and (2) rapidly decrease the jail population.

Staff of the Department of Correction (DOC) and Correctional Health Services (CHS) are doing heroic work to keep people in custody and staff safe and healthy. The Board of Correction, the independent oversight agency for the City's jails, has closely monitored Rikers Island and the borough jails for over sixty years. From this experience, we know that DOC's and CHS's best efforts will not be enough to prevent viral transmission in the jails. Their work must be supplemented by bold and urgent action from the City's District Attorneys, New York State judges, New York State Department of Corrections and Community Supervision (DOCCS), and DOC's utilization of its executive release authority. Fewer people in the jails will save lives and minimize transmission among people in custody as well as staff. Failure to drastically reduce the jail population threatens to overwhelm the City jails' healthcare system as well its basic operations.

Over the past six days, we have learned that at least twelve DOC employees, five CHS employees, and twenty-one people in custody have tested positive for the virus. There are more than 58 individuals currently being monitored in the contagious disease and quarantine units (up from 26 people on March 17). It is likely these people have been in hundreds of housing areas and common areas over recent weeks and have been in close contact with many other people in custody and staff. Given the nature of jails (e.g. dense housing areas and structural barriers to social distancing, hygiene, and sanitation), the number of patients diagnosed with COVID-19 is certain to rise exponentially. The best path forward to protecting the community of people housed and working in the jails is to rapidly decrease the number of people housed and working in them.

Mayor de Blasio announced on March 19 that the NYPD and Mayor's Office of Criminal Justice (MOCJ) had identified 40 people for release from custody, pending approval of the District Attorneys' Offices and the courts. This number is far from sufficient to protect against the rapid spread of coronavirus in the jails.

We urge you to follow your colleagues in Los Angeles County (CA), San Francisco (CA), Cook County (IL), Autauga County (AL), Augusta County (VA), Allegheny County (PA), Hamilton County (OH), Harris County (TX), Travis County (TX), and Cuyahoga County (OH), and take action now to release people from City jails. As further detailed below, this immediate reduction should prioritize the release of people who are at higher risk from infection such as those over 50 or with underlying health conditions. Additionally, you must safely release other people in jail to decrease the overall population; this process should begin with people detained for administrative reasons (including failure to appear and parole violations) and people serving "City Sentences" (sentences of one year or less). The process should continue to identify all other people who can be released. DOC and CHS should provide discharge planning to all people you release, including COVID screening, connection to health and mental health services, and support with housing, as necessary.

People over 50 years old

The morbidity rates for COVID-19 accelerate with age, with older people being the least likely to recover from complications of the virus. There are currently 906 people in DOC custody who are over age 50. Older adults in custody have an average of between three and four medical diagnoses each, and each of them takes between six and seven medications. Of the 906 older adults in custody today, 189 are being detained on technical parole violations. Another 74 older adults are City-Sentenced, serving one year or less for low-level offenses.

People with underlying health conditions

People with underlying health conditions, including lung disease, heart disease, diabetes, cancer, or a weakened immune system, are especially at risk of dying from COVID-19. As of today, there are 62 people in the infirmary at North Infirmary Command on Rikers Island. They are housed there because they require a higher level of medical care. Twelve of them are technical parole violators and six are City-Sentenced. In addition, there are eight women currently in the infirmary at the Rose M. Singer Center, three of whom are in custody on technical parole violations.

People detained for administrative reasons
There are currently 666 people in custody being held solely for a technical violation of parole, including failure to make curfew, missing a meeting with a parole officer, or testing positive for drugs. There are an additional 811 people detained on an open case and a technical parole violation who also should be reviewed for immediate release.

People serving city sentences
There are currently 551 people in DOC custody who are serving a City Sentence of under one year for low-level offenses. The Mayor must use his executive powers to release these people.

New York must replicate the bold and urgent action it has taken in other areas to stem the tide of COVID-19 in the jails. The Board strongly urges you to take urgent action today to drastically reduce the NYC jail population using the guidelines above.

Sincerely,

Jacqueline Sherman
Interim Chair

Times-Republican

Iowa's prisons will accelerate release of approved inmates to mitigate COVID-19

Contributed photo Anamosa State Penitentiary is a maximum-security prison in Jones County.

From school districts to workplaces to restaurants, Iowans across the state are shutting their doors and keeping to themselves to mitigate the spread of COVID-19. But for inmates in Iowa's jail and prisons, social distancing is not an option.

The close quarters and transient influx of new people behind bars creates a precarious situation where a highly contagious virus like COVID-19 could spread and expose not only inmates but also the general public.

To mitigate a possible outbreak and create more room in Iowa's overcrowded prisons, the Iowa Department of Corrections plans to expedite the release of about 700 inmates who were already determined eligible for release by the Iowa Board of Parole.

"We're trying to be more efficient in our area and free up some space," said Beth Skinner, director of the Iowa Department of Corrections.

By accelerating the release wait list, more beds will open up, which can allow the correctional facility to move inmates more easily if an outbreak does occur in a prison. Iowa's eight prisons are already about 23% overcrowded, according to the Iowa Department of Corrections daily statistics.

Skinner

But releasing people without offering them a place to go doesn't help either, Skinner said. She said they're working to ensure all parolees have a place to stay once they return to their communities.

"It has to be a suitable, safe place," Skinner said.

Prisoners medically screened before intake or release

Beyond accelerating the release of people, the Iowa Department of Corrections is also medically screening all new inmates and people who are released from their facilities, Skinner said.

On average, 500 new inmates are transferred to the prisons on a monthly basis, Skinner said.

Correctional workers will take their temperatures and give them medical questionnaires to fill out. Because symptoms of COVID-19 may not

immediately show, new inmates are automatically quarantined for 14 days.

Visitations are also temporarily suspended to mitigate the spread of COVID-19, but the department is examining reducing the costs of mail and phone calls, Skinner said.

Inmates and correctional officers have access to soap and water and employees are also provided hand sanitizer.

A *"huge piece"* in preventing outbreaks will be COVID-19 tests, however, Skinner said. Each correctional facility will receive five to six tests, which can help them evaluate people who may have symptoms and quarantine them.

"We get the people who have the flu. What's different with this one is the unknown," Skinner said.

ACLU: Iowa should do more to reduce prison population

But an Iowa civil rights group believes the state should go even further to reduce the density of the prison population and mitigate the spread of COVID-19.

ACLU of Iowa is calling for comprehensive changes to law enforcement and correctional facilities practices.

Veronica Fowler, spokesperson for ACLU of Iowa, said limiting arrests and releasing more people not only protects the jail and prison populations, but also the general public who may be exposed to COVID-19 by a correctional officer.

"We have in any one day about 16,000 people, essentially behind bars," Fowler said of Iowa's prisons and jails. *"That is the equivalent of Clive or Boone or Oskaloosa. We're not talking about tiny little populations."*

The organization is calling for limiting the number of arrests, people in

county jails and number of people being held on pretrial detention. Additionally, the group is asking the state to commute people with medical conditions who would have been released in the next two years and commuting people who were scheduled to be released in a year.

Another concern is an order from the Iowa Supreme Court, Fowler said.

On March 14, the Iowa Supreme Court ordered all criminal jury trials be postponed until April 20. Fowler said that could result in some inmates staying behind bars longer than necessary.

Fowler said ACLU plans to send a letter to the governor and state officials detailing their requests.

"If all these people get sick, that's a health crisis that overwhelms the system," Fowler said.

In Johnson County, 37 inmates were being held in the county jail. The county has the highest rate of COVID-19 with 22 confirmed cases so far. The facility was originally built to house 46 inmates, but by double-bunking inmates, it can hold 92, according to The Gazette.

No plans for early release from expanded Polk County jail

At the Polk County Jail, there are no plans to expedite the release of prisoners, said Lt. Heath Osberg of the Polk County Sheriff's Office.

In 2008, Polk County finished construction on a new jail facility that holds 1,500 inmate beds and is tripled in size from the previous jail.

Because of the larger size, Osberg, said there is not overcrowding in the jail. Around 749 inmates were being held in the jail as of Friday afternoon.

The difference between jails and prisons, however, is the more transient flow of people coming in and out.

Between Wednesday and Thursday, 24 inmates were booked into Polk

County Jail, according to its website. Eleven of those detained have already been released.

Osberg said inmates who are brought into the facility are getting their temperatures checked and filling out medical questionnaires.

He said any changes in the release of inmates would have to come from county attorneys and Iowa courts.

Fowler said she hopes state officials stay aware of Iowa's jailed population, particularly people who can't afford to pay bond and those with health conditions that make them more vulnerable to COVID-19.

"The bottom line is that we already have an over-incarceration problem in our country and our state," Fowler said.

California Chief Justice Issues Second Advisory on Emergency Relief Measures

March 20, 2020

Contact: Peter Allen | 415-865-7740

California Chief Justice Tani Cantil-Sakauye issued new guidance to the state's superior courts on Friday to mitigate some of the health risks to judicial officers, court staff, and court users during the COVID-19 pandemic.

In California, unlike other states, presiding judges of county superior courts may petition the Chief Justice—as chair of the Judicial Council—for an emergency order. (So far, the Chief Justice has signed emergency orders for nearly all of California's 58 counties, available to the public **here**).

Under Gov. Gavin Newsom's executive order to shelter in place, courts are considered "essential services" that must still provide services to the public.

"I am deeply concerned about the disruption and hardships caused by the COVID-19 crisis and I have applied and will continue to apply all the constitutional and statutory powers of my office to minimize these unprecedented problems," Cantil-Sakauye said.

In Friday's advisory, Cantil-Sakauye urged court officials to consider the following measures. "These actions can be taken immediately to protect constitutional and due process rights of court users. They will require close collaboration with your local justice system partners," Cantil-Sakauye said.

In criminal cases:

Lower bail amounts significantly for the duration of the coronavirus emergency, including lowering the bail amount to $0 for many lower level offenses.
Consider a defendant's existing health conditions, and conditions existing at the anticipated place of confinement, in setting conditions of custody for adult or juvenile defendants.
Identify detainees with less than 60 days in custody to permit early release, with or without supervision or community-based treatment.
Determine the nature of supervision violations that will warrant detention in county jail, or “flash incarceration," to drastically reduce or eliminate its use during the current health crisis.
Prioritize arraignments and preliminary hearings for in-custody defendants, and the issuance of restraining orders.
Prioritize juvenile dependency detention hearings to ensure they are held within the time required by state and federal law.
Allow liberal use of telephone or video appearance by counsel and defendant for routine or non-critical criminal matters.

In civil cases:

Suspend all civil trials and hearings for at least 60 days, with the exception of time-sensitive matters, such as restraining orders and urgent dependency, probate, and family matters.
When possible, provide that any urgent matters may be done telephonically.

See Chief Justice Tani Cantil-Sakauye’s advisory below, sent to all county superior court presiding judges and court executive officers on Friday:

To: Presiding Judges and Court Executive Officers of the California Courts

Dear Judicial Branch Colleagues:

I write to share information on actions we are taking at the state level regarding the current crisis in our California court system resulting from COVID-19, and to provide guidance on ways that might mitigate some of the health risks to judicial officers, court staff, and court users.

Governor Newsom’s order last night for all Californians to shelter in place reflects the unprecedented challenge we face with the COVID-19 virus, both as Californians and as judicial officers and court administrators. We sought and received clarification from the Governor’s office that the Governor’s order is not meant to close our courts. The courts are—and continue to be—considered as an essential service. I recognize, however, that this new adjustment to health guidelines and direction likely may require further temporary adjustment or suspension of certain court operations, keeping in mind, as we all are, that we are balancing constitutional rights of due process with the safety and health of all court users and employees.

We are working at both the state and local levels to identify more options to provide relief. Aiding in these efforts are the perspectives and input from the TCPJAC and CEAC chairs and vice chairs who are dealing with local emergencies while making time to focus on the welfare of our larger judicial branch family.

In addition, we are in daily, close contact with the Governor’s office, executive branch departments, and legislative

leadership to make them aware of the impact on courts as well as to see where immediate and longer-term assistance may be needed to respond to a crisis of this magnitude.

I am deeply concerned about the disruption and hardships caused by the COVID-19 crisis and I have applied and will continue to apply all the constitutional and statutory powers of my office to minimize these unprecedented problems.

I, like many of you, am being contacted by justice system partners and advocates seeking immediate and direct action to address the particular needs of their constituencies. In responding to these requests, we have made clear what the limits of authority are for the Chief Justice and the Judicial Council, as well as the role of independent trial courts to manage their operations, while stressing our shared commitment to be responsive within the framework of respective constitutional and statutory responsibilities.

The relief I am authorized to grant with an emergency order is limited to the items enumerated in Government Code section 68115. In California, unlike other states, each of the 58 superior courts retains local authority to establish and maintain its own court operations. This decentralized nature of judicial authority is a statutory structure that reflects the diversity of each county.

In an effort to alleviate some of the immediate problems faced by the trial courts, I have authorized court holidays and extensions of time for court procedures in response to requests submitted by the presiding judges in many superior courts, with the understanding that the immense diversity of our state may require variations on what is considered an essential or priority service in a particular court or community.

I will continue to grant emergency order requests while balancing fairness and access to justice. As of writing, 63 emergency orders have been processed with several more pending. In light of the continuing emergency posed by the COVID-19 pandemic, I am prepared to approve requests for further extensions as warranted, consistent with my authority under Government Code section 68115(b).

In addition to the steps you have taken under the orders you have been granted, I strongly encourage to you consider the following suggestions to mitigate the effect of reduced staffing and court closures and to protect the health of judges, court staff, and court users.

These actions can be taken immediately to protect constitutional and due process rights of court users. They will require close collaboration with your local justice system partners.

Criminal Procedures

1. Revise, on an emergency basis, the countywide bail schedule to lower bail amounts significantly for the duration of the coronavirus emergency, including lowering the bail amount to $0 for many lower level offenses – for all misdemeanors except for those listed in Penal Code section 1270.1 and for lower-level felonies. This will result in fewer individuals in county jails thus alleviating some of the pressures for arraignments within 48 hours and preliminary hearings within 10 days.
2. In setting an adult or juvenile defendant's conditions of custody, including the length, eligibility for alternative sentencing, and surrender date, the court should consider defendant's existing health conditions, and any conditions existing at defendant's anticipated place of confinement that could affect the defendant's health, the health of other detainees, or the health of personnel staffing the anticipated place of confinement.
3. With the assistance of justice partners, identify those persons currently in county jail or juvenile hall custody who have less than 60 days remaining on their jail sentence for the purpose of modifying their sentences to permit early release of such persons with or without supervision or to community-based organizations for

treatment.

4. With the assistance of justice partners, calendar hearings for youth returning to court supervision from Department of Juvenile Justice following parole consideration for a Welf. & Inst. Code, §1766 hearing.
5. With the assistance of justice partners, determine the nature of supervision violations that will warrant "flash incarceration," for the purpose of drastically reducing or eliminating the use of such an intermediate sanction during the current health crisis.
6. Prioritize arraignments and preliminary hearings for in-custody defendants, and the issuance of restraining orders.
7. Prioritize juvenile dependency detention hearings to ensure they are held within the time required by state and federal law.
8. For routine or non-critical criminal matters, allow liberal use of telephonic or video appearance by counsel and the defendant, and appearance by counsel by use of waivers authorized by Penal Code, § 977. Written waivers without being obtained in open court have been approved if the waiver is in substantial compliance with language specified in section 977, subdivision (b)(1). (*People v. Edwards* (1991) 54 Cal.3d 787, 811; *People v. Robertson* (1989) 48 Cal.3d 18, 62.)

Civil Procedures

1. Suspend all civil trials, hearings, and proceedings for at least 60 days, with the exception of time-sensitive matters, such as restraining orders and urgent dependency, probate, and family matters. Consider whether an emergency order may be needed to address cases reaching 5-year deadlines under Code of Civil Procedure section 583.310.
2. When possible, provide that any urgent matters may be done telephonically, under the general policy encouraging use of telephonic appearances in Code of Civil Procedure section 367.5(a) and California Rule of Court, rule 3.670.

The Judicial Council's entire management team and staff are focused on supporting you, your judicial officers, and court employees. They are moving as quickly as possible to address questions, share information, provide resources, and maintain open lines of communication to facilitate our branch's response.

I am immensely grateful to you and your dedicated employees for your tireless efforts to navigate this storm as you are also trying to help and protect your own families through this challenging time for us all.

Tani G. Cantil-Sakauye
Chief Justice of California

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March 26, 2020

Chief Justice Bridget M. McCormack, Michigan Supreme Court
Sheriff Matt Saxton (ret.), Executive Director, Michigan Sheriffs' Association
Joint Statement

Thank you to judges, sheriffs, and law enforcement statewide who have stepped up to reduce jail populations in response to the ongoing public health emergency. With a single-minded focus on keeping our communities safe, jail populations across Michigan have declined to between 25% and 75% below their maximum capacities.

We are grateful for the efforts taken so far, but we must make sure we do all we can to protect the health of Michiganders. We have half a million criminal court cases each year in Michigan and several hundred thousand people entering jails. Governor Whitmer has requested that we all do our part to limit risk, and judges and sheriffs must work together to protect court employees, jail staff, inmates, and the public at large.

We can be proactive to reduce this risk:

- Judges and Sheriffs should use the statutory authority they have to reduce and suspend jail sentences for people who do not pose a public safety risk.
- Law enforcement should only arrest people and take them to jail if they pose an immediate threat to people in the community.
- Judges should release far more people on their own recognizance while they await their day in court. For some, judges may want to release them under supervision or under a condition that they stay away from a particular place or person.
- And judges should use probation and treatment programs as jail alternatives.

In addition, see the detailed advice that the Michigan Supreme Court State Court Administrative Office previously provided to judges and court administrators statewide. Following this advice WILL SAVE LIVES. (attached below)

Guidance to Trial Courts (Provided to Trial Courts March 20, 2020)

Detention, Bail, and Pretrial Release

In an effort to slow the spread of COVID-19, especially in the confined environments of county jails, courts should collaborate with county stakeholders and consider the following recommendations:

Coordinate with law enforcement in your county about expanding the use of appearance citations (when appropriate and legally permissible) rather than custodial arrests.

Pursuant to MCL 764.9c, police officers may issue appearance tickets, subject to certain exceptions, for misdemeanor or ordinance violations for which the maximum permissible penalty does not exceed 93 days in jail. Appearance tickets save police officers' time for more pressing matters and eliminate jail confinement. Even if an offense does not qualify for an appearance ticket (e.g. felonies or misdemeanors with punishments exceeding 93 days in jail), law enforcement still has the option for many offenses to release defendants, without charges, and submit their report to the prosecutor's office for review.

Coordinate with your prosecutors and law enforcement agencies in your county regarding the possible use of summons (when appropriate) rather than arrest warrants.

Pursuant to MCR 6.103, a court may issue a summons instead of an arrest warrant upon the request of the prosecutor. This presents another opportunity to avoid incarceration and allows the court more flexibility with scheduling arraignments than with in-custody defendants.

If defendants are arrested for warrantless misdemeanor offenses, courts should coordinate with law enforcement to use their discretionary authority to set lower interim bonds for an expedited release of low-risk defendants before arraignment.

Pursuant to MCL 780.581, a police officer may, subject to certain exceptions, set interim bail if defendants are arrested without a warrant for misdemeanor offenses and a magistrate is not available. The amount of interim bail must be "a sum of money" determined by the police officer, not the court, but must not exceed the maximum possible fine for the offense nor be less than 20 percent of the minimum possible fine. Law enforcement agencies sometimes accomplish this by using a "bond schedule." Several courts utilize an Interim Bond Order for this purpose.

Courts must closely adhere to MCR 6.106(C) regarding personal or unsecured bonds to effectuate as many pretrial releases from custody as safely possible.

MCR 6.106(C) requires courts to release defendants on personal or unsecured bonds unless they will not reasonably ensure the appearance of the defendant as required or will present a danger to the public. Money bail of even modest amounts can delay, or outright deny, the release of certain presumptively innocent defendants.

When setting bail, courts should carefully weigh the public necessity of certain pretrial conditions (including drug/alcohol testing, counseling, office visits, etc.) with the risk of spreading COVID-19.

Courts should be mindful that conditions of release, while not confining defendants in jail, can still place defendants in close proximity with other individuals. MCR 6.106(D) allows courts to impose conditions of pretrial release if a personal recognizance bond will not reasonably ensure the appearance of the defendant or the safety of the public. Moreover, research suggests many conditions of pretrial release, with the exception of court date reminders, are ineffective at reducing failure to appear and rearrests rates. When balancing which bond conditions to order with minimizing the spread of the COVID-19, the court should still be mindful that behavior that is dangerous to the defendant or others should not be tolerated.

Consider using non-warrant alternatives (when appropriate) when defendants fail to appear in court or otherwise commit conditional release violations.

Pursuant to MCR 3.606(A)(1) and MCR 6.106(H)(2), a court may order a defendant to appear for a show cause hearing for an alleged bond violation or issue a summons for a modification of bond. Show Cause Orders (MC 230) and Summons Regarding Bond Violations (MC 308) are two options that will avoid custodial arrests and allow courts more control over their dockets. The court should continue to issue bench warrants in those circumstances where the defendant's conduct resulting in the alleged bond or probation violations present a danger to the defendant or others.

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ABC NEWS | CORONAVIRUS GOVERNMENT RESPONSE

AG William Barr pushes expansion of home confinement to reduce prison populations amid coronavirus

Barr said he doesn't want prisons to become 'petri dishes' for the virus.

By **Alexander Mallin**
March 26, 2020, 2:37 PM • 7 min read

10 ways life has changed since coronavirus struck

The WHO has now declared the virus, aka COVID-19, a pandemic.

Amid concerns of the potentially devastating effects that an outbreak of the novel coronavirus could have within the walls of the nation's prisons, Attorney General William Barr said Thursday that he has issued new recommendations to the Federal Bureau of Prisons to explore releasing certain at-risk prisoners to home confinement in order to reduce the overall prison population.

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"You want to make sure that our institutions don't become petri dishes and it spreads rapidly through a particular institution," Barr said on Thursday. "But we have the protocols that are designed to stop it and we are using all the tools we have to protect the inmates."

He added that "one of the those tools will be identifying vulnerable prisoners who would make more sense to allow to go home to finish their confinement."

Tune into ABC at 1 p.m. ET and ABC News Live at 4 p.m. ET every weekday for special coverage of the novel coronavirus with the full ABC News team, including the latest news, context and analysis.

Attorney General William Barr speaks about the coronavirus in the James Brady Briefing Room, March 23, 2020, in Washington.
Alex Brandon/AP, FILE

Barr added that anyone who would be considered eligible for release to home confinement would have to quarantine themselves for 14 days.

In a phone interview with ABC News following the press conference, Barr stressed that there would be significant limits on what would make prisoners eligible for release to home confinement, noting that they could not be convicted of violent crimes or sex offenses -- which makes up roughly 40% of the over-60 population.

"My main interest is making sure that they're safe to the community and that the situation they're going into is likely to be safer than staying where they are where they have ready access to doctors and we can keep them in isolation," Barr said.

+ MORE: 9 inmates bolt from South Dakota prison on same day a prisoner tested positive for coronavirus

The announcement comes after a number of staff and inmates in federal facilities in New York City, Atlanta and Louisiana have tested positive for the virus, leading to lockdowns of the prisons and some workers and prisoners put in isolation to try to attempt further spread.

"I don't want people to think we're doing it out of panic because we feel we've lost control," Barr said of the home confinement plan. " We haven't lost control but I'm still concerned that we keep each of these facilities from becoming vectors of infection."

A New York City Police officer puts on gloves as people wait in line to be tested for COVID-19, outside Elmhurst Hospital Center in the Queens borough of New York City, March 26, 2020.
Stefan Jeremiah/Reuters

Asked about the situations that have unfolded in prisons in Italy and Colombia, where coronavirus outbreaks have resulted in some instances in prison riots and mass escapes by inmates, Barr told ABC News he doesn't believe at this point that conditions in America's federal prison system will similarly devolve.

"I'm not as worried in the federal system, at least from what I'm seeing now," Barr said. "I don't want to be presumptuous and predict the future but I think the main thing is communication with the inmates and I think they're communicating very well."

In response to some local and state prisons across the U.S. who have opted to release inmates in prisons and jails in large numbers, Barr said he was concerned about those using the coronavirus simply as a vehicle to de-populate prisons around the U.S.

Editor's Picks


State prisons prepare for coronavirus but federal prisons not providing significant guidance, sources say


Releases, infections, fear: U.S. coronavirus crisis in jails and prisons looms


9 inmates bolt from South Dakota prison on same day a prisoner tested positive for coronavirus

"I don't think that people should make the blanket assumption that inmates are safer, per se, outside of facilities than in," Barr said. "A lot of it depends on where they're going. Frankly, someone in Otisville, New York in a low-security facility is probably better off than if he's released home into New York City."

He said he remains opposed to any kind of "wholesale" or mass release of inmates from the country's prisons.

+ MORE: State prisons prepare for coronavirus but federal prisons not providing significant guidance, sources say

"Do you want to send a signal right now that you can get away with things?" Barr said. "Is there going to be a general break down in law and order in some place and I think the whole optic of, 'Okay, well we're not going to take any more prisoners,' could contribute to that."

What to know about coronavirus:

- *How it started and how to protect yourself:* ***coronavirus explained***
- *What to do if you have symptoms:* ***coronavirus symptoms***
- *Tracking the spread in the US and Worldwide:* ***coronavirus map***

Comments (24)

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Coronavirus Disease 2019 (COVID-19)

Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities

Printer friendly version

PowerPoint Presentation: Managing COVID-19 in Correctional and Detention Facilities [25 pages, 1 MB]

This interim guidance is based on what is currently known about the transmission and severity of coronavirus disease 2019 (COVID-19) as of the date of posting, March 23, 2020.

The US Centers for Disease Control and Prevention (CDC) will update this guidance as needed and as additional information becomes available. Please check the CDC website periodically for updated interim guidance.

This document provides interim guidance specific for correctional facilities and detention centers during the outbreak of COVID-19, to ensure continuation of essential public services and protection of the health and safety of incarcerated and detained persons, staff, and visitors. Recommendations may need to be revised as more information becomes available.

Who is the intended audience for this guidance?

This document is intended to provide guiding principles for healthcare and non-healthcare administrators of correctional and detention facilities (including but not limited to federal and state prisons, local jails, and detention centers), law enforcement agencies that have custodial authority for detained populations (i.e., US Immigration and Customs Enforcement and US Marshals Service), and their respective health departments, to assist in preparing for potential introduction, spread, and mitigation of COVID-19 in their facilities. In general, the document uses terminology referring to correctional environments but can also be applied to civil and pre-trial detention settings.

This guidance will not necessarily address every possible custodial setting and may not use legal terminology specific to individual agencies' authorities or processes**. The guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions.** Facilities should contact CDC or their state, local, territorial, and/or tribal public health department if they need assistance in applying these principles or addressing topics that are not specifically covered in this guidance.

Why is this guidance being issued?

Correctional and detention facilities can include custody, housing, education, recreation, healthcare, food service, and workplace components in a single physical setting. The integration of these components presents unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors. Consistent application of specific preparation, prevention, and management measures can help reduce the risk of transmission and severe disease from COVID-19.

- Incarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced.
- In most cases, incarcerated/detained persons are not permitted to leave the facility.
- There are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including daily staff ingress and egress; transfer of incarcerated/detained persons between facilities and systems, to court appearances, and to outside medical visits; and visits from family, legal representatives, and other community members. Some settings, particularly jails and detention centers, have high turnover, admitting new entrants daily who may have been exposed to COVID-19 in the surrounding community or other regions.
- Persons incarcerated/detained in a particular facility often come from a variety of locations, increasing the potential to introduce COVID-19 from different geographic areas.
- Options for medical isolation of COVID-19 cases are limited and vary depending on the type and size of facility, as well as the current level of available capacity, which is partly based on medical isolation needs for other conditions.
- Adequate levels of custody and healthcare staffing must be maintained to ensure safe operation of the facility, and options to practice social distancing through work alternatives such as working from home or reduced/alternate schedules are limited for many staff roles.
- Correctional and detention facilities can be complex, multi-employer settings that include government and private employers. Each is organizationally distinct and responsible for its own operational, personnel, and occupational health protocols and may be prohibited from issuing guidance or providing services to other employers or their staff within the same setting. Similarly, correctional and detention facilities may house individuals from multiple law enforcement agencies or jurisdictions subject to different policies and procedures.
- Incarcerated/detained persons and staff may have medical conditions that increase their risk of severe disease from COVID-19.
- Because limited outside information is available to many incarcerated/detained persons, unease and misinformation regarding the potential for COVID-19 spread may be high, potentially creating security and morale challenges.
- The ability of incarcerated/detained persons to exercise disease prevention measures (e.g., frequent handwashing) may be limited and is determined by the supplies provided in the facility and by security considerations. Many facilities restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants.
- Incarcerated persons may hesitate to report symptoms of COVID-19 or seek medical care due to co-pay requirements and fear of isolation.

CDC has issued separate COVID-19 guidance addressing healthcare infection control and clinical care of COVID-19 cases as well as close contacts of cases in community-based settings. Where relevant, community-focused guidance documents are referenced in this document and should be monitored regularly for updates, but they may require adaptation for correctional and detention settings.

This guidance document provides additional recommended best practices specifically for correctional and detention facilities. **At this time, different facility types (e.g., prison vs. jail) and sizes are not differentiated. Administrators and agencies should adapt these guiding principles to the specific needs of their facility.**

What topics does this guidance include?

The guidance below includes detailed recommendations on the following topics related to COVID-19 in correctional and detention settings:

- Operational and communications preparations for COVID-19
- Enhanced cleaning/disinfecting and hygiene practices
- Social distancing strategies to increase space between individuals in the facility
- How to limit transmission from visitors
- Infection control, including recommended personal protective equipment (PPE) and potential alternatives during PPE shortages
- Verbal screening and temperature check protocols for incoming incarcerated/detained individuals, staff, and visitors
- Medical isolation of confirmed and suspected cases and quarantine of contacts, including considerations for cohorting when individual spaces are limited
- Healthcare evaluation for suspected cases, including testing for COVID-19
- Clinical care for confirmed and suspected cases
- Considerations for persons at higher risk of severe disease from COVID-19

Definitions of Commonly Used Terms

Close contact of a COVID-19 case – In the context of COVID-19, an individual is considered a close contact if they a) have been within approximately 6 feet of a COVID-19 case for a prolonged period of time or b) have had direct contact with infectious secretions from a COVID-19 case (e.g., have been coughed on). Close contact can occur while caring for, living with, visiting, or sharing a common space with a COVID-19 case. Data to inform the definition of close contact are limited. Considerations when assessing close contact include the duration of exposure (e.g., longer exposure time likely increases exposure risk) and the clinical symptoms of the person with COVID-19 (e.g., coughing likely increases exposure risk, as does exposure to a severely ill patient).

Cohorting – Cohorting refers to the practice of isolating multiple laboratory-confirmed COVID-19 cases together as a group, or quarantining close contacts of a particular case together as a group. Ideally, cases should be isolated individually, and close contacts should be quarantined individually. However, some correctional facilities and detention centers do not have enough individual cells to do so and must consider cohorting as an alternative. See Quarantine and Medical Isolation sections below for specific details about ways to implement cohorting to minimize the risk of disease spread and adverse health outcomes.

Community transmission of COVID-19 – Community transmission of COVID-19 occurs when individuals acquire the disease through contact with someone in their local community, rather than through travel to an affected location. Once community transmission is identified in a particular area, correctional facilities and detention centers are more likely to start seeing cases inside their walls. Facilities should consult with local public health departments if assistance is needed in determining how to define “local community” in the context of COVID-19 spread. However, because all states have reported cases, all facilities should be vigilant for introduction into their populations.

Confirmed vs. Suspected COVID-19 case – A **confirmed case** has received a positive result from a COVID-19 laboratory test, with or without symptoms. A **suspected case** shows symptoms of COVID-19 but either has not been tested or is awaiting test results. If test results are positive, a suspected case becomes a confirmed case.

Incarcerated/detained persons – For the purpose of this document, "incarcerated/detained persons" refers to persons held in a prison, jail, detention center, or other custodial setting where these guidelines are generally applicable. The term includes those who have been sentenced (i.e., in prisons) as well as those held for pre-trial (i.e., jails) or civil purposes (i.e, detention centers). Although this guidance does not specifically reference individuals in every type of custodial setting (e.g., juvenile facilities, community confinement facilities), facility administrators can adapt this guidance to apply to their specific circumstances as needed.

Medical Isolation – Medical isolation refers to confining a confirmed or suspected COVID-19 case (ideally to a single cell with solid walls and a solid door that closes), to prevent contact with others and to reduce the risk of transmission. Medical isolation ends when the individual meets pre-established clinical and/or testing criteria for release from isolation, in consultation with clinical providers and public health officials (detailed in guidance below). In this context, isolation does NOT refer to punitive isolation for behavioral infractions within the custodial setting. Staff are encouraged to use the term "medical isolation" to avoid confusion.

Quarantine – Quarantine refers to the practice of confining individuals who have had close contact with a COVID-19 case to determine whether they develop symptoms of the disease. Quarantine for COVID-19 should last for a period of 14 days. Ideally, each quarantined individual would be quarantined in a single cell with solid walls and a solid door that closes. If symptoms develop during the 14-day period, the individual should be placed under medical isolation and evaluated for COVID-19. If symptoms do not develop, movement restrictions can be lifted, and the individual can return to their previous residency status within the facility.

Social Distancing – Social distancing is the practice of increasing the space between individuals and decreasing the frequency of contact to reduce the risk of spreading a disease (ideally to maintain at least 6 feet between all individuals, even those who are asymptomatic). Social distancing strategies can be applied on an individual level (e.g., avoiding physical contact), a group level (e.g., canceling group activities where individuals will be in close contact), and an operational level (e.g., rearranging chairs in the dining hall to increase distance between them). Although social distancing is challenging to practice in correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19. Additional information about social distancing, including information on its use to reduce the spread of other viral illnesses, is available in this CDC publication .

Staff – In this document, "staff" refers to all public sector employees as well as those working for a private contractor within a correctional facility (e.g., private healthcare or food service). Except where noted, "staff" does not distinguish between healthcare, custody, and other types of staff including private facility operators.

Symptoms – Symptoms of COVID-19 include fever, cough, and shortness of breath. Like other respiratory infections, COVID-19 can vary in severity from mild to severe. When severe, pneumonia, respiratory failure, and death are possible. COVID-19 is a novel disease, therefore the full range of signs and symptoms, the clinical course of the disease, and the individuals and populations most at risk for disease and complications are not yet fully understood. Monitor the CDC website for updates on these topics.

Facilities with Limited Onsite Healthcare Services

Although many large facilities such as prisons and some jails usually employ onsite healthcare staff and have the capacity to evaluate incarcerated/detained persons for potential illness within a dedicated healthcare space, many smaller facilities do not. Some of these facilities have access to on-call healthcare staff or providers who visit the facility every few days. Others have neither onsite healthcare capacity nor onsite medical isolation/quarantine space and must transfer ill patients to other correctional or detention facilities or local hospitals for evaluation and care.

The majority of the guidance below is designed to be applied to any correctional or detention facility, either as written or with modifications based on a facility's individual structure and resources. However, topics related to healthcare evaluation and clinical care of confirmed and suspected COVID-19 cases and their close contacts may not apply directly to facilities with limited or no onsite healthcare services. It will be especially important for these types of facilities to coordinate closely with their state, local, tribal, and/or territorial health department when they encounter confirmed or suspected cases among incarcerated/detained persons or staff, in order to ensure effective medical isolation and quarantine, necessary medical evaluation and care, and medical transfer if needed. The guidance makes note of strategies tailored to facilities without onsite healthcare where possible.

Note that all staff in any sized facility, regardless of the presence of onsite healthcare services, should observe guidance on recommended PPE in order to ensure their own safety when interacting with confirmed and suspected COVID-19 cases. Facilities should make contingency plans for the likely event of PPE shortages during the COVID-19 pandemic.

COVID-19 Guidance for Correctional Facilities

Guidance for correctional and detention facilities is organized into 3 sections: Operational Preparedness, Prevention, and Management of COVID-19. Recommendations across these sections can be applied simultaneously based on the progress of the outbreak in a particular facility and the surrounding community.

- **Operational Preparedness.** This guidance is intended to help facilities prepare for potential COVID-19 transmission in the facility. Strategies focus on operational and communications planning and personnel practices.
- **Prevention**. This guidance is intended to help facilities prevent spread of COVID-19 from outside the facility to inside. Strategies focus on reinforcing hygiene practices, intensifying cleaning and disinfection of the facility, screening (new intakes, visitors, and staff), continued communication with incarcerated/detained persons and staff, and social distancing measures (increasing distance between individuals).
- **Management.** This guidance is intended to help facilities clinically manage confirmed and suspected COVID-19 cases inside the facility and prevent further transmission. Strategies include medical isolation and care of incarcerated/detained persons with symptoms (including considerations for cohorting), quarantine of cases' close contacts, restricting movement in and out of the facility, infection control practices for individuals interacting with cases and quarantined contacts or contaminated items, intensified social distancing, and cleaning and disinfecting areas visited by cases.

Operational Preparedness

Administrators can plan and prepare for COVID-19 by ensuring that all persons in the facility know the symptoms of COVID-19 and how to respond if they develop symptoms. Other essential actions include developing contingency plans for reduced workforces due to absences, coordinating with public health and correctional partners, and communicating clearly with staff and incarcerated/detained persons about these preparations and how they may temporarily alter daily life.

Communication & Coordination

- **Develop information-sharing systems with partners.**
  - Identify points of contact in relevant state, local, tribal, and/or territorial public health departments before cases develop. Actively engage with the health department to understand in advance which entity has jurisdiction to implement public health control measures for COVID-19 in a particular correctional or detention facility.
  - Create and test communications plans to disseminate critical information to incarcerated/detained persons,

staff, contractors, vendors, and visitors as the pandemic progresses.

- Communicate with other correctional facilities in the same geographic area to share information including disease surveillance and absenteeism patterns among staff.
- Where possible, put plans in place with other jurisdictions to prevent confirmed and suspected COVID-19 cases and their close contacts from being transferred between jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.
- Stay informed about updates to CDC guidance via the CDC COVID-19 website as more information becomes known.

- **Review existing pandemic flu, all-hazards, and disaster plans, and revise for COVID-19.**
  - Ensure that physical locations (dedicated housing areas and bathrooms) have been identified to isolate confirmed COVID-19 cases and individuals displaying COVID-19 symptoms, and to quarantine known close contacts of cases. (Medical isolation and quarantine locations should be separate). The plan should include contingencies for multiple locations if numerous cases and/or contacts are identified and require medical isolation or quarantine simultaneously. See Medical Isolation and Quarantine sections below for details regarding individual medical isolation and quarantine locations (preferred) vs. cohorting.
  - Facilities without onsite healthcare capacity should make a plan for how they will ensure that suspected COVID-19 cases will be isolated, evaluated, tested (if indicated), and provided necessary medical care.
  - Make a list of possible social distancing strategies that could be implemented as needed at different stages of transmission intensity.
  - Designate officials who will be authorized to make decisions about escalating or de-escalating response efforts as the epidemiologic context changes.

- **Coordinate with local law enforcement and court officials.**
  - Identify lawful alternatives to in-person court appearances, such as virtual court, as a social distancing measure to reduce the risk of COVID-19 transmission.
  - Explore strategies to prevent over-crowding of correctional and detention facilities during a community outbreak.
- **Post signage throughout the facility communicating the following:**
  - **For all:** symptoms of COVID-19 and hand hygiene instructions
  - **For incarcerated/detained persons**: report symptoms to staff
  - **For staff**: stay at home when sick; if symptoms develop while on duty, leave the facility as soon as possible and follow CDC-recommended steps for persons who are ill with COVID-19 symptoms including self-isolating at home, contacting their healthcare provider as soon as possible to determine whether they need to be evaluated and tested, and contacting their supervisor.
  - Ensure that signage is understandable for non-English speaking persons and those with low literacy, and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or low-vision.

Personnel Practices

- **Review the sick leave policies of each employer that operates in the facility.**
  - Review policies to ensure that they actively encourage staff to stay home when sick.
  - If these policies do not encourage staff to stay home when sick, discuss with the contract company.
  - Determine which officials will have the authority to send symptomatic staff home.

- **Identify staff whose duties would allow them to work from home.** Where possible, allowing staff to work from home can be an effective social distancing strategy to reduce the risk of COVID-19 transmission.
  - Discuss work from home options with these staff and determine whether they have the supplies and technological equipment required to do so.
  - Put systems in place to implement work from home programs (e.g., time tracking, etc.).

- **Plan for staff absences.** Staff should stay home when they are sick, or they may need to stay home to care for a sick household member or care for children in the event of school and childcare dismissals.
  - Allow staff to work from home when possible, within the scope of their duties.
  - Identify critical job functions and plan for alternative coverage by cross-training staff where possible.
  - Determine minimum levels of staff in all categories required for the facility to function safely. If possible, develop a plan to secure additional staff if absenteeism due to COVID-19 threatens to bring staffing to minimum levels.
  - Consider increasing keep on person (KOP) medication orders to cover 30 days in case of healthcare staff shortages.

- **Consider offering revised duties to staff who are at higher risk of severe illness with COVID-19.** Persons at higher risk may include older adults and persons of any age with serious underlying medical conditions including lung disease, heart disease, and diabetes. See CDC's website for a complete list, and check regularly for updates as more data become available to inform this issue.
  - Facility administrators should consult with their occupational health providers to determine whether it would be allowable to reassign duties for specific staff members to reduce their likelihood of exposure to COVID-19.
- **Offer the seasonal influenza vaccine to all incarcerated/detained persons (existing population and new intakes) and staff throughout the influenza season.** Symptoms of COVID-19 are similar to those of influenza. Preventing influenza cases in a facility can speed the detection of COVID-19 cases and reduce pressure on healthcare resources.

- **Reference the Occupational Safety and Health Administration website for recommendations regarding worker health.**

- **Review CDC's guidance for businesses and employers** to identify any additional strategies the facility can use within its role as an employer.

Operations & Supplies

- **Ensure that sufficient stocks of hygiene supplies, cleaning supplies, PPE, and medical supplies (consistent with the healthcare capabilities of the facility) are on hand and available, and have a plan in place to restock as needed if COVID-19 transmission occurs within the facility.**
  - Standard medical supplies for daily clinic needs
  - Tissues
  - Liquid soap when possible. If bar soap must be used, ensure that it does not irritate the skin and thereby discourage frequent hand washing.
  - Hand drying supplies
  - Alcohol-based hand sanitizer containing at least 60% alcohol (where permissible based on security restrictions)
  - Cleaning supplies, including EPA-registered disinfectants effective against the virus that causes COVID-19
  - Recommended PPE (facemasks, N95 respirators, eye protection, disposable medical gloves, and disposable gowns/one-piece coveralls). See PPE section and Table 1 for more detailed information, including

recommendations for extending the life of all PPE categories in the event of shortages, and when face masks are acceptable alternatives to N95s. Visit CDC's website for a calculator to help determine rate of PPE usage.
    - Sterile viral transport media and sterile swabs to collect nasopharyngeal specimens if COVID-19 testing is indicated

- **Make contingency plans for the probable event of PPE shortages during the COVID-19 pandemic, particularly for non-healthcare workers.**
    - See CDC guidance optimizing PPE supplies.

- **Consider relaxing restrictions on allowing alcohol-based hand sanitizer in the secure setting where security concerns allow.** If soap and water are not available, CDC recommends cleaning hands with an alcohol-based hand sanitizer that contains at least 60% alcohol. Consider allowing staff to carry individual-sized bottles for their personal hand hygiene while on duty.
- **Provide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing.** (See Hygiene section below for additional detail regarding recommended frequency and protocol for hand washing.)
    - Provide liquid soap where possible. If bar soap must be used, ensure that it does not irritate the skin and thereby discourage frequent hand washing.

- **If not already in place, employers operating within the facility should establish a respiratory protection program as appropriate, to ensure that staff and incarcerated/detained persons are fit tested for any respiratory protection they will need within the scope of their responsibilities.**
- **Ensure that staff and incarcerated/detained persons are trained to correctly don, doff, and dispose of PPE that they will need to use within the scope of their responsibilities.** See Table 1 for recommended PPE for incarcerated/detained persons and staff with varying levels of contact with COVID-19 cases or their close contacts.

Prevention

Cases of COVID-19 have been documented in all 50 US states. Correctional and detention facilities can prevent introduction of COVID-19 from the community and reduce transmission if it is already inside by reinforcing good hygiene practices among incarcerated/detained persons, staff, and visitors (including increasing access to soap and paper towels), intensifying cleaning/disinfection practices, and implementing social distancing strategies.

Because many individuals infected with COVID-19 do not display symptoms, the virus could be present in facilities before cases are identified. Both good hygiene practices and social distancing are critical in preventing further transmission.

Operations

- **Stay in communication with partners about your facility's current situation.**
    - State, local, territorial, and/or tribal health departments
    - Other correctional facilities
- **Communicate with the public about any changes to facility operations, including visitation programs.**
- **Restrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.**
    - Strongly consider postponing non-urgent outside medical visits.

- If a transfer is absolutely necessary, perform verbal screening and a temperature check as outlined in the Screening section below, before the individual leaves the facility. If an individual does not clear the screening process, delay the transfer and follow the protocol for a suspected COVID-19 case – including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing. If the transfer must still occur, ensure that the receiving facility has capacity to properly isolate the individual upon arrival. Ensure that staff transporting the individual wear recommended PPE (see Table 1) and that the transport vehicle is cleaned thoroughly after transport.

- **Implement lawful alternatives to in-person court appearances where permissible.**
- **Where relevant, consider suspending co-pays for incarcerated/detained persons seeking medical evaluation for respiratory symptoms.**
- **Limit the number of operational entrances and exits to the facility.**

Cleaning and Disinfecting Practices

- **Even if COVID-19 cases have not yet been identified inside the facility or in the surrounding community, begin implementing intensified cleaning and disinfecting procedures according to the recommendations below. These measures may prevent spread of COVID-19 if introduced.**
- **Adhere to CDC recommendations for cleaning and disinfection during the COVID-19 response.** Monitor these recommendations for updates.
  - Several times per day, clean and disinfect surfaces and objects that are frequently touched, especially in common areas. Such surfaces may include objects/surfaces not ordinarily cleaned daily (e.g., doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, and telephones).
  - Staff should clean shared equipment several times per day and on a conclusion of use basis (e.g., radios, service weapons, keys, handcuffs).
  - Use household cleaners and EPA-registered disinfectants effective against the virus that causes COVID-19 as appropriate for the surface, following label instructions. This may require lifting restrictions on undiluted disinfectants.
  - Labels contain instructions for safe and effective use of the cleaning product, including precautions that should be taken when applying the product, such as wearing gloves and making sure there is good ventilation during use.
- **Consider increasing the number of staff and/or incarcerated/detained persons trained and responsible for cleaning common areas to ensure continual cleaning of these areas throughout the day.**
- **Ensure adequate supplies to support intensified cleaning and disinfection practices, and have a plan in place to restock rapidly if needed.**

Hygiene

- **Reinforce healthy hygiene practices, and provide and continually restock hygiene supplies throughout the facility, including in bathrooms, food preparation and dining areas, intake areas, visitor entries and exits, visitation rooms and waiting rooms, common areas, medical, and staff-restricted areas (e.g., break rooms).**
- **Encourage all persons in the facility to take the following actions to protect themselves and others from COVID-19. Post signage throughout the facility, and communicate this information verbally on a regular basis. Sample signage and other communications materials are available on the CDC website.** Ensure that materials can be understood by non-English speakers and those with low literacy, and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or low-vision.

- **Practice good cough etiquette:** Cover your mouth and nose with your elbow (or ideally with a tissue) rather than with your hand when you cough or sneeze, and throw all tissues in the trash immediately after use.
- **Practice good hand hygiene:** Regularly wash your hands with soap and water for at least 20 seconds, especially after coughing, sneezing, or blowing your nose; after using the bathroom; before eating or preparing food; before taking medication; and after touching garbage.
- **Avoid touching your eyes, nose, or mouth without cleaning your hands first.**
- **Avoid sharing eating utensils, dishes, and cups.**
- **Avoid non-essential physical contact.**

- **Provide incarcerated/detained persons and staff no-cost access to:**
  - **Soap** – Provide liquid soap where possible. If bar soap must be used, ensure that it does not irritate the skin, as this would discourage frequent hand washing.
  - **Running water, and hand drying machines or disposable paper towels** for hand washing
  - **Tissues** and no-touch trash receptacles for disposal
- **Provide alcohol-based hand sanitizer with at least 60% alcohol where permissible based on security restrictions.** Consider allowing staff to carry individual-sized bottles to maintain hand hygiene.
- **Communicate that sharing drugs and drug preparation equipment can spread COVID-19 due to potential contamination of shared items and close contact between individuals.**

Prevention Practices for Incarcerated/Detained Persons

- **Perform pre-intake screening and temperature checks for all new entrants. Screening should take place in the sallyport, before beginning the intake process**, in order to identify and immediately place individuals with symptoms under medical isolation. See Screening section below for the wording of screening questions and a recommended procedure to safely perform a temperature check. Staff performing temperature checks should wear recommended PPE (see PPE section below).
  - **If an individual has symptoms of COVID-19** (fever, cough, shortness of breath)**:**
    - Require the individual to wear a face mask.
    - Ensure that staff who have direct contact with the symptomatic individual wear recommended PPE.
    - Place the individual under medical isolation (ideally in a room near the screening location, rather than transporting the ill individual through the facility), and refer to healthcare staff for further evaluation. (See Infection Control and Clinical Care sections below.)
    - Facilities without onsite healthcare staff should contact their state, local, tribal, and/or territorial health department to coordinate effective medical isolation and necessary medical care.
  - **If an individual is a close contact of a known COVID-19 case (but has no COVID-19 symptoms):**
    - Quarantine the individual and monitor for symptoms two times per day for 14 days. (See Quarantine section below.)
    - Facilities without onsite healthcare staff should contact their state, local, tribal, and/or territorial health department to coordinate effective quarantine and necessary medical care.
- **Implement social distancing** strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of the presence of symptoms). Strategies will need to be tailored to the individual space in the facility and the needs of the population and staff. Not all strategies will be feasible in all facilities. Example strategies with varying levels of intensity include:
  - **Common areas:**
    - Enforce increased space between individuals in holding cells, as well as in lines and waiting areas such as intake (e.g., remove every other chair in a waiting area)

- **Recreation:**
  - Choose recreation spaces where individuals can spread out
  - Stagger time in recreation spaces
  - Restrict recreation space usage to a single housing unit per space (where feasible)
- **Meals:**
  - Stagger meals
  - Rearrange seating in the dining hall so that there is more space between individuals (e.g., remove every other chair and use only one side of the table)
  - Provide meals inside housing units or cells
- **Group activities:**
  - Limit the size of group activities
  - Increase space between individuals during group activities
  - Suspend group programs where participants are likely to be in closer contact than they are in their housing environment
  - Consider alternatives to existing group activities, in outdoor areas or other areas where individuals can spread out
- **Housing:**
  - If space allows, reassign bunks to provide more space between individuals, ideally 6 feet or more in all directions. (Ensure that bunks are cleaned thoroughly if assigned to a new occupant.)
  - Arrange bunks so that individuals sleep head to foot to increase the distance between them
  - Rearrange scheduled movements to minimize mixing of individuals from different housing areas
- **Medical:**
  - If possible, designate a room near each housing unit to evaluate individuals with COVID-19 symptoms, rather than having them walk through the facility to be evaluated in the medical unit. If this is not feasible, consider staggering sick call.
  - Designate a room near the intake area to evaluate new entrants who are flagged by the intake screening process for COVID-19 symptoms or case contact, before they move to other parts of the facility.

- **Communicate clearly and frequently with incarcerated/detained persons about changes to their daily routine and how they can contribute to risk reduction.**

- **Note that if group activities are discontinued, it will be important to identify alternative forms of activity to support the mental health of incarcerated/detained persons.**

- **Consider suspending work release programs and other programs that involve movement of incarcerated/detained individuals in and out of the facility.**
- **Provide up-to-date information about COVID-19 to incarcerated/detained persons on a regular basis, including:**
  - Symptoms of COVID-19 and its health risks
  - Reminders to report COVID-19 symptoms to staff at the first sign of illness
- **Consider having healthcare staff perform rounds on a regular basis to answer questions about COVID-19.**

Prevention Practices for Staff

- **Remind staff to stay at home if they are sick.** Ensure that staff are aware that they will not be able to enter the facility if they have symptoms of COVID-19, and that they will be expected to leave the facility as soon as possible if they develop symptoms while on duty.
- **Perform verbal screening (for COVID-19 symptoms and close contact with cases) and temperature checks for all staff daily on entry.** See Screening section below for wording of screening questions and a recommended procedure to safely perform temperature checks.
    - In very small facilities with only a few staff, consider self-monitoring or virtual monitoring (e.g., reporting to a central authority via phone).
    - Send staff home who do not clear the screening process, and advise them to follow CDC-recommended steps for persons who are ill with COVID-19 symptoms.
- **Provide staff with up-to-date information about COVID-19 and about facility policies on a regular basis, including:**
    - Symptoms of COVID-19 and its health risks
    - Employers' sick leave policy
    - **If staff develop a fever, cough, or shortness of breath while at work**: immediately put on a face mask, inform supervisor, leave the facility, and follow CDC-recommended steps for persons who are ill with COVID-19 symptoms.
    - **If staff test positive for COVID-19:** inform workplace and personal contacts immediately, and do not return to work until a decision to discontinue home medical isolation precautions is made. Monitor CDC guidance on discontinuing home isolation regularly as circumstances evolve rapidly.
    - **If a staff member is identified as a close contact of a COVID-19 case (either within the facility or in the community):** self-quarantine at home for 14 days and return to work if symptoms do not develop. If symptoms do develop, follow CDC-recommended steps for persons who are ill with COVID-19 symptoms.
- **If a staff member has a confirmed COVID-19 infection, the relevant employers should inform other staff about their possible exposure to COVID-19 in the workplace, but should maintain confidentiality as required by the Americans with Disabilities Act.**
    - Employees who are close contacts of the case should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).
- **When feasible and consistent with security priorities, encourage staff to maintain a distance of 6 feet or more from an individual with respiratory symptoms while interviewing, escorting, or interacting in other ways.**
- **Ask staff to keep interactions with individuals with respiratory symptoms as brief as possible.**

Prevention Practices for Visitors

- **If possible, communicate with potential visitors to discourage contact visits in the interest of their own health and the health of their family members and friends inside the facility.**
- **Perform verbal screening (for COVID-19 symptoms and close contact with cases) and temperature checks for all visitors and volunteers on entry.** See Screening section below for wording of screening questions and a recommended procedure to safely perform temperature checks.
    - Staff performing temperature checks should wear recommended PPE.
    - Exclude visitors and volunteers who do not clear the screening process or who decline screening.
- **Provide alcohol-based hand sanitizer with at least 60% alcohol in visitor entrances, exits, and waiting areas.**
- **Provide visitors and volunteers with information to prepare them for screening.**

- Instruct visitors to postpone their visit if they have symptoms of respiratory illness.
- If possible, inform potential visitors and volunteers before they travel to the facility that they should expect to be screened for COVID-19 (including a temperature check), and will be unable to enter the facility if they do not clear the screening process or if they decline screening.
- Display signage outside visiting areas explaining the COVID-19 screening and temperature check process. Ensure that materials are understandable for non-English speakers and those with low literacy.

- **Promote non-contact visits:**
  - Encourage incarcerated/detained persons to limit contact visits in the interest of their own health and the health of their visitors.
  - Consider reducing or temporarily eliminating the cost of phone calls for incarcerated/detained persons.
  - Consider increasing incarcerated/detained persons' telephone privileges to promote mental health and reduce exposure from direct contact with community visitors.
- **Consider suspending or modifying visitation programs, if legally permissible. For example, provide access to virtual visitation options where available.**
  - If moving to virtual visitation, clean electronic surfaces regularly. (See Cleaning guidance below for instructions on cleaning electronic surfaces.)
  - Inform potential visitors of changes to, or suspension of, visitation programs.
  - Clearly communicate any visitation program changes to incarcerated/detained persons, along with the reasons for them (including protecting their health and their family and community members' health).
  - If suspending contact visits, provide alternate means (e.g., phone or video visitation) for incarcerated/detained individuals to engage with legal representatives, clergy, and other individuals with whom they have legal right to consult.

NOTE: Suspending visitation would be done in the interest of incarcerated/detained persons' physical health and the health of the general public. However, visitation is important to maintain mental health. If visitation is suspended, facilities should explore alternative ways for incarcerated/detained persons to communicate with their families, friends, and other visitors in a way that is not financially burdensome for them. See above suggestions for promoting non-contact visits.

- **Restrict non-essential vendors, volunteers, and tours from entering the facility.**

Management

If there has been a suspected COVID-19 case inside the facility (among incarcerated/detained persons, staff, or visitors who have recently been inside), begin implementing Management strategies while test results are pending. Essential Management strategies include placing cases and individuals with symptoms under medical isolation, quarantining their close contacts, and facilitating necessary medical care, while observing relevant infection control and environmental disinfection protocols and wearing recommended PPE.

Operations

- **Implement alternate work arrangements deemed feasible in the Operational Preparedness**
- **Suspend all transfers of incarcerated/detained persons to and from other jurisdictions and facilities (including work release where relevant), unless necessary for medical evaluation, medical isolation/quarantine, care, extenuating security concerns, or to prevent overcrowding.**
  - If a transfer is absolutely necessary, perform verbal screening and a temperature check as outlined in the

Screening section below, before the individual leaves the facility. If an individual does not clear the screening process, delay the transfer and follow the protocol for a suspected COVID-19 case – including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing. If the transfer must still occur, ensure that the receiving facility has capacity to appropriately isolate the individual upon arrival. Ensure that staff transporting the individual wear recommended PPE (see Table 1) and that the transport vehicle is cleaned thoroughly after transport.

- **If possible, consider quarantining all new intakes for 14 days before they enter the facility's general population (SEPARATELY from other individuals who are quarantined due to contact with a COVID-19 case).** Subsequently in this document, this practice is referred to as **routine intake quarantine**.
- **When possible, arrange lawful alternatives to in-person court appearances.**
- **Incorporate screening for COVID-19 symptoms and a temperature check into release planning.**
  - Screen all releasing individuals for COVID-19 symptoms and perform a temperature check. (See Screening section below.)
    - If an individual does not clear the screening process, follow the protocol for a suspected COVID-19 case – including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing.
    - If the individual is released before the recommended medical isolation period is complete, discuss release of the individual with state, local, tribal, and/or territorial health departments to ensure safe medical transport and continued shelter and medical care, as part of release planning. Make direct linkages to community resources to ensure proper medical isolation and access to medical care.
    - Before releasing an incarcerated/detained individual with COVID-19 symptoms to a community-based facility, such as a homeless shelter, contact the facility's staff to ensure adequate time for them to prepare to continue medical isolation, or contact local public health to explore alternate housing options.
- Coordinate with state, local, tribal, and/or territorial health departments.
  - When a COVID-19 case is suspected, work with public health to determine action. See Medical Isolation section below.
  - When a COVID-19 case is suspected or confirmed, work with public health to identify close contacts who should be placed under quarantine. See Quarantine section below**.**
  - Facilities with limited onsite medical isolation, quarantine, and/or healthcare services should coordinate closely with state, local, tribal, and/or territorial health departments when they encounter a confirmed or suspected case, in order to ensure effective medical isolation or quarantine, necessary medical evaluation and care, and medical transfer if needed. See Facilities with Limited Onsite Healthcare Services section.

Hygiene

- **Continue to ensure that hand hygiene supplies are well-stocked in all areas of the facility.** (See above.)
- **Continue to emphasize practicing good hand hygiene and cough etiquette.** (See above.)

Cleaning and Disinfecting Practices

- **Continue adhering to recommended cleaning and disinfection procedures for the facility at large.** (See above.)
- **Reference specific cleaning and disinfection procedures for areas where a COVID-19 case has spent time (below).**

Medical Isolation of Confirmed or Suspected COVID-19 Cases

NOTE: Some recommendations below apply primarily to facilities with onsite healthcare capacity. Facilities without onsite healthcare capacity, or without sufficient space to implement effective medical isolation, should coordinate with local public health officials to ensure that COVID-19 cases will be appropriately isolated, evaluated, tested (if indicated), and given care.

- **As soon as an individual develops symptoms of COVID-19, they should wear a face mask (if it does not restrict breathing) and should be immediately placed under medical isolation in a separate environment from other individuals.**
- **Keep the individual's movement outside the medical isolation space to an absolute minimum.**
  - Provide medical care to cases inside the medical isolation space. See Infection Control and Clinical Care sections for additional details.
  - Serve meals to cases inside the medical isolation space.
  - Exclude the individual from all group activities.
  - Assign the isolated individual a dedicated bathroom when possible.
- **Ensure that the individual is wearing a face mask at all times when outside of the medical isolation space, and whenever another individual enters.** Provide clean masks as needed. Masks should be changed at least daily, and when visibly soiled or wet.
- **Facilities should make every possible effort to place suspected and confirmed COVID-19 cases under medical isolation individually. Each isolated individual should be assigned their own housing space and bathroom where possible.** Cohorting should only be practiced if there are no other available options.
  - If cohorting is necessary:
    - **Only individuals who are laboratory confirmed COVID-19 cases should be placed under medical isolation as a cohort. Do not cohort confirmed cases with suspected cases or case contacts.**
    - Unless no other options exist, do not house COVID-19 cases with individuals who have an undiagnosed respiratory infection.
    - Ensure that cohorted cases wear face masks at all times.
  - **In order of preference, individuals under medical isolation should be housed:**
    - Separately, in single cells with solid walls (i.e., not bars) and solid doors that close fully
    - Separately, in single cells with solid walls but without solid doors
    - As a cohort, in a large, well-ventilated cell with solid walls and a solid door that closes fully. Employ social distancing strategies related to housing in the Prevention section above.
    - As a cohort, in a large, well-ventilated cell with solid walls but without a solid door. Employ social distancing strategies related to housing in the Prevention section above.
    - As a cohort, in single cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. (Although individuals are in single cells in this scenario, the airflow between cells essentially makes it a cohort arrangement in the context of COVID-19.)
    - As a cohort, in multi-person cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. Employ social distancing strategies related to housing in the Prevention section above.
    - Safely transfer individual(s) to another facility with available medical isolation capacity in one of the above arrangements
      (NOTE – Transfer should be avoided due to the potential to introduce infection to another facility; proceed only if no other options are available.)

If the ideal choice does not exist in a facility, use the next best alternative.

- **If the number of confirmed cases exceeds the number of individual medical isolation spaces available in the facility, be especially mindful of cases who are at higher risk of severe illness from COVID-19.** Ideally, they should not be cohorted with other infected individuals. If cohorting is unavoidable, make all possible accommodations to prevent transmission of other infectious diseases to the higher-risk individual. (For example, allocate more space for a higher-risk individual within a shared medical isolation space.)
    - Persons at higher risk may include older adults and persons of any age with serious underlying medical conditions such as lung disease, heart disease, and diabetes. See CDC's website for a complete list, and check regularly for updates as more data become available to inform this issue.
    - Note that incarcerated/detained populations have higher prevalence of infectious and chronic diseases and are in poorer health than the general population, even at younger ages.
- **Custody staff should be designated to monitor these individuals exclusively where possible.** These staff should wear recommended PPE as appropriate for their level of contact with the individual under medical isolation (see PPE section below) and should limit their own movement between different parts of the facility to the extent possible.
- **Minimize transfer of COVID-19 cases between spaces within the healthcare unit.**
- **Provide individuals under medical isolation with tissues and, if permissible, a lined no-touch trash receptacle.** Instruct them to:
    - **Cover** their mouth and nose with a tissue when they cough or sneeze
    - **Dispose** of used tissues immediately in the lined trash receptacle
    - **Wash hands** immediately with soap and water for at least 20 seconds. If soap and water are not available, clean hands with an alcohol-based hand sanitizer that contains at least 60% alcohol (where security concerns permit). Ensure that hand washing supplies are continually restocked.
- **Maintain medical isolation until all the following criteria have been met. Monitor the CDC website for updates to these criteria.**
    - **For individuals who will be tested to determine if they are still contagious:**
        - The individual has been free from fever for at least 72 hours without the use of fever-reducing medications **AND**
        - The individual's other symptoms have improved (e.g., cough, shortness of breath) **AND**
        - The individual has tested negative in at least two consecutive respiratory specimens collected at least 24 hours apart
    - **For individuals who will NOT be tested to determine if they are still contagious:**
        - The individual has been free from fever for at least 72 hours without the use of fever-reducing medications **AND**
        - The individual's other symptoms have improved (e.g., cough, shortness of breath) **AND**
        - At least 7 days have passed since the first symptoms appeared
    - **For individuals who had a confirmed positive COVID-19 test but never showed symptoms:**
        - At least 7 days have passed since the date of the individual's first positive COVID-19 test **AND**
        - The individual has had no subsequent illness
- **Restrict cases from leaving the facility while under medical isolation precautions, unless released from custody or if a transfer is necessary for medical care, infection control, lack of medical isolation space, or extenuating security concerns.**
    - If an incarcerated/detained individual who is a COVID-19 case is released from custody during their medical isolation period, contact public health to arrange for safe transport and continuation of necessary medical care and medical isolation as part of release planning.

Cleaning Spaces where COVID-19 Cases Spent Time

- **Thoroughly clean and disinfect all areas where the confirmed or suspected COVID-19 case spent time. Note – these protocols apply to suspected cases as well as confirmed cases, to ensure adequate disinfection in the event that the suspected case does, in fact, have COVID-19. Refer to the Definitions section for the distinction between confirmed and suspected cases.**
  - Close off areas used by the infected individual. If possible, open outside doors and windows to increase air circulation in the area. Wait as long as practical, up to 24 hours under the poorest air exchange conditions (consult CDC Guidelines for Environmental Infection Control in Health-Care Facilities for wait time based on different ventilation conditions), before beginning to clean and disinfect, to minimize potential for exposure to respiratory droplets.
  - Clean and disinfect all areas (e.g., cells, bathrooms, and common areas) used by the infected individual, focusing especially on frequently touched surfaces (see list above in Prevention section).
- **Hard (non-porous) surface cleaning and disinfection**
  - If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
  - For disinfection, most common EPA-registered household disinfectants should be effective. Choose cleaning products based on security requirements within the facility.
    - Consult a list of products that are EPA-approved for use against the virus that causes COVID-19 . Follow the manufacturer's instructions for all cleaning and disinfection products (e.g., concentration, application method and contact time, etc.).
    - Diluted household bleach solutions can be used if appropriate for the surface. Follow the manufacturer's instructions for application and proper ventilation, and check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted. Prepare a bleach solution by mixing:
      - 5 tablespoons (1/3rd cup) bleach per gallon of water or
      - 4 teaspoons bleach per quart of water
- **Soft (porous) surface cleaning and disinfection**
  - For soft (porous) surfaces such as carpeted floors and rugs, remove visible contamination if present and clean with appropriate cleaners indicated for use on these surfaces. After cleaning:
    - If the items can be laundered, launder items in accordance with the manufacturer's instructions using the warmest appropriate water setting for the items and then dry items completely.
    - Otherwise, use products that are EPA-approved for use against the virus that causes COVID-19 and are suitable for porous surfaces.
- **Electronics cleaning and disinfection**
  - For electronics such as tablets, touch screens, keyboards, and remote controls, remove visible contamination if present.
    - Follow the manufacturer's instructions for all cleaning and disinfection products.
    - Consider use of wipeable covers for electronics.
    - If no manufacturer guidance is available, consider the use of alcohol-based wipes or spray containing at least 70% alcohol to disinfect touch screens. Dry surfaces thoroughly to avoid pooling of liquids.

Additional information on cleaning and disinfection of communal facilities such can be found on CDC's website.

- **Ensure that staff and incarcerated/detained persons performing cleaning wear recommended PPE.** (See PPE section below.)
- **Food service items.** Cases under medical isolation should throw disposable food service items in the trash in their medical isolation room. Non-disposable food service items should be handled with gloves and washed with hot

water or in a dishwasher. Individuals handling used food service items should clean their hands after removing gloves.

- **Laundry from a COVID-19 cases can be washed with other individuals' laundry.**
  - Individuals handling laundry from COVID-19 cases should wear disposable gloves, discard after each use, and clean their hands after.
  - Do not shake dirty laundry. This will minimize the possibility of dispersing virus through the air.
  - Launder items as appropriate in accordance with the manufacturer's instructions. If possible, launder items using the warmest appropriate water setting for the items and dry items completely.
  - Clean and disinfect clothes hampers according to guidance above for surfaces. If permissible, consider using a bag liner that is either disposable or can be laundered.
- **Consult cleaning recommendations above to ensure that transport vehicles are thoroughly cleaned after carrying a confirmed or suspected COVID-19 case.**

Quarantining Close Contacts of COVID-19 Cases

NOTE: Some recommendations below apply primarily to facilities with onsite healthcare capacity. Facilities without onsite healthcare capacity, or without sufficient space to implement effective quarantine, should coordinate with local public health officials to ensure that close contacts of COVID-19 cases will be effectively quarantined and medically monitored.

- **Incarcerated/detained persons who are close contacts of a confirmed or suspected COVID-19 case (whether the case is another incarcerated/detained person, staff member, or visitor) should be placed under quarantine for 14 days (see CDC guidelines).**
  - If an individual is quarantined due to contact with a suspected case who is subsequently tested for COVID-19 and receives a negative result, the quarantined individual should be released from quarantine restrictions.
- **In the context of COVID-19, an individual (incarcerated/detained person or staff) is considered a close contact if they:**
  - Have been within approximately 6 feet of a COVID-19 case for a prolonged period of time **OR**
  - Have had direct contact with infectious secretions of a COVID-19 case (e.g., have been coughed on)

Close contact can occur while caring for, living with, visiting, or sharing a common space with a COVID-19 case. Data to inform the definition of close contact are limited. Considerations when assessing close contact include the duration of exposure (e.g., longer exposure time likely increases exposure risk) and the clinical symptoms of the person with COVID-19 (e.g., coughing likely increases exposure risk, as does exposure to a severely ill patient).

- **Keep a quarantined individual's movement outside the quarantine space to an absolute minimum.**
  - Provide medical evaluation and care inside or near the quarantine space when possible.
  - Serve meals inside the quarantine space.
  - Exclude the quarantined individual from all group activities.
  - Assign the quarantined individual a dedicated bathroom when possible.
- **Facilities should make every possible effort to quarantine close contacts of COVID-19 cases individually.** Cohorting multiple quarantined close contacts of a COVID-19 case could transmit COVID-19 from those who are infected to those who are uninfected. Cohorting should only be practiced if there are no other available options.
  - If cohorting of close contacts under quarantine is absolutely necessary, symptoms of all individuals should be monitored closely, and individuals with symptoms of COVID-19 should be placed under medical isolation
  - If an entire housing unit is under quarantine due to contact with a case from the same housing unit, the entire

housing unit may need to be treated as a cohort and quarantine in place.

- Some facilities may choose to quarantine all new intakes for 14 days before moving them to the facility's general population as a general rule (not because they were exposed to a COVID-19 case). Under this scenario, avoid mixing individuals quarantined due to exposure to a COVID-19 case with individuals undergoing routine intake quarantine.
- If at all possible, do not add more individuals to an existing quarantine cohort after the 14-day quarantine clock has started.

- **If the number of quarantined individuals exceeds the number of individual quarantine spaces available in the facility, be especially mindful of those who are at higher risk of severe illness from COVID-19.** Ideally, they should not be cohorted with other quarantined individuals. If cohorting is unavoidable, make all possible accommodations to reduce exposure risk for the higher-risk individuals. (For example, intensify social distancing strategies for higher-risk individuals.)
- **In order of preference, multiple quarantined individuals should be housed:**
  - Separately, in single cells with solid walls (i.e., not bars) and solid doors that close fully
  - Separately, in single cells with solid walls but without solid doors
  - As a cohort, in a large, well-ventilated cell with solid walls, a solid door that closes fully, and at least 6 feet of personal space assigned to each individual in all directions
  - As a cohort, in a large, well-ventilated cell with solid walls and at least 6 feet of personal space assigned to each individual in all directions, but without a solid door
  - As a cohort, in single cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells creating at least 6 feet of space between individuals. (Although individuals are in single cells in this scenario, the airflow between cells essentially makes it a cohort arrangement in the context of COVID-19.)
  - As a cohort, in multi-person cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. Employ social distancing strategies related to housing in the Prevention section to maintain at least 6 feet of space between individuals housed in the same cell.
  - As a cohort, in individuals' regularly assigned housing unit but with no movement outside the unit (if an entire housing unit has been exposed). Employ social distancing strategies related to housing in the Prevention section above to maintain at least 6 feet of space between individuals.
  - Safely transfer to another facility with capacity to quarantine in one of the above arrangements (NOTE – Transfer should be avoided due to the potential to introduce infection to another facility; proceed only if no other options are available.)
- **Quarantined individuals should wear face masks if feasible based on local supply, as source control, under the following circumstances** (see PPE section and Table 1)**:**
  - If cohorted, quarantined individuals should wear face masks at all times (to prevent transmission from infected to uninfected individuals).
  - If quarantined separately, individuals should wear face masks whenever a non-quarantined individual enters the quarantine space.
  - All quarantined individuals should wear a face mask if they must leave the quarantine space for any reason.
  - Asymptomatic individuals under routine intake quarantine (with no known exposure to a COVID-19 case) do not need to wear face masks.
- **Staff who have close contact with quarantined individuals should wear recommended PPE if feasible based on local supply, feasibility, and safety within the scope of their duties** (see PPE section and Table 1).
  - Staff supervising asymptomatic incarcerated/detained persons under routine intake quarantine (with no known exposure to a COVID-19 case) do not need to wear PPE.

- **Quarantined individuals should be monitored for COVID-19 symptoms twice per day, including temperature checks.**
  - If an individual develops symptoms, they should be moved to medical isolation immediately and further evaluated. (See Medical Isolation section above.)
  - See Screening section for a procedure to perform temperature checks safely on asymptomatic close contacts of COVID-19 cases.
- **If an individual who is part of a quarantined cohort becomes symptomatic:**
  - **If the individual is tested for COVID-19 and tests positive:** the 14-day quarantine clock for the remainder of the cohort must be reset to 0.
  - **If the individual is tested for COVID-19 and tests negative:** the 14-day quarantine clock for this individual and the remainder of the cohort does not need to be reset. This individual can return from medical isolation to the quarantined cohort for the remainder of the quarantine period.
  - **If the individual is not tested for COVID-19:** the 14-day quarantine clock for the remainder of the cohort must be reset to 0.
- **Restrict quarantined individuals from leaving the facility (including transfers to other facilities) during the 14-day quarantine period, unless released from custody or a transfer is necessary for medical care, infection control, lack of quarantine space, or extenuating security concerns.**
- **Quarantined individuals can be released from quarantine restrictions if they have not developed symptoms during the 14-day quarantine period.**
- **Meals should be provided to quarantined individuals in their quarantine spaces.** Individuals under quarantine should throw disposable food service items in the trash. Non-disposable food service items should be handled with gloves and washed with hot water or in a dishwasher. Individuals handling used food service items should clean their hands after removing gloves.
- **Laundry from quarantined individuals can be washed with other individuals' laundry.**
  - Individuals handling laundry from quarantined persons should wear disposable gloves, discard after each use, and clean their hands after.
  - Do not shake dirty laundry. This will minimize the possibility of dispersing virus through the air.
  - Launder items as appropriate in accordance with the manufacturer's instructions. If possible, launder items using the warmest appropriate water setting for the items and dry items completely.
  - Clean and disinfect clothes hampers according to guidance above for surfaces. If permissible, consider using a bag liner that is either disposable or can be laundered.

Management of Incarcerated/Detained Persons with COVID-19 Symptoms

NOTE: Some recommendations below apply primarily to facilities with onsite healthcare capacity. Facilities without onsite healthcare capacity or without sufficient space for medical isolation should coordinate with local public health officials to ensure that suspected COVID-19 cases will be effectively isolated, evaluated, tested (if indicated), and given care.

- **If possible, designate a room near each housing unit for healthcare staff to evaluate individuals with COVID-19 symptoms, rather than having them walk through the facility to be evaluated in the medical unit.**
- **Incarcerated/detained individuals with COVID-19 symptoms should wear a face mask and should be placed under medical isolation immediately. Discontinue the use of a face mask if it inhibits breathing. See Medical Isolation section above.**

- **Medical staff should evaluate symptomatic individuals to determine whether COVID-19 testing is indicated.** Refer to CDC guidelines for information on evaluation and testing. See Infection Control and Clinical Care sections below as well.
- **If testing is indicated (or if medical staff need clarification on when testing is indicated), contact the state, local, tribal, and/or territorial health department. Work with public health or private labs as available to access testing supplies or services.**
  - If the COVID-19 test is positive, continue medical isolation. (See Medical Isolation section above.)
  - If the COVID-19 test is negative, return the individual to their prior housing assignment unless they require further medical assessment or care.

Management Strategies for Incarcerated/Detained Persons without COVID-19 Symptoms

- **Provide clear information to incarcerated/detained persons about the presence of COVID-19 cases within the facility, and the need to increase social distancing and maintain hygiene precautions.**
  - Consider having healthcare staff perform regular rounds to answer questions about COVID-19.
  - Ensure that information is provided in a manner that can be understood by non-English speaking individuals and those with low literacy, and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or low-vision.
- **Implement daily temperature checks in housing units where COVID-19 cases have been identified, especially if there is concern that incarcerated/detained individuals are not notifying staff of symptoms.**See Screening section for a procedure to safely perform a temperature check.
- **Consider additional options to intensify social distancing** within the facility.

Management Strategies for Staff

- **Provide clear information to staff about the presence of COVID-19 cases within the facility, and the need to enforce social distancing and encourage hygiene precautions.**
  - Consider having healthcare staff perform regular rounds to answer questions about COVID-19 from staff.
- **Staff identified as close contacts of a COVID-19 case should self-quarantine at home for 14 days and may return to work if symptoms do not develop.**
  - See above for definition of a close contact.
  - Refer to CDC guidelines for further recommendations regarding home quarantine for staff.

Infection Control

Infection control guidance below is applicable to all types of correctional facilities. Individual facilities should assess their unique needs based on the types of exposure staff and incarcerated/detained persons may have with confirmed or suspected COVID-19 cases.

- **All individuals who have the potential for direct or indirect exposure to COVID-19 cases or infectious materials (including body substances; contaminated medical supplies, devices, and equipment; contaminated environmental surfaces; or contaminated air) should follow infection control practices outlined in the CDC Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19) in Healthcare Settings. Monitor these guidelines regularly for updates.**
  - Implement the above guidance as fully as possible within the correctional/detention context. Some of the

specific language may not apply directly to healthcare settings within correctional facilities and detention centers, or to facilities without onsite healthcare capacity, and may need to be adapted to reflect facility operations and custody needs.

- Note that these recommendations apply to staff as well as to incarcerated/detained individuals who may come in contact with contaminated materials during the course of their work placement in the facility (e.g., cleaning).

- **Staff should exercise caution when in contact with individuals showing symptoms of a respiratory infection.** Contact should be minimized to the extent possible until the infected individual is wearing a face mask. If COVID-19 is suspected, staff should wear recommended PPE (see PPE section).
- **Refer to PPE section to determine recommended PPE for individuals persons in contact with confirmed COVID-19 cases, contacts, and potentially contaminated items.**

Clinical Care of COVID-19 Cases

- **Facilities should ensure that incarcerated/detained individuals receive medical evaluation and treatment at the first signs of COVID-19 symptoms.**
  - If a facility is not able to provide such evaluation and treatment, a plan should be in place to safely transfer the individual to another facility or local hospital.
  - The initial medical evaluation should determine whether a symptomatic individual is at higher risk for severe illness from COVID-19. Persons at higher risk may include older adults and persons of any age with serious underlying medical conditions such as lung disease, heart disease, and diabetes. See CDC's website for a complete list, and check regularly for updates as more data become available to inform this issue.
- **Staff evaluating and providing care for confirmed or suspected COVID-19 cases should follow the CDC Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19) and monitor the guidance website regularly for updates to these recommendations.**
- **Healthcare staff should evaluate persons with respiratory symptoms or contact with a COVID-19 case in a separate room, with the door closed if possible, while wearing recommended PPE and ensuring that the suspected case is wearing a face mask.**
  - If possible, designate a room near each housing unit to evaluate individuals with COVID-19 symptoms, rather than having them walk through the facility to be evaluated in the medical unit.
- **Clinicians are strongly encouraged to test for other causes of respiratory illness (e.g., influenza).**
- **The facility should have a plan in place to safely transfer persons with severe illness from COVID-19 to a local hospital if they require care beyond what the facility is able to provide.**
- **When evaluating and treating persons with symptoms of COVID-19 who do not speak English, using a language line or provide a trained interpreter when possible.**

Recommended PPE and PPE Training for Staff and Incarcerated/Detained Persons

- **Ensure that all staff (healthcare and non-healthcare) and incarcerated/detained persons who will have contact with infectious materials in their work placements have been trained to correctly don, doff, and dispose of PPE relevant to the level of contact they will have with confirmed and suspected COVID-19 cases.**
  - Ensure that staff and incarcerated/detained persons who require respiratory protection (e.g., N95s) for their work responsibilities have been medically cleared, trained, and fit-tested in the context of an employer's respiratory protection program.
  - For PPE training materials and posters, please visit the CDC website on Protecting Healthcare Personnel.

- **Ensure that all staff are trained to perform hand hygiene after removing PPE.**
- **If administrators anticipate that incarcerated/detained persons will request unnecessary PPE, consider providing training on the different types of PPE that are needed for differing degrees of contact with COVID-19 cases and contacts, and the reasons for those differences (see Table 1). Monitor linked CDC guidelines in Table 1 for updates to recommended PPE.**
- **Keep recommended PPE near the spaces in the facility where it could be needed, to facilitate quick access in an emergency.**
- **Recommended PPE for incarcerated/detained individuals and staff in a correctional facility** will vary based on the type of contact they have with COVID-19 cases and their contacts (see Table 1). Each type of recommended PPE is defined below. **As above, note that PPE shortages are anticipated in every category during the COVID-19 response.**
  - **N95 respirator**
    See below for guidance on when face masks are acceptable alternatives for N95s. N95 respirators should be prioritized when staff anticipate contact with infectious aerosols from a COVID-19 case.
  - **Face mask**
  - **Eye protection** – goggles or disposable face shield that fully covers the front and sides of the face
  - **A single pair of disposable patient examination gloves**
    Gloves should be changed if they become torn or heavily contaminated.
  - **Disposable medical isolation gown or single-use/disposable coveralls, when feasible**
    - If custody staff are unable to wear a disposable gown or coveralls because it limits access to their duty belt and gear, ensure that duty belt and gear are disinfected after close contact with the individual. Clean and disinfect duty belt and gear prior to reuse using a household cleaning spray or wipe, according to the product label.
    - If there are shortages of gowns, they should be prioritized for aerosol-generating procedures, care activities where splashes and sprays are anticipated, and high-contact patient care activities that provide opportunities for transfer of pathogens to the hands and clothing of staff.
- **Note that shortages of all PPE categories are anticipated during the COVID-19 response, particularly for non-healthcare workers. Guidance for optimizing the supply of each category can be found on CDC's website:**
  - **Guidance in the event of a shortage of N95 respirators**
    - Based on local and regional situational analysis of PPE supplies, **face masks are an acceptable alternative when the supply chain of respirators cannot meet the demand**. During this time, available respirators should be prioritized for staff engaging in activities that would expose them to respiratory aerosols, which pose the highest exposure risk.
  - **Guidance in the event of a shortage of face masks**
  - **Guidance in the event of a shortage of eye protection**
  - **Guidance in the event of a shortage of gowns/coveralls**

Classification of Individual Wearing PPE	N95 respirator	Face mask	Eye Protection	Gloves	Gown/ Coveralls
Incarcerated/Detained Persons					
Asymptomatic incarcerated/detained persons (under quarantine as close contacts of a COVID-19 case*)	Apply face masks for source control as feasible based on local supply, especially if housed as a cohort				

Incarcerated/detained persons who are confirmed or suspected COVID-19 cases, or showing symptoms of COVID-19		X			
Incarcerated/detained persons in a work placement handling laundry or used food service items from a COVID-19 case or case contact				X	X
Incarcerated/detained persons in a work placement cleaning areas where a COVID-19 case has spent time	Additional PPE may be needed based on the product label. See CDC guidelines for more details.			X	X
Staff					
Staff having direct contact with asymptomatic incarcerated/detained persons under quarantine as close contacts of a COVID-19 case* (but not performing temperature checks or providing medical care)		Face mask, eye protection, and gloves as local supply and scope of duties allow.			
Staff performing temperature checks on any group of people (staff, visitors, or incarcerated/detained persons), or providing medical care to asymptomatic quarantined persons		X	X	X	X
Staff having direct contact with (including transport) or offering medical care to confirmed or suspected COVID-19 cases (see CDC infection control guidelines)	X**		X	X	X
Staff present during a procedure on a confirmed or suspected COVID-19 case that may generate respiratory aerosols (see CDC infection control guidelines)	X		X	X	X
Staff handling laundry or used food service items from a COVID-19 case or case contact				X	X
Staff cleaning an area where a COVID-19 case has spent time	Additional PPE may be needed based on the product label. See CDC guidelines for more details.			X	X

Classification of Individual Wearing PPE

* If a facility chooses to routinely quarantine all new intakes (without symptoms or known exposure to a COVID-19 case) before integrating into the facility's general population, face masks are not necessary.

** A NIOSH-approved N95 is preferred. However, based on local and regional situational analysis of PPE supplies, face masks are an acceptable alternative when the supply chain of respirators cannot meet the demand. During this time, available respirators should

be prioritized for procedures that are likely to generate respiratory aerosols, which would pose the highest exposure risk to staff.

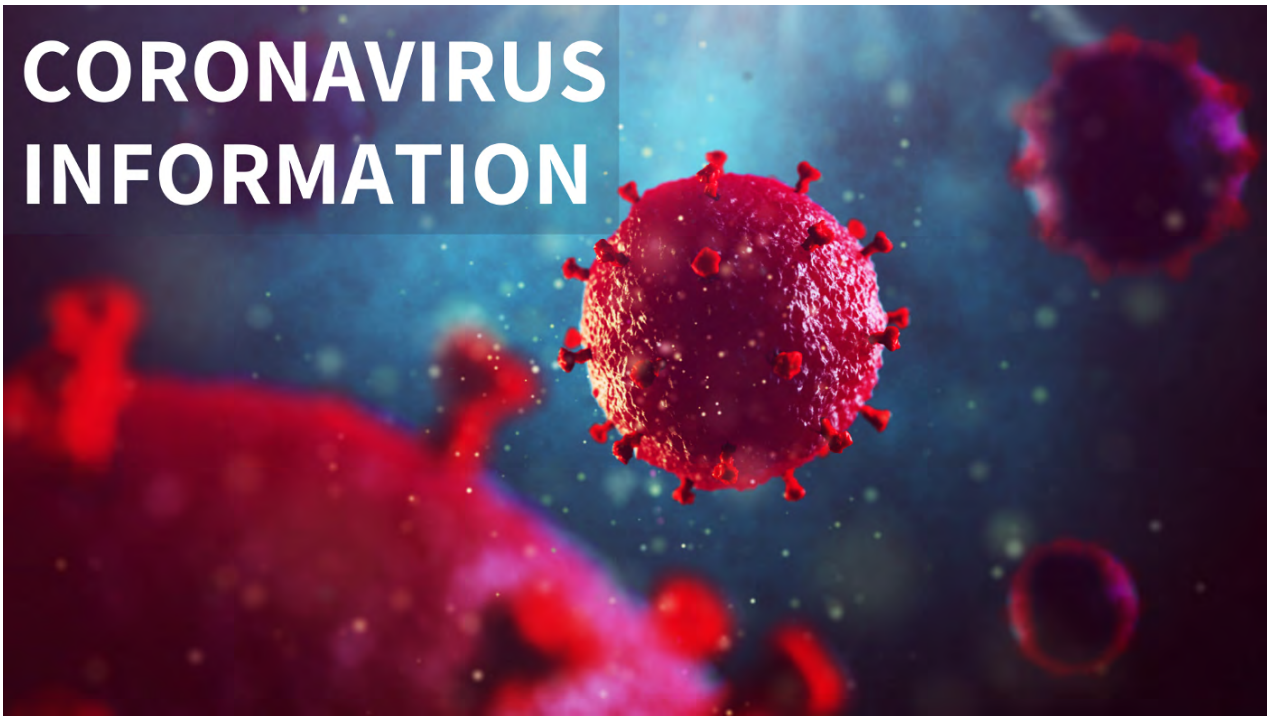
Verbal Screening and Temperature Check Protocols for Incarcerated/Detained Persons, Staff, and Visitors

The guidance above recommends verbal screening and temperature checks for incarcerated/detained persons, staff, volunteers, and visitors who enter correctional and detention facilities, as well as incarcerated/detained persons who are transferred to another facility or released from custody. Below, verbal screening questions for COVID-19 symptoms and contact with known cases, and a safe temperature check procedure are detailed.

- **Verbal screening for symptoms of COVID-19 and contact with COVID-19 cases should include the following questions:**
  - *Today or in the past 24 hours, have you had any of the following symptoms?*
    - *Fever, felt feverish, or had chills?*
    - *Cough?*
    - *Difficulty breathing?*
  - *In the past 14 days, have you had contact with a person known to be infected with the novel coronavirus (COVID-19)?*
- **The following is a protocol to safely check an individual's temperature:**
  - Perform hand hygiene
  - Put on a face mask, eye protection (goggles or disposable face shield that fully covers the front and sides of the face), gown/coveralls, and a single pair of disposable gloves
  - Check individual's temperature
  - **If performing a temperature check on multiple individuals, ensure that a clean pair of gloves is used for each individual and that the thermometer has been thoroughly cleaned in between each check.** If disposable or non-contact thermometers are used and the screener did not have physical contact with an individual, gloves do not need to be changed before the next check. If non-contact thermometers are used, they should be cleaned routinely as recommended by CDC for infection control.
  - Remove and discard PPE
  - Perform hand hygiene

Page last reviewed: April 18, 2020

Content source: National Center for Immunization and Respiratory Diseases (NCIRD), Division of Viral Diseases



MDOC Response and Information on coronavirus (COVID-19)

Updated April 26, 2020

MI Dept. of Corrections Follow
Mar 12 · 18 min read

Those with questions about parole, healthcare or programming for prisoners, correctional facility operations or other corrections-

related issues can call the numbers listed below for more information. Please call the number for the section that most appropriately applies to your issue.

Please do not leave a message on more than one phone line. This will slow down our ability to respond in a timely manner to your concern. Due to a high call volume, numbers may go to voicemail. Please leave a message and a representative from the specific program area will return your call as soon as possible.

If you have questions about the early release of a prisoner, please know that the MDOC has no legal authority to release prisoners prior to their earliest release date because of Truth in Sentencing laws, which require those sentenced to prison to serve their entire minimum sentence before they can be paroled.

If you are trying to reach an incarcerated loved one, please contact the correctional facility where the prisoner is housed. You can find a list of all MDOC correctional facilities and their contact information here. Prisoners continue to have access to phones and electronic messaging in order to contact family and friends.

Parole and Probation (517) 335–1979

- Release info
- Parole status
- General field questions

Healthcare (517) 335–2263

- Status of a prisoner
- COVID-19 related protocols
- Healthcare-related questions

Prison (517) 335–1418

- Questions related to PPE supplies
- Questions related to cleaning supplies
- Questions related to physical plant
- General prison-related questions

Programming and Education (517) 881–2534

- Questions related to programming
- Questions related to education

General (517) 388–6892 or (517) 388–6894

- Questions that do not fall into one of the above categories

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Frequently Asked Questions about the MDOC's response to coronavirus (COVID-19)

The Michigan Department of Corrections is committed to ensuring the safety and well-being of staff, the public and those under our supervision.

You can click here to find information that will help address many commonly-asked questions regarding the MDOC's response to coronavirus (COVID-19) and preventative steps we're taking to help protect the health of employees, prisoners and those in the community.

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Mourning the loss of Michigan Department of Corrections staff

Corrections staff are courageous. They never hesitate to help others in need, regardless of the situation, and show an unending commitment to protecting the citizens of our state safe.

We mourn the loss of two corrections professionals, a corrections transportation officer and a word processing assistant at the Lahser Probation Office in Detroit, who passed away after contracting coronavirus (COVID-19).

Their dedication to the safety of all Michigan residents will not be forgotten. Our thoughts are with their family, friends and colleagues during this difficult time.

Remembering Prisoners who have Passed

The MDOC is sad to report there have been a total of 33 deaths of prisoners who had tested positive for COVID-19.

The most recent deaths, reported on April 26, were of a prisoner at Duane Waters Health Center and a prisoner at Lakeland Correctional Facility. On April 25, a prisoner at Lakeland Correctional Facility passed away. On April 24, the deaths of a prisoner at Lakeland Correctional Facility and a prisoner at Parnall Correctional Facility were reported. On April 23, the department reported the deaths of a prisoner at Lakeland Correctional Facility, Parnall Correctional Facility and Woodland Center Correctional Facility. On April 21, there were of three prisoners at Macomb Correctional Facility who passed away. On April 18, 19 and 20 the deaths of prisoners at Lakeland Correctional Facility were also reported. On April 17, the department reported the deaths of four prisoners who had been housed at Detroit Reentry Center, Parnall Correctional Facility, Macomb Correctional Facility and Lakeland Correctional Facility. The death of a prisoner who had been housed at Charles Egeler Reception and Guidance Center and a prisoner at Lakeland Correctional Facility were reported on April 15. A prisoner who had been housed at Women's Huron Valley Correctional Facility and had tested positive for the virus died at a local hospital April

14 due to cardiac arrest.

A prisoner who had been housed at Parnall Correctional Facility and tested positive died at a local hospital April 13. On April 11 the department reported prisoners at Charles Egeler Reception and Guidance Center C- Unit and the Duane Waters Health Center had passed away.

On April 10, the department reported the passing of prisoners at Lakeland Correctional Facility and Women's Huron Valley Correctional Facility. The prisoner who died at WHV had not been tested at the facility and was not a close contact or a patient under investigation. After her death, the hospital tested her for COVID-19 and the positive test result came back April 10.

The passing of three prisoners including two prisoners from Parnall Correctional Facility and one from Detroit Reentry Center, was announced on April 9. A prisoner who tested positive at Lakeland Correctional Facility and was taken to the hospital for further treatment also died on April 7.

The MDOC on April 1 had its first death of a prisoner who tested positive for COVID-19. He was housed at Parnall Correctional Facility. This prisoner had not previously been tested and had never told healthcare that he was feeling sick. He was found unresponsive in his cell and was taken to the hospital, where he died. The hospital then tested him and the results came back

positive for the virus.

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Total Confirmed Prisoner and Staff Cases to Date by Location

Updated April 26, 2020– p.m.

The department has been leading the nation when it comes to consistent testing of the prisoner population when they have symptoms. We have now started a system of expanded testing beginning at Lakeland Correctional Facility. The plan is to test all prisoners at Lakeland by the end of the week and begin testing prisoners at G. Robert Cotton Correctional Facility the week of April 26.

- *According to the Michigan Department of Health and Human Services, an individual is considered "recovered" once they have gone 30 days from the onset of symptoms.
- *A step-down unit has been opened at Gus Harrison Correctional Facility for prisoners who previously tested positive for COVID-19, and have since been medically cleared by the MDOC's chief medical officer, are symptom free and are no longer considered contagious. Access to the unit is limited and prisoners in the unit do not have contact with the rest of the population at Gus Harrison Correctional Facility. Prisoners at Women's Huron Valley Correctional Facility are housed in a step-down unit at the facility and are not transferred to Gus Harrison Correctional.

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What the MDOC is doing in response

The Michigan Department of Corrections is taking a series of measures to protect its staff, the prison population and the community as positive cases of coronavirus disease 2019 (COVID-19) have been identified in the state.

There are now 37,778 cases of coronavirus disease 2019 (COVID-19) in Michigan as of April 26.

Information around this outbreak is changing rapidly. The latest information is available at Michigan.gov/Coronavirus and CDC.gov/Coronavirus.

Personal Protective Equipment, cleaning and mitigation measures

- Michigan State Industries has produced masks for all prisoners and correctional facility staff to wear. Each employee and prisoner received three masks each and the masks can be laundered and worn again. Facility staff are also permitted to bring their own PPE, such as masks, gloves and gowns. Staff are expected to wear their mask during their entire shift and prisoners are expected to also wear their masks at all times, except while eating, sleeping or showering. Michigan State Industries is also manufacturing gowns, protective eyewear and protective suits.
- All MDOC staff transporting a prisoner on or off grounds are required to be dressed in full personal protective equipment (PPE), which is available for those employees.
- All facilities have received approval from the regional sanitation officer to use bleach during facility cleaning. Facilities have enhanced cleaning efforts and cleaning products are available to clean commonly-used areas and

phones before and after use. Cleaning efforts have been doubled at facilities with vulnerable prisoner populations. We have increased our production of soap and ensured that all prisoner areas and bathrooms have plentiful access to soap.

- Movements have been modified to help facilitate social distancing and the number of prisoners attending classes and meals has been reduced so prisoners can be seated farther apart. Prisoners and staff are frequently reminded of the need for social distancing and prisoners are instructed not to gather in groups on the yard. Activities such as basketball and weight pit have been suspended to encourage social distancing, as well. There are also markers and cones set up for med lines and in the chow hall as a visual reference for prisoners on how far apart they should stand.
- The department has been leading the nation when it comes to consistent testing of the prisoner population when they have symptoms. We have now started a system of expanded testing beginning at Lakeland Correctional Facility. All prisoners at Lakeland are expected to be tested by the end of the week of April 19 and testing is expected to begin at G. Robert Cotton Correctional Facility the week of April 26.

Visits and Transfers

- Visitation at facilities statewide was suspended as of March 13.
- The department worked with communication vendors GTL and JPay to provide enhanced services for prisoners to

communicate with family and friends during the period without visits. GTL has offered two free, five-minute phone calls each week and JPay is offering two free stamps per week. Both of these measures began March 17.

- In connection with visitation suspension, face-to-face college classes at all facilities have also been suspended effective immediately. The MDOC will work with higher education institutions willing and able to deliver classes as correspondence courses. Core programming and school classes taught by MDOC staff will continue.
- Outside contractors for substance abuse programming will be allowed inside and will be screened upon entry per the screening protocol. Attorney visits will continue to be authorized.
- During this time, transfers of prisoners or staff between facilities will not be authorized without the approval of the Assistant Deputy Director or higher.
- Transfers of offenders with new sentences from county jails in the community have been suspended. The department also issued protocol to all county sheriff offices to offer guidance on screening and other preventative measures.

Quarantine and Care of Sick Prisoners

- Facility healthcare staff will meet with prisoners who have presented with symptoms of coronavirus. The MDOC does not make the diagnosis of the coronavirus. The department is

following the Michigan Department of Health and Human Services protocol. If a prisoner has symptoms and meets the criteria for testing, the MDOC can test the prisoner.

- Prisoners who test positive for the virus are isolated from the general population and any prisoners or staff they have had close contact with are identified and notified of the need to quarantine.

- Prisoners who test positive will be transferred to one of the department's designated quarantine units at either G. Robert Cotton Correctional Facility, Carson City Correctional Facility or the former Maxey Annex, which is located near Woodland Center Correctional Facility. The Maxey Annex previously housed juvenile offenders under the jurisdiction of MDHHS, prior to its closure, and the MDOC had been working to convert it to a training site. These units are in buildings that are completely separated from each of the correctional facilities. They have limited movement and access to these units is extremely limited. Only a small number of designated staff work in the unit in 12-hour shifts to limit the number of people entering. Those staff members report directly to the unit and do not enter the main correctional facility. Prisoners transferred to the unit also stay on the unit and do not enter any other areas of the prison.

- Prisoners who have been identified as having close contact with another prisoner who tests positive, but have not tested positive for the virus themselves, will be isolated from the

general population at their facility for the 14-day quarantine period.

- Co-pays for prisoners who need to be tested for COVID-19 have been waived.
- Prisoners have been urged to notify healthcare if they are sick or experiencing symptoms of illness so they can be evaluated. Prisoners who require outside medical attention will be transported to an area hospital for treatment.

Recovery

- A step-down unit has been established at Gus Harrison Correctional Facility for prisoners who previously tested positive for COVID-19, but no longer have symptoms, are no longer considered contagious and have been medically cleared by our chief medical officer. The unit sits outside the main perimeter of the facility, so prisoners in the unit do not have contact with the rest of the population at the facility. The same custody staff work consistently in that unit only and staff working in the unit are expected to wear PPE. Prisoners at Women's Huron Valley Correctional Facility are housed in a step-down unit at the facility and are not transferred to Gus Harrison Correctional Facility.
- A unit has also been established at Central Michigan Correctional Facility for recovered prisoners who previously tested positive for the virus. These prisoners are considered officially recovered by the Michigan Department of Health and

Human Services, have no symptoms, are not considered contagious, have been medically cleared by the MDOC's chief medical officer, and must test negative before they are moved to the unit at Central. The department is NOT sending COVID-19 positive prisoners to Central.

Parole Information

- The MDOC Parole Board continues to hold parole hearings and is reviewing all eligible cases to determine prisoners who can be safely released at this time. In addition, the department is exploring the possibility of conducting future public hearings for lifer or commutation cases remotely.
- The department continues to review individual cases and the Parole Release Unit is working to process parole releases for prisoners with positive parole decisions as quickly and safely as possible.
- We are no longer allowing parole representatives to enter correctional facilities for parole hearings as an additional step to limit the potential introduction of illness. However, individuals designated by a prisoner as a parole representatives should contact the facility where the prisoner is being housed to find out about options to call in for the hearing.
- The Parole Board is aware that prisoners do not have access to certain programming and the Board is taking that into consideration. If there are changes in the prisoner's case, the

prisoner will be notified directly.

- We continue to monitor the prisoner population, our parole and probation population and the parole process as this pandemic continues, in order to consider all options to ensure the safety of offenders under our supervision.
- All of our paroles are done with public safety in mind. The Parole Board looks at each individual on a case-by-case basis and will only grant a parole if they believe that person will not be a harm to society.
- Every prisoner is screened for symptoms prior to parole and given a temperature check by MDOC healthcare staff. If it's determined they should be tested, the person does not parole until the results come back. If it's negative, they can parole. If it's positive, they stay until they are medically cleared to parole. Any prisoner coming out of a facility on outbreak status because of a high number of cases will automatically be considered a "close contact" and the local Health department will be made aware of their anticipated release into the community along with information on how to contact them.

Staff Measures and Information

- The need for social distancing to help prevent the spread of this virus has included asking organizations to have as many people telecommute as possible, and the MDOC is doing that to the extent we can. Employees should have been authorized to telecommute by their supervisor and supervisors who have

questions should contact their leadership. No employees who have been ordered to telecommute should return to their work site unless authorized to do so by their deputy director or Director Washington. Employees who are telecommuting should complete required online training during this time.

- ALL correctional facility employees continue to report to work. Our facilities need to continue operating as close to normal as possible for the safety of those both outside and inside the institution. We need to continue to keep prisoners engaged and occupied in a productive manner to ensure the stability, safety and security of our facilities. Thank you to our correctional facility staff for all they do to keep the citizens of our state safe.
- Anyone entering facilities will be subject to enhanced screening prior to entering. This includes answering screening questions and having their temperatures taken. Anyone suspected of having symptoms will not be allowed in the facility.
- The Michigan Correctional Officers' Training Council has supported the Department's request to extend the period for obtaining necessary college credits to 24 months from date of hire. Officers who are deficient in their college credits will now have 24 months from their date of hire to complete the required college credits, rather than 18. This change allows officers extra time during this period of uncertainty.
- All employees who are working on location at one of our

prisons will receive $750 in COVID-19 premium pay, per pay period during the course of this event.

- As the state works to limit the spread of the virus, we caution employees not to let fear lead to discriminatory actions against any individuals based on their disability, race or ethnicity. If you have experienced or witnessed discriminatory harassment or discrimination, we want you to know it will not be tolerated and we strongly encourage you to report it by calling the MDOC Equal Employment Opportunity Office at 1–800–326–4537, 517–335–3654, or by contacting MDOC EEO Officer Toya Williams at 517–335–4125 or williamst8@michigan.gov.

Operational Changes

- Corrections Transportation Officers or other department staff will be reassigned to facilities to augment custody staff as determined by Assistant Deputy Directors.
- No out-of-state business travel will be allowed through May 15. All in-state business travel should be for essential matters only.
- Most construction projects have been placed on hold for 60 days. Each project will be evaluated on a case-by-case basis.
- Staff are encouraged to use phone calls, email and teleconferencing in place of in-person meetings when possible. Any necessary in-person meetings should be limited as much as possible and the size of the meeting should be reduced to allow for attendees to stay the recommended 6-foot distance

apart.

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UPDATED: Suspended or Postponed Events

The MDOC, like many other large organizations, is taking steps to protect staff, family members, prisoners and visitors by suspending or postponing large-scale events. Postponed events have included the March 16 Lansing recruitment open house, the March 20 Corrections Officer Academy graduation and the March

27 Wayne County Returning Citizen Job Fair.

The Corrections Officer Academies scheduled to begin in April in the Upper Peninsula and in the Lower Peninsula have been postponed. The May 5 Employee Appreciation Banquet and Warden's Meeting has also been cancelled.

NEW UPDATE: The Employee Recreation Day event scheduled for June at the Royal Scot in Lansing and the Employee Recreation Day event scheduled for September in Brimley have been cancelled as we continue to focus on precautions to protect the health and well-being of staff.

Most training, other than firearms requalification, has been postponed. The department has also postponed Parole Board lifer and commutation public hearings.

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UPDATE: Visitation Restrictions

In an effort to protect the health of staff, prisoners and the public, the MDOC suspended visitation at **ALL** correctional facilities statewide.

This also includes outside volunteers and other tours and groups who routinely come into the prisons.

"This was not a decision we arrived at lightly, as we understand and recognize the importance of family contact with the prison population," said MDOC Director Heidi Washington. "Our primary concern has to be public safety and reducing the number of people who enter our facilities is a key factor in limiting the potential spread of this illness into our prisoner population."

The department will monitor the situation to determine when visits will be restored.

During the period without visits, the department worked with GTL and JPay to provide enhanced services for prisoners to communicate with family and friends. GTL has offered two free, five-minute phone calls each week and JPay is offering two free stamps per week. Both these measures began Tuesday, March 17.

UPDATE: As of April 15, 2020, in addition to the weekly 2-free JPay Stamps that are credited to your account, JPay will be offering MORE JPay Stamps in the JPay Stamp packages at no

additional cost. This Stamp Package promotion will be available through May 6, 2020.

Current Offering: 20 JPay Stamp Bundle: $5.00; 50 JPay Stamp Bundle: $10.00; 100 JPay Stamp Bundle: $20.00

Bonus Offering: 22 Stamp Bundle: $5.00 (TWO additional JPay Stamps); 55 Stamp Bundle: $10.00 (FIVE additional JPay Stamps); 110 Stamp Bundle: $20.00 (TEN additional JPay Stamps)

The department will continue to work with the companies on anything else they may be willing to provide.

In addition, all staff working at facilities are being asked a series of screening questions and have their temperature checked before being allowed entrance into a facility. For those with a temperature above 100.4, they will not be allowed to work.

Information on prevention has been provided to the prison population and MDOC staff. Facilities have also instituted additional and more frequent cleaning.

Staff and visitors can also access information about their facility by signing up for Nixle alerts. To sign up for Nixle alerts, go to www.michigan.gov/corrections and select the page for the correctional facility in your area to register via the Nixle Widget,

or text the zip code of the facility you would like to receive updates from to 888777.

A press release on visiting restrictions was sent out statewide on March 13. You can find a full version of that release here.

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What it is

Coronaviruses are a large family of viruses. Some cause illness in people, and others, such as canine and feline coronaviruses, only infect animals. Rarely, animal coronaviruses that infect animals have emerged to infect people and can spread between people. This is suspected to have occurred for the virus that causes COVID-19. Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS) are two other examples of coronaviruses that originated from animals and then spread to people.

SARS-CoV-2 is a new coronavirus that has not been previously identified. This virus causes the disease of COVID-19. The virus causing COVID-19 is not the same as the coronavirus that

commonly circulate among humans and cause mild illness, like the common cold.

This virus was first detected in Wuhan City, Hubei Province, China. The first infections were linked to a live animal market, but the virus is now spreading from person-to-person. It's important to note that person-to-person spread can happen on a continuum. Some viruses are highly contagious (like measles), while other viruses are less so.

Transmission: The virus that causes COVID-19 seems to be spreading easily and sustainably in the community ("community spread") in some affected geographic areas. Community spread means people have been infected with the virus in an area, including some who are not sure how or where they became infected.

The virus is thought to spread mainly from person-to-person via respiratory droplets, resembling the spread of influenza.

It would be spread by:

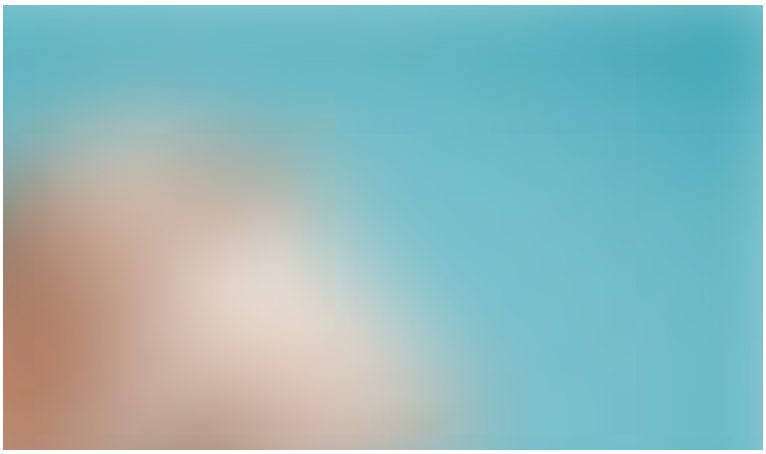
The air by coughing and sneezing.

Close personal contact, such as touching or shaking hands.

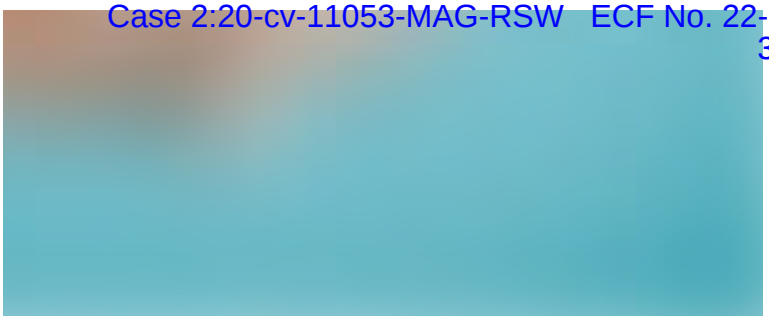
Touching an object or surface with the virus on it, then touching your mouth, nose, or eyes.

It is possible that a person can contract COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes. According to the World Health Organization (WHO), coronaviruses may survive on surfaces for just a few hours or several days. Many factors will influence this, including surface material and weather.

Symptoms: People who have been diagnosed with 2019 Novel Coronavirus have reported symptoms that may appear in as few as two days or as long as 14 days after exposure to the virus. Most cases are occurring approximately five days after exposure. Symptoms consist of fever, cough, and difficulty breathing (shortness of breath). Pneumonia appears to be the most frequent serious manifestation of infection. Older people and people of all ages with severe underlying health conditions such as heart disease, lung disease and diabetes, seem to be at higher risk of developing serious COVID-19 illness.



Prevention: Steps you can take to prevent spread of flu and the common cold will also help prevent 2019 Novel Coronavirus.



Wash your hands often with soap and water. If not available, use hand sanitizer.

Avoid touching your eyes, nose or mouth with unwashed hands.

Cover your mouth and nose with a tissue when coughing

Stay home if you are sick.

Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, keyboards, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label.

No additional disinfection beyond routine cleaning is recommended at this time.

Additional information and resources can be found at the CDC, Michigan Department of Health and Human Services (MDHHS), and World Health Organization (WHO):

Coronavirus Disease 2019 (COVID-19)

Coronavirus disease 2019 (COVID-19) is a virus (more specifically, a coronavirus) identified as the cause of an...

www.cdc.gov

Coronavirus - Coronavirus

Description: Coronavirus - Coronavirus

www.michigan.gov

Home

WHO's primary role is to direct international health within the United Nations' system and to lead partners in global...

www.who.int

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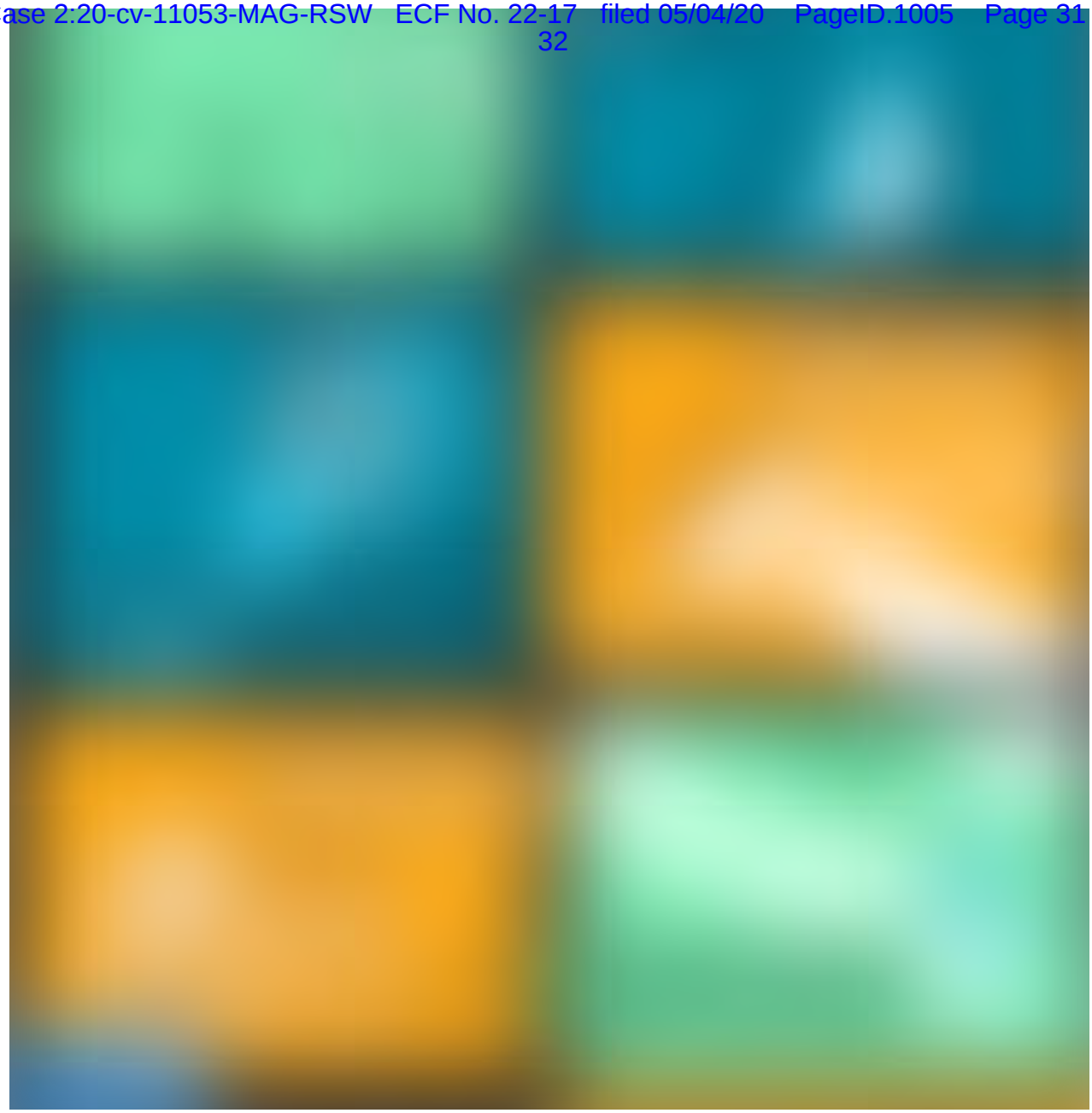
Informational Posters

These posters from the CDC regarding coronavirus (COVID-19) have been distributed to worksites across the department.



Health Public Health Michigan Corrections

DECLARATION OF VINCENT GLASS, 182453

I, VINCENT GLASS, under the penalty of perjury, states the following:

1. Presently I am confined at Parnall Correctional Facility, located in Jackson, Michigan.

2. I am now confined in 10-block in the type of cell that you see in old prison movies, with bars on the front. This cellblock holds approximately 370 inmates. Based on its design, there is no method for preventing the spread of the COVID-19 throughout that block.

3. I was told by officers that the Warden- Defendant Melinda Braman approved the placement of positive tested inmates within 10-block and took no additional steps to separate and protect plaintiff and the class members from the COVID-19 virus. A number of officers told me that numerous positive tested COVID-19 inmate had been placed in 10-block.

4. I feared for my life each day I was confined in 10-block. This fear came from the design of the building that did not allow social distancing, the placement of positive tested inmates in 10-block and the failure to require social distancing when using the showers, bathrooms, telephones, and kiosks. The same when going to chow, at the chow hall, and in the yard, there was no social distancing.

5. I am familiar with the description of 10-block provided by Plaintiff Mobreg, *supra*, and agree with the descriptions of the layout of 10-block and how its operate daily.

6. Glass was confined on the upper level of 10-Block. In order for him to leave his cell and go to the base to go to chow, to take a shower, or to use the telephone, Glass had to go within two feet of 10 to 30 prisoners, to get to the stairs that lead to the base. Once on base, if Glass went to use the telephone, Jpay, shower or chow, it was almost impossible not to be within 6-feet of numerous inmates.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Vincent Glass signed w/ permission DEM

EXHIBIT 18 - WITHDRAWN

EXHIBIT 18 - WITHDRAWN

DECLARATION OF ELLIOTT ABRAMS, 974262

I, Elliott Abrams, under the penalty of perjury, states the following:

1. Presently I am confined at Macomb Correctional Facility, located in Lenox, Michigan. I am required to share a cell with another inmate. Since his incarceration, MDOC has recognized that he has a compromised immune system.[1]

2. My parole date is next year. I am scared that I will not live that long. Based on the manner that I am forced to share a cell with another inmate and that there seems to be little if no effort to enforce social distancing and sanitizing of common areas, I am surprised when I wake up each morning without having contacted COVID-19. I have seen inmates removed from this prison in body bags and I think how I would be the next one. I fear that I might die in prison from COVID-19.

3. Defendants have designated numerous cells at MRF to house two prisoners. Each cell includes 2 lockers, 2 desks, 2 chairs, a bunk bed, and the personal property (2 footlockers, 2 TVs, books, paperwork, clothes) of each inmate. At

[1] On April 13, 2020, I filed two grievances as to being subjected to COVID-19. One grievance was addressed to the Warden-Defendant and the other directed at the Director-Defendant. A response was provided to both grievances. The grievance against the warden was rejected claiming he was following policy. The grievance against the Director was rejected as being duplicative. I then sought 2d step grievance forms but have not received such forms yet.

Macomb Correctional Facility some of the cells do not have their own bathrooms. Instead at the beginning of each of the 4 levels or "wings", there is a community bathroom with 3 stalls. 2 urinals, 4 sinks with mirrors, and 2 wall mounted electric hand dryers. Two individual showers stalls are located at the beginning of each of the community bathrooms. Located by the stairs to each of the four wings are 2 telephones, a drinking fountain, a garbage can and a microwave. At least 16 inmates are now housed in the dayroom and these inmates are required to use the same bathroom, kiosk, microwave, telephone, and chow area in the housing unit as the other inmates.

4. I have observed that cleaning of commonly used areas is not consistently wiped down or cleaned.

5. The meals are now fed in the housing unit and inmates are not required to keep spacing of 6-feet while waiting to be serve their food. One person is allowed to use the microwave at a time. There are two telephone that are approximately 6 feet apart and there is no restriction limiting the telephone used to the roommates at the same time. Prison staff did implement a rule that only the two inmates in a cell could use the telephone at the same time. The enforcement of this policy lasted about a week. From what I have observed, it seems that the telephones are not sanitized after each use. There is a kiosk room in the unit that contains the Jpay system (similar to a computer which

allows inmates to send emails to family members and others) and a store kiosk, where twice a month inmates can order items from the prison store to be delivered to the housing unit. Staff, generally, will allow only the two inmates sharing the cell in the kiosk room at the same time. Plaintiff Abrams is not sure if the kiosk room is sanitized after each use. Plaintiff Abrams has observed the inmate porters undertake only one cleaning per each 8-hour shift. Each staff is required to do three shakedown each shift worked. Abrams has observed officer do shakedowns of more than one inmate at a time without changing gloves.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Elliott Abrams signed w/ permission

DECLARATION OF ROBERT REEVES

I, Robert Reeves, under penalty of perjury, state the following:

1. I am presently confined at the G. Robert Cotton Correctional facility (JCF), Prior to my confinement at Cotton, I was confined at Parnall Correctional Facility (SMT) in Jackson, Michigan. At SMT, I contracted COVID-19 when I was house in 58-B 10 block at Parnall. I was only at Parnall from February 25, 2020, to March 28, 2020. At Parnall, I was confined in a one-man cell that had open bars. There are more than 300 prisoners confined in the open-bar setting. At Parnall, there are thirteen (13) open showers in 10-block for the use of 300 prisoners. At Parnall, I was allowed to go to chow hall. Prisoners stood in line with other prisoners, but once we got to the chow hall, we sat 2 at a table, about 2 feet from each other. However, prisoners walked to chow together without being told to distance from each other. At Parnall, I was only given a mask after I tested positive for COVID-19. However, I was forced to be around positive prisoners in the same block before I was tested.

2. When I was told that I tested positive for CORVIC-19, I was sure that within days I would be extremely sick and then die. The only care I received was that I was transferred from Parnall to Cotton on March 28, 2020 because I tested positive for COVID-19. When I arrived at Cotton, I was placed in a one-man cell, with closed quarters. The next day another positive inmate was placed in the cell with me.

3. I was given a mask on March 28th, and sixteen (16) days later, I still have the same mask. I was told to wash the mask that I have. When I tried to exchange my mask for a new one, I was told that they don't have extras.

4. On April 14th, staff were not wearing gloves or masks when handing out disbursements for the phone or at the desk. I could not help but consider that these guards don't care if I live or die by their attitudes and I realized that am helpless and can die.

5. At Cotton, there are two prisoners to a cell in a unit, called K-unit, that seems to house all positive tested inmates. These inmates share the same showers, bathroom, phones, and JPay Kiosks. Three (3) to six (6) inmates are allowed out at a time. There are 88 bunks, with 2 inmates to a cell in K-unit. Each cell is 11' x 8'. There are three (3) showers in K-unit, and one inmate is allowed in each shower at a time. I observed he bathroom in K-unit being cleaned only one time per day by an inmate who is positive for COVID-19.

6. There is a nurse in K-unit at all times and the nurse is wearing a mask. The nurse calls each prisoner out of their cell every day to take their blood pressure and temperature. Prisoners sit in the same chair, and the same medical equipment and supplies are being used without being cleaned between inmates. The nurses do not change their gloves from inmate to inmate.

7. I have not been given any supplies to clean my cell. There is a mop and broom in K unit for all prisoners to use; this is the same mop that is used to clean the bathroom.

8. Inmates are fed in their cells. I have not seen a doctor, nor did I receive medical instructions on what to do if my symptoms got worse, despite complaining of chest pain, coughing up blood, and having problems breathing. I was just told it was normal and to go through it. Being told by medical staff this is normal and just suck it up, created extreme levels of fear and anxiety. You cannot help but think that the medical staff do not care if you live or die.

9. Because I tested positive for COVID-19, I am not allowed to send kites, mail, or grievances.

10. After 21 days in quarantine at JCF- Cotton, I was transferred to Gus Harrison in Adrian, Michigan. At Gus Harrison, I am allowed to send out mail and write grievances, but because I keep being transferred, it is hard to get the grievance responses back from the Grievance Coordinator, or a receipt that the grievance was received.

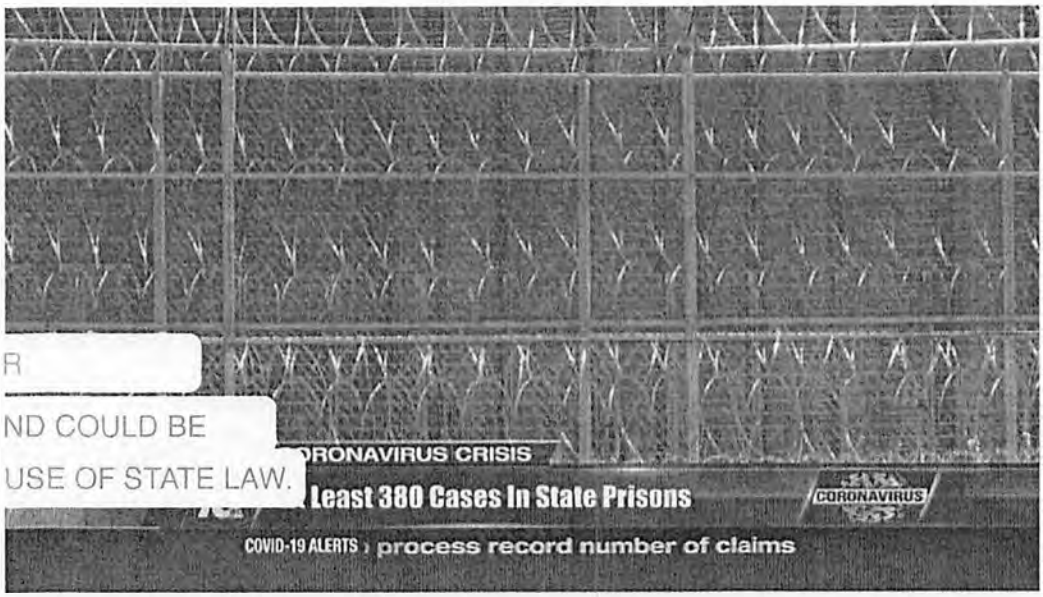
11. Due to prison staff not requiring social distancing, I cannot help but believe MDOC does not care if inmates, such as me, die. Prisons can be violent places and inmates need to fear for their safety but to add to that fear that you right die from COVID-19 is totally unreasonable

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Robert Reeves signed w/ permission Dan

Michigan Department of Corrections taking steps to curb COVID-19



By Cody Butler | Posted: Wed 5:29 PM, Apr 08, 2020 | Updated: Wed 6:52 PM, Apr 08, 2020

BLACKMAN TOWNSHIP, MI. (WILX) - There were at least 380 cases of COVID-19 between inmates and corrections officers in Michigan's prison system Wednesday.

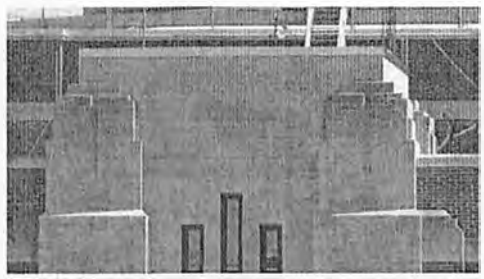
A second inmate died from the virus Tuesday. Two employees have also died.

Most of Michigan's prisons don't have any cases of COVID-19 among the inmate population.

However, Parnall Correctional Facility in Jackson County has 119 prisoners who tested positive for coronavirus, three additional tests were pending.

"It's been very, very stressful," said Cindy Merling.

Merling's son is serving time at Parnall, which has the most cases of coronavirus in the Michigan prison system.



Michigan Department of Corrections is trying to contain COVID-19 outbreak.

She's worried her son could be the next case.

"This is working overtime mentally, not only on the inmates, but I'm sure for every family that has some loved one in there," said Merling.

The MDOC said there are 10 facilities with at least one case of coronavirus among inmates.

Department spokesman Chris Gautz said the prisons are doing what they can to keep prisoners healthy.

"We've been practicing social distancing to the extent we can in a prison. Really anything outside of your immediate living area. If you're in a cell, obviously your bunkmate is going to be within 6 feet of you," said Gautz.

He added inmates who test positive for COVID-19 at Parnall are taken across the street to the Cotton Correctional Facility where they are quarantined.

But in order to do that, inmates need to help.

"We have to know if they're sick so we can treat them because they're putting themselves at risk, they're putting their fellow prisoners at risk, and they are absolutely putting our staff at risk," Gautz said.

In March, News 10 reported county jails are releasing inmates early to help control the spread of coronavirus on the inside.

Gautz said of the state's 38,000 prisoners, only about 5,000 could be eligible for parole now because of state laws.

"As you widdle that down you do get some potential cases for parole but then again these are small numbers,' said Gautz.

"I understand that under normal circumstances, but this is a pandemic and they are saying it is still going to spike," Merling said.

Her son is expected to be released in June.

Gautz said Michigan State Industries is making PPE for the prison system. Every staffer and prisoner will be issued masks to help stop the spread of COVID-19.

DECLARATION OF CRAIG SEEGMILLER, 373625

I, Craig Seegmiller, under the penalty of perjury, state the following:

1. I am presently confined within the Michigan Department of Corrections at Cotton Correctional Facility, located in Jackson, Michigan.

2. Seegmiller is confined in a Pole Barn at JCF. He is confined in a cube with at least 8 other inmates, in an area that is approximately 10'x12'. There is a total of 20 cubes, for a total population of 160 inmates on each side of the Pole Barn. Seegmiller is currently housed in T-A, one of two sides of the pole-barn. T-A and T-B each house one hundred and sixty (160) inmates. There are two bathrooms in each side of the pole barn. One for the front hall and one for the back hall. There are three (3) showers, three (3) urinals, and four (4) toilets for eighty (80) inmates in each hall. The ceiling in the cubicles is approximate twelve (12) feet high. There is an eight (8) foot divider wall resembling an open case between the back and front of the top of the divider. The ceiling in the cubicles is approximate twelve (12) feet high. There are two (2) JPAY computers, one (1) store kiosk, and five (5) telephones on each side and these are shared by the 160 inmates on each particular side. Plaintiff Seegmiller has not observed any of these items sanitized by prison porters after being used by prisoners. An individual prisoner may wipe one of these items down before using it. Prison staff has made available a limited supply of cleaning materials each day but once the cleaning supplies have been issued for that day none is available until the next day.

Exhibit 22 - Decl of Seegmiller

3. As of April 20, 2020, five of the inmates in my cube tested positive. When I heard that, I freaked out. I thought for sure that I also had CORVID-19 and there was nothing I would do about it. I was never tested. The only treatment I was given, if you can call it that, I was temporarily moved to the level 2 side of dorm D, a different housing unit, for approximately 36 hours. and was sent back to the level 1 side to the Pole Barn without first being tested.[1] I constantly live in fear that I will die next because I was given little medical care after five of my bunkies tested positive.

4. On April 17, 2020, in the afternoon, the officers in the Pole Barns at the Cotton Facility went through each Pole Barn and cut the electrical cord to each fan to prevent the spread of the spread of COVID-19 virus is what the officer told me. However, I was not provided social distancing while confined at the Cotton Prison to help prevent me from becoming infected. It is very fearful to be in prison with a pandemic, knowing that you could easily catch it, and die.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Craig Seegmiller signed w/ permission

[1] I filed two grievances. One was against the Warden and the other against Director Washington on April 9, 2020. These grievances were returned to be on April 13, 2020. I filled out and submitted steps II's appeals for both grievance on April 17, 2020 but have not received responses.

Exhibit 22 - Decl of Seegmiller

Plaintiff Lamont Heard, 252329 – Lakeland Correctional Facility

I, Lamont Heard, under the penalty of perjury, state the following:

1. Presently I am confined within the Michigan Department of Corrections at Lakeland Correctional Facility (LCF), in Coldwater, Michigan.

2. Heard is confined in Pole Barn E-2 at LCF, which means he is confined in a cube with at least 8 other inmates, in an area that is approximately 10'x12'. The height of the wall separating these Cubes is eight feet high. There are approximately 20 other cubes for a total population of 160 inmates on each side of the Pole Barn.

3. As to the cube in the Pole Barn where Plaintiff Heard is confined, the entire unit can leave their cubes starting at 5:50 am and are required to be locked down in the cubes at 11:30 pm. During the time not required to be in the cube, the inmates in Unit E-2 are allowed yard for approximately 30 minutes at least 10 times a day. During this time out of cubes, the inmates are able to commingle in the Pole Barn without social distancing.

4. I and other inmates were recently told by health service and prison staff that due to some inmates already testing positive in that unit and the other unit inmates in that unit already being exposed to these positive tested inmates, that there was no reason to quarantine any of the inmates.

5. Plaintiff Heard was informed by both medical and unit officers not to request medical care unless it was severe. However, when he asked what is considered severe, no one would tell him. Comments like that from staff

that I will wake up the next morning with no virus. Due to design of the Pole Barn, no social distancing in the Pole Barn, at chow, or in the yard, I fear that the odds are I will be infected and die in prison.[1]

6 This past week MDOC started testing all the inmates confined at Lakeland prison. As of April 23, 2020, the reported test results showed that 600 – or 40% of the population – have tested positive. MDOC has confirmed that not all tests results have been returned. Once I heard that I became convinced that I will only leave this prison in a body bag. I have observed numerous body bags being take out of Lakeland. I fear for my life.

7. Plaintiff Heard was given three masks and told that he had to wash them because staff would not provide more masks. Plaintiff Heard's temperature is not regularly taken

[1] On April 13, 2020, I filed two grievances. One grievance against the Warden for failure to protect against COVID-19 and the other grievance against the Director for her failure to protect me against COVID-19. I have received no response as to either grievance. The reasons for no responses might be that I observed the regular grievance coordinator working in the Pole Barn, in a position of correction officer.

8. Plaintiff Heard has observed prison staff pat downs inmates either without gloves or not changing gloves when they have completed the pat down of one inmate and patting down the next inmate.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Lamont Heard signed w/ permission DEM

POLICY TOPICS

First research findings measure COVID-19 prevalence in U.S. prisons, jails

Harvard researchers work with correctional healthcare experts in ongoing study tracing outbreaks among prison inmates, correctional staff

April 09, 2020

A collaboration between Harvard University researchers and the National Commission on Correctional Health Care (NCCHC) has yielded the first detailed survey on the effects of the coronavirus pandemic on correctional facilities in the United States.

The ongoing survey has so far collected data from more than 320 facilities housing approximately 10 percent of the country's inmates across 47 states. While not necessarily representative of all correctional institutions, the results nonetheless are vital for policymakers responding to the pandemic in their own states and communities.

Among the key findings:

- Correctional staff, like the general population, are at risk for contracting of COVID-19 infection, with a higher infection rate than inmates.
- Many protocols call for screening inmates and staff for COVID-19 on a regular basis, but a significant fraction of facilities still lack access to lab testing.
- The nationwide shortage of personal protective equipment (PPE) as well as ancillary supplies (such as cleaning products and thermometer probes) is also a problem for correctional health care operations.

The survey was devised as a collaboration between Marcella Alsan (https://www.hks.harvard.edu/faculty/marcella-alsan), professor of public policy at Harvard Kennedy School, Professor Crystal Yang (https://hls.harvard.edu/faculty/directory/11405/Yang) from Harvard Law School, and the National Commission on Correctional Health Care (https://www.ncchc.org/). Alsan and Yang are faculty affiliates of the Kennedy School's Malcolm Wiener Center for Social Policy. They are both

economists. Alsan also has degrees in medicine and public health, and has held hospital fellowships in global health equity and infectious disease. Yang served as a federal prosecutor and is also a faculty research fellow at the National Bureau of Economic Research.

The NCCHC sent the initial survey and a daily follow-up questionnaire to jails, prisons, and juvenile detention facilities nationwide. Results are providing unique insights into the prevalence of the novel coronavirus and the associated COVID-19 disease among the incarcerated population as well as the challenges correctional health staff are facing as they respond to the pandemic.

“What’s striking to me about these findings so far is that correctional staff are also at high risk, either because of community exposure or exposure in the facilities themselves. Therefore, keeping visitors out is unlikely to be a failsafe method to prevent infectious spread. Staff also need to have access to protective equipment and testing,“ said Alsan. “In addition, many of the facilities surveyed recounted they were screening inmates using the only method they had readily available: temperature and symptom screening. Since COVID-19 can be transmitted asymptomatically, it would be much safer to empower all facilities to screen using rapid lab tests.”

Yang said the findings suggest that as the pandemic continues to spread within facilities, policymakers should implement criminal justice policies that can protect the health of inmates and correctional staff without endangering public safety. She added: “Qualitative comments from participating facilities in our survey indicate a range of sound responses to the pandemic, including releasing medically vulnerable inmates, limiting

pretrial detention for individuals charged with non-violent or misdemeanor offenses, quashing non-violent minor arrest warrants, and increasing the use of summons in lieu of arrests for non-violent offenses."

The surveyed correctional facilities represent more than 267,000 inmates and 53,000 correctional and health care staff. The data are primarily drawn from jails (70 percent), with prisons accounting for 20 percent and other detention facilities, such as juvenile facilities, making up the remainder of the sample. These data may not be fully representative of all correctional institutions.

"By definition, jails and prisons are closed environments and therefore potential hotspots for virus spread," said Deborah Ross, NCCHC chief executive officer. "As corrections grapples with the challenges of the pandemic, this study provides very important data in an area that is often overlooked."

"This is a truly innovative public health effort," said Brent Gibson, chief health officer at NCCHC. "It underscores that there is no bright line between correctional health care and community health. The work we are doing now not only brings immediate understanding and perspective, but also will fuel studies and programs for years to come. The lessons learned here will be beneficial far into the future."

The collaboration will continue to collect data on the pandemic's effect on correctional facilities, as well as other correctional health care topics, in the months ahead. Information and reports are posted at https://www.ncchc.org/study-of-covid-19-in-correctional-facilities (https://www.ncchc.org/study-of-covid-19-in-correctional-facilities). The researchers urge all facilities to participate.

Findings to Date

Between March 25 (the initial survey) and April 3 (the latest daily follow-up), the number of reported COVID-19 cases among participating correctional facilities increased steadily (see Figure 1). The highest number of reported cases was among correctional staff—including health care staff and correctional officers. Specifically, the number of COVID-19 cases among staff increased from 136 to 245 among approximately 100 facilities that have consistently reported each day. During this period, the number of cases among inmates increased from 32 to 67 among approximately 100 facilities that consistently reported. In addition, there were two reported deaths among correctional staff.

Combining the survey data with COVID-19 case data from the *New York Times*, the reported cases among correctional staff are highly correlated with cases in the broader community (see Figure 2). States that have been especially hard hit by the pandemic, such as Michigan and New Jersey, are also locations where correctional officers are more affected. At the state level, reported correctional staff cases are also correlated with reported cases among inmates (see Figure 3).

As of April 3, approximately two-thirds of participating facilities reported having adequate PPE for their staff. Approximately 60 percent reported having access to laboratory testing for COVID-19. However, in the comments section of the survey, several facilities reported struggling to obtain adequate PPE and testing. They also noted long waits to receive test results, leading to uncertainty as to how to handle individuals who might be in jail for only a short time.

Exhibits

FIGURE 1:
CUMULATIVE CASES OF COVID-19 AMONG STAFF AND INMATES

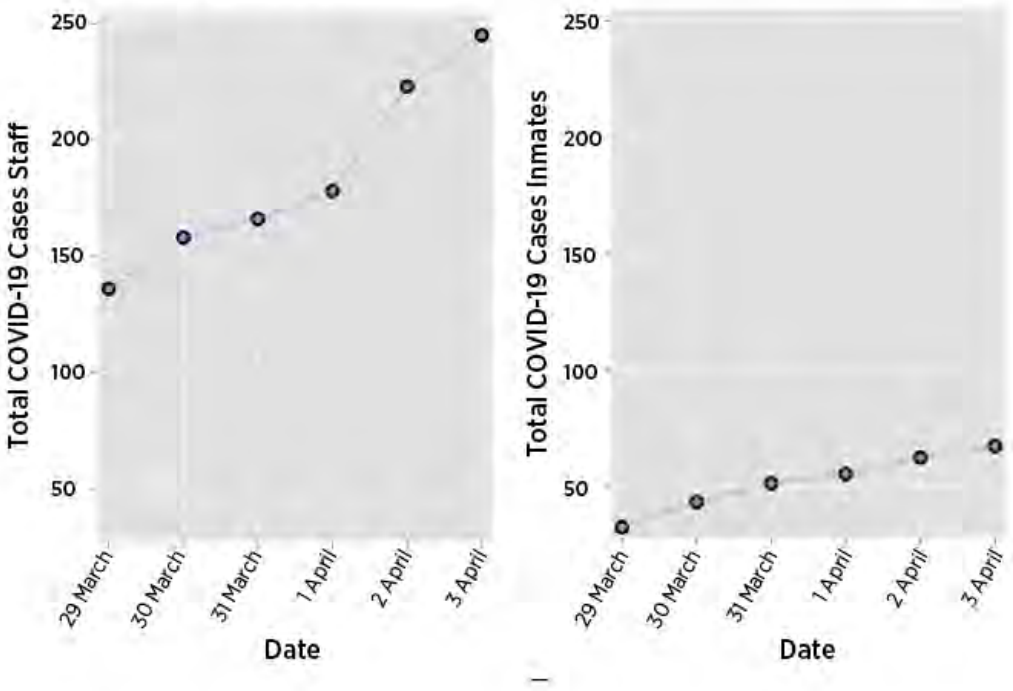
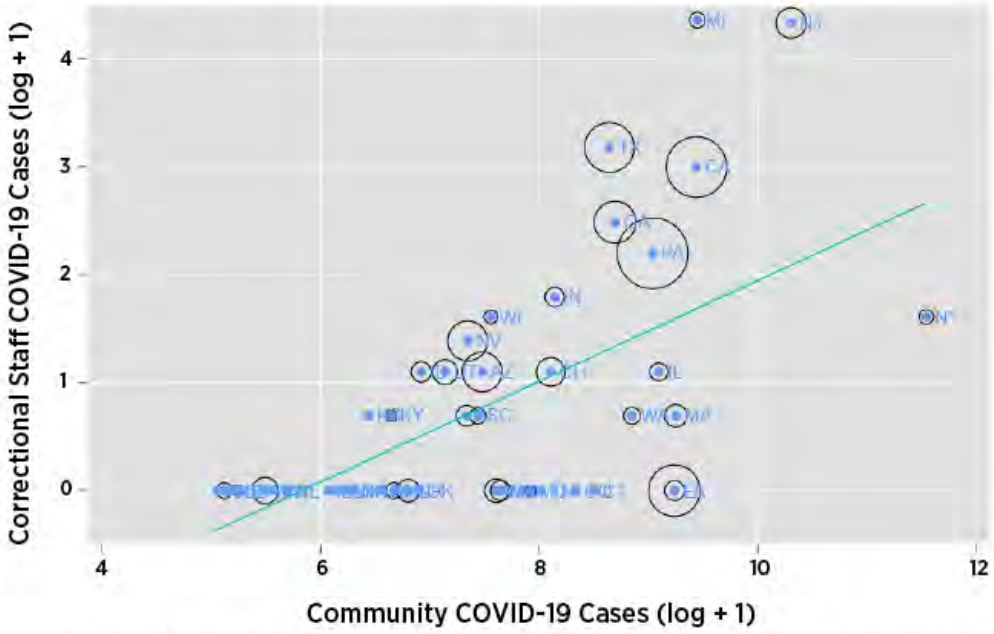
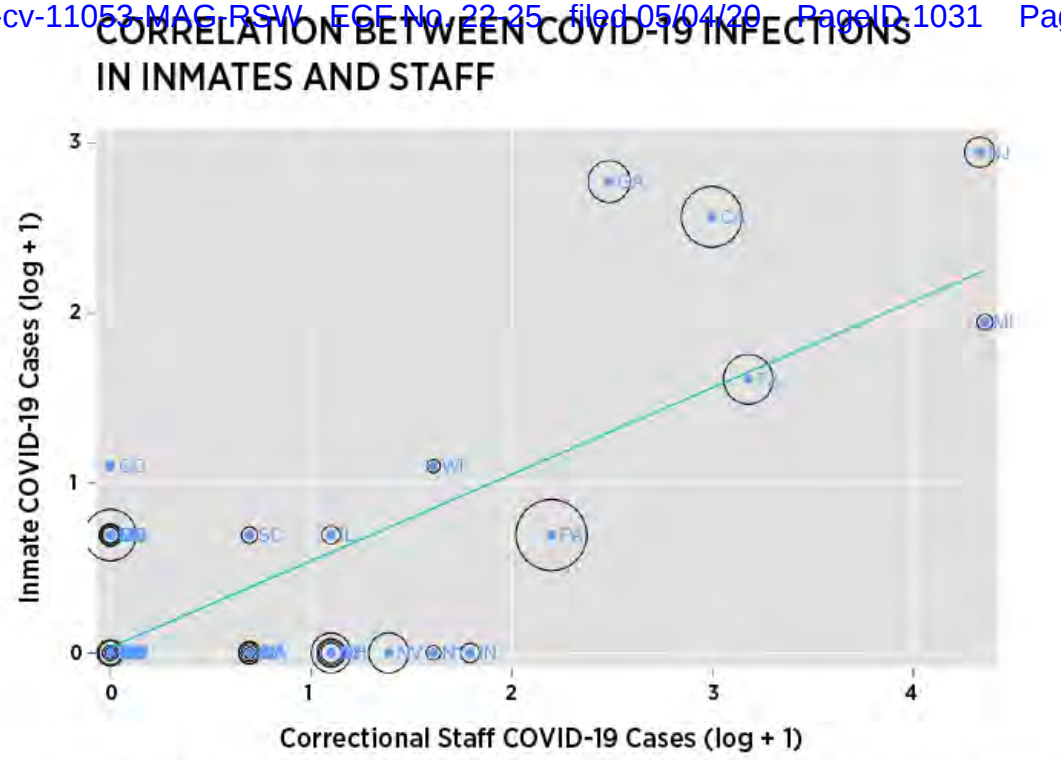


FIGURE 2:
CORRELATION BETWEEN COVID-19 INFECTIONS IN STAFF AND COMMUNITY



Note: COVID-19 State Case Data from the *New York Times*, Facility Data from the NCCHC-HU Survey

FIGURE 3:



Note: COVID-19 State Case Data from the *New York Times*, Facility Data from the NCCHC-HU Survey

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Photo by David Ryan

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DECLARATION OF DR. ADAM LAURING

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

I. Background and Qualifications

1. My name is Adam Lauring, M.D., Ph.D.
2. I am a board-certified medical doctor in Infectious Diseases.
3. I have been a physician for more than 18 years, and I have worked in Infectious Diseases for 14 years.
4. My bio, attached as Exhibit A, includes a brief description of my education and relevant experience.
5. My Curriculum Vitae, attached as Exhibit B, includes a full list of my honors, experience, and publications.
6. I am donating my time reviewing materials and preparing this Declaration. Any live testimony I provide will also be *pro bono*.

II. Heightened Risk of Epidemics in Jails and Prisons

7. As I will discuss below, the risk posed by infectious diseases in jails and prisons is significantly higher than in the community, both in terms of multiple risks of transmission and exposure to individuals who become infected.

8. Globally, outbreaks of contagious diseases are all too common in closed detention settings and are more common than in the community at large. Prisons and jails, however, are closely connected to communities. Staff, visitors, contractors, and vendors pass between communities and these facilities and, if infected, these individuals can carry with them and transmit infectious diseases. Moreover, rapid turnover of jail and prison populations means that people often cycle between facilities and communities, posing the same risk. People often need to be transported to and from facilities to attend court and move between facilities. Prison health is public health.

9. Reduced prevention opportunities: Congregate settings such as jails and prisons allow for rapid spread of infectious diseases that are transmitted person to

person, especially those passed by droplets through coughing and sneezing. When people share dining halls, bathrooms, showers, telephones, and other common areas, the opportunities for transmission are greater. Where infectious diseases are transmitted from person to person by droplets, and no vaccine exists, the best initial strategy is to practice social distancing – maintaining a physical distance of at least six feet from any other person. When jailed or imprisoned, people have much less of an opportunity to protect themselves by social distancing than they would in the community.

10. Spaces within jails and prisons are often also poorly ventilated, which promotes highly efficient spread of diseases through droplets. Placing someone in such a setting, therefore, dramatically reduces their ability to protect themselves from being exposed to and acquiring infectious diseases, and significantly increases the likelihood of the spread of infection. For example, in mid-March, the jail at Rikers Island in New York City had not had a single confirmed COVID-19 case. By March 30, 167 inmates, 114 correction staff and 20 health workers at Rikers tested positive for COVID-19; two correction staff members have died and multiple inmates have been hospitalized.[1] As of April 8, Rikers had a rate of infection that is far higher than the infection rates of the most infected regions of the world. More than 700 people have tested positive for COVID-19, including more than 400 staff.[2] The Chief Medical Officer of Rikers has described a "public health disaster unfolding before our eyes." In his view, following CDC guidelines has not been enough to stem the crisis: "infections in our jails are growing quickly despite these efforts."[3]

11. Like the explosive growth at Rikers, the Cook County Jail went from two confirmed COVID-19 cases on March 23 to more than 350 confirmed cases, 238

[1] Jan Ransom and Alan Feuer, *We're Left for Dead: Fears of Virus Catastrophe at Rikers Jail*, NY Times, (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html.
[2] Asher Stockler, More Than 700 People Have Tested Positive for Coronavirus on Rikers Island, Including Over 440 Staff, Newsweek (April 8, 2020), https://www.newsweek.com/rikers-island-covid-19-new-york-city-1496872.
[3] Ross MacDonald (@RossMacDonaldMD), Twitter (Mar. 30, 2020, 8:03 PM), https://twitter.com/rossmacdonaldmd/status/1244822686280437765?s=12 ("I can assure you we were following the CDC guidelines before they were issued. We could have written them ourselves. . . [I]infections in our jails are growing despite these efforts.").

inmates and 115 staff members, two weeks later.[4] As of April 13, the number of confirmed cases totaled 500, of which two-thirds are inmates.[5]

12. The infection rate in Michigan prisons like Parnall Correctional Facility in Jackson has surpassed even Cook County or Rikers.[6] Four men initially tested positive at this facility on March 25th, 2020.[7] Over 162 of the 1,641 prisoners have tested positive for the virus as of April 16.[8] There are 63 positive cases among staff.[9] However, the growing devastation in other prisons around the country is a harbinger for what almost certainly awaits MDOC if immediate safeguards are not enacted. For instance, at the Marion Correction Institution in Marion, Ohio, 1,828 inmates have tested positive, along with 109 staff members.[10] That number will only grow under the present conditions.

13. Disciplinary segregation or solitary confinement is not an effective disease containment strategy. Beyond the known detrimental mental health effects of solitary confinement, isolation of people who are ill in solitary confinement results in decreased medical attention and increased risk of death. Isolation of people who are ill using solitary confinement also is an ineffective way to

[4] Timothy Williams and Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, NY Times (April 8, 2020), https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html.

[5] Cheryl Corley, *The Covid-19 struggle in the Cook County Jail*, *NPR* (April 13, 2020), https://www.npr.org/2020/04/13/833440047/the-covid-19-struggle-in-chicagos-cook-county-jail.

[6] Angie Jackson and Kristi Tanner, *Infection rate at Michigan prison exceeds New York, Chicago jail hot spots*, Detroit Free Press (April 16, 2020), https://www.freep.com/story/news/local/michigan/2020/04/16/infection-rate-michigan-prison-exceeds-new-york-chicago-jail-hotspots/2987935001/.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] Jim Woods and Patrick Cooley, *Coronavirus in Ohio: More Than 1,800 Inmates at Marion Correctional Test Positive,* The Cincinatti Enquirer (Apr. 19, 2020) https://www.cincinnati.com/story/news/2020/04/19/coronavirus-ohio-more-than-1-800-inmates-marion-correctional-test-positive/5163046002/.

prevent transmission of the virus through droplets to others because, except in specialized negative pressure rooms (rarely in medical units if available at all), air continues to flow outward from rooms to the rest of the facility. Risk of exposure is thus increased to other jail or prison inmates, and staff.

14. Reduced prevention opportunities: During an infectious disease outbreak, people can curb their risk of infection by washing hands. Jails and prisons often do not provide adequate opportunities to exercise necessary hygiene measures, such as frequent handwashing or use of alcohol-based sanitizers. When handwashing is unavailable, then the risk of infection and rate of infection spread is much greater. Jails and prisons are often under-resourced and ill-equipped with sufficient hand soap and alcohol- based sanitizers for people detained in and working in these settings. High-touch surfaces (doorknobs, light switches, telephones, etc.) should also be cleaned and disinfected regularly with bleach to prevent virus spread, but this is often not done in jails and prisons because of a lack of cleaning supplies and lack of people available to perform necessary cleaning procedures.

15. **Additional reduced prevention opportunities**: During an infectious disease outbreak, a containment strategy requires people who are ill with symptoms to be isolated and that caregivers have access to personal protective equipment, including gloves, masks, gowns, and eye shields. Jails and prisons are often under-resourced and ill-equipped to provide sufficient personal protective equipment for people who are incarcerated and caregiving staff, increasing the risk to everyone in the facility of a widespread outbreak.

16. **Increased susceptibility**: People incarcerated in jails and prisons are more susceptible to acquiring and experiencing complications from infectious diseases than the population in the community.[11] This is because people in jails and prisons are more likely than people in the community to have chronic underlying health conditions, including diabetes, heart disease, chronic lung disease, chronic liver disease, and lower immune systems from HIV.

[11] Active case finding for communicable diseases in prison, 391 The Lancet 2186 (2018), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31251-0/fulltext.

17. Jails and prisons are often poorly equipped to diagnose and manage infectious disease outbreaks. Some jails and prisons lack onsite medical facilities or 24-hour medical care. The medical facilities at jails and prisons are almost never sufficiently equipped to handle large outbreaks of infectious diseases. To prevent transmission of droplet-borne infectious diseases, people who are infected and ill need to be isolated in specialized airborne negative pressure rooms. Most jails and prisons have few negative pressure rooms, if any, and these may be already in use by people with other conditions (including tuberculosis or influenza). Resources will become exhausted rapidly and any beds available will soon be at capacity. This makes containing the illness and caring for those who have become infected nearly impossible.

18. Jails and prisons lack access to vital community resources to diagnose and manage infectious diseases. Jails and prisons do not have access to community health resources that can be crucial in identifying and managing widespread outbreaks of infectious diseases. This includes access to testing equipment, laboratories, medications, and specialized equipment, such as ventilators.

19. Jails and prisons often need to rely on outside facilities (hospitals, emergency departments) to provide intensive medical care given that the level of care they can provide in the facility itself is typically relatively limited. During a pandemic, this will not be possible, as those outside facilities will likely be at or over capacity themselves. To help ease the collective burden on Southeastern Michigan hospitals, the state is constructing make-shift field hospitals.[12] The patient volume at Detroit's Sinai-Grace Hospital is so overwhelming that patients are lining the hallways, and patient care is suffering from staff, supplies, and equipment shortages.[13] In some cases, patients have died waiting for medical attention.[14]

[12] *TCF Center makeshift hospital in Detroit ready to accept first patients*, WXYZ Detroit, Channel 7 (April 9, 2020) https://www.wxyz.com/news/coronavirus/4-local-health-systems-will-help-staff-tcf-center-temporary-hospitals-first-patients-arriving-friday.

[13] Paul P. Murphy and Theresa Waldrop, *Detroit hospital workers say people are dying in the ER hallways before help can arrive* (April 9, 2020), https://www.cnn.com/2020/04/09/us/detroit-hospital-workers-sinai-grace-coronavirus/index.html.

[14] *Id*.

20. **Health safety**: As an outbreak spreads through jails, prisons, and communities, medical personnel become sick and do not show up to work. Absenteeism means that facilities can become dangerously understaffed with healthcare providers. This increases a number of risks and can dramatically reduce the level of care provided. As health systems inside facilities are taxed, people with chronic underlying physical and mental health conditions and serious medical needs may not be able to receive the care they need for these conditions. As supply chains become disrupted during a global pandemic, the availability of medicines may be limited. Locally, for example, two Wayne County Jail physicians, including the Jail's medical director, have died from COVID-19.[15]

21. **Safety and security**: As an outbreak spreads through jails, prisons, and communities, correctional officers and other security personnel become sick and do not show up to work. Absenteeism poses substantial safety and security risk to both the people inside the facilities and the public. Furthermore, rapid spread of infectious diseases among the inmates can often worsen the epidemic outside of the incarcerated population because staff are more likely to be infected and spread the disease to their families and the wider population.

22. These risks have all been borne out during past epidemics of influenza in jails and prisons. For example, in 2012, the CDC reported an outbreak of influenza in 2 facilities in Maine, resulting in two inmate deaths.[16] Subsequent CDC investigation of 995 inmates and 235 staff members across the 2 facilities discovered insufficient supplies of influenza vaccine and antiviral drugs for treatment of people who were ill and prophylaxis for people who were exposed. During the H1N1-strain flu outbreak in 2009 (known as the "swine flu"), jails and prisons experienced a disproportionately high number of cases.[16] Even facilities on "quarantine" continued to accept new cases of influenza, a viral

[15] Charlie LeDuff, *LeDuff: Covid Has Killed 2 Wayne County Jail Doctors, A Commander, And Still: Silence*, Deadline Detroit (April 13, 2020), https://www.deadlinedetroit.com/articles/24965/leduff_covid_has_killed_2_wayne%20_county_jail_doctors_a_commander_and_still_silence.

[16] *Influenza Outbreaks at Two Correctional Facilities—Maine, March 2011,* Centers for Disease Control and Prevention (2012), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6113a3.htm.

infection for which there was an effective and available vaccine and antiviral medications, unlike COVID-19, for which there is currently neither.

III. Profile of COVID-19 as an Infectious Disease[17]

23. The novel coronavirus, officially known as SARS-CoV-2, causes a disease known as COVID-19. The virus is thought to pass from person to person primarily through respiratory droplets (by coughing or sneezing) but may also survive on inanimate surfaces. People seem to be most able to transmit the virus to others when they are sickest but recent data from China has demonstrated that almost 13% of transmission occurs from asymptomatic individuals before they start to show symptoms, and it is possible that transmission can occur for weeks after their symptoms resolve.[18] In China, where COVID-19 originated, the average infected person passed the virus on to 2-3 other people; transmission occurred at a distance of 3-6 feet. A recent study out of Singapore found 10% of new infections could be caused by asymptomatic patients.[19] Not only is the virus very efficient at being transmitted through droplets, everyone is at risk of infection because our immune systems have never been exposed to or developed protective responses against this virus. A vaccine is currently in development but will likely not be able for over a year to the general public. Antiviral medications are currently in testing but not yet FDA-approved. People in prison

[17] This whole section draws from Brooks J. *Global Epidemiology and Prevention of COVID-19*, COVID-10 Symposium, Conference on Retroviruses and Opportunistic Infections (CROI), virtual (March 10, 2020); Coronavirus (COVID19), Centers for Disease Control, http://www.croiconference.org/sessions/global-epidemiology-and-prevention-covid-19; Brent Gibson, *COVID-19 (Coronavirus): What You Need to Know in Corrections*, National Commission on Correctional Health Care (updated April 17, 2020), https://www.ncchc.org/blog/covid-19-weekly-roundtable-for-law-enforcement-correctional-health-care-webinar.

[18] Du Z, Xu X, Wu Y, Wang L, Cowling BJ, Ancel Meyers L. Serial interval of COVID-19 among Publicly Reported Confirmed Cases, (Research Letter), Vol. 26 Emerg Infect Dis. Journal No. 6 (June 2020 early release) [*retrieved on* April 20, 2020]. https://www.cdc.gov/eid/article/26/6/20-0357_article.

[19] Linda Givetash, *New Chinese data on asymptomatic coronavirus cases could help world response*, NBC News (April 9, 2020), https://www.nbcnews.com/news/world/new-chinese-data-asymptomatic-coronavirus-cases-could-help-world-response-n1173896.

and jail will likely have even less access to these novel health strategies as they become available.

24. Most people (80%) who become infected with COVID-19 will develop a mild upper respiratory infection but emerging data from China suggests serious illness occurs in up to 16% of cases, including death.[20] Serious illness and death is most common among people with underlying chronic health conditions, like heart disease, lung disease, liver disease, and diabetes, and older age.[21] 74% of cases requiring hospitalization are people over the age of 50.[22] Among those individuals, the risk of poor outcomes, included the need for mechanical intervention is over 20%. Death in COVID-19 infection is usually due to pneumonia, and sepsis, and would occur between approximately 1-4% of the population. The emergence of COVID-19 during influenza season means that people are also at risk from serious illness and death due to influenza, especially when they have not received the influenza vaccine or the pneumonia vaccine.

25. The care of people who are infected with COVID-19 depends on how seriously they are ill.[23] People with mild symptoms may not require hospitalization but may continue to be closely monitored at home. People with moderate symptoms may require hospitalization for supportive care, including intravenous fluids and supplemental oxygen. People with severe symptoms may require ventilation and

[20] *Coronavirus Disease 2019 (COVID-19): Situation Summary*, Centers for Disease and Prevention (updated April 19, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html.

[21] Fei Zhou, Ting Yu, and Ronghui Du et. al, *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, The Lancet (published online March 11, 2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)305663/fulltext.

[22] Garg, Kim, and Whitaker et. al, Center for Disease Control, Morbidity and Mortality Weekly Report – Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory- Confirmed Coronavirus Cases (April 8, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm.

[23] *Coronavirus Disease 2019 (COVID-19): Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease*, Centers for Disease Control and Prevention (updated April 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html.

intravenous antibiotics. As discussed earlier, Southeastern Michigan hospitals are already overwhelmed and beyond capacity to provide this type of intensive care. This will worsen as COVID-19 becomes more widespread in communities.

26. In order to reduce the burden on the local health systems, aggressive containment and COVID-19 prevention is of utmost importance. To this end, State of Michigan and the City of Detroit have mandated COVID- 19 prevention strategies, such as "shelter in place" or "stay at home" orders, which have gone beyond containment and mitigation. Jails and prisons already have difficulty with containment because it requires intensive hand washing practices, decontamination and aggressive cleaning of surfaces, and identifying and isolating people who are ill or who have had contact with people who are ill, including the use of personal protective equipment. However, even with these efforts, it is nearly impossible for jails and prisons to provide the atmosphere of "shelter in place" or "stay at home" social distancing, given the number of individuals that work in and are housed in these facilities in the current system.

27. The time to act is now. Data from other settings demonstrates what happens when jails and prisons are unprepared for COVID-19. To date, few state or federal prison systems have adequate (or any) pandemic preparedness plans in place.[24] Systems are just beginning to screen and isolate people on entry and perhaps place visitor restrictions, but this is wholly inadequate when staff and vendors can still come to work sick and potentially transmit the virus to others.

IV. Risk of COVID-19 in the Michigan Department of Corrections

28. In preparing this report I have reviewed the declarations of Plaintiffs Elliot Abrams, Craig Seegmiller, Vincent Glass, Isaac Morberg, Robert Reeves, Jermaine Campbell, and Lamont Heard.

29. Based on my expertise in virology, review of the relevant literature, and my review of the declarations referred to paragraph 28, it is my professional judgment that immediate action is necessary to stem the spread of COVID-19

[24] Luke Barr & Christina Carrega, *State prisons prepare for coronavirus but federal prisons not providing significant guidance, sources say*, ABC News (March 11, 2020), https://abcnews.go.com/US/state-prisons-prepare-coronavirus-federal-prisons-providing-significant/story?id=69433690.

throughout the Michigan Department of Corrections and prevent an even worse outbreak, which will result in severe harm to detained individuals, prison staff, and the broader community. The MDOC is obviously under-equipped and ill prepared to prevent and manage a COVID-19 outbreak assuming what is described in the declarations are true, in some cases taking almost no precautions because they deemed inmates' contraction of the virus as inevitable. The reasons for this conclusion are detailed as follows.

30. According to one of the declarants, Mr. Abrams had his spleen removed, heightening his risk of complications due to COVID-19. Despite that risk, Mr. Abrams cannot possibly social distance in prison. He has a cell mate, and shares necessary areas like bathrooms, microwaves, telephones, and mess halls with other inmates. He notes that he has observed officers, who also present a serious risk of spreading COVID-19, continue to conduct "pat-downs" of each inmate several times a shift without changing their gloves. If these statements are true, the prison is not following basic CDC protection and prevention.

31. Another declarant, Mr. Seegmiller, describes the crowded conditions of his confinement as one hundred and sixty inmates cramped into a pole barn and forced to share just two bathrooms with limited accommodations. Eight individuals sharing one cube presents a serious risk of contracting COVID-19 because of its survival on inanimate surfaces. These bathrooms should be sanitized after each use to properly protect the next user from COVID-19.

32. Another declarant, Mr. Vincent Glass describes the conditions at Parnall Correctional Facility. Glass is confined in the now infamous "10-Block," where four inmates tested positive for the virus in late March. According to Glass, the warden placed these inmates in single cells on the lower level with open bars, where other inmates live above, below, and next door to them. This unit holds over four hundred inmates, and its crowded conditions present a near impossible risk of avoiding others. Like the other inmates, Glass shares common spaces like the phone, shower, and chow hall with his fellow inmates.

33. The declarants attested to the fact that individuals confined have limited access to disinfectant, if at all, or basic cleaning supplies with which to clean their shared cells, shared living quarters, common areas, or high-touch surfaces. One declarant describes his only cleaning utensil as a mop. High-touch surfaces, such as light switches, door and sink knobs, telephones, tables, etc., should be

sanitized after each use. Failure to properly sanitize shared spaces, common areas, and high- touch surfaces that detained individuals heavily use, seriously increases the risk of the spread of COVID-19 and demonstrates the MDOC's failure to take the most fundamental precautions for preventing the spread of the disease.

34. The declarations attest to significant neglect of inmates' medical needs and the ability to provide the care necessary to prevent serious illness or death. The declarants stated that, although they were initially able to make requests for medical attention, those requests were ignored for days or dismissed. Presently, according to declarants, inmates are essentially unable to request medical attention because nurses and doctors are unavailable and correctional officers tell the inmates that they cannot assist with to those requests. This is true, according to declarants, even for inmates who are particularly vulnerable to risk of severe illness or death, as a result of underlying health conditions.

35. The MDOC's failure to provide inmates with adequate medical care for their underlying chronic health conditions, as described by the declarants, results in increased risk of COVID-19 infection and increased risk of infection-related morbidity and mortality if they do become infected. According to their declarations, some Plaintiffs, and others held in the different prisons have serious medical vulnerabilities. A worsening outbreak in these different prisons would prove disastrous, and potentially fatal, for these medically vulnerable individuals. Based upon the declarations, it is apparent that the prisons are not providing adequate medical treatment to infected inmates. This is also worrisome because it will surely cause unnecessary risk of severe illness or death, and because patients from the prisons will further strain already-burdened Southeastern Michigan medical facilities who will have to absorb patients from various prisons.

36. The declarants further attested to the fact that inmates who exhibit COVID-like symptoms, such as cough, shortness of breath, or a fever are not immediately tested or quarantined, if at all. Failure to adequately test for infection results in dramatic undercounting of persons infected, and, in turn, makes it impossible to protect against an outbreak.

37. The quarantine procedures utilized by facilities like Parnall will not in any way mitigate or prevent the spread of infection. The declarants stated that the prison

is "quarantining" presumably infected inmates in cells immediately adjacent to and within arms-reach of cells with inmates who are not presumed to be infected.

V. Conclusion and Recommendations

38. For the reasons above, it is my professional judgment that individuals placed in the custody of the Michigan Department of Corrections are at a significantly higher risk of infection with COVID-19 as compared to the population in the community, given the procedural and housing conditions in the facility, and that they are at a significantly higher risk of harm if they do become infected. These harms include serious illness (pneumonia and sepsis) and even death.

39. Indeed, based on the circumstances described in the declarations, my expertise in virology, and based upon my knowledge and understanding of the ways in which the novel coronavirus is transmitted, drastically reducing the contraction of COVID-19 in the prison setting is the *only* way to protect the health and safety of people detained in the facility and the public at large.

40. For the medically vulnerable – individuals with preexisting conditions (e.g., heart disease, chronic lung disease, chronic liver disease, suppressed immune systems, cancer, and diabetes) or who are over the age of 50[25] – the wardens of various facilities and the Director have demonstrated neglect of medical needs and failure to both identify and quarantine infection, coupled with the inmates' limited access to lifesaving protections, if any, and inability to practice physical distancing creates a meaningfully higher risk of death.

41. Based on the facts in the Declarations, it seems that the Defendants are not complying with the standards contained in the CDCs guidelines for prisons and jails. Failure to comply with those standards applicable to jail and prisons will result in a full-blown pandemic within the walls of the prisons of Michigan.

42. It is my professional opinion that these steps are both necessary and urgent. The horizon of risk for COVID-19 in this facility is a matter of days, not weeks.

[25] Garg, Kim, and Whitaker et. al, Center for Disease Control, Morbidity and Mortality Weekly Report – Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory- Confirmed Coronavirus Cases (April 8, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm.

43. Health in jails and prisons is community health. Protecting the health of individuals who are detained in and work in these facilities is vital to protecting the health of the wider community.

44. Based on the above, it is my recommendations that the following procedures are implemented with the Michigan prison system.

a. Frequently communicate to all incarcerated people information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices;

b. Provide adequate spacing of six feet or more between inmates so that social distancing can be accomplished in accordance with the CDC guidelines;

1. impose at least 6-feet of social distancing for each inmate confined in a 2-person cell;

2. Impose at least 6-feet of social distancing for each inmate confined in the Pole Barns;

3. Impose at least 6-feet of social distancing for each inmate confined in dayrooms, gyms, classrooms, or any other area where inmates are housed;

4. Impose at least 6-feet of social distancing for each inmate during feeding;

5. Impose at least 6-feet of social distancing for each inmate during yard / exercise periods;

c. Ensure that each incarcerated person receives, free of charge, an individual supply of hand soap and paper towels sufficient to allow frequent hand washing and drying each day; an adequate supply of clean implements for clearing such as sponges and brushes and disinfectant hand wipes or disinfectant products effective against the virus that causes COVID-19 for daily cleanings;

d. Require that all prison staff wear person protective equipment, including CDC-recommended surgical masks, when interacting with any person or when touching surfaces in cells or common areas;

e. Require that all prison staff wash their hands, apply hand sanitizer containing at least 60% alcohol, or change their gloves both before and after interacting with any person or touching surfaces in cells or common areas;

f. Take each incarcerated person's temperature daily (with a functioning and properly operated and sanitized thermometer) to identify potential COVID19 infections;

g. Assess (through questioning) each incarcerated person daily to identify potential COVID-19 infections;

h. Conduct immediate testing for anyone displaying known symptoms of COVID-19;

i. Ensure that inmates identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined in a non-punitive setting, with continued access to showers, recreation, mental health services, reading materials, phone and video visitation with loved ones, communications with counsel, and personal property;

j. Respond to all emergency (as defined by the medical community) requests for medical attention within an hour;

k. Provide sufficient disinfecting supplies, free of charge, so inmates can clean high-touch areas or items (including, but not limited to, phones and headphones) between each use;

l. Waive all medical co-pays for those experiencing COVID-19-related symptoms;

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

Executed on this 22nd day of April 2020.

Adam Lauring, MD, PHD

Declaration of Jeremy D. Young, MD, MPH

I, Jeremy D. Young, declare as follows:

I. Background and Qualifications

1. I am a physician and am board-certified in Internal Medicine and Infectious Diseases. I am an Associate Professor of Medicine at The Ohio State University College of Medicine in the Division of Infectious Diseases in the Department of Internal Medicine and am the Associate Chief of Clinical Operations for that division at The Ohio State University Wexner Medical Center in Columbus, Ohio. I completed my residency in Internal Medicine at The Ohio State University Medical Center in Columbus, Ohio, in 2004. I completed a fellowship in Infectious Diseases at The Ohio State University Medical Center in 2006. I also hold a Master of Public Health, which I received from The Ohio State University in 2006.

2. Before returning to Ohio State as a professor in 2019, I was previously an Associate Professor (with tenure) at the University of Illinois at Chicago in the Division of Infectious Diseases, Immunology & International Medicine in Chicago, Illinois. While at the University of Illinois at Chicago, I also served as the Program Director for the Infectious Diseases Fellowship. While I was in Illinois, for approximately ten years, I worked on controlling the spread of infectious diseases such as HIV and hepatitis C in correctional institutions across the state. Specifically, I worked to develop improved virologic suppression methods with respect to HIV across the prison system in Illinois using telemedicine. Through this work over the past decade or more, I have become knowledgeable about infection control procedures and the spread of virus through prisons and other correctional facilities.

3. I have spoken about, written, and published extensively on the topics of infectious diseases among people involved in the criminal justice system, including through poster presentations, oral abstracts, book chapters, and articles in peer-reviewed journals and publications (including *Journal of Respiratory Diseases*, *New England Journal of Medicine*, *Clinical Infectious Diseases*, *JAMIA*, *American Journal of Infection Control*, *Journal of Clinical Medicine*, and others) on issues of prevention, diagnosis, and management of HIV, hepatitis C, and other infectious diseases among people in the criminal justice system. I am well-versed in infectious disease epidemiology, have taught lectures on the subject, and apply the principles of infection control on a daily basis as part of my job. I have taught graduate students, medical students, residents, and infectious disease fellows on the principles and practices of infection control and epidemiology.

4. I have attached, as Exhibit A, a copy of my curriculum vitae, which contains a full listing of my education, experience, publication, and honors.

II. Infectious Disease Transmission in Correctional Facilities

5. The risk posed by exposure to contagious infectious diseases in correctional facilities is significantly higher than in the general community, both in terms of risk of transmission and harm to individuals who become infected. This is partially because correctional facilities are often poorly equipped to diagnose, treat, and manage infectious disease outbreaks due to lack of resources and medical providers. Also, the congregative nature of correctional facilities presents unique challenges to infection control, particularly with highly contagious diseases with person-to-person spread. Regarding risk of severity, offenders in correctional facilities often have underlying characteristics or conditions that may predispose them to an increased risk of morbidity and mortality from infectious diseases, including older age, diabetes mellitus, lung disease (e.g. COPD), coronary artery disease, immunocompromising conditions (e.g. HIV/AIDS), and high body mass index (BMI).

6. Globally, outbreaks of contagious diseases, including viral respiratory tract infections, are exceedingly common in closed detention settings, more so than in non-correctional communities. Not only are prisons and correctional facilities high-risk for internal outbreaks, due to close quarters and person-to-person transmission, these facilities are not isolated from their surrounding communities, allowing infectious diseases to enter the prison environment and spread quickly. Staff, visitors, contractors, and vendors, among others, pass between communities and correctional facilities and can (and do) bring community-based infections into facilities. In addition, turnover of prison and correctional facility populations means that people often cycle between units, facilities, and communities. People are often transported to and from facilities for other various purposes as well, including to attend court, move between facilities, and to attend external healthcare appointments. The incarcerated are an at-risk population, and their contagious conditions also put communities at risk. Accordingly, prison health is a vital component of public health.

7. Communal settings in prisons and other correctional facilities provide an ideal environment for the rapid spread of infectious diseases that are transmitted person-to-person, particularly those passed by respiratory droplets, aerosols, direct contact, or fomites (objects or materials likely to harbor infectious pathogens, such as clothes, utensils, and furniture). Opportunities for transmission of such diseases increases when individuals share dining space, living quarters, bathrooms, showers, and other common areas. In these cases, the best initial strategies to help combat the spread of the infectious diseases are to perform frequent hand hygiene, clean and disinfect potential fomites, and practice social distancing. When imprisoned, people have a decreased ability to protect themselves through social distancing than they would have in the non-correctional community. Spaces within prisons and other correctional facilities also tend to be poorly ventilated, which promotes highly efficient spread of infectious diseases through droplets. Individuals in these settings have a diminished ability to protect themselves from exposure to infectious diseases.

8. During an infectious disease outbreak, many individuals protect themselves by performing hand hygiene, either with soap and water or alcohol-based hand sanitizers. However, correctional facilities rarely provide adequate opportunities for inmates to exercise necessary hand hygiene measures. Prisons and correctional facilities are often ill-equipped with sufficient hand soap and alcohol-based sanitizers for detained persons living and working in these facilities. Furthermore, high-traffic fomites such as doorknobs, light switches, tables, and counters should also be cleaned and disinfected regularly with bleach-based solutions to prevent the spread of virus. This measure rarely taken in prisons and correctional facilities due to a lack of cleaning supplies and available personnel to perform the necessary cleaning and disinfecting procedures.

9. Often in an infectious disease pandemic, containment strategies require people who are symptomatic and may be infected to be isolated, and that caregivers and treating physicians and nurses have access to personal protective equipment (PPE), including gloves, masks, gowns, and eye protection (goggles or face shield). As stated, prisons and correctional facilities are often ill-equipped to provide sufficient resources, including PPE for people who are incarcerated and associated caregiving staff. This lack of resources increases the risk to the broader prison population (including inmates as well as those entering the prison for other reasons) of a widespread outbreak.

10. Prisons and correctional facilities often lack onsite medical facilities, 24-hour medical care, and/or access to other medical equipment necessary to diagnose, treat, and manage ill individuals and spread to others during infectious disease outbreaks. Medical facilities and prisons and correctional facilities are rarely sufficiently equipped to handle large outbreaks properly, applying evidence-based strategies for risk reduction, treatment, and containment. To prevent the transmission of droplet-borne diseases, people who are infected and symptomatic must be isolated in a single cell, without cellmates, in a room with a closed door. Any available resources are likely to become rapidly exhausted during an infectious disease outbreak, and any available rooms or beds in any infirmary or other medical facility will likely be at capacity within hours or days. This makes containing the illness and treating those who have become infected much more difficult. In addition, prisons often lack access to community health resources that can be crucial to identify and manage widespread outbreaks, including testing kits, venipuncture capabilities, laboratory equipment, radiology, and medication for those who are infected.

11. Because of their limited resources and access to adequate facilities, prisons and correctional institutions often need to rely on nearby outside facilities, including hospitals and emergency departments, to provide intensive medical care. During a pandemic, however, this may not be possible, as outside facilities will likely be at or over capacity already.

12. Correctional facilities often house populations who are more susceptible to acquiring and experiencing complications from infectious diseases as compared with the general population at large. Often, people in prisons and correctional facilities have chronic underlying health conditions, including diabetes, hypertension, heart disease, chronic lung disease, chronic liver disease, and immunocompromising conditions such as HIV/AIDS.

Thus, prisons and correctional facilities house populations who have increased susceptibility.

III. COVID-19

13. The novel coronavirus, also known as SARS-CoV-2, causes a disease known as COVID-19. COVID-19 is a serious disease and has reached pandemic status. Over 802,500 cases have been confirmed in the United States – and almost 33,000 in Michigan – with more than 44,500 deaths.[1,2] These numbers will increase, perhaps exponentially, as testing capabilities improve.

14. The virus is believed to pass from person to person primarily through respiratory droplets (by coughing or sneezing) but may also survive on inanimate surfaces (i.e. fomites, such as doorknobs, countertops, and other objects and surfaces). People seem to be most able to transmit the virus to others when they are exhibiting the most severe symptoms, but it is possible that people can transmit the virus while still asymptomatic or for weeks after their symptoms resolve. In China, where SARS-CoV-2 originated, the average infected person passed the virus on to 2-3 other people, with transmission occurring at a distance of 3-6 feet. However, symptomatic persons clustered in close quarters are often referred to as "super spreaders," and can transmit the virus to hundreds of others, as demonstrated in nursing homes and on cruise ships. Every person is at risk of infection because our immune systems have never been exposed to, or developed protective responses against, this novel coronavirus.

15. The time course of the disease, from wellness to severe illness, can be very rapid. Individuals may show symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days after that. For others, symptoms may not manifest for up to two weeks after contraction of SARS-CoV-2. This presents its own issues as far as disease transmission, because individuals may not realize they have contracted the virus for several weeks, and may continue to interact with others for weeks, thereby spreading the disease to those with whom they come into contact.

16. Although a vaccine is currently in development, it will likely not be available for another year to the general public. Antiviral medications are currently in testing but not yet received FDA-approved. This means those medications, such as remdesivir, are only available as part of a clinical trial through either the manufacturer or National Institutes of Health (NIH), or off-label use of unproven therapies such as chloroquine or hydroxychloroquine. People in prisons and correctional facilities will likely have less access to these novel treatment strategies than other individuals, even as they become available to the broader public.

17. The majority of individuals infected with COVID-19 develop mild disease. That is, they experience flu-like symptoms and develop mild upper respiratory infections. But emerging data from China suggests that serious illness may occur in up to 16% of cases, and can

include the need for intubation and mechanical ventilation, or even death.[1] Serious illness and death is most common among elderly patients, and patients with underlying health conditions, such as diabetes, heart disease, lung disease, and liver disease.[2] Death from COVID-19 is typically due to pneumonia complicated by acute respiratory distress syndrome (ARDS) and/or sepsis. The risk of death or serious illness is heightened for people who have not received the influenza and/or pneumonia vaccine as these co-infections can occur, increasing the risk of poor outcomes.

18. Treatment of individuals infected with COVID-19 varies based on the severity of illness. Individuals with mild symptoms may be treated at home without the need for hospitalization. Those with moderate and severe symptoms, however, likely require hospitalization for supportive care (such as intravenous fluids and supplemental oxygen) or for more intensive care (such as ventilation and intravenous antimicrobials). Doctors, infectious disease specialists, and public health officials anticipate that hospitals are likely to be overwhelmed and beyond capacity to provide the required intensive care as COVID-19 becomes more widespread across the United States. Indeed, this type of overcrowding was experienced in hospitals across China and Italy in connection with treatment of individuals with COVID-19 and is currently occurring in New York City.

IV. The Risk of COVID-19 in Correctional Facilities

19. COVID-19 is particularly dangerous for those who are elderly, immunocompromised, or who have underlying medical conditions such as diabetes, heart disease, or lung disease. These populations are at a higher risk of morbidity and mortality if infected.

20. Patients' immune systems can be compromised by chemotherapy for the treatment of malignancies, HIV/AIDS, hepatitis C, immunosuppressive medications, and other reasons. All of these conditions may make individuals more susceptible to poor outcomes associated with COVID-19.

21. Vulnerable people who are exposed to COVID-19 can experience severe respiratory illness and damage to major organs from ARDS, myocarditis, septic shock, and other serious complications. Supportive care for serious cases of COVID-19 requires significant resources, including clinicians, proper PPE, intensive care units, nursing support, and ventilators. An outbreak of COVID-19 could put significant pressure on, or exceed the capacity of, the local health infrastructure.

22. Based on my understanding of the Lakeland Correctional Facility (LCF), my review of relevant materials, my experience working on public health in prisons and other correctional facilities, and my review of the relevant literature, **it is my opinion that LCF has failed to implement infection control procedures sufficient to prevent and manage**

[1] *Coronavirus Disease 2019 (COVID-19): Situation Summary*, Centers for Disease Control and Prevention (April 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/summary.html.
[2] *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, The Lancet (published online March 11, 2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext

a COVID-19 outbreak. The current infection control measures in place to reduce the spread of COVID-19 at LCF are grossly inadequate, particularly considering its vulnerable population. My understanding is that many other MDOC facilities, not just LCF, are not following the appropriate measures of quarantine, social distancing, and hand hygiene necessary to protect inmates. These MDOC facilities include, but appear to be not limited to: Macomb Correctional Facility (MRF), G. Robert Cotton Correctional Facility (JCF), and Parnall Correctional Facility (SMT). This could result in severe harm to detained individuals, prison staff, and the broader community. The reasons for this conclusion are detailed below.

23. As stated, prisons and correctional facilities are congregate environments where people live and sleep in close proximity. In such environments, infectious diseases that are transmitted via the droplet, direct contact, or fomites are more likely to spread. This therefore presents an increased danger for the spread of COVID-19. To the extent that detainees or prisoners are housed in close quarters, unable to maintain a six-foot distance from others, and sharing or touching objects used by others, the risks of spread are greatly, if not exponentially, increased as already evidenced by spread of COVID-19 in another congregate environment: nursing homes and cruise ships.

24. The CDC has published a guidance for correctional and detention facilities to prepare and protect inmates and employees from the spread of COVID-19. Specifically, the CDC recommends the following measures:

    a. The availability of sufficient hand hygiene supplies, cleaning supplies, PPE, and medical supplies, including, but not limited to, liquid soap, alcohol-based hand sanitizers with at least 60% alcohol, facemasks, face shields, goggles, gloves, and testing supplies such as swabs and viral transport media.

    b. Provide a no-cost supply of soap to incarcerated/detained persons and employees, sufficient to allow frequent handwashing.

    c. Provide easy access to alcohol-based hand sanitizer containing at least 60% alcohol.

    d. Adhere to CDC recommendations for cleaning and disinfection during the COVID-19 response, including cleaning and disinfecting frequently touched surfaces several times per day.

    e. Post signage throughout the facility and communicating the information verbally on a regular basis.

    f. Implement social distancing strategies to increase the physical space between incarcerated/detained persons, including in holding cells and waiting areas, and by staggering time in recreation spaces, staggering meals and rearranging seating in the dining hall to increase space between individuals, liming the size of group activities, and rearranging housing spaces to increase space between individuals.

g. Provide inmates with information and consistent updates about COVID-19 and its symptoms.

25. Combined, implementation of these procedures for all prisoners across the Unit has a number of valuable effects on public health and public safety within the prison and to the surrounding community. For example, increased social distancing will reduce the chance of spread of the virus if it is introduced; increased preventative measures such as handwashing, cleaning supplies for surfaces, etc. helps further restrict the spread of the virus and will help inmates protect themselves and others. These measures will, in turn, also reduce the burden on prison staff and local hospital and emergency room medical staff by reducing the number of people who will become sick and require hospitalization. This, in turn, helps to reduce the health and economic burden to the local community at large.

V. Conclusions and Recommendations

I have read the complaint as well as the declarations by inmates E. Abrams, D Lyons, E. Marr, V. Glass, I. Moberg, R. Reeves, C. Seegmiller, T. Combs, and T. Killian.

26. As an infectious diseases expert with experience in the transmission of viruses and diseases within the correctional system, it is my opinion that the individuals in Michigan correctional facilities are at a significantly higher risk of infection with COVID-19 as compared with the population at large and are at a significantly higher risk of morbidity and mortality if they do become infected. Strict measures must be taken in the following areas: a) hand hygiene; b) social distancing; c) enhanced and frequent cleaning of high-touch surfaces; d) limiting transfers of inmates; e) quarantining those who are symptomatic and/or have tested positive for SARS-CoV-2; and f) inmate education regarding the above, including both signage and verbal teaching for those who may have difficulties with reading.

27. As such, I recommend that MDOC implement and strictly adhere to and enforce all of the CDC guidelines listed in paragraph 24, above. Moreover, the CDC recommends—as do I—that transportation and movement of incarcerated persons between units be limited. If transfer or movement is necessary, I recommend that those individuals be tested for COVID-19 or placed in a 14-day quarantine before being released into the general population of the prison. It is my opinion that these steps are necessary to ensure that the virus is not introduced to the broader and highly at-risk population.

28. It is my professional opinion that these steps are both necessary and urgent. The horizon of risk for COVID-19 in MDOC facilities is a matter of days, not weeks. **This is an imminent threat to inmates, correctional employees and their families, and the greater community.**

29. I find the MDOC's COVID-19 policies and actions, or lack thereof, to be egregiously deficient in comparison with the CDC standard in a number of respects, and posing substantial risk that inmates will face an outbreak of the novel coronavirus and resulting

COVID-19 disease, further entailing grave risks to the health of inmates, including the risk of death. The deficiencies in MDOC's policy include the following items:

a. Forbidding inmates from using hand sanitizer, despite that fact that staff are required to carry and use it when needed. By contrast, the CDC recommends "relaxing restrictions on allowing alcohol-based sanitizer in the secure setting where security concerns allow." Hand sanitizer is an important component of an infection control strategy to prevent transmission of SARS-CoV-2.

b. With respect to the transfer of inmates, MDOC's policy only requires facilities to minimize transfer of offenders between units. By contrast, the CDC Guidance recommends correctional facilities "[r]estrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding."

c. To the extent MDOC cannot avoid transfers of inmates, the newly-arrived inmates should either be tested for the virus, or quarantined for 14 days. MDOC's policies and actions are seriously deficient in this regard.

d. Social distancing is a crucial strategy to prevent spread of the coronavirus. After reading the inmate declarations referenced above, it appears as if several MDOC facilities are housing inmates together without any attempt at social distancing, with continued sharing of bathrooms, microwaves, telephones, and dining areas. Indeed, inmates who have tested positive for SARS-CoV-2 (COVID-19) have allegedly been allowed to interact with inmates from other units. Social distancing at several MDOC facilities appears to fall well short of the recommendations by CDC, and some facilities do not appear to be making any efforts whatsoever.

e. I also understand that, based on inmate reports, MDOC facilities are not providing appropriate education to inmates regarding the signs and symptoms of COVID-19, the threat of COVID-19, or how to help prevent contracting SARS-CoV-2. Some specific steps would be:

   i. Posting signs providing guidance and education on COVID-19 symptoms and best methods for preventing transmission;

   ii. Reducing social gatherings or taking other precautions to reduce inmate contact;

   iii. Educating inmates on how COVID-19 is transmitted, signs and symptoms, and prevention of transmission;

   iv. Reducing and restricting inmate movement;

v. Reminding inmates of effective measures to prevent transmission, such as washing hands with soap for at least 20 seconds.

30. In my opinion to a reasonable degree of medical certainty, MDOC's policy and its practices regarding the novel coronavirus are egregiously inadequate, and pose significant risks to inmates. Any competent physician in the field of infectious disease would recognize both 1) the serious deficiencies in MDOC's policies and practices with respect to protecting inmates from the virus, and 2) the serious health risks posed by the virus, particularly to a crowded population with underlying health conditions.

31. Health in prisons and correctional facilities impacts community health. Protecting the health of individuals who are detained and work in these facilities is vital.

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

Executed this 23rd of April, 2020.

_____

Jeremy D. Young, MD, MPH

Exhibit 26 - Dr. young's Declaration

2020 WL 1955303
Only the Westlaw citation is currently available.
United States District Court, M.D. Louisiana.

CHRISTOPHER **MARLOWE**

v.

JAMES **LEBLANC**, ET AL.

CIVIL ACTION NO.: 18-63-BAJ-EWD

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04/23/2020

RULING AND ORDER

JUDGE BRIAN A. JACKSON UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF LOUISIANA

***1** Before the Court is Plaintiff's **Motion for Temporary Restraining Order and/or Emergency Motion for Temporary Release (Doc. 93)**. Plaintiff has filed an Amended Memorandum in Support (Doc. 100), a Response (Doc. 102), and a Post-Hearing Reply (Doc. 110). Defendants filed an Opposition (Doc. 101) and Sur-Reply Memorandum in Opposition (Doc. 108). For the reasons stated herein, Plaintiff's **Motion (Doc. 93)** is **GRANTED IN PART** and **DENIED IN PART**.

I. FACTS

Plaintiff seeks emergency relief authorizing his temporary supervised release, or other appropriate but unspecified forms of relief, while the spread of the COVID-19 virus remains a threat within the Louisiana Department of Corrections system. (Doc. 100 at p. 1). The Court notes that both the President of the United States and the Governor of Louisiana have declared a state of emergency in response to this pandemic [1] . As a diabetic, Plaintiff alleges that he is especially vulnerable to experiencing complications associated with the virus, which is actively circulating at the Rayburn Correctional Center ("Rayburn"), where he is assigned. (*Id.* at 1). According to the evidence presented at the hearing on the Motion, at least 25 people within the facility, including 23 inmates, have tested positive for COVID-19. (Doc. 110, at p. 1).

[1] See, *Proclamation Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* issued March 13, 2020 by President Donald J. Trump. See also, *Declaration of Public Health Emergency in Response to COVID-19* issued March 11, 2020 by Governor John Bel Edwards.

Plaintiff originally filed this action in 2018, alleging that Defendants, staff at the Elayn Hunt Correctional Center, exhibited deliberate indifference towards his medical needs and provided constitutionally deficient meal service that resulted in Plaintiff developing diabetes and that the failure to adequately treat his illness later exacerbated the symptoms. (Doc. 1, at ¶4). Plaintiff filed Amended Complaints, which Defendants have moved to dismiss. *See* (Doc. 84). While this case was pending, Plaintiff was transferred to the Rayburn. He now brings the instant Motion for Temporary Restraining Order and/or Emergency Motion for Temporary Release (Doc. 93).

The Court held a status conference on April 3, 2020 (Doc. 95) and an evidentiary hearing on April 7, 2020 (Doc. 109). Additionally, both parties have filed numerous memoranda to keep the Court apprised of evolving conditions at the facility.

In his Amended Memorandum in Support (Doc. 100), Plaintiff alleges that his medical condition places him "at extreme risk to develop life-threatening complications should he contract COVID-19." (Doc. 100 at p. 2). He argues that the primary steps recommended by the Governor to limit the spread of COVID-19 have not been and cannot be meaningfully implemented within the Department of Corrections because prisoners are housed in compact and confined spaces. *Id.* In his memorandum, Plaintiff alleges that he shares a dormitory with approximately 78 other inmates who sleep in bunk rows and share five toilets. (Doc. 110–1 at p. 56). During the evidentiary hearing, Plaintiff provided testimony about numerous common areas used by the prisoners, including a common water fountain, microwave ovens, telephones, and a common cafeteria. *Id.* at 56-61. He also testified that many prisoners do not take social-distancing measures seriously, that the Warden arranged for social distance markers to be removed from the floors, and that he had received no official guidance concerning social-distancing measures from prison officials. *Id.* at 64. As noted, at least 23 offenders at Rayburn have tested positive for COVID-19. (Doc. 110, at p. 1).

***2** In opposition, Defendants allege that they are protected by Eleventh Amendment immunity and that the Plaintiff fails to sufficiently plead a claim of unconstitutional conditions. (Doc. 108, at p. 2). Defendants additionally argue that the Federal Rules of Civil Procedure do not allow a Plaintiff to request new relief or a new cause of action by way of the filing of a TRO, that Plaintiff lacks standing, and that Plaintiff failed to fully exhaust administrative remedies, which is typically a prerequisite to bringing a prisoner claim in federal court. *See* (Doc. 101).

II. LEGAL STANDARD

To obtain injunctive relief by way of a Temporary Restraining Order, Plaintiff must establish: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) that the injunction will not disserve the public interest. *See* *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 734 (5th Cir. 2008).

III. DISCUSSION

A. Jurisdiction

As an initial matter, the Court reviews its jurisdiction to consider the Motion. Defendants allege that it is improper for Plaintiff to allege new claims, not included in the initial complaint, through the filing of this TRO. While Defendants are correct that Plaintiff's Second Amended Complaint (Doc. 64) does not specifically address the outbreak of the novel coronavirus, it is fully premised upon Plaintiff's diabetes diagnosis and the prison facility's alleged inability to effectively provide medical care related to it.[2] Plaintiff has been moved to another facility, but remains within the custody of the Louisiana Department of Corrections, a named Defendant. An enhanced risk of contracting COVID-19 due to his condition, while not foreseeable at the time Plaintiff originally filed this lawsuit, stems from the same factual nexus as the original and amended Complaints.

[2] The underlying Complaint is premised upon allegations against personnel at the Elayn Hunt Correctional Center who allegedly contributed to Plaintiff's diagnosis of diabetes.

In addition to the factual similarities, the Court finds that it serves the interests of judicial economy to adjudicate the instant Motion within this ongoing case. The Court is sufficiently familiar with the claims and defenses asserted by the Parties and finds that an efficient resolution is warranted by the adjudication of the Motion by this Court, given the unique circumstances.

Next, the Court shall consider Plaintiff's standing to bring this claim. Defendants argue that Plaintiff has failed to allege an injury in fact because the potential harms complained of (contracting coronavirus and experiencing complications associated with it) are not sufficiently likely due to the procedures implemented at Rayburn to prevent the spread of COVID-19. (Doc. 101 at p. 5–6). However, the Court notes that when this Motion was filed, only two inmates had tested positive for COVID-19. As of April 13, 2020, less than two weeks later, that number had escalated to 25 infections among inmates and staff. (Doc. 110, at p. 1).

As noted, the exponential growth of the novel coronavirus has resulted in emergency declarations by the President and the Governor, as well as governors of numerous other states. Due to the nature of this virus, the Court finds that the risk of contracting the virus in a prison environment, where at least 23 inmates have already tested positive, poses a sufficiently high risk, rendering this matter ripe for adjudication even though Plaintiff has not contracted the virus. The United States Supreme Court has held that the risk of contracting a serious disease may indeed constitute an unsafe, life-threatening condition that violates the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22 (1993). Further, the Supreme Court held that it would "be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.* With the clear danger posed by COVID-19 in the Rayburn facility, Plaintiff has adequately demonstrated standing.

***3** Regarding Defendants' assertion that Plaintiff failed to exhaust the administrative remedies available to him, Plaintiff admits that he did not exhaust administrative remedies and did not file a request to initiate the Administrative Remedy Procedure (ARP) related to this claim until April 7, 2020, after filing the instant Motion. (Doc. 102–2, at p. 2). Plaintiff initially contended that he could not file a claim because he lacked access to a computer and the ARP process had been closed because it was "non-essential."[3] (Doc. 102 at 5).

[3] Warden Robert Tanner testified at the hearing that this was not the case, and that ARP requests would be processed within 48 hours.

Generally, under the Prison Labor Reform Act ("PRLA"), pre-litigation exhaustion of available administrative remedies is mandatory for any suits brought under § 1983 by prisoners. *Porter v. Nussle*, 534 U.S. 516, 524, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12 (2002); *see also* 42 U.S.C. § 1997e(a). Despite the strict approach required within this Circuit concerning PLRA exhaustion requirements, the United States Court of Appeals for the Fifth Circuit has recognized that a district court must afford a prisoner an opportunity to show that he has either exhausted the available administrative remedies or that he should be excused from complying with them. *Johnson v. Ford*, 261 F. App'x 752, 755 (5th Cir. 2008) (holding that, while the facts presented in that case did not justify excusal, PLRA exhaustion requirements may be excused where dismissal would be "inefficient and would not further the interests of justice or the purposes of the exhaustion requirement").

Here, the statutory 30-day period to adjudicate Plaintiff's administrative claim will not expire until May 7, at which point Defendants contend the Court may then properly hear this matter if

it is not satisfactorily resolved through administrative proceedings sooner. Because of the nature of COVID-19, especially considering its ability to spread with great rapidity among densely populated communities, like prisons, the Court must reject Defendants plea and find that the interests of justice demand action by the Court on an emergency basis.[4] Further, the Court is vested with a traditional equitable power to issue injunctions to prevent irreparable injury, pending such exhaustion of administrative remedies. *Johnson v. Ford*, 261 F. App'x 752, 755 (5th Cir. 2008); *Jackson v. D.C.*, 254 F.3d 262, 268 (D.C. Cir. 2001). Due to the important implications of this case to the Plaintiff, the Court shall exercise its authority while the administrative proceedings brought by Plaintiff are still under review by prison authorities.

4 The Centers for Disease Control and Prevention (CDC) issued specific guidelines pertaining to the spread of COVID-19 within correctional and detention facilities. The CDC explained that it was issuing guidance because detention facilities have a heightened risk for the spread of COVID-19 due to offenders living within congregate environments, the inability to leave, staff ingress and egress, transfers between facilities, and more. *See* CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Mar. 23, 2020), at https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidancecorrectional-detention.pdf.

Lastly, sovereign immunity does not apply to Defendants with respect to the relief requested in the instant Motion. It is axiomatic that state officials acting in their official capacity can nonetheless be sued for prospective injunctive relief to correct ongoing violations of federal law. *Saahir v. Estelle*, 47 F.3d 758, 761 (5th Cir. 1995), *citing* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105, 104 S. Ct. 900, 910, 79 L. Ed. 2d 67 (1984). Here, Plaintiff seeks relief based on alleged ongoing violations of the Eighth Amendment of the United States Constitution. Thus, this Court is appropriately vested with jurisdiction to consider the claim.

B. Request for Relief

***4** Plaintiff's claim arises under the Eight Amendment, which, as he notes, may hold an official liable for "deliberate indifference." (Doc. 110, at p. 2). The Court has held conferences, conducted an evidentiary hearing and reviewed several filings in this case that all demonstrate the officials at Rayburn have taken numerous steps to implement policies to contain the spread of COVID-19 during these challenging times. While the number of infected inmates has grown, so too have the protective measures implemented at Rayburn by the DOC in response. Indeed, the demands

made upon corrections officials in their effort to contain the spread of this pandemic within their facilities is unprecedented.

Robert Tanner, the warden at Rayburn, testified that meetings are held at least three times weekly to assess the facility's response to the coronavirus, often resulting in daily changes. (Doc. 110–1, at p. 26). He further testified that quarantined offenders receive masks, as do staff members and offenders assigned to the kitchen, laundry, the infirmary, and anyone the medical director deems should wear a mask. (Doc. 110–1, at p. 33). Masks are also provided when "medically necessary."[5] Warden Tanner admitted that all offenders in the institution could be provided with a mask, if necessary. *Id.* at 33–34. Additionally, the guidelines provided by the DOC list numerous precautions being taken to handle the COVID-19 outbreak within the prison system. Such guidelines are applicable at Rayburn. Inmates who are asymptomatic, but have been in close contact with an inmate or employee confirmed or suspected to have COVID-19, are required to be quarantined for a minimum of 14 days. (Doc. 108–1, at p. 9). Defendants assert that these measures are adequate to protect Plaintiff from contracting the disease.

[5] This term was not defined by the Defendants.

However, Plaintiff's credible testimony paints a very different picture. For example, Plaintiff testified that the common water fountain in his dormitory is not wiped clean after each use by the inmates. He also testified that telephones in the dormitory are spaced a mere 12 inches apart and that no prisoner separation procedures have been implemented in the area of the telephones. The microwave ovens made available to the offenders are not regularly cleaned and disinfected. Also, no procedures have been implemented to avoid chokepoints in the walkways in the dormitory. According to the Plaintiff, foot traffic often results in offenders and staff "almost touching" each other. During mealtimes, inmates allegedly stand in line in the cafeteria in a heel-to-toe fashion to receive meals. After receiving their meals, inmates sit directly next to one another at tables in the cafeteria. More troubling is the Plaintiff's testimony that the inmates who serve the food only occasionally wear face masks in a proper manner while serving food. And the computers used by the inmates to communicate with family members and attorneys are not cleaned or sanitized after each use.

Plaintiff contends that Rayburn has struggled to sufficiently execute its own policies. Plaintiff's uncontroverted testimony has adequately demonstrated that, under the circumstances, his Eighth Amendment claim will likely prevail on the merits. Deliberate indifference is "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Board of County Com'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 410 (1997).

Of particular concern to the Court is the fact that there remain several instances in which Plaintiff is seemingly unable to properly protect himself from infection, despite efforts currently being taken by the facility. For example, Plaintiff testified that while in his bunk, he is capable of touching his bunk neighbor if he reaches to his left. (Doc. 110-1, at p. 55). Also, as a diabetic, he must frequently visit the infirmary for testing and treatment. He alleges that he is required to wait in line at the infirmary in a "shoulder-to-shoulder" manner, thereby increasing the risk of contracting COVID-19. *Id*, at 69.

***5** The most recent policy statements provided by the Defendants, which include the DOC Medical Division's COVID-19 Guidance (the Policy) issued April 6, 2020, lists several requirements that Defendants do not appear to be following, thereby exposing Plaintiff to an unreasonable risk of serious harm. For example, the Policy requires routine and frequent cleaning of high-touch surfaces and shared resident equipment. Such cleaning must be conducted using EPA-registered hospital-grade disinfectants. (Doc. 108–1 at p. 2). On April 13, Plaintiff reported that he had received a spray-bottle to clean high-touch surfaces as contemplated. *See* (Doc. 112). However, a few days later, Plaintiff notified the Court that the bottle was often empty. (Doc. 113, at p. 3). He also informed the Court of several other shortcomings. For example, he alleges that two medical orderlies who work in the infirmary that he regularly visits have not worn the proper personal protective equipment recommended for protection of themselves or others who utilize the services of the infirmary. *Id.* Plaintiff has also allegedly witnessed officers and cafeteria workers wearing PPE incorrectly with their noses exposed from the masks. *Id.*

It would appear, therefore, that despite taking some steps to deter the spread of the virus, Rayburn has not effectively implemented the DOC policies that require staff members and orderlies to wear masks and other PPE to protect the prison population, including the Plaintiff. (Doc. 108–1 at p. 12–14). The prison has also failed to meaningfully implement social-distancing procedures and other measures aimed at thwarting the spread of the coronavirus. Although the DOC policy defines "social distancing," it does not require that it be implemented at Rayburn or any other DOC facilities. *Id.* at 5. The Court finds it troubling that DOC officials, at least at Rayburn, have apparently disregarded the importance of social distancing in preventing the spread of this unique disease, when numerous public health officials, and the Governor of Louisiana, have consistently urged the residents of the state to observe such measures to slow the spread of the illness.[6] Defendants' failure to implement their own internal protective policies may itself entitle Plaintiff to relief from the Court. See *Johnson v. Epps*, 479 F. App'x 583, 590 (5th Cir. 2012) (holding that an inmate sufficiently stated a claim for deliberate indifference where prison officials adopted a policy mandating more sanitary procedures, but failed to enforce the policy).

6 The Governor has credited social distancing practices with helping to slow the rate of new COVID-19 infections within Louisiana. *See* Gov. Edwards: Social Distancing Working in Coronavirus Fight (April 10, 2020), available at https://www.kalb.com/content/news/Gov-Edwards-provides-updates-on-COVID-19-on-Good-Friday-569540141.html. Also, the CDC has observed that the best way to prevent contracting COVID-19 is to practice social distancing, as well as other preventative measures such as frequent hand-washing, disinfecting surfaces, and covering one's mouth and nose. *See* CDC: How to Protect Yourself and Others (April 13, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

Accordingly, the Court finds that Plaintiff has shown a substantial likelihood of prevailing on the merits of this Motion. He has also demonstrated a sufficiently substantial threat of irreparable injury if relief is not immediately ordered. The threatened injury that he has proven outweighs any harm that may result to the State if the injunction is not granted, and the injunction contemplated herein will not disserve the public. Accordingly, the Court finds that the Plaintiff has met the requirements for injunctive relief. *See, Ridgely* at 734.

C. Remedies

The Court will deny Plaintiff's request to modify his sentence, to include temporary release with monitoring conditions. Plaintiff's sentence was imposed by a state court, and this Court cannot now conclude that the conditions of confinement, despite the lack of sufficient precautionary measures, entitles him to immediate release. Therefore, the Court will not disturb the judgment of the sentencing court. Counsel for the Plaintiff have acknowledged that although officials have implemented several measures aimed at addressing the prevention of the coronavirus at Rayburn, more must be done, and some remedy other than Plaintiff's immediate release may be appropriate.

***6** Based on the evidence presented and the policies provided by Defendants, the Court finds that Defendants are capable of providing Plaintiff with the care necessary to protect him from COVID-19 without requiring relief in the form of temporary compassionate release during the duration of the COVID-19 crisis. Plaintiff's request to modify his sentence is therefore **DENIED**.

IV. CONCLUSION

Defendants must comply with the Governor's recommendations and their own internal policies concerning disinfection of common areas and the wearing of masks by staff and certain categories of offenders, particularly those who work in the infirmary and cafeteria where the Plaintiff is

assigned. Officials must also implement reasonable social-distancing measures to limit the spread of COVID-19 to the Plaintiff.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Temporary Restraining Order and/or Emergency Motion for Temporary Release (Doc. 93) is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that Defendants shall submit to the Court a Plan to ensure the implementation of proper hygiene practices in the dormitory in which Plaintiff is assigned, and to implement social distancing practices to limit the spread of COVID-19, as recommended by the Center For Disease Control and other public health authorities, in Plaintiff's immediate living area, for the protection of the Plaintiff. Defendants shall also submit a Plan to minimize Plaintiff's exposure to possible infected persons while visiting the infirmary and cafeteria areas of the prison.

IT IS FURTHER ORDERED that Defendants shall submit the Plan herein ordered within 5 days of the date of this Order.

IT IS FURTHER ORDERED that Plaintiff's request for an Order authorizing his immediate supervised released is **DENIED.**

The Parties are advised that the Court may impose additional substantive precautionary measures following its review and evaluation of the Plan.

Baton Rouge, Louisiana, this 23rd day of April, 2020.

All Citations

Slip Copy, 2020 WL 1955303

End of Document

Coronavirus disease 2019 (COVID-19)
Situation Report – 98

World Health Organization

Data as received by WHO from national authorities by 10:00 CEST, 27 April 2020

HIGHLIGHTS

- The WHO Regional Office for the Americas has published a document providing guidance regarding the operation of immunization programs in the context of the COVID-19 pandemic. More information is available here.

- The Ministry of Health, Consumer Affairs and Social Welfare of Spain has recently changed its criteria for reporting COVID-19 cases to include only those with positive polymerase chain reaction (PCR) test results. This has resulted in a retrospective decrease of 12,130 cases. Spain will continue to report only new PCR positive cases.

- An update on Emergency Medical Teams, the Global Health Cluster, the Global Outbreak Alert and Response Network, and Risk Communications and Community Engagement is provided in today's 'Subject in Focus' below.

SITUATION IN NUMBERS
total (new cases in last 24 hours)

Globally
2 878 196 confirmed (85 530)
198 668 deaths (4982)

European Region
1 359 380 confirmed (29 659)
124 525 deaths (2307)

Region of the Americas
1 140 520 confirmed (45 674)
58 492 deaths (2453)

Eastern Mediterranean Region
165 933 confirmed (5347)
6991 deaths (104)

Western Pacific Region
144 121 confirmed (1482)
5958 deaths (15)

South-East Asia Region
46 060 confirmed (2214)
1824 deaths (77)

African Region
21 470 confirmed (1154)
865 deaths (26)

WHO RISK ASSESSMENT
Global Level Very High

Figure 1. Countries, territories or areas with reported confirmed cases of COVID-19, 27 April 2020

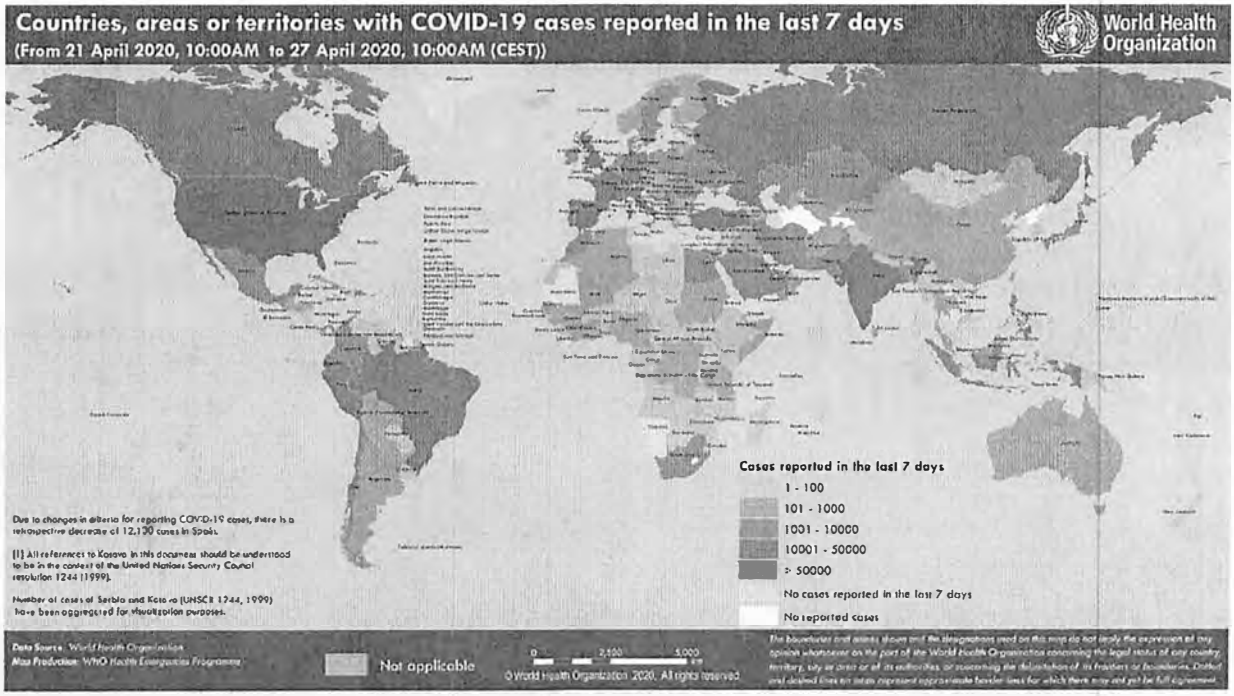

Exhibit 28, World Health Organization, 2019 (COVID-19)

2020 WL 1671563
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

BHARATKUMAR G. THAKKER, et al., Petitioners-Plaintiffs,
v.
CLAIR DOLL, in his official capacity as Warden of York County Prison, et al., Respondents-Defendants.

1:20-cv-480
|
Filed 03/31/2020

Hon. John E. Jones III

MEMORANDUM AND ORDER

John E. Jones III United States District Judge

***1** Pending before the Court is the Motion for Temporary Restraining Order and/or Preliminary Injunction filed by Petitioners-Plaintiffs Bharatkumar G. Thakker, Abedodun Adebomi Idowu, Courtney Stubbs, Rigoberto Gomez Hernandez, Rodolfo Augustin Juarez Juarez, Meiling Lin, Henry Pratt, Jean HErdy Christy Augustin, Mayowa Abayomi Oyediran, Agus Prajoga, Mansyur, Catalino Domingo Gomez Lopez and Dexter Anthony Hillocks (collectively "Petitioners"). [1] (Doc. 7). The Motion has been briefed by the parties. (Docs. 12; 35; 46). The Court has received an *amicus* brief from a group of public health officials and human rights experts, (Doc. 36), as well as a factual update and supplemental authority filed by Petitioners. (Docs. 33 and 34). Thus, this matter is ripe for our review.

1 Petitioners' counsel advised that Mayansur and Agus Prajoga were released from immigration detention on March 27, 2020. (Doc. 33). Accordingly, their request for release from custody is moot.

For the reasons that follow, the temporary restraining order shall be granted and the Respondents shall be directed to immediately release Petitioners today on their own recognizance.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioners are a diverse group of individuals from around the world who are being held in civil detention by Immigration and Customs Enforcement (ICE) at York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility, ("the Facilities"), while they await final disposition of their immigration cases.

Each Petitioner suffers from chronic medical conditions and faces an imminent risk of death or serious injury if exposed to COVID-19. Thakker is 65 years old and suffers from high blood pressure and cholesterol and has kidney failure. Further, he is currently suffering from symptoms similar to those of COVID-19. (Doc. 2, Ex. 3). Idowu, 57, had type II diabetes as well as high blood pressure and cholesterol. He is also currently sick. (Doc. 2, Ex. 4). Stubbs is 52 years old and is immunocompromised due to a kidney transplant he received 6 years ago. He has a heart stent and also suffers from type II diabetes and blood clots. (Doc. 2, Ex. 5). Hernandez, 52, suffers from diabetes, dental problems and an ulcer. (Doc. 2, Ex. 7). Juarez, 21, suffers from diabetes and is currently sick with COVID-19 type symptoms, including trouble breathing. (Doc. 2, Ex. 8). Lin is 45 years old and suffers from chronic pain due to a forced sterilization, as well as chronic hepatitis B and liver disease. (Doc. 2, Ex. 9). Pratt, age 50, suffers from diabetes and high blood pressure. (Doc. 2, Ex. 10). Augustin, 34 years old, suffers from multiple conditions including diabetes, high blood pressure, nerve pain, limited mobility and pain from a prior bladder and intestine reconstruction, anemia, PTSD and depression. (Doc. 2, Ex. 11). Oyediran is a 40-year-old asthmatic suffering from high blood pressure and cholesterol. (Doc. 2, Ex. 12). Lopez, age 51, has contracted the flu four times while in ICE custody since November of 2018 and is concerned that he is especially susceptible to contracting COVID-19. (Doc. 2, Ex. 15). Finally, Hillocks, age 54, has been diagnosed with leukemia. He also suffers from diabetes, anemia, high blood pressure and cholesterol. (Doc. 2, Ex. 16).

***2** Several Petitioners have reported symptoms similar to those of COVID-19. None have been quarantined, isolated, or treated. (Doc. 2 Exs. 3; 4; 8).

Named as Respondents are: Clair Doll, Warden of York County Prison; Angela Hoover, Warden of Clinton County Correctional Facility; Craig A. Lowe, Warden of Pike County Correctional Facility; Simona Flores-Lund, Field Office Director, ICE Enforcement and Removal Operations; Matthew Albence, Acting Director of ICE; and Chad Wolf, Acting Secretary of the Department of Homeland Security.

II. DISCUSSION

In a matter of weeks, the novel coronavirus COVID-19 has rampaged across the globe, altering the landscape of everyday American life in ways previously unimaginable. Large portions of our economy have come to a standstill. Children have been forced to attend school remotely. Workers deemed 'non-essential' to our national infrastructure have been told to stay home. Indeed, we now live our lives by terms we had never heard of a month ago—we are "social distancing" and "flattening the curve" to combat a global pandemic [2] that has, as of the date of this writing, infected 719,700 people worldwide and killed more than 33,673. [3] Each day these statistics move exponentially higher. It is against this increasingly grim backdrop that we now consider the Petitioners' claims for habeas relief.

[2] The World Health Organization ("WHO") officially declared COVID-19 as global pandemic on March 11, 2020. *See WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION, (March 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[3] *See Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION, https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last accessed March 31, 2020).

A. Threshold Questions: Standing and the Propriety of a Habeas Petition

Respondents raise two threshold challenges to the Petitioners' Motion. First, Respondents contend that Petitioners lack standing because they have not alleged an injury in fact. Next, Respondents submit that Petitioners cannot challenge their conditions of confinement through a habeas petition. Taking the latter challenge first, we note that federal courts, including the Third Circuit, have condoned conditions of confinement challenges through habeas. *See* *Aamer v. Obama*, 742 F.3d 1023, 1032 (D.C. Cir. 2014); *see also* *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242-44 (3d Cir. 2005); *see also* *Ali v. Gibson*, 572 F.2d 971, 975 n.8 (3d Cir. 1978). Accordingly, we find that Petitioners have appropriately invoked this court's jurisdiction through a 28 U.S.C. § 2241 petition for writ of habeas corpus.

Respondents' standing challenge can also be easily resolved. Respondents essentially contend that because the Petitioners themselves do not have COVID-19 and their likelihood of contracting the illness is speculative, Petitioners cannot establish that they would suffer a concrete, non-

hypothetical injury absent a temporary restraining order. However, as the Supreme Court observed in *Helling v. McKinney*, 509 U.S. 25, 33 (1993), "it would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." The COVID-19 pandemic is moving rapidly and expansively throughout Pennsylvania. Vast regions of the Commonwealth are now under stay-at-home orders, and social distancing the norm to prevent the spread of this deadly virus. And yet, Respondents would have us offer no substantial relief to Petitioners until the pandemic erupts in our prisons. We reject this notion. Since "[a] remedy for unsafe conditions need not await a tragic event," it is evident that the Petitioners have standing in this matter. *Id.*

B. Temporary Restraining Order

i. Legal Standard

***3** Courts apply one standard when considering whether to issue interim injunctive relief, regardless of whether a petitioner requests a temporary restraining order ("TRO") or preliminary injunction. *See Ellakkany v. Common Pleas Court of Montgomery Cnty.*, 658 Fed.Appx. 25, 27 (3d Cir. July 27, 2016) (applying one standard to a motion for both a TRO and preliminary injunction). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Apple Inc. v. Samsung Electronics Co.*, 695 F.3d 1370, 1373–74 (Fed. Cir. 2012) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008)).

The Supreme Court has emphasized that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Apotex Inc. v. U.S. Food and Drug Admin.*, 508 F.Supp.2d 78, 82 (D.D.C. 2007) ("Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly."). "Awarding preliminary relief, therefore, is only appropriate 'upon a clear showing that the plaintiff is entitled to such relief.' " *Groupe SEC USA, Inc. v. Euro–Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter*, 555 U.S. at 22).

ii. Irreparable Harm

To succeed on their Motion, Petitioners "must demonstrate...the probability of irreparable harm if relief is not granted." *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) (internal quotations omitted). "In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial"...the temporary restraining order..."must be the only way of protecting the plaintiff from harm." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). The moving party must demonstrate that it is likely to suffer "actual or imminent harm which cannot otherwise be compensated by money damages," or it "fail[s] to sustain its substantial burden of showing irreparable harm." *Frank's GMC*, 847 F.2d at 103. The mere risk of injury is insufficient. The moving party must establish that the harm is imminent and probable. *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997). Additionally, "a showing of irreparable harm is insufficient if the harm will occur only in the indefinite future. Rather, the moving party must make a clear showing of immediate irreparable harm." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992).

The Petitioners' claim is rooted in imminent, irreparable harm. Petitioners face the inexorable progression of a global pandemic creeping across our nation—a pandemic to which they are particularly vulnerable due to age and underlying medical conditions. At this point, it is not a matter of *if* COVID-19 will enter Pennsylvania prisons, but *when* it is finally detected therein. It is not unlikely that COVID-19 is already present in some county prisons—we have before us declarations that portions of the Facilities have been put under ineffective quarantines due to the presence of symptoms similar to COVID-19 among the inmate population. [4] Indeed, we also have reports that a correctional officer at Pike has already tested positive for COVID-19. (Doc. 33 at 1).

[4] We also have allegations that prison guards have shown symptoms while interacting with inmates.

***4** Public health officials now acknowledge that there is little that can be done to stop the spread of COVID-19 absent effective quarantines and social distancing procedures. But Petitioners are unable to keep socially distant while detained by ICE and cannot keep the detention facilities sufficiently clean to combat the spread of the virus. Based upon the nature of the virus, the allegations of current conditions in the prisons, and Petitioners' specific medical concerns, detailed below, we therefore find that Petitioners face a very real risk of serious, lasting illness or death. There can be no injury more irreparable.

a. Seriousness of the virus

COVID-19 is a type of highly contagious novel coronavirus that is thought to be "spreading easily and sustainably in the community." [5] Experts believe that it can live on some surfaces for up to 72 hours after contact with an infected person. [6] A simple sneeze or brush of the face without washing your hands is now known to easily spread the virus, which generally causes fever, cough, and shortness of breath. (*How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL; Doc. 12 at 15).

[5] *How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html (last accessed March 31, 2020).

[6] *New Coronavirus Stable for Hours on Surfaces*, NATIONAL INSTITUTE OF HEALTH (March 17, 2020), https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces.

In most people, these symptoms are relatively mild. (Doc. 12 at 15). However, the effects of COVID-19 can be drastically more severe in older individuals or those with medical conditions. (Doc.2, Ex. 2). In some cases, COVID-19 can cause serious, potentially permanent, damage to lung tissue, and can require extensive use of a ventilator. (*Id.*). The virus can also place greater strain on the heart muscle and can cause damage to the immune system and kidneys. (*Id.*). These long-term consequences and the likelihood of fatality increase in those of advanced age and those with other medical conditions, like the Petitioners here. (*Id.*). For those in high-risk categories, the fatality rate is thought to be approximately fifteen percent. (*Id.*).

There is currently no vaccine for COVID-19, nor are there known, clinically-tested therapeutic treatments. (*Id.*). As a result, public health officials have touted the importance of maintaining physical separation of at least six feet between individuals, now commonly known as "social distancing." (*Id.*). Experts have also emphasized that proper hand hygiene with soap and water is vital to stop the spread. (*Id.*). Beyond these measures, health professionals can do little to combat this highly infectious disease. (*Id.*).

b. Prevalence of the virus

The United States now records more confirmed cases of COVID-19 than any other country in the world.[7] As of the date of this writing, there were in excess of 164,458 cases of the virus in America, with 3,167 fatalities.[8] This represented an increase of 2,651 cases in only *twenty-four hours*. (*Id*).

7 Nicole Chavez, Holly Yan, and Madeline Holcombe, *US has more Known Cases of Coronavirus than any Other Country*, CNN, https://www.cnn.com/2020/03/26/health/coronavirus-thousand-deaths-thursday/index.html (last accessed March 31, 2020).

8 Niko Kommenda, Pablo Gutiérrez, and Juweek Adolphe, *Coronavirus Map of the US: Latest Cases State by State*, THE GUARDIAN, https://www.theguardian.com/world/ng-interactive/2020/mar/27/coronavirus-map-of-the-us-latest-cases-state-by-state (last accessed March 31, 2020).

Indeed, Pennsylvania currently reports 4,087 confirmed cases of COVID-19, with 48 fatalities.[9] Troublingly, that number represents nearly double the confirmed cases reported a mere four days ago—on March 27, 2020, Pennsylvania reported a total of 2,218 cases, with 22 deaths. *Id.* The three counties which house the Facilities are located in York County, Pike County, and Clinton County. They currently report a total of 93 cases: 54 in York County and 39 in Pike County.[10] Clinton County has not yet reported any confirmed cases of COVID-19. *Id.* As of March 27, 2020, the Governor of Pennsylvania placed both York County and Pike County under a stay-at-home order in an attempt to slow the spread of the virus.[11] Average Pennsylvanians in these counties can no longer leave their homes for anything but essential trips to gather supplies, medications, or to perform work essential to our national infrastructure—COVID-19 spreads so easily and rapidly that public health officials have determined that social isolation is necessary to keep our hospital systems from becoming overwhelmed. *Id.* The same rationale applies, perhaps even more so, to immigration detention facilities housing high-risk populations.

9 *Coronavirus (COVID-19): Pennsylvania Overview*, PENNSYLVANIA DEPARTMENT OF HEALTH, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed March 31, 2020).

10 *Coronavirus (COVID-19): Pennsylvania Overview*, PENNSYLVANIA DEPARTMENT OF HEALTH, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed March 31, 2020).

11 *Governor Wolf and Health Secretary Expand 'Stay at Home' Order to Nine More Counties to Mitigate Spread of COVID-19, Counties Now Total 19*, WEBSITE OF THE GOVERNOR

OF PENNSYLVANIA, https://www.governor.pa.gov/newsroom/governor-wolf-and-health-secretary-expand-stay-at-home-order-to-nine-more-counties-to-mitigate-spread-of-covid-19-counties-now-total-19/ (last accessed March 31, 2020).

c. Unique nature of detention facilities

***5** Various public health officials have warned that the nature of ICE detention facilities makes them uniquely vulnerable to the rapid spread of highly contagious diseases like COVID-19. COVID-19 is transmitted primarily through "close contact via respiratory droplets produced when an infected person coughs or sneezes." (Doc. 12 at 18; Doc. 2, Ex. 1). Immigration detention facilities are particularly at risk for such close contact because they are considered "congregate settings, or places where people live or sleep in close proximity." (Doc. 2, Ex. 1). Such conditions provide "ideal incubation conditions" for COVID-19. (*Id.*).

Within the past few weeks, two medical experts for the Department of Homeland Security authored a letter to Congress warning of the unique dangers COVID-19 poses to ICE detention facilities. Specifically, they described the current ICE detention environment as a "tinderbox" in which:

> [a]s local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community...To be more explicit, a detention center with a rapid outbreak could result in multiple detainees — five, ten or more — being sent to the local community hospital where there may only be six or eight ventilators over a very short period...As [hospitals] fill up and overwhelm the ventilator resources, those ventilators are unavailable when the infection inevitably is carried by staff to the community and are also unavailable for all the usual critical illnesses (heart attacks, trauma, etc). [12]

The experts contrasted this scenario with a situation in which ICE detainees were released from "high risk congregate settings," allowing the "volume of patients sent to community hospitals to level out," which they believed would provide much more favorable outcomes, both for the detainees and the surrounding communities. *Id.* "At a minimum," these health experts urged, the government "should consider releasing all detainees in high risk medical groups such as older people and those with chronic diseases." *Id.* ICE detention facilities, they warned, are so poorly equipped to allow safe social distancing practices and are unlikely to have the ability to provide

adequate medical care in the case of a COVID-19 outbreak. *Id.* The consequences, they maintain, could be disastrous. *Id.*

12 Catherine E. Shoichet, *Doctors warn of 'tinderbox scenario' if coronavirus spreads in ICE detention*, CNN, https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/ (last accessed March 28, 2020).

Indeed, we have before us declarations stating that such high-risk conditions are present in the detention facilities at issue in this case. Both Petitioners and lawyers familiar with the ICE facilities at issue here have attested to overcrowding that makes social distancing impossible at all three facilities. At the York facility, for example, inmates are housed in dormitory-style conditions, in which 60 people reside in each housing block. (Doc. 2, Ex. 18). That space is used for both eating and sleeping. (*Id.*). Petitioners report that not even the medical staff wear gloves when in contact with inmates. (Doc. 2, Ex. 11). Detainees must eat their meals four-to-a-table, with approximately three feet of space between individuals. (*Id.*).

At Clinton, inmate bunks are often less than two feet apart, and inmate declarations show that it is difficult to keep more than a two feet distance between inmates, let alone the recommended six feet. (Doc. 2, Ex. 10). The laundry facilities at Clinton are also reported to be chronically broken, preventing detainees from keeping their clothes and bedding clean. (*Id.*). Indeed, for a total of 72 men, Clinton provides only four sets of sinks and showers. (*Id.*). The Facility is also reported to have bugs mice, and rats, which add to the unsanitary conditions experienced by detainees. (*Id.*).

***6** At Pike, detainees share eight-by-ten or twelve foot cells with two other men. (Doc. 2, Ex. 13). Those cells also contain a sink and a shower. (*Id*). Some men at Pike report being forced to share cells with other individuals currently exhibiting COVID-19 symptoms or report exhibiting symptoms themselves while housed with other inmates. (Doc. 2, Exs. 3; 4; 8). Inmates at Pike are also usually forced to remain within two feet of other individuals, even while in the common areas of the facility. (Doc. 2, Ex. 4). They are also required to buy their own soap, are not given hand sanitizer, and are forced to share cleaning supplies with an entire block of cells. (Doc. 2, Exs. 3; 13).

ICE guidance states that these types of risks are mitigated by quarantining detainees with symptoms and by housing those with a higher risk of exposure separately from the rest of the detainee population. (Doc. 2, Ex. 1). The Respondents further proffer that the Facilities are practicing "cohorting," an "infection prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic." (Doc. 35 at 12). This practice is meant to last for fourteen days, the duration of the virus's incubation period. The Petitioner's declarations, however, show that these practices are not being followed.

At least two Petitioners aver that they are experiencing symptoms and have not been isolated from other individuals. (Doc. 2, Exs. 3; 4; 8). Furthermore, all Petitioners have a higher risk of exposure, and none have been moved to separate housing. Indeed, it does not even seem that ICE is providing detainees with proper information on how they can combat the virus on their own. (Doc. 2, Ex. 3). Troublingly, some facilities seem to have shut off detainee access to news outlets, thereby preventing the detention facility's population from informing themselves on best practices to prevent transmission. (Doc. 2, Ex. 5).

d. Petitioners are at uniquely high risk for contracting COVID-19

Not only are the Facilities themselves uniquely suited to rapidly spread COVID-19, but also Petitioners themselves are members of high-risk groups that are likely to feel the effects of the virus more keenly than the average individual.[13] Each of the Petitioners before us has an underlying medical condition that heightens their risk of serious COVID-19 effects, among them asthma, diabetes, heart conditions, hepatitis, and immunocompromising conditions such as leukemia and organ transplants.

13 *People at Risk for Serious Illness from COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (Mar. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html ("Older people and people of all ages with severe underlying health conditions—like heart disease, lung disease and diabetes, for example—seem to be at higher risk of developing serious COVID-19 illness"); *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (Mar. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html (stating that "moderate to severe asthma," "heart disease," "obesity," and "diabetes" are conditions that trigger higher risk of severe illness from COVID-19).

e. The threat to high-risk individuals posed by COVID-19 constitutes irreparable injury

Various courts across the nation have found that COVID-19, coupled with the lack of hygiene and overcrowding present in detention facilities, will pose a greatly heightened risk to inmates. *See Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020) ("[I]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court.");

United States v. Stephens, No. 15 Cr. 95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) ("[I]nmates may be at a heightened risk of contracting COVID-19 should an outbreak develop."); *United States v. Garlock*, 18 Cr. 418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) ("By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations. Notably, the chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual." (citations omitted)).

***7** Courts have also acknowledged the particular risks facing older inmates and those with underlying medical conditions. *See* *United States v. Martin*, No. 19 Cr. 140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) ("[T]he Due Process Clauses of the Fifth or Fourteenth Amendments, for federal and state pretrial detainees, respectively, may well be implicated if defendants awaiting trial can demonstrate that they are being subjected to conditions of confinement that would subject them to exposure to serious (potentially fatal, if the detainee is elderly and with underlying medical complications) illness."). At least one court has ordered the release on bail of an inmate facing extradition on the basis of the risk the pandemic poses to his health. *Matter of Extradition of Toledo Manrique*, No. 19 MJ 71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) ("These are extraordinary times. The novel coronavirus that began in Wuhan, China, is now a pandemic. The nine counties in the San Francisco Bay Area have imposed shelter-in-place orders in an effort to slow the spread of the contagion. This Court has temporarily halted jury trials, even in criminal cases, and barred the public from courthouses. Against this background, Alejandro Toledo has moved for release, arguing that at 74 years old he is at risk of serious illness or death if he remains in custody. The Court is persuaded. The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.").

Indeed, courts have even specifically held that COVID-19 constitutes an irreparable harm that supports the grant of a TRO. *See* *Vasif "Vincent" Basank, et al v. Decker*, 2020 WL 1481503 at *4-5 (S.D.N.Y. March 26, 2020) ("The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO"); *Castillo v. Barr*, CV-20-00605-TJH (C.D. Cal. 2020) (granting a TRO to immigration detainees due to the COVID-19 pandemic); *see also* *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (finding irreparable harm "premised ... upon [the district court's] finding that [Petitioner] was subject to risk of injury, infection, and humiliation"); *Mayer v. Wing*, 922 F.

Supp. 902, 909 (S.D.N.Y. 1996) ("[T]he deprivation of life-sustaining medical services...certainly constitutes irreparable harm.").

The painful new reality is that we are constantly at risk of contracting a deadly virus and are experiencing previously unimagined safety measures to stop its spread. This virus spares no demographic or race and is ruthless in its assault. The precautions being adopted to stop it should apply equally, if not more so, to the most vulnerable among us. Petitioners have shown that adequate measures are not in place and cannot be taken to protect them from COVID-19 in the detention facilities, and that catastrophic results may ensue, both to Petitioners and to the communities surrounding the Facilities. We therefore find that the likely irreparable injury to Petitioners, as high-risk individuals, satisfies the first element of our TRO analysis.

iii. Likelihood of Success on the Merits

Petitioners argue that their continued incarceration in ICE detention facilities exposes them to serious risks associated with COVID-19 which violate their due process rights. (Doc. 2 at 27). We find that Petitioners are likely to succeed on the merits of their claim. [14]

14 The Respondents argue that Petitioners do not have a legitimate due process claim because they have no "liberty or property interest" in a purely "discretionary grant of humanitarian parole." (Doc. 35 at 28). We disagree. "Unsanitary, unsafe, or otherwise inadequate conditions" are sufficient to state a Due Process Claim and we shall thus proceed with our analysis. *Petty v. Nutter*, No. 15-3430, 2016 WL 7018538, at *2 (E.D. Pa. Nov. 30, 2016); *Grohs v. Lanigan*, No. 16-7083, 2019 WL 1500621, at *11 (D.N.J. Apr. 5, 2019) ("extreme heat combined with lack of potable water, as well as generally unsanitary conditions" are sufficient to state a conditions-of-confinement claim).

To bring a Fifth Amendment due process claim, Petitioners must show that their conditions of confinement "amount[ed] to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). "To determine whether challenged conditions of confinement amount to punishment, this Court determines whether a condition of confinement is reasonably related to a legitimate governmental objective; if it is not, we may infer 'that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.' " *E. D. v. Sharkey*, 928 F.3d 299, 307 (3d Cir. 2019) (quoting *Hubbard v. Taylor*, 538 F.3d 229, 232 (3d Cir. 2008)). In other words, we must ascertain whether the conditions serve a legitimate purpose

and whether the conditions are rationally related to that legitimate purpose. *Hubbard* 538 F.3d at 232.

***8** Considering the Facility conditions previously discussed, we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments—doing so would constitute a punishment to Petitioners. Despite the Respondents' protests to the contrary, we need not find that the Facilities had the "express intent" to punish Petitioners with the conditions alleged. (Doc. 35 at 37). Instead we ask whether the conditions are rationally related to a legitimate government objective. *Hubbard* 538 F.3d at 232. Here, they are not.

The Respondents maintain that "preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective." (Doc. 35 at 38). They cite a great deal of authority supporting this point, and we do not disagree. (*Id.*). However, we cannot find that unsanitary conditions, which include overcrowding and a high risk of COVID-19 transmission, are rationally related to that legitimate government objective.

Social distancing and proper hygiene are the *only* effective means by which we can stop the spread of COVID-19. Petitioners have shown that, despite their best efforts, they cannot practice these effective preventative measures in the Facilities. Considering, therefore, the grave consequences that will result from an outbreak of COVID-19, particularly to the high-risk Petitioners in this case, we cannot countenance physical detention in such tightly-confined, unhygienic spaces.

The global COVID-19 pandemic and the ensuing public health crisis now faced by American society have forced us all to find new ways of operating that prevent virus transmission to the greatest extent possible. We expect no less of ICE. We note that ICE has a plethora of means *other than* physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins. Physical detention itself will place a burden on community healthcare systems and will needlessly endanger Petitioners, prison employees, and the greater community. We cannot see the rational basis of such a risk. [15]

15 Moreover, not only have Petitioners established a likelihood of success on the merits on their Fifth Amendment claim, but, in fact, they have also demonstrated that their claim is likely to be successful under the more exacting Eighth Amendment standards as well. To succeed in proving that conditions of confinement violate the Eighth Amendment, a plaintiff must show: (1) the deprivation alleged must objectively be "sufficiently serious," and (2) the "prison

official must have a sufficiently culpable state of mind," such as deliberate indifference to the prisoner's health or safety. See Thomas v. Tice, 948 F.3d 133, 138 (3d Cir. 2020) (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)). COVID-19 has been shown to spread in the matter of a single day and would well prove deadly for Petitioners. Such a risk is objectively "sufficiently serious." Furthermore, the Supreme Court has recognized authorities can be "deliberately indifferent to an inmate's current health problems" where they "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," including "exposure of inmates to a serious, communicable disease," even when "the complaining inmate shows no serious current symptoms." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). There is no requirement that Petitioners show that "they actually suffered from serious injuries" to succeed on this claim. *See* *Helling*, 509 U.S. at 33. Instead, if Petitioners can show that the conditions "pose an unreasonable risk of serious damage to their future health," they may succeed on their claim. *Helling*, 509 U.S.at 35) (alteration omitted). The current measures undertaken by ICE, including "cohorting" detainees, are patently ineffective in preventing the spread of COVID-19. Indeed, we now have reports of a positive test amongst the employees at Pike County prison, thereby greatly increasing the likelihood that COVID-19 is present in the prison population.

***9** We therefore find that Petitioners are likely to succeed on the merits of their due process claim that their conditions of confinement expose them "to serious risks associated with COVID-19." (Doc. 2 at 35).

iv. Balancing of the Equities and Public Interest

The equities at issue and public interest weigh heavily in Petitioners' favor. First, and as described, Petitioners face irreparable harm to both their constitutional rights and their health. Second, we find that the potential harm to the Respondents is limited. While we understand and agree that preventing Petitioners from absconding and ensuring their presence at immigration proceedings is important, we note that Petitioners' failure to appear at future immigration proceedings would carry grave consequences of which Petitioners are surely aware. Further, it is our view that the risk of absconding is low, given the current restricted state of travel in the United States and the world during the COVID-19 pandemic.

Finally, the public interest favors Petitioners' release. As mentioned, Petitioners are being detained for civil violations of this country's immigration laws. Given the highly unusual and unique circumstances posed by the COVID-19 pandemic and ensuing crisis, "the continued detention of

aging or ill civil detainees does not serve the public's interest." *Basank*, 2020 WL 1481503, *6; *see also Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 Cal. Mar. 24, 2020) (opining that "the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19"); *Castillo v. Barr*, CV-20-00605-TJH (C.D. Cal. 2020). Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest, and the release of these fragile Petitioners from confinement is one step further in a positive direction.

III. CONCLUSION

In times such as these, we must acknowledge that the *status quo* of a mere few weeks ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly. We now face a global pandemic in which the actions of each individual can have a drastic impact on an entire community. The choices we now make must reflect this new reality.

Respondents' Facilities are plainly not equipped to protect Petitioners from a potentially fatal exposure to COVID-19. While this deficiency is neither intentional nor malicious, should we fail to afford relief to Petitioners we will be a party to an unconscionable and possibly barbaric result. Our Constitution and laws apply equally to the most vulnerable among us, particularly when matters of public health are at issue. This is true even for those who have lost a measure of their freedom. If we are to remain the civilized society we hold ourselves out to be, it would be heartless and inhumane not to recognize Petitioners' plight. And so we will act.

Based on the foregoing, we shall grant the requested temporary restraining order. Respondents, and the York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility shall be ordered to immediately release the Petitioners **today** on their own recognizance without fail.

***10 NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. The Petitioners' Motion for Temporary Restraining Order, (Doc. 7), is **GRANTED.**

2. Respondents, and the York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility **SHALL IMMEDIATELY RELEASE** the Petitioners **TODAY** on their own recognizance.

3. This TRO will expire on April 13, 2020 at 5:00 p.m.

4. No later than noon on April 7, 2020, the Respondents shall **SHOW CAUSE** why the TRO should not be converted into a preliminary injunction.

5. The Petitioners may file a response before the opening of business on April 10, 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 1671563

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Disagreed With by United States v. Wilburn, W.D.Pa., April 17, 2020

2020 WL 1295155
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

UNITED STATES of America,
v.
Dante STEPHENS, Defendant.

15-cr-95 (AJN)
|
Signed March 18, 2020
|
Filed 03/19/2020

Synopsis
Background: After denial of bail, defendant filed emergency motion for reconsideration of his bail conditions.

Holdings: The District Court, Alison J. Nathan, J., held that:

[1] defendant established by clear and convincing evidence that he did not pose danger to community, and

[2] obstacles that COVID-19 pandemic posed to preparation of defendant's defense constituted compelling reason necessitating his temporary release.

Motion granted.

Procedural Posture(s): Bail or Custody Motion.

West Headnotes (2)

[1] **Bail** Evidence

Defendant established by clear and convincing evidence that he did not pose danger to community, and thus was entitled to release on bail, even though government initially argued that defendant had been in possession of loaded firearm in proximity to drugs, where arresting officer had initially identified different individual as holding bag that contained firearm, and defendant had no prior convictions involving violent conduct or gun charges. 18 U.S.C.A. § 3142.

1 Cases that cite this headnote

[2] **Bail** Right to Release on Bail

Bail Imposition of conditions in general

Obstacles that COVID-19 pandemic posed to preparation of defense constituted compelling reason necessitating defendant's temporary release to custody of his mother, subject to home incarceration with GPS monitoring; pandemic compelled Bureau of Prisons (BOP) to suspend all visits—including legal visits, except as allowed on case-by-case basis—until further notice. 18 U.S.C.A. § 3142(i).

12 Cases that cite this headnote

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OPINION & ORDER

ALISON J. NATHAN, United States District Judge

Exhibit 30 - United Stataes v. Stephens

***1** At the hearing on March 6, 2020, the Court reviewed Magistrate Judge Fox's bail determination *de novo* and concluded that the Defendant failed to establish by clear and convincing evidence that he did not pose a danger to the community. *See* March 6 Hr'g Tr. at 31:11–32:1; *see also* 18 U.S.C. § 3143(a)(1); Fed. R. Crim. P. 32.1(a); 18 U.S.C. § 3142. Accordingly, the Court ordered him remanded to the custody of the Bureau of Prisons ("BOP").

On March 16, 2020, the Defendant filed an emergency motion for reconsideration of his bail conditions. *See* Dkt. No. 2789-1. The Court GRANTS that motion and orders the Defendant released subject to the additional conditions of 24-hour home incarceration and electronic location monitoring as directed by the Probation Department.

The Court concludes that reconsidering the Defendant's bail conditions is appropriate in light of circumstances that have changed since the March 6 hearing. *Cf.* 18 U.S.C. § 3142(f) (A detention hearing under 18 U.S.C. § 3142 "may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community."). These changed circumstances are two-fold. First, the strength of the primary evidence relied upon by the Government to demonstrate the danger the Defendant poses to the community has been undermined by new information not available to either party at the time of the March 6 hearing. Indeed, while the Government argued at the hearing that the Defendant's "possession of a loaded firearm in proximity to drugs ... is an inherently dangerous activity" that weighed in favor of his detention, *see* March 6 Hr'g Tr. at 8:23–9:3, the Court has since learned that the arresting officer—who will not testify for the Government at the hearing on the Defendant's alleged violation of supervised release—initially identified a *different* individual as holding the bag that contained the firearm. *See* Dkt. No. 2789-1 at 2. Though the Government proffers additional evidence that it will introduce at the hearing, [1] this new information nonetheless indicates that the Government's case is weaker than it believed it to be at the March 6 hearing and bears upon the Court's prior conclusion that the Defendant failed to establish by clear and convincing evidence that he did not pose a danger to the community.

1 The Government proffers that at the hearing it will offer, among other evidence, video surveillance footage, testimony of an NYPD officer who was present when the firearm was recovered and will testify that he recognizes the Defendant in the surveillance video as the individual carrying the bag containing the firearm, and testimony from the Defendant's Probation Officer, who will testify that she also identified the Defendant in the video as the individual carrying the bag containing the firearm.

***2** Second, since the March 6 hearing, the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent. Although there is not yet a known outbreak among the jail and prison populations, inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop. *See, e.g.*, Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 Clinical Infectious Diseases 1047, 1047 (Oct. 2007), https://doi.org/10.1086/521910 (noting that in jails "[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise"); *see also* Claudia Lauer & Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, Associated Press (Mar. 7, 2020). The magnitude of this risk has grown exponentially since the March 6 hearing before this Court; at the end of the day on March 6, New York State had 44 confirmed cases of COVID-19, *see* Andrew Cuomo (@NYGovCuomo), Twitter (Mar. 6, 2020, 4:51 PM), https://twitter.com/NYGovCuomo/status/1236046668220567553, but by the end of the day on March 18, that number had climbed to 2,382, *see* Mitch Smith, *et al.*, *Tracking Every Coronavirus Case in the U.S.: Full Map*, N.Y. Times, Mar. 18, 2020, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html. Though the BOP has admirably put transmission mitigation measures in place, *see* Federal Bureau of Prisons, *Federal Bureau of Prisons COVID-19 Action Plan*, https://www.bop.gov/resources/news/20200313_covid-19.jsp, in the event of an outbreak at the Metropolitan Correctional Center ("MCC") (where the Defendant is currently being detained), substantial medical and security challenges would almost certainly arise. A comprehensive view of the danger the Defendant poses to the community requires considering all factors—including this one—on a case-by-case basis. *See, e.g.*, *United States v. Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. No. 20 at 10:12–19 (E.D.N.Y. Mar. 12, 2020) (deciding to continue a criminal defendant on pretrial release rather than order him remanded to the Metropolitan Detention Center due, in part, to the Magistrate Judge's recognition of the fact that "[t]he more people we crowd into that facility, the more we're increasing the risk to the community").

[1] Taken together, these changed circumstances necessitate a reconsideration of the Defendant's bail conditions. The question of whether the Defendant had met his burden to establish by clear and convincing evidence that he did not pose a danger to the community was a close one at the March 6 hearing. Indeed, Defense counsel presented ample evidence at that hearing that aside from the arrest from which the alleged violation of supervised release arises, the Defendant does not have a violent background: no prior convictions involved violent conduct or gun charges. *See* March 6 Hr'g Tr. at 16:18–17:14. In light of the changed circumstances discussed above, the weight of the evidence now clearly and convincingly tips in the Defendant's favor. Accordingly, based on the evidence and arguments presented at the March 6 hearing coupled with the reasons stated above, the Court concludes that the Defendant has now established by clear and convincing evidence that he does not pose a danger to the community.

Even if the Court were to conclude that changed circumstances did not compel reconsideration of the Defendant's bond conditions, a separate statutory ground advanced by the Defendant would require his release here. 18 U.S.C. § 3142(i) provides that, where a detention order has been issued, "a judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason." The Government does not challenge the application of this provision—indeed, it does not address it at all in opposing the Defendant's motion, *see generally* Dkt. No. 2791—and the Court thus concludes that it applies here.

The text of Section 3142(i) provides that the Court may temporarily release a detained defendant to the custody of an "appropriate person" where a "compelling reason" necessitates such release. Compelling reasons may exist where release is necessary for the preparation of the defendant's defense, *see* 18 U.S.C. § 3142(i), or where the defendant's serious medical conditions warrant release, *see, e.g.*, *United States v. Rebollo-Andino*, 312 F. App'x 346, 348 (1st Cir. 2009) (explaining that a defendant who is denied bail "retains the ability to request[,] ... in extraordinary circumstances, ... temporary release under § 3142(i)" should future developments with respect to his medical conditions so warrant); *see also United States v. Birbragher*, No. 07-cr-1023-(LRR), 2008 WL 1883504, at *2 (N.D. Iowa Apr. 25, 2008) (describing *United States v. Scarpa*, 815 F. Supp. 88 (E.D.N.Y. 1993), and *United States v. Cordero Caraballo*, 185 F. Supp. 2d 143 (D.P.R. 2002), as cases in which courts found "compelling reason" to temporarily release defendants due to the defendants' serious medical issues).[2] Furthermore, case law suggests that family members may constitute "appropriate persons" where the defendant is released to relatives and placed under house arrest. *See* *Cordero Caraballo*, 185 F. Supp. 2d at 145 (releasing the defendant, who the court would have detained on dangerousness grounds, to the custody of his mother and grandmother on 24-hour house arrest due to his severe injuries). "A defendant has the burden of showing that temporary release is 'necessary ...' under Section 3142(i)." *See United States v. Dupree*, 833 F. Supp. 2d 241, 246 (E.D.N.Y. 2011).

2 In a similar context, the Second Circuit has described "exceptional" reasons permitting the release of a defendant subject to mandatory detention—arguably a higher standard than "compelling" reasons—as those that "present a unique combination of circumstances giving rise to situations that are out of the ordinary." *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991); *see also* 18 U.S.C. § 3145 ("A person subject to detention pursuant to

section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate."). The Second Circuit has explained that determining whether a given circumstance presents exceptional reasons under Section 3145 requires a case-by-case evaluation by the district judge and that the district judge's discretion is "constrained only by the language of the statute: 'exceptional reasons.' " *DiSomma*, 951 F.2d at 497.

***3** **[2]** The Court concludes that the Defendant has met his burden by demonstrating at least one compelling reason that also necessitates his release under this provision. Namely, the obstacles the current public health crisis poses to the preparation of the Defendant's defense constitute a compelling reason under 18 U.S.C. § 3142(i). *See id.* (providing that the Court "may ... permit the temporary release of [a] person, in the custody of a United States marshal or another appropriate person, to the extent [it] determines such release to be necessary for preparation of the person's defense"). The spread of COVID-19 throughout New York State—and the country—has compelled the BOP to suspend all visits—including legal visits, except as allowed on a case-by-case basis—until further notice. *See* Federal Bureau of Prisons, *Federal Bureau of Prisons COVID-19 Action Plan*, https://www.bop.gov/resources/news/20200313_covid-19.jsp (explaining that "legal visits will be suspended for 30 days" nationwide and that "case-by-case accommodation will be accomplished at the local level"). This suspension impacts the Defendant's ability to prepare his defenses to the alleged violation of supervised release in advance of the merits hearing scheduled for March 25, 2020. Defense counsel represents that after contacting the MCC Legal Department to arrange legal calls with the Defendant, "the MCC did not permit a legal call to Mr. Stephens." Dkt. No. 2789-1 at 10. He further proffers that other defense counsel have faced similar obstacles in attempting to communicate with their clients. *Id.* The Government neither responds to nor contests these factual representations, and so the Court relies upon them here. *See generally* Dkt. No. 2791. Thus, the Court concludes that these circumstances necessitate the Defendant's temporary release. *See United States v. Persico*, No. 84-cr-809 (JFK), 1986 WL 3793, at *1 (S.D.N.Y. Mar. 27, 1986) (describing cases in which "temporary releases of defendants therein were granted prior to trial in order to facilitate the defendants' expeditious preparation for trial and thus to promote the prompt disposition of the charges against each defendant" where "[t]he concern in each case was that, given the admittedly limited access to telephones and attorney conference rooms at the detention facilities, the effective preparation of a defense might have been impossible in the short time available before the commencement of trial"). [3]

[3] The Defendant also argues that the current public health crisis itself provides an additional compelling reason necessitating his release for all the reasons already articulated above. *Cf.* *Rebollo-Andino*, 312 F. App'x at 348 (explaining that "extraordinary circumstances"

related to medical conditions may necessitate temporary release under § 3142(i)). The Court need not decide this additional factor here because its determination that release is necessary for the preparation of the Defendant's defense is sufficient under § 3142(i).

The Court further concludes that the Defendant's mother constitutes an "appropriate person" within the meaning of this provision so long as the Defendant is subject to home incarceration with GPS monitoring at the residence he shares with her. *See* *Cordero Caraballo*, 185 F. Supp. 2d at 146 (finding that the defendant's mother and grandmother "qualif[ied] as third-party custodians" for purposes of the release of the defendant).

In sum, circumstances that have changed since the March 6 hearing warrant reconsideration of the Defendant's bail conditions, and the Court concludes that, in light of these changed circumstances, the Defendant has established by clear and convincing evidence that he does not pose a danger to the community. Furthermore, even were the Court to conclude that reconsideration was not warranted, compelling reasons would necessitate the Defendant's temporary release under 18 U.S.C. § 3142(i). Accordingly, the Court orders the Defendant released from the custody of the Bureau of Prisons to the custody of his mother, with whom he lives, subject to the additional conditions of supervised release of 24-hour home incarceration at his current residence in the Bronx and electronic location monitoring as directed by the Probation Department.

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 1295155

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Exhibit 30 - United States v. Stephens

2020 WL 1808906
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

OLIVER NISSAN AWSHANA, ALI NAJIM AL-SADOON, and WISAM GHARIB HAMANA, Plaintiffs,
v.
REBECCA ADDUCCI, Detroit District Director, United States Immigration and Customs Enforcement, MATTHEW T. ALBENCE, Director, United States Immigration and Customs Enforcement, KEVIN MCALEENAN, Secretary of the United States Department of Homeland Security, and WILLIAM P. BARR, United States Attorney General. Respondents.

Case Number 20-10699
|
04/09/2020

DAVID M. LAWSON, United States District Judge

OPINION AND ORDER DENYING IN PART PETITION FOR WRIT OF HABEAS CORPUS

***1** "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general wellbeing." *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (citation omitted). Citing concerns for their safety due to potential exposure to the novel coronavirus and contracting COVID-19, petitioners Oliver Nissan Awshana, Ali Najim Al-Sadoon, and Wisam Gharib Hamana, Iraqi refugees currently detained by the United States Immigration Customs and Enforcement Agency ("ICE"), ask this Court to order their release in a petition for a writ of habeas corpus filed under 28 U.S.C. § 2241. They base their petition on a vague reference to an undeveloped theory of substantive due process embodied in the Fifth Amendment. The government opposes their request due in part to their criminal histories that would disfavor release under normal circumstances. But these are not normal times, and the Court has the authority to order the petitioners' release if their continued detention violates a constitutional right for which the only remedy is release. Nonetheless, the present circumstances do not warrant relief: there are no confirmed or suspected COVID-19 cases in the one of detention facilities mentioned in the

petition, and none of the petitioners are burdened with conditions that place them in an enhanced risk category. The petition will be denied in part, but it may be renewed if conditions change. The respondents promptly must furnish additional information about the conditions at the St. Clair County Detention Facility, where COVID-19 cases have been reported.

I. The Petition

Although the petitioners have styled their petition as an "emergency," they have not moved for a temporary restraining order or preliminary injunction or any other form of immediate consideration. The petition cites no legal authority except for references to 28 U.S.C. § 2241. The petitioners filed no memorandum of law to support their request. And they have not coupled their petition with any claim for violations of their constitutional rights under, for example, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

The government believes that the petitioners' exclusive reliance on section 2241 is fatal to their claim. Generally, section 2241 provides a remedy for prisoners and detainees in two circumstances: (1) to "challeng[e] the execution of a sentence," and (2) to "test the legality of a detention where [28 U.S.C.] § 2255 is otherwise inadequate." *Terrell v. United States*, 564 F.3d 442, 447-48 (6th Cir. 2009). The government characterizes the petition as a challenge to the petitioners' conditions of confinement. It argues that section 2241 cannot provide a basis for relief for such a challenge.

It is generally accepted in this circuit that section 2241 "is not the proper vehicle for a prisoner to challenge conditions of confinement." *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013) (citing *Martin v. Overton,* 391 F.3d 710, 714 (6th Cir. 2004)). That is because the purpose of a writ of habeas corpus is to contest "the very fact or duration of...physical imprisonment." *Lutz v. Hemingway*, 476 F. Supp. 2d 715, 718 (E.D. Mich. 2007). It is employed when "the relief that [a petitioner] seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment." *Ibid.* (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). If the remedy a detainee is seeking is a change in the *conditions* of his custody arrangements, or to obtain compensation for past unconstitutional conditions of confinement, then he must file an action under 42 U.S.C. § 1983, or for a federal detainee, under *Bivens*. *Ibid.*

***2** The petitioners here, however, are not seeking to change the conditions of their confinement or to obtain damages for past constitutional violations. Instead, they describe the close living

conditions typical of custodial confinement, they recount the current commands for social distancing necessary to inhibit the spread of the novel coronavirus, and they argue that no custodial condition will protect them from infection. Therefore, they argue, the *only* remedy that will vindicate their due process right under the Fifth Amendment is release from custody.

That form of relief falls squarely within the prevue of section 2241. "The statute is an affirmative grant of power to federal courts to issue writs of habeas corpus to prisoners being held 'in violation of the Constitution or laws or treaties of the United States.' " *Rice v. White*, 660 F.3d 242, 249 (6th Cir. 2011) (quoting 28 U.S.C.§ 2241(c)). Courts generally look to the form of relief sought when deciding if section 2241 is applicable. In cases involving medical decisions, sometimes fine distinctions must be drawn. *See Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005) (distinguishing between a section 2241 petitioner who requests a "quantum change in the level of custody, which must be addressed by habeas corpus," and a petitioner who requests "a different program or location or environment, which raises a civil rights claim" and holding that "[i]f an inmate establishe[s] that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option." (citation omitted)); *cf. Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) ("[L]eav[ing] to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself." (citation omitted)). But section 2241 has been pressed into service in medical condition cases where the line of demarcation is fuzzy. *See Roba v. United States*, 604 F.2d 215, 218-19 (2d Cir. 1979) (allowing a section 2241 petition to challenge an inmate's "transfer while seriously ill" where that transfer posed a risk of fatal heart failure).

Other courts that have granted relief to detainees based on the current pandemic have relied on section 2241 for their authority. Most of them, however, also have considered coordinated requests for a temporary restraining order and the attending relevant equitable factors. *See Jones v. Wolf*, No. 20-361, 2020 WL 1643857 (W.D.N.Y. Apr. 2, 2020); *Basank v. Decker*, No. 20-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Coronel v. Decker*, ---F.Supp.3d---, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020).

The petitioners allege that their continued detention violates their constitutional right under the Fifth Amendment, which forbids depriving a person of life, liberty, or property without due process of law. They contend that their continued detention will compromise their health and may kill them. They are entitled to advance their claim — and seek release from custody — under section 2241.

II. Immigration Status and Constitutional Detention

The petitioners are natives and citizens of Iraq admitted at various times to the United States as refugees. The statuses of Awshana and Hamana were adjusted to lawful permanent residents. All three were placed in removal proceedings because of criminal convictions. And all eventually were scheduled for deportations, which were stayed when Immigration Judges granted requests for withholding of removal under the Immigration and Naturalization Act, the United Nations Convention Against Torture, or both.

***3** Congress has prescribed that once an alien has been ordered to be deported, "the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." 8 U.S.C. § 1231(a)(1)(A). During this removal period, "the Attorney General shall detain the alien." *Id.* § 1231(a)(2). Congress has authorized the Attorney General (now the Secretary of the Department of Homeland Security) to detain certain aliens beyond the 90-day removal period under certain circumstances. *Id.* § 1231(a)(6). "By its terms, this provision applies to three categories of aliens: (1) those ordered removed who are inadmissible under § 1182, (2) those ordered removed who are removable under § 1227(a)(1)(C), § 1227(a)(2), or § 1227(a)(4), and (3) those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk." *Clark v. Martinez*, 543 U.S. 371,377 (2005). The petitioners here all fall within the second category, and possibly the third as well.

Detention of removable aliens, however, must be consistent with the Constitution. The protection of the Fifth Amendment's Due Process Clause applies to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The petitioners allege that their continued detention during the COVID-19 pandemic violates their substantive rights under the Due Process Clause of the Fifth Amendment to the United States Constitution because it jeopardizes their health and medical wellbeing.

It is well known that the State "has an 'obligation to provide medical care for those whom it is punishing by incarceration.' " *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). "[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling*, 509 U.S. at 31.

However, claims by detainees for due process violations emanating from confinement conditions are not strictly governed by the Eighth Amendment, because the detainees do not stand convicted and are not subject to punishment. *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). A detainee's rights are at least as great as the Eighth Amendment protections available to a convicted prisoner. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004) (holding that civil detainees are entitled to superior conditions of confinement than prisoners and pretrial detainees). Nonetheless, claims relating to health concerns by detainees are analyzed using an Eighth-Amendment, deliberate-indifference framework. *Watkins v. City of Battle Creek*, 273 F.3d 682, 685-86 (6th Cir. 2001).

That framework calls for proof that detention officials were deliberately indifferent to a substantial risk of harm. *Farmer v. Brennan*, 511 U.S. 825, 837–38 (1994). The applicable test has two elements. *Id.* at 834. First, the petitioners must demonstrate that the constitutional deprivation was "objectively, 'sufficiently serious.' " *Ibid.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). Second, they must demonstrate that the detention official had a "sufficiently culpable state of mind." *Ibid.* This element can be proven by circumstantial evidence from which the fact finder can conclude that the state actor perceived the risk, *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001), or "from the very fact that the risk was obvious." *Terrance v. Northville Reg'l Psychiatric Hospital*, 286 F.3d 834, 843 (6th Cir. 2002).

In *Helling v. McKinney*, the Supreme Court held that a prisoner could state a claim under the Eighth Amendment by alleging that officials "exposed him to levels of [environmental tobacco smoke] that pose[d] an unreasonable risk of serious damage to his future health." 509 U.S. at 35. To satisfy the objective prong, the plaintiff had to show both that he was "being exposed to unreasonably high levels of [environmental tobacco smoke]" and that "society consider[ed] the risk that the prisoner complain[ed] of to be so grave that it violate[d] contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Id.* at 35, 36 (emphasis in original). The plaintiff must produce "more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood [of] injury." *Id.* at 36. To succeed on the subjective prong, the plaintiff had to show that "the prison authorities' current attitude and conduct" amounted to deliberate indifference. *Ibid.*

***4** However, "a remedy for unsafe conditions need not await a tragic event," and the plaintiff need not allege present harm to succeed on an unconstitutional conditions claim. *Id.* at 33. In *Helling*, the Court rejected the government's argument that the plaintiff's claim was not cognizable

because he had not alleged any present harm. The Court explained that the government 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." *Ibid.* The Court noted some examples of circumstances where inmates may obtain injunctive relief to remedy life-threatening conditions even though "nothing yet had happened to them." *Ibid*. One example was the "exposure of inmates to serious, communicable disease [even if the] inmate shows no serious current symptoms." *Ibid.*

III. COVID-19 Pandemic and Detention Facilities

A. Novel Coronavirus in Michigan

On March 22, 2020, the Governor of Michigan announced that "[t]he novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spreads from person to person. There is currently no approved vaccine or antiviral treatment for this disease." Executive Order, No. 2020-20, Mar. 22, 2020, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, estimated that between 100,000 and 240,000 people will die from COVID-19 related complications. Michael D. Shear et al., *Coronavirus May Kill 100,000 to 240,000 in U.S. Despite Actions, Officials Say*, N.Y. Times, Mar. 31, 2020, https://www.nytimes.com/2020/03/31/us/politics/coronavirus-death-toll-united-states.html.

The Centers for Disease Control and Prevention (CDC) advised that "[p]eople aged 65 years and older" might be at higher risk for severe illness from COVID-19. *See People Who Are at Higher Risk for Severe Illness*, Ctrs. for Disease Control and Prevention (Mar. 31, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html? CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019ncov%2Fspecific-groups%2Fhigh-risk-complications.html. The CDC identified other high-risk conditions, which include: [p]eople with chronic lung disease or moderate to severe asthma[; p]eople who have serious heart conditions[; p]eople who are immunocompromised...[; p]eople of any age with severe obesity (body mass index [BMI] of 40 or higher)[; p]eople with diabetes[; p]eople with chronic kidney disease undergoing dialysis[; or p]eople with liver disease." *People Who Are at Higher Risk for Severe Illness, supra*.

On March 10, 2020, the Governor of Michigan announced the state's first two cases of COVID-19 and simultaneously declared a state of emergency. Executive Order, No. 2020-4 (Mar. 10,

2020). The number of new cases is growing exponentially. As of today, that number is now at 20,346 confirmed cases and 959 known related deaths. *See* Coronavirus, Michigan.Gov, https://www.michigan.gov/coronavirus/0,9753,7-406-98163-520743--,00.html. COVID-19 has a high risk of transmission, and the number and rate of confirmed cases indicate broad community spread. *Ibid.*

B. ICE Detention Facilities

The parties paint very different pictures of the conditions within the ICE detention facilities. The government argues that the situation is no worse than what is occurring throughout the rest of the world. But the petitioners argue that the packed, unsanitary conditions at the facilities are completely inadequate, warning that they will become breeding grounds for the disease.

1. ICE Facility Conditions

As of March 30, 2020, when the respondents filed their answer to the petition, there have been no suspected or confirmed cases of COVID-19 in either the Calhoun or St. Clair County detention centers. However, the Court learned from the U.S. Marshal Service that confirmed cases were reported by the St. Clair County Jail on April 8, 2020. The petitioners argue that the poor conditions in the facility will compromise their safety and that exposure to the virus while detained within ICE's facilities is inevitable.

***5** Relying on the following articles from major news outlets, the petitioners believe that ICE detention facilities are rife with overcrowding, neglect, and substandard conditions, making them hotbeds for the virus:

1. Human Rights Watch & American Civil Liberties Union, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention* (June 2018) ECF No. 1-4. (Since March 2010, 74 detainees have died in ICE custody; medical care lapses contributed to 23 of them);

2. Amanda Holpuch, *Coronavirus Inevitable in Prison-Like US Immigration Centers, Doctors Say*, THE GUARDIAN, ECF No. 1-5;

3. *Former ICE Director: Release Immigrants from Detention or COVID-19 Will Spread Like Wildfire Inside*, DEMOCRACYNOW, ECF No. 14-1;

4. Ken Klippenstein, *Exclusive: ICE Detainees Are Being Quarantined*, THE NATION, ECF No. 14-3 (ICE has been quarantining detainees at 10 different facilities, suggesting that there may be outbreaks);

5. Scott A. Allen & Josiah D. Rich, Letter to House Committee on Homeland Security, ECF No. 14-4 (letter from infectious disease specialists urging immediate mitigation strategies to slow the spread of COVID-19 within immigration detention facilities);

6. Julie Mack, *Another Big Jump in Michigan Coronavirus Numbers: Now at 2,295 Cases; 43 Deaths*, MLIVE (Mar. 25, 2020), ECF No. 14-5;

7. Open Letter to ICE from [3,014] Medical Professionals Regarding COVID-19, ECF No. 14-6, at PageID.398 (urging the release of "[i]ndividuals and families, particularly the most vulnerable – the elderly, pregnant women, people with serious mental illness, and those at higher risk of complications");

8. Dara Lind, *ICE Detainee Says Migrants Are Going on a Hunger Strike for Soap*, PROBULICA, ECF No. 14-6; and
9. Gregory Bull, *Coronavirus: SF D.A., Activists, Doctors Call for Undocumented Immigrants' Release*, ASSOCIATED PRESS, ECF No. 14-11.

On March 23, 2020, the Centers for Disease Control and Prevention (CDC) acknowledged that detention facilities "present [ ] unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors." *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Ctrs. for Disease Control (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html. "The CDC noted that many detention conditions create a heightened risk of danger to detainees. These include: low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, highly congregational environments, inability of most patients to leave the facility, and limited ability of incarcerated/detained persons to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing)." *United States v. Kennedy*, No. 18-20315, 2020 WL 1493481, at *2 (E.D. Mich. Mar. 27, 2020) (Levy, J.).

Both detention facilities at issue — Calhoun and St. Clair — are located within jail complexes where vendors, visitors, attorneys, clergy, and correctional facility staff come and go on a daily basis, according to the petitioners. The government advises, however, that visits are restricted

presently and inmates have no direct contact with people from outside the facilities. The petitioners maintain that there is no coronavirus screening testing for new detainees, nor is there coronavirus testing provided to the facility staff. ICE reported that coronavirus testing is provided only when symptoms manifest, which, according to the World Health Organization, is 5 to 14 days after the virus is contracted.

***6** Awshana and Hamana are both detained in the Calhoun Facility. The facility has two types of dorms. The first type contains 30 to 40 cells that house two people each. The second type of dorm "has simple bed rows that each have 8 to 16 people." All detainees share common eating and social areas. The petitioners report that they have no masks to wear, people come and go every day, they must share five phones among each other, and there is only one sink for everyone to wash their hands. Although the facility has hand sanitizer, detainees are not allowed access to it after 5:00 p.m. They wear the same jumpsuits every day, which are washed twice a week. The petitioners allege that the facilities in the St. Clair County jail, where Al-Sadoon is held, "are virtually identical to those at Calhoun County."

Through this morning, Calhoun County has reported 541 total cases of COVID-19 and one death, and St. Clair County reported 140 cases and 3 deaths. *See* Coronavirus, Michigan.Gov, https://www.michigan.gov/coronavirus/0,9753,7-406-98163-520743--,00.html

2. Steps Taken to Ameliorate the Situation

Jennifer Moon, the Deputy Assistant Director for Healthcare Compliance with ICE Health Service Corps (IHSC), filed a declaration describing the steps ICE has taken to stem the spread of COVID-19 within the Calhoun and St. Clair County detention facilities.

Following guidance from the CDC, facility staff assess detainees for fever and respiratory illness during intake medical screenings. Detainees are also asked if they traveled through areas with sustained community spread or if they had close contact with anyone with a laboratory-confirmed COVID-19 diagnosis within the past two weeks. Asymptomatic detainees with known exposure to COVID-19 "are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness." Those detainees who present with symptoms associated with COVID-19 are placed in isolation where they will be tested. And if they test positive, they will remain isolated, treated, and hospitalized if necessary. And on Friday, March 13, 2020, the Federal Bureau of Prisons announced that incarcerated people will not be allowed visits from

family, friends, and attorneys for 30 days. *Federal Bureau of Prison Action Plan,* Federal Bureau of Prisons, (Mar. 13, 2020), https://www.bop.gov/resources/news/ 20200313_covid-19.jsp.

The facilities, working with their local Health Departments, also provide staff and detainee services to help curb the spread of the virus. Calhoun County and St. Clair County provide education on COVID-19, which includes guidance on identifying symptoms and the importance of hygiene. The facilities also provide daily access to sick calls, specialty services, and hospital care.

ICE also insists that the conditions at the detention facilities are adequate. The facilities maintain "populations within their approved capacities and are not overcrowded." And they both provide "disinfectants, soap, and personal protective equipment when needed."

IV. Petitioners' Individual Circumstances

The petitioners argue that the conditions at the Calhoun and St. Clair detention centers subject them to a heightened risk of contracting COVID-19, going so far as calling the facilities soon-to-be "death camps." That language does little to advance the arguments, but the Court is mindful of the petitioners' legitimate concern — shared by society in general — over minimizing exposure to the novel coronavirus. The increasing number of courts that have addressed pleas for release because of the fear of COVID-19 infection have ruled both ways, denying relief when the concern is too generalized, and granting relief when specific and heightened risks of exposure to complications have been shown. Courts have been more inclined to grant relief where the detention facility has reported confirmed cases of COVID 19 or where the petitioners fall into one of the high-risk categories for COVID-19. *See decisions granting relief*: *Jones*, 2020 WL 1643857 (W.D.N.Y.) (granting relief for detainees with chronic medical conditions held in a detention facility with no confirmed COVID-19 cases); *Basank*, 2020 WL 1481503 (S.D.N.Y.) (granting relief for detainees with chronic medical conditions held in a facility with confirmed cases of COVID-19); *Coronel*, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (same); *Malam v. Adducci*, --- F. Supp. 3d ---, No. 20-10829, 2020 WL 1672662, at *1 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) (granting relief for petitioner in high-risk category but held in facility with no confirmed cases); *and see decisions denying relief*: *Dawson v. Asher*, No. 20-0409, 2020 WL 1304557 (W.D. Wash. Mar. 19, 2020) (denying petition where petitioners were not in high-risk group and no detainees or staff at the facility at issue tested positive for COVID-19); *Sacal-Micha v. Longoria*, No. 20-37, 2020 WL 1518861 (S.D. Tex. Mar. 27, 2020) (same); *Xuyue Zhang v. Barr*, 2020 WL 1502607, at *4 (C.D. Cal. Mar. 27, 2020) (denying relief for petitioners in high-risk categories held a detention facility with no confirmed cases of COVID-19).

***7** That pattern is consistent with a deliberate indifference analysis. Objectively, the health risks posed by COVID-19 are abundantly clear. The parties do not dispute that the virus is particularly dangerous to those over 65 years old or with certain underlying health conditions. *See People Who Are at Higher Risk for Severe Illness*, *supra*. There is no vaccine to prevent COVID-19, nor is there a known cure or antiviral treatment at this time. *Ibid.* Dr. Fauci estimated on March 31, 2020, that between 100,000 and 240,000 will die of COVID-19. Shear et al., *supra.* And the Southern and Western Districts of New York have "take[en] judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality." *Basank*, 2020 WL 1481503, at *3 (S.D.N.Y.); *Jones*, 2020 WL 1643857, at *8 (W.D.N.Y.).

The petitioners are also housed in a manner that increases their risk of exposure to the coronavirus. They are held in the general population of the Calhoun County and St. Clair County detention centers, use shared restrooms, and are confined in shared cells or dorm-style housing. Government experts agree that such a communal style of living can increase the infection rate. *See Former ICE Director: Release Immigrants from Detention or COVID-19 Will Spread Like Wildfire Inside*, DEMOCRACYNOW, ECF No. 14-1; *FAQs for administrators, staff, people who are incarcerated, families*, Ctrs. for Disease Control and Prevention (Mar. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html.

However, unlike the petitioners in the cases for which courts granted relief, the petitioners in this case do not allege that they are in a high-risk category as defined by the CDC. Petitioners Awshana and Hamana, presently detained at the Calhoun County Detention Center, have not alleged that any detainees or staff have tested positive for the illness in that detention facility. The petitioners assert generally that they "are older adults and/or people with medical conditions who are at particularly grave risk of severe illness or death if they contract COVID-19." But they never have alleged that any of them suffered from a medical condition that placed them in a high-risk category, per the CDC's guidelines. As of July 2019, Hamana was 39 years old. And although the parties never stated the Awshana's age, he never claimed that he was over 45. *See People Who Are at Higher Risk for Severe Illness*, *supra.* Despite Awshana's assertions that his medical condition has deteriorated over the past two weeks, he was given consistent medical attention. After visiting the clinic at the Calhoun facility six times over the course of nine days, medical staff never noted that he presented any symptoms beyond seasonal allergies or dehydration. Although the seriousness of the pandemic cannot be doubted, petitioners Awshana and Hamana are in an objectively better situation than the petitioners in *Jones*, *Basank,* and *Coronel*, who were either in high-risk categories, were held in facilities with confirmed cases, or both.

Petitioner Al-Sadoon's circumstances are different, because the United States Marshal reported on Wednesday that two inmates at the St. Clair County jail tested positive for COVID-19. An ICE Assistant Field Office Director reports that each inmate was isolated in his respective housing unit, and that Al-Sadoon does not reside in either unit. No further information was provided. The government will be required promptly to investigate and report to the Court and petitioners' counsel the details. Al-Sadoon has not alleged that he falls in one of the high-risk categories that portend complications from a coronavirus infection. He is approximately 32 years old.

***8** To satisfy the subjective element of their claim, the petitioners must demonstrate that the government subjected them to objectively poor confinement conditions with deliberate indifference to their health and safety. *Farmer*, 511 U.S. at 834. There is no doubt that the respondents are aware of the grave threat posed by the pandemic and the exacerbated risk caused by the close quarters of the detention facilities. *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/ correction-detention/guidance-correctional-detention.html (last visited April 8, 2020) (explaining that measures ordered by the CDC to reduce person-to-person contact present unique challenges for prisons and detention facilities, because "[i]ncarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced").

According to Deputy Assistant Director Moon, the government has put in place specific measures to stem the spread of the pandemic. Following CDC guidance, Calhoun and St. Clair facility staff assess detainees for fever and respiratory illness during intake medical screenings and ask about any possible exposure to the virus. Those with confirmed exposure will be segregated in separate cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee). And the government will place detainees who present with COVID-19 symptoms in isolation where they are tested and treated if necessary. However, while these measures are certainly commendable, "the fact is that none of the steps [taken]...includes the 'social distancing measures recommended — especially for high-risk individuals — by the CDC..." *Jones*, 2020 WL 1643857, at *10 (W.D.N.Y.). It is unlikely that any operating detention facility will be able to achieve that goal.

V. Release as a Remedy

The premise of this habeas corpus petition is that the conditions of confinement in these ICE detention facilities are so intolerable because of the risk of contracting COVID-19 that release is

the only remedy. With appropriate proof, that may indeed be true. But the petitioners have leveled only generalized allegations; if those were deemed sufficient, then all inmates would be entitled to release until the pandemic subsides. The petitioners have not stated as much in so many words, but neither have they attempted to articulate any limiting principle.

Limits, however, are imposed by the Due Process Clause itself, and the manner of its application. The seminal case dealing with the constitutionality of conditions of confinement of non-convicted detainees is *Bell v. Wolfish,* 441 U.S. 520 (1979). There, the Supreme Court held that such claims are governed by the Due Process Clause, a proposition that is now well accepted. *See, e.g.*, *Phillips v. Roane County*, 534 F.3d 531, 539 (6th Cir. 2008) (reiterating that when a conditions-of-confinement claim "is asserted on behalf of a pre-trial detainee, the Due Process Clause...is the proper starting point"). But the Court also emphasized that those constitutional rights implicated by conditions of confinement, when analyzed for pretrial detainees under the Due Process Clause, must be balanced against the "Government['s]...legitimate interests that stem from its need to manage the facility in which the individual is detained." *Bell*, 441 U.S. at 540. Courts, therefore, must strike a balance "between institutional needs and objectives and the provisions of the Constitution that are of general application." *Id.* at 546 (quoting *Wolff v. McDonell*, 418 U.S. 539, 556 (1974)). In striking that balance, courts must give great deference to the custodians "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security," *id.* at 547, lest courts become "enmeshed in the minutiae of prison operations." *Id.* at 562.

***9** The institutional interests here circle back to ICE's interest in continuing the detention of those removable aliens whom the Secretary determines "to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). When considering the remedy of a complete release from detention (albeit with conditions for supervision), the Court must strike a balance between the gravity of the risk of contracting COVID-19 (with uncertain outcomes for recovery and a path that could lead to death) with the danger to the public that could result from releasing the petitioners into the community. The petitioners each contend that they are neither a danger nor a flight risk. In light of those arguments, it is relevant to review their backgrounds. The following information came from the petition and declarations furnished by the respondents.

A. Oliver Nissan Awshana

According to the declaration of deportation officer Christopher Labadini, Oliver Nisan Awshana came to the United States as a refugee on April 20, 2009, and became a lawful permanent resident on January 21, 2011. He has not revealed his age, but there is no allegation that he is over 45 years old.

1. Immigration Proceedings

Awshana was convicted of possession of cocaine and two counts of retail fraud in the second degree in state court. Due to his convictions, the Bureau of Immigrations and Customs Enforcement (ICE) detained Awshana in April 2018 and placed him in removal proceedings under 8 U.S.C. § 1227(a)(2). He filed applications for relief from removal, but the Immigration Court denied them on August 2, 2018, and ordered him deported to Iraq. Awshana's removal was scheduled to occur on April 23, 2019.

On April 1, 2019, Awshana filed a petition for a writ of habeas corpus in the Northern District of Ohio under 28 U.S.C. § 2241. He argued that his continued detention under 8 U.S.C. § 1231(a) was unlawful and that he should be released from ICE custody because the United States was unable to obtain travel documents necessary to remove him to Iraq. The district court in Ohio denied the petition on July 10, 2019.

ICE began the physical removal process on April 23, 2019, flying Awshana from Detroit to Chicago. But Awshana "refus[ed]" to board the plane for his trip to Iraq from Chicago. So ICE transferred him to the Calhoun County Detention Center in Battle Creek, Michigan, where he remains in custody.

Three days later, on April 26, Awshana filed two motions with the Immigration Court in Detroit, Michigan: the first to reopen his case, and the second to stay his removal proceedings. On April 30, 2019, the Immigration Court granted Awshana's motion to stay his removal, and on May 14, 2019, the court reopened his immigration case.

After holding hearings in November and December 2019, the Immigration Court issued a written decision on February 4, 2020, granting Awshana's applications for withholding of removal under the Immigration and Nationality Act and alternatively withholding removal under the United Nations Convention Against Torture due to the deteriorating conditions in Iraq. The court concluded that Awshana would face torture and persecution in Iraq because he is a Christian, he will be identified as a supporter of the United States, and he has no social network to protect him

in Iraq. ICE then filed a notice of appeal with the Board of Immigration Appeals (BIA) on March 3, 2020. The appeal currently is pending, awaiting the issuance of the BIA's briefing schedule and hearing transcripts.

2. Medical History at Calhoun Detention Facility

In a reply to the government's response, Awshana asserts that his medical condition has deteriorated over the past two weeks while at the Calhoun Detention Center. His attorney alleges that when she visited him on March 20, 2020, he looked "sick." He allegedly had a fever, a runny nose, and a cough, and he had difficulty swallowing, was sweating profusely, and was slightly jaundiced. The government adamantly disputes this account, contending that attending nurses saw nothing wrong with Awshana, aside from seasonal allergies and dehydration. The government detailed Awshana's recent medical history in its sur-reply:

> ***10** March 20, 2020: Awshana visited the clinic complaining of a stuffy nose and nausea that started the day before. He denied being around anyone that had been sick. "The practitioner noted that it appears Awshana has allergic rhinitis and that there are no signs of infection." He was prescribed Cetirizine for his allergy symptoms and was told to increase his fluids.
>
> March 24, 2020: Awshana visited the clinic complaining about sneezing and fatigue. He denied having a cough or nausea. He stated that he gets dizzy after laying down and rising quickly. He also admitted that he had only been drinking three glasses of water because it tastes bad.
>
> March 25, 2020: Awshana visited the clinic for unusual behavior. He denied feeling suicidal or homicidal. But he reported feeling anxious and wanted to be released.
>
> March 26, 2020: He visited the clinic again for unusual behavior. He complained of "feeling bad," that his ears were plugged, and that he had been coughing. No cough was noted during the encounter. He was housed and placed in observation.
>
> March 26, 2020: Awshana returned to the clinic by the request of command staff, as he had been kiting the night before stating that he needed to go to the hospital. He appeared very anxious, had no fever, was slightly tachycardic, and said he was not sleeping. He did not cough during the exam or observation period. He received an x-ray of his chest, which came back normal. He was cleared and returned to general population.
>
> March 29, 2020: Awshana visited the clinic complaining about a cold or the flu. He claimed that he had a fever, chills, nasal drainage, and a cough. A physical exam showed that his vital

signs were fine, and the nurse did not detect a cough, runny nose, or congestion. No signs or symptoms of a cold or the flu were noted.

B. Ali Najim Al-Sadoon

Ali Najim Al-Sadoon is an Iraqi Shi'a Muslim. He and his family fled Iraq and sought refuge in the United States on June 23, 1994. He is roughly 32 years old. He has not identified any health problems.

1. Immigration Proceedings

After being convicted of safe breaking and breaking and entering in state court, ICE initiated removal proceedings against Al-Sadoon on August 20, 2013, charging him as removable under 8 U.S.C. §§ 1227(a)(2). He did not contest the charges. While Al-Sadoon was serving his sentence, an Immigration Judge in Detroit ordered him removed on March 24, 2015. Al-Sadoon waived his right to appeal the decision and was transferred from the custody of the Michigan Department of Corrections (MDOC) to ICE on May 17, 2016.

Al-Sadoon moved to reopen his removal proceedings in September 2017, and an Immigration Judge denied the motion on November 8, 2017. Al-Sadoon appealed the decision to the BIA but withdrew his appeal on August 31, 2018.

In the meantime, Al-Sadoon was a member of a class action lawsuit filed in this Court in 2018 in which Iraqi aliens in ICE custody sought a writ of habeas corpus to preclude their detention pending removal. *See Hamama v. Adducci*, No. 17-11910 (E.D. Mich.) (Goldsmith J.). Judge Goldsmith granted the petitioners' motion for a preliminary injunction on November 20, 2018. *See Hamama v. Adduci*, 349 F. Supp. 3d 665 (E.D. Mich. 2018) (Goldsmith, J.), *vacated and remanded*, 946 F.3d 875 (6th Cir. 2020). Per the order, ICE released Al-Sadoon from custody and placed him on a GPS tether.

***11** The Iraqi government then issued a one-way *Laissez-Passer* travel document for Al-Sadoon's removal on March 13, 2019. The travel document was valid for six months.

Al-Sadoon was ordered to report to the Detroit Metropolitan Airport on June 23, 2019, at 4:00 p.m. for removal. But he had filed on June 20, 2019 in the Immigration Court in Detroit a motion to

reopen and a motion to stay his removal. Because he had not yet heard from the immigration court, Al-Sadoon cut his tether on the morning of June 23 and did not report to the airport as instructed. The immigration court denied Al-Sadoon's motion to reopen removal proceedings on June 25. ICE officers found Al-Sadoon at his house about a month later on July 26, 2019. He barricaded himself in his home using a couch and a washing machine. A Special Response Team had to break in to arrest him.

The government filed a criminal complaint charging Al-Sadoon with hampering removal in violation of 8 U.S.C. 1253(a)(1)(C). The court denied bond on August 5, 2019, finding that Al-Sadoon was a flight risk and danger to the community. The court eventually dismissed the indictment on the government's motion "to allow ICE to effectuate [Al-Sadoon's] removal."

Al-Sadoon was then re-detained by ICE on December 18, 2019. But on January 10, 2020, the BIA granted Al-Sadoon's request for a stay of removal, pending the decision of Al-Sadoon's appeal of the immigration court's June 25, 2019, denial of his motion to reopen removal proceedings. Al-Sadoon's removal, which was planned on January 12, 2020, was therefore cancelled.

Al-Sadoon currently is detained at the St Clair Detention Center. Most recently, on February 14, 2020, Judge Goldsmith explicitly authorized his continued detention in a sealed order in the ongoing class action.

> 2. Criminal History In addition to the hampering removal charge, Al-Sadoon has an extensive criminal history.

He has been arrested for the following conduct:

> August 2, 2001: arrested by Dearborn, Michigan, police for "an offense related to a stolen vehicle." Al-Sadoon received a juvenile order of guilt for receiving and concealing stolen property valued at $20,000 or more; December 6, 2003: arrested by Detroit, Michigan, police for "a public order crime"; December 9, 2004: arrested by Dearborn police and convicted of unlawfully taking a motor vehicle without authority;
>
> December 4, 2006: arrested and convicted of "domestic violence in Detroit"; January 23, 2007: arrested by Detroit police and convicted of "larceny in a building and breaking and entering a building";

July 6, 2007: arrested by Detroit police "for an offense relating to assault"; July 7, 2007: arrested by Dearborn police and convicted of "operating a vehicle with no license or multiple licenses";

July 17, 2007: arrested by Detroit police "for a traffic offense"; September 26, 2007: arrested by Detroit police for an "offense related to the obstruction of justice";

December 3, 2007: arrested by Detroit police for "an offense related to robbery"; June 8, 2008: arrested by Detroit police "for a public peace offense"; June 23, 2008: arrested by Detroit police for "a dangerous drugs offense"; August 14, 2008: arrested by Detroit police and convicted of "breaking and entering by illegal entry without the owner's permission";

***12** October 19, 2008: arrested by Detroit police for "an offense related to burglary"; December 4, 2008: arrested by the Detroit police for "an offense related to obstruction of justice";

December 9, 2008: arrested by Detroit police for "a traffic offense"; January 9, 2009: arrested by Detroit police for "an armed robbery offense"; January 29, 2009: arrested by the Westland, Michigan, police "for a traffic offense"; February 20, 2009: arrested by the Dearborn police for traffic and controlled substance related offenses, resulting in a conviction of "operating a vehicle with a suspended, revoked or denied license";

March 28, 2009: arrested by Sidney, Ohio, police and convicted of "fleeing a police officer in a vehicle";

April 9, 2009: arrested by Dearborn police and convicted of "fleeing a police officer in a vehicle";

April 15, 2009: arrested by Dearborn police and convicted of "operating while intoxicated and controlled substance possession"; June 5, 2009: arrested by Dearborn police and convicted of "operating a vehicle with no license or multiple licenses";

June 15, 2011: arrested by Wayne, Michigan, police and convicted of "breaking and entering outside a showcase";

September 27, 2011: arrested by Dearborn police for a "public peace offense"; October 26, 2011: arrested by the Dearborn police department for safe-breaking — convicted and sentenced to three years and six months to 15 years imprisonment with the MDOC; and

April 16, 2012: arrested by Redford, Michigan, police for breaking and entering — convicted and sentenced as a habitual offender to three years and six months to 15 years imprisonment with the MDOC.

The last two convictions were the basis of the removal proceedings.

C. Wisam Gharib Hamana

Wisam Gharib Hamana is an Iraqi Christian who, along with his family, was granted asylum in 1983. He is around 39 years old. He left Iraq when he was eight weeks old. He does not speak Arabic or Chaldean fluently and knows little about Iraqi social and cultural norms. On July 27, 1984, he became a lawful permanent resident of the United States. He has not identified any health problems.

1. Immigration Proceedings

ICE began removal proceedings against Hamana on August 6, 2010, charging him as removable under 8 U.S.C. § 1227(a)(2)(A)(ii) and (B)(i) based on convictions of "controlled substance offenses," receiving and concealing stolen property, and retail fraud. On September 29, 2010, an immigration judge ordered his removal from the United States. The case was reopened in August 2017, and on February 26, 2018, an Immigration Judge again ordered his removal.

Like Al-Sadoon, Hamana was a class member in the *Hamama* class action before Judge Goldsmith. After Judge Goldsmith granted the petitioners' motion for a preliminary injunction on November 20, 2018, ICE released Hamana from custody on December 19, 2018, and placed him on a GPS tether.

On March 13, 2019, the Iraqi government issued a one-way, *Laissez-Passer* travel document for Hamana's removal from the United States, which was valid for six months. ICE scheduled Hamana's removal to begin on June 25, 2019, and instructed him to meet ICE officers at the Detroit Metropolitan Airport that day at 3:30 p.m.

***13** Hamana filed a motion to reopen and a motion to stay his removal with the immigration court in Detroit on June 18, 2019, several days before he was scheduled to leave. The immigration court denied both motions on June 24, 2019. Hamana appealed, and the BIA denied his request to stay his removal proceedings pending his appeal of the Immigration Court's decisions.

Hamana never reported to the airport on June 25, 2019, as ordered. Instead, he cut his tether around 6:40 p.m. Acting on a complaint and warrant charging him with hampering removal in violation

of 8 U.S.C. 1253(a)(1)(C), ICE found Hamana and arrested him about a month later on July 22, 2019. Hamana was arrested without further incident. Two days later, a magistrate judge in this district detained Hamana pending trial on his criminal charges, finding that he was a flight risk and posed a danger to the community. Hamana was indicted on the hampering removal charge on August 6, 2019.

On November 25, 2019, the Iraqi government issued another six-month travel document for Hamana's removal. ICE arranged to deport him on February 9, 2020, and the government dismissed its indictment against him on January 8, 2020, to facilitate his removal.

ICE re-detained Hamana on January 14, 2020. But days before his second deportation date, Hamana filed a supplemental motion with the BIA for an emergency stay on February 6, 2020. He argued that his family had been granted the right to emigrate to Italy before coming to the United States and asked that he be removed there instead of Iraq. Luck was on his side, it seems, because the next day, the flight that ICE booked to remove him was cancelled. And that same day — February 7, 2020 — the BIA granted Hamana's request to stay removal pending his appeal of the Immigration Court's June 24, 2019, denial of his motion to reopen removal proceedings.

Hamana currently is detained by ICE at the Calhoun County Detention Facility. Most recently, on March 31, 2020, Judge Goldsmith explicitly authorized his continued detention in a sealed order in the ongoing class action.

> 2. Criminal History In addition to his hampering removal, it appears that Hamana also has a criminal record:
>
> July 21, 1998: arrested by Troy, Michigan, police and convicted of "retail fraud"; June 7, 2002: arrested by Oakland County, Michigan, sheriffs and convicted of "receiving and concealing stolen property";
>
> July 13, 2002: arrested by the Warren police and convicted of "controlled substance
>
> offenses";
>
> July 24, 2003: arrested by Hazel Park, Michigan, police and convicted of "disorderly conduct";
>
> July 19, 2010: arrested by Warren police and convicted of "assault with a dangerous weapon and controlled substance possession";
>
> October 21, 2011: arrested by Warren police and convicted of "assault with a dangerous weapon"; and

January 18, 2013: arrested by Detroit police and convicted of "receiving and concealing a motor vehicle."

The first three entries are the convictions that served as a basis for Hamana's removal.

* * * * *

In normal times, the petitioners' respective criminal records, interference with supervision, and resistance to lawful deportation orders would justify their continued detention. When striking the balance between ICE's institutional need for continued detention and the petitioners' legitimate concerns over an unreasonable risk of serious damage to their future health, it is fair to require the petitioners to articulate something more than a generalized fear of exposure to disease in a detention facility. That only makes sense, since "the requirements of due process are fluid and fact dependent." *Shoemaker v. City of Howell*, 795 F.3d 553, 559 (6th Cir. 2015). A detainee who poses a greater flight risk or danger to the community will need to make a stronger showing of risk to his life and health to win release.

***14** In their criticism of the government, the petitioners point only to the lack of social distancing measures implemented at the facilities. They have not argued that the government ignored their high-risk status, failed to treat someone suffering from COVID-19 adequately, or ignored the threat level when someone associated with the detention facilities tested positive for the virus. In fact, the briefings reveal the opposite. The Calhoun facility medical staff were attentive to Awshana's complaints, caring for him each time he visited the clinic, monitoring his condition, providing advice about managing his hydration levels, and giving him allergy medications.

To prevail, the petitioners must show that the government, "with deliberate indifference, exposed [them] to [an environment] that pose[s] an unreasonable risk of serious damage to [their] future health." *Helling*, 509 U.S. at 35. Petitioners Awshana and Hamana have not done so; they have not offered specific proof that the respondents' facilities "[are] incapable of protecting [them] from contracting COVID-19 or providing appropriate medical attention should [they] be infected." *Sacal-Micha*, 2020 WL 1518861, *5 (S.D. Tex.). The petitioners offer only conclusory arguments based on articles regarding the contagious nature of COVID-19 and the potential to spread in detention facilities. But none of the exhibits concern the Calhoun or St. Clair detention centers specifically. The relatively healthy petitioners are left with the argument that the government acted with deliberate indifference by failing to implement social distancing measures in its facilities in which no one tested positive for COVID-19.

More information is needed to assess petitioner Al-Sadoon' claim.

VI. Conclusion

The petitioners understandably seek release from their crowded detention facilities as the world reels from the effects of the global coronavirus pandemic. And courts across the country have released inmates and civil detainees to stem the spread of COVID-19. But in the immigration context, courts have released only those individuals who fell within one of the CDC's high-risk categories, were housed in detention facilities with confirmed cases, or both. Petitioners Awshana and Hamana do not fit this mold: they are relatively healthy people detained in facilities with no confirmed cases. And when one of them sought medical attention, it was promptly provided. Petitioners Awshana and Hamana have not shown that the are in custody in violation of the Constitution. Therefore, they are not entitled to relief under 28 U.S.C. § 2241.

Petitioner Al-Sadoon's claim is on a slightly different footing. There are reports of a confirmed case of COVID-19 at the St. Clair County detention facility. That changes the nature of the concern beyond mere generalities. But more information is required to determine if release is an appropriate remedy.

Accordingly, it is **ORDERED** the petition for a writ of habeas corpus (ECF No. 1) is **DENIED** as to petitioners Oliver Nissan Awshana and Wisam Gharib Hamana, **only**.

It is further **ORDERED** that the respondents must furnish to the Court and petitioners' counsel by **noon on Friday, April 10, 2020**, detailed information describing the extent of CIVID-198 infestation at the St. Clair County jail, including the number of suspected and confirmed cases, the location of the infected inmates, whether petitioner Al-Sadoon was present in any areas visited by the infected inmates within the last 14 days, the steps taken to address the infections, the number of inmates in each housing unit (including the housing units where those inmates with confirmed COVID-19 cases are quarantined), and all remedial measures undertaken at the facility in light of the presence confirmed or suspected cases.

***15** It is further **ORDERED** that petitioners Awshana and Hamana may reapply for appropriate relief under this case number of conditions at the Calhoun County Detention Facility change with respect to suspected or confirmed cases of COVID-19 at that facility.

s/David M. Lawson

DAVID M. LAWSON

United States District Judge

Dated: April 9, 2020

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UNITED STATES of America, Plaintiff,
v.
Francisco PATINO, M.D., Defendant.

Case No. 18-cr-20451
|
Signed 04/06/2020

Attorneys and Law Firms

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ORDER DENYING DEFENDANT'S MOTION FOR PRETRIAL RELEASE PENDING TRIAL [ECF No. 111]

DENISE PAGE HOOD, UNITED STATES DISTRICT JUDGE

I. Introduction

***1** On March 31, 2020, Defendant filed a Motion for Pretrial Release Pending Trial. ECF No. 111. The Government has filed a response.

II. Background

On June 26, 2018, the grand jury returned an Indictment charging Defendant, a 63-year old man, with one count of conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349, two counts of health care fraud, in violation 18 U.S.C. § 1347, one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and one count of receipt of a kickback in connection

with a federal health care program, in violation of 42 U.S.C. § 1320a-7(b)(1)(A). On February 25, 2020, the Grand Jury returned a Superseding Indictment, which added a wire fraud object to the conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349 (thus increasing the statutory maximum on that count from ten to twenty years). The Superseding Indictment also added one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) and a substantive count of money laundering. The conspiracy to commit money laundering count has a statutory maximum of twenty years.

On July 4, 2018, the Magistrate Judge ordered Defendant be detained pending trial. ECF No. 15. The Magistrate Judge found that the Government established by a preponderance of the evidence that Defendant is a flight risk based on the weight of the evidence against Defendant being strong and the fact that Defendant is subjection to a lengthy period of incarceration if convicted. The Magistrate Judge also concluded that the Government established by clear and convincing evidence that there is no condition or combination of conditions that will reasonably assure that Defendant will refrain from obstructing justice.

The Court subsequently denied Defendant's Emergency Motion for a Six-Day Furlough, concluding that there is no condition or combination of conditions of release that would reasonably assure Defendant's appearance if the Emergency Motion was granted. ECF No. 38. The Court stated:

> The Court's review of the Magistrate Judge's Order of Detention and the Pretrial Services' Report establishes that there is no condition or combination of conditions which will reasonably assure the appearance of Patino. Although Patino represents that he is willing to surrender both his U.S. Passport and passport card, he still retains both of them. More significantly, the Government has proffered that Patino lied numerous times during his interview with Pretrial Services, including: (a) grossly misrepresenting the number of recent international trips he took (Patino said two in the last four years, whereas it was 11 trips over the last eight years) and failing to tell Pretrial Services that he had been to the Cayman Islands three times recently; (b) lying or failing to mention his involvement with FDRS Diagnostics; (c) stating that his income was about $300,000/year, when there were years he made about $900,000; and (d) failing to disclose substantial assets in cash, potentially over $2,000,000, including more than $400,000 withdrawn from accounts in cash in 2017 and 2018.
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> ***2** Patino is 63 years old and is subject to a lengthy period of incarceration (up to 40 years) if convicted. Notwithstanding the fact that his accounts have been frozen by the Government in this country, Patino seemingly has access to substantial sums of money in offshore accounts, including the Cayman Islands where he has traveled in recent years (but failed to mention as

much in talking to Pretrial Services). The Court notes that Patino is not asking to attend services in the Eastern District of Michigan, to which his travel generally would be limited even if he were to be released on unsecured bond. Rather, he is seeking to fly to Miami, Florida, far from the Court's jurisdiction and closer to his native Cuba. In addition, Pretrial Services has represented to the Government that Pretrial Services would not be able to effectively supervise Patino in Miami, Florida with a GPS tether, the only method of supervised release proposed by Patino.

ECF No. 38, PgID 288-89.

Defendant later filed a Motion for Revocation of Detention Order. ECF No. 42. The Court denied that motion on March 27, 2019, concluding:

> The Court finds that the Government has shown by a preponderance of evidence that Defendant is a risk of flight and to obstruct justice if he is released. There is evidence that: (1) significant sums of Defendant's funds are not accounted for; (2) Defendant made misrepresentations to Pretrial Services, including regarding his income and his international travel; (3) Defendant made false statements to State of Michigan regulators, including false statements made to state investigators on August 26, 2016 about his use of injections; and (4) Defendant lied at the hearing regarding the ownership of FDRS, specifically, that Defendant knew Campbell had an ownership interest in FDRS for a period of time. A grand jury has determined that there is probable cause to support a finding that Defendant engaged in conduct to mislead and defraud throughout the alleged scheme for which he has been indicted. And, if convicted, it is possible and perhaps likely that Defendant will spend the rest of his life in prison.
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> The Court also finds that the Government has shown by clear and convincing evidence that Defendant is a danger to the community. As the reports of interviews with numerous witnesses reflect, Defendant has threatened or sought to cause physical harm to several persons, including Burns, Rashid, an associate of Burns, someone who had cheated Defendant on a deal, and a medical provider who threatened to alert the authorities of Defendant's conduct.
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> For the reasons stated, after considering the Section 3142(g) factors, the Court finds that no set of conditions will reasonably assure the appearance of the person and the safety of the community and Orders that Defendant remain detained pending trial. *See* 18 U.S.C. § 3142(f).

ECF No. 56, PgID 806-07.

On April 2, 2020, the Court and the parties received an updated Pretrial Services report on Defendant. That updated report concludes:

As noted in the Order issued by Your Honor on March 27, 2019, "Defendant made misrepresentations to Pretrial Services, including regarding his income and his international travel." Pretrial Services believes the defendant poses a risk of nonappearance and danger to the community. There is no condition or combination of conditions that will reasonably assure the safety of the community and the defendant's appearance in court as requested. Therefore, Pretrial Services respectfully recommends that the defendant be detained.

III. Analysis

A. Release from Detention

In his present motion, Defendant states:

The exponential proliferation of the COVID-19 pandemic in the United States has materially changed the calculus for determining whether a non-violent detainee such as Mr. Patino can safely remain in the general prison population versus on pre-trial release pending sentence. He cannot. Mr. Patino therefore should be immediately released.

***3** Mr. Patino is vulnerable to COVID-19. The Centers for Disease Control and Prevention ("CDC") have issued guidance recommending social distancing, limiting gatherings to groups of less than 10 (if necessary at all), and avoiding all nonessential travel. CDC and medical professionals have also warned that the older [o]r immunocompromised (or both) populations are at increased risk of complications or death resulting from COVID-19. Mr. Patino is at high risk due to stage 3 chronic kidney disease and hypertension, and his age (63 years old).

Detention exacerbates the threat of contracting COVID-19. As this Court is certainly aware, and as detailed below, this country is undergoing a serious pandemic. In every aspect of society, individuals and officials recognize that "business per usual" must be dramatically altered; otherwise the impact of the pandemic will be far worse than with such changes. As numerous news reports reflect, officials around the country are recognizing that the criminal justice system is an area requiring immediate systematic change in response to the crisis. The threat to the jail population (and thus indirectly, to the community as a whole) has led jail officials to reduce inmate populations through early release and led prosecuting agencies to rely on summonses, rather than arrest, and to forestall on less serious cases.

This new information bears on the issue of whether Mr. Patino's short term release is appropriate in response to the COVID-19 pandemic and considering the foregoing health and safety concerns posed by incarceration at the FCI Milan Detention facility. The defense requests an order of short-term, temporary release subject to whatever conditions the Court deems

> appropriate, including location monitoring (home incarceration), and the appointment of a third-party custodian who will reside with Mr. Patino. Further, the global pandemic has resulted in heightened security and travel restrictions worldwide. These restrictions eliminate the risk that Mr. Patino can flee. Nor would he. Federal and state governments throughout the country have take—and are expected to take additional steps to limit international, domestic, and local travel for nonessential purposes.
>
> Keeping Mr. Patino detained at this time unnecessarily and cruelly exposes him to a pandemic that not even the finest hospitals around the world are equipped to handle. The best defense against COVID-19 is to prevent contraction in the first place. His release on the condition of home confinement (and quarantine) to the custody of a custodian—and whatever other reasonable conditions this Court sets—better assures his safety and appearance at trial.

The Government responds that Defendant's motion should be denied. The Government cites the Court's two prior decisions denying Defendant's requests for release from detention, and it asserts that, since the Court's March 27, 2019 Order denying revocation of the detention order, Defendant's motive to flee and obstruct justice has only increased. As to the latter, the Government accurately states that four persons accused of substantively similar charges for actions tied to Defendant were recently convicted of similar charges, and the grand jury recently returned a Superseding Indictment with additional crimes that carry even longer potential penalties.

***4** In response to Defendant's COVID-19 argument, the Government states that an "individualized assessment of the factors" applicable to defendants is required, not a categorical release on broadly formulated criteria. Relying on *United States v. Martin*, No. 19-cr-140-13, 2020 WL 1274857, at *3 (D. Md. Mar. 17, 2020) (denying release pending appeal on COVID-19 grounds). The Government argues that this Court, like other courts that have recently considered similar arguments, should reject Defendant's attempt to use the COVID-19 epidemic as a basis for pre-trial release. Citing *United States v. Woods,* 4:19-cr-20112 (E.D. Mich. March 28, 2020) (ECF # 258 at 9); *United States v. Martin*, 19-cr-140-13 (D. Md. March 17, 2020) (ECF # 209); *United States v. Isbell*, 1:10-cr-10002 (W.D. Tenn. March 20, 2020) (ECF # 31); *United States v. Gileno*, 3:19-cr-00161 (D. Conn. March 19, 2020) (ECF # 28).

The Government asserts that Defendant does not cite any case law in support of his motion for release and the risk of contracting COVID-19 is "not the sole determinant of whether detention is appropriate." Citing *United States v. Jones*, Crim. No. 17-582, 2020 WL 1323109, at *1 (D. Md. Mar. 20, 2020) (rejecting release requested by incarcerated pregnant detainee on grounds that she is "at increased risk of contracting COVID-19"). The Government contends that federal courts have generally rejected release based on the risk of contracting COVID-19, focusing on the individual

factors applicable to each pretrial detainee and the ability of correctional facilities to respond to the risk of COVID-19 infection. Citing *Martin*, 19-cr-140-13 (denying detention appeal and holding that allegations of defendants medical conditions including high blood pressure, asthma, and diabetes "insufficient to rebut" government proffer that "correctional and medical staff ... are implementing precautionary and monitoring practices sufficient to protect detainees from exposure to COVID-19."); *Isbell*, 1:10-cr-10002 (denying motion for pretrial release based on COVID-19 in part because the government described "various precautions" the facility had taken to prevent the spread of COVID-19); *Gileno*, 3:19-cr-00161 (denying motion to amend sentence to allow for early release where defendant had not "shown that the plan proposed by the Bureau of Prisons is inadequate to manage the pandemic ... or that the facility is specifically unable to adequately treat" him.); *Woods*, 4:19-cr-20112, at 9 ("the COVID-19 pandemic cannot be the sole basis for releasing a defendant from custody pending trial; the Court must still consider the Section 3142(g) factors.").

The Government states that efforts to reduce pretrial inmate populations on COVID-19 grounds have centered on low-risk offenders, not persons like Defendant, charged with felonies and facing lengthy terms of imprisonment. The Government states that Defendant is not a low-level offender, contemnor, or probation violator; rather, if convicted of the felony charges against him, he would receive a *de facto* life sentence. The Government submits that releasing this Defendant would signal that almost any health care fraud offender should be entitled to temporary release.

The Government notes that Defendant asserts that he has stage 3 chronic kidney disease and hypertension, but the Government asserts that Defendant provides no evidence to substantiate the existence of this condition or its severity.[1] The Government argues that the courts in *Martin*, *Isbell*, and *Gileno* considered similar requests for release from defendants with serious health conditions, including asthma, high blood pressure, and diabetes; congestive heart failure, chronic obstructive pulmonary disease, a tumor on the spine, and a heart blockage. *Martin*, 19-cr-140-13 at 8; *Isbell*, 10-cr-10002 at 4; *Gileno*, 3:19-cr-00161 at 4. The Government also argues that FDC Milan (Milan or the "Facility") has implemented reasonable precautionary and monitoring practices, including locking down the Facility, in an effort to protect detainees from excessive exposure to COVID-19.[2]

1 The Government accurately states that Defendant raised these same issues at his original detention hearing over one year ago but failed to produce documentation to support his assertions. The Government states that, despite Defendant claims that he is at a high risk of serious illness from COVID-19 (or the many other ailments to which the Defendant's alleged

condition might make him more vulnerable), Defendant has not alleged that he asked to be placed in medical isolation.

2 The Government argues:

> As of March 31, the BOP announced that it was confining all inmates to their cells for 14 days to prevent any potential spread of the virus. https://www.bop.gov/resources/news/pdfs/20200331_press_release_action_plan_ 5.pdf. The confinement of Defendant will minimize the risk of contracting COVID-19. This is particularly true because Rashid is relatively young and doesn't have any of the medical conditions that place an individual at greater risk from COVID-19.
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> Previously, officials at FDC Milan instituted other precautionary measures to reduce the risk of infection at the detention center in the interest of both inmates and staff. [1] Sanitation efforts were increased. Quarantine and isolation areas were identified for anyone exhibiting signs or symptoms. Operations and programs were modified in order to assist with social distancing efforts. A comprehensive procedure for daily health monitoring was established for those inmates who leave the facility and have contact with the community, for example during an emergency medical trip. Additionally, onsite medical services have been available at the Health Services department at FCI Milan, which is currently accredited by the Accreditation Association for Ambulatory Healthcare. Moreover, the Bureau of Prisons had implemented precautionary measures across all BOP facilities, including FDC Milan, to reduce the risk of a COVID-19 outbreak. Those included rules and limitations on inmate movement and health screening, visitation (suspended), sanitation, *and screening of correctional officers and staff*. https://www.bop.gov/coronavirus/covid19_status.jsp.
>
> [1] Information regarding the precautionary measures at FDC Milan was provided on March 27, 2020 by a Bureau of Prisons (BOP) attorney. The Bureau of Prison also maintains updated information regarding its COVID-19 Action Plan at its public website: https://www.bop.gov/coronavirus/.

ECF No. 475, PgID 6792-93 (emphasis in original).

***5** Finally, the Government argues that the ability of Pretrial Services and other law enforcement officials to safely monitor Defendant if released has been greatly diminished as a result of the COVID-19 epidemic. [3] Citing *Ellis*, Case No. 2:20-cr-20002, at 5-6 ("the Government persuasively argues that granting [defendant's] requested relief may well endanger the public, pretrial services officers, and local law enforcement officers who are already operating under the strain of limited resources.").

[3] The Court notes that Pretrial Services and the Probation Department are adequately supervising clients during this crisis, including through the use of new and innovative means of monitoring clients and their conditions.

The Government argues that Defendant's case is unlike the *Kennedy* case for three reasons. First, it asserts the nature of the offenses at issue here are more serious than the probation violation at issue in *Kennedy.* Second, Judge Levy in *Kennedy* determined that the defendant was not a risk of flight or public safety risk, but noting that this Court previously found the opposite in regard to Defendant. Third, unlike the Defendant in *Kennedy*, who provided credible evidence of untreated flulike symptoms and was coughing audibly during the bond review hearing, Defendant has presented no evidence that he is infected or at a specific risk of infection.

The Court is now familiar with the concerns and arguments regarding continued detention in light of COVID-19. As to the concerns regarding COVID-19 that pertain to this Defendant, the Court recognizes that Defendant is 63 years old, and it does appear that Defendant has been treated for high blood pressure (hypertension). *See, e.g.*, ECF No. 52, PgID 702, 739, 741. Both of those factors may place Defendant in a category of persons with a heightened risk if infected with COVID-19. Defendant has not in the past, and has not in support of this motion, shown that he has been diagnosed with Stage 3 kidney disease by any treating physician. *See, e.g.,* ECF No. 52, PgID 701-02 (Transcript of January 25, 2019 Hearing) (admitting that he had not made any formal complaints at Milan, where he was housed, related to Stage 3 kidney disease; he had only talked to the doctor there about it). Accordingly, the Court does not consider Defendant's assertion of kidney disease in determining Defendant's motion.

As set forth above, this Court has previously denied Defendant's release from detention for a number of reasons, including the charges against him, his threats against others, the numerous instances of lying to government agencies, and unaccounted for sums of money. In those instances, the Court concluded that there was clear and convincing evidence that there were no conditions that could reasonably assure the safety of the community and Defendant's appearance. Those reasons for continued detention remain relevant and controlling, even after consideration of the effects and dangers of COVID-19.

***6** Defendant is facing a number of felony charges, for which he will likely serve the rest of his life in prison if convicted. Four other defendant physicians, many of whom testified that they were advised by or learned from Defendant, were recently convicted of health care fraud, in part for administering medically unnecessary and painful facet joint injections to their patients, the same type of conduct for which Defendant is being prosecuted. It is also true that one of his alleged

co-conspirators, Mashiyat Rashid, testified against those four defendants and, Defendant believes, will testify against Defendant at his trial.

Based on Defendant's history of interaction with and lies to governmental agencies, his threats of harm to others, the charges against him – in particular the sentences he faces if convicted, the risk of danger to the community, and his motivation for and risk of non-appearance in the future due to the length of his sentence and other reasons noted previously, the Court concludes that Defendant is not a good candidate for temporary release from detention, even during the current COVID-19 pandemic. Accordingly, the Court denies Defendant's request for release from detention pending trial.

B. Directive to the BOP

Defendant alternatively requests an order from this Court directing the United States Marshal (Bureau of Prisons) to ensure the following necessary life-saving safety measures are in place to protect him (and other federal pretrial detainees) from the devastating impact of COVID-19:

1. Screen Defendant for symptoms of COVID-19 daily and if there signs or symptoms, administer a COVID-19 test kit within 24 hours.

2. Ensure Defendant remains at least six feet away from any other person unless necessary to administer health care or in the course of an emergency.

3. No shared housing or transportation that requires proximity to others of less than six feet.

4. Provision of hygiene items, to include at a minimum: tissues, hand sanitizer containing at least 60% alcohol, disinfecting wipes, soap, disposable latex gloves and face masks.

5. All areas where the defendant is housed or transported shall be cleaned and disinfected prior to the defendant being housed or transported there. Afterward, whenever a person other than the defendant enters the area, the area shall be cleaned and disinfected.

6. Clean and disinfect his cell every 24 hours, at a minimum, regardless of whether anyone else has entered the area. Defendant shall also be permitted to disinfect his own cell with disinfecting wipes.

7. Defendant's clothing, linens, towels and any other porous items shall be cleaned and disinfected daily.

8. Defendant shall be permitted to wash his hands regularly and thoroughly with an alcohol-based hand rub or soap and water.

As set forth above, Defendant is housed at Milan and that Facility has undertaken numerous safeguards against interaction of prisoners, namely locking prisoners down in their cells. Under those safeguards, it does not seem likely that Defendant will interact with other persons, except for Facility personnel, who will be screened and monitored. And, as a general rule, the Court lacks authority to direct the operations of the Bureau of Prisons. *See, e.g.,* *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) ("We should not be too ready to exercise oversight and put aside the judgment of prison administrators."); *Crowe v. United States*, 430 F. App'x 484, 485 (6th Cir. 2011) ("a federal court lacks authority to review a decision by the BOP to not seek a compassionate release for an inmate"); *Vida v. Cage*, 385 F.2d 408, 409 (6th Cir. 1967) ("The prison authorities [have] the right to adopt reasonable restrictions governing the conduct of inmates [or visitors] and the Courts ought not to interfere with prison operations in the absence of constitutional deprivation.").

***7** For the foregoing reasons, and in the absence of evidence (or even allegations) that the Bureau of Prisons at Milan is not endeavoring to ensure the safety of its prisoners, generally – and Defendant, specifically, the Court will not order the Bureau of Prisons at Milan to provide specific care to Defendant, some of which may not even be possible because of other dangers.

IV. Conclusion

Accordingly, and for the reasons stated above,

IT IS ORDERED that Motion for Pretrial Release Pending Trial [ECF No. 111] is **DENIED**.

IT IS ORDERED.

All Citations

Slip Copy, 2020 WL 1676766

Exhibit 32 - United Staes v. Patino

2020 WL 1493481
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

UNITED STATES of America, Plaintiff,
v.
Keith KENNEDY (D-3), Defendant.

Case No. 18-20315
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Signed 03/27/2020

Attorneys and Law Firms

Christopher Graveline, United States Attorney's Office, Detroit, MI, for Plaintiff.

ORDER TEMPORARILY REVOKING DETENTION

JUDITH E. LEVY, United States District Judge

***1** On March 11, 2020 Magistrate Judge David Grand detained Defendant Keith Kennedy subject to a bond review hearing before Judge Judith Levy. (*See* ECF No. 71.) Judge Grand detained Defendant due to several violations of his pretrial release conditions, including the following: failing several drug screens, failing to report to pretrial services, failing to report to inpatient substance abuse treatment, and failing to report for a bond review hearing. (*Seeid.*; ECF No. 58.) On March 26, 2020, the Court conducted a bond reviewing hearing of Defendant's confinement at the Saginaw County Jail. The hearing took place telephonically due to federal, state, and court stay-at-home directives in response to the COVID-19 pandemic.

The Court is authorized to revisit the Magistrate Judge's order pursuant to 18 U.S.C. § 3145(b). As set forth below, the Court finds that it is necessary to temporarily release Defendant, pursuant to 18 U.S.C. § 3142(i)(4), *see* infra pg. 8, for two reasons. First, under the facts of this case, the danger posed to Defendant in the Saginaw County Jail by the COVID-19 pandemic constitutes an independent compelling reason to temporarily release him from custody. Second, temporary release is necessary for Defendant to prepare his pre-sentencing defense.

BACKGROUND

On March 22, 2020, the Governor of Michigan issued the following statement: "The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease." Executive Order, No. 2020-20 (Mar. 22, 2020).

Since March 11, 2020, the date of Defendant's hearing before Magistrate Judge Grand, the exceptionally dangerous nature of the COVID-19 pandemic has become apparent. On March 10, 2020, the Governor of Michigan announced the state's first two cases of COVID-19 and simultaneously declared a State of Emergency. Executive Order, No. 2020-4 (Mar. 10, 2020). The number of new cases is growing exponentially. As of March 27, 2020, that number is now at 3,657 confirmed cases and 92 known related deaths. *See* Coronavirus, Michigan.Gov, https://www.michigan.gov/coronavirus/0,9753,7-406-98163-520743--,00.html. COVID-19 has a high risk of transmission, and the number and rate of confirmed cases indicate broad community spread. Executive Order, No. 2020-20 (Mar. 22, 2020). Indeed, as of March 27, 2020, Michigan jails are attempting to lower their detained populations "as officials scramble to remove people thought to be at high risk of contracting the coronavirus, but little risk to the general public if they were not behind bars." James David Dickson, *Jail populations plunge in Metro Detroit as coronavirus spreads*, Detroit News (March 27, 2020), https://www.detroitnews.com/story/news/local/macomb-county/2020/03/27/jail-populations-plunge-metro-detroit-coronavirus-spreads/2914358001/. Defendant's case fits this description.

***2** On March 23, 2020, the Centers for Disease Control and Prevention (CDC) acknowledged that correctional and detention facilities "present[ ] unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors." *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html [Hereinafter "CDC Guidance 3/23/2020"]. Specifically, the CDC noted that many detention conditions create a heightened risk of danger to detainees. These include: low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, highly congregational environments, inability of most patients to leave the facility, and limited ability of incarcerated/detained persons to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing). *Id.*

The CDC recommended that all correctional facilities take preventative measures, including: ensuring an adequate supply of hygiene and medical supplies, allowing for alcohol-based sanitizer throughout facilities, providing no-cost soap to all inmates for frequent handwashing, cleaning and disinfecting frequently touched surfaces several times per day, performing pre-intake screening and temperature checks for all new entrants, increasing space between all detained persons to at least six feet, staggering meals, and having healthcare staff perform regular rounds. *Id.* Even if all of the CDC's interim recommendations are followed, and this record suggests that they are not, the Court is concerned that such measures will prove insufficient to stem deadly outbreaks. *See*, *e.g.*, *New York City Board of Correction Calls for City to Begin Releasing People From Jail as Part of Public Health Response to COVID-19*, N.Y.C. Bd. of Corr. (Mar. 17, 2020), https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17% 20-% 20Board% 20***o***f% 20Correction% 20Statement% 20re% 20Release.pdf (arguing that, despite the "heroic work" of Department of Correction and Correctional Health Services staff "to prevent the transmission of COVID-19 in the jails and maintain safe and humane operations, the City must drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances"). Indeed, on March 26, 2020, Attorney General Barr issued a separate directive ordering the Director of the Bureau of Prisons to "prioritiz[e] home confinement as appropriate in response to the COVID-19 pandemic ... to protect the health and safety of BOP personnel and the people in our custody." *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, Att'y Gen. (Mar. 26, 2020).

Research shows that prisoners and jail inmates are more likely than the general population to report experiencing infectious diseases, indicating that these individuals face a heightened risk during this pandemic. [1] Laura M. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, U.S. Department of Justice, Bureau of Justice Statistics, (2016), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf.

[1] As of March 26, 2020, there have been fourteen confirmed cases of a Michigan prisoner testing positive for COVID-19, up from one case on March 24, 2020. Gus Burns, Michigan prisons prep for possibility of coronavirus outbreak among inmate population, M-Live (Mar. 26, 2020), https://www.mlive.com/public-interest/2020/03/michigan-prisons-prep-for-possibility-of-coronavirus-spread-among-inmate-population.html.

***3** By way of example, Michigan prisons are beginning to prepare "contingency plans" for extreme outbreaks, but the evidence suggests that it is only a matter of time before a deadly outbreak occurs for which the prison system is woefully unprepared. *See id.* ([The Michigan Department of Corrections spokesperson] "said administrators haven't projected how many inmates might eventually contract the highly contagious virus, and he didn't immediately

know how much quarantine space is available throughout the prison network.") Because many individuals infected with COVID-19 do not display symptoms, the virus will almost certainly be present in jails and prisons before cases are formally identified.

During the March 26 hearing, Defendant credibly testified that he has conditions which render him particularly vulnerable to COVID-19. Defendant, who was audibly ill with congestion and who coughed intermittently throughout the call, testified that he is exhibiting flu-like symptoms. Defendant also credibly testified that Saginaw County Jail has not been treating his underlying conditions or his flu-like symptoms. He testified that, prior to detainment, he was on high blood pressure medication, thyroid medication, and blood sugar medication. Despite these conditions and symptoms, Defendant testified that he was not being provided with these medications, not having his blood pressure taken regularly, not having his thyroid tested, not having his temperature taken regularly, and unable to access to tissues into which he could sneeze or cough.[2] Defendant also testified that the detainees had no access to hand sanitizer and were instead provided with a small bar of soap once a week.

2 Defendant did testify that the detainees had access to toilet paper.

LAW AND ANALYSIS

Where a detention order has been issued, the Court is permitted to issue a "subsequent order" temporarily releasing an individual in custody "to the extent that the judicial officer determines such release to be necessary for the preparation of the person's defense or for another compelling reason." 18 U.S.C. § 3142(i)(4). While the language of § 3142(i)(4) appears under the heading "Release or detention of a defendant pending trial," this provision applies to Defendant even though he has pled guilty and is thus pending sentencing rather than trial. The language specifies that the Court may permit temporary release "by subsequent order." *Id.* The Court's current directive is a "subsequent order," issued subsequent to a prior detainment order under 18 U.S.C. § 3142.[3] *United States v. Thornton*, 787 F.2d 594, 594 (6th Cir. 1986) (Table decision) (suggesting that a district court could temporarily release a detainee pursuant to § 3142(i)(4) by subsequent order even after a prior order holding that the detainee was a flight risk or a risk to public safety); *United States v. Dante Stephens*, No. 15-cr-0095, 2020 WL 1295155, *3 (S.D.N.Y. Mar. 19, 2020) (holding that 18 U.S.C. § 3142(i)(4) constitutes a "separate statutory ground" for post-conviction release).

3 The Court notes that typical post-plea releases involve a finding "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person

or the community." 18 U.S.C. § 3143(a)(1). However, it is unnecessary for the Court to make a finding under 18 U.S.C. § 3143, because the Court is releasing Defendant pursuant to the independent statutory ground 18 U.S.C. § 3142(i)(4). Nevertheless, the Court finds, by clear and convincing evidence based on Defendant's actions and testimony, that Defendant would not pose a danger to the safety of any other person or to the community. The Court notes that Defendant testified under oath about his concern for his aging parents and his desire to remain at home, in quarantine, to support them. Defendant was solemn, thoughtful, and responsive to the Court's questions and concerns. Defendant does not have a violent history. The Court found Defendant to be a credible witness when discussing his health and treatment at Saginaw County Jail, his willingness to cooperate with Probation, and his motivation for staying at home once released.

The Court also notes that any § 3143(a)(1) considerations would need to account for the restricted flight possibilities presented by the current COVID-19 pandemic, as well as "balance the public health safety risk posed by the continued incarceration of [ ] defendants in crowded correctional facilities with any community safety risk posed by a defendant's release." *See Karr v. State*, No. A-13630, 2020 WL 1456469, *3 (Alaska Ct. App. Mar. 24, 2020); *see also Matter of Extradition of Toledo Manrique*, No. 19-71055, 2020 WL 1307109, *1 (N.D. Cal. Mar. 19, 2020) ("This [flight risk] problem has to a certain extent been mitigated by the existing pandemic. The Court's concern was that Toledo would flee the country, but international travel is hard now. Travel bans are in place ...")

***4** For the reasons below, the Court finds that temporary pretrial release is necessary for the compelling reason that it will protect Defendant, the prison population, and the wider community during the COVID-19 pandemic, and also that pretrial release is necessary for the preparation of Defendant's pre-sentencing defense.

Section 3142(i) does not define "compelling reason," and the Sixth Circuit has yet to interpret this statutory language. However, as courts across the country have begun to recognize, the global health crisis posed by COVID-19 necessitates informed, speedy, and preemptive action to reduce the risk of infection, illness, and death to prisoners and prison officials alike. *See Xochihua-Jaimes v. Barr*, No. 18-71460, ECF No. 53 (9th Cir. Mar. 23, 2020) (sua sponte ordering release of non-citizen from immigration detention center "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers."); *United States v. Perez*, No. 19-cr-00297, ECF No. 62 (S.D.N.Y. Mar. 19, 2020) (finding that the defendant's heightened risk to COVID-19 complications constitutes a compelling reason for release under § 3142(i)); *United States v. Barkman*, No. 19-cr-0052, 2020 U.S. Dist. LEXIS 45628, at *11 (D. Nev. Mar. 17, 2020) (granting emergency relief amending probation order to delay confinement for thirty days because of risk of infection to both Defendant and others in jail).

Under any possible interpretation of Section 3142(i)'s language, current events and Defendant's particular vulnerability to the disease constitute a compelling reason for release under § 3142(i).

Even if Defendant did not have a heightened susceptibility to COVID-19, the public health crisis—and its impact on Defendant's ability to present a defense—nonetheless satisfies § 3142(i). Saginaw County Jail has suspended on-site visitation "due to coronavirus concerns." Brianna Owczarzak, *MDOC halts visits to MI prisons due to coronavirus concerns* (March 13, 2020), https://www.wnem.com/news/mdoc-halts-visits-to-mi-prisons-due-to-coronavirus-concerns/article_cbb094ea-6530-11ea-8dcc-6f67de338459.html. The Federal Bureau of Prisons and Michigan Department of Corrections have also broadly suspended on-site visits in light of coronavirus concerns. *See* Federal Bureau of Prisons, *Federal Bureau of Prisons COVID-19 Action Plan*, https://www.bop.gov/resources/news/20200313_covid-19.jsp (explaining the nationwide suspension and noting that "case-by-case accommodation will be accomplished at the local level"); Michigan Department of Corrections, *MDOC Halts All Visits at State Prisons* (Mar. 13, 2020), https://www.michigan.gov/coronavirus/0,9753,7-406-98163-521571--,00.html.

Defendant and his attorney, Mr. Kinney, testified specifically to their difficulty in conducting attorney-client communications under current conditions. Defendant testified that his attorney was able to call him, but unable to visit him to prepare for this hearing. Mr. Kinney additionally testified that, though he was able to speak by phone with his client, he was unable to receive assurances from the facility that the calls were private. Mr. Kinney noted that he was "not comfortable that [he and Defendant] could actually talk about anything over the phone," because "there's certain things that I don't want him to say" without a guarantee of attorney-client privacy.

***5** These communication difficulties are endemic to confinement during the current pandemic and, under the facts of this case, further support Defendant's release under § 3142(i). Defendant has an upcoming bond review hearing on June 4, 2020 and an upcoming sentencing hearing on July 28, 2020. (ECF Nos. 75, 76.) Release is necessary in order to allow Defendant to adequately prepare and consult with defense counsel for these proceedings. *See Stephens*, 2020 WL 1295155 at *5 (holding that Defendant's inability to communicate regularly and effectively with counsel in light of BOP's visitation policies satisfied requirements for release under § 3142(i)).

The United States argues that release is improper here because it was unaware of any known COVID-19 cases at Saginaw County Jail. However, this argument fails to address the facts of the current global public health crisis—particularly as Michigan prisons are beginning to

see exponential spread of the disease. *See* Burns, *supra*. The seemingly preemptive nature of Defendant's release renders it no less necessary or compelling. To the contrary—as the above background makes clear—waiting for either Defendant to have a confirmed case of COVID-19, or for there to be a major outbreak in Defendant's facility, would render meaningless this request for release. Such a failure to act could have devastating consequences for Defendant and would create serious medical and security challenges to the existing prison population and the wider community.

CONCLUSION

Defendant has set forth compelling reasons for his temporary release amidst this growing public health emergency. Accordingly, Defendant is immediately released pursuant to the conditions set forth in the bond documents, with the additional modification that Defendant is to self-quarantine for 14 days as discussed during the hearing.

The Court will revisit this Order in four months.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 1493481

Exhibit 33 - United States v. Kennedy

2020 WL 1814084
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

Ronald Lee MILLER, Petitioner,
v.
UNITED STATES of America, Respondent.

Criminal Case No. 16-20222-1
|
Signed 04/09/2020

Attorneys and Law Firms

Eric Doeh, U.S. Attorney, Detroit, MI, for Respondent.

ORDER GRANTING PETITIONER'S MOTION FOR RELEASE FROM CUSTODY [374]

Arthur J. Tarnow, Senior United States District Judge

***1** On March 23, 2020, the family of Petitioner Ronald Lee Miller asked the Court to release Miller from his incarceration in Federal Correctional Institution ("FCI") Butner due to his age and chronic health conditions, which put him at a higher risk falling severely ill from COVID-19. (ECF No. 371). On March 24, 2020, the Court appointed the Federal Community Defender to represent Miller and ordered both parties to file concurrent responsive briefs. (ECF No. 372). The Petitioner and the Government filed their respective briefs on March 31, 2020. (ECF No. 373 & 374). On April 3, 2020, both parties filed supplemental briefs and exhibits. (ECF Nos. 378, 379, 380, 381, 382). For the reasons stated below, the Court **GRANTS** Petitioner's motion.

FACTUAL BACKGROUND

On July 12, 2017, Miller pled guilty to violating 21 U.S.C. § 846, 841(a)(1) and (b)(1)(B) (Conspiracy to Distribute and to Possess With Intent to Distribute Heroin) and 18 U.S.C. § 922(g)(1) (Felon in Possession of a Firearm). (ECF No. 337, PageID. 1755). On January 31, 2018, the Court sentenced Miller to six years of incarceration followed by four years of supervised release. (*Id.* at 1756-57). Additionally, the Court recommended that the Bureau of Prisons ("BOP") immediately medically evaluate Miller upon imprisonment due to his history of serious medical conditions. (*Id.* at 1756).

Miller's medical records show that he has a history of: Coronary Artery Disease, Chronic Obstructive Pulmonary Disease ("COPD"), Hypertension, Hepatitis C, Liver Cancer, Heart Disease, and Cirrhosis of the liver. (ECF No. 379, PageID. 2198, 2200, 2203; ECF No. 384-1, PageID. 2439). His medications to treat most of his conditions have been continually renewed throughout his incarceration. (ECF No. 379, PageID. 2205, 2236, 2295). As of March 26, 2020, Miller has 14 active prescriptions for treatment, including an inhaler that he is told to use as needed to prevent or relieve asthma attacks caused by his COPD. (*Id.* at 2237, 2295).

Due to his ailments, Miller, in conjunction with his family, sought compassionate release from the BOP through both administrative remedies and petitions to Michigan's U.S. Senator Debbie Stabenow. A letter on October 4, 2018 from FCI Butner's Warden to Senator Stabenow reveals that "Miller's case was reviewed in accordance with Bureau of Prisons Statement 5050.48, Compassionate Release, Elderly Inmates with Medical Conditions, and determined he does not meet the criteria for consideration of Compassionate Release." (ECF No. 380, PageID. 2297). His denial was based on a medical review of Miller's case that showed "normal liver function with no diagnosis of cancer [and] no detection of Hepatitis C." (*Id.*). Miller appealed his compassionate release denial on December 29, 2018, stating that he was diagnosed with Hepatitis C and Cirrhosis prior to incarceration and is currently receiving medication for both diseases. (*Id.* at 2298). Miller's appeal was rejected on February 5, 2019 for two reasons: failing to raise a sensitive issue and failing to first file a BP-9 request. (*Id.* at 2301). Miller then appealed this rejection on February 25, 2019 and March 10, 2019, claiming that he had already filed a BP-9 form that the Warden responded to in October of 2018. (*Id.* at 2302; ECF No. 383-1, PageID. 2423-24). This appeal was rejected on March 13, 2019, for failing to attempt an informal resolution. (ECF No. 380, PageID 2301). On March 15, 2019, Miller filed an "Attempt at Informal Resolution" form, yet again seeking review of his compassionate release request and treatment for his Cirrhosis. (ECF No. 383-3, PageID. 2426-27). Miller's release request was again denied on June 4, 2019, because the Warden found that his condition remained stable. (ECF No. 383-4, PageID. 2428).

***2** Miller is now seeking release through either home confinement under 18 U.S.C. § 3624(c)(2) or compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). However, since this Court and others have recognized that the authority to place a prisoner in home confinement is given to the BOP, through Attorney General delegation, the Court will solely analyze Miller's eligibility for compassionate release. *See* *United States v. Doshi*, No. 13-CR-20349, 2020 WL 1527186, at *1 (E.D. Mich. Mar. 31, 2020); *see also* *United States v. Cantu*, No. 1:05-CR-458-1, 2019 WL 2498923, at *2 (S.D. Tex. June 17, 2019) ("The First Step Act grants only the Attorney General, and by delegation the BOP, authority to grant release to home confinement under the Family Reunification Program."); *see also* *United States v. Moore*, No. 2:93-CR-310-ID, 2009 WL 2970464, at *2 (M.D. Ala. Sept. 11, 2009) ("As a general matter, it is plain from the statute that the Attorney General is charged with administration of this pilot program, and the Court is not inclined to interfere with his authority in that regard.").

ANALYSIS

The compassionate release statute states the following in relevant part.

> **(A)** the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> **(i)** extraordinary and compelling reasons warrant such a reduction.

18 U.S.C.A. § 3582.

The Court will discuss both elements—exhaustion of administrative remedies and extraordinary and compelling reasons for release—in turn.

I. Exhaustion of Administrative Remedies

Miller has properly exhausted all of his administrative remedies. The record shows that Miller sought compassionate release due to his medical conditions in the fall of 2018 and his request was denied. Miller then appealed the denial twice, and twice his appeals were rejected.

Despite this, the Government argues that Miller's exhaustion should not be honored, because he did not specify requesting release due to the COVID-19 outbreak. The Court finds this argument to be unfounded. Miller, then and now, seeks release due to his myriad of serious health conditions. *C.f. United States v. Brummett*, No. 6: 07-103-DCR, 2020 WL 1492763, at *1 (E.D. Ky. Mar. 27, 2020) (denying compassionate release when the petitioner failed to specify his grounds for release when requested to warden). The COVID-19 pandemic merely accentuates his meritorious claims for release. In the alternative, the Court may waive the exhaustion requirement if a recognized exception applies. *United States of America, v. Wilson Perez*, No. 17 CR. 513-3 (AT), 2020 WL 1546422, at *2–3 (S.D.N.Y. Apr. 1, 2020); *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019) ("Even where exhaustion is seemingly mandated by statute ... the requirement is not absolute.").

These exceptions include waiver of exhaustion "where it would be futile, either because agency decisionmakers are biased or because the agency has already determined the issue" and "where pursuing agency review would subject plaintiffs to undue prejudice." *Washington*, 925 F.3d 118. Both exceptions apply here. First, Miller has already petitioned the BOP once and appealed its denial twice, stating that Miller's conditions are stable and do not warrant release. The BOP's stance on Miller's case is clear. Requiring him to submit yet another petition to merely indicate his heightened vulnerability due to COVID-19 would be futile. *See United States of America v. Teresa Ann Gonzalez*, No. 2:18-CR-0232-TOR-15, 2020 WL 1536155, at *1 (E.D. Wash. Mar. 31, 2020) (finding the same).

***3** Second, such a delay would unduly prejudice Miller. COVID-19 is spreading at rapid and unprecedented rates. In North Carolina, where Miller is incarcerated, the number infected has grown from 763 on March 27th to 3,651 on April 9th—quadrupling in less than two weeks. N.C. Exec. Order No. 121 (Mar. 27, 2020), https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf; *COVID-19 North Carolina Dashboard*, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.ncdhhs.gov/divisions/public-health/covid19/covid-19-nc-case-count (last visited Apr. 9, 2020). Moreover, FCI Butner's cases have grown from 9 to 39 in six days. CBS-17 Digital Desk, *9 inmates, staff member test positive for COVID-19 at NC federal prison*, https://www.cbs17.com/community/health/coronavirus/9-inmates-staff-member-test-positive-for-covid-19-at-nc-federal-prison/ (last visited Apr. 7, 2020); *COVID-19 Cases*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/coronavirus/ (last visited Apr. 7, 2020). Time is not on Miller's side. It is paramount to his safety to decide this issue promptly. Therefore, his request for release is properly before the Court.

II. Extraordinary and Compelling Reasons for Release

In order to determine if extraordinary and compelling reasons exist to release Miller, the Court must determine if a sentence reduction is "consistent with applicable policy statements issued by the [United States] Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). The applicable policy statement recites the following:

> **1. Extraordinary and Compelling Reasons.--**Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:
>
> **(A) Medical Condition of the Defendant.--**
>
> **(i)** The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
>
> **(ii)** The defendant is--
>
> **(I)** suffering from a serious physical or medical condition,
>
> **(II)** suffering from a serious functional or cognitive impairment, or
>
> **(III)** experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover
>
> [...]
>
> **(D) Other Reasons.--**As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S.S.G. 1B1.13

Here, Miller has presented "Other Reasons" in combination with his serious medical conditions, to warrant compassionate release. While the COVID-19 pandemic is devastating in every region it invades, prison populations are subject to heightened vulnerability. *See, e.g.*, Danielle

Ivory, *"We Are Not a Hospital": A Prison Braces for the Coronavirus*, N.Y. TIMES (March 17, 2020), https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html (citing densely populated living conditions, shortage of masks, soap, and hand sanitizer, and the inability to routinely disinfect surfaces and maintain safe distances between inmates and guards as reasons prisoners are at increased risk of infection); *See, e.g.*, Courtney Bublé, *Federal Prisons Pose 'Imminent Danger' in Spreading COVID-19, Union Says*, GOVERNMENT EXECUTIVE (April 6, 2020), https://www.govexec.com/oversight/2020/04/federal-prisons-pose-imminent-danger-spreading-covid-19-union-says/164390/ (detailing a prison workers' union complaint to OSHA complaining of "imminent danger" due to the BOP's failure to follow national safety guidelines). To date, at least 42 inmates at FCI Butner have tested positive for COVID-19—the most of any federal prison. *COVID-19 Cases*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/coronavirus/ (last visited Apr. 9, 2020).

***4** Furthermore, the persuasive precedent for granting compassionate release under the current circumstances is overwhelming. *United States v Andre Williams*, Case No. 04-cr-95/MCR, at *7 (N.D. Fla. April 1, 2020) ("[A]n outbreak of COVID-19 in Williams' facility would likely have fatal consequences for him. Based on these facts, the Court finds that Williams' deterioration in physical health is sufficiently serious to satisfy the medical criteria for a reduction in sentence."); *United States v. Teresa Ann Gonzalez*, No. 2:18-CR-0232-TOR-15, 2020 WL 1536155, at *3 (E.D. Wash. Mar. 31, 2020) ("Defendant is the most susceptible to the devastating effects of COVID-19. She is in the most susceptible age category (over 60 years of age) and her COPD and emphysema make her particularly vulnerable. 18 U.S.C. § 3582(c)(1)(A)(i) compassionate release granted."); *United States v. Campagna*, No. 16 Cr. 78-01 (LGS), 2020 WL 1489829, at *3 (S.D.N.Y. Mar. 27, 2020) ("Defendant's compromised immune system, taken in concert with the COVID-19 public health crisis, constitutes an extraordinary and compelling reason to modify to Defendant's sentence on the grounds that he is suffering from a serious medical condition that substantially diminishes his ability to provide self-care within the environment of the RCC."); *United States v. Muniz*, No. 4:09-CR-0199-1, 2020 WL 1540325 (S.D. Tex. Mar. 30, 2020), at *2 ("Because Defendant is at high-risk for severe illness from COVID-19 and because inmates in detention facilities are particularly vulnerable to infection, the Court finds that Defendant has demonstrated an extraordinary and compelling reason for compassionate release.").

Miller squarely fits the definition of an individual who has a higher risk of falling severely ill from COVID-19. The Center for Disease Control ("CDC") states that individuals who are 65 and older have a higher risk of severe illness. *Groups at Higher Risk for Severe Illness*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (last visited Apr. 7, 2020). Miller is 69. The CDC also

states that individuals with underlying medical conditions, such as a chronic lung disease, a serious heart condition, and liver disease, have a higher risk of severe illness. *Id.* Miller suffers from all three. Continuing Miller's incarceration under the current circumstances could be a lethal decision. Therefore, the Court finds that extraordinary and compelling reasons exist for his immediate compassionate release.

CONCLUSION

IT IS ORDERED that Petitioner's Motion for Compassionate Release from Custody [374] is **GRANTED**.

IT IS FURTHER ORDERED that Miller be immediately placed in a 14-day quarantine before his release from FCI Butner, in accordance with Attorney General Barr's directive to the BOP.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 1814084

2020 WL 1672662
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

Janet MALAM, Petitioner,
v.
Rebecca ADDUCCI, et al., Respondents.

Case No. 20-10829
|
Signed 04/05/2020
|
Amended 04/06/2020

Attorneys and Law Firms

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AMENDED OPINION AND ORDER GRANTING IN PART PETITIONER'S EMERGENCY APPLICATION FOR A TEMPORARY RESTRAINING ORDER [2] [1]

[1] On April 6, 2020 the Court amended its April 5, 2020 Order to include additional terms of supervision.

JUDITH E. LEVY, United States District Judge

***1** This is an emergency petition challenging Janet Malam's mandatory detention pursuant to 8 U.S.C. § 1226(c) because of danger posed to her by the COVID-19 pandemic. Petitioner claims that her continued detention violates her Fifth Amendment rights by exposing her to substantial risk of illness and death. She requests a temporary restraining order (TRO) requiring that Respondents release her on her own recognizance and refrain from re-detaining her for the pendency of her immigration proceedings.

For the foregoing reasons, the Court GRANTS IN PART this emergency application for relief.

BACKGROUND

Petitioner Janet Malam, born in the United Kingdom, is a lawful permanent resident. (ECF No. 1, PageID.3.) She was legally admitted to the United States in 1967 at the age of four and is now fifty-six years old. (*Id.*) Petitioner has been detained since March 4, 2020, in the Calhoun County Correctional Facility[2] in conjunction with removal proceedings at the Detroit Immigration Court. (*Id.*) She brings suit against the following Respondents: Rebecca Adducci, the Detroit District Director of United States Immigration and Customs Enforcement (ICE); Matthew Albence, Deputy Director of ICE; Chad Wolf, Acting Secretary of the U.S. Department of Homeland Security; William Barr, Attorney General of the United States; ICE; and Heidi Washington, Director of the Michigan Department of Corrections (MDOC). (*Id.*)

[2] The parties each refer to the Calhoun County Correctional Facility with different terminology. *See Jail/Corrections Division*, Calhoun County, https://www.calhouncountymi.gov/departments/sheriffs_office/jail.php (last visited Apr. 5, 2020) ("Calhoun County Correctional Facility"); *Detention Facilities*, U.S. Immigrations and Customs Enforcement, https://www.ice.gov/detentionfacility/ calhoun-county-correctional-center (last visited Apr. 5, 2020) ("Calhoun County Correctional Center"); *Calhoun County Jail*, Google Maps, at https://www.google.com/maps/place/Calhoun+County+Jail/@42.3166565,-85.1757947,15z/data=!4m2!3m1!1s0x0:0x4f8faa7bcca370c4?sa=X&ved=2ahUKEwiRwvHM3NHoAhUQmHIEHWeUCl4Q_BIwCnoECA4QCA (last visited Apr. 5, 2020) ("Calhoun County Jail"). The Court will refer to Petitioner's current place of detention as the Calhoun County Correctional Facility or CCCF.

Petitioner alleges that she suffers from a number of health conditions, including: multiple sclerosis; bipolar disorder; pain; anemia; essential primary hypertension; hypothyroidism; chronic obstructive pulmonary disease; fibromyalgia; mild cognitive impairment; carpal tunnel syndrome; severe major depressive disorder; opioid addiction; nicotine dependence; and polyneuropathy. (ECF No. 1, PageID.7.) According to Petitioner's extensive medical records, these diagnoses are current and accurate as of March 3, 2020. (ECF No. 1-4, PageID.31.)

Because Petitioner has committed two or more crimes involving moral turpitude, her detention is mandatory pursuant to 8 U.S.C. § 1226(c).[3] On March 30, 2020, Petitioner filed a petition requesting emergency relief in either one of two forms: a writ of habeas corpus or an injunction "ordering Defendants to immediately release [Petitioner], with appropriate precautionary public health measures, on the grounds that her continued detention violates the Due Process Clause [of the Fifth and Fourteenth Amendments]." (*Id.* at PageID.17.) Petitioner simultaneously filed an

Application for Temporary Restraining Order requesting that the Court order Petitioner's release during the pendency of her immigration proceedings due to the substantial risk to her health posed by COVID-19 as a result of Petitioner's continued detention in the enclosed group environment endemic to the Calhoun County Correctional Facility. (ECF No. 2.)

3 Petitioner does not specify the nature of these crimes in either her petition or this application. In their response to Petitioner's application for a temporary restraining order, Respondents note that Petitioner's charge of removal is based on a 2003 Michigan state conviction of Larceny from the Person, Mich. Comp. Laws § 750.737, a 2008 conviction of Larceny $100 or Less in violation of a Taylor City, Michigan ordinance, a 2009 conviction of Retail Fraud in violation of a City of Flat Rock, Michigan ordinance, a 2011 conviction of Attempted Simple Larceny in violation of a City of Tyler, Michigan ordinance, and a 2012 conviction of Retail Fraud 3rd Degree $200 or less in violation of a City of Southgate, Michigan ordinance. (ECF No. 11-1, PageID.192.)

***2** For the reasons stated below, the Court GRANTS Petitioner's application for a temporary restraining order requiring her immediate release from detention for the duration of the COVID-19 State of Emergency in Michigan or until further Court order.

LAW AND ANALYSIS

I. Jurisdiction

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress." *Hamama v. Adducci*, 912 F.3d 869, 874 (6th Cir. 2018) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986)). All courts have an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999)). A court must determine whether it has jurisdiction before deciding a cause of action. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

Petitioner pleads that "[t]he Court has subject matter jurisdiction over this case pursuant to Article I, § 9, cl. 2 of the U.S. Constitution (Suspension Clause); the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution; 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1651 (All Writs Act); and 28 U.S.C. § 2241 (habeas corpus)." (ECF No. 1, PageID.5.) The

Court has jurisdiction to adjudicate Petitioner's claims under 28 U.S.C. § 2241. Moreover, even if Petitioner's claims could not be heard under 28 U.S.C. § 2241, 28 U.S.C. § 1331 provides an independent source of jurisdiction.

A. 28 U.S.C. § 2241 Jurisdiction

28 U.S.C. § 2241 provides a district court with jurisdiction over petitions for habeas corpus where a petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). *See* *INS v. St. Cyr*, 533 U.S. 289, 298, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (recognizing 28 U.S.C. § 2241 as a jurisdictional statute). For over 100 years, habeas corpus has been recognized as the vehicle through which noncitizens may challenge the fact of their detention. *See Chin Yow v. U.S.*, 208 U.S. 8, 13, 28 S.Ct. 201, 52 L.Ed. 369 (1908) ("Habeas corpus is the usual remedy for unlawful imprisonment.") In 2001, the Supreme Court recognized the continued viability of the writ in cases involving the detention of noncitizens: "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." *Zadvydas v. Davis*, 533 U.S. 678, 688, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). In 2018, the Court ruled on the merits of a habeas petition challenging the validity of pre-removal detention. *Jennings v. Rodriguez*, —— U.S. ——, 138 S. Ct. 830, 200 L.Ed.2d 122 (2018).

Respondents claim, citing *Luedtke v. Berkebile*, that the Court lacks jurisdiction to grant habeas relief because 28 U.S.C. § 2241 "is not the proper vehicle for a prisoner to challenge conditions of confinement." *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013). Though the Supreme Court has left as an open question "the reach of the writ with respect to claims of unlawful conditions of treatment or confinement," *Boumediene v. Bush*, 553 U.S. 723, 792, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2006), the Sixth Circuit, conversely, has held that "a § 2241 habeas petition is not the appropriate vehicle for challenging the conditions of...confinement." *Velasco v. Lamanna*, 16 F. App'x 311, 314 (6th Cir. 2001). In 2018, the Sixth Circuit reiterated this holding, affirming a district court that dismissed a § 2241 petition raising an Eighth Amendment challenge to subpar prison conditions because such a claim must be brought in a civil-rights action such as one under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *Solano-Moreta v. Fed. Bureau of Prisons*, No. 17-1019, 2018 WL 6982510 (6th Cir. Sep. 24, 2018); but see *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014) ("Habeas corpus tests not only the fact but also the form of detention.") (internal

citation omitted); *Roba v. U.S.*, 604 F.2d 215 (2d Cir. 1979) (holding that § 2241 petition may be used to challenge conditions of confinement).

***3** The Respondents argue that "there is no dispute that Petitioner brings a challenge to the conditions of her confinement." (ECF No. 11, PageID.175.) On its face, the application appears to concern Petitioner's conditions of confinement. Petitioner titles her claim for relief: "Freedom from Cruel Treatment and Conditions of Confinement." (ECF No. 1, PageID.16.) But Petitioner may nonetheless bring her claim under 28 U.S.C. § 2241 because she seeks immediate release from confinement as a result of there being no conditions of confinement sufficient to prevent irreparable constitutional injury under the facts of her case.

Supreme Court and Sixth Circuit precedent support the conclusion that where a petitioner claims no set of conditions would be sufficient to protect her constitutional rights, her claim should be construed as challenging the fact, not conditions, of her confinement and is therefore cognizable in habeas. In *Nelson v. Campbell*, the Supreme Court held that a death-row inmate's challenge to the method of his upcoming execution constituted a challenge to the conditions—not the fact or duration—of his execution, and therefore his claim fell outside the "core" of habeas corpus. 541 U.S. 637, 644-45, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004). However, the Court speculated that if the challenged method "were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives," there would be a "stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself," bringing the claim into the core of habeas corpus. *Id.* at 645, 124 S.Ct. 2117. In *Adams v. Bradshaw*, the Sixth Circuit relied on *Nelson* to uphold habeas jurisdiction over a claim where a petitioner challenged the method of his execution but did not concede that any acceptable alternative existed. 644 F.3d 481, 483 (6th Cir. 2011) ("Adams has not conceded the existence of an acceptable alternative procedure....Thus, Adams's lethal-injection claim, if successful, could render his death sentence effectively invalid.") Here, Petitioner has not conceded the existence of acceptable alternative conditions of her confinement; her Fifth Amendment claim, if successful, would render her continued detention invalid.

In contrast to this case, claims which the Sixth Circuit has held noncognizable in habeas are those in which the petitioner seeks relief other than release from custody: *See Solano-Moreta*, 2018 WL 6982510, at *1 (seeking transfer); *Luedtke v. Berkebile*, 704 F.3d 465, 465–66 (6th Cir. 2013) (challenge to lack of compensation and conditions of work performed in prison); *Hodges v. Bell*, 170 F. App'x 389, 390 (6th Cir. 2006) (seeking amelioration of conditions or transfer to mental health facility); *Sullivan v. United States*, 90 Fed. App'x 862, 862 (6th Cir. 2004) (seeking medical treatment in prison); *Lutz v. Hemingway*, 476 F.Supp. 2d 715, 718 (E.D. Mich. 2007) (seeking

restoration of mail privileges in prison); see also *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004) (seeking transfer). Indeed, in *Preiser v. Rodriguez*, the Supreme Court distinguished conditions of confinement claims from claims seeking immediate or speedier release. 411 U.S. 475, 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (distinguishing habeas case seeking good-time credits from § 1983 conditions of confinement cases on the grounds that "none of the state prisoners in those cases was challenging the fact or duration of his physical confinement itself, and none was seeking immediate release or a speedier release from that confinement—the heart of habeas corpus.")

***4** Although Petitioner here titles her claim for relief "Freedom from Cruel Treatment and Conditions of Confinement," her Petition is a challenge to the continued validity of her confinement, regardless of its conditions. Petitioner argues that the only adequate relief is her release from confinement. As Petitioner explains,

> [S]ocial distancing and hygiene measures [are] Janet's only defense against COVID-19. Those protective measures are exceedingly difficult, if not impossible, in the environment of an immigration detention center, where Janet shares toilets, sinks, phones, and showers, eats in communal spaces, and is in close contact with the many other detainees and officers.

(ECF No. 1, PageID.16.) At the Court's March 31, 2020 status conference for this case, counsel for Respondents conceded that social distancing between prisoners of at least six feet would be impossible at the Calhoun County Correctional Facility. This concession supports the conclusion of multiple doctors and public health experts: that "[t]he only viable public health strategy available is risk mitigation....[T]he public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety" (ECF No. 6-1, PageID.87 (Declaration of Infectious Disease Epidemiologist Joseph Amon)); the only way to "prevent serious illness including death" in ICE facilities is to "release all people with risk factors." (ECF No. 20-3, PageID.374 (Declaration of Dr. Robert B. Greifingert).)

In this case, Petitioner does not take issue with the steps taken at the Calhoun County Correctional Facility to mitigate the risk of detainees contracting COVID-19. Rather, she says that no matter what steps are taken, due to her underlying serious health conditions, there is no communal holding facility where she could be incarcerated during the Covid-19 pandemic that would be constitutional. Petitioner's claim must therefore be considered as a challenge to the continued

validity of confinement itself. Accordingly, Petitioner's claim is properly brought under 28 U.S.C. § 2241, and the Court has jurisdiction.

B. 28 U.S.C. § 1331 Jurisdiction

Even if the Court were to lack jurisdiction under 28 U.S.C. § 2241, the Fifth Amendment provides Petitioner with an implied cause of action, and thus 28 U.S.C. § 1331 would offer an independent source of jurisdiction.

28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Petitioner properly framed her pleading as a civil rights action "[i]n the alternative." In addition to her request for a writ of habeas corpus, Petitioner requests "injunctive relief ordering Defendants to immediately release Janet, with appropriate precautionary public health measures, on the grounds that her continued detention violates the Due Process Clause." (ECF No. 1, PageID.17.) She titles her single claim for relief "Violation of Fifth Amendment Right to Substantive and Procedural Due Process (Unlawful Punishment; Freedom from Cruel Treatment and Conditions of Confinement." (Id. at PageID.16.)

Should Petitioner's habeas petition fail on jurisdictional grounds, the Fifth Amendment provides Petitioner with an implied cause of action, and accordingly 28 U.S.C. 1331 would vest the Court with jurisdiction. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court first upheld the proposition that the Constitution itself provided an implied cause of action for claims against federal officials. 403 U.S. at 388, 91 S.Ct. 1999. In 2017, the Supreme Court held that federal courts should not extend a *Bivens* remedy into new contexts if there exist any "special factors counseling hesitation." *Ziglar v. Abbasi*, —— U.S. ——, 137 S.Ct. 1843, 1857, 198 L.Ed.2d 290 (2017). However, there is no corresponding limitation on the Constitution as a cause of action to seek injunctive or other equitable relief. *See Ziglar*, 137 S. Ct. at 1862 (declining to extend Bivens to conditions of confinement claim, but noting that "Respondents ...challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. To address those kinds of decisions, detainees may seek injunctive relief."). Instead, there is a "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Hubbard v. E.P.A.*, 809 F.2d 1, 11 (D.C. Cir. 1986) (citing *Bivens*, 403 U.S. at 404, 91 S.Ct. 1999 (Harlan, J., concurring)). Indeed, "the power of the federal courts to grant equitable relief for constitutional violations has long been established." *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995). Here, Petitioner seeks only

injunctive and declaratory relief. Accordingly, she may bring her claim directly under the Fifth Amendment, and the Court has jurisdiction to hear the claim under 28 U.S.C. § 1331.

***5** At oral argument, counsel for Respondent raised the question of whether the United States may be entitled to sovereign immunity if Petitioner brought this case under the Fifth Amendment. Sovereign immunity does not apply in this instance, and even if it did, it has been statutorily waived. Federal courts may exercise the traditional powers of equity in cases within their jurisdiction to enjoin violations of constitutional rights by government officials. In *Ex Parte Young*, the Supreme Court first articulated the principle that state government officials may be sued for acting unconstitutionally, even if an ensuing injunction would bind the state. 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In *Philadelphia Co. v. Stimson*, the Supreme Court recognized the applicability of that principle to suits against federal officials. 223 U.S. 605, 620, 32 S.Ct. 340, 56 L.Ed. 570 (1912) ("in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process"). More recently, the Supreme Court affirmed this principle in *Dalton v. Specter*: "sovereign immunity would not shield an executive officer from suit if the officer acted either 'unconstitutionally or beyond his statutory powers.' " 511 U.S. 462, 472, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949)). In *Malone v. Bowdoin*, the Court called this principle the "constitutional exception to the doctrine of sovereign immunity." 369 U.S. 643, 647, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962). Petitioner here raises a constitutional challenge to her detention as the result of actions taken by Respondent Adducci, a federal officer. Sovereign immunity does not apply.

Even absent this constitutional exception, the Administrative Procedure Act (APA) provides a statutory waiver to any defense of sovereign immunity. 5 U.S.C. § 702 provides that:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

In 2013, the Sixth Circuit recognized that this waiver extends beyond suits brought under the APA:

> [W]e now join all of our sister circuits who have done so in holding that § 702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers sued in their official capacity, regardless of whether plaintiff seeks review of "agency action" or "final agency action" as set forth in § 704.

Muniz-Muniz v. U.S. Border Patrol, 741 F.3d 668, 673 (6th Cir. 2013); *see also* *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not."). ICE is a federal agency, of which Respondent Adducci is an officer or employee thereof. Petitioner challenges Respondent's actions made in her official capacity. Accordingly, the APA provides a statutory waiver of sovereign immunity.

C. Petitioner's Status as a Noncitizen

Petitioner's status as a noncitizen who is undergoing removal proceedings does not affect the Court's jurisdiction to hear this case. Although several statutes limit a district court's authority to hear cases in the immigration context, none apply here, as set forth below.

28 U.S.C. § 1252(b)(9) provides that judicial review of:

> all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter [including §§ 1225 and 1226] shall be available only in judicial review of a final order under this section.

28 U.S.C. § 1252(b)(9). Petitioner does not have a final order of removal. In *Jennings v. Rodriguez*, the Supreme Court held that 1252(b)(9) did not strip jurisdiction from courts to hear challenges to detention pending removal because detention was not an action taken to remove a noncitizen from the United States. —— U.S. ——, 138 S. Ct. 830, 841, 200 L.Ed.2d 122 (2018).

Petitioner challenges her continued detention; accordingly, 28 U.S.C. § 1252(b)(9) does not strip this Court of jurisdiction.

8 U.S.C. § 1226(e) bars federal court review of any discretionary decision made by the Attorney General regarding detention, release, bond, or parole in an immigration case. However, in *Demore v. Kim*, 538 U.S. 510, 123 S. Ct. 1708, 1713–14, 155 L.Ed.2d 724 (2003), the Supreme Court held that § 1226(e) did not prevent noncitizens from raising constitutional challenges to mandatory detention under § 1226(c). Petitioner here raises a Fifth Amendment challenge to her continued mandatory detention under § 1226(c); thus, § 1226(e) does not prevent this Court from exercising jurisdiction.

***6** Finally, 8 U.S.C. § 1252(f), titled "Limit on Injunctive Relief," provides that:

> [N]o court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). But as the Supreme Court recognized in *Reno v. Amer.-Arab Anti-Discrim. Comm.*, "this ban does not extend to individual cases." 525 U.S. 471, 481–82, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). Petitioner seeks individual relief. Therefore, 8 U.S.C. § 1252(f) does not affect this Court's jurisdiction to enter injunctive or declaratory relief.

II. Proper Habeas Respondent

Petitioner names as Respondents: Rebecca Adducci, the Detroit District Director of ICE; Matthew Albence, Deputy Director; Chad Wolf, Acting Secretary of the U.S. Department of Homeland Security; William Parr, Attorney General of the United States; U.S. Immigration and Customs Enforcement; and Heidi Washington, Director of the Michigan Department of Corrections. Only Respondent Rebecca Adducci is properly named with respect to the petition for a writ of habeas corpus.

"Historically, the question of who is 'the custodian,' and therefore the appropriate respondent in a habeas suit, depends primarily on who has power over the petitioner and...on the convenience of the parties and the court." *Roman v. Ashcroft*, 340 F.3d 314, 319 (6th Cir. 2003) (citing *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998)). In *Roman*, the Sixth Circuit held that for habeas petitions in immigration contexts, "the INS District Director for the district where a detention facility is located 'has power over' alien habeas corpus petitioners." *Id.* at 320. The court, in finding that the Attorney General was not a proper respondent for a noncitizen's habeas claim and that a habeas claim could properly have only one respondent, reiterated 28 U.S.C. § 2243's requirement that a writ of habeas corpus "shall be directed to *the* person having custody of the person detained." *Id.* at 321. Michigan only has one ICE District, located in Detroit. *See Enforcement and Removal Operations Field Offices*, https://www.ice.gov/contact/ero. Accordingly, Rebecca Adducci, the Detroit District Director, is the proper Respondent for Petitioner's request for a writ of habeas corpus.

III. Petitioner's Application for a Temporary Restraining Order

Petitioner, along with her complaint, filed an emergency application for a temporary restraining order. (ECF No. 3.) In determining whether to grant such an order, courts evaluate four factors: 1) whether the movant has a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury absent an injunction; 3) whether granting the injunction would cause substantial harm to others; and 4) whether the public interest would be served by granting the injunction. *Northeast Ohio Coal. for Homeless and Serv. Emps. Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). These four factors "are not prerequisites that must be met, but are interrelated considerations that must be balanced together. For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay." *Id.* (internal quotations omitted). "[P]reliminary injunctions are extraordinary and drastic remedies [ ] never awarded as of right." *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015). Nonetheless, each of the four factors weighs in Petitioner's favor, and the Court grants Petitioner's motion for a temporary restraining order.

A. Irreparable Harm

***7** Petitioner is likely to experience irreparable injury absent an injunction, both in the form of loss of health or life, and in the form of an invasion of her constitutional rights.

1. Loss of Health or Life from COVID-19

The ongoing COVID-19 pandemic creates a high risk that absent an injunction by this Court, Petitioner will suffer irreparable harm in the form of loss of health or life as a result of contracting the COVID-19 virus.

On March 22, 2020, the Governor of Michigan issued the following statement: "The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease." Executive Order, No. 2020-20 (Mar. 22, 2020).

Since March 4, 2020, the date of Petitioner's detention at the Calhoun County Correctional Facility, the exceptionally dangerous nature of the COVID-19 pandemic has become apparent. On March 10, 2020, the Governor of Michigan announced the state's first two cases of COVID-19 and simultaneously declared a State of Emergency. Executive Order, No. 2020-4 (Mar. 10, 2020). The number of new cases then began to grow exponentially. As of April 5, 2020, there are now 15,718 confirmed cases of COVID-19 and 617 known related deaths, with 238 confirmed cases within the Michigan Department of Corrections system specifically. *See Coronavirus*, Michigan.gov, https://www.michigan.gov/coronavirus/0,9753,7-406-98163-520743--,00.html. COVID-19 has a high risk of transmission, and the number and rate of confirmed cases indicate broad community spread. [4] Executive Order, No. 2020-20 (Mar. 22, 2020). Nationally, ICE detention facilities across our country are experiencing the same thing. As of April 4, 2020, ICE has confirmed at least 13 cases of COVID-19 among immigration detainees and 7 cases among detention facility employees and personnel. *ICE Guidance on COVID-19*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/coronavirus (updated Apr. 4, 2020 at 8:00pm).

[4] Indeed, since the time of Respondent's brief, the numbers have continued to grow. Respondent reported that, as of April 3, 2020, Calhoun County alone had 25 cases. (ECF No. 11, PageID.169) By the time the Court held oral argument later that day, that number had grown to 31, with 1 reported death. On April 5, the date of this Order, the number of confirmed cases is now 42, with 1 reported death. *Coronavirus*, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html.

On March 23, 2020, the Centers for Disease Control and Prevention (CDC) acknowledged that correctional and detention facilities "present[ ] unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors." *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention*

Facilities, Centers for Disease Control (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html. [Hereinafter "CDC Guidance 3/23/2020"]. Specifically, the CDC noted that many detention conditions create a heightened risk of danger to detainees. These include: low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, highly congregational environments, inability of most patients to leave the facility, and limited ability of incarcerated/detained persons to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing).*Id.*

***8** Though the CDC has recommended public health guidance for detention facilities, and though the Calhoun County Correctional Facility has indeed implemented measures designed to prevent spread of the disease, these measures are inadequate to sufficiently decrease the substantial likelihood that Petitioner will contract COVID-19. As prison officials are beginning to recognize around the country, even the most stringent precautionary measures—short of limiting the detained population itself—simply cannot protect detainees from the extremely high risk of contracting this unique and deadly disease. For example, on April 1, 2020, the Rikers Island jail complex's chief physician acknowledged that "infections are soaring" despite the facility's "following Centers for Disease Control and Prevention guidelines and having moved mountains to protect our patients." Miranda Bryant, *Coronavirus Spread at Rikers is a 'Public Health Disaster', Says Jail's Top Doctor*, The Guardian (Apr. 1, 2020), https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster. In the immigration context specifically, despite Respondents' argument that the federal government has effectively incorporated appropriate and effective precautions, medical experts at the Department of Homeland Security have warned that detention confinement creates a "tinderbox scenario" where rapid outbreak is extremely likely, and extremely likely to lead to deadly results as resources dwindle on an exponential level. Catherine E. Shoichet, *Doctors Warn of 'Tinderbox Scenario' if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html.

Petitioner is 56 years old and suffers from the following conditions, almost all of which place her at an increased risk of a dire outcome from contracting the COVID-19 virus: multiple sclerosis, bipolar disorder, anemia, essential primary hypertension, hypothyroidism, chronic obstructive pulmonary disease, fibromyalgia, severe major depressive disorder, opioid addition, and polyneuropathy. (ECF No. 1-4, PageID.31.) *See* Centers for Disease Control, *Groups at Higher Risk for Severe Illness*, (Apr. 2, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html (noting that "people of all ages with underlying medical conditions are at higher risk for severe illness, particularly if the underlying medical conditions are not well controlled"). Additionally, Respondents have confined Petitioner in an environment where she "shares toilets, sinks, phones, and

showers, eats in communal spaces, and is in close contact with the many other detainees and officers." (ECF No. 1, PageID.16.) Petitioner's involuntary interaction with purportedly asymptomatic guards who rotate shifts is also a significant exposure factor. *How COVID-19 Spreads*, CDC (April 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covidspreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2 Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html. [5]

[5] On April 3, 2020, after Petitioner filed her emergency application for a temporary restraining order, the CDC updated its guidance in light of new evidence of asymptomatic transmission of COVID-19 to recommend that all individuals wear cloth face coverings "in public settings where other social distancing measures are difficult to maintain." *Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission*, CDC (Apr. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

***9** These are many of the conditions that the CDC has identified as being particularly likely to increase COVID-19 transmissions in detention facilities. CDC Guidance 3/23/2020. For these reasons, Petitioner's confinement at the Calhoun County Correctional Facility renders her substantially likely to contract COVID-19, and Petitioner's severe health conditions render her substantially likely to suffer irreparable harm or death as a result.

Respondents focus on one particular issue: whether Petitioner is more likely to contract COVID-19 if released than if she remains confined in their jail. Respondents acknowledge that "there is a health risk posed by COVID-19 and that Petitioner is in the category of people identified to be at higher risk for serious health consequences if she contracts COVID-19." (ECF No. 11, PageID.178.) Respondents also acknowledge that Petitioner "does not have to wait until she has COVID-19 to claim that the precautions taken to reduce exposure were insufficient." (*Id.* at PageID.179.) Indeed, the crux of Respondents' argument is not that COVID-19 does not pose a deadly threat to Petitioner if contracted. Rather, Respondents' argument relies on the proposition that Petitioner does not have a substantial risk for *exposure* at the Calhoun County Correctional Facility, and her risk of exposure in the community may be greater. (*Id.* at PageID.178.)

To this end, Respondents posit the following: Petitioner has not established that she has either been exposed to COVID-19, or that her exposure is "imminent," because there are currently no cases in the facility in which she is detained "and only 25 cases in the surrounding county." [6] (ECF No. 11, PageID.179.) Additionally, Respondents argue that their facility has implemented "numerous precautions to reduce the risk of exposure and spread of COVID-19," [7] and that even if Petitioner is at a "generalized risk" of contracting COVID-19, that does not mean that she is at a "substantial

risk" for purposes of her constitutional claim. (*Id.* at PageID.179-180, citing *Wooler v. Hickman Cty.*, 377 Fed. Appx. 502, 505 (6th Cir. 2010)).

6 Hours later, due to the exponential nature of COVID-19's spread, this statistic was already out of date. *See supra* fn.2.

7 Specifically, Respondents note that the ICE and CCCF precautions are as follows: tracking the disease, screening incoming detainees, isolating and testing symptomatic detainees, quarantining detainees who test positive, screening incoming staff, suspending in-person social visitation and limiting professional visitation to non-contact, increasing sanitation, educating all staff and detainees, providing detainees with toilet paper, personal soap, and disinfectants, and increasing hand-washing stations. (ECF No. 11, PageID.172.)

Respondents' arguments fail to address the stark reality of this particular global public health crisis. In the face of a deadly pandemic with no vaccine, no cure, limited testing capacity, and the ability to spread quickly through asymptomatic human vectors, a "generalized risk" is a "substantial risk" of catching the COVID-19 virus for any group of human beings in highly confined conditions, such as Petitioner within the CCCF facility. In acknowledgment of this simple truth, both the United States Attorney General and the Governor of Michigan have issued independent directives to consider early release for detainees who do not pose a public safety risk, as minimizing crowded populations is the only known way to mitigate spread of this pandemic. *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, Att'y Gen. (Mar. 26, 2020); Executive Order, No. 2020-29 (COVID-19) (Mar. 26, 2020). Moreover, Petitioner's risk of contracting COVID-19 outside of Respondents' custody has no bearing on whether they have exposed her to the likelihood of irreparable harm. Though the Court commends Respondents for the steps they have taken to prevent spread of the disease, as prisons and courts around the country are beginning to recognize, such measures are insufficient to stem deadly prison outbreaks. *See, e.g., New York City Board of Correction Calls for City to Begin Releasing People From Jail as Part of Public Health Response to COVID-19*, N.Y.C. Bd. of Corr. (Mar. 17, 2020), https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17% 20-% 20Board% 20***o***f% 20Correction% 20Statement% 20re% 20Release.pdf (arguing that, despite the "heroic work" of Department of Correction and Correctional Health Services staff "to prevent the transmission of COVID-19 in the jails and maintain safe and humane operations, the City must drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances."). Even the Calhoun County Correctional Facility's additional measure of screening incoming shift workers for high temperatures is insufficient to stem the spread of disease, as COVID-19 spreads asymptomatically. *How COVID-19 Spreads*, CDC (Apr. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/

how-covidspreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html.

***10** Accordingly, the Court concludes that Petitioner's continued confinement at the Calhoun County Correctional Facility exposes her to a substantial risk of contracting COVID-19, which due to her specific underlying health conditions exposes her to a substantial risk of irreparable harm to her health or life.

2. Violation of Constitutional Rights

Petitioner's Fifth Amendment claim triggers a finding that Petitioner will suffer irreparable harm absent an injunction. Petitioner alleges that in "subjecting Janet to detention conditions that amount to punishment and that fail to ensure her safety and health," Respondent is "subjecting [her] to a substantial risk of serious harm, in violation of [her] rights under the Due Process Clause." (ECF No. 1, PageID.17.) The alleged violation of a constitutional right is sufficient for a court to find irreparable harm. *See Overstreet v. Lexington-Fayette Urban Cty. Gov.*, 305 F.3d 566, 578 (6th Cir. 2002) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984); *see also Rhinehart v. Scutt*, 509 F. App'x 510, 514 (6th Cir. 2013) (suggesting that allegation of "continuing violation of...Eighth Amendment rights" would trigger a finding of irreparable harm). Below, the Court finds Petitioner is likely to succeed on the merits of this Fifth Amendment claim. Accordingly, "no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

B. Likelihood of Success on the Merits

Petitioner is likely to succeed on the merits of her claim that her continued confinement during the COVID-19 pandemic violates her Fifth Amendment rights.

The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. U.S. Const. amend. V. The protection applies to "all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). As it pertains to Petitioner, the Due Process Clause prohibits the government from imposing torture or cruel and unusual confinement conditions on non-convicted detainees. *See Bell v. Wolfish*, 441 U.S.

520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt."). This type of Fifth Amendment claim is analyzed "under the same rubric as Eighth Amendment claims brought by prisoners." *Villegas v. Metropolitan Government of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013).

Eighth Amendment claims require a showing of deliberate indifference, *see* *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), which has both an objective and a subjective component. *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013) (citing *Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008)).

1. Objective Component

***11** The objective component is satisfied by showing that, "absent reasonable precautions, an inmate is exposed to a substantial risk of serious harm." *Richko v. Wayne Cty.*, 819 F.3d 907, 915 (6th Cir. 2016) (citing *Amick v. Ohio Dep't of Rehab. & Corr.*, 521 Fed.Appx. 354, 361 (6th Cir.2013)). Respondents argue that the precautions they have taken at the Calhoun County Correctional Facility combined with the lack of a confirmed outbreak of COVID-19 at the facility show that Petitioner is unable to demonstrate she is at substantial risk of serious harm. (ECF No. 11, PageID.180.) Instead, Respondents argue that Petitioner merely has a "generalized risk" of contracting COVID-19, which is insufficient to prevail on a Fifth Amendment constitutional claim. (*Id.*) But as noted above, in Petitioner's case, a generalized risk is a substantial risk.

As the Supreme Court explained in *Helling v. McKinney*, "[w]e have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may 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." 509 U.S. 25, 33, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). "That the Eighth Amendment protects against future harm to inmates is not a novel proposition." *Id.* "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.*

Respondents attempt to distinguish this case from *Helling* on the grounds that the Petitioner in *Helling* alleged a sufficiently imminent danger from "actual exposure to high levels of cigarette smoke because his former cellmate was a five-pack a day smoker." (ECF No. 11, PageID.179 (citing *Helling*, 509 U.S. at 29, 113 S.Ct. 2475).) Respondents argue that "Petitioner has not established that she either has been exposed to COVID-19, or that her exposure is "imminent."

" (*Id.*) But as the above analysis regarding the risk of irreparable injury to Petitioner demonstrates, the Respondents grievously underestimate the seriousness of the risk to Petitioner, in spite of precautionary measures and despite the lack of confirmed CCCF outbreak to date. The ever-growing number of COVID-19 outbreaks in prisons and detention facilities,[8] despite a range of precautionary measures, demonstrates that the risk of a COVID-19 outbreak in Respondent's facility is significant. Nor, given the percentage of asymptomatic COVID-19 cases and the virus' incubation period of up to fourteen days, can Respondents reasonably assert, as they do, that there are no COVID-19 cases in CCCF; they can only allege that there are no confirmed cases. By the time a case is confirmed, it will almost certainly be too late to protect Petitioner's constitutional rights. Petitioner, so long as she remains detained, is therefore exposed to a substantial risk of serious harm.

8 *See, e.g.*, Ted Rod Roelofs, *Coronavirus Cases Surge in Michigan's Crowded Prisons*, Bridge (Mar. 27, 2020), https://www.bridgemi.com/michigan-government/coronavirus-cases-surge-michigans-crowded-prisons; *Oregon Inmate in Salem Tests Positive for COVID-19, the First in the State Prison System*, SalemReporter (Apr. 3, 2020), https://www.salemreporter.com/posts/2168/oregon-inmate-in-salem-tests-positive-for-covid-19-the-first-in-the-state-prison-system (noting outbreak despite precautionary measures); Ames Alexander and Jessica Banov, *In NC Prisons, Five Employees and Four Inmates Have Now Tested Positive for COVID-19*, Charlotte Observer (Apr. 1, 2020), https://www.charlotteobserver.com/news/coronavirus/article241675886.html; Alexandra Kelley, *Louisiana Prison Records Third Inmate Death as a Result of the Coronavirus*, The Hill (Apr. 1, 2020), https://thehill.com/changing-america/well-being/prevention-cures/490839-louisiana-prison-records-third-inmate-death-as-a.

2. Subjective Component

***12** The subjective component is demonstrated by showing that "(1) the official being sued subjectively perceived facts from which to infer a substantial risk to the prisoner, (2) the official did in fact draw the inference, and (3) the official then disregarded that risk." 819 F.3d at 915–16 (citing *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 446 (6th Cir. 2014)). "Because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence...." *Richko*, 819 F.3d at 916 (citing *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 550 (6th Cir. 2009)). Additionally, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842, 114 S.Ct. 1970.

Respondents concede the COVID-19 risk to Petitioner: "The government does not dispute that there is a health risk posed by COVID-19 and that Petitioner is in the category of people identified to be at higher risk for serious health consequences if she contracts COVID-19." (ECF No. 11, PageID.178.) Rightfully so: the above analysis pertaining to the risk of irreparable harm reveals that the substantial risk to Petitioner is obvious. *Farmer*, 511 U.S. at 842, 114 S.Ct. 1970.

Respondents instead argue that Calhoun County Correctional Facility's precautionary measures preclude a finding of deliberate indifference because government officials cannot be said to have disregarded the risk to Petitioner. As noted above, officials at the Calhoun County Correctional Facility have taken a range of precautionary measures to protect against a potential outbreak. (*See* ECF No. 11-3.) But as Plaintiff's pleadings and the above analysis regarding irreparable injury demonstrate, even with these precautionary measures, in light of Petitioner's underlying health conditions, she is not ensured anything close to "reasonable safety." *Farmer*, 511 U.S. at 844, 114 S.Ct. 1970. (*See* ECF No. 6-3, PageID.112 (Declaration of Doctor Golob stating, "[V]ulnerable people, people over the age of 50 and people of any age with lung disease...living in an institutional setting...are at grave risk of severe illness and death from COVID-19."); ECF No. 6-1, PageID.87 (Declaration of Infectious Disease Epidemiologist Joseph Amon, stating "The only viable public health strategy available is risk mitigation....[T]he public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety.").) Based on the record before the Court, the only reasonable response by Respondents is the release of Petitioner; any other response demonstrates a disregard of the specific, severe, and life-threatening risk to Petitioner from COVID-19.

For the same reasons, Petitioner's continued detention cannot "reasonably relate[ ] to any legitimate government purpose." *Bell v. Wolfish*, 441 U.S. 520, 536-39, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (holding that pretrial detention not reasonably related to a legitimate government purpose must be considered punishment and therefore contrary to the Fifth Amendment). In their response, Respondents do not directly address the justification for Petitioner's continued detention. The Court notes that Petitioner is in civil detention pending removal proceedings pursuant to 8 U.S.C. § 1226(c). Petitioner faces significant risk of death due to COVID-19; accordingly, her continued confinement at the Calhoun County Correctional Facility is both unrelated and contrary to the government purpose of carrying out her removal proceedings.

Both the objective and subjective components are met; Petitioner has shown a likelihood of success on the merits. The Court reiterates that at this early stage in the litigation, Petitioner need not show a certainty of success on the merits. Indeed, "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay."

Northeast Ohio Coalition for Homeless and Service Employees Intern. Union, Local 1199, 467 F.3d at 1009 (6th Cir. 2006). Given the risk and severity of irreparable harm to Petitioner and the weight of public health evidence indicating release as the only reasonable option under these facts, Petitioner has met her current burden with respect to the merits of her claim.

***13** Respondents nonetheless cite to some authority that release is an inappropriate remedy for Petitioner's claim. *See Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005) (noting release is not among the proper remedies for Eighth Amendment deliberate indifference claims, which are limited to injunctive relief for proper treatment and damages); *Heximer v. Woods*, No. 08-14170, 2018 WL 1193368, at *2 (E.D. Mich. Mar. 8, 2018) (noting that "release from custody is not an available remedy for a deliberate indifference claim."). As explained above, Petitioner has shown a likelihood of success on the merits of her claim that given the extraordinary nature of the COVID-19 pandemic, no set of possible confinement conditions would be sufficient to protect her Fifth Amendment rights. Release from custody represents the only adequate remedy in this case, and it is within this Court's broad equitable power to grant it. *See Swann v. Charlotte–Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15–16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.")

3. Qualified Immunity

In its supplemental brief, Respondents note that to the extent Petitioner brings a civil rights case, Respondents are entitled to assert a defense of qualified immunity. (ECF No. 19, PageID.317.) Qualified immunity is unavailable as a defense in cases seeking injunctive relief. *See Pearson v. Callahan*, 555 U.S. 223, 242, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (noting that qualified immunity defense is not available in "suits against individuals where injunctive relief is sought in addition to or instead of damages"); *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (describing qualified immunity as "immunity from suits for damages"). Because Petitioner here seeks only declaratory and injunctive relief, qualified immunity does not apply.

C. Balance of Equities and Public Interest

When the government opposes the issuance of a temporary restraining order, as Respondents do here, the final two factors—the balance of equities and the public interest—merge, because "the government's interest is the public interest." *Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 512 (D.C. Cir. 2016) (citing *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)).

The public interest favors Petitioner's release because of the risk that Petitioner's constitutional rights will be deprived absent an injunction. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir.1994).

Additionally, Petitioner's release will protect public health. Given the highly unusual and unique circumstances posed by the COVID-19 pandemic and ensuing crisis, "the continued detention of aging or ill civil detainees does not serve the public's interest." *Basank v. Decker*, —— F.Supp.3d ——, ——, 2020 WL 1481503, at *6 (S.D.N.Y.2020); *see also Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) ("the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19"); *Castillo v. Barr*, CV-20-00605-TJH, —— F.Supp.3d ——, 2020 WL 1502864 (C.D. Cal. 2020). Protecting public health and safety is in the public interest. *See* *Neinast v. Bd. of Trustees*, 346 F.3d 585, 592 (6th Cir. 2003) (recognizing public health and safety as legitimate government interests).

Respondents argue that public interest favors Petitioner's continued detention because "the public interest in enforcement of the United States' immigration laws is significant." (ECF No. 11, PageID.187 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant.")).

Respondents point to only one immigration law that will see continued enforcement by denying relief to Petitioner. That law is 8 U.S.C. § 1226(c), and it authorizes Petitioner's continued detention. But as set forth above, Petitioner's continued detention is in violation of the United States Constitution, to which 8 U.S.C. § 1226(c) must give way.

***14** The enforcement of the remainder of U.S. immigration laws against Petitioner will continue unabated should the Court grant Petitioner relief. A hearing on Petitioner's request for cancellation of removal is scheduled for April 14, 2020. (ECF No. 11, PageID.170). Respondents do not argue that Petitioner's release will jeopardize her appearance at that hearing, nor do they argue that Petitioner's release will undermine her removal from this country, should Petitioner's defense fail and should conditions allow such removal.

The public interest and balance of equities demand that the Court protect Petitioner's constitutional rights and the public health over the continued enforcement of a detention provision that, as applied to Petitioner, is unconstitutional. The remaining factors counsel granting Petitioner relief.

Because all four factors weigh in favor of issuing emergency injunctive relief, Petitioners motion for a temporary restraining order is granted.

IV Conclusion

For the reasons stated above, Petitioner's Application for a Temporary Restraining Order is GRANTED IN PART. Respondent Adducci is ORDERED to release Petitioner on April 6, 2020 on her own recognizance. Petitioner will be subject to the following restrictions: Petitioner is subject to fourteen days of home quarantine; Petitioner must comply with all Michigan Executive Orders; and Petitioner must appear at all hearings pertaining to her removal proceedings.

Respondents are further RESTRAINED from arresting Petitioner for civil immigration detention purposes until the State of Emergency in Michigan (related to COVID-19) is lifted or until further Court Order stating otherwise.

The Temporary Restraining Order will expire on April 17, 2020, at 6:30 p.m. No later than April 10, 2020, at 12:00 p.m., Respondents must show cause why this Order should not be converted to a preliminary injunction. Petitioner may file a response no later than April 16, 2020, at 12:00 p.m.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 1672662

KeyCite Yellow Flag - Negative Treatment
Distinguished by United States v. Catledge, N.D.Cal., April 16, 2020

2020 WL 1540325
Only the Westlaw citation is currently available.
United States District Court, S.D. Texas, Houston Division.

UNITED STATES of America,
v.
Pedro MUNIZ, Defendant.

CRIMINAL ACTION NO. 4:09-CR-0199-1
|
Signed 03/30/2020

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MEMORANDUM AND ORDER

HON. KEITH P. ELLISON, UNITED STATES DISTRICT JUDGE

***1** Defendant Pedro Muniz pleaded guilty to conspiracy to possess with intent to distribute a controlled substance in violation of Title 21, United States Code, Sections 846, 841(a)(1), (b)(1)(A)(ii), and (b)(1)(A)(viii) in January 2010. Defendant was sentenced to a term of 235 months, but his sentence was reduced to 188 months on May 29, 2015 pursuant to 18 U.S.C. § 3582(c)(2). (Doc. No. 517). Defendant has been in custody since April 20, 2009.

Defendant now moves for compassionate release because of concerns about his medical condition and the potential spread of the novel coronavirus at the Federal Medical Center Butner, in Bahama, North Carolina, where he is currently incarcerated. Defendant has exhausted all possible avenues

for administrative release, and if released plans to live under the care of his mother in Conroe, Texas.

Under 18 U.S.C. § 3582, a court may modify a defendant's sentence upon motion of the Director of the Bureau of Prisons or "upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A). Upon such a motion, a court may modify a defendant's sentence after considering the factors set forth in § 3553(a) to the extent applicable if it finds that "extraordinary and compelling reasons warrant such a reduction" and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* § 3582(c)(1)(A)(i).

The policy statement regarding compassionate release sets forth three circumstances that are considered "extraordinary and compelling reasons." U.S. Sentencing Guidelines, § 1B1.13(1)(A) & cmt. n.1. Among these are the "medical condition of the defendant," including where the defendant is "suffering from a serious physical or medical condition ... that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." *Id.* § 1B1.13 cmt. 1. The policy statement also requires that the defendant not pose a danger to the safety of the community. *Id.* § 1B1.13(2).

The Court is persuaded that Defendant presents an extraordinary and compelling reason for compassionate release and that such release is consistent with applicable policy considerations. In so concluding, the Court is grievously aware of the current global health crisis caused by COVID-19. The President has declared a National Emergency due to the spread of the novel coronavirus and states and localities across the nation have implemented measures to stymie its rapid spread. And while the Court is aware of the measures taken by the Federal Bureau of Prisons, news reports of the virus's spread in detention centers within the United States and beyond our borders in China and Iran demonstrate that individuals housed within our prison systems nonetheless remain particularly vulnerable to infection. *See, e.g.*, Danielle Ivory, *"We Are Not a Hospital": A Prison Braces for the Coronavirus*, N.Y. Times (March 17, 2020), https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html (citing densely populated living conditions, dearth of soap, hand sanitizer, and protective gear, and impossibility of maintaining safe distance between inmates and guards as reasons prisoners are at particular risk of infection). The virus's spread at the Cook County jail in Chicago provides an alarming example: in a single week, the county jail went from two diagnoses to 101 inmates and a dozen employees testing positive for the virus. *See* Timothy Williams et al., *As Coronavirus Spreads Behind Bars, Should Inmates*

Get Out?, N.Y. Times (March 30, 2020), https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html.

***2** Indeed, news reports indicate that the virus has already begun infiltrating federal prisons; in one prison in Louisiana, an inmate died after testing positive for the virus and at least 30 other inmates and staff have tested positive. *See* Kimberly Kindy, *An Explosion of Coronavirus Cases Cripples a Federal Prison in Louisiana*, Wash. Post (March 29, 2020), https://www.washingtonpost.com/national/an-explosion-of-coronavirus-cases-cripples-a-federal-prison-in-louisiana/2020/03/29/75a465c0-71d5-11ea-85cb-8670579b863d_story.html (hereinafter, *An Explosion of Coronavirus Cases*). To date, at least one inmate and one staff member have tested positive for the virus in FMC Butner, where Defendant is housed. *See* COVID-19, Fed. Bureau of Prisons (March 29, 2020), https://www.bop.gov/coronavirus/.

In this case, Defendant has been diagnosed with serious medical conditions that, according to reports from the Center for Disease Control, make him particularly vulnerable to severe illness from COVID-19. These include, inter alia, end stage renal disease, diabetes, and arterial hypertension. *See People Who Are at Higher Risk for Severe Illness*, CDC (March 26, 2020) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC_AA_refVal=https% 3A% 2F% 2Fwww.cdc.gov% 2Fcoronavirus% 2F2019-ncov% 2Fspecific-groups% 2Fhigh-risk-complications.html. The Court notes that the inmate in Louisiana who died after testing positive from the virus was only two years older than Defendant and also suffered from long-term, preexisting medical conditions. *See* Kindy, *An Explosion of Coronavirus Cases*. Defendant has also undergone amputation of his right foot, which has left him wheelchair-bound and significantly hinders his mobility. This further diminishes his ability to care for himself in a prison environment. While it is true that Defendant's request for a sentence reduction and subsequent administrative appeal to the Board of Prisons were denied, those requests and denials occurred in March and July of 2019—long before the coronavirus was understood to be such a public health crisis. Because Defendant is at high-risk for severe illness from COVID-19 and because inmates in detention facilities are particularly vulnerable to infection, the Court finds that Defendant has demonstrated an extraordinary and compelling reason for compassionate release.

Moreover, the Court is persuaded that the applicable § 3553(a) factors support Defendant's request for compassionate release and that Defendant will not pose a threat to the community. While the Court acknowledges the seriousness of Defendant's offense, Defendant has been in custody since April 2009—over ten years—and has served approximately 80 percent of his reduced sentence. The length of Defendant's incarceration adequately expresses the seriousness of the offense, deters criminal conduct, and protects the public under § 3553(a). Moreover, the Court notes that Defendant's offense was not a violent one, and due to Defendant's serious medical conditions

Defendant is confined to a wheelchair and requires medical assistance. If released Defendant will be under the care of his mother in Conroe, Texas. Because of Defendant's serious medical conditions and the length of time already served, the Court is persuaded that Defendant will not pose a threat to the community.

Pursuant to 18 U.S.C. § 3582(c)(1)(A), the Court finds that extraordinary and compelling reasons warrant a reduction of Defendant's sentence, that Defendant does not pose a danger to any other person or the community, that the § 3553(a) factors support a reduction, and that the reduction is consistent with currently applicable Sentencing Commission policy statements. The Court therefore **GRANTS** Defendant's Motion for Compassionate Release and orders release of Defendant.

***3 IT IS SO ORDERED.**

All Citations

Slip Copy, 2020 WL 1540325

Exhibit 36 - United States v. Muniz

2020 WL 1481503
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Vasif "Vincent" BASANK; Freddy Barrera Carrerro; Manuel Benitez Pineda; Miguel Angel Hernandez Balbuena; Latoya Legall; Carlos Martinez; Estanlig Mazariegos; Manuel Menendez; Antar Andres Pena; and Isidro Picazo Nicolas, Petitioner,

v.

Thomas DECKER, in His Official Capacity as Director of the New York Field Office of U.S. Immigrations & Customs Enforcement; and Chad Wolf, in His Official Capacity as Acting Secretary, U.S. Department of Homeland Security, Respondents.

20 Civ. 2518 (AT)
|
Signed 3/26/2020

Synopsis

Background: Alien detainees, who suffered from serious chronic medical conditions and were detained in connection with their removal proceedings in county jails where cases of COVID-19 had been identified, petitioned for § 2241 writ of habeas corpus, requesting release from custody of Immigration and Customs Enforcement (ICE) because of public health crisis posed by coronavirus and also moved for temporary restraining order (TRO) releasing them on their own recognizance, subject to reasonable and appropriate conditions, and restraining Director of New York Field Office of ICE and Acting Secretary of Department of Homeland Security (DHS) from arresting detainees for civil immigration detention purposes during pendency of their immigration proceedings.

Holdings: The District Court, Analisa Torres, J., held that:

[1] detainees would suffer irreparable harm absent TRO;

[2] detainees would likely succeed on merits of due process claim;

[3] balance of equities weighed in favor of TRO; and

[4] public interest supported TRO.

Motion granted.

Procedural Posture(s): Motion for Temporary Restraining Order (TRO).

West Headnotes (20)

[1] Injunction Grounds in general; multiple factors

A plaintiff seeking a temporary restraining order (TRO) must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

1 Cases that cite this headnote

[2] Injunction Relation or conversion to preliminary injunction

The standard for entry of a temporary restraining order (TRO) is the same as for a preliminary injunction.

[3] Injunction Irreparable injury

The showing of irreparable harm is the single most important prerequisite for a preliminary injunction.

[4] Injunction Irreparable harm

Injunction Adequacy of remedy at law

Under the irreparable harm prong of the test for a temporary restraining order (TRO), the movant must show that the injury it will suffer is likely and imminent, not remote or speculative, and that such injury is not capable of being fully remedied by money damages.

[5] Injunction Irreparable harm

To satisfy the irreparable harm requirement for a temporary restraining order (TRO), a movant must demonstrate that he would suffer irreparable harm if the TRO does not issue.

1 Cases that cite this headnote

[6] Injunction Discretionary nature of remedy

The district court has wide discretion in determining whether to grant a preliminary injunction.

[7] Injunction Irreparable injury

Irreparable harm required for issuance of a preliminary injunction must be actual and imminent rather than speculative.

[8] Civil Rights Preliminary Injunction

Alien detainees, who suffered from chronic medical conditions and were detained by Immigration and Customs Enforcement (ICE) in county jails where cases of COVID-19 were confirmed, would suffer irreparable harm absent temporary restraining order (TRO) releasing them on their own recognizance and preventing their arrest for civil immigration detention purposes during pendency of their immigration proceedings; detainees risked imminent, severe, and possibly fatal infection if they remained in detention, as well as deprivation of their right to due process from deliberate indifference to their health. U.S. Const. Amend. 5.

2 Cases that cite this headnote

[9] Evidence Facts relating to human life, health, habits, and acts

On motion for temporary restraining order (TRO) by alien detainees seeking release from Immigration and Customs Enforcement (ICE) custody in county jails in which cases of COVID-19 had been confirmed, judicial notice would be taken that for people of advanced age, with underlying health problems, or both, COVID-19 caused severe medical conditions and had increased lethality. Fed. R. Evid. 201(b).

17 Cases that cite this headnote

[10] Civil Rights Preliminary Injunction

An alleged constitutional violation constitutes irreparable harm required for grant of temporary restraining order (TRO).

2 Cases that cite this headnote

[11] Constitutional Law Protections Provided and Deprivations Prohibited in General

The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. U.S. Const. Amend. 5.

[12] Constitutional Law Persons and Entities Protected

Constitutional Law Non-citizens; aliens

Due process protection applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. U.S. Const. Amend. 5.

[13] Habeas Corpus Limitations and conditions; treatment and discipline

An application for § 2241 habeas corpus is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing. 28 U.S.C.A. § 2241.

[14] Constitutional Law Arrest, detention, supervision, and parole

Immigration detainees can establish a due process violation for unconstitutional conditions of confinement by showing that a government official knew, or should have known of a condition that posed an excessive risk to health and failed to take appropriate action. U.S. Const. Amend. 5.

4 Cases that cite this headnote

[15] Civil Rights Preliminary Injunction

Alien detainees seeking temporary restraining order (TRO), releasing them on their own recognizance and preventing their arrest for civil immigration detention purposes during pendency of their immigration proceedings, were likely to succeed on merits of due process claim that Director of New York Field Office of Immigration and Customs Enforcement (ICE) and Acting Secretary of Department of Homeland Security (DHS) were deliberately indifferent to detainees' conditions of confinement in county jails, where cases of COVID-19 cases were identified, that posed excessive risk of life-threatening illness to detainees who suffered from chronic medical conditions; officials knew or should have known of risk and failed to take sufficient action to protect detainees' future health. U.S. Const. Amend. 5.

7 Cases that cite this headnote

[16] Constitutional Law Restraint, commitment, and detention

Government authorities may be deemed deliberately indifferent to an inmate's current health problems in violation of due process, where authorities 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, including exposure of inmates to a serious, communicable disease, even when the complaining inmate shows no serious current symptoms. U.S. Const. Amend. 5.

1 Cases that cite this headnote

[17] Constitutional Law Restraint, commitment, and detention

Inmates need not demonstrate that they actually suffered from serious injuries to show a due process violation from deliberate indifference to their medical needs; instead, showing that the conditions of confinement pose an unreasonable risk of serious damage to their future health is sufficient. U.S. Const. Amend. 5.

6 Cases that cite this headnote

[18] Civil Rights Preliminary Injunction

Balance of equities weighed in favor of temporary restraining order (TRO) releasing alien detainees on their own recognizance from county jails, where they were in Immigration and Customs Enforcement (ICE) custody and COVID-19 cases had been identified, and preventing their arrest for civil immigration detention purposes during pendency of their immigration proceedings; detainees faced irreparable harm to their due process rights

and their health from continued detention in unsafe conditions, and interest of Director of New York Field Office of ICE and Acting Secretary of Department of Homeland Security (DHS) in detainees' in-person participation in future immigration proceedings was safeguarded by grave consequences of their failure to appear. U.S. Const. Amend. 5.

3 Cases that cite this headnote

[19] Aliens, Immigration, and Citizenship Judicial Review or Intervention

Civil Rights Judgment and relief in general

Courts have the authority to order those detained in violation of their due process rights released, notwithstanding statute requiring mandatory detention of criminal aliens. U.S. Const. Amend. 5; Immigration and Nationality Act, § 236, 8 U.S.C.A. § 1226(c).

4 Cases that cite this headnote

[20] Aliens, Immigration, and Citizenship Judicial Review or Intervention

Public interest supported grant of temporary restraining order (TRO) releasing alien detainees on their own recognizance from county jails, where they were in Immigration and Customs Enforcement (ICE) custody and COVID-19 cases had been identified, and preventing their arrest for civil immigration detention purposes during pendency of their immigration proceedings, since public interest in health and safety was served best by rapidly decreasing number of individuals detained in confined and unsafe conditions.

5 Cases that cite this headnote

Attorneys and Law Firms

Alexandra Lynn Lampert, Hannah McCrea, Mary Sameera Van Houten Harper, Brooke Menschel, Brooklyn Defender Services, Brooklyn, NY, for Petitioner.

Michael James Byars, U.S. Attorney's Office, SDNY (Chambers Street), New York, NY, for Respondents.

MEMORANDUM AND ORDER

ANALISA TORRES, District Judge:

***1** Petitioners, Vasif "Vincent" Basank, Freddy Barrera Carrerro, Manuel Benitez Pineda, Miguel Angel Hernandez Balbuena; Latoya Legall, Carlos Martinez, Estanlig Mazariegos, Manuel Menendez, Antar Andres Pena, and Isidro Picazo Nicolas, are currently detained by Immigration and Customs Enforcement ("ICE") in county jails where cases of COVID-19 have been identified. Petition ¶ 1, ECF No. 9.

Last night after 11:00 p.m., Petitioners filed an amended petition for a writ of habeas corpus under 28 U.S.C. § 2241, requesting release from ICE custody because of the public health crisis posed by COVID-19. *See* Petition. Petitioners also submitted an application for a temporary restraining order ("TRO") pursuant to Rule 65 of the Federal Rules of Civil Procedure, seeking an order (1) releasing them on their own recognizance, subject to reasonable and appropriate conditions, and (2) restraining Respondents, Thomas Decker, in his official capacity as Director of the New York Field Office of ICE, and Chad Wolf, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security, from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings. TRO at 1, ECF No. 6.

For the reasons stated below, the TRO is GRANTED, and (1) Respondents, and the Hudson, Bergen, and Essex County Correctional Facilities, are ORDERED to **immediately** release Petitioners today on their own recognizance, and (2) Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings.

BACKGROUND

Petitioners were detained by ICE in connection with removal proceedings pending at the Varick Street Immigration Court. They are housed in New Jersey county jails where either detainees or staff have tested positive for COVID-19. TRO at 3–4. Specifically, Basank, Benitez Pineda, and Mazariegos are detained at the Hudson County Correctional Facility ("Hudson County Jail"). Petition ¶¶ 5, 7, 11. Barrera Carrerro, Hernandez Balbuena, Legall, Martinez, and Menendez are detained at the Bergen County Correctional Facility ("Bergen County Jail"). *Id.* ¶¶ 6, 8, 9, 10, 12.

Pena and Picazo Nicolas are detained at the Essex County Correctional Facility ("Essex County Jail"). *Id.* ¶¶ 13–14. [1]

[1] During oral argument, Respondents represented to the Court that five Petitioners—Hernandez Balbuena, Legall, Menendez, Basank, and Benitez Pineda—are expected to be released today. However, because Petitioners are not yet released, and because counsel for Petitioners indicated, and Respondents did not dispute, that ICE may take as long as a day to complete the release process, the Court enters the TRO as to all Petitioners directing their immediate release today without fail.

Each Petitioner suffers from chronic medical conditions, and faces an imminent risk of death or serious injury in immigration detention if exposed to COVID-19. Basank is 54 years old and has a lengthy history of smoking. *Id.* ¶ 5. Barrera Carrerro, age 39, has underlying health conditions, including obesity, respiratory problems, a history of gastrointestinal problems, and colorectal bleeding. *Id.* ¶ 6. Benitez Pineda is 44, with pulmonary issues and a history of hospitalization for severe pneumonia. *Id.* ¶ 7. Hernandez Balbuena suffers from diabetes and diabetes-related complications. *Id.* ¶ 8. Legall is 33 years old, and suffers from respiratory problems, including asthma. *Id.* ¶ 9. Martinez, age 56, suffers from severe heart disease, and has a history of hospitalization for congestive heart failure, severe aortic valvular insufficiency, and acute systolic failure, requiring immediate heart valve replacement surgery. *Id.* ¶ 10. Mazariegos is 44, and suffers from high blood pressure and pre-diabetes. *Id.* ¶ 11. Menendez is 31 years old and suffers from chronic asthma. *Id.* ¶ 12. At 36, Pena is asthmatic and has chronic obstructive pulmonary disease ("COPD"), which require inhalers and other medical treatment. *Id.* ¶ 13. Picazo Nicolas, age 40, suffers from Type II diabetes and morbid obesity. *Id.* ¶ 14.

***2** On March 16, 2020, Hannah McCrea, an attorney with Brooklyn Defender Services, emailed Assistant United States Attorney Michael Byars, requesting that ICE release particularly vulnerable individuals, including Petitioners Basank, Legall, Martinez, and Picazo Nicolas. Harper Decl. ¶ 2, ECF No. 6-1. On March 18, 2020, AUSA Byars responded that he did "not have a timeframe for ICE's response." *Id.* ¶ 3. On March 24, 2020, Alexandra Lampert, also a lawyer with Brooklyn Defender Services, emailed Byars to request the release of additional individuals identified as particularly vulnerable, including Barrera Carrerro, Benitez Pineda, Hernandez Balbuena, Mazariegos, Menendez, and Pena. *Id.* ¶ 4. On March 25, 2020, Lampert again emailed Byars and informed him of Petitioners' intent to seek a temporary restraining order in the Southern District of New York, with the amended petition attached, thus putting Respondents on notice of Petitioners' serious medical conditions and their request for injunctive relief. *Id.* ¶¶ 5, 7.

At 12:30 p.m. today, the Court held a telephonic hearing on Petitioners' request for a TRO.

DISCUSSION

I. Legal Standard

[1] "A plaintiff seeking a temporary restraining order must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Natera, Inc. v. Bio-Reference Labs., Inc.*, No. 16 Civ. 9514, 2016 WL 7192106, at *2 (S.D.N.Y. Dec. 10, 2016) (internal quotation marks, citation, and alteration omitted).

[2] **[3]** **[4]** **[5]** **[6]** "It is well established that in this Circuit the standard for an entry of a TRO is the same as for a preliminary injunction." *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008) (collecting cases). "The showing of irreparable harm is perhaps the single most important prerequisite for a preliminary injunction." *CF 135 Flat LLC v. Triadou SPY N.A.*, No. 15 Civ. 5345, 2016 WL 2349111, at *1 (S.D.N.Y. May 3, 2016) (internal quotation marks, citation, and alteration omitted). Under this prong, the movant "must show that the injury it will suffer is likely and imminent, not remote or speculative, and that such injury is not capable of being fully remedied by money damages." *NAACP v. Town of E. Haven*, 70 F.3d 219, 224 (2d Cir. 1995). To satisfy this requirement, a movant must demonstrate "that he would suffer irreparable harm if the TRO does not issue." *Andino*, 555 F. Supp. 2d at 419. "The district court has wide discretion in determining whether to grant a preliminary injunction." *Almontaser v. N.Y.C. Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (internal quotation marks and citation omitted) (per curiam).

II. Analysis

A. Irreparable Harm

[7] In the Second Circuit, a "showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citations omitted). That harm must be "actual and imminent" rather than speculative. *Id.*

[8] Petitioners have shown irreparable injury by establishing the risk of harm to their health and to their constitutional rights.

1. Risk of Death

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. Petition ¶ 26. At that time, there were more than 118,000 cases in 114 countries, and 4,291 people had died. *Id.* ¶ 27. Merely two weeks later, there have been at least 458,927 cases identified in 172 countries and at least 20,807 people have died. *Id.* New York and its surrounding areas have become one of the global epicenters of the outbreak. *Id.* ¶ 35. Petitioners are held at detention facilities located in northern New Jersey. *See id.* ¶¶ 5–14.

As of March 26, 2020, New Jersey has 4,407 confirmed cases of COVID-19—the second highest number of reported cases by any state after New York. Niko Kommenda and Pablo Gutierrez, *Coronavirus map of the US: latest cases state by state*, The Guardian (Mar. 26, 2020), https://www.theguardian.com/world/ng-interactive/2020/mar/26/coronavirus-map-of-the-us-latest-cases-state-by-state. New Jersey also has the fourth most COVID-19 related deaths in the country. *Id.* The three counties where the jails are located—Bergen, Essex, and Hudson counties—comprise one-third of the confirmed cases of COVID-19 in New Jersey, with Bergen County reporting 819 positive results, Essex reporting 381 positives, and Hudson 260. Petition ¶ 36. The jails are no exceptions. Each of the jails where a Petitioner is being housed has reported confirmed cases of COVID-19. *Id.* ¶ 41. This includes two detainees and one correctional officer in the Hudson County Jail; one detainee at the Bergen County Jail; and a "superior officer" at the Essex County Jail. *Id.*

***3** The nature of detention facilities makes exposure and spread of the virus particularly harmful. Jaimie Meyer, M.D., M.S., who has worked extensively on infectious disease treatment and prevention in the context of jails and prisons, recently submitted a declaration in this district noting that the risk of COVID-19 to people held in New York-area detention centers, including the Hudson, Bergen, and Essex County Jails, "is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected." Meyer Decl. ¶ 7, *Velesaca v. Wolf*, 20 Civ. 1803 (S.D.N.Y. Feb. 28, 2020), ECF No. 42.

Moreover, medical doctors, including two medical experts for the Department of Homeland Security, have warned of a "tinderbox scenario" as COVID-19 spreads to immigration detention centers and the resulting "imminent risk to the health and safety of immigrant detainees" and the public. Catherine E. Shoichet, *Doctors Warn of "Tinderbox scenario" if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html. "It will be nearly impossible to prevent widespread infections inside the Hudson, Bergen, and Essex County jails now that the virus is in the facilities because

detainees live, sleep, and use the bathroom in close proximity with others, and because '[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.' " Petition ¶ 47 (internal quotation marks and citation omitted).

[9] Petitioners face serious risks to their health in their confinement. Each has underlying illnesses, including asthma, diabetes, heart disease, hypertension, obesity, and respiratory problems including COPD. *Id.* ¶¶ 5–14. The Court takes judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality. *People at Risk for Serious Illness from COVID-19*, Centers for Disease Control (Mar. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html ("Older people and people of all ages with severe underlying health conditions —like heart disease, lung disease and diabetes, for example—seem to be at higher risk of developing serious COVID-19 illness."); *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, Centers for Disease Control (Mar. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html (listing, among other medical diagnoses, "moderate to severe asthma," "heart disease," "obesity," and "diabetes" as conditions that trigger higher risk of severe illness from COVID-19); *see* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned."); *Brickey v. Superintendent, Franklin Corr. Facility*, No. 10 Civ. 085, 2011 WL 868148, at *2 n.3 (N.D.N.Y. Feb. 17, 2011) (taking judicial notice of the meaning and symptoms of the condition sciatica), *report and recommendation adopted*, 2011 WL 868087 (N.D.N.Y. Mar. 10, 2011); *Lin v. Metro. Life Ins. Co.*, No. 07 Civ. 03218, 2010 WL 668817, at *1 (S.D.N.Y. Feb. 25, 2010) ("In its decision, the Court took judicial notice of certain medical background information about Hepatitis B.").

A number of courts in this district and elsewhere have recognized the threat that COVID-19 poses to individuals held in jails and other detention facilities. *See* *United States v. Stephens*, No. 15 Cr. 95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) ("[I]nmates may be at a heightened risk of contracting COVID-19 should an outbreak develop.") (collecting authorities); *United States v. Garlock*, 18 Cr. 418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) ("By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations. The chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual." (citations omitted)); *see also* Letter from Mike McGrath, Chief Justice, Montana Supreme Court, to Montana Courts of Limited Jurisdiction

Judges (Mar. 20, 2020), https://courts.mt.gov/Portals/189/virus/Ltr% 20to% 20COLJ% 20Judges % 20re% 20COVID-19% 20032020.pdf?ver=2020-03-20-115517-333 ("Because of the high risk of transmittal of COVID-19, not only to prisoners within correctional facilities but staff and defense attorneys as well, we ask that you review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for nonviolent offenses.... Due to the confines of [correctional] facilities, it will be virtually impossible to contain the spread of the virus."). Indeed, at least one court has ordered the release on bail of a non-citizen in immigration detention on the ground that detention conditions have been rendered unsafe by COVID-19. *Calderon Jimenez v. Wolf*, No. 18 Civ. 10225 (D. Mass. Mar. 26, 2020), ECF No. 507. Addressing the situation in New Jersey specifically, the New Jersey Supreme Court has held that "reduction of county jail populations, under appropriate conditions, is in the public interest to mitigate risks imposed by COVID-19" in light of "the profound risk posed to people in correctional facilities arising from the spread of COVID-19," and has ordered the release of many individuals serving sentences in New Jersey county jails. *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Case No. 84230 (N.J. Mar. 22, 2020).

***4** Courts have also recognized this health risk to be particularly acute—and of constitutional significance—for inmates who are elderly or have underlying illnesses. *See* *United States v. Martin*, No. 19 Cr. 140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) ("[T]he Due Process Clauses of the Fifth or Fourteenth Amendments, for federal and state pretrial detainees, respectively, may well be implicated if defendants awaiting trial can demonstrate that they are being subjected to conditions of confinement that would subject them to exposure to serious (potentially fatal, if the detainee is elderly and with underlying medical complications) illness."). At least one court has ordered the release on bail of an inmate facing extradition on the basis of the risk to his health the pandemic poses. *Matter of Extradition of Toledo Manrique*, No. 19 MJ 71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) ("These are extraordinary times. The novel coronavirus that began in Wuhan, China, is now a pandemic. The nine counties in the San Francisco Bay Area have imposed shelter-in-place orders in an effort to slow the spread of the contagion. This Court has temporarily halted jury trials, even in criminal cases, and barred the public from courthouses. Against this background, Alejandro Toledo has moved for release, arguing that at 74 years old he is at risk of serious illness or death if he remains in custody. The Court is persuaded. The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.").

The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO. *See* *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (upholding finding of irreparable injury "premised ... upon [the district court's] finding that [plaintiff] was subject to risk of injury, infection, and

humiliation"); *Mayer v. Wing*, 922 F. Supp. 902, 909 (S.D.N.Y. 1996) ("[T]he deprivation of life-sustaining medical services ... certainly constitutes irreparable harm.").

2. Constitutional Violations

[10] Second, Petitioners have also shown irreparable injury because, as discussed below, they face a violation of their constitutional rights. In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm. *See, e.g.*, *Connecticut Dep't of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) ("[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury." (internal quotation marks and citations omitted)); *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999) ("Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (clarifying that "it is the alleged violation of a constitutional right that triggers a finding of irreparable harm" and a substantial likelihood of success on the merits of a constitutional violation is not necessary); *Sajous v. Decker*, No. 18 Civ. 2447, 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018) (finding that immigration detainee established irreparable injury by alleging that prolonged immigration detention violated his constitutional due process rights).

The Court finds, therefore, that Petitioners have established the threat of irreparable harm absent the TRO.

B. Likelihood of Success on the Merits

The Court concludes that Petitioners have met their burden of showing a likelihood of success on the merits. Petitioners argue that their continued confinement in ICE detention centers where COVID-19 is present and without adequate protection for their health violates their due process rights. TRO at 8. The Court agrees.

[11] **[12]** **[13]** The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. The protection applies to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). An application for habeas corpus under 28

U.S.C. § 2241 is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing. *See* *Roba v. United States*, 604 F.2d 215, 218–19 (2d Cir. 1979) (allowing a § 2241 application to challenge an inmate's "transfer while seriously ill" where that transfer posed a risk of fatal heart failure).

***5** **[14]** **[15]** **[16]** **[17]** Immigration detainees can establish a due process violation for unconstitutional conditions of confinement by showing that a government official "knew, or should have known" of a condition that "posed an excessive risk to health," and failed to take appropriate action. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) ("Deliberate indifference ... can be established by either a subjective or objective standard: A plaintiff can prove deliberate indifference by showing that the defendant official recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to the plaintiff's health or safety." (internal quotation marks, citation, and alterations omitted)). The risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious.[2] It can no longer be denied that Petitioners, who suffer from underlying illnesses, are caught in the midst of a rapidly-unfolding public health crisis. The Supreme Court has recognized that government authorities may be deemed "deliberately indifferent to an inmate's current health problems" where authorities "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," including "exposure of inmates to a serious, communicable disease," even when "the complaining inmate shows no serious current symptoms." *Helling v. McKinney*, 509 U.S. 25, 33, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). Petitioners need not demonstrate that "they actually suffered from serious injuries" to show a due process violation. *Darnell*, 849 F.3d at 31; *see* *Helling*, 509 U.S. at 33, 113 S.Ct. 2475. Instead, showing that the conditions of confinement "pose an unreasonable risk of serious damage to their future health" is sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35, 113 S.Ct. 2475) (alteration omitted).

2 Other courts have recognized of the heightened risk to detainees in contracting COVID-19. *See, e.g.*, *Xochihua-Jaimes v. Barr*, 18-71460, Doc. No. 53 (9th Cir. Mar. 23, 2020) (unpublished) ("In light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petitioner be immediately released from detention ...."); *Stephens*, 2020 WL 1295155, at *2 (ordering "conditions of 24-hour home incarceration and electronic location monitoring"); Chris Villani, *Releasing ICE Detainee, Judge Says Jail No Safer Than Court*,

> Law360, March 25, 2020 ("We are living in the midst of a coronavirus pandemic, some infected people die, not all, but some infected people die," U.S. District Judge Wolf said. "Being in a jail enhances risk. Social distancing is difficult or impossible, washing hands repeatedly may be difficult. There is a genuine risk this will spread throughout the jail.").

Respondents have exhibited, and continue to exhibit, deliberate indifference to Petitioners' medical needs. The spread of COVID-19 is measured in a matter of a single day—not weeks, months, or years—and Respondents appear to ignore this condition of confinement that will likely cause imminent, life-threatening illness. At oral argument, Respondents represented that ICE and the detention facilities in which Petitioners are housed are taking certain measures to prevent the spread of the virus: screening detainees upon intake for risk factors, isolating detainees who report symptoms, conducting video court appearances with only one detainee in the room at a time, providing soap and hand sanitizer to inmates, and increasing the frequency and intensity of cleaning jail facilities.

These measures are patently insufficient to protect Petitioners. At today's hearing, Respondents could not represent that the detention facilities were in a position to allow inmates to remain six feet apart from one another, as recommended by the Centers for Disease Control and Prevention ("CDC"). *See How to Protect Yourself*, Centers for Disease Control (Mar. 18, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html. Nor could Respondents provide the Court with any information about steps taken to protect high-risk detainees like Petitioners. And though Respondents represented that the detention facilities are below their full capacity, the appropriate capacity of a jail during a pandemic obviously differs enormously from its appropriate capacity under ordinary circumstances. Confining vulnerable individuals such as Petitioners without enforcement of requisite social distancing and without specific measures to protect their delicate health "pose[s] an unreasonable risk of serious damage to [their] future health," *Phelps*, 308 F.3d at 185 (internal quotation marks and citation omitted), and demonstrates deliberate indifference.

***6** The Court holds, therefore, that Petitioners are likely to succeed on the merits of their due process claim that Respondents knew or should have known that Petitioners' conditions of confinement pose excessive risks to their health. [3]

[3] The Court does not reach Petitioners' additional argument that they are likely to succeed on the merits of the claim that their due process rights were violated because their current conditions of confinement are punitive. TRO at 8–9.

C. Balance of Equities and Public Interest

[18] The equities and public interest weigh heavily in Petitioners' favor. First, Petitioners face irreparable injury—to their constitutional rights and to their health.

Second, the potential harm to Respondents is limited. At today's hearing, Respondents were unable to identify a single specific reason for Petitioners' continued detention. And the Court finds that there is none. Petitioners' counsel committed to ensuring the continued appearance of Petitioners at immigration hearings. And, of course, Petitioners' failure to appear at those hearings would carry grave consequences for their respective cases. The Court finds that those incentives are sufficient to safeguard Respondents' interest in Petitioners' in-person participation in future immigration court proceedings.

[19] At oral argument, Respondents raised the fact that Petitioners Martinez and Pena are currently mandatorily detained pursuant to 8 U.S.C. § 1226(c).[4] However, courts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c). *See* *Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases). Thus, Respondents have failed to justify Petitioners' continued detention in unsafe conditions.

4 As represented by Petitioners' counsel, Martinez's § 1226(c) detention was triggered by his conviction for controlled substances trafficking in 2014, an offense for which he served no term of imprisonment. Pena's § 1226(c) detention was triggered by misdemeanor marijuana convictions from 2002.

[20] Finally, the public interest favors Petitioners' release. Petitioners are confined for civil violations of the immigration laws. In the highly unusual circumstances posed by the COVID-19 crisis, the continued detention of aging or ill civil detainees does not serve the public's interest. *See* Declaration of Dr. Homer Venters ¶ 12, *Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that "the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19"); Declaration of Dr. Carlos Franco-Paredes, *id.* at ECF No. 81-12 at 1 ("Immigration detention centers in the U.S. are tinderboxes for the transmission of highly transmissible infectious pathogens including the SARS-CoV-2, which causes COVID-19. Given the large population density of immigration detention centers and the ease of transmission of this viral pathogen, the attack rate inside these centers will take exponential proportions, consuming significant medical and financial resources."); *Urgent action needed to prevent COVID-19 "rampaging through places*

of detention" – Bachelet, UNHCR (Mar. 25, 2020), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=e (United Nations High Commissioner for Human Rights urging that detention of people in jails "should be a measure of last resort, particularly during this crisis"). To the contrary, public health and safety are served best by rapidly decreasing the number of individuals detained in confined, unsafe conditions. *See, e.g.*, *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to "public health" as a "significant public interest").

CONCLUSION

***7** For the reasons stated above, the TRO is GRANTED. Respondents, and the Hudson, Bergen, and Essex County Correctional Facilities are ORDERED to **immediately** release Petitioners today on their own recognizance without fail. Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings.

The TRO will expire on **April 9, 2020**, at **6:30 p.m.** No later than **April 2, 2020**, at **12:00 p.m.**, Respondents must show cause why the TRO should not be converted to a preliminary injunction. Petitioners may file a response no later than **April 7, 2020**, at **12:00 p.m.**

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 1481503

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United States District Court, W.D. New York.

Vernon JONES, et al., Petitioners,
v.
Chad WOLF, et al., Respondents.

20-CV-361
|
Signed 04/02/2020

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United States Attorney's Office, Western District of New York, Adam A. Khalil, U.S. Attorney's Office, Rochester, NY, for Respondents.

DECISION & ORDER

LAWRENCE J. VILARDO, UNITED STATES DISTRICT JUDGE

***1** On March 25, 2020, the petitioners, civil immigration detainees held in the custody of the Department of Homeland Security, Immigration and Customs Enforcement ("ICE") at the Buffalo Federal Detention Facility in Batavia, New York ("BFDF"), filed an "Emergency Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Injunctive Relief." Docket Item 1. The following day, the petitioners filed a motion for a temporary restraining order ("TRO"). *See* Docket Item 8. The petitioners allege that their continued civil detention in the wake of the COVID-19 pandemic violates their substantive rights under the Due Process Clause of the Fifth Amendment to the United States Constitution, and they seek their immediate release from ICE custody. Docket Item 1 at 23-24. Each petitioner is "either over the age of fifty and/or [has] a

serious underlying medical condition, making [him] more vulnerable to complications arising from COVID-19." *Id.* at 4. On March 31, 2020, this Court held oral argument on the TRO. *See* Docket Item 43.

For the reasons that follow, the Court GRANTS IN PART and DENIES IN PART the petitioners' motion for a TRO. More specifically, the Court finds that holding the petitioners in the current conditions at the BFDF during the COVID-19 epidemic violates their substantive Due Process rights. Immediate release, however, is not the appropriate remedy—at least at this juncture. The Due Process violation stems from failing to take the steps recommended by public health officials to protect high-risk individuals from contracting COVID-19. Thus, as explained in more detail below, **the respondents shall submit a detailed plan to the Court by 5:00 p.m. on April 3, 2020**, demonstrating how they will provide those petitioners who are vulnerable individuals, as defined by the Centers for Disease Control and Prevention ("CDC"), with a living situation that facilitates "social distancing." No later than **9:00 a.m. on April 6, 2020, the respondents shall report to the Court** as to whether any or all of the steps outlined in the plan have been taken and, if so, which ones. They also shall identify for which petitioners the measures have been taken and provide a brief explanation why any petitioner does not meet the CDC's high-risk criteria.

BACKGROUND

The petitioners are twenty-two [1] civil immigration detainees, [2] currently held in the custody of ICE at the BFDF. Docket Item 1. Each petitioner is "either over the age of fifty and/or [has] a serious underlying medical condition, making [him] more vulnerable to complications arising from COVID-19," a novel coronavirus that has created a global pandemic. *Id.* at 4. In less than four months, 951,901 people have been diagnosed with the disease. *See Coronavirus Resource Center*, Johns Hopkins Univ. & Med. (Apr. 2, 2020, 6:31 AM), https://coronavirus.jhu.edu/. 48,283 have died. *Id.*

1 Petitioner Shantadewie Rahmee was released on March 30, 2020. *See* Docket Item 42-5 at 1 n.1.

2 An exhaustive review of the law governing immigration detention is not possible—or necessary—here. It is sufficient, for purposes of this motion, to state that immigration detention is a form of civil detention. *See* *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

***2** Most of the petitioners allege that they suffer from one or more of the following "medical conditions that influence higher risks of severe illness or death from COVID-19": "lung disease,

including moderate to severe asthma; heart disease; immunodeficiency, including cancer; diabetes; and severe obesity." Docket Item 1 at 2. The petitioners' medical expert, Joe Goldenson, M.D., classifies such petitioners as being "at grave risk of developing serious complications or dying if [they] contract[ ] COVID-19." Docket Item 14 at 4-7 ("Goldenson Decl. II"). The remaining petitioners allege that they are at a "higher risk" because of their age or other serious medical conditions. Docket Item 1 at 2. Dr. Goldenson classifies these petitioners as being "at increased risk of developing serious complications or dying if [they] contract[ ] COVID-19." Docket Item 14 at 3, 5 (Goldenson Decl. II).

Medical professionals, including professionals employed by the United States government, are advising individuals vulnerable to serious complications from COVID-19 to self-isolate in order to reduce their risk of exposure—a measure the petitioners allege is not possible in the congregate settings in which they currently are housed at BFDF. *See* Section (I)(B), *infra.* The petitioners have not pointed to any confirmed cases at BFDF but highlight that there are at least two confirmed cases at the Wende Correctional Facility, through which all persons transferring from a New York State prison into ICE custody at BFDF are processed. Docket Item 1 at 4.

LEGAL STANDARD

"A preliminary injunction is an equitable remedy and an act of discretion by the court." *Am. Civil Liberties Union v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015). The same standard governs consideration of an application for a TRO. *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Trump v. Deutsche Bank AG*, 943 F.3d 627, 640 (2d Cir.), *cert. granted*, 140 S. Ct. 660 (2019) (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).[3] Moreover, the Second Circuit has instructed that a mandatory injunction—that is, an injunction commanding a positive act, as opposed to one that merely maintains the status quo—"should issue 'only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.' " *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995) (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

3 Although the Second Circuit also recognizes a "less rigorous standard" of "sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly in their favor," that standard "cannot be used"—as the petitioners here seek to do—"to preliminarily enjoin governmental action." *Deutsche Bank*, 943 F.3d at 637 (citations omitted); *see also* *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) ("As long as the action to be enjoined is taken pursuant to a statutory or regulatory scheme, even government action with respect to one litigant requires application of the 'likelihood of success' standard.").

DISCUSSION

I. LIKELIHOOD OF SUCCESS

The petitioners allege that their continued detention during the COVID-19 pandemic violates their substantive rights under the Due Process Clause of the Fifth Amendment to the United States Constitution. *See* Docket Item 1. The Due Process Clause prohibits the federal government from depriving any "person ... of ... liberty without due process of law." U.S. Const. amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). The protection applies to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693.

***3** "[G]overnment detention violates the Due Process Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* (citations omitted) (alteration in original); *see also* *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019) (explaining that, other than those unique, special, and narrow circumstances, "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty"—a "promise [that] stands as one of the Constitution's most vital protections against arbitrary government"); *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

A. Substantive Due Process Violation: Deliberate Indifference

The petitioners' claim is best understood as an amalgam of two theories of substantive Due Process violations: unconstitutional conditions of confinement and deliberate indifference to serious medical needs.[4] Both theories derive from the same principle:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being.... The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment....

Helling v. McKinney, 509 U.S. 25, 32 (1993) (alterations in original) (quoting *DeShaney v. Winnebago Cty. Dept. of Soc. Svcs.*, 489 U.S. 189, 199-200 (1989)). This rationale applies here because a detainee's rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *See* *City of Revere*, 463 U.S. 239, 244 (1983).

4 *Cf.* *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998) ("[The plaintiff] claims that his continuous health problems caused by exposure to friable asbestos in the air went unattended at [the prison] as [the] defendants failed to rid the premises of the asbestos or take measures to insulate [the plaintiff] from the asbestos particles. [The plaintiff's] request to be kept in an asbestos-free environment constituted a serious medical need.").

To evaluate the merits of either a conditions-of-confinement or a denial-of-medical-care claim, courts consider whether the complained-of conditions or deprivation "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).[5] That is so because "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535; *see also* *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) ("A pretrial detainee's claims are evaluated under the Due Process Clause because[ ] pretrial detainees have not been convicted of a crime and thus may not be punished in any manner—neither cruelly and unusually nor otherwise." (citations omitted)).

5 *See also* *Charles v. Orange Cty.*, 925 F.3d 73, 86 (2d Cir. 2019) (explaining that because " 'deliberately indifferent conduct' is 'egregious enough to state a substantive due process claim,' " a court "need not ... conduct a separate analysis, over and above the deliberate indifference analysis, of whether the state's conduct 'shocks the conscience' " (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998))).

A complained-of condition or deprivation amounts to punishment if: (a) "the disability is imposed for the purpose of punishment"—that is, there is "an expressed intent to punish on the part of detention facility officials"; (b) no "alternative purpose to which [the condition or deprivation] may rationally be connected is assignable for it"; or (c) the condition or deprivation is "excessive in relation to the alternative purpose assigned [to it]." *See* *Bell*, 441 U.S. at 538 (third and fourth quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)).

***4** The petitioners here do not advance the first theory. Nor do they advance the second, and wisely so. There is no dispute that an individual's unlawful presence in this country is a "special justification" that in many circumstances outweighs the individual's interest in avoiding restraint. *See* *Zadvydas*, 533 U.S. at 690 (recognizing the government's interests in detaining noncitizens to "ensur[e] the appearance of aliens at future immigration proceedings" and to "prevent[ ] danger to the community" (citations omitted)); *see also Demore v. Kim*, 538 U.S. 512, 528 (2003) ("[D]etention of deportable criminal aliens pending their removal proceedings ... necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." (alterations omitted)). [6]

6 When analyzing the process due to noncitizens, there is a relevant "distinction between an alien who has effected an entry into the United States and one who has never entered." *Zadvydas*, 533 U.S. at 693; *see also* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (explaining that "an alien on the threshold of initial entry stands on a different footing" when it comes to Due Process rights). After all, if release from physical confinement means that noncitizens who have never "entered" our country will "be released into American society," *Chi Thon Ngo. v. I.N.S.*, 192 F.3d 390, 394 (3d Cir. 1999) (quoting *Barrera-Eschavarria*, 44 F.3d 1441, 1448 (9th Cir. 1995)), release may "ultimately result in our losing control over our borders," *id.* (quoting *Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984)). Therefore, the nature of protection under the Due Process Clause "may vary depending upon [a noncitizen's] status and circumstance." *Zadvydas*, 533 U.S. at 694. Although it appears that petitioner Patrick Maduabuchi Nwankwo was never admitted

> to the United States, *see* Docket Item 26, this Court does not find that his interests as an excludable alien are materially lower than those of removable aliens *for purposes of this analysis* and, more importantly, *for purposes of the injunctive relief ordered today.* Both the excludable- and removable-alien petitioners claim that the government is forcing them to live in conditions that fall below acceptable societal standards of decency. By holding Nwankwo in detention, the respondents have assumed a burden they cannot ignore—his status as an excludable alien notwithstanding.
>
> This Court also notes that, in light of the injunctive relief it orders today, it need not consider the penological ramifications of releasing the detainees. It nevertheless notes that the analysis in the criminal context would involve a decidedly more intense analysis of the individual's dangerousness to the community upon release. *Cf.* *Salerno*, 481 U.S. at 749, 50 ("The government's interest in preventing crime by arrestees is both legitimate and compelling ... [and] heightened when the [g]overnment musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community." (citation omitted)). While it is true that many immigration detainees have criminal histories—including some of the petitioners in this matter—it also is true that all petitioners with criminal records have served their sentences and so any risk of danger to society is necessarily not as high as that posed by someone who has not yet completed his period of rehabilitation.

The central dispute is therefore whether the petitioners' detention at the BFDF under current conditions during the COVID-19 pandemic is "excessive" in relation to the government's legitimate interests in keeping them detained.

1. Unsanitary Conditions of Confinement

***5** A civil detainee may establish that he is subject to "excessive" and therefore unconstitutional conditions of confinement by showing that "officers acted with deliberate indifference to the challenged conditions." *Darnell*, 849 F.3d at 29 (2d Cir. 2017) (citation omitted). That showing requires the detainee to "satisfy two prongs": (1) an "objective prong showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process," and (2) a "subjective" or "*mens rea* prong ... showing that the officer acted with at least deliberate indifference to the challenged conditions"—that is, that the official "acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed ... even though the [official] knew, or should have known, that the condition posed an excessive risk to health or safety." *Id.* at 29, 35.

With respect to the first prong, "to establish an objective deprivation, the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health, which includes the risk of serious damage to physical and mental soundness." *Id.* at 30 (citations omitted). "There is no static test to determine whether a deprivation is sufficiently serious; instead, the conditions themselves must be evaluated in light of contemporary standards of decency." *Id.* (citations omitted). For example, in the context of the Eighth Amendment, the Second Circuit has explained that "whether exposure to [a specific condition] is cruel and unusual depends on both the duration and the severity of the exposure." *Willey v. Kirkpatrick*, 801 F.3d 51, 68 (2d Cir. 2015). "The severity of an exposure may be less quantifiable than its duration, but its qualitative offense to a prisoner's dignity should be given due consideration." *Id.* "[A]ny analysis must consider both the duration and the severity of an inmate's experience of being exposed to unsanitary conditions." *Id.* "[A]lthough the seriousness of the harms suffered ... may shed light on the severity of an exposure, serious injury is unequivocally not a necessary element of an [unconstitutional conditions] claim." *Id.* (citations omitted).

In *Helling*, the Supreme Court held that a prisoner could state a cognizable claim under the Eighth Amendment where he alleged that officials had, "with deliberate indifference, exposed him to levels of [environmental tobacco smoke] that pose[d] an unreasonable risk of serious damage to his future health." 509 U.S. at 35. To succeed on the subjective prong, the plaintiff would need to show that "the prison authorities' current attitudes and conduct" evinced deliberate indifference. *Id.* at 36. To succeed on the objective prong, the Court explained, the plaintiff would need to show both that "he himself [was] being exposed to unreasonably high levels of [environmental tobacco smoke]" and that "society consider[ed] the risk that the prisoner complain[ed] of to be so grave that it violate[d] contempora[neous] standards of decency to expose *anyone* unwillingly to such a risk"—that is, the plaintiff would need to produce "more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood [of] injury." *Id.* at 35, 36 (emphasis in original).

In so holding, the Court rejected the defendants' argument that the plaintiff's claim was not cognizable because he had not alleged any present harm, explaining: "We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may 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." *Id.* at 33. The Court noted several other examples of circumstances where inmates might obtain an "injunction" to remedy a "plainly ... unsafe, life-threatening condition in their prison" even though "nothing yet had happened to them." *Id.* One such circumstance was "exposure of inmates to a serious,

communicable disease [even if the] inmate shows no serious current symptoms." *Id.* In short, the Court found that "a remedy for unsafe conditions need not await a tragic event." *Id.*

2. Serious Medical Needs

***6** A civil detainee also may show that his detention "amounts to punishment" and therefore violates the Due Process Clause by demonstrating that officials are acting with deliberate indifference to his serious medical needs. "That is true whether the deliberate indifference is manifested by prison doctors in their response to the prisoner's needs, or by prison guards who intentionally deny or delay access to medical care or intentionally deny or delay access to the treatment once prescribed." *Charles v. Orange Cty.*, 925 F.3d 73, 85 (2d Cir. 2019). A civil detainee may establish an unconstitutional deprivation of medical care by showing "(1) that [he has] a serious medical need ..., and (2) that the [d]efendants [have] acted with deliberate indifference to such needs." *Id.* at 86 (citation omitted).

The "objective," serious-medical-needs prong "contemplates a condition of urgency such as one that may produce death, degeneration, or extreme pain." *Id.* (citation omitted). "In determining whether a medical need is sufficiently serious to be cognizable as a basis for a constitutional claim for deprivation of medical care, [courts] consider factors such as whether a reasonable doctor or patient would find the injury important and worthy of treatment, whether the medical condition significantly affects an individual's daily activities, and whether the illness or injury inflicts chronic and substantial pain." *Id.* (citation omitted).

The "*mens rea*," deliberate-indifference prong mirrors the standard discussed above in the context of a conditions-of-confinement claim. *See id.* at 86-87. "[A] detainee asserting a [Due Process] claim for deliberate indifference to his medical needs can allege either that the defendants *knew* that failing to provide the complained of medical treatment would pose a substantial risk to his health or that the defendants *should have known* that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health." *Id.* at 87 (emphasis in original). "Whether the state knew or should have known of the substantial risk of harm to the detainee is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Id.* (citations omitted). "A factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* (quoting *Farmer*, 511 U.S. 825, 842 (1994)).

B. Application

1. Objective: Unsanitary Conditions and/or Serious Medical Needs

The petitioners make two separate (though related) arguments. The first is that the conditions at BFDF subject them to a heightened risk of contracting COVID-19. They argue that this heightened risk—together with the high death rates among those over a certain age or with underlying conditions like theirs who contract COVID-19, even if they receive treatment—amounts to an unreasonably high risk of serious injury or death. The second is that if they contract COVID-19, they will not receive adequate care at or through BFDF.

This Court is unpersuaded by the second argument. The petitioners have not presented any evidence that BFDF could not provide them with adequate care, including by transporting them to local hospitals. The point of reference must be what someone would receive were he or she not in state custody. And the petitioners have not persuaded the Court that BFDF could not provide, or would deny them, such care. The respondents, on the other hand, have shown that they are providing detainees with 24/7 access to medical professionals, *see* Docket Item 42-4 at 2 (Declaration of Jeffrey Searls, administrator of BFDF ("Searls Decl.")), and have represented that if a detainee is infected, he or she would be kept in isolation and immediately hospitalized if necessary, *see* Docket 42-1 at 3 (Declaration of Captain Abelardo Montalvo, M.D. ("Montalvo Decl.")).

***7** So the question is whether the petitioners' first argument has any teeth. In other words, is the expected risk to the petitioners' health and safety from COVID-19 so high that the respondents cannot, as a constitutional matter, force the petitioners to live in conditions that pose a heightened risk of contracting the disease? If so, does their current living situation heighten the risk of contraction? In Due Process language: Does forcing high-risk detainees to live in a congregate setting during the COVID-19 pandemic pose a risk that "society considers ... so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk"? *See* *Helling*, 509 U.S. at 36 (emphasis in original). If so, are the efforts the respondents have taken to ameliorate that risk of contraction sufficient?

This Court is trained in the law, not medicine. The best it can do in this situation is turn to the experts. And the guidance from experts, including many government experts, is that the health risks posed by COVID-19 to individuals over a certain age or with certain underlying medical conditions are indeed grave.

a. Health and Safety Risks Posed by COVID-19

First, COVID-19 poses a grave risk for those over 65 or with certain underlying health conditions. According to one of the petitioners' medical experts, Robert B. Greifinger, M.D., "COVID-19 is a serious disease, ranging from no symptoms or mild ones for people at low risk, to respiratory failure and death in older patients and patients with chronic underlying conditions." Docket Item 3 at 1-2 ("Greifinger Decl."); *see also* Docket Item 4 at 2 ("Goldenson Decl. I"); Docket Item 7 at 2 (declaration of Jonathan Louis Golob, M.D., Ph.D. ("Golob Decl.")). There is no vaccine to prevent COVID-19, nor is there a known cure or anti-viral treatment at this time. Docket Item 7 at 2 (Golob Decl.). Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, estimated on March 31, 2020, that between 100,000 and 240,000 will die of COVID-19. Michael D. Shear et al., *Coronavirus May Kill 100,000 to 240,000 in U.S. Despite Actions, Officials Say*, N.Y. Times, Mar. 31, 2020, https://www.nytimes.com/2020/03/31/us/politics/coronavirus-death-toll-united-states.html.

The CDC has concluded that "[p]eople aged 65 years and older" might be at higher risk for severe illness from COVID-19. *See People who are at higher risk for severe illness*, Ctrs. for Disease Control and Prevention (March 31, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC_AA_refVal=https% 3A% 2F% 2Fwww.cdc.gov% 2Fcoronavirus% 2F2019-ncov % 2Fspecific-groups% 2Fhigh-risk-complications.html; *see also* Docket Item 3 at 1-2 (Greifinger Decl.) ("[T]he risk of serious disease and death among those with COVID-19 increases with age, with 78% of reported deaths occurring in people over the age of 65. More than 50% of COVID-19 related intensive care admissions and more 80% of COVID-19 deaths were among people 65 years old or older."); *cf.* Docket Item 4 at 2 (Goldenson Decl. I) ("Older individuals ... are at greater risk of becoming seriously ill or dying from the illness. (It is well-accepted within the medical community that, due to the burden of chronic illnesses and unhealthy lifestyle choices of many of many those housed in correctional facilities, incarcerated individuals over the age of 50 years old are considered to be elderly.)"); Docket Item 5 at 1 (Declaration of Marc F. Stern, M.D. ("Stern Decl.")) ("Vulnerable people include people over the age of 50."); Docket Item 7 at 1 (Golob Decl.) ("People over the age of fifty are at higher risk, with those over 70 at serious risk.").

***8** The CDC also has advised that "[o]ther high-risk conditions could include: [p]eople with chronic lung disease or moderate to severe asthma[; p]eople who have serious heart conditions[; p]eople who are immunocompromised ... [; p]eople of any age with severe obesity (body mass index [BMI] of 40 or higher)[; p]eople with diabetes[; p]eople with chronic kidney disease undergoing dialysis[; or p]eople with liver disease." *See People who are at higher risk for*

severe illness, *supra*; *see also* Docket Item 4 at 2 (Goldenson Decl. I) ("[T]hose with serious chronic medical conditions, such as heart disease, diabetes and lung disease, are at greater risk of becoming seriously ill or dying from the illness."); Docket Item 5 at 1 (Stern Decl.) ("The effects of COVID-19 are very serious, especially for people who are most vulnerable[,] ... includ[ing] people ... of any age with underlying health problems such as—but not limited to—weakened immune systems, hypertension, diabetes, blood, lung, kidney, heart, and liver disease, and possibly pregnancy.").

The CDC recently released an analysis of 7,162 cases of COVID-19 in the United States for which data on the patient's underlying health was available. CDC COVID-19 Response Team, *Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019—United States, February 12–March 28, 2020*, Morbidity and Mortality Weekly Report, at 1-2 (Mar. 31, 2020), http://dx.doi.org/10.15585/mmwr.mm6913e2. 78% of those admitted to the intensive care unit had at least one pre-existing condition, including diabetes, lung disease, cardiovascular disease, renal disease, or an otherwise compromised immune system. *Id.*

This Court therefore "takes judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality." *Basank v. Decker*, 2020 WL 1481503, at *3 (S.D.N.Y. Mar. 26, 2020) (citing Fed. R. Evid. 201(b)) (additional citations omitted). Numerous Courts, including several in this circuit, have reached similar conclusions. *See* *Coronel v. Decker*, 2020 WL 1487274, at *4 (S.D.N.Y. Mar. 27, 2020); *Hernandez v. Decker*, 2020 WL 1547459, at *3 (S.D.N.Y. Mar. 31, 2020); *Basank*, 2020 WL 1481503, at *5.

b. Risk of COVID-19 Infection in a Congregate Setting

The petitioners also have shown that they face a heightened risk of contracting COVID-19. At oral argument, the respondents confirmed that the petitioners are currently being housed within the general population at the BFDF. They eat communally, use shared restrooms, and are housed in either shared cells or in dorm-style housing. [7] Government experts and the petitioners' experts agree that such a communal-living style congregate setting increases the infection rate.

7 The government could not confirm, however, how many individuals are in each room in the dormitories.

For example, the CDC advises:

> People in correctional and detention facilities are at greater risk for some illnesses, such as COVID-19, because of close living arrangements with other people. The virus is thought to spread mainly from person-to-person, through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or be launched into the air and inhaled into someone's lungs. It is possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes; however, this is not the most likely way the virus spreads.

See FAQs for administrators, staff, people who are incarcerated, families, Ctrs. for Disease Control and Prevention (Mar. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html. The United States Attorney General largely concurs. *See, e.g.*, Docket Item 15 at 4 (United States Attorney General, *Memorandum to the Director of the Federal Bureau of Prisons: Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic* (March 26, 2020)) ("I am hereby directing you to prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic. Many inmates will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care. But for some eligible inmates, home confinement might be more effective in protecting their health.").

***9** For their part, the petitioners' experts assert strongly that congregate settings like those at BFDF heighten the risk of contracting COVID-19. "The conditions of congregate settings, such as jails and immigration detention facilities, pose a heightened public health risk to the spread of COVID-19, even greater than other non-carceral institutions." Docket Item 3 at 3 (Greifinger Decl.). The experts point to a host of reasons for this heightened risk of contraction, including crowding, the proportion of vulnerable people detained, the lack of ventilation, and often scant medical-care resources. Docket Item 3 at 4-5 (Greifinger Decl.); Docket Item 5 at 2 (Stern Decl.). They point in particular to the fact that detainees cannot practice the "social distancing" measures needed to contain the spread because detainees share toilets, sinks, and showers; sleep in communal dorms or barracks-style rooms and eat communally; and eat food prepared and served communally as well. Docket Item 3 at 5 (Greifinger Decl.); Docket Item 5 at 2 (Stern Decl.). They also highlight that daily staff rotations increase the risk of infection. Docket Item 3 at 5 (Greifinger Decl.); Docket Item 5 at 2 (Stern Decl.); *see also* Docket Item 5 at 2 (Stern Decl.) ("To the extent that detainees are

housed in close quarters, unable to maintain a six-foot distance from others, and sharing or touching objects used by others, infectious diseases that are transmitted via the air or touch are more likely to spread, placing people at risk.... For these reasons, if—but more likely when—COVID-19 is introduced into the facility, the risks of spread is greatly, if not exponentially, increased as already evidenced by spread of COVID-19 in two other congregate environments: nursing homes and cruise ships.").

What is more, the findings regarding the risk of contracting COVID-19 in a communal setting are true even though there presently are no reported cases at BFDF. Docket Item 42-1 at 4.[8] Community spread is nationwide at this point, and there are reported cases in all eight of Western New York's counties. *See Live: Coronavirus Cases in Western New York*, Rochester Regional Health (Apr. 1, 2020), https://www.rochesterregional.org/news/2020/02/coronavirus-in-new-york. Moreover, there are least two confirmed cases at the Wende Correctional Facility, through which all persons transferring from a New York State prison into ICE custody at BFDF are processed. Docket Item 1 at 4. And the petitioners' expert has concluded that "it is highly likely, and perhaps inevitable, that COVID-19 will reach the immigration detention facilities in New York." Docket Item 3 at 3 (Greifinger Decl.). "[A] remedy for unsafe conditions need not await a tragic event." *Helling*, 509 U.S. at 33; *see also* *Coronel*, 2020 WL 1487274, at *1 (granting four immigration detainees' motion for a TRO and ordering their immediate release where they "represented ... that there [had] been confirmed cases at two of the three facilities where [they were] detained"). What then of the respondents' efforts to ameliorate the heightened risk of contracting this dangerous disease?

8 The government argues that the petitioners have not met their burden in this case because they have not shown that they would be at lower risk in many of the locations to which they would travel if released. Indeed, the government asserts that most of the petitioners would be no safer outside BFDF than inside because they plan to travel to areas of the country with significant outbreaks of COVID-19. *See* Docket Item 42-5 at 2, 16-17. A majority of the petitioners represent that, if released, they would reside with friends or family in the New York metropolitan area. *See* Docket Items 16, 28.
In light of the injunctive relief ordered today, the Court need not address this argument in depth. It notes, however, that the government misconstrues the nature of the legal claims at issue here. The Fifth Amendment right to confinement in conditions that do not pose an unreasonable risk to health and safety derives from the fact that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being.... [because] it [has] render[ed] him unable to care for himself." *Helling*, 509 U.S. at

32 (alterations in original) (quoting *DeShaney,* 489 U.S. at 199-200). So a condition can be unconstitutional only when an individual forcibly is held in state custody. The violation *necessarily* ends when the individual no longer is in state custody. At that point, the state no longer owes him a duty of reasonable care. *See* *DeShaney*, 489 U.S. at 199-200.

What is more, the respondents' argument does not, as a factual matter, address the petitioners' claim. Even if it is true that the petitioners would face greater hurdles to accessing *treatment and care* in New York, that does not carry the day. As this Court already has found, the petitioners are not being denied access to care. The relevant factual question is whether the petitioners are at an unconstitutionally greater risk of *contracting* the disease at BFDF than if they were not detained. And on that question, the respondents have not presented any data to that effect. If the petitioners follow the "social distancing" measures put in place by the Governor—and the Court has no reason to believe they would not, given their risk factors—there is no reason to believe they would be at greater risk of *contraction* in New York than at BFDF.

2. "Mens Rea": Deliberate Indifference

***10** As an initial matter, there is no dispute that the respondents have actual knowledge of the petitioners' serious needs. On March 22, 2020, and again on March 25, 2020, the petitioners notified the government about the particular circumstances of their cases and their high risk of harm. *See* Docket Item 9 at 10 (Petitioners' Memorandum of Law). The question is what the respondents have done with the knowledge.

The respondents have taken substantial steps toward protecting the health and safety of the individuals detained at BFDF. Captain Abelardo Montalvo, M.D., the Eastern Regional Clinical Director with ICE Health Services Corps, reviewed the measures currently being taken at BFDF to protect the detainees' health and safety. He attests to the following facts. Docket Item 42-1 (Montalvo Decl.).

Since March 12, 2020, incoming detainees at BFDF are "checked with a thermometer for fever." Docket Item 42-1 at 3. They also are "asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through areas with sustained community transition in the past two weeks." *Id.* at 2-3. "Detainees who present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be placed in the BFDF medical bay or referred to a local hospital." *Id.* at 3. Detainees with known exposure to a person with confirmed COVID-19 but who are asymptomatic

"are placed in a quarantine with restricted movement for" up to 14 days and "monitored daily for fever and symptoms of respiratory illness." *Id.* Quarantine "involves housing [exposed but asymptomatic] detainees together." *Id.* And new detainees arriving at the facility "will be placed in quarantined dorms and separated from the general population for 14 days until cleared. If new persons are added, or someone becomes ill, then the 14-day quarantine restarts." *Id.* at 4. [9]

[9] At oral argument, the respondents stated that *all* new arrivals are isolated from the general population upon arrival. The respondents' declarations leave some question as to whether this policy indeed applies to all new arrivals or only to those who confirm contact with an infected individual, *see* Docket Item 42-1 at 3 (Montalvo Decl.), those arriving from a hospital, *see id.* at 4, and those arriving from other detention facilities, *see* Docket Item 42-4 at 4 (Searls Decl.). The Court assumes the veracity of the respondents' counsel's representation at argument but expects confirmation of that fact in the isolation plan it orders today.

BFDF also "has increased sanitation frequency and thoroughness." *Id.* at 4. The facility uses paid "detainee workers to reduce the contact rate between ICE staff and detainees and ... limit any exposure between populations." *Id.* at 4. Personal visits have been temporarily suspended—though counsel is able to visit in "no-contact" rooms—and BFDF has been providing and continues to provide education to detainees regarding best practices to prevent the spread of COVID-19. *Id.* at 4-5. Additionally, "[g]atherings of detainees have been cancelled or are being completed in dorms and their respective outdoor areas." *Id.* at 5.

These measures are commendable and likely have prevented some measure of spread and mitigated some of the risks facing the respondents. But the fact is that none of the steps discussed by Capt. Montalvo includes the "social distancing" measures recommended—especially for high-risk individuals—by the CDC, the New York State Department of Health, and the petitioners' experts, to name a few.

***11** The CDC has recommended that people who are at higher risk should "[s]tay home." *See People who are at higher risk for severe illness*, *supra.* The State of New York has said even more. On March 20, 2020, the Governor issued an executive order with the following guidance for New Yorkers over 70 and with underlying health conditions: "[r]emain indoors; ... go outside [only] for solitary exercise; [p]re-screen all visitors and aides by taking their temperature and seeing if person is exhibiting other flu-like symptoms; [d]o not visit households with multiple people; [w]ear a mask when in the company of others; [t]o the greatest extent possible, everyone in the presence of vulnerable people should wear a mask; [a]lways stay at least six feet away from individuals; and [d]o not take public transportation unless urgent and absolutely necessary."

Governor Cuomo Signs the 'New York State on Pause' Executive Order, New York State Office of Governor Andrew Cuomo (Mar. 20, 2020), https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order.

In fact, the Governor and state health officials have concluded that the risks posed by COVID-19 are so grave that it has taken a number of *unprecedented* steps affecting all New Yorkers, even those with no particular vulnerability to the disease. On March 7, 2020, Governor Cuomo declared a state of emergency for all of New York State. *See* N.Y. Exec. Order No. 202 (Mar. 7, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf. And in stages beginning on March 16, 2020, the Governor ordered the closing of all schools and universities, as well as nearly all businesses and places of public accommodation, and he has prohibited non-essential gatherings of any size through at least April 15, 2020.[10] Governor Cuomo is far from alone in ordering these drastic measures. *See Coronavirus: Three out of four Americans under some form of lockdown*, BBC World News (Mar. 31, 2020), https://www.bbc.com/news/world-us-canada-52103066. And the New York State Department of Health advises that "[w]hen in public[,] individuals *must* practice social distancing of at least six feet from others." *Governor Cuomo Signs the 'New York State on Pause' Executive Order*, *supra* (emphasis added).

10 *See* N.Y. Exec. Order No. 202.3 (Mar. 16, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.3.pdf; N.Y. Exec. Order No. 202.4 (Mar. 16, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.4.pdf; N.Y. Exec. Order No. 202.5 (Mar. 18, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_5.pdf; N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf; N.Y. Exec. Order No. 202.11 (Mar. 27, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_11.pdf; N.Y. Exec. Order No. 202.12 (Mar. 30, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.13.pdf.

The petitioners' experts urge the importance of these same "social distancing" measures. "The only way to mitigate the rapid spread of COVID-19 is to use scrupulous hand hygiene and social distancing, self-quarantine for individuals who may have been exposed, and isolation at a home or care facility for those who have been infected." Docket Item 3 at 2 (Greifinger Decl.); *see also* Docket Item 4 at 2 (Goldenson Decl. I); Docket Item 5 at 1 (Stern Decl.) ("COVID-19 is a novel virus. There is no vaccine for COVID-19, and there is no cure for COVID-19. No one has prior immunity. The only way to control the virus is to use preventive strategies, including social distancing.").

The respondents so far have not made it possible for individuals with the CDC-identified vulnerabilities to take these steps. It has not, for example, isolated higher risk individuals from other detainees or from staff who rotate daily in and out of the facility. Nor is it testing all incoming detainees or the staff that comes and goes. That failure is particularly concerning given that the CDC recently reported that as many as 25 percent of people infected with COVID-19 may not show symptoms. *See* Apoorva Mandavelli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html?action=click&module=Spotlight&pgtype=Homepage; *see also* Docket Item 5 at 1 (Stern Decl.) ("It is believed that people can transmit the virus without being symptomatic and, indeed, that a significant amount of transmission may be from people who are infected but asymptomatic or pre-symptomatic."). The petitioners also continue to eat their meals in communal settings and share bathing facilities, indicating that "social distancing" is not possible at this time. And the respondents have not provided the petitioners or other high-risk detainees with masks as recommended by the New York State Department of Health. *Cf.* Docket Item 42-1 at 4 (Montalvo Decl.) (explaining that "[*d*]*etainee workers*" are provided goggles" and "gloves" (emphasis added)).

***12** In light of the decisions of a number of executive branch officials at both the state and federal level, it seems clear that "social distancing" for those with heightened COVID-19 risks is the most effective form of preventing a serious threat to the health and safety of those persons. Moreover, the recommended measures for preventing the spread of COVID-19 are unprecedented. Indeed, this Court is not aware of any other disease that caused New York State—let alone most of the nation—to decide that the *only* reasonable course of action was to shutter the economy, shelter in place, and isolate at home for weeks on end.

In short, the government's recommendations to the public suggest that those with certain conditions should not assume the risk of social contact. Indeed, New York State has *prohibited* individuals from assuming that risk. A measure that the government has forcibly—under threat of civil penalties—*imposed* on all persons within its jurisdiction cannot, at the same time, be forcibly denied to some portion of that population. The result compelled by this finding is that the respondents are acting with deliberate indifference to the health and safety of those petitioners with the conditions identified by the CDC by holding them in a congregate, communal-living setting where "social distancing is an oxymoron." *See* Docket Item 9-1 at 5 (Letter from Scott Allen, M.D., F.A.C.P., and Josiah D. Rich, M.D., M.P.H., to the House Committees on Homeland Security and Oversight and Reform, Mar. 19, 2020) ("Allen Letter"); *see also* *Hernandez*, 2020 WL 1547459 at *3 (finding that measures such as "modification of the intake process and increasing sanitation frequency ... [were] 'patently insufficient' to protect *any* detainees from infection absent

'enforcement of requisite social distancing' " (alteration in original) (quoting *Basank*, 2020 WL 1481503, at *5)).

In other words, the respondents have actual knowledge of serious risks to the health and well-being of individuals with the vulnerabilities identified by the CDC and have not taken adequate steps to protect the petitioners who have such vulnerabilities against those risks. *See also* *Hernandez*, 2020 WL 1547459 at *2 (concluding that the civil-immigration-detainee petitioner was likely to succeed on his deliberate-indifference claim because the respondents had "not taken any action to address the particular risks that COVID-19 poses to high-risk individuals like [the p]etitioner"); *Coronel*, 2020 WL 1487274, at *6 (same); *Basank*, 2020 WL 1481503, at *5 (same). *But see* *Sacal-Micha v. Longoria*, 2020 WL 1518861 (S.D. Tex. Mar. 27. 2020); *Dawson v. Asher*, 2020 WL 1304557, at *3 (W.D. Wash. Mar. 19, 2020). Because the high-risk petitioners are held in the respondents' "custody ... against [their] will" and therefore "unable to care for [themselves]," *see* *Helling*, 509 U.S. at 32 (citation omitted), the respondents' failure to take these steps is a violation of their substantive rights under the Due Process Clause.

C. Conclusion

This Court finds that those petitioners who have the COVID-19 vulnerabilities identified by the CDC have demonstrated a likelihood of succeeding on their claim that the respondents are acting with deliberate indifference to unreasonably unsafe conditions at BFDF and to those petitioners' serious medical needs. The Court acknowledges both that such a finding is extraordinary and that the respondents themselves have been impacted by the COVID-19 pandemic in a variety of ways that have affected their ability to respond to the outbreak. But the Court's goal is neither to assign blame nor to justify past efforts. It is instead to ensure that the petitioners' constitutional rights—here, their right to liberty and possibly life—are protected.

II. IRREPARABLE HARM

***13** "The showing of irreparable harm is '[p]erhaps the single most important prerequisite for the issuance of a' " temporary restraining order. *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (quoting *Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983)). Under this prong, parties seeking a TRO "must show that, on the facts of their case" and in the absence of the requested injunction, they will suffer a harm that "cannot be remedied after a final adjudication, whether by damages or a permanent injunction." *Salinger v. Colting*, 607 F.3d 68, 81-82 (2d Cir. 2010). In addition, the harm must be "neither remote nor speculative, but actual

and imminent." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (citation omitted).

The petitioners have established irreparable harm in two different ways. First, "the *alleged* violation of a constitutional right ... triggers a finding of irreparable harm." *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (emphasis in original) (citation omitted). As discussed above, the petitioners have adequately alleged that their substantive due process rights have been violated. Accordingly, "no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (citations omitted)).

Second, irreparable harm exists where, as here, the moving individuals "face imminent risk to their health, safety, and lives." *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 214 (E.D.N.Y. 2000) (citation omitted), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003). For all the reasons discussed above, those petitioners with the CDC-identified vulnerabilities face a grave, irreparable risk to their health and safety if they remain confined under current conditions at BFDF.

III. BALANCE OF EQUITIES AND PUBLIC INTEREST

Where the government is the opposing party, the final two factors in the temporary restraining order analysis—the balance of the equities and the public interest—merge. *Planned Parenthood of New York City, Inc. v. U.S. Dep't of Health & Human Servs.*, 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018).

The petitioners and the public *both* benefit from ensuring public health and safety. *See Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to "public health" as a "significant public interest"). Moreover, under the circumstances here, the public interest in ensuring public health is also best served by the petitioners' being confined in conditions that do not pose a substantial risk of their contracting COVID-19. As one of their medical experts points out, a COVID-19 outbreak at a detention facility "could result in multiple detainees—five, ten or more—being sent to the local community hospital where there may only be six or eight ventilators over a very short period. As they fill up and overwhelm ventilator resources, those ventilators become unavailable for all the usual critical illnesses." Docket Item 9-1 at 5 (Allen Letter). And ventilators used to treat detainees cannot be used to treat others who contract the virus. *See* Docket Item 5 at 3 (Stern Decl.) ("Reducing the spread and severity of infection in a federal immigration detention center slows, if not reduces, the number of people who will become ill enough to require hospitalization where they will be using scarce community resources (ER

beds, general hospital beds, ICU beds) which in turn reduces the health and economic burden to the local community at large."); Docket Item 3 at 5 (Greifinger Decl.) ("Releasing individuals, and prioritizing the most vulnerable, reduces the burden on local health care resources, as it reduces the risk of transmission of the disease to a large number of people living in close proximity for an extended period of time. It also reduces the risk of transmission to staff."). "In the alternate scenario where detainees" are either confined in conditions facilitating "social distancing" or are released, "the tinderbox scenario of a large cohort of people getting sick all at once is less likely to occur, and the peak volume of patients hitting the community hospital would level out." Docket Item 9-1 at 5 (Allen Letter).

***14** The respondents argue that the Western New York community would be able to serve the needs of the petitioners and that the public interest therefore tips in their favor. In support of that claim, they have presented data on available health beds in the area surrounding BFDF. *See* Docket Item 42-3 at 6. But they have not provided data on, for example, the number of available ventilators. Nor have they provided projections on the rate of spread in the surrounding community or any expert testimony to the effect that the community could sustain an outbreak at BFDF as community spread outside the facility—including in other carceral facilities—also increases. The Court therefore finds that the public interest favors the petitioners.

IV. REMEDY

For the reasons stated above, the petitioners have met the criteria for a TRO. The next question is what remedy is appropriate under the circumstances. The petitioners seek their immediate release under conditions of supervision and, ultimately, a writ of habeas corpus under 22 U.S.C. § 2241.

Section 2241(c)(3) provides: "The writ of habeas corpus shall not extend to a prisoner unless ... [h]e is in custody in violation of the Constitution or laws or treaties of the United States." Courts are divided on whether section 2241 provides a vehicle for challenging (and a remedy for addressing) allegedly unconstitutional conditions of confinement. [11]

11 *Compare* *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) ("This court has long interpreted [section] 2241 as applying to challenges to the execution of a federal sentence" [and seeking injunctive relief], "including such matters as the administration of parole, ... prison disciplinary actions, prison transfers, type of detention and prison conditions." (citations omitted)), *with* *Spencer v. Haynes*, 774 F.3d 467, 469 (8th Cir. 2014) (drawing a bright line between claims that challenge the "validity" or "length" of

> a conviction, which may be brought under section 2241, and those that challenge "the conditions of confinement," which may not) and *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005) (distinguishing between a section 2241 petitioner who requests a "quantum change in the level of custody, which must be addressed by habeas corpus," and a petitioner who requests "a different program or location or environment, which raises a civil rights claim" and holding that "[i]f an inmate establishe[s] that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option." (citation omitted)) and *Gomez v. United States*, 899 F.2d 1124 (11th Cir. 1990) (same) and *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979) (same) and *Cook v. Hanberry*, 596 F.2d 658, 660 (5th Cir. 1979) (same). *Cf.* *Bell*, 441 U.S. at 526 n.6 (1979) ("[L]eav[ing] to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself." (citation omitted)).

This Court need not resolve these difficult questions at this junction because the Second Circuit "has long interpreted [section] 2241 as applying to challenges to ... prison conditions," *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (citation omitted)—at least to the extent the petitioners seek a remedy short of release—and this Court is not convinced that the unconstitutional conditions at BFDF cannot be remedied through an injunction.

That is so because BFDF currently is at roughly half of its capacity to house detainees. Docket Item 42-1 at 4. So it remains plausible that the respondents could rectify the ongoing violation by providing those petitioners who meet the CDC's definition of vulnerable individuals with a living situation that facilitates "social distancing."[12] The respondents might, for example, house those individuals in individual cells or units with a limited number of individuals akin to a family unit outside the facility; eat their meals, bathe, and shower in isolation or only among those in their smaller unit; have extremely limited contact with both other detainees and staff, all of whom are screened for fevers; and are provided masks to wear when contact is necessary. The Court leaves the task of identifying which petitioners satisfy the CDC criteria, and how to facilitate their "social distancing," to the respondents' medical staff—at least in the first instance.[13]

12 Governor Cuomo, in concert with the New York State Department of Health, advises the following actions: "[r]emain indoors; ... go outside [only] for solitary exercise; [p]re-screen all visitors and aides by taking their temperature and seeing if person is exhibiting other flu-like symptoms; [d]o not visit households with multiple people; [w]ear a mask when in the company of others; [t]o the greatest extent possible, everyone in the presence of vulnerable people should wear a mask; [a]lways stay at least six feet away from individuals; and [d]o not

take public transportation unless urgent and absolutely necessary." *Governor Cuomo Signs the 'New York State on Pause' Executive Order*, *supra.*

13 As discussed above, the CDC explains that "[o]ther high-risk conditions could include: [p]eople with chronic lung disease or moderate to severe asthma[; p]eople who have serious heart conditions[; p]eople who are immunocompromised ... [; p]eople of any age with severe obesity (body mass index [BMI] of 40 or higher)[; p]eople with diabetes[; p]eople with chronic kidney disease undergoing dialysis[; or p]eople with liver disease." *See People who are at higher risk for severe illness*, *supra.*

ORDER

***15** **The respondents shall report to the Court no later than 5:00 p.m. on April 3, 2020**, with a detailed plan explaining how they will identify which petitioners meet the CDC's high-risk criteria and how they will facilitate those individuals' taking any or all of the "social distancing" measures recommended by the CDC and New York State Department of Health. No later than **9:00 a.m. on April 6, 2020, the respondents shall report to the Court** as to whether any or all of the steps outlined in the plan have been taken and, if so, which ones. They also shall identify for which petitioners the measures have been taken and provide a brief explanation why any petitioner does not meet the CDC's high-risk criteria. The Court then will decide whether the constitutional violation has been remedied and whether further action of the Court is required.

IT IS SO ORDERED.

All Citations

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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Lucero XOCHIHUA-JAIMES, Petitioner,
v.
William P. BARR, Attorney General, Respondent.

No. 18-71460
|
MARCH 24, 2020

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Before: SILER,* WARDLAW, and M. SMITH, Circuit Judges.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

ORDER

***1** In light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court sua sponte orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court. *See* 8 U.S.C. § 1252(b)(3)(B); 28 U.S.C. § 1651(a).

The matter is remanded to the BIA for the limited purpose of securing Petitioner's immediate release.

IT IS SO ORDERED.

All Citations

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