Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT N

UNITED STATES DISTRICT COURT
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, NOAH NAGY, MELINDA BRAMAN, BRYAN MORRISON, and HEIDI WASHINGTON,

Defendants.

No. 2:20-cv-11053

HON. MARK A. GOLDSMITH

MAG. R. STEVEN WHALEN

AFFIDAVIT OF NOAH NAGY

Daniel Manville (P39731)
Attorney for Plaintiffs
Civil Rights Clinic,
MSU College of Law
P.O. Box 1570
East Lansing, MI 48823
(517) 432-6866
daniel.manville@law.msu.edu

Kevin J. O'Dowd (P39383)
Kristin M. Heyse (P64353)
Scott A. Mertens (P60069)
Sara E. Trudgeon (P82155)
Cori E. Barkman (P61470)
Allan J. Soros (P43702)
Assistants Attorney General
Attorneys for MDOC Defendants
MDOC Division
P. O. Box 30217
Lansing, MI 48909
(517) 335-3055
odowdk@michigan.gov

Kevin Ernst (P44223)
Attorney for Plaintiffs
Ernst Charara & Lovell, PLC
645 Griswold, Ste 4100 Detroit, MI
48226 313-965-5555
kevin@ecllawfirm.com

_____/

AFFIDAVIT OF NOAH NAGY

Noah Nagy, being first duly sworn, deposes and says as follows:

1. I am presently employed by the Michigan Department of Corrections ("MDOC") as the Warden at the G. Robert Cotton Correctional Facility (JCF), Jackson, Michigan,

2. JCF is a multi-level prison on 114 acres located northwest of the intersection of Elm Road and I-94 in Jackson County, Michigan.

3. JCF currently consists of 2,026 of beds.

4. JCF consists of six pole barn housing buildings, 11 brick housing buildings, an administration building, an education building, and two food service buildings.

5. JCF also houses a healthcare department, maintenance department, Michigan State Industries Print Shop and Mattress Factory, and the Michigan Braille Transcribing Fund.

6. Male inmates who are 18 and older with Security Levels I, II, and IV are housed at JCF.

7. In addition, JCF offers several academic programs that include Adult Basic Education, General Education Development preparation, Special Education, Jackson College, Employment Readiness, and Food Technology training program.

8. The facility offers evidence-based cognitive programs such as Thinking for a Change (T4C), Violence Prevention Program (VPP), Phase II Substance Abuse, Advanced Substance Abuse Treatment (ASAT), and Alcoholics Anonymous. JCF also has the Leader Dog for the Blind Program.

9. Prisoners are provided on-site medical, dental and mental health services. Serious medical problems are treated at the MDOC's Duane Waters Health Center (DWH).

10. With respect to COVID-19, specifically, I am involved daily in the implementation of all MDOC policies and directives for preventing the spread of COVID-19 within JCF. Through this role, I have personal knowledge regarding the numerous measures discussed

below that have been swiftly implemented at JCF in order to minimize and manage the spread of COVID-19.

11. Before any positive case for COVID-19 appeared at JCF, on March 11, 2020, the MDOC Director's office began disseminating COVID-19 risk reduction protocols to Wardens at all facilities, including JCF, requiring the screening of anyone coming into a prison facility. The protocols called for limiting and cancelling certain group gatherings and implementing social distancing measures for prisoners and staff alike.

12. The protocols also mandated an adequate supply of hand soap, disinfectants and cleaning materials for prisoners and staff so that they were never in short supply and available upon request. JCF was also instructed to provide additional and more frequent cleaning of its entire facility, including prisoner cells, bathrooms, showers, dining halls and all common areas.

13. I can attest that when these protocols were released, JCF began implementing each of the above measures.

14. I began to hold daily meetings (sometimes multiple times a day) with Deputy Warden Rurka, Assistant Deputy Wardens White and

Kisor to ensure that these practices were being implemented at JCF. I have also increased the frequency of meetings with my administrative staff. In addition, I began meeting and or talking via telephone with members of JCF's healthcare team to ensure that prisoners in need of healthcare were continuing to receive these services

15. On March 9, 2020, in response to two confirmed influenza A cases, we implemented explicit quarantine procedures and adopted extensive additional cleaning protocols with increased frequency. As such, additional cleaning protocols were in place prior to our first positive COVID test. These cleaning protocols continue to this day. Cleaning has been a total team effort consisting of staff and inmates.

16. On March 13, 2020, and effective immediately, the Michigan Department of Corrections ceased all in-person visitation of prisoners for the safety of staff, prisoners and the public. This included all visitation at JCF.

17. Additionally, any MDOC staff member or contractor entering the facility was not allowed in if they displayed signs or symptoms of the virus and were screened for temperatures above 100.4

degrees. Symptomatic staff members were not allowed to enter JCF and would not be allowed to return to work.

18. On April 8, 2020, in furtherance of risk reduction protocols already in place, MDOC Director Washington issued Director's Office Memorandum (DOM) 2020-30 to the MDOC's Executive Policy Team, the administrative Management Team and Wardens, regarding the subject of COVID-19. (Ex. H to Defendants' response brief.) As noted in the first paragraph of the DOM, "[t]he MDOC is taking many steps to protect staff and prisoners from the spread of COVID-19, including developing isolation areas to place and treat prisoner who tested positive for COVID-19 or who are under investigation for having COVID-19, as well as those who have had close contact with a known-positive COVID-19 individual."

19. I can attest that these isolation areas were set up immediately at JCF. In fact, as evidenced by the attached JCF specific housing and isolation protocols, we had procedures in place for isolating inmates very early on. (Attach. 1.) Because it was necessary to separate prisoners under investigation for COVID -19 from positive cases and from prisoners who tested negative, we had to become

creative and use non-traditional spaces for housing our prisoner population. For example, our gym, for a period of time, was designated as a COVID positive unit. Currently, our COVID positive units are TA Unit, TC Unit, TD Unit, TE Unit, D Unit, and K Unit. Staff in these units must wear full PPE while working in these units. Effective May 3, 2020, all COVID positive inmates were moved from the gym and into one of the other units.

20. In addition to the early measures discussed above, the DOM includes a detailed outline of the many steps MDOC is taking to address the COVID-19 pandemic. In compliance with the DOM, I can verify that the following measures were promptly implemented at JCF.

a. All staff and prisoners are provided three masks (at a minimum) that they are always required to wear when interacting with others or moving throughout the facility.

b. Staff are instructed to provide prisoners with an adequate supply of hand soap and cleaning materials, to be replenished upon request as necessary.

c. Social distancing measures were and continue to be implemented throughout the facility, consistent with

Centers for Disease Control (CDC) guidelines, requiring that there be a distance of at least six feet between all individuals, including programing, classrooms, chow lines, staff screenings and office buildings, to the fullest extent feasible. Attached are photos of some signage and "X" markings to remind inmates and staff about social distancing. (Attach. 2.)

d. Screening measures for all staff entering the facility are strictly enforced, and any staff member flagged through the screening process is not allowed to return to work until after a negative COVID-19 test result was provided.

e. As indicated above, separate isolation areas were established for prisoners who are under investigation (PUIs) for having COVID-19 as well as for those who have had close contact with a PUI or known-positive COVID-19 individual (Close Contacts), as necessary.

f. A prisoner testing positive for COVID-19 is placed in quarantine in a designated isolation area as soon as resources permit regardless of their security level or prior

criminal history. The purpose for this isolation area is not to serve as any sort of punitive measure. It is to ensure that positive cases are appropriately contained and risk that the virus will spread to other prisoners and staff is significantly reduced.

g. The isolation areas for PUIs follow the same criteria as the isolation areas for prisoners with confirmed cases of COVID-19. A PUI is placed alone in a cell pending the outcome of their test results.

h. Alcohol-based hand sanitizer and wipes are provided and permitted within the secure perimeter of the facility for use by staff.

i. Special authorization was provided for prisoners to be able to use cleaning materials containing bleach upon request. Prior to the COVID-19 epidemic, cleaning products containing bleach were not allowed within any MDOC facility due to the potential that bleach may be used as a weapon against another individual.

j. Clothed-body or thorough pat-down searches of prisoners are suspended for (1) prisoners who have tested positive for COVID-19, (2) PUIs, and (3) are a Close Contact.

k. Similarly, routine searches of prisoner living areas by custody staff are suspended for cells or areas whose occupants (1) have tested positive for COVID-19, (2) are a PUI, and (3) Close Contacts.

l. In lieu of visits, prisoners are given two free phone calls (each lasting five minutes) and two free JPay stamps per week.

m. No prisoner or staff transfers are made unless approved by the CFA Deputy Director or higher.

n. Cell moves are only made if absolutely necessary (e.g., medical, prisoner protection).

21. I can attest that these measures have been properly implemented at JCF in accordance with the DOM. During my daily briefings with Housing Unit, Custody, and Healthcare staff, we discuss these and other measures being taken and any issues or concerns from staff and prisoners with said measures. I also attend a weekly

Warden's Forum meeting with prisoner elected cell block representatives who bring issues of concern to my attention with regard to these procedures.

22. As indicated above, I ensure continuing compliance with the measures through near daily meetings with my staff, HUMs, and Resident Unit Managers (RUMs) where I receive updates on all COVID-19 response measures and any issues that arise regarding the implementation and enforcement of these COVID-19 protocols.

23. Prisoners receive frequent and consistent daily messaging of all COVID-19 risk reduction protocols through JPays directed to the entire prisoner populations, ubiquitous signs and posters placed throughout the facility, and through digital TV displays.

24. Further, I make regular rounds throughout the facility and can attest that prisoners at JCF have each received three masks and have an adequate supply of hand soap, cleaning supplies and PPE, so that they are never in short supply and available upon request. Should any prisoner complain or express concern over not having an adequate supply of hand soap, cleaning materials or PPE, those concerns would be immediately addressed.

25. I also receive near daily updates from custody staff through their chain of command that prisoners are wearing masks and that social distancing is being enforced. For example, if custody staff sees prisoners gathering in close contact groups while using the yard, those prisoners will be instructed to disperse to ensure proper social distancing. We have also assigned non-custody staff to assist in the enforcement of wearing masks during yards and during meal lines. Prisoners who do not have a mask on going to chow will be instructed to put their mask on or they will be directed to report to their cell/bunk to retrieve their mask. We also have custody standing by the serving line enforcing the social distance markers in place keeping prisoners six feet apart while waiting to eat.

26. It is well understood by all staff at JCF that the failure to respond to prisoner concerns over hand soap, cleaning materials or PPE or failure to enforce the wearing of masks and social distancing could result in corrective action being issued and these matters are taken very seriously by me and my entire staff.

27. In order to further implement these measures, the MDOC developed an aggressive testing plan of the entire JCF prison population. (Attach. 3.)

28. Testing was necessary in order to learn which prisoners were COVID-19 positive so that those individuals could be quarantined from the remainder of the prison population. The testing would proceed by housing unit and once the test results were reviewed by healthcare, the prisoner would be assigned a housing unit consistent with the results.

29. I have reviewed the allegations made in Plaintiffs' complaint filed in this matter as it concerns the current conditions at JCF and find them misleading and inaccurate. To clarify:

a. In the early stages of our testing of confined prisoners, there were a limited number of COVID-19 test kits available across all MDOC facilities, but this shortage situation quickly improved in the month of April as more testing kits became available.

b. Once increased COVID testing became available, and we were able to administer more tests, we observed a significant number of COVID positive prisoners.

c. These initial testing results revealed high numbers of COVID positive prisoners which caused us to develop new quarantine procedures, in consultation with our Chief Medical Officer and medical staff. For example, we immediately ceased transferring COVID positive prisoner to other facilities, and established an on-site COVID response unit at JCF, where we quarantine all COVID positive prisoners testing positive at JCF.

d. Based on the results of this mass testing at JCF, we were able to identify all COVID positive prisoners, and transfer them to our COVID response units where they could receive proper medical treatment.

e. The process of testing, identification and transfer of COVID positive prisoners to the COVID response unit, plus the tracing of Close Contacts and identification of

PUIs, required a tremendous and unprecedented effort on the part of our correctional and medical staff.

f. This process was designed and implemented in accordance with protocols and procedures formulated by the MDOC Chief Medical Officer (CMO) and medical staff in accordance with CDC and the Michigan Department of Health and Human Services (MDHHS) guidelines.

g. Through this process, JCF has been successful in the separation and quarantine of COVID positive prisoners, Close Contacts, PUIs and prisoners testing negative, and there have been very few exceptions where a prisoner testing negative remained in proximity to a COVID positive, Close Contact or PUI. Further, these few exceptions, which were quickly remedied, can be attributed to a reasonable and unavoidable time lag associated with receiving and responding to the mass testing results.

30. Further, I have reviewed Plaintiffs' complaint and the requested relief set forth in paragraph C) 1-21 on pages 53-55 of the Complaint (R. 1, Page ID # 53-55), and with few exceptions, either exceed CDC guidelines or exceed MDOC's jurisdiction under state law, or JCF has already implemented these measures that Plaintiffs are seeking. As for some of the noted exceptions:

a. JCF is not required under CDC guidelines to take the temperature daily of all prisoners, nor does it have the nursing staff to accomplish such a task. However, any prisoner complaints or staff observations of any symptoms associated with COVID-19 are immediately responded to by correctional staff and addressed by healthcare, and any indication of symptoms is closely monitored by correctional staff. CDC guidelines do not require that prisoners receive a personal supply of alcohol-based hand sanitizer, and there are security reasons for not doing so. However, non-alcohol-based hand sanitizers are placed throughout the facility in common areas, and prisoners are always provided an adequate supply of soap and cleaning materials for their individual cells.

b. Social distancing is enforced throughout the facility and prisoners (outside of their cell) and staff are always required to wear masks when moving through the housing units. Where the physical structure and layout of JCF does not always allow for maintaining a six-foot social distancing, we take every reasonable precaution to maintain social distancing, and are currently delivering meals to all prisoners in their respective housing units to avoid social distancing issues in chow halls.

c. MDOC has released prisoners early in response to COVID-19 where it is within MDOC's jurisdiction to do so, such as prisoners who have early parole eligibility, and that is true at JCF as well.

d. CDC guidelines do not require, and it is not practical or feasible for healthcare staff to assess through questioning every incarcerated person daily to identify potential COVID-19 infections. However, JCF has completed a mass testing of its prisoner population and as discussed above, correctional and healthcare staff closely monitor and immediately respond

to any signs, symptoms or prisoner complaints associated with COVID-19.

e. Prisoners are also well informed on the symptoms associated with COVID-19 through the communication methods discussed above and are encouraged to notify staff by any means available, including the kite and grievance system, regarding any concerns they may have related to COVID-19.

f. JCF ensures that COVID positive prisoners receive proper medical care, are properly quarantined in a non-punitive setting, and receive the services Plaintiffs seek while quarantined, consistent with CDC guidelines. However, that would not include all services Plaintiffs seek, such as group recreation for COVID positive prisoners or video visitation with loved ones. Prisoners are receiving increased phone and email privileges during this unprecedented pandemic to help compensate for lack of in person visitation.

31. As it pertains to JCF's six pole barn structures and communal living pod arrangements, there are physical limitations in what we can do to maintain six-foot social distancing in living quarters

and bunk bed areas. However, JCF has established separate housing units to cohort PUIs. Presently, there are four COVID positive units in pole barn structures. In addition, there are two COVID negative units. Signs have been placed throughout that indicate social distancing, six feet apart. We have placed an "X" on the floor by the telephones and Jpay areas that are six feet apart. We also limit the number of people allowed in the base area and in the day rooms. The base areas are limited to eight people. The day rooms are limited to 12 people. The TV room is limited to eight people. There are postings in the housing units that spell out these limitations. Individuals in the pole barn structures are being fed in their housing units and have been for several weeks. They have not been in the chow hall. Prior to feeding in the dorm, we were completing chow lines very slow, calling units a quarter at a time. We had them sitting every third seat and only sitting on one side of the table, not facing each other. We also had an "X" mark in the chow hall all the way outside indicating six feet apart for social distancing while they were waiting in line.

32. Finally, to recap, prisoners at JCF receive frequent communication and reinforcement of these COVID-19 risk reduction measures through the communication methods discussed above, directly from staff and through rounds being made by myself and my Deputy Wardens. Staff also receive constant reinforcement of the importance of enforcing COVID-19 risk reduction measures through daily reminders sent out by the Department and staff meetings and are advised that corrective action will be taken for failure to enforce these measures.

33. Given my close oversight of JCF's COVID-19 response measures, I can verify that JCF is meeting and exceeding CDC's guidelines and is operating in compliance with the applicable COVID-19 risk reduction protocols.

34. I make this affidavit on personal knowledge, and, if called upon to testify, I can competently testify as to the matters contained herein.

Noah Nagy, Warden
G. Robert Cotton Correctional Facility

Subscribed and sworn to before me

This 11 day of May, 2020.

DANIEL SHERMAN
NOTARY PUBLIC, STATE OF MI
COUNTY OF JACKSON
MY COMMISSION EXPIRES Feb 22, 2023
ACTING IN COUNTY OF Jackson

Daniel Sherman
Notary Public, State of Michigan

County of Jackson

My commission expires: 2/22/23

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

Attachment 1

Affidavit of Noah Nagy

G. ROBERT COTTON CORRECTIONAL FACILITY

JCF COVID PROTOCOL

JCF COVID PROTOCOL Update: 5/3/2020

Based this past week's JCF COVID testing, we have established which units will house COVID positive prisoners, we are going to make a few more additional moves.

As a reminder, the current COVID positive units are:

TA Unit
TC Unit
TD Unit
TE Unit
D Unit
K Unit
Gym

Staff working in these units, must wear full PPE while working in these units.

Beginning today, we are going to move the COVID positive prisoners from the gym to the temp side COVID units. We currently have 68 COVID positive prisoners in the gym. Based on bed space and trying to keep the numbers fairly equal in each housing unit, we will move 35 from the gym to TD, 11 to TA, 11 to TC and 11 to TE.

On 5/4/2020 we will be moving the 40 prisoners from JCF, that are currently in K-Unit, back in to the facility and they will move in to TA, TC, TD and TE.

Moving forward, prisoners who are COVID positive will remain in those units until they are recovered. They will be assessed by healthcare to determine if further testing is needed. This testing would determine if they are clear to remain in the same unit or could be considered recovered and moved as appropriate.

Continue to monitor social distancing on a daily basis, both with staff and the prisoner population. Please wear your mask, wash your hands and wear appropriate PPE.

We will not be moving staff back in to the 300 building for another week or two, until we have time to assess and ensure the bed space in the gym will not be needed.

JCF COVID PROTOCOL Update: 4/17/2020

If you hear or see of someone who is not feeling well. Contact both, shift command and health care. The prisoner who is not feeling well, should be escorted to Intake.

*Shift command will send an officer to intake to sit with the prisoner.

*Health care will report to intake to complete the assessment of the prisoner.

*If the prisoner is deemed symptomatic, and a COVID test is approved, he will be sent to L-Unit for medical isolation, pending the results of the COVID test. If no beds are available in L-Unit, D-Unit upper will be the back-up for PUI's and they will be single bunked in D-Unit on medical quarantine pending their COVID-19 test results.

*Once we have a PUI, we will locate all close contacts.

*All close contacts for the PUI will be sent to Intake to be assessed.

*Once health care assesses the close contacts, they will be escorted to D-Unit.

*All close contacts will be housed D-Unit on medical quarantine pending the test results of the PUI.

*If the test results are negative, the PUI and Close Contacts will be released once health care clears them.

*If the test results are positive, the PUI will now be a COVID positive prisoner and a determination will be made to their location.

***If the test results are positive, the close contacts will be moved to housing unit TB with their cohort and they will remain in TB until medically cleared.**

JCF COVID Protocol Update: 4/8/2020

If you hear or see of someone who is not feeling well. Contact both, shift command and health care. The prisoner who is not feeling well, should be escorted to Intake.

*Shift command will send an officer to intake to sit with the prisoner.

*Health care will report to intake to complete the assessment of the prisoner.

*If the prisoner is deemed symptomatic, and a COVID test is approved, he will be sent to L-Unit upper for medical isolation, pending the results of the COVID test.

*Once we have a PUI, we will locate all close contacts.

*All close contacts for the PUI will be sent to Intake to be assessed.

*Once health care assesses the close contacts, they will be escorted to D-Unit. D-unit lower has been emptied out in preparation for this process and most of upper D-Unit is empty as well.

*All close contacts will be housed in Lower D-Unit on medical quarantine pending the test results of the PUI.

*If the test results are negative, the PUI and Close Contacts will be released once health care clears them.

*If the test results are positive, the PUI will now be a COVID positive prisoner and a determination will be made to their location.

*If the test results are positive, the close contacts will remain in lower D-Unit for 14 days on medical quarantine and will not be released until cleared by health care.

JCF COVID PROTOCOL: 3/20/2020

Upper L-Unit will be used to isolate Persons Under Investigation (PUI's). There are 12 beds in upper L-unit. It is connected to health care and the chow hall.

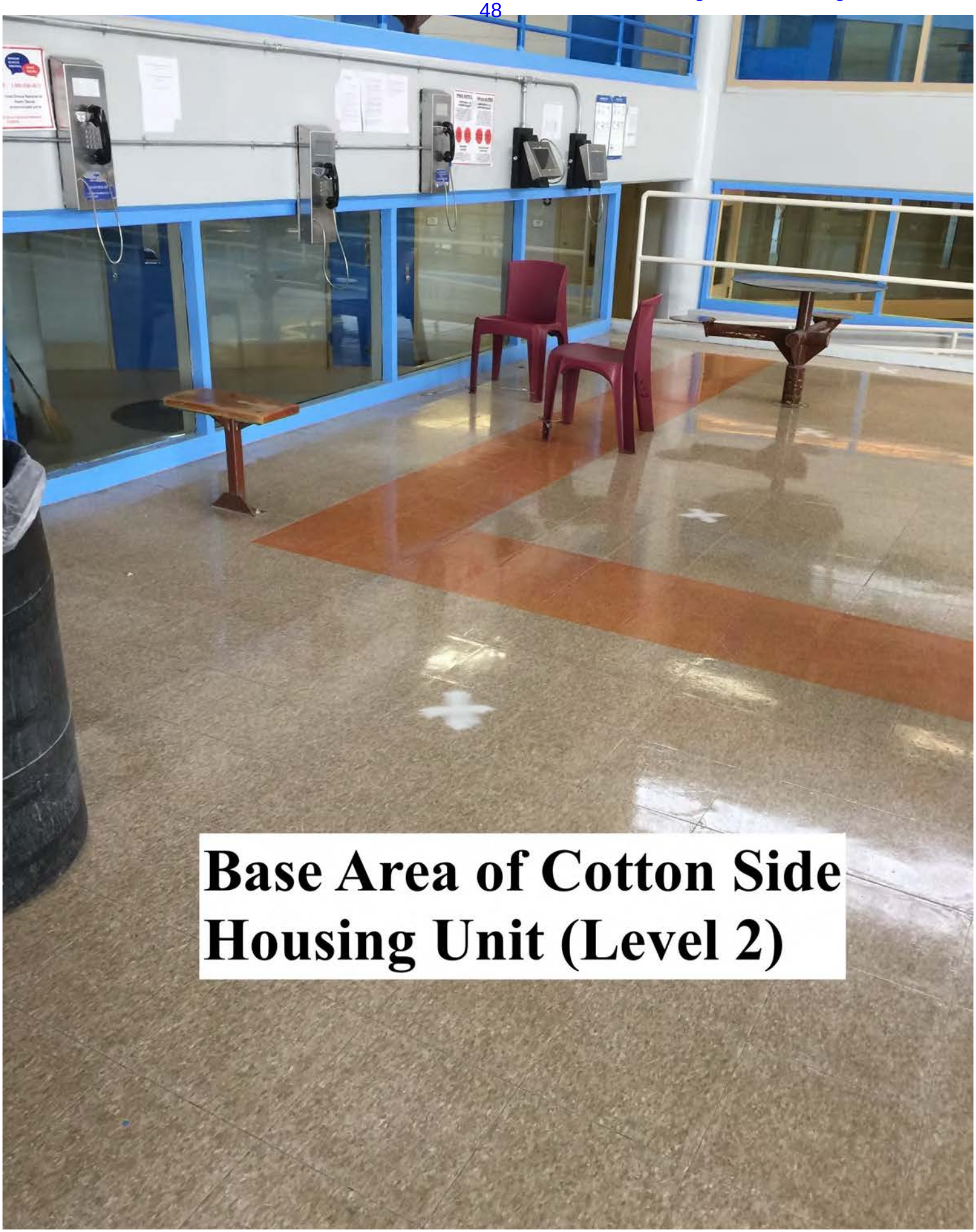
If we need additional PUI beds, we will move to Lower L-Unit, which has 10 beds.

This is also are segregation unit, which is 22 of our 70 beds.

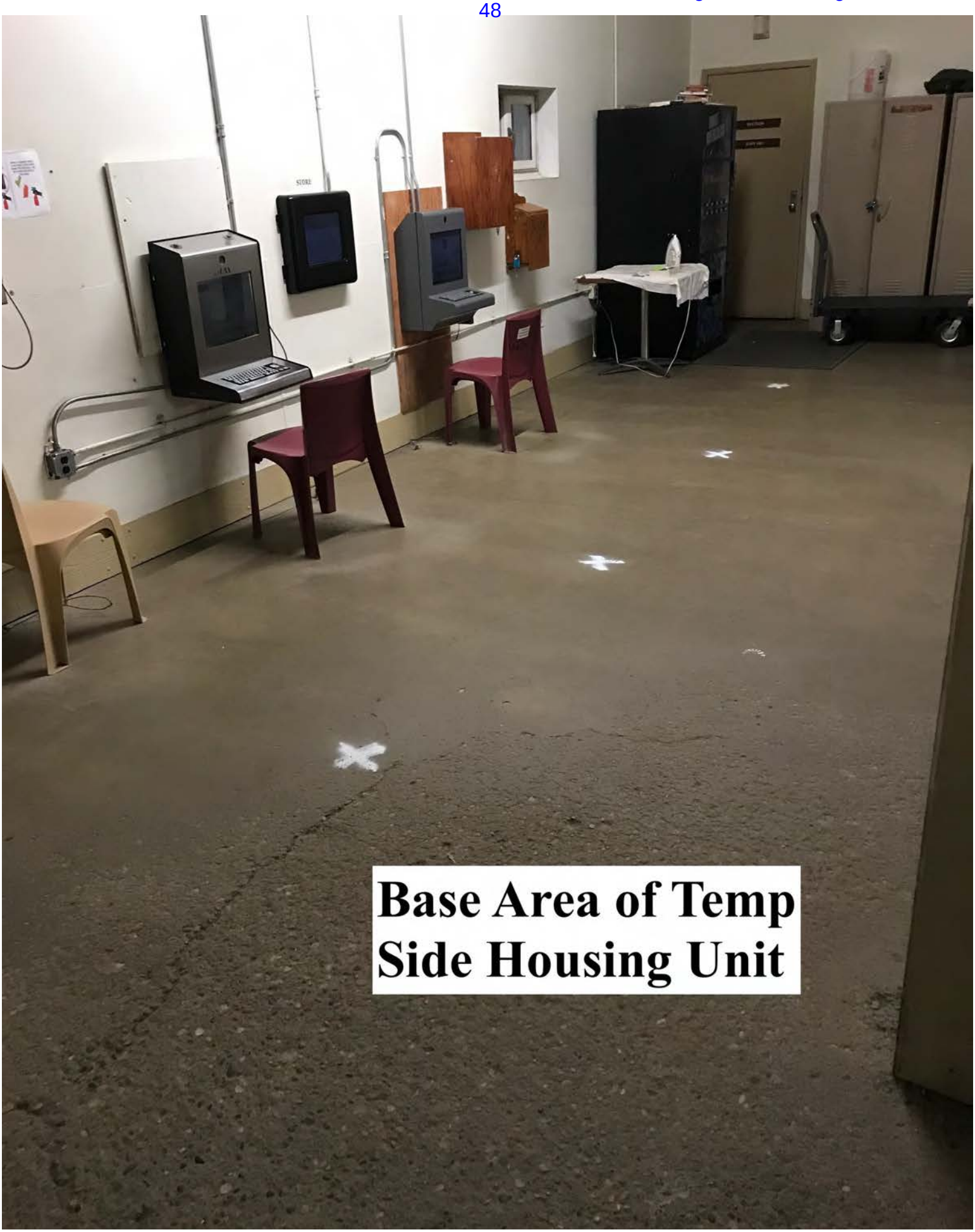
If we have a greater need, we will move to housing unit A. There are 48 rooms in there. We can isolate the air exchange and close the bow tie. We would have to utilize the gym in this situation for housing. We have 48 beds in K-Unit we could move to the gym. We could move the healthy prisoners to the gym and utilize housing unit A for the PUI prisoners.

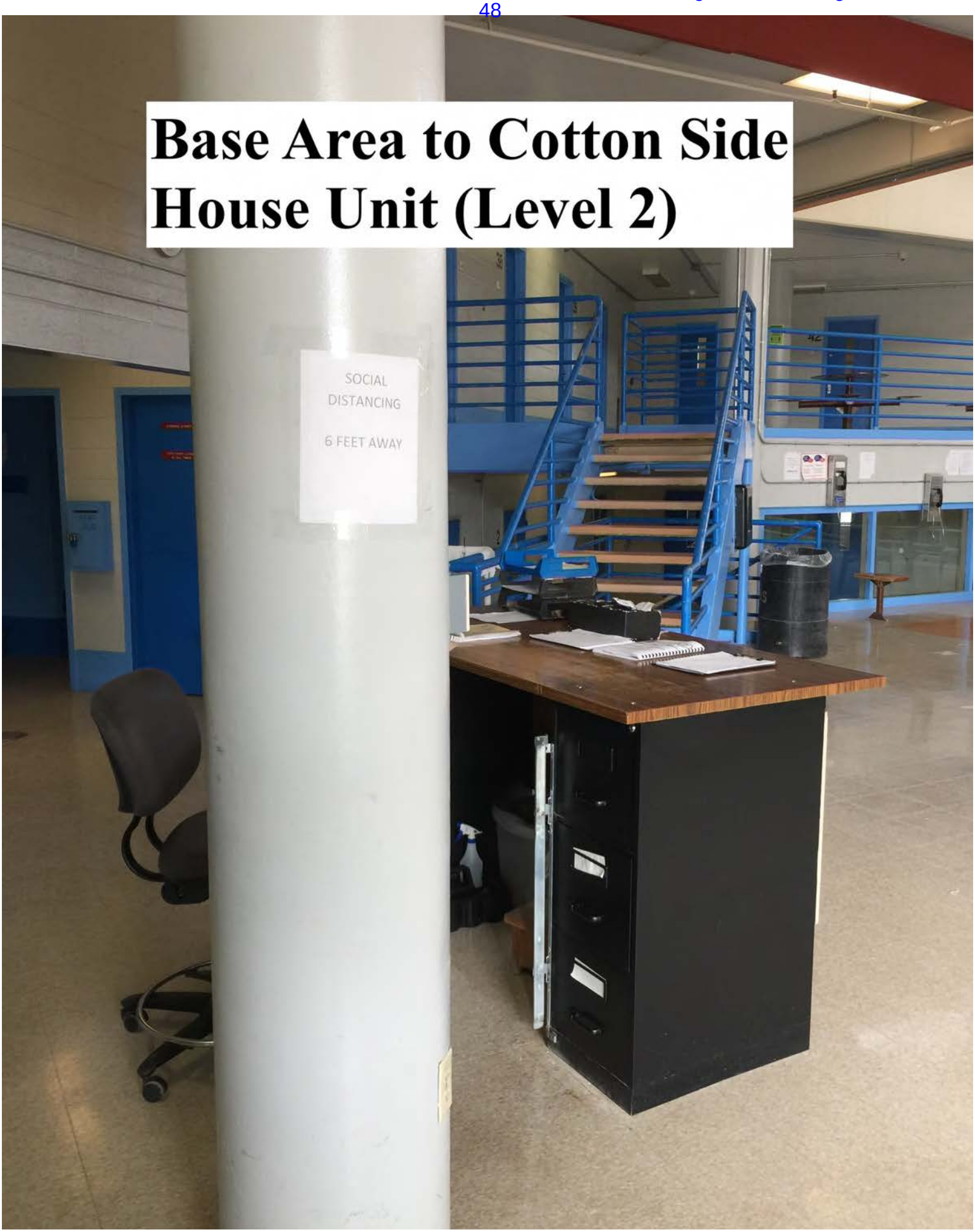
Attachment 2

Affidavit of Noah Nagy

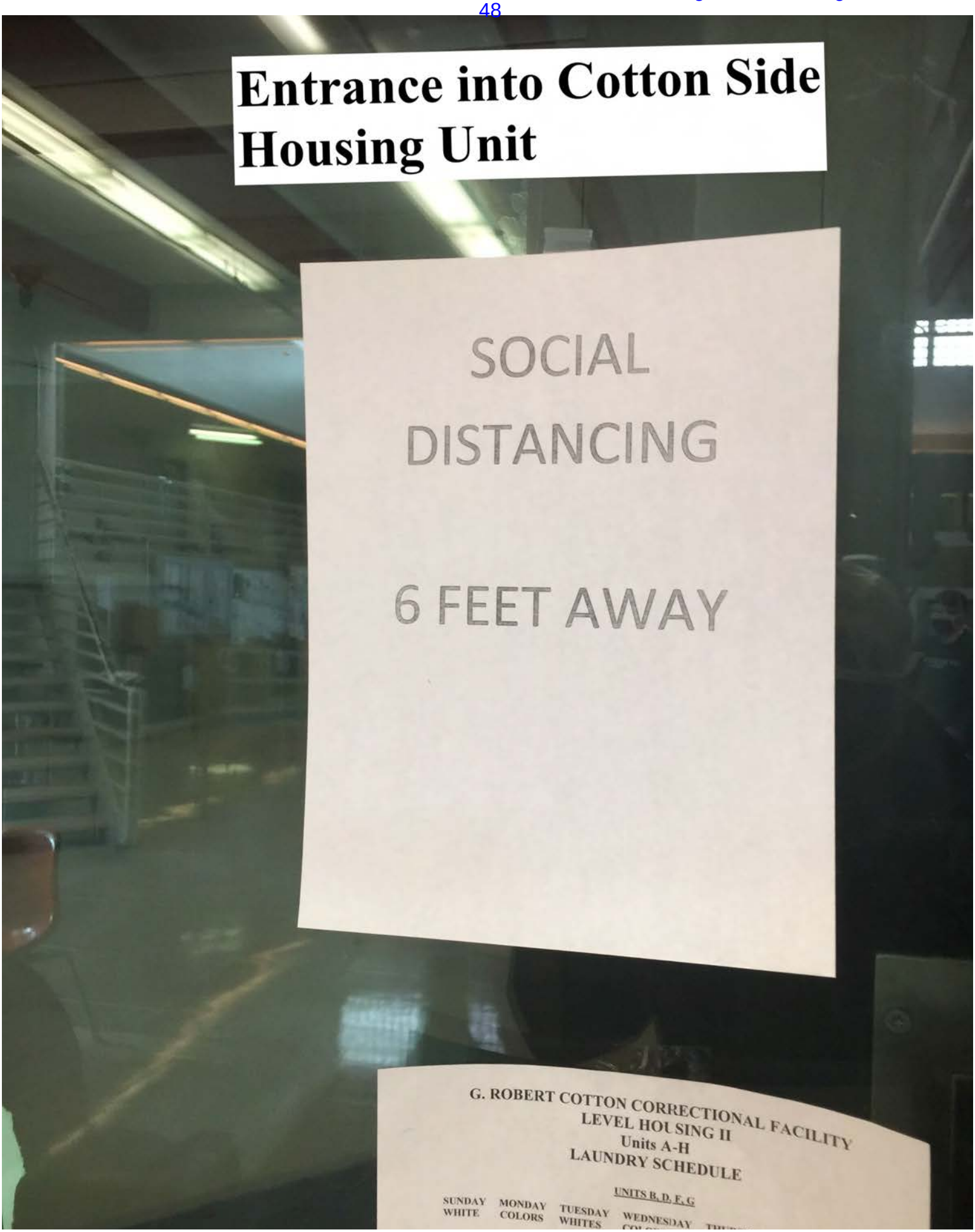

Base Area of Cotton Side
Housing Unit (Level 2)

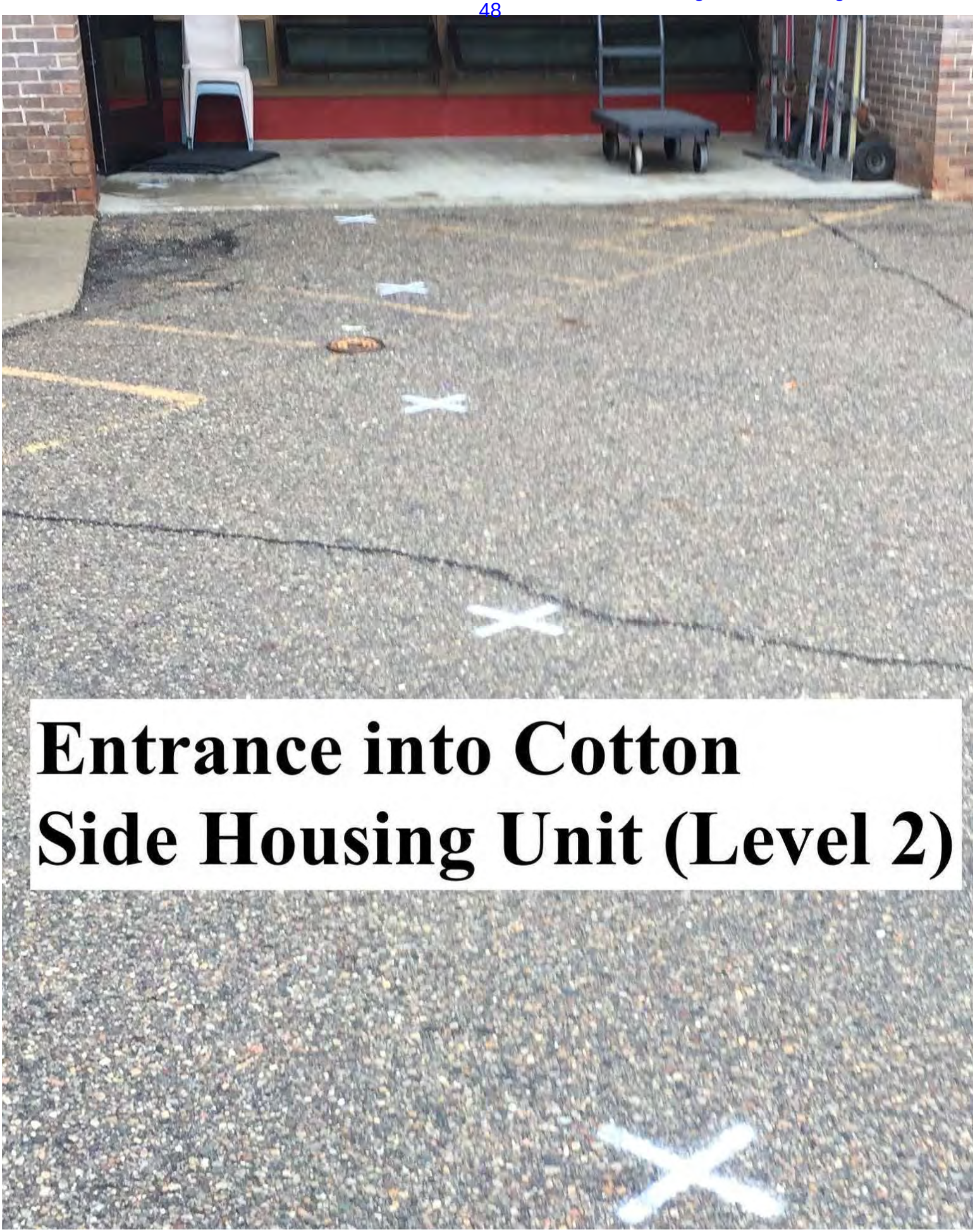

KITES
I.D.
Base Area of Temp Side
Housing Unit (Level 1)


Base Area of Temp
Side Housing Unit


Base Area to Cotton Side House Unit (Level 2)
SOCIAL DISTANCING
6 FEET AWAY


Entrance into Cotton Side
Food Service


Entrance into Cotton Side Housing Unit
SOCIAL DISTANCING
6 FEET AWAY
G. ROBERT COTTON CORRECTIONAL FACILITY
LEVEL HOUSING II
Units A-H
LAUNDRY SCHEDULE
UNITS B, D, F, G
SUNDAY WHITE
MONDAY COLORS
TUESDAY WHITES
WEDNESDAY


Entrance into Cotton
Side Housing Unit (Level 2)


Entrance to Health Care
SOCIAL
DISTANCING
6 FEET AWAY

FRONT LOBBY OF JCF

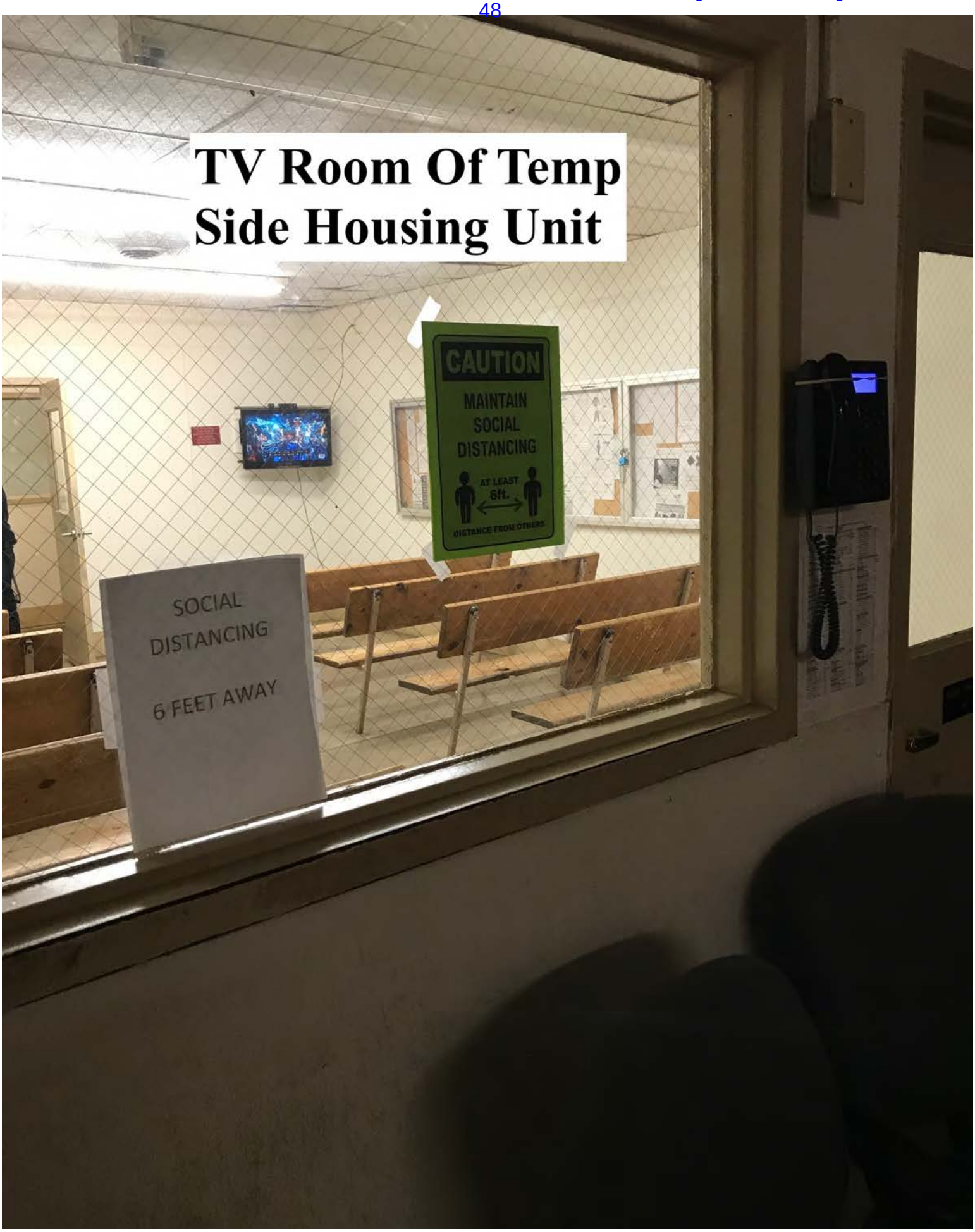

Front Lobby Of JCF


exit
FRONT LOBBY OF JCF


Healthcare
Social Distancing Hashtag Speech Bubble stock photo
#SocialDistancing
6 ft
Create your free account
Honeywell
INMATE KEY DROP


Medication Line


MSI FACTORY


TV Room Of Temp
Side Housing Unit
CAUTION
MAINTAIN
SOCIAL
DISTANCING
AT LEAST
6ft.
DISTANCE FROM OTHERS
SOCIAL
DISTANCING
6 FEET AWAY

Attachment 3

Affidavit of Noah Nagy

G. ROBERT COTTON CORRECTIONAL FACILITY

JCF FACILITY WIDE COVID TESTING SCHEDULE

JCF COVID Testing

Next week we will be testing the entire JCF population for COVID-19. Additionally, we have 16 individuals who are scheduled to parole/discharge next week. Today, we are moving them to L-Unit to be tested for COVID-19. If their test results are negative, they will return to their housing unit and parole as scheduled. If the prisoner is positive for COVID-19, they will be moved to the gym and attached process will be followed regarding their parole. Please see attachments.

Test for the rest of JCF population will begin on Monday morning, April 27th. The testing schedule will be as followed:

Monday, 4/27/2020: Housing Unit A, B, C & D; approximately 260 tests
Tuesday, 4/28/2020: Housing Unit E, F, G & H; approximately 353 tests
Wednesday, 4/29/2020: Housing Unit TA, TB & TC; approximately 397 tests
Thursday, 4/30/2020: Housing Unit TD, TE & TF; approximately 430 tests
Friday, 5/1/2020: Housing Unit I & J; approximately 131 tests

Please note if you have a prisoner who has a work detail that is in your housing unit, they must remain in the unit the day your housing unit is scheduled for testing.

For those prisoners housed on the Cotton Side; once the test results are received, those who test positive will be advised by Health Care of the results of their test and they will be moved to housing unit D. If the test results are negative, they will remain in their housing unit.

For those prisoners housed on the Temp Side; once the test results are received, those who test positive will be advised by Health Care of the results of their test and they will be moved to housing unit TA. If the test results are negative, they will remain in their housing unit.

We will be making the appropriate moves as necessary to accommodate the moves to housing unit TA.

For those prisoners who were to test positive from either I or J-unit, we will assess to determine the best location for them to be housed while COVID-19 positive.

The prisoners that test positive for COVID-19, will pack up their property and take it with them to either housing unit D or TA. The prisoners in the COVID units, housing unit D and TA, will have their property and we will work out an opportunity for them to have yard as well. Meals will be in for housing unit D and TA when they are housing COVID positive prisoners.

The prisoner who are COVID positive, will remain in housing unit TA or D for at least 28 days. They will be assessed medically and once symptom free for at least 72 hours and they test negative for COVID-19, they would then be medically cleared to return to general population at JCF.

For prisoners, who medical needs are such, that we cannot accommodate at JCF in one of the proposed COVID units, we will look at possibly moving those prisoners to C-Unit at RGC.

For any prisoner who refuses to submit to a COVID test, they will be placed in L-Unit on medical isolation, for a minimum of 14 days. Each day, they will be offered the ability to submit to the COVID test.

Please note we will be sending out a JPAY to all prisoners this evening or tomorrow to advise them of this plan.

Please note if anything changes to the schedule or plan, we will keep everyone updated. This will be an extremely busy week and we appreciate everyone' attention to this detail.

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT O

UNITED STATES DISTRICT COURT
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, NOAH NAGY, MELINDA BRAMAN, BRYAN MORRISON, and HEIDI WASHINGTON,

Defendants.

No. 2:20-cv-11053

HON. MARK A. GOLDSMITH

MAG. R. STEVEN WHALEN

AFFIDAVIT OF WILLIS CHAPMAN

Daniel Manville (P39731)
Attorney for Plaintiffs
Civil Rights Clinic,
MSU College of Law
P.O. Box 1570
East Lansing, MI 48823
(517) 432-6866
daniel.manville@law.msu.edu

Kevin J. O'Dowd (P39383)
Kristin M. Heyse (P64353)
Scott A. Mertens (P60069)
Sara E. Trudgeon (P82155)
Cori E. Barkman (P61470)
Allan J. Soros (P43702)
Assistants Attorney General
Attorneys for MDOC Defendants
MDOC Division
P. O. Box 30217
Lansing, MI 48909
(517) 335-3055
odowdk@michigan.gov

Kevin Ernst (P44223)
Attorney for Plaintiffs
Ernst Charara & Lovell, PLC
645 Griswold, Ste 4100 Detroit, MI
48226 313-965-5555
kevin@ecllawfirm.com

_____/

AFFIDAVIT OF WILLIS CHAPMAN

Willis Chapman, being first duly sworn, deposes and says as follows:

1. I am presently employed by the Michigan Department of Corrections ("MDOC") as the Warden at the Macomb Correctional Facility (MRF).

2. MRF is a multi-level prison that sits on 100 acres and is located at 34625 26 Mile Road, Lenox Township, Michigan 48048.

3. MRF has a capacity of 1,416 inmates.

4. MRF is comprised of 11 major buildings and two minor buildings, totaling approximately 300,000 square feet.

5. The prison houses male inmates who are 18 and older, contains four Level II housing units, two Level IV housing units, and one Level I housing unit outside the secure perimeter.

6. Four other buildings house a school, administrative offices, support services, and warehouse/maintenance.

7. Educational programming includes Special Education, General Education Development preparation, Adult Basic Education, and vocational classes.

8. Routine health and dental care are provided on site. Major medical emergencies are treated in a community hospital or at the Duane L. Waters Health Center in Jackson.

9. A Residential Treatment Program is provided for prisoners needing a residential setting for Mental Health treatment.

10. With respect to COVID-19, specifically, I am involved daily in the implementation of all MDOC policies and directives for preventing the spread of COVID-19 within MRF. Through this role, I have personal knowledge regarding the numerous measures discussed below that have been swiftly implemented at MRF in order to minimize and manage the spread of COVID-19.

11. Before any positive case for COVID-19 appeared at MRF, on March 11, 2020, the MDOC Director's office began disseminating COVID-19 risk-reduction protocols to Wardens at all facilities,

including MRF, requiring the screening of anyone coming into a prison facility. The protocols called for limiting and cancelling certain group gatherings and implementing social distancing measures for prisoners and staff alike. The protocols also mandated an adequate supply of hand soap, disinfectants and cleaning materials for prisoners and staff so that they were never in short supply and available upon request. MRF was also instructed to provide additional and more frequent cleaning of its entire facility, including prisoner cells, bathrooms, showers, dining halls and all common areas. I can attest that when these protocols were released, MRF began implementing each of the above measures. I began to hold daily meetings with my staff – including Deputy Warden George Stephenson, Assistant Deputy Wardens, and Resident Unit Managers to ensure that these practices were being implemented in the seven housing units at MRF. I also began meeting with members of MRF's healthcare team to ensure that prisoners in need of healthcare were continuing to receive these services. I met daily with Health Unit Manager (HUM) Erin Parr-Mirza on our protocols and the MRF contingency plan for operation.

12. On March 13, 2020, and effective immediately, MRF ceased all in-person visitation of prisoners for the safety of staff, prisoners, and the public. This included all visitation at MRF. Additionally, any MDOC staff member or contractor entering the facility was not allowed in if they displayed signs or symptoms of the virus and were screened for temperatures above 100.4 degrees. Symptomatic staff members were not allowed to enter MRF (or any other MDOC Correctional Facility) and would not be allowed to return to work.

13. On April 8, 2020, in furtherance of risk reduction protocols already in place, MDOC Director Washington issued Director's Office Memorandum (DOM) 2020-30 to the MDOC's Executive Policy Team, the Administrative Management Team and Wardens, regarding the subject of COVID-19. As noted in the first paragraph of the DOM, "[t]he MDOC is taking many steps to protect staff and prisoners from the spread of COVID-19, including developing isolation areas to place and treat prisoners who tested positive for COVID-19 or who are under investigation for having COVID-19, as well as those who have had close contact with a known-positive COVID-19 individual."

14. I can attest that these isolation areas were set up immediately at MRF. MRF established a room in healthcare to be utilized for all suspected COVID-19 prisoners. Prisoners determined to be a Person Under Investigation (PUI) are swabbed and placed in isolation in Housing Unit (HU) 5 (COVID-19 Unit) pending the test results. All close contacts are identified and place in quarantine (single celled) in HU5. Prisoners found to be positive remain in HU5. Prisoners determined to be negative are released to general population along with their close contacts. When MRF first began the quarantine process, close contacts were quarantined in Building 300, which was revised so that all COVID-19 related prisoners are housed in the same unit with the exception of special cases secured in segregation (wheelchair bound, observation status, etc.).

15. In addition to the early measures discussed above, the DOM includes a detailed outline of the many steps MDOC is taking to address the COVID-19 pandemic. In compliance with the DOM, I can verify that the following measures were promptly implemented at MRF and these measures were discussed and continue to be discussed on a daily/weekly/ basis with our custody and housing unit staff:

a. All staff and prisoners are provided three masks (at a minimum) that they are always required to wear when interacting with others or moving throughout the facility.

b. Staff are instructed to provide prisoners with an adequate supply of hand soap and cleaning materials, to be replenished upon request as necessary.

c. Social distancing measures were and continue to be implemented throughout the facility, consistent with the Centers for Disease Control and Prevention (CDC) guidelines, requiring that there be a distance of at least six feet between all individuals, including programing, classrooms, chow lines, staff screenings and office buildings, to the fullest extent feasible. (Attach. 1, social distancing photographs; See also Attach. 2.)

d. Screening measures for all staff entering the facility are strictly enforced, and any staff member flagged through the screening process is not allowed to return to work until after a negative COVID-19 test result was provided.

e. As indicated above, separate isolation areas were established for prisoners who are under investigation (PUIs) for having COVID-19 as well as for those who have had close contact with a PUI or known-positive COVID-19 individual (close contacts), as necessary. (Attach. 2, isolation housing pictures.)

f. A prisoner testing positive for COVID-19 is placed in quarantine in a designated isolation area as soon as resources permit regardless of their security level or prior criminal history. The purpose for this isolation area is not to serve as any sort of punitive measure. It is to ensure that positive cases are appropriately contained and that the risk that the virus will spread to other prisoners and staff is significantly reduced.

g. The isolation areas for PUIs follow the same criteria as the isolation areas for prisoners with confirmed cases of COVID-19. A PUI is placed alone in a cell pending the outcome of their test results.

h. Alcohol-based hand sanitizer and wipes are provided and permitted within the secure perimeter of the facility for use by staff.

i. Special authorization was provided for prisoners to be able to use cleaning materials containing bleach upon request. Prior to the COVID-19 epidemic, cleaning products containing bleach were not allowed within any MDOC facility due to the potential that bleach may be used as a weapon against another individual.

j. MRF prisoners are currently on lockdown with restricted movement to the bathrooms, showers, phones, Kiosks, and yard. All movement is monitored to ensure social distancing.

k. Clothed-body or thorough pat-down searches of prisoners are suspended for (1) prisoners who have tested positive for COVID-19, (2) PUIs, and (3) are a Close Contact.

l. Similarly, routine searches of prisoner living areas by custody staff are suspended for cells or areas whose occupants (1) have tested positive for COVID-19, (2) are a PUI, and (3) Close Contacts.

m. In lieu of visits, prisoners are given two free phone calls (each lasting five minutes) and two free JPay stamps per week.

n. No prisoner or staff transfers are made unless approved by a Deputy Director or higher.

o. Cell moves are only made if absolutely necessary (e.g., medical, prisoner protection).

16. I can attest that these measures have been properly implemented at MRF in accordance with the DOM. During my daily briefings with Housing, Custody, and Healthcare staff, we discuss these, and other measures being taken and any issues or concerns from staff and prisoners with said measures. I met at least weekly with Warden's Forum with prisoner-elected cell-block representatives who bring issues of concern to my attention with regard to these procedures.

17. As indicated above, I ensure continuing compliance with the measures through daily meetings with my staff, Deputy Warden, ADWs Housing and Custody and HUM, where I receive updates on all COVID-19 response measures and any issues that arise regarding the implementation and enforcement of these COVID-19 protocols.

18. Prisoners receive frequent and consistent messaging of all COVID-19 risk reduction protocols through JPays directed to the entire prisoner population, ubiquitous signs and posters placed throughout the facility, and through digital TV displays.

19. Further, I make frequent or near daily rounds throughout the facility and can attest that prisoners at MRF have each received

three masks and have an adequate supply of hand soap, cleaning supplies and PPE, so that they are never in short supply and available upon request. Should any prisoner complain or express concern over not having an adequate supply of hand soap, cleaning materials or PPE, those concerns would be immediately addressed.

20. I also receive daily updates from custody staff through their chain of command that prisoners are wearing masks and that social distancing is being enforced. For example, if custody staff sees prisoners gathering in close contact groups while using the yard, those prisoners will be instructed to disperse to ensure proper social distancing. We have also assigned non-custody staff to assist in the enforcement of wearing masks during yard times. All prisoners are fed in unit.

21. In order to further implement these measures, and in consultation with the CDC and the Michigan Department of Health and Human Services (MDHHS), MRF has implemented a COVID-19 testing plan. MRF is scheduled to receive facility-wide testing on Monday, May 11, 2020.

22. MRF also conducts regular verbal screening and temperature checks of prisoners, and any prisoners who are flagged by the screening process are moved to a designated PUI unit and tested, where they remain in a single cell pending test results. Any prisoner testing positive is immediately secured in Housing Unit 5, which is MRF's approved COVID-19 unit.

23. Further, I have reviewed Plaintiffs' complaint and the requested relief set forth in paragraph C. 1-21 on pages 53-55 of the complaint (R. 1, Page ID # 53-55), and with few exceptions, which either exceed CDC guidelines or exceed MDOC's jurisdiction under state law, MRF has already implemented these measures that Plaintiffs are seeking. As for some of the noted exceptions:

a. MRF is not required under CDC guidelines to take the temperature daily of all prisoners, nor does it have the nursing staff to accomplish such a task. However, any prisoner complaints or staff observations of any symptoms associated with COVID-19 are immediately responded to by correctional staff and addressed by healthcare, and any indication of symptoms is closely monitored by correctional staff. Staff immediately contact health care and control center informing them if there is a symptomatic prisoner. Health care will direct the prisoner be brought to health care for screening. If the prisoner has a positive screen the COVID-19 swab test will be completed, and the prisoner will then be placed in isolation as a PUI. Once the PUI is placed in isolation,

the close contacts are identified, assessed by HealthCare and placed in quarantine as a close contact.

b. CDC guidelines do not require that prisoners receive a personal supply of alcohol-based hand sanitizer, and there are security reasons for not doing so. However, non-alcohol-based hand sanitizers are placed throughout the facility in common areas, and prisoners are always provided an adequate supply of soap and cleaning materials for their individual cells.

c. Social distancing is enforced throughout the facility and prisoners (outside of their cell) and staff are always required to wear masks when moving through the housing units. Where the physical structure and layout of MRF does not always allow for maintaining six-foot social distancing at all times (as recommend by the CDC), we take every reasonable precaution to maintain social distancing.

d. MDOC has released prisoners early in response to COVID-19 where it is within MDOC's jurisdiction to do so, such as prisoners who have early parole eligibility, and that is true at MRF as well.

e. CDC guidelines do not require, and it is not practical or feasible for healthcare staff to assess through questioning every incarcerated person daily to identify potential COVID-19 infections.

f. Prisoners are also well informed on the symptoms associated with COVID-19 through the communication methods discussed above and are encouraged to notify staff by any means available, including the kite and grievance system, regarding any concerns they may have related to COVID-19.

24. Finally, to recap, prisoners at MRF receive frequent communication and reinforcement of these COVID-19 risk reduction measures through the communication methods discussed above, directly from staff and through prisoner representative participation in weekly Warden forums. Staff also receive constant reinforcement of the importance of enforcing COVID-19 risk-reduction measures through their required attendance in daily staff discussions, and staff are advised that investigations may be initiated for failure to enforce these measures.

25. Given my close oversight of MRF's COVID-19 response measures, I can verify that MRF is meeting and exceeding CDC's guidelines and is operating in compliance with the applicable COVID-19 risk reduction protocols.

26. I make this affidavit on personal knowledge, and, if called upon to testify, I can competently testify as to the matters contained herein.

Willis Chapman, Warden

Macomb Correctional Facility

Subscribed and sworn to before me
This 12th day of May, 2020.

Jessica France

JESSICA FRANCE
NOTARY PUBLIC, STATE OF MI
COUNTY OF GENESEE
MY COMMISSION EXPIRES Jun 16, 2024
ACTING IN COUNTY OF Lapeer

Notary Public, State of Michigan
County of Lapeer
My commission expires: 6-16-24

Attachment 1

Affidavit of Willis Chapman

Macomb Correctional Facility
4/22/2020
Social Distancing

Sidewalks

Food Service

New Handicap Ramp

Garden Walk

Main Walk

RTP Unit

Big Yard Gate

Housing Units 4 and 5

Unit Entrances

Level II Units

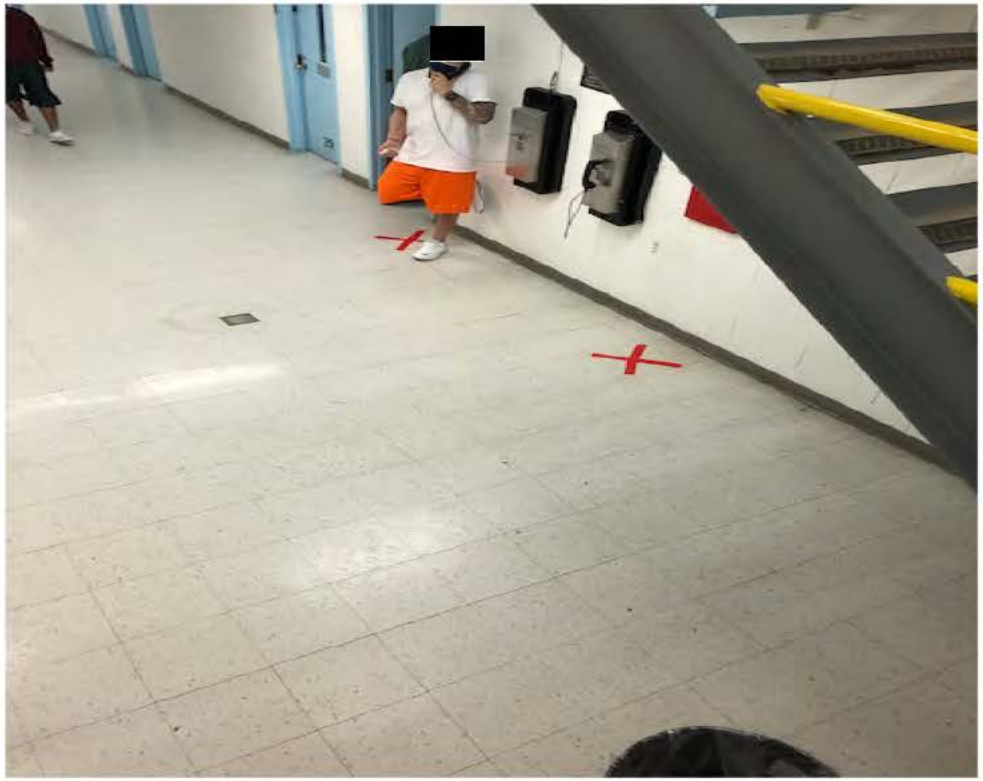
Level IV Units

RTP Unit

Level II Units

Inside of Units

Prisoner Phones



Staging Areas/Phones and Bathrooms

Unit Stairs

Medication Window

Unit Podiums

Attachment 2

Affidavit of Willis Chapman

Macomb Correctional Facility

This power point was created to track the progress at MRF

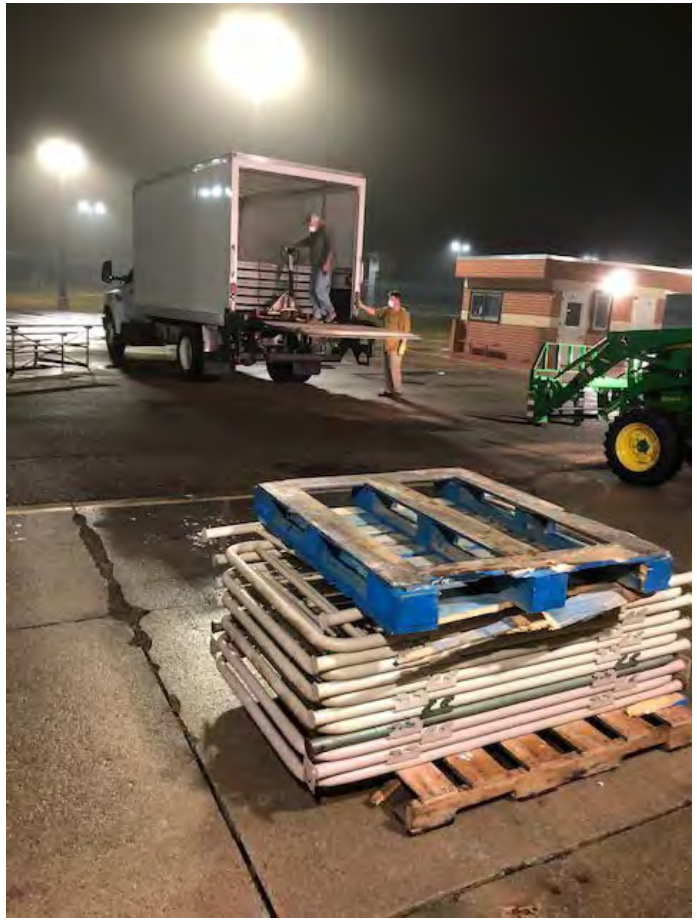
- Quarantine began with first COVID-19 Positive prisoner, March 26th
- MRF received notification on March 28th that there were 23 additional positive prisoners which initiated multiple operational changes

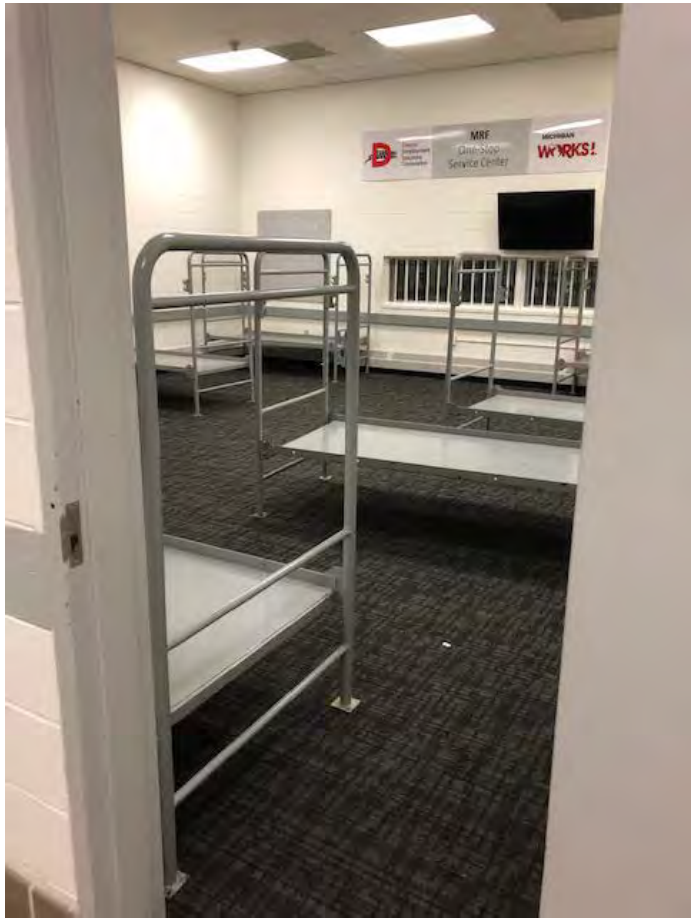
Initial Task Board

Employee Screening Process

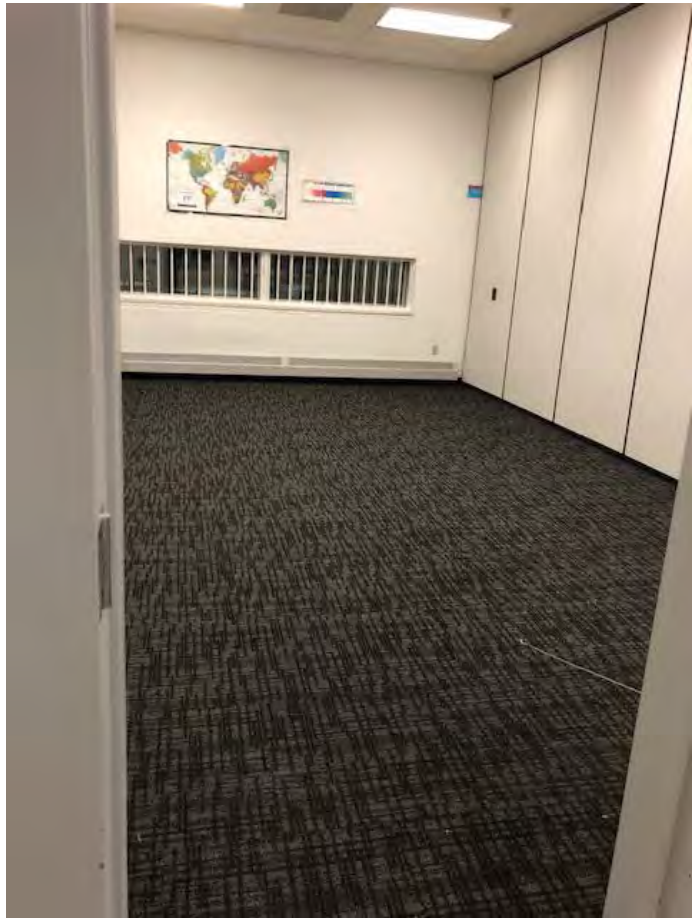
Initial Staging of Prisoner Beds

Initial Staging of Prisoner Beds

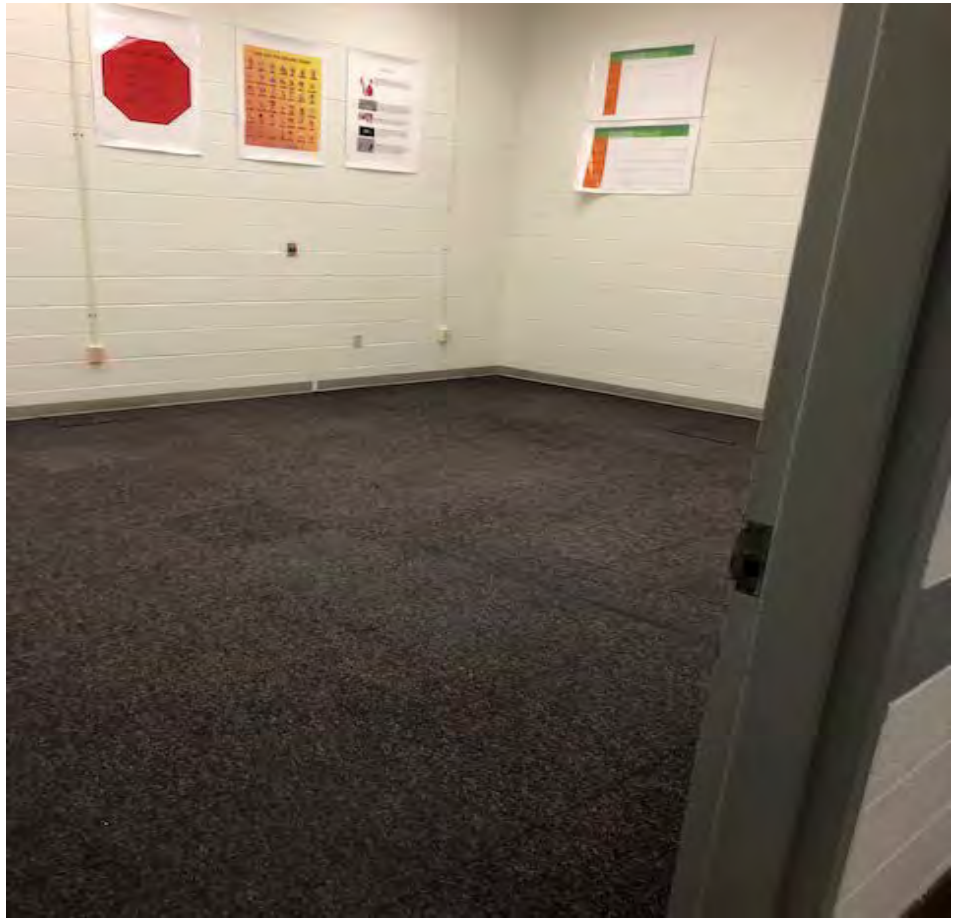


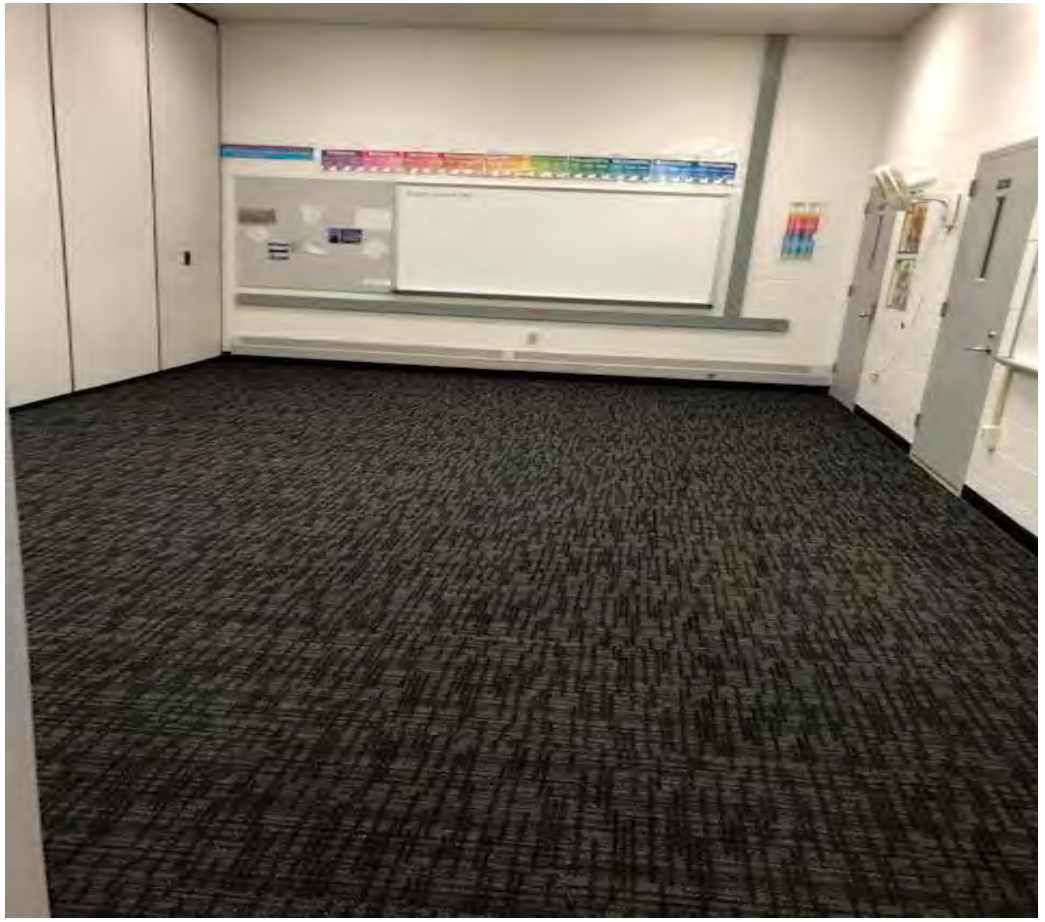


Staging



Staging





Initial Screening/Triage

Testing Kits

PUIs


SEGREGATION
STAFF ONLY
CONTROL CENTER CLEARANCE REQUIRED
BEFORE ENTERING AREA
PUI

COVID-19 Positives

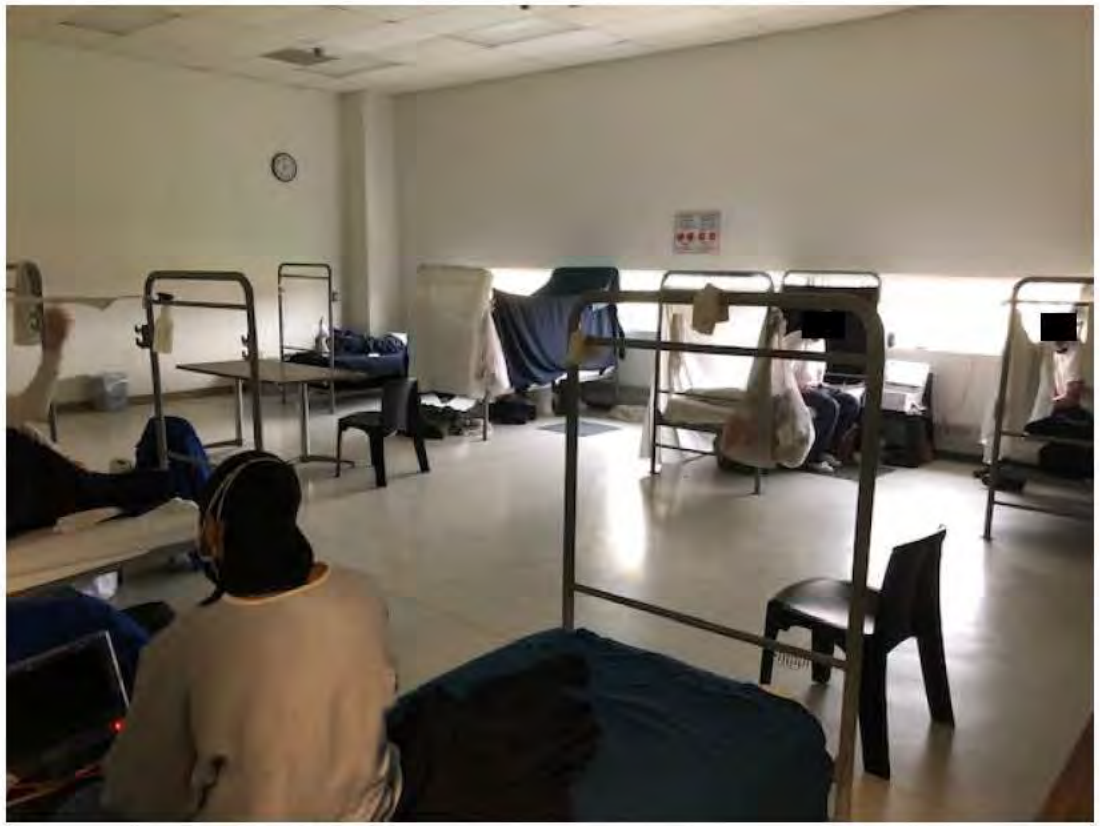
Close Contacts

Close Contact Cohorts – 16 Beds Each Side

Close Contact Cohorts – Smaller Classrooms

Close Contact Cohorts - Continued

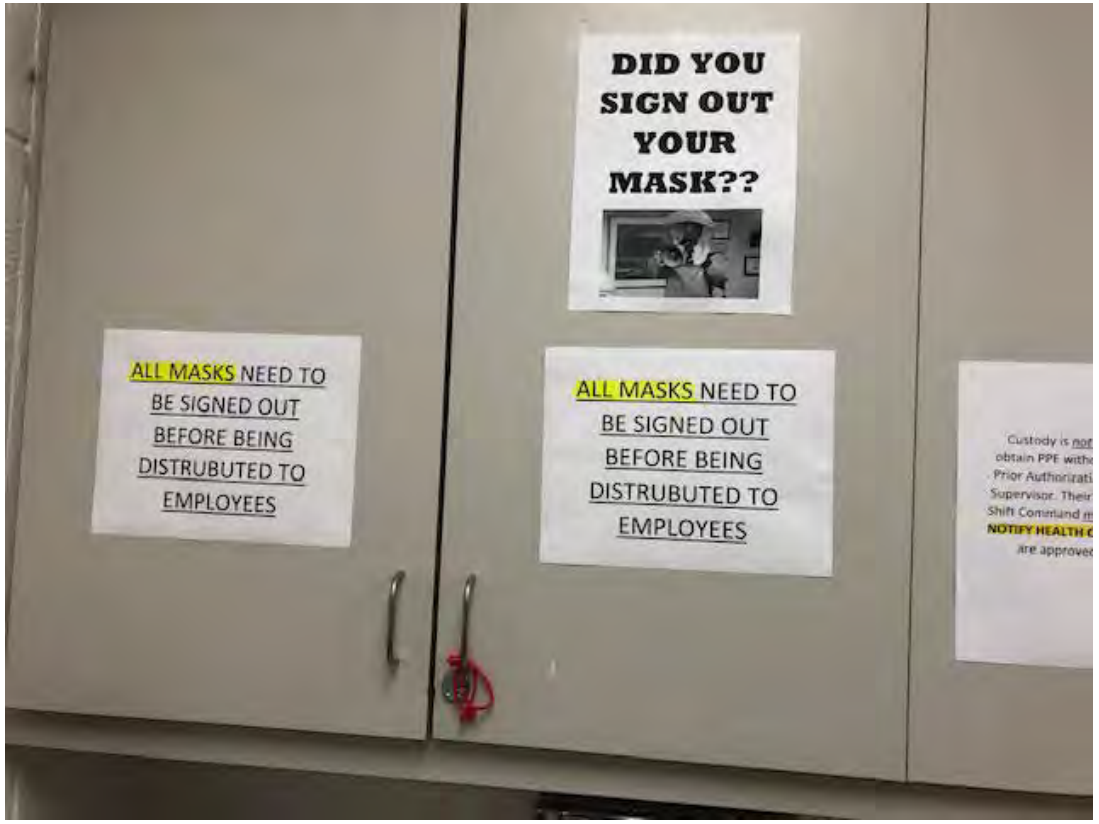
Close Contact Cohorts- Continued

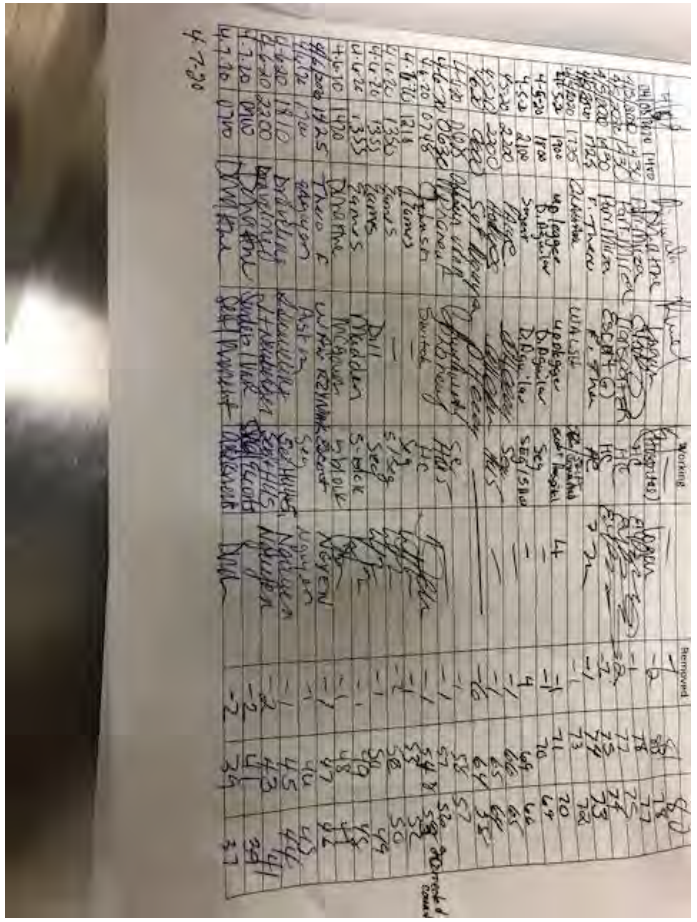


Dayroom Expansion for General Population

Dayrooms

PPE - Tracking





PPE Return for Washing

Social Distancing

Food Service

New Handicap Ramp

Garden Walk

Main Walk

RTP Unit

Big Yard Gate

Housing Units 4 and 5

Unit Entrances

Level II Units

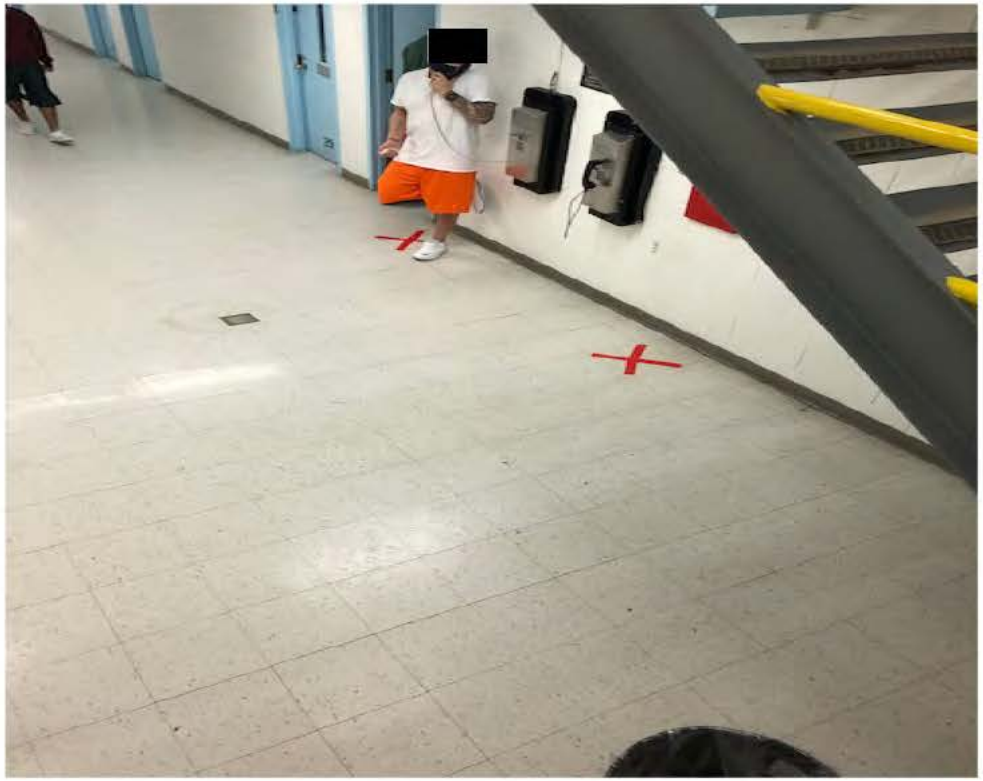
Level IV Units

RTP Unit

Level II Units

Inside of Units

Prisoner Phones



Staging Areas/Phones and Bathrooms

Unit Stairs

Unit Podiums

Medication Windows

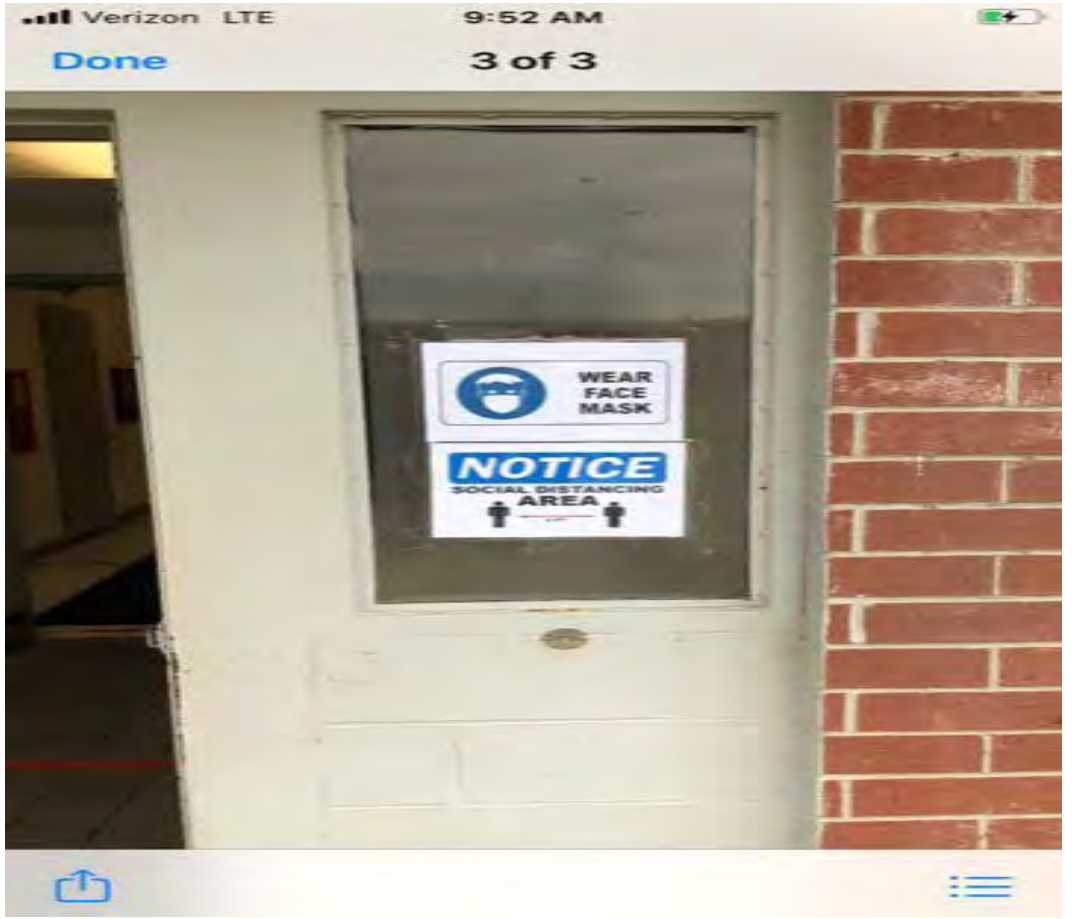
RTP

RTP

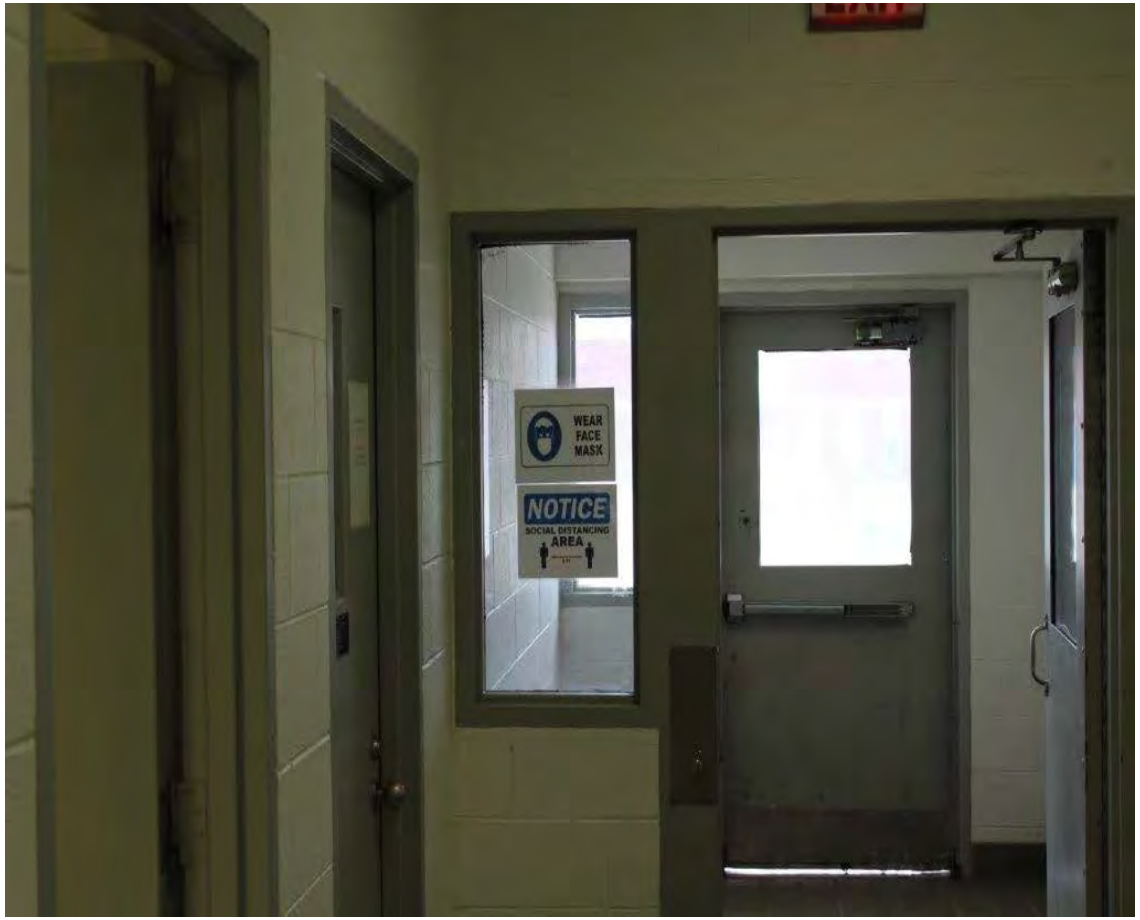
Signage - Building Entrances

Unit Podiums

Gates and Doors



Unit Entrances



Other Areas


PUI or Positive COVID
1. GOWN
2. MASK OR RESPIRATOR
3. GOGGLES OR FACE SHIELD
4. GLOVES
STOP
STOP
ISOLATION PRECAUTION:


WEAR
FACE
MASK

Lobby

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT P

UNITED STATES DISTRICT COURT
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, NOAH NAGY, MELINDA BRAMAN, BRYAN MORRISON, and HEIDI WASHINGTON,

Defendants.

No. 2:20-cv-11053

HON. MARK A. GOLDSMITH

MAG. R. STEVEN WHALEN

AFFIDAVIT OF JEREMY BUSH

Daniel Manville (P39731)
Attorney for Plaintiffs
Civil Rights Clinic,
MSU College of Law
P.O. Box 1570
East Lansing, MI 48823
(517) 432-6866
daniel.manville@law.msu.edu

Kevin J. O'Dowd (P39383)
Kristin M. Heyse (P64353)
Scott A. Mertens (P60069)
Sara E. Trudgeon (P82155)
Cori E. Barkman (P61470)
Allan J. Soros (P43702)
Assistants Attorney General
Attorneys for MDOC Defendants
MDOC Division
P. O. Box 30217
Lansing, MI 48909
(517) 335-3055
odowdk@michigan.gov

Kevin Ernst (P44223)
Attorney for Plaintiffs
Ernst Charara & Lovell, PLC
645 Griswold, Ste 4100 Detroit, MI
48226 313-965-5555
kevin@ecllawfirm.com

_____/

AFFIDAVIT OF JEREMY BUSH

Jeremy Bush, being first duly sworn, deposes and says as follows:

1. I make this affidavit on personal knowledge, and, if called upon to testify, I can competently testify as to the matters contained herein.

2. I am presently employed by the Michigan Department of Corrections ("MDOC") as the Acting Assistant Deputy Director, Jackson Region, which encompasses multiple MDOC facilities, including Parnall Correctional Facility (SMT), Lakeland Correctional Facility (LCF), Macomb Correctional Facility (MRF) and Cotton Correctional Facility (JCF).

3. With respect to COVID-19, specifically, I am involved daily in overseeing the implementation of all MDOC policies and directives for preventing the spread of COVID-19 within all Jackson Region facilities, including those specifically referenced above. Through this role, I have personal knowledge regarding the numerous measures discussed below that have been swiftly implemented in order to minimize and manage the spread of COVID-19.

4. On March 11, 2020, acting on behalf of the MDOC Director's office, I began disseminating COVID-19 risk reduction protocols to Wardens at all facilities in the Jackson Region, requiring the screening of anyone coming into a prison

facility; limiting and cancelling certain group gatherings; implementing social distancing measures; and ensuring an adequate supply of hand soap, disinfectants and cleaning materials for prisoners and staff so that they were never in short supply and available upon request. Wardens at these facilities were also instructed to provide additional and more frequent cleaning of their entire facility, including prisoner cells, bathrooms, showers, dining halls and all common areas.

5. On March 13, 2020, and effective immediately, the Michigan Department of Corrections ceased all in-person visitation of prisoners for the safety of staff, prisoners and the public. Additionally, any MDOC staff member or contractor entering the facility was not allowed to enter if they displayed signs or symptoms of the virus, and were screened for temperatures above 100.4 degrees. Symptomatic staff members were not allowed to enter any MDOC Correctional Facility and would not be allowed to return to work.

6. In addition to the early measures discussed above, the Director's Office Memorandum (DOM) includes a detailed outline of the many steps MDOC is taking to address the COVID-19 pandemic. In compliance with the DOM (Ex. H to Defendants' response brief), I communicated directly with Wardens and their staff in the Jackson Region to ensure that the required COVID-19 risk reduction protocols were promptly implemented. While some measures were uniquely designed for specific facilities, uniform measures applied to all facilities included, but were not limited to:

a. All staff and prisoners were provided three (3) masks (at a minimum) that they are always required to wear when interacting with others or moving throughout the facility.

b. Staff were instructed to provide prisoners with an adequate supply of hand soap and cleaning materials, to be replenished upon request as necessary.

c. Social distancing measures were implemented throughout the facility, consistent with Centers for Disease Control (CDC) guidelines, requiring that there be a distance of at least six feet between all individuals, including programing, classrooms, chow lines, staff screenings and office buildings, to the fullest extent feasible.

d. Screening measures for all staff entering the facility are strictly enforced, and any staff member flagged through the screening process is not allowed to return to work until after a negative COVID-19 test result was provided.

e. Separate isolation areas were established for prisoners who are under investigation (PUIs) for having COVID-19 as well as for those who have had close contact with a PUI or known-positive COVID-19 individual (Close Contacts), as necessary.

f. A prisoner testing positive for COVID-19 is placed in quarantine in a designated isolation area as soon as resources permit regardless of their security level or prior criminal history. The purpose for this

isolation area is not to serve as any sort of punitive measure. It is to ensure that positive cases are appropriately contained and risk that the virus will spread to other prisoners and staff is significantly reduced.

g. The isolation areas for PUIs follow the same criteria as the isolation areas for prisoners with confirmed cases of COVID-19. A PUI is placed alone in a cell pending the outcome of their test results.

h. Alcohol-based hand sanitizer and wipes are provided and permitted within the secure perimeter of the facility for use by staff.

i. Special authorization was provided for prisoners to be able to use cleaning materials containing bleach upon request. Prior to the COVID-19 epidemic, cleaning products containing bleach were not allowed within any MDOC facility due to the potential that bleach may be used as a weapon against another individual.

j. Clothed-body or thorough pat-down searches of prisoners are suspended for (1) prisoners who have tested positive for COVID-19, (2) PUIs, and (3) are a Close Contact.

k. Similarly, the searches of prisoner living areas are suspended for cells or areas whose occupants (1) have tested positive for COVID-19, (2) are a PUI, and (3) Close Contacts.

l. In lieu of visits, prisoners are given two free phone calls (each lasting five minutes) and two free JPay stamps per week.

m. No prisoner or staff transfers are to be made unless approved by the CFA Deputy Director or higher.

n. Cell moves are only to be made if absolutely necessary (e.g., medical, prisoner protection).

7. As Acting Assistant Deputy Director for the Jackson Region, I receive near daily briefings from Wardens and their staff at these facilities, regarding the measures being taken to minimize the spread of COVID-19 at these facilities, and can verify that these measures have been properly taken at the Jackson Region facilities in accordance with the DOM.

8. Further, based on my direct oversight of the Jackson Region facilities, Warden meetings and near-daily reports from these facilities, I can verify that the following measures are also being taken:

a. Any prisoner complaints or staff observations of any symptoms associated with COVID-19 are immediately responded to by correctional staff and addressed by healthcare, and any indication of symptoms is closely monitored by correctional staff.

b. Non-alcohol-based hand sanitizers are placed throughout the facility in common areas, and prisoners are always provided an adequate supply of soap and cleaning materials for their individual cells.

c. Social distancing is enforced throughout the facility and prisoners (outside of their cell) and staff are always required to wear masks when moving through the housing units. Where the physical structure

and layout of a facility does not always allow for maintaining a six-foot social distancing, we take every reasonable precaution to maintain social distancing, such as staggering meal times, limiting the numbers of prisoner who sit at a table in the chow hall and thoroughly cleaning between visits to chow hall.

d. Wardens and their staff are instructed to make rounds throughout the facility and ensure that prisoners have each received three (3) masks and have an adequate supply of hand soap, cleaning supplies and PPE. Should any prisoner complain or express concern over not having an adequate supply of hand soap, cleaning supplies or PPE, those concerns would be immediately addressed.

e. Wardens and their staff receive daily updates from their Health Unit Manager (HUM) and Assistant Resident Unit Supervisors (ARUS)/Prisoner Counselors (PC), confirming that prisoners are receiving an adequate supply of hand soap, cleaning materials and PPE, and that the wearing of masks by prisoners and staff and social distancing is being enforced.

f. It is well understood by all Wardens and staff at these facilities that the failure to respond to prisoner concerns over hand soap, cleaning materials or PPE or to enforce the wearing of masks and social distancing could result in corrective action and these matters are taken very seriously.

g. MDOC has released prisoners at the Jackson Region facilities early in response to COVID-19 where it is within MDOC's jurisdiction to do so, such as prisoners who have early parole eligibility.

h. Proper screening and testing of staff and prisoners is taking place at the facilities within CDC guidelines, and at some facilities, mass testing of the prisoner population has been performed, such as at Lakeland (LCF) and Cotton (JCF).

i. Correctional and healthcare staff closely monitor and immediately respond to any signs, symptoms or prisoner complaints associated with COVID-19. Prisoners are also well informed on the symptoms associated with COVID-19 by staff, Jpay messages, signs and digital displays throughout the facility and are encouraged to notify staff by any means available, including the kite system, regarding any concerns they may have related to COVID-19.

9. As Acting Assistant Deputy Director over the Jackson Region facilities, I can verify that MDOC will continue to fully implement and enforce COVID-19 risk reduction measures for the duration of this unprecedented pandemic to minimize the spread of COVID-19.

10. I make this affidavit on personal knowledge, and, if called upon to testify, I can competently testify as to the matters contained herein.

Jeremy Bush,
Acting Assistant Deputy Director
Jackson Region

Subscribed and sworn to before me

This 8th day of May, 2020.

PAUL J. SLAGTER II
NOTARY PUBLIC, STATE OF MI
COUNTY OF JACKSON
MY COMMISSION EXPIRES Dec 12, 2023
ACTING IN COUNTY OF Jackson

Notary Public, State of Michigan

County of Jackson

My commission expires: 12/12/2023

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT Q

SOCIAL DISTANCING PRACTICES

SOCIAL DISTANCING PRACTICES

SOCIAL DISTANCING PRACTICES

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT R

Caution
As of: May 11, 2020 4:29 PM Z

Valentine v. Collier

United States Court of Appeals for the Fifth Circuit

April 22, 2020, Filed

No. 20-20207

Reporter
2020 U.S. App. LEXIS 12941 *

LADDY CURTIS VALENTINE; RICHARD ELVIN KING, Plaintiffs-Appellees, v. BRYAN COLLIER; ROBERT HERRERA; TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Defendants-Appellants.

Prior History: **[*1]** Appeal from the United States District Court for the Southern District of Texas.

Valentine v. Collier, 2020 U.S. Dist. LEXIS 59781 (S.D. Tex., Apr. 6, 2020)

Core Terms

inmates, district court, exhaustion, injunction, cleaning, grievance, preliminary injunction, measures, prison, pandemic, masks, staff, required to exhaust, irreparable, deliberate indifference, administrative remedy, protective measures, state law, recommendations, circumstances, housing

Case Summary

Overview
HOLDINGS: [1]-In a case that implicated the State of Texas's response to the COVID-19 virus, the circuit court concluded that Texas Department of Criminal Justice (TDCJ) was likely to prevail on the merits of its appeal of the issuance of a reticulated preliminary injunction for two reasons. The first reason was that after accounting for the protective measures TDCJ had taken, plaintiffs had not shown a substantial risk of serious harm that amounted to cruel and unusual punishment; [2]-The second reason was that the district court committed legal error in its application of Farmer v. Brennan. Even assuming that there was a substantial risk of serious harm, plaintiffs lacked evidence of defendants' subjective deliberate indifference to that risk. The evidence showed that TDCJ had taken and continued to take measures to abate and control the spread of the virus.

Outcome
TDCJ's motion to stay the preliminary injunction pending appeal was granted. The appeal was expedited to the next available argument calendar.

LexisNexis® Headnotes

Civil Procedure > Judgments > Entry of Judgments > Stays of Judgments

HN1[] **Entry of Judgments, Stays of Judgments**

When considering a stay, a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. The first two factors are the most critical.

Civil Rights Law > Protection of Rights > Prisoner

Rights > Confinement Conditions

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN2[] Prisoner Rights, Confinement Conditions

In a constitutional claim alleging deliberate indifference to the conditions of a prisoner's confinement, the plaintiff must satisfy both the subjective and objective requirements of the *Eighth Amendment* inquiry. To satisfy the objective requirement, the plaintiff must show an objectively intolerable risk of harm. To satisfy the subjective requirement, the plaintiff must show that the defendant: (1) was aware of facts from which the inference could be drawn that a substantial risk of serious harm exists; (2) subjectively drew the inference that the risk existed; and (3) disregarded the risk. The incidence of diseases or infections, standing alone, do not imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks. Instead, the plaintiff must show a denial of basic human needs. Deliberate indifference is an extremely high standard to meet.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] Injunctions, Preliminary & Temporary Injunctions

Parties can present evidence at the preliminary-injunction stage with declarations or affidavits.

Constitutional Law > State Sovereign Immunity

HN4[] Constitutional Law, State Sovereign Immunity

The *Eleventh Amendment* prohibits federal courts from enjoining state facilities to follow state law.

Civil Rights Law > Protection of Rights > Prisoner Rights > Confinement Conditions

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN5[] Prisoner Rights, Confinement Conditions

Deliberate indifference to the conditions of a prisoner's confinement requires the defendant to have a subjective state of mind more blameworthy than negligence, akin to criminal recklessness.

Civil Rights Law > Protection of Rights > Prisoner Rights > Medical Treatment

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN6[] Prisoner Rights, Medical Treatment

Mere disagreement with a prison administrator's medical decisions does not establish deliberate indifference.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > Judgments > Entry of Judgments > Stays of Judgments

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN7[] Grounds for Injunctions, Irreparable Harm

When the State is seeking to stay a preliminary injunction, it's generally enough to say any time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.

Civil Procedure > Remedies > Injunctions

HN8[] Remedies, Injunctions

Where the State is the appealing party with respect to an injunction, its interest and harm merge with that of the public.

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Exhaustion of Administrative Remedies

HN9[] Prison Litigation Reform Act, Exhaustion of Administrative Remedies

The Prison Litigation Reform Act requires inmates to exhaust such administrative remedies as are available before filing suit in federal court to challenge prison conditions. *42 U.S.C.S. §*

1997e(a). This exhaustion obligation is mandatory - there are no futility or other judicially created exceptions to the statutory exhaustion requirements. So long as the State's administrative procedure grants authority to take some action in response to a complaint, that procedure is considered available, even if it cannot provide the remedial action an inmate demands. By contrast, a remedy is not available - and exhaustion is not required - when: (1) the procedure operates as a simple dead end because the relevant administrative procedure lacks authority to provide any relief, or administrative officials have apparent authority, but decline ever to exercise it; (2) the administrative scheme is so opaque that no reasonable prisoner can use them; or (3) prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Remedies

HN10[] **Injunctions, Preliminary & Temporary Injunctions**

The Prison Litigation Reform Act (PLRA) mandates that preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. *18 U.S.C.S. § 3626(a)(2)*. The PLRA says courts shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in *§ 3626(1)(B)* in tailoring any preliminary relief.

Counsel: For Laddy Curtis Valentine, Richard Elvin King, Plaintiffs - Appellees: Brandon W. Duke, John R. Keville, Attorney, Winston & Strawn, L.L.P., Houston, TX; Jeff S. Edwards, Edwards Law, Austin, TX.

For Bryan Collier, Robert Herrera, Texas Department of Criminal Justice, Defendants - Appellants: Kyle Douglas Hawkins, Jason R. LaFond, Office of the Attorney General, Office of the Solicitor General, Austin, TX; Christin Cobe Vasquez, Office of Attorney General for the State of Texas, Austin, TX.

Judges: Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

Opinion

PER CURIAM:

This case implicates the State of Texas's response to COVID-19. On April 16, 2020, the United States District Court for the Southern District of Texas issued a reticulated preliminary injunction against the executive director of the Texas prison system and the warden of one of its prisons. The injunction regulates in minute detail the cleaning intervals for common areas, the types of bleach-based disinfectants the prison must use, the alcohol content of hand sanitizer that inmates must receive, mask requirements for inmates, and inmates' access to tissues (amongst **[*2]** many other things). The district court admitted that its injunction "goes beyond" the recommendations of the Centers for Disease Control and Prevention. But in the district court's view, anything less than this injunction—including, presumably, the CDC guidelines— violates the *Eighth Amendment*. Pursuant to *Federal Rule of Appellate Procedure 8*, we stay the injunction pending appeal.

I.

As with every other part of the country, our Nation's correctional facilities have not escaped the reach of COVID-19. To mitigate the spread of the virus, the Texas Department of Criminal Justice ("TDCJ") has adopted and implemented several rounds of measures guided by ever-changing CDC recommendations. Plaintiffs are two inmates at the TDCJ Wallace Pack Unit ("Pack Unit"), a prison for the elderly and the infirm. They say TDCJ's measures don't go far enough.

On March 30, 2020, Plaintiffs filed a class action lawsuit on behalf of disabled and high-risk Pack Unit inmates against TDCJ, its executive director, and the warden of the Pack Unit. The complaint alleges violations of the *Eighth Amendment's* prohibition against cruel and unusual punishment, and of the *Americans with Disabilities Act*. In addition, Plaintiffs sought a preliminary injunction.

After considering Defendants' **[*3]** written evidence and Plaintiffs' live witness testimony, the district court granted that injunction, finding it likely that Plaintiffs could prove an

Eighth Amendment violation. The district court enjoined TDCJ to:

- "Provide Plaintiffs and the class members with unrestricted access to hand soap and disposable hand towels to facilitate handwashing."
- "Provide Plaintiffs and the class members with access to hand sanitizer that contains at least 60% alcohol in the housing areas, cafeteria, clinic, commissary line, pill line, and laundry exchange."
- "Provide Plaintiffs and the class members with access to tissues, or if tissues are not available, additional toilet paper above their normal allotment."
- "Provide cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning, including in quantities sufficient for each inmate to clean and disinfect the floor and all surfaces of his own housing cubicle, and provide new gloves and masks for each inmate during each time they are cleaning or performing janitorial services."

- "Provide all inmates and staff members with masks. If TDCJ chooses to provide **[*4]** inmates with cotton masks, such masks must be laundered regularly."
- "Require common surfaces in housing areas, bathrooms, and the dining hall to be cleaned every thirty minutes from 7 a.m. to 10 p.m. with bleach-based cleaning agents, including table tops, telephones, door handles, and restroom fixtures."
- "Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television controls, books, and gym and sports equipment."
- "Institute a prohibition on new prisoners entering the Pack Unit for the duration of the pandemic. In the alternative, test all new prisoners entering the Pack Unit for COVID-19 or place all new prisoners in quarantine for 14 days if no COVID-19 tests are available."
- "Limit transportation of Pack Unit inmates out of the prison to transportation involving immediately necessary medical appointments and release from custody."
- "For transportation necessary for prisoners to receive medical treatment or be released, CDC-recommended social distancing requirements should be strictly enforced in TDCJ buses and vans."

- "Post signage and information in common areas that provides: (i) general updates and information about **[*5]** the COVID-19 pandemic; (ii) information on how inmates can protect themselves from contracting COVID-19; and (iii) instructions on how to properly wash hands. Among other locations, all signage must be posted in every housing area and above every sink."
- "Educate inmates on the COVID-19 pandemic by providing information about the COVID-19 pandemic, COVID-19 symptoms, COVID-19 transmission, and how to protect oneself from COVID-19. A TDCJ staff person must give an oral presentation or show an educational video with the above-listed information to all inmates, and give all inmates an opportunity to ask questions. Inmates should be provided physical handouts containing COVID-19 educational information, such as the CDC's 'Share Facts About COVID-19' fact sheet already in TDCJ's possession."
- "TDCJ must also orally inform all inmates that co-pays for medical treatment are suspended for the duration of the pandemic, and encourage all inmates to seek treatment if they are feeling ill."

- "TDCJ must, within three (3) days, provide the Plaintiffs and the Court with a detailed plan to test all Pack Unit inmates for COVID-19, prioritizing those who are members of Dorm A and of vulnerable populations **[*6]** that are the most at-risk for serious illness or death from exposure to COVID-19. For any inmates who test positive, TDCJ shall provide a plan to quarantine them while minimizing their exposure to inmates who test negative. TDCJ must also provide a plan for testing all staff who will continue to enter the Pack Unit, and for any staff that test positive, provide a plan for minimizing inmates' exposure to staff who have tested positive."

Prelim. Inj. Order at 2-4 [hereinafter PI Order].

In its memorandum opinion explaining this injunction, the district court acknowledged that "many of the measures ordered in the preliminary injunction largely overlap with TDCJ's COVID-19 policy requirements and recommendations." D. Ct. Op. at 23. Yet the court believed the injunction necessary "to promote compliance" with TDCJ's policy, as well as CDC guidelines. *Id*. at 24. Some of the conduct required of Defendants under the injunction goes even further than CDC guidelines. But the district court found that compliance with those guidelines alone could be constitutionally insufficient. *Id*. at 25-26.

The district court stayed its preliminary injunction until April 22, 2020, at 5 p.m. Defendants timely appealed and sought a stay **[*7]** of the preliminary injunction pending appeal.

II.

HN1[↑] When considering a stay, "a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other

parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder, 556 U.S. 418, 426, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)* (quotation omitted). The first two factors are the most critical. *Barber v. Bryant, 833 F.3d 510, 511 (5th Cir. 2016)*.

A.

We start with TDCJ's likelihood of success on appeal. ***HN2***[] In a constitutional claim alleging deliberate indifference to the conditions of a prisoner's confinement, the plaintiff must satisfy both the "subjective and objective requirements" of the *Eighth Amendment* inquiry. *Farmer v. Brennan, 511 U.S. 825, 846, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*. To satisfy the objective requirement, the plaintiff must show an "objectively intolerable risk of harm." *Ibid*. To satisfy the subjective requirement, the plaintiff must show that the defendant: "(1) was 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists'; (2) subjectively 'dr[e]w the inference' that the risk existed; and (3) disregarded the risk." *Cleveland v. Bell, 938 F.3d 672, 676 (5th Cir. 2019)* (quoting *Farmer, 511 U.S. at 837*). The "incidence of diseases or infections, **[*8]** standing alone," do not "imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks." *Shepherd v. Dallas Cty., 591 F.3d 445, 454 (5th Cir. 2009)*. Instead, the plaintiff must show a denial of "basic human needs." *Ibid*. "Deliberate indifference is an extremely high standard to meet." *Cadena v. El Paso Cty., 946 F.3d 717, 728 (5th Cir. 2020)*.

TDCJ is likely to prevail on the merits of its appeal. That's for two reasons: (1) after accounting for the protective measures TDCJ has taken, the Plaintiffs have not shown a "substantial risk of serious harm" that amounts to "cruel and unusual punishment"; and (2) the district court committed legal error in its application of *Farmer v. Brennan*.

1.

First, the harm analysis. There is no doubt that infectious diseases generally and COVID-19 specifically can pose a risk of serious or fatal harm to prison inmates. TDCJ acknowledges that fact. And it submitted evidence to the district court of the protective measures it has taken as a result.[1] Those protective measures include many of the things the district court ordered—including "access to soap, tissues, gloves, masks, regular cleaning, signage and education, quarantine of new prisoners, and social distancing during transport." D. Ct. Op. at 24. The legal question **[*9]** is whether the *Eighth Amendment* requires TDCJ to do more to mitigate the risk of harm.

The district court said yes. It acknowledged the numerous protections TDCJ provided, but it wanted to see "extra measures," such as providing alcohol-based sanitizer and additional paper products. D. Ct. Op. at 26. The district court further acknowledged that the "extra measures" it required "go[] beyond TDCJ and CDC policies." *Id*. at 25. Plaintiffs have cited no precedent holding that the CDC's recommendations are insufficient to satisfy the *Eighth Amendment*.

TDCJ also is likely to succeed on appeal insofar as the district court enjoined the State to follow its own laws and procedures. In *Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*, a plaintiff class brought suit under *inter alia* the *Eighth Amendment* and state law to challenge the conditions at a state facility for people with mental disabilities. *See id. at 92*. The Supreme Court held that ***HN4***[] the *Eleventh Amendment* prohibits federal courts from enjoining state facilities to follow state law. *See id. at 103-23*. Here, however, the district court acknowledged that its injunction "largely overlap[ped] with TDCJ's COVID-19 policy requirements and recommendations." D. Ct. Op. at 23. In the district court's view, this was a virtue not a vice because its injunction would "promote compliance" **[*10]** with TDCJ's own policies. *Id*. at 24. *Pennhurst* plainly prohibits such an injunction.

2.

Second, even assuming that there is a substantial risk of serious harm, the Plaintiffs lack evidence of the Defendants' subjective deliberate indifference to that risk. In *Farmer v. Brennan*, the Supreme Court held that ***HN5***[] deliberate indifference requires the defendant to have a subjective "state of mind more blameworthy than negligence," *Farmer, 511 U.S. at 835*, akin to criminal recklessness, *id. at 839-40*. The district court misapplied this standard. It appeared to think that the question was "whether [the Defendants] reasonably abate[d] the risk" of infection, D. Ct. Op. at 20, or stated differently, "whether and how [TDCJ's] policy is being administered," *id*. at 23.

The district court thus collapsed the objective and subjective

[1] The district court made much of the fact that TDCJ did not present "live testimony" at the preliminary-injunction hearing. It's unclear to us why that matters. It long has been true that ***HN3***[] parties can present evidence at the preliminary-injunction stage with declarations or affidavits. *See, e.g., Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545, 551 (5th Cir. 1993)*. And, of course, it's the Plaintiffs' burden to prove their entitlement to an injunction, not the Defendants' burden to prove the opposite.

components of the *Eighth Amendment* inquiry established in *Farmer*, treating inadequate measures as dispositive of the Defendants' mental state. Such an approach resembles the standard for civil negligence, which *Farmer* explicitly rejected. Though the district court cited the Defendants' general awareness of the dangers posed by COVID-19, it cited no evidence that they subjectively believe the measures they are taking are inadequate. To the contrary, **[*11]** the evidence shows that TDCJ has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus. *See* Dkt. 36-7 (declaration of TDCJ Health Services Director); Dkt. 36 at 13-20 (compiling evidence of protective measures taken by TDCJ). Although the district court might do things differently, ***HN6***[↑] mere "disagreement" with TDCJ's medical decisions does not establish deliberate indifference. *Cadena, 946 F.3d at 729*.

B.

TDCJ also has shown that it will be irreparably injured absent a stay. *See Nken, 556 U.S. at 434*. ***HN7***[↑] When the State is seeking to stay a preliminary injunction, it's generally enough to say "'[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King, 567 U.S. 1301, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012)* (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351, 98 S. Ct. 359, 54 L. Ed. 2d 439 (1977)* (Rehnquist, J., in chambers)). The Texas Legislature assigned the prerogatives of prison policy to TDCJ. *See, e.g.*, *TEX. GOV'T CODE ch. 501*. The district court's injunction prevents the State from effectuating the Legislature's choice and hence imposes irreparable injury.

Moreover, the Supreme Court has repeatedly warned that "it is 'difficult to imagine an activity in **[*12]** which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" *Woodford v. Ngo, 548 U.S. 81, 94, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006)* (quoting *Preiser v. Rodriguez, 411 U.S. 475, 491-92, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973)*); *see also Missouri v. Jenkins, 495 U.S. 33, 51, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990)*. Yet the district court in this case imposed a number of immediate demands on TDCJ. Among these is a plan within three days to test all Pack Unit inmates for COVID-19, as well as a new plan to quarantine those who test positive, distribute physical handouts with COVID-19 information to the inmates, clean common surfaces every thirty minutes for fifteen hours each and every day, and to provide masks to all inmates and staff members. As we've said before about such intrusive orders, this one creates "an administrative nightmare" for TDCJ "to comply with the district court's quotas and deadlines." *Ruiz v. Estelle, 650 F.2d 555, 571 (5th Cir. Unit A June 1981)*. "[T]he burden upon TDC[J] in terms of time, expense, and administrative red tape is too great" while it must respond in other ways to the crisis. *Ibid*.

The harm to TDCJ is particularly acute because the district court's order interferes with the rapidly changing and flexible system-wide approach that TDCJ has used to respond to the pandemic so far. The TDCJ's Director of Health Services explained this statewide **[*13]** approach in her declaration. *See* Dkt. 36-7. The Director worked with a team of medical directors to develop Policy B-14.52 in response to COVID-19. *Id*. at 2. TDCJ first implemented that policy on March 20, 2020. It was designed "to adhere to guidance issued" by the CDC. *Ibid*. And the policy was then disseminated to staff, placed in the "Correctional Managed Health Care Infection Control Policy Manual[,] and posted on the TDCJ website." *Id*. at 3. But just three days later, the CDC updated its guidance, so TDCJ implemented a revised policy on March 27, 2020. *Id*. at 4. More changes came again on April 2, 2020, and again TDCJ disseminated and implemented the updated policy. *Ibid*. And on April 15, 2020, TDCJ disseminated and began implementation of yet *another* policy. *Id*. at 4-5. TDCJ's ability to continue to adjust its policies is significantly hampered by the preliminary injunction, which locks in place a set of policies for a crisis that defies fixed approaches. *See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 28-29, 25 S. Ct. 358, 49 L. Ed. 643 (1905)*; *In re Abbott, No. 20-50264, 2020 U.S. App. LEXIS 10893, 2020 WL 1685929, at *12 (5th Cir. 2020)* (describing COVID-19 as a "massive and rapidly-escalating threat"). And it prevents TDCJ from responding to the COVID-19 threat without a permission slip from the district court. That constitutes irreparable harm.

C.

The remaining two factors of the **[*14]** stay standard are the balance of the harms and the public interest. *See Nken, 556 U.S. at 426*. Both weigh in favor of staying the district court's injunction. There is no doubt that COVID-19 poses risks of harm to all Americans, including those in the Pack Unit. But the question is whether Plaintiffs have shown that they will suffer irreparable injuries *even after* accounting for the protective measures in TDCJ Policy B-14.52. Neither the Plaintiffs nor the district court suggest the evidence satisfies that standard. And ***HN8***[↑] "[b]ecause the State is the appealing party, its interest and harm merge with that of the public." *Veasey v. Abbott, 870 F.3d 387, 391 (5th Cir. 2017)* (citing *Nken, 556 U.S. at 435*). Therefore, TDCJ has satisfied all four requirements of the stay standard.

III.

Plaintiffs also face several obstacles to relief under the Prison Litigation Reform Act ("PLRA"). Two bear emphasis at this stage: exhaustion and narrowness.

A.

First, exhaustion. HN9[] The PLRA requires inmates to exhaust "such administrative remedies as are available" before filing suit in federal court to challenge prison conditions. 42 U.S.C. § 1997e(a). This exhaustion obligation is mandatory—there are no "futility or other [judicially created] exceptions [to the] statutory exhaustion requirements . . . ." Booth v. Churner, 532 U.S. 731, 741 n.6, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001). So long as the State's **[*15]** administrative procedure grants "authority to take *some* action in response to a complaint," that procedure is considered "available," even if it cannot provide "the remedial action an inmate demands." Id. at 736 (emphasis added); *see also* id. at 739 ("Congress meant to require procedural exhaustion regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible.").

By contrast, a remedy is not "available"—and exhaustion is not required—when:

> 1. The procedure "operates as a simple dead end" because "the relevant administrative procedure lacks authority to provide any relief," or "administrative officials have apparent authority, but decline ever to exercise it."
> 2. The "administrative scheme [is] so opaque that . . . no reasonable prisoner can use them."
>
> 3. Or when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."

Ross v. Blake, 136 S. Ct. 1850, 1859-60, 195 L. Ed. 2d 117 (2016) (quotation omitted).

Under these standards, Plaintiffs' suit appears premature. All parties agree that the TDCJ administrative process is open for Plaintiffs' use. And Plaintiffs do not argue that TDCJ is incapable of providing *some* (albeit inadequate) relief. Nor do they **[*16]** contend that TDCJ always "decline[s] to exercise" its authority, id. at 1859, that the scheme is unworkably opaque, or that administrators thwart use of the system, *see* id. at 1859-60. Therefore, according to the standards the Supreme Court has given us, TDCJ's grievance procedure is "available," and Plaintiffs were required to exhaust.

The district court disagreed. It considered the TDCJ process too lengthy to provide timely relief, and therefore incapable of use and unavailable under the special circumstances of the COVID-19 crisis. *See* D. Ct. Op. at 16. Other inmates have tried this argument before. In Blake v. Ross, 787 F.3d 693 (4th Cir. 2015), the court of appeals held that true exhaustion was not required when the inmate had "exhausted his remedies *in a substantive* sense by affording corrections officials time and opportunity to address complaints internally." Id. at 698 (quoting Macias v. Zenk, 495 F.3d 37, 43 (2d Cir. 2007)).

The Supreme Court rejected this "special circumstances" exception "as inconsistent with the PLRA." Ross, 136 S. Ct. at 1855. In so holding, the Court noted that the precursor to today's § 1997e(a) "would require exhaustion only if a State provided 'plain, speedy, and effective' remedies . . . ." Id. at 1858 (quoting § 7(a), 94 Stat. 352 (1980)). By enacting the PLRA (which removed that proviso), Congress rejected this "weak exhaustion provision" **[*17]** in favor of an "invigorated" and absolute "exhaustion provision." *Ibid.* (quotation omitted). In the Supreme Court's view, reading a "special circumstances" exception into the PLRA would undo the PLRA and "resurrect" its predecessor. *Ibid.*

The district court's understanding of the exhaustion requirement similarly revivifies the rejected portions of the old regime. The crux of the court's concern is that TDCJ has not acted speedily enough. But that was an exception to exhaustion under the old § 1997e(a), not the current one. Moreover, the district court held that TDCJ's procedure would be unduly lengthy if TDCJ were to use the full time allotted for a response to the grievance under state law. *See* D. Ct. Op. at 17. But the district court never found that TDCJ *would* take the full time if given the chance. The holding that the TDCJ process "presents no 'possibility of some relief,'" *id.* at 17-18 (citing Ross, 136 S. Ct. at 1859), is therefore unsupported by the evidence.

Nor are we persuaded by the district court's reliance on Fletcher v. Menard Correctional Center, 623 F.3d 1171 (7th Cir. 2010). In that case, Judge Posner hypothesized that administrative remedies might "offer no possible relief in time to prevent . . . imminent danger from becoming an actual harm." Fletcher, 623 F.3d at 1174. But, in that hypothetical, the State **[*18]** procedure could "offer no *possible* relief" because State law prohibited a response to the grievance until two weeks after it was filed—rendering the procedure of no use to an inmate threatened with death in 24 hours. *Ibid.* (emphasis added). In those circumstances, of course the procedure is unavailable—"it lacks authority to provide any relief," Ross, 136 S. Ct. at 1859, because as a matter of law it cannot respond quickly enough. We need not confront Judge Posner's hypothetical because TDCJ faces no legal bar to offering timely relief. TDCJ is empowered to act on a grievance any time *up to*—not *after*, as in Fletcher—the statutory limit. Relief by TDCJ therefore remains possible

(and the procedure available), even if TDCJ has not acted as swiftly as Plaintiffs would like.[2]

B.

Finally, it appears that the district court's injunction goes well beyond the limits of what the PLRA would allow even if the Plaintiffs had properly exhausted their claims. HN10[↑] The PLRA mandates that "[p]reliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). And the PLRA says courts **[*19]** "shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief." *Ibid*.

The district court's order recited these propositions, *see* PI Order at 1-2, but the injunction's substance contravenes them. This is a class-action injunction that applies to all inmates—disabled and non-disabled alike—in the Pack Unit. And it's hard to see how an injunction that prescribes both a prison-wide testing regime and a cleaning schedule down to the half-hour interval is "narrowly drawn" or the "least intrusive means" available. *See id*. at 3-4. So too with the requirement that every single sink have a sign over it with COVID-19 information. *See id*. at 3. These may be salutary health measures. But that level of micromanagement, enforced upon threat of contempt, does not reflect the principles of comity commanded by the PLRA.

* * *

For the foregoing reasons, TDCJ's motion to stay the preliminary injunction pending appeal is GRANTED. The appeal is EXPEDITED to the next available argument calendar.

Concur by: STEPHEN A. HIGGINSON

Concur

[2] Nor is the possibility of TDCJ action speculative. As noted above in Part II.B, Defendants offered uncontroverted testimony from the Director of TDCJ Health Services that TDCJ adopted an infection control policy as early as March 20, 2020. Dkt. 36-7 at 3. TDCJ's medical directors have updated the policy periodically in response to ever-evolving CDC guidelines and other input. *Id*. at 4.

STEPHEN A. HIGGINSON, Circuit Judge, **[*20]** concurring in the judgment:

I agree that Appellants have demonstrated a substantial likelihood of success on their claim that Appellees failed to exhaust prison remedies prior to seeking relief in federal court. Appellees did not submit any grievance request to prison authorities before filing this lawsuit, and I am not aware of any case, nor do Appellees or the district court cite one, in which a prisoner has been deemed compliant with the Prison Litigation Reform Act (PLRA) when there has been no attempt to file a grievance prior to suit in federal court.[1]

I write separately, however, to emphasize two points as governments, state and federal, respond to the COVID-19 crisis, which presents enormous and imminent health risks for prisoners and correctional officers alike.

First, the instant stay order does not foreclose the possibility that, upon expedited consideration, our court may nonetheless conclude that a remedy using the Texas Department of Criminal Justice's (TDCJ) grievance system is not "available" because of the immediacy of the COVID-19 medical emergency coupled with statements credited by the district court that prisoners' grievances may **[*21]** not be addressed promptly. If these plaintiffs—geriatric prisoners, many of whom are medically compromised—have no opportunity to expedite systemic medical emergency grievances, our court might hold that prison administrative remedies "operate[] as a simple dead end" giving prison officials apparent authority though they decline to exercise it. *See* Ross v. Blake, 136 S. Ct. 1850, 1859, 195 L. Ed. 2d 117 (2016).[2] However, here it is undisputed that the plaintiffs sought relief in federal district

[1] *Cf.* United States v. Vigna, No. S1 16-CR-786-3 (NSR), 2020 U.S. Dist. LEXIS 68432, 2020 WL 1900495, at *5 (S.D.N.Y. Apr. 17, 2020) (noting that the court is not aware of any case where an inmate's failure to exhaust has been excused without the inmate "at least submitting a request [to the prison] . . . prior to, or in conjunction with, his or her application to the court").

[2] *See also* Fletcher v. Menard Corr. Ctr., 623 F.3d 1171, 1174 (7th Cir. 2010); Nellson v. Barnhart, No. 20-CV-00756-PAB, 2020 U.S. Dist. LEXIS 66971, 2020 WL 1890670, at *4 (D. Colo. Apr. 16, 2020) (discussing importance of an imminent-danger exception while also noting that the Supreme Court clarified that "total and immediate relief is not the standard for exhaustion, 'the possibility of some relief' is"). *Cf.* Muhammad v. Mayfield, 933 F.3d 993, 1000 (8th Cir. 2019) (identifying the examples in *Ross* as "*at least* three" of the circumstances where the administrative process may be "unavailable" (emphasis added)); Williams v. Corr. Officer Priatno, 829 F.3d 118, 123 n.2 (2d Cir. 2016) ("We note that the three circumstances discussed in *Ross* do not appear to be exhaustive . . . .").

court *prior* to filing *any* grievance, and Appellees cite no PLRA exhaustion caselaw supporting a not "available" determination ex ante.

Second, our reasoning on PLRA's exhaustion requirement does not foreclose federal prisoners from seeking relief under the First Step Act's provisions for compassionate release. *See 18 U.S.C. § 3582(c)(1)(A)(i)*. Though that statute contains its own administrative exhaustion requirement, several courts have concluded that this requirement is not absolute and that it can be waived by the government or by the court, therefore justifying an exception in the unique circumstances of the COVID-19 pandemic. *See, e.g., United States v. Russo, No. 16-cr-441 (LJL), 2020 U.S. Dist. LEXIS 65390, 2020 WL 1862294, at *4-5 (S.D.N.Y. Apr. 14, 2020)* (holding that, "[d]espite the mandatory nature of [the **[*22]** statute's] exhaustion requirement," the exhaustion bar is "not jurisdictional" and can therefore be waived); *United States v. Smith, No. 12 Cr. 133 (JFK), 2020 U.S. Dist. LEXIS 64371, 2020 WL 1849748, at *2-3 (S.D.N.Y. Apr. 13, 2020)* (citing cases); *see also Vigna, 2020 U.S. Dist. LEXIS 68432, 2020 WL 1900495, at *5-6* (identifying the difficulties of the First Step Act exhaustion question while ultimately deferring a ruling until the petitioner exhausted his remedies); *but see United States v. Raia, F.3d , 2020 WL 1647922, at *2 (3d Cir. 2020)*; *United States v. Clark, No. 17-85-SDD-RLB, 2020 U.S. Dist. LEXIS 59439, 2020 WL 1557397, at *3 (M.D. La. Apr. 1, 2020)*.[3]

Because Appellants are substantially likely to succeed on their argument that statutory exhaustion of administrative remedies was not even sought prior to filing this lawsuit, I would not reach the merits of Appellees' ADA and *42 U.S.C. § 1983* claims. Whereas those claims face high legal hurdles,[4] they also are intensely **[*23]** fact-based.[5] The district court assessed lay and expert testimony before making extensive and careful findings of fact showing that mitigation deficiencies still exist. D. Ct. Op. at 7-14. However, given the TDCJ's systemic and ongoing responses to fast-changing guidance, I would reserve for the merits panel the complex question of whether and which of these deficiencies amount to a cognizable violation.

End of Document

[3] I note that, unlike the PLRA, *Section 3582* does not limit the exhaustion requirement to "available" remedies. *See 18 U.S.C. § 3582(c)(1)(A)* (authorizing a motion for a sentence reduction "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"). The "availability" caveat—PLRA's "built-in exception to the exhaustion requirement," *Ross, 136 S. Ct. at 1855*—arguably presents a stronger basis from which to conclude that Appellants were not required to exhaust their remedies here.

[4] *See Gobert v. Caldwell, 463 F.3d 339, 349 (5th Cir. 2006)* (holding that "deliberate indifference exists wholly independent of an optimal standard of care"); *see also Alexander v. Choate, 469 U.S. 287, 301, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985)* (holding that an accommodation is reasonable under the ADA if it provides "meaningful access to the benefit[s] that the [prison] offers"); *Love v. Westville Corr. Ctr., 103 F.3d 558, 561 (7th Cir. 1996)* (holding that in the prison context, it is appropriate to consider "[s]ecurity concerns, safety concerns, and administrative exigencies"); *cf. Garza v. City of Donna, 922 F.3d 626, 636-37 (5th Cir. 2019)* (holding that a deliberate indifference claim does not "require[] proof that officials *subjectively* intend that the harm occur" (emphasis added)).

[5] *See, e.g., Banks v. Booth, No. 1:20-cv-00849, 2020 U.S. Dist. LEXIS 68287 (D.D.C. Apr. 19, 2020)* (order granting temporary restraining order in COVID-19 prison context); *cf. Fraher v. Heyne, No. 1:10-cv-00951-MJS (PC), 2011 U.S. Dist. LEXIS 125581, 2011 WL 5240441, *2 (E.D. Cal. Oct. 31, 2011)* (prisoner with preexisting heart condition who was refused a swine flu test could state a claim for violation of constitutional rights).

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT S

Neutral
As of: May 11, 2020 4:33 PM Z

Marlowe v. Leblanc

United States Court of Appeals for the Fifth Circuit

April 27, 2020, Decided

No. 20-30276

Reporter
2020 U.S. App. LEXIS 14063 *

CHRISTOPHER MARLOWE, Plaintiff - Appellee v. JAMES M. LEBLANC, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; RAMAN SINGH, Doctor; TIMOTHY HOOPER, Warden; STEPHANIE MICHEL, Deputy Warden; MORGAN LEBLANC, Assistant Warden; PREETY SINGH, Doctor; GAIL LEVY; POLLY SMITH; FALLON STEWART; ELIZABETH GAUTHREAUX; JONATHAN TRAVIS; STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS; PAM HEARD, Doctor; DARRYL CAMPBELL, Assistant Warden; JOHN MORRISON; ANGEL HORN, Master Sergeant; ROLANDA PALMER, Master Sergeant; CHERMAINE BROWN, Sergeant, Defendants - Appellants

Prior History: **[*1]** Appeal from the United States District Court for the Middle District of Louisiana.

Marlowe v. Leblanc, 2020 U.S. Dist. LEXIS 72146 (M.D. La., Apr. 23, 2020)

Core Terms

district court, injunction, measures, grievance, spread, prison, distancing, practices, exhaust, pending appeal, indifference, irreparable, deliberate, virus

Counsel: For Christopher Marlowe, Plaintiff - Appellee: Emily Henrion Posner, New Orleans, LA.

For James M. Leblanc, Secretary, Department of Public Safety And Corrections, RAMAN SINGH, Doctor, TIMOTHY HOOPER, Warden, STEPHANIE MICHEL, Deputy Warden, MORGAN LEBLANC, Assistant Warden, PREETY SINGH, Doctor, Gail Levy, Polly Smith, Fallon Stewart, Elizabeth Gauthreaux, Jonathan Travis, State of Louisiana Through The Department of Public Safety And Corrections, PAM HEARD, Doctor, DARRYL CAMPBELL, Assistant Warden, John Morrison, ANGEL HORN, Master Sergeant, ROLANDA PALMER, Master Sergeant, CHERMAINE BROWN, Sergeant, Defendants - Appellants: Phyllis Esther Glazer, Louisiana Department of Justice, Office of the Attorney General, Baton Rouge, LA; James Garrison Evans, Assistant Attorney General, Louisiana Department of Justice, Baton Rouge, LA; Suzanne Quinlan Mooney, Louisiana Department of Justice, Baton Rouge, LA.

Judges: Before JONES, HIGGINSON, and OLDHAM, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge, concurring in the judgment.

Opinion

PER CURIAM:

This appeal concerns the efforts of Louisiana's Department of Public Safety and **[*2]** Corrections ("DPSC") to respond to the rapidly evolving COVID-19 pandemic on behalf of one prisoner in one unit. On April 23, 2020, the United States District Court for the Middle District of Louisiana issued an injunction requiring Defendants to comply with their own internal policies and submit a plan to ensure proper social distancing and hygiene practices. Dist. Ct. Order at 13-14. This order came just one day after this court stayed a similar injunction against the Texas Department of Criminal Justice. *Valentine v. Collier, No. 20-20207, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431 (5th Cir. Apr. 22, 2020)*. We conclude that *Valentine*'s reasoning controls here and

accordingly stay the district court's injunction pending appeal.

BACKGROUND

Plaintiff, a prisoner currently detained at the Rayburn Correctional Center ("RCC"), originally filed suit against Defendants in 2018, alleging they exhibited deliberate indifference toward his medical needs by providing a constitutionally deficient meal service that resulted in his developing diabetes and then failing to adequately treat his illness. On April 1, 2020, Plaintiff filed a motion tangential to the ongoing dispute, requesting a temporary restraining order authorizing his supervised release until spread of the COVID-19 virus is no longer **[*3]** a threat within the Department of Corrections. Defendants opposed the motion on the basis of jurisdictional obstacles, Plaintiff's failure to exhaust administrative remedies, and the deficiency of Plaintiff's constitutional claim on its merits.

The district court conducted a telephonic evidentiary hearing on April 7. Following the evidentiary hearing, Defendants submitted a memorandum updating the district court on the numerous procedures taken at RCC to contain the spread of COVID-19. Plaintiff responded that these procedures were "woefully inadequate" and "deliberately indifferent" to his medical needs. He also suggested, for the first time, that, in lieu of temporary release, the court could order that RCC create conditions that allow for proper social distancing to protect him. The district court latched on to this eleventh-hour request. After determining that Plaintiff was likely to prevail on the merits of his deliberate indifference claim, it ordered Defendants to "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." Dist. Ct. Order at 13. It further **[*4]** ordered Defendants to "submit to the [c]ourt a [p]lan 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." *Id.* at 14. The Defendants were ordered to submit said plan within five days, i.e. by Tuesday, April 28. *Id.*

Defendants, relying heavily on this court's just-issued *Valentine* decision, requested that the district court stay enforcement of the injunction. The district court has yet to rule on that motion. Defendants then appealed to this court, requesting a stay pending appeal.

ANALYSIS[1]

Four well established factors govern the propriety of a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder, 556 U.S. 418, 426, 129 S. Ct. 1749, 1761, 173 L. Ed. 2d 550 (2009)* (quoting *Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987)*). "The first two factors . . . are the most critical." *Id. at 434*.

We begin by considering Defendants' likelihood of success on appeal. In making this assessment, we are bound by a decision **[*5]** in which this court recently resolved a motion for stay raising nearly identical issues. *See Valentine v. Collier, No. 20-20207, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431 (5th Cir. Apr. 22, 2020)*. Although *Valentine*'s facts are slightly different from the facts of this case, we might have expected the district court to at least mention *Valentine*. Perhaps Defendants did not apprise the district court of our decision before the issuance of its injunction. *Valentine* was decided just one day earlier. But Defendants repeatedly cite *Valentine* in their motion to stay enforcement of the injunction pending appeal. And yet, for whatever reason, the district court has not ruled on that motion. Regardless of the basis for the district court's decision, we must consider Defendants' arguments in light of *Valentine*, and, for three independent reasons, conclude that Defendants are likely to succeed on appeal.

First, *Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*, prohibits the injunction imposed by the district court. As this court explained in *Valentine*, a district court cannot enjoin a state facility to follow state law. *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *4*. Yet that is exactly what the district court did here. It concluded that "Defendants do not appear to be following" their own policy statements. Dist. Ct.

---

[1] Plaintiff contends that the district court's order is a TRO, governed by *Fed. R. Civ. P. 65(b)* and normally unappealable. *See Faulder v. Johnson, 178 F.3d 741, 742 (5th Cir. 1999)*. However, precedent makes clear that when a court holds a hearing on a preliminary motion and the motion is strongly contested, its resulting order constitutes an injunction appealable under *28 U.S.C. § 1291(a)(1)*. *See Sampson v. Murray, 415 U.S. 61, 87, 94 S. Ct. 937, 951, 39 L. Ed. 2d 166 (1974)* ("[W]here an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of [a] potentially unlimited order as a temporary restraining order seems particularly unjustified.").

Order at 10. For instance, "despite taking some steps to deter the spread **[*6]** of the virus, [RCC] has not effectively implemented the [Department of Correction] policies that require staff members and orderlies to wear masks and other [personal protective equipment] to protect the prison population, including the Plaintiff." *Id*. at 11. The court further determined that RCC "failed to meaningfully implement social-distancing procedures and other measures aimed at thwarting the spread of the coronavirus." *Id*. The court therefore ordered Defendants to comply with "their own internal policies" and "implement social distancing practices to limit the spread of COVID-19." *Id*. at 13-14. *Pennhurst* forbids this.

Plaintiff contends the court's injunction does not run afoul of *Pennhurst* because it is intended to correct constitutionally deficient medical care. The court did not so express itself, and in any event, the essence of *Pennhurst* is that a federal court lacks jurisdiction to sit as a super-state executive by ordering a state entity to comply with its own law.

Second, the district court's analysis falls woefully short of satisfying either the objective or subjective requirements of *Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*. We do not question that COVID-19 presents a risk of serious harm to those confined in prisons, nor that **[*7]** Plaintiff, as a diabetic, is particularly vulnerable to the virus's effects. But, for purposes of resolving Plaintiff's *Eighth Amendment* claim, we are not tasked with resolving whether, absent RCC's precautionary measures, the COVID-19 pandemic presents a substantial risk of serious harm to prisoners like Plaintiff. Rather, the question here is whether the *Eighth Amendment* requires RCC to do more than it has already done to mitigate the risk of harm. The district court's laconic analysis provides little basis for concluding that RCC's mitigation efforts are insufficient. Indeed, because the district court made few (if any) factual findings, it left no reviewable basis to conclude that the measures implemented by Defendants are constitutionally deficient.[2] Plaintiff cites no precedent supporting a contrary conclusion, and we are aware of none.

Even assuming that Plaintiff's testimony somehow satisfies *Farmer*'s objective requirement, the district court cited no evidence establishing that Defendants subjectively believed that the measures they were (and continue) taking were inadequate. If anything, the record proves just the opposite. Defendants point to a plethora of measures they are taking to abate the risks posed **[*8]** by COVID-19, from providing prisoners with disinfectant spray and two cloth masks to limiting the number of prisoners in the infirmary lobby and painting markers on walkways to promote social distancing. Plaintiff's own counsel conceded at the April 7 evidentiary hearing that "everyone here is trying their very, very best to make sure that nobody gets sick at [RCC]." The district court's analysis resembles the analysis we condemned in *Valentine*, where the district court had treated inadequate measures as dispositive of the defendants' mental state. "Such an approach," we explained, "resembles the standard for civil negligence, which *Farmer* explicitly rejected." *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *4*.

In opposing this stay, Plaintiff now asserts, contrary to the above-quoted statement, that RCC's measures in fact demonstrate deliberate indifference. Plaintiff's evidence is no different, however, and indeed, Defendants have been heightening their efforts to contain the virus. Although the virus has spread within RCC, given the many prevention measures RCC has taken, an increase in infection rate alone is insufficient to prove deliberate indifference.

Third, the district court's exhaustion analysis under the Prison Litigation **[*9]** Reform Act runs counter to Supreme Court precedent. The district court acknowledged that Plaintiff failed to exhaust administrative remedies. It nonetheless excused Plaintiff, reasoning that "the interests of justice" compelled it to act on an emergency basis. *See Johnson v. Ford, 261 F. App'x 752, 755 (5th Cir. 2008)*. As this court explained in *Valentine*, such an approach is out-of-step with Supreme Court precedent, *see Valentine*, 2020 1934431, at *6-7, and this court has disavowed the "interests of justice" exception embraced in *Johnson, see Gonzalez v. Seal, 702 F.3d 785, 788 (5th Cir. 2012)* (holding that *Underwood v. Wilson, 151 F.3d 292 (5th Cir. 1998)*, which *Johnson* relied on, was "tacitly overruled and is no longer good law to the extent it permits prisoner lawsuits challenging prison conditions to proceed in the absence of pre-filing administrative exhaustion"). It must be acknowledged that Superintendent LeBlanc issued an order on March 23 temporarily suspending the administrative deadlines for replying to grievances, and such order may have affected the "availability" of exhaustion. But Plaintiff makes no effort to explain the impact of that order on his refusing to file a grievance or on the way in which it would have been processed. The record, moreover, indicates that grievances are currently being processed within 48 hours. **[*10]** Dist. Ct. Order at 6 n.3.

---

[2] Warden Robert Tanner, the Warden of RCC, offered a declaration that blunts many (if not all) of Plaintiff's concerns, giving us further cause to doubt that Plaintiff has come close to satisfying the "extremely high standard" of deliberate indifference. *Cadena v. El Paso Cty., 946 F.3d 717, 728 (5th Cir. 2020)*.

For at least these three, independent reasons,[3] we conclude that Defendants have demonstrated a substantial likelihood of success on the merits.

Turning to the second stay factor, Defendants have shown that they will be irreparably injured absent a stay. "When the State is seeking to stay a preliminary injunction, it's generally enough to say '[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *4* (quoting *Maryland v. King, 567 U.S. 1301, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012)*). The Louisiana Legislature assigned the prerogatives of prison policy to DPSC. *See La. Stat. § 36:401*. "The district court's injunction prevents the State from effectuating the Legislature's choice and hence imposes irreparable injury." *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *4*.[4]

As if that weren't enough, the Supreme Court has repeatedly warned that "it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" *Woodford v. Ngo, 548 U.S. 81, 94, 126 S. Ct. 2378, 2388, 165 L. Ed. 2d 368 (2006)* (quoting *Preiser v. Rodriguez, 411 U.S. 475, 491-92, 93 S. Ct. 1827, 1837, 36 L. Ed. 2d 439 (1973)*). Here, the district court invaded Louisiana's interests by requiring Defendants to create a plan within five days "to ensure **[*11]** the implementation of proper hygiene practices in the dormitory in which Plaintiff is assigned," "to implement social distancing practices to limit the spread of COVID-19," and "to minimize Plaintiff's exposure to possible infected persons while visiting infirmary and cafeteria areas of the prison." Dist. Ct. Order at 14. The harm to Louisiana's interests is "particularly acute because the district court's order interferes with the rapidly changing . . . approach that [DPSC] has used to respond to the pandemic so far." *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *5*. In light of these concerns, the second factor weighs in Defendants' favor.

The remaining two factors—balance of the harms and the public interest—likewise weigh in favor of staying the district court's injunction. COVID-19 unquestionably poses risks of harm to all Americans—particularly those like Plaintiff who have underlying health conditions. "But the question is whether Plaintiff[] has shown that [he] will suffer irreparable injuries *even after* accounting for the [DPSC's] protective measures . . . . Neither the Plaintiff[] nor the district court suggest the evidence satisfies that standard. And '[b]ecause the State is the appealing party, its interest and harm merge **[*12]** with that of the public.'" *Id.* (emphasis in original) (quoting *Veasey v. Abbott, 870 F.3d 387, 391 (5th Cir. 2017)*).

Because Defendants have satisfied all four stay factors, their motion to stay the preliminary injunction pending appeal is **GRANTED**.

Concur by: STEPHEN A. HIGGINSON

Concur

STEPHEN A. HIGGINSON, Circuit Judge, concurring in the judgment:

I concur in the court's stay order because I agree that the Appellants have demonstrated a substantial likelihood of success on their claim that Marlowe failed to exhaust his administrative remedies. It is undisputed that Marlowe did not file a grievance with the prison until several days *after* he filed his motion with the district court. *See Valentine v. Collier, F.3d , No. 20-20207, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *7 (5th Cir. Apr. 22, 2020)* (Higginson, J., concurring in judgment). Though Marlowe now argues that Appellants' suspension of the grievance deadline process renders the prison's administrative remedies "unavailable," the district court was apparently presented with this evidence and still came to the conclusion that the prison is required to adjudicate Marlowe's grievance by May 7, 2020. In their request for a stay, the Appellants do not dispute that May 7, 2020 is the deadline for their response. Should the prison fail to adjudicate Marlowe's grievance by May 7, 2020, there may well be an argument **[*13]** that the administrative grievance process is "unavailable." *See Ross v. Blake, 136 S. Ct. 1850, 1859, 195 L. Ed. 2d 117 (2016)*.

---

[3] Defendants also argue that they are likely to succeed on appeal "because the claims upon which the injunctive relief were granted are not pleaded in this lawsuit." We offer no opinion on this argument at this stage of the appeal.

[4] *See also In re Abbott, 954 F.3d 772, 792 (5th Cir. 2020)* ("As *Jacobson* repeatedly instructs, . . . if the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities. 'It is no part of the function of a court or a jury to determine which one of two modes [i]s likely to be the most effective for the protection of the public against disease.' . . . Such authority properly belongs to the legislative and executive branches of the governing authority." (second alteration in original) (quoting *Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 30, 25 S. Ct. 358, 363, 49 L. Ed. 643 (1905)*)).

Finally, this order does not foreclose Marlowe, a diabetic, from continuing to seek relief through other appropriate channels, such as the state parole process. Marlowe's September 2019 application for commutation, which appears to be pending, includes over 100 pages of exhibits and letters that purport to show that he has been a model prisoner while in the custody of the Louisiana Department of Corrections.[5]

End of Document

[5] Although we respect that it is the exclusive prerogative of the Louisiana Pardon and Parole Board to conclude if this evidence demonstrates that he is entitled to relief, all judges on this panel concur that the clemency petition appears well-supported.

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT T


Positive
As of: May 11, 2020 4:46 PM Z

Burnett v. Howard

United States District Court for the Western District of Michigan, Northern Division

March 30, 2010, Decided; March 30, 2010, Filed

CASE NO. 2:09-cv-37

Reporter
2010 U.S. Dist. LEXIS 30499 *; 2010 WL 1286256

MICHAEL ANGELO BURNETT, Plaintiff, v. TYREE HOWARD, et al., Defendants.

Prior History: *Burnett v. Howard, 2010 U.S. Dist. LEXIS 30501 (W.D. Mich., Feb. 16, 2010)*

Core Terms

grievance, exhaustion, administrative remedy, motion to dismiss, fail to exhaust, summary judgment motion, preliminary injunction

Case Summary

Procedural Posture

Plaintiff, a pro se inmate, sued under *42 U.S.C.S. § 1983*. Defendants filed two motions to dismiss, one before and one after plaintiff filed his amended complaint. Plaintiff moved for a temporary restraining order/preliminary injunction. A magistrate judge recommended, inter alia, that defendants' motions to dismiss be denied and plaintiff's motion for a temporary restraining order/preliminary injunction be denied. The parties filed objections.

Overview

Defendants objected, inter alia, to the magistrate judge's determination that defendants were not entitled to dismissal of plaintiff's claims because plaintiff failed to exhaust his administrative remedies as required by *42 U.S.C.S. § 1997e(a)*. The court sustained defendants' objection and granted their motions to dismiss. Defendants attached four grievances filed by plaintiff, claiming that these were the only "relevant grievances," and correctly pointed out that none of them properly exhaust plaintiff's administrative remedies because none of them specifically stated a grievance against any of the six defendants named in plaintiff's *§ 1983* action as required by the prison grievance policies in effect when the grievances were filed. Defendants put plaintiff to his proofs when they introduced evidence of failure to exhaust with their motion to dismiss, and plaintiff failed to introduce any evidence in opposition. Whether the issue was properly decided under the standard governing motions for summary judgment or motions to dismiss, the court held that as a matter of law plaintiff failed to exhaust his administrative remedies against any of the defendants.

Outcome

Defendants' objections to the report and recommendation were approved in part and overruled in part. To the extent defendants objected to the magistrate judge's determination that they were not entitled to dismissal of plaintiff's claims based on plaintiff's failure to exhaust, the objection was sustained. All other objections were overruled. Defendants' motions to dismiss were granted. Plaintiff's objections were overruled.

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

HN1[] **Magistrates, Standards of Review**

The court must review de novo those portions of the report and recommendation to which specific objection has been made, and may accept, reject, or modify any or all of the Magistrate Judge's findings or recommendations. *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(b)*.

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Exhaustion of Administrative Remedies

HN2[] **Prison Litigation Reform Act, Exhaustion of Administrative Remedies**

Proper exhaustion of administrative remedies is required before a prisoner may bring suit under *42 U.S.C.S. § 1983*. *42 U.S.C.S. § 1997e(a)*.

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Exhaustion of Administrative Remedies

HN3[] **Prison Litigation Reform Act, Exhaustion of Administrative Remedies**

To properly exhaust administrative remedies, prisoners must complete the administrative review process in accordance with the applicable procedural rules--rules that are defined not by the Prison Litigation Reform Act (PLRA), but by the prison grievance process itself. Compliance with prison grievance procedures is all that is required by the PLRA to "properly exhaust." The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion. As long as the state clearly rejects a grievance for a reason explicitly set forth in the applicable grievance procedure, a subsequent *§ 1983* claim based on the grievance will be subject to dismissal for failure to properly exhaust.

Counsel: **[*1]** Michael Angelo Burnett # 200640, plaintiff, Pro se, Kincheloe, MI.

For Tyree Howard, Physician, in his individual and official capacity, W. M. Warren, Physician, in their individual and official capacity, defendants: Anthony D. Pignotti, Brian J. Richtarcik, Randall Alan Juip, The JuipRichtarcik Law Firm, Detroit, MI.

For Richard Miller, Physician, in his individual and official capacity, Jerry Rocco, Physician, in their individual and official capacity, Brenda Parker, Physician, in her individual and official capacity, defendants: Anthony D. Pignotti, The JuipRichtarcik Law Firm, Detroit, MI.

Judges: HON. ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT HOLMES BELL

Opinion

MEMORANDUM OPINION AND ORDER

This is an action brought by Plaintiff Michael Angelo Burnett pursuant to *42 U.S.C. § 1983*. Defendants Howard, Miller, Parker, Warren, and Roco have filed two motions to dismiss, one before and one after Plaintiff filed his amended complaint on April 3, 2009. (Dkt. Nos. 9, 61.) Plaintiff has filed a motion for a temporary restraining order/preliminary injunction (Dkt. No. 21) and a motion to amend his complaint (Dkt. No. 34). On February 16, 2010, Magistrate Judge Timothy P. Greeley issued a report **[*2]** and recommendation ("R&R") recommending that Defendants' motions to dismiss be denied, Plaintiff's motion for a temporary restraining order/preliminary injunction be denied, and that Plaintiff's motion for leave to amend his complaint be denied. (Dkt. No. 70.) Defendants filed objections to the R&R on March 2, 2010, and Plaintiff filed objections on March 5, 2010. ***HN1***[] This Court must review de novo those portions of the R&R to which specific objection has been made, and may accept, reject, or modify any or all of the Magistrate Judge's findings or recommendations. *28 U.S.C. § 636(b)(1)*; *Fed. R.*

Civ. P. 72(b).

I. Defendant's Objections

Defendants first object to the Magistrate Judge's determination that Defendants are not entitled to dismissal of Plaintiff's claims because Plaintiff failed to exhaust his administrative remedies. HN2[] Proper exhaustion of administrative remedies is required before a prisoner may bring suit under § 1983. 42 U.S.C. § 1997e(a). The Supreme Court has held:

> HN3[] To properly exhaust administrative remedies, prisoners must complete the administrative review process in accordance with the applicable procedural rules - rules that are defined not by the PLRA, but by the prison **[*3]** grievance process itself. Compliance with prison grievance procedures, is all that is required by the PLRA to "properly exhaust." The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.

Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007) (citations omitted). As long as the state clearly rejects a grievance for a reason explicitly set forth in the applicable grievance procedure, "a subsequent § 1983 claim based on the grievance will be subject to dismissal for failure to properly exhaust." Grear v. Gelabert, No. 07-cv-203, 2008 U.S. Dist. LEXIS 11669, 2008 WL 474098, at *2 n.1 (W.D. Mich. Feb. 15, 2008).

Although the Supreme Court has held that failure to exhaust is an affirmative defense and that the defendant bears the burden of proving it, Bock, 549 U.S. at 216, neither the Supreme Court nor the Sixth Circuit has specified whether a defendant should use a motion to dismiss under Rule 12(b) or a motion for summary judgment under Rule 56 to make the required showing. At least two circuits have explicitly concluded that, because the issue of exhaustion **[*4]** is a matter in abatement, defendants should raise the issue in a motion to dismiss rather than a motion for summary judgment. Bryant v. Rich, 530 F.3d 1368, 1374-75 (11th Cir. 2008); *Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003)*. Under this procedure, the Court is permitted to make factual findings as to whether the exhaustion requirement has been satisfied. Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 481 (6th Cir. 2009); Bryant, 530 F.3d at 1374-75; *Wyatt, 315 F.3d at 1119*. However, the Sixth Circuit has determined that although the exhaustion requirement has "jurisdictional characteristics," it is not a jurisdictional requirement. Wyatt v. Leonard, 193 F.3d 876, 879 (6th Cir. 1999). Such a conclusion would suggest that Defendants should raise the issue of exhaustion in a motion for summary judgment rather than a motion to dismiss, in which case the Court should permit the jury to determine whether the exhaustion requirement has been satisfied when genuine issues of material fact exist. *See* Fed. R. Civ. P. 56.

Though the Sixth Circuit has not provided guidance as to whether the exhaustion issue should be analyzed the under the standard governing motions for summary judgment **[*5]** or the standard governing motions to dismiss, the question is merely academic in this case. If the Court were to treat Plaintiff's motion as a motion to dismiss, it would use its fact-finding power to determine that Defendants have carried their burden of demonstrating that Plaintiff failed to exhaust his administrative remedies. If the Court were to treat Defendant's motion as a motion for summary judgment, the Court would determine that there are no genuine issues of material fact as to whether Plaintiff failed to exhaust his administrative remedies.

Defendants filed their original motion to dismiss on March 30, 2009. (Dkt. No. 9.) To this motion Defendants attached four grievances filed by Plaintiff on June 20, 2006, April 8, 2007, December 1, 2008, and December 15, 2008. (*Id.* at Ex. B.) Defendants claim that these are the only "relevant grievances," and correctly point out that none of them properly exhaust Plaintiff's administrative remedies because none of them specifically state a grievance against any of the six Defendants named in Plaintiff's § 1983 action as required by the MDOC grievance policies in effect when the grievances were filed. (Dkt. No. 61, Ex. A P T (effective **[*6]** 12/19/03), P R (effective 03/05/07), P R (effective 07/09/07) ("names of all those involved in the issue being grieved are to be included [in the grievance]."); *see* Sullivan v. Kasajaru, 316 F. App'x 469 (6th Cir. 2009) (unpublished). Defendants' evidence is certainly probative of whether Plaintiff failed to exhaust his administrative remedies, and should be considered in determining whether Defendants have satisfied their burden of showing lack of exhaustion. [1] Defendants' March 30, 2009, showing is sufficient to shift the burden to Plaintiff to demonstrate that there is an issue of fact as to whether he failed to exhaust his administrative remedies. Fed. R. Civ. P. 56(e)(2).

---

[1] It can be difficult to prove a negative. The Magistrate Judge suggests that Defendants should have provided the Court with an affidavit verifying that no other relevant grievances exist. Though such an affidavit would have been helpful, the Court does not believe it to be necessary. The evidence of failure to exhaust that Defendants did submit in this case was sufficient to meet its burden.

Plaintiff attempts to create an issue of fact by attaching a grievance filed January 20, 2008, to his response to Defendants' **[*7]** March 30, 2009, motion. (Dkt. No. 18, Ex. 2) However, this grievance does not help Plaintiff. It cannot serve as the grievance that exhausts Plaintiff's administrative remedies because it is duplicative of other grievances and thus does not comply with the MDOC grievance policy. (Dkt. No. 61, Ex. A P G(1) (all policies) ("A grievance may also be rejected [if it is] duplicative of [the issues] raised in another grievance by the grievant.")); *see* *Grear, 2008 U.S. Dist. LEXIS 11669, 2008 WL 474098, at *2 n.1*. Plaintiff does not introduce evidence, or even allege, that he filed any other grievances that properly exhausted his administrative remedies. Thus, Defendants put Plaintiff to his proofs when they introduced evidence of failure to exhaust with their March 30, 2009, motion, and Plaintiff failed to introduce any evidence in opposition. Whether the issue is properly decided under the standard governing motions for summary judgment or motions to dismiss, the Court holds that as a matter of law Plaintiff failed to exhaust his administrative remedies against any of the Defendants.

Defendants next object to the Magistrate Judge's determination that Plaintiff's complaint states an *Eighth Amendment* claim for deliberate **[*8]** indifference to a serious medical need. The Court agrees with the Magistrate Judge. Plaintiff has pleaded facts relating to both deliberate indifference and the seriousness of his medical condition that, if true, are sufficient to entitle him to relief. *See* *Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998)*.

Finally, Defendants object to the Magistrate Judge's determination that Plaintiff's claims are not precluded by the applicable three-year limitations period. The Court agrees with the Magistrate Judge. To the extent Plaintiff contends that his *Eighth Amendment* rights were violated at any point after February 13, 2006, Plaintiff's claims are not barred by the limitations period. However, *Eighth Amendment* claims based on the denial of medical attention prior to February 13, 2006, are barred by the limitations period.

II. Plaintiff's Objections

Plaintiff objects to the Magistrate Judge's determination that he is not entitled to preliminary injunctive relief because he has failed to establish a likelihood of success on the merits and that he will suffer irreparable harm absent such relief. The Court agrees with the Magistrate Judge. As discussed above, Plaintiff has not shown a likelihood **[*9]** of succeeding on his *Eighth Amendment* claim because he failed to exhaust his administrative remedies prior to bringing suit under *§ 1983*. For this reason, even if the Court were to conclude that Plaintiff is likely to suffer irreparable harm in the absence of a preliminary injunction, a preliminary injunction is still not appropriate. *See* *In re Delorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)* (noting that the Court must balance the four factors of the preliminary injunction analysis). Accordingly,

IT IS HEREBY ORDERED that Defendants' objections to the R&R (Dkt. No. 73) are approved in part and overruled in part. To the extent Defendants object to the Magistrate Judge's determination that they are not entitled to dismissal of Plaintiff's claims based on Plaintiff's failure to exhaust, the objection is **SUSTAINED.** All other objections are **OVERRULED.**

IT IS FURTHER ORDERED that Plaintiff's objections to the R&R (Dkt. No. 74) are **OVERRULED.**

IT IS FURTHER ORDERED that the R&R (Dkt. No. 70) is rejected in part and approved in part. To the extent the Magistrate Judge determined that Defendants are not entitled to dismissal of Plaintiff's claims for Plaintiff's failure to exhaust, that **[*10]** determination is **REJECTED,** and replaced with the opinion set forth herein. In all other respects the R&R is **APPROVED** and, combined with the opinion set forth herein, **ADOPTED** as the opinion of the Court.

IT IS FURTHER ORDERED that Defendants' motions to dismiss (Dkt. Nos. 9, 61) are **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's motion for a temporary restraining order/preliminary injunction (Dkt. No. 21) is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's motion for leave to amend his complaint (Dkt. No. 34) is **DENIED.**

A judgment consistent with this opinion and order will be entered.

Dated: March 30, 2010

/s/ Robert Holmes Bell

ROBERT HOLMES BELL

UNITED STATES DISTRICT JUDGE

End of Document

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT U

MICHIGAN DEPARTMENT OF CORRECTIONS **POLICY DIRECTIVE**	EFFECTIVE DATE 03/18/2019	NUMBER 03.02.130
SUBJECT PRISONER/PAROLEE GRIEVANCES	SUPERSEDES 03.02.130 (07/09/2007)	
	AUTHORITY MCL 791.203	
	PAGE 1 OF 8	

POLICY STATEMENT:

Prisoners and parolees shall be provided with an effective method of seeking redress for alleged violations of policy and procedure or unsatisfactory conditions of confinement.

RELATED POLICIES:

01.01.140 Internal Affairs
03.02.131 Prisoner State Administrative Board Property Claims
03.03.140 Prison Rape Elimination Act (PREA) and Prohibited Sexual Conduct Involving Prisoners

DEPARTMENT-WIDE OPERATING PROCEDURE:

03.02.130 Prisoner/Parole Grievances

POLICY:

DEFINITIONS

A. Business day: Monday through Friday, 8:00 to 4:30, excluding State observed holidays.

B. Respondent: The staff person who investigates and responds to a grievance.

GENERAL INFORMATION

C. Complaints filed by prisoners regarding grievable issues as defined in this policy serve to exhaust a prisoner's administrative remedies only when filed as a grievance through all three steps of the grievance process in compliance with this policy.

D. Grievances filed regarding sexual abuse, including those filed by a third party, shall not be processed as grievances under this policy but shall be reported in accordance with PD 03.03.140 “Prison Rape Elimination Act (PREA) and Prohibited Sexual Conduct Involving Prisoners.” Any grievance submitted under this policy that contains an allegation of sexual abuse shall be copied by the Grievance Coordinator and forwarded to the PREA Coordinator. The original grievance shall be returned to the prisoner. If the grievance also includes a non-PREA grievable issue, it will need to be refiled by the prisoner.

E. The grievance process shall be equally available to all prisoners housed in a correctional facility, including prisoners incarcerated under the Holmes Youthful Trainee Act, and all parolees unless placed on modified access pursuant to this policy. Probationers are not covered by this policy but may resolve specific problems and complaints with supervising staff and, if not resolved, with the sentencing court. If the probationer is housed in the Special Alternative Incarceration Program, s/he shall follow the grievance process set forth in PD 05.01.142 "Special Alternative Incarceration Program.” Prisoners housed in non-MDOC facilities shall follow the established grievance process for the facility in which they are confined.

F. Grievances may be submitted regarding alleged violations of policy or procedure or unsatisfactory conditions of confinement that personally affect the grievant, including alleged violations of this policy and related procedures.

G If a prisoner chooses to file a claim for reimbursement of personal property allegedly lost or damaged while in the Department's sole possession, s/he shall request a Prisoner Claim Against the State of Michigan (DTMB-1104-P) form from the Grievance Coordinator in accordance with PD 03.02.131 "Prisoner State Administrative Board Property Claims."

H. Grievances shall not be rejected or denied solely because the prisoner has not included with his/her grievance exhibits or other documents related to the grievance; funds shall not be loaned to a prisoner to pay for photocopying of such documents. If the grievance references documents that are not in the prisoner's files or otherwise available to the Grievance Coordinator or respondent except through the prisoner, the documents shall be reviewed with the prisoner as part of the grievance investigation process if necessary to respond on the merits. If the Grievance Coordinator or respondent determines that a copy of a document is needed for the grievance investigation, the copy shall be made at Department expense.

I. A grievant whose grievance is rejected may appeal the rejection to the next step as set forth in this policy. A new grievance shall not be filed regarding the rejection.

REASONS FOR REJECTION

J. Prisoners and parolees are required to file grievances in a responsible manner. A grievance shall be rejected by the Grievance Coordinator if:

1. It is vague, illegible, or contains multiple unrelated issues.

2. It raises issues that are duplicative of those raised in another grievance filed by the grievant.

3. The grievant is on modified access pursuant to Paragraphs JJ through NN and has filed a grievance in violation of those paragraphs.

4. The grievant did not attempt to resolve the issue with the staff member involved prior to filing the grievance unless prevented by circumstances beyond his/her control or if the issue falls within the jurisdiction of Internal Affairs in the Office of Executive Affairs.

5. The grievance is filed in an untimely manner. The grievance shall not be rejected if there is a valid reason for the delay; e.g., transfer.

6. It contains profanity, threats of physical harm, or language that demeans the character, race, ethnicity, physical appearance, gender, religion, or national origin of any person, unless it is part of the description of the grieved behavior and is essential to that description.

7. Two or more prisoners and/or parolees have jointly filed a single grievance regarding an issue of mutual impact or submit identical individual grievances regarding a given issue as an organized protest.

8. The prisoner is grieving content of the policy or procedure except as it was specifically applied to the grievant. If a prisoner has a concern with the content of a policy or procedure, s/he may direct comments to the Warden's Forum as provided in PD 04.01.105 "Prisoner Housing Unit Representatives/Warden's Forum."

9. The prisoner is grieving a decision made in a Class I misconduct hearing or other hearings conducted by Administrative Law Judges (ALJ's) employed by the Michigan Department of Licensing and Regulatory Affairs (LARA), including property disposition and issues directly related to the hearing process (e.g., sufficiency of witness statements; timeliness of misconduct review; timeliness of hearing). Prisoners are provided an appeal process for Class I decisions pursuant to PD 03.03.105 "Prisoner Discipline."

10. The prisoner is grieving a decision made by the Parole Board to grant, deny, rescind, amend or revoke parole, or not to proceed with a lifer interview or a public hearing. This includes grieving the tools (scoring weights and ranges) utilized in developing guideline scores. However, a prisoner may challenge the calculation of his/her parole guideline score, including the accuracy of the information used in calculating the score by filing a grievance.

11. The prisoner is grieving a decision made in a Class II or Class III misconduct hearing, including property disposition, and issues directly related to the hearing process (e.g., sufficiency of witness statements, timeliness of misconduct review, timeliness of hearing). Prisoners are provided an appeal process for Class II and Class III decisions pursuant to PD 03.03.105 "Prisoner Discipline."

12. The prisoner is grieving issues not within the authority of the Department to resolve (e.g., disputes between a prisoner and an MDOC vendor or an outside agency (courts), etc.). The grievant shall be told who to contact in order to attempt to resolve the issue, if known.

13. The prisoner is grieving the result of a Risk Assessment Instrument (e.g., COMPAS) or Transition Accountability Plan (TAP). However, a prisoner may challenge the accuracy of the information used in assessments, including in the TAP.

14. The prisoner is seeking reimbursement for property loss or damage that must be submitted pursuant to PD 03.02.131 "Prisoner State Administrative Board Property Claims."

K. Grievances shall not be placed in Counselor files, Record Office files, or Central Office files, or placed in the prisoner health record. Grievances also shall not be referenced on any document placed in these files or the prisoner health record, except as necessary pursuant to Paragraph M. Grievance documents and files shall be accessed only to investigate or respond to a pending grievance, to respond to a request under the Freedom of Information Act, to respond to a request from the Department of Attorney General or appropriate Central Office staff, for audits, for statistical reporting, or to the Warden or his/her supervisor.

L. A grievant shall not be penalized in any way for filing a grievance except as provided in this policy for misusing the grievance process. Staff shall avoid any action that gives the appearance of reprisal for using the grievance process.

M. With the Warden's approval, a prisoner may be issued a Class II misconduct report (e.g., Interference With Administration of Rules) if the grievant intentionally files a grievance that is investigated and determined to be unfounded that, if proven true, may have caused an employee or a prisoner to be disciplined or an employee to receive corrective action. The Class II misconduct may be elevated to a Class I misconduct only if approved by the Warden. The misconduct report shall be processed as set forth in PD 03.03.105 "Prisoner Discipline." If the grievant is found guilty of the misconduct, the grievant shall be placed on modified access consistent with Paragraphs JJ through NN.

N. Wardens and FOA Region Managers shall ensure prisoners and parolees are provided assistance in completing a grievance form, if s/he determines it is needed. In such cases, assistance shall be provided by a staff member who is not involved in the grievance.

GRIEVANCE COORDINATORS

O. Each Warden shall designate at least one staff member to serve as the Step I Grievance Coordinator and at least one staff member to serve as the Step II Grievance Coordinator. The FOA Deputy Director shall designate staff members to serve as Step I Grievance Coordinators and Step II Grievance Coordinators for each FOA field office. Step III grievances shall be processed by the Grievance Section in the Office of Legal Affairs (OLA).

P. Each Step I Grievance Coordinator shall prepare and submit monthly reports on grievances filed in

his/her respective facility or office to the Grievance Section, as directed by the Manager of the Grievance Section. The monthly report shall include information on the subject matter of each grievance filed and, for rejected grievances, the basis for the rejection.

GRIEVANCE PROCESS

Q. Prior to submitting a written grievance, the grievant shall attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue, unless prevented by circumstances beyond his/her control or if the issue is believed to fall within the jurisdiction of Internal Affairs. If the issue is not resolved, the grievant may file a Step I grievance. The Step I grievance must be filed within five business days after the grievant attempted to resolve the issue with appropriate staff.

R. All grievances alleging conduct that falls under the jurisdiction of Internal Affairs shall be referred to Internal Affairs as set forth in PD 01.01.140 “Internal Affairs” even if they would otherwise be rejected. The Manager of Internal Affairs or designee shall notify the Warden or FOA Deputy Director or designee, and either the Inspector or Grievance Coordinator as appropriate, in writing if the grievance is determined to fall within the jurisdiction of Internal Affairs; in such cases, an investigation shall be conducted in accordance with PD 01.01.140 and the grievant notified that an extension of time is therefore needed to respond to the grievance. The Manager of Internal Affairs or designee also shall notify the Warden or FOA Deputy Director or designee, and the Inspector or Grievance Coordinator as appropriate, if it is determined that the grievance is not within the jurisdiction of Internal Affairs; in such cases, the grievance shall continue to be processed as a Step I grievance in accordance with this policy.

S. A grievant shall use a Prisoner/Parolee Grievance (CSJ-247A) to file a Step I grievance. A Prisoner/Parolee Grievance Appeal (CSJ-247B) shall be used to file a Step II or Step III grievance. The forms may be completed by hand or by typewriter; however, handwriting must be legible. The issues should be stated briefly but concisely. Information provided is to be limited to the facts involving the issue being grieved (i.e., who, what, when, where, why, how). Dates, times, places, and names of all those involved in the issue being grieved are to be included. Information should be confined to the form and not written on the back, sides, or margins of the form, or in the response area. Additional pages may be attached to the grievance form if necessary to provide required information; however, grievants are encouraged to limit the information to the grievance form itself. If the grievant believes additional pages are necessary, s/he is to submit four copies of each additional page; Departmental forms are not to be used for this purpose. The grievant may use an intradepartmental mail run, if available, to send a grievance to another facility, or to send a Step III grievance, to the Grievance Section. If an intradepartmental mail run is not available and the grievant does not have sufficient funds to mail the grievance, postage shall be loaned as set forth in PD 05.03.118 "Prisoner Mail.”

T. Grievances and grievance appeals at all steps shall be considered filed on the date received by the Department. All grievances and appeals shall be date stamped upon receipt. Time frames for responding to grievances are set forth in this policy directive. An extension may be granted at the discretion of the Grievance Coordinator for a Step I or II response. However, the extension shall not exceed 15 business days. The Grievance Coordinator shall immediately notify the grievant in writing whenever an extension has been approved. The extension also shall be noted in the grievance response.

U. If a grievant chooses to pursue a grievance that has not been responded to by staff within required time frames, including any extensions granted, the grievant may forward the grievance to the next step of the grievance process within ten business days after the response deadline expired, including any extensions that have been granted.

V. Prisoners and staff who may be involved in the issue being grieved shall not participate in any capacity in the grievance investigation, review, or response, except as necessary to provide information to the respondent.

Step I

W. Within five business days after attempting to resolve a grievable issue with staff, a grievant wishing to advance a grievance must send a completed Prisoner/Parolee Grievance form (CSJ-247A) to the Step I Grievance Coordinator designated for the facility or other office being grieved. If the office being grieved does not have a designated Grievance Coordinator, the grievance shall instead be sent to the Step I Grievance Coordinator for the facility in which the grievant is housed. A grievant in a CFA facility alleging conduct under the jurisdiction of the Internal Affairs Division may send the grievance to the Inspector for investigation and processing as set forth in Paragraph R.

X. The Grievance Coordinator shall log and assign a unique identifying number to each Step I grievance received, including those that may be rejected. A computerized grievance tracking system shall be used for this purpose.

Y. After receipt of the grievance, the Grievance Coordinator shall determine if the grievance should be rejected pursuant to this policy. If the grievance is rejected, the grievance response shall state the reason for the rejection without addressing the merits of the grievance. The Grievance Coordinator's supervisor shall review the reason for the rejection to ensure it is in accordance with policy; both the Grievance Coordinator and the supervisor shall sign the grievance before returning the grievance to the grievant. If the grievance is accepted, the Grievance Coordinator shall assign an appropriate respondent and identify the date by which the response is due. The respondent shall generally be the supervisor of the person being grieved except:

1. For grievances involving Clinical Issues, the Health Unit Manager shall designate the respondent.

2. For grievances regarding Michigan State Industries (MSI), the Administrator of MSI shall designate the respondent.

3. For grievances involving administrative support functions for correctional facilities, the appropriate Administrative Manager shall designate the respondent.

4. For grievances referred to Internal Affairs, the Internal Affairs Manager or designee shall be the respondent. However, if the grievance is determined not to fall under the jurisdiction of Internal Affairs, it shall be returned to the Grievance Coordinator at the facility at which the grievance is filed to complete grievance processing.

5. For grievances involving court-ordered payment of victim restitution, filing fees, criminal fines/fees/costs or other assessments, child support obligations or bankruptcy actions, the responder shall be designated by the Business Administrator in the Jackson Business Office.

6. For grievances involving transportation issues, the Transportation Section Manager in the Operations Division, CFA shall designate the respondent.

7. For grievances regarding time computation, the Manager of the Time Computation Unit (TCU), Operations Division, CFA shall designate the respondent.

8. For grievances involving the Parole Board, the Parole Board Chairperson shall designate the respondent for grievances involving the Parole Board.

Z. A Step I grievance shall be responded to within 15 business days after receipt of the grievance unless an extension is granted pursuant to Paragraph T. If the issue is of an emergent nature, the Grievance Coordinator may order a Step I response within two business days. The Grievance Coordinator may respond at Step I to grievances that require only minimal investigation or are rejected for reasons authorized by this policy.

AA. The respondent shall interview the grievant to clarify issues of merit, to further an investigation, or otherwise aid in resolution of the grievance at Step I. An interview is not required when:

1. The grievance is rejected pursuant to policy.

2. The prisoner refuses to participate in the interview. The date and time the interview was attempted shall be recorded in the Step I response.

3. The respondent is not assigned to the location at which the grievant is confined.

4. The grievant is on parole in the community, and the respondent does not have ready access to the field office to which the grievant is assigned.

5. No further clarification is needed.

At any time, the Grievance Coordinator may require an interview if s/he determines it to be essential to an adequate response. At Step II, the Warden or designee may conduct an interview whether or not one was performed at Step I. If the grievant is not interviewed at Step I the reason shall be recorded in the Step I response. Prisoners do not have a due process right to an interview.

BB. Each Step I grievance response shall be reviewed by the respondent's supervisor prior to the grievance being returned to the Step I Grievance Coordinator to ensure that it appropriately addresses the issue raised in the grievance and accurately reflects Department policy and procedure. The respondent shall identify in the response applicable policies, rules, or procedures that are directly related to the issue or conduct being grieved.

CC. The Step I Grievance Coordinator shall ensure that a thorough investigation was completed for each Step I grievance accepted, that the response was reviewed by the appropriate supervisor, and that a copy of the response is provided to the grievant by the due date, including any extension granted.

Step II

DD. A grievant may file a Step II grievance if s/he is dissatisfied with the response received at Step I or if s/he did not receive a timely response. To file a Step II grievance, the grievant must request a Prisoner/Parolee Grievance Appeal (CSJ-247B) from the Step I Grievance Coordinator and send the completed form to the Step II Grievance Coordinator designated for the facility, field office, or other office being grieved within ten business days after receiving the Step I response or, if no response was received, within ten business days after the date the response was due, including any extensions. If the office being grieved does not have a designated Grievance Coordinator, the grievant is to send the grievance to the Step II Grievance Coordinator for the facility in which s/he is housed.

EE. The Grievance Coordinator shall log each Step II grievance received, including those that may be rejected. The Grievance Coordinator shall use a computerized grievance tracking system to do so. The Grievance Coordinator shall determine if the grievance should be rejected pursuant to this policy. If the grievance is rejected, the grievance response shall state the reason for the rejection without addressing the merits of the grievance. If accepted, the Grievance Coordinator shall assign an appropriate respondent and indicate the date by which the response is due. The due date shall be within 15 business days after receipt of the grievance, unless an extension is granted as set forth in Paragraph T.

FF. The respondents for Step II grievances shall be as follows:

1. The Warden, except that s/he may delegate this responsibility to the appropriate Deputy Warden if more than one institution is supervised.

2. For grievances regarding clinical issues, the Step II clinical authority as determined by the

Bureau of Health Care Services (BHCS) Administrator or for Duane L. Waters Health Center (DWH), the Warden of the Charles E. Egeler Reception and Guidance Center (RGC).

3. For grievances regarding Michigan State Industries (MSI), the Administrator of MSI or designee.

4. For grievances involving administrative support functions for correctional facilities, the appropriate Administrative Manager.

5. The appropriate Region Manager for FOA area offices and facilities.

6. The FOA Deputy Director or designee for all other FOA grievances.

7. For grievances involving court-ordered payment of victim restitution, filing fees, criminal fines/fees/costs or other assessments, child support obligations or bankruptcy actions, the responder shall be designated by the Business Administrator in the Jackson Business Office.

8. For grievances involving transportation issues, the Transportation Section Manager in the Operations Division, CFA.

9. For grievances regarding time computation, the Manager of TCU, Operations Division, CFA.

10. For grievances involving the Parole Board, the Parole Board Chairperson.

GG. The Grievance Coordinator shall ensure that any additional investigation was completed as necessary for each Step II grievance accepted and that a copy of the response is provided to the grievant by the due date.

Step III

HH. A grievant may file a Step III grievance if s/he is dissatisfied with the Step II response or does not receive a timely response. To file a Step III grievance, the grievant must send a completed Prisoner/Parolee Grievance Appeal form (CSJ-247B) to the Grievance Section within ten business days after receiving the Step II response or, if no response was received, within ten business days after the date the response was due, including any extensions.

II. The Grievance Section shall be the respondent for Step III grievances on behalf of the Director. Each grievance received at Step III, including those that may be rejected, shall be logged on a computerized grievance tracking system. The tracking system shall include information on the subject matter of each grievance received and, for rejected grievances, the basis for the rejection. The Grievance Section shall forward grievances regarding clinical issues to the Administrator of the BHCS. The BHCS Administrator shall ensure the referred grievance is investigated and a response is provided to the Grievance Section in a timely manner. The Manager of the Grievance Section shall ensure that any additional investigation is completed as necessary for each Step III grievance accepted, including referral to the Internal Affairs and, for disability issues, to the Equal Employment Opportunity Office, as appropriate, and that a copy of the Step III response is provided to the grievant. Generally, Step III responses will be responded to within 60 business days. The Step III response is final.

MODIFIED ACCESS

JJ. A prisoner or parolee who files an excessive number of grievances (three within a 30 calendar day span) that are rejected or the prisoner is found guilty of misconduct for filing an unfounded grievance as set forth in Paragraph M, may have access to the grievance process limited by the Warden or FOA Region Manager for an initial period of not more than 90 calendar days. If the prisoner or parolee continues to file such grievances while on modified access, the Warden or FOA Region Manager may extend the prisoner's or parolee's modified access status for not more than an additional 30 calendar days for each violation. A recommendation to place a prisoner on modified access shall be submitted

only by the Grievance Coordinator or the Grievance Section Manager and shall include a list of the grievances forming the basis for the recommendation and the reason for the recommendation.

KK. The Warden or FOA Region Manager, as appropriate, shall ensure that a prisoner or parolee placed on modified access, or who has had that status extended, is immediately notified in writing of this determination, including a list of the grievances upon which the determination was based. The Warden or FOA Region Manager also shall immediately notify the appropriate Assistant Deputy Director, and the Grievance Section Manager in writing whenever s/he places a prisoner or parolee on modified access or extends that status.

LL. The Manager of the Grievance Section also may place a prisoner or parolee on modified access, or extend that status, for the reasons set forth in Paragraph JJ. The Manager of the Grievance Section shall ensure that each prisoner or parolee placed on modified access or who has that status extended is immediately notified in writing of that determination, including a list of the grievances upon which the determination was based. The Manager of the Grievance Section also shall ensure that the appropriate Warden or FOA Region Manager is notified in writing of the determination.

MM. While on modified access, the prisoner or parolee shall be able to obtain grievance forms only through the Step I Grievance Coordinator. A grievance form shall be provided if the Step I Grievance Coordinator determines that the issue the prisoner or parolee wishes to grieve is grievable and otherwise meets the criteria outlined in this policy. The Grievance Coordinator shall maintain a record of requests received for grievance forms and whether the request was approved or denied and, if denied, the reason for the denial. If a prisoner or parolee on modified access attempts to file a grievance using a form not provided by the Grievance Coordinator, the Grievance Coordinator may reject the grievance in accordance with Paragraph J. The Warden, FOA Region Manager, or Manager of the Grievance Section may extend the prisoner's or parolee's modified access status for not more than an additional 30 days for each violation. Notification of such extensions shall be consistent with the requirements set forth in Paragraphs KK and LL.

NN. A prisoner or parolee shall remain on modified access for the approved period even if transferred to another facility. The Grievance Coordinator for the sending facility shall ensure that the Grievance Coordinator for the receiving facility is notified of this information.

OPERATING PROCEDURE

OO. If necessary, the Administrator of the Office of Legal Affairs shall ensure that procedures are developed/updated to implement requirements set forth in this policy directive.

AUDIT ELEMENTS

PP. A Primary Audit Elements List has been developed and is available on the Department's Document Access System to assist with self-audit of this policy pursuant to PD 01.05.100 "Self-Audits and Performance Audits."

APPROVED: HEW 02/18/2019

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT V

Neutral
As of: May 11, 2020 5:21 PM Z

Swain v. Junior

United States Court of Appeals for the Eleventh Circuit

May 5, 2020, Decided

No. 20-11622-C

Reporter
2020 U.S. App. LEXIS 14301 *

ANTHONY SWAIN, et al., Plaintiffs - Appellees, versus DANIEL JUNIOR, in his official capacity as Director of the Miami-Dade Corrections and Rehabilitation Department, and MIAMI-DADE COUNTY, FLORIDA, Defendants - Appellants.

Prior History: [*1] On Appeal from the United States District Court for the Southern District of Florida.

Swain v. Junior, 2020 U.S. Dist. LEXIS 60878 (S.D. Fla., Apr. 7, 2020)

Core Terms

district court, inmates, preliminary injunction, injunction, measures, distancing, staff, deliberate indifference, succeed, irreparable, exhaustion, cleaning, masks, failure to exhaust, public interest, pending appeal, municipality, confinement, implemented, facilities, pandemic

Case Summary

Overview

HOLDINGS: [1]-A county and director of the corrections and rehabilitation department were likely to prevail on appeal because the district court committed errors in granting inmates a preliminary injunction; [2]-The district court ruled the inmates did not need to establish a likelihood of success, and thus, the county was likely to succeed in arguing error on appeal; [3]-Because the district court did not address whether the inmates were likely to satisfy the requirements as to the director, he was likely to succeed in having the injunction against him vacated; [4]-The district court could not determine that the inmates were likely to succeed on their *42 U.S.C.S. § 1983* claim without finding the county and director were unlikely to show failure to exhaust under the Prison Litigation Reform Act, *42 U.S.C. § 1997e(a)*, and because it failed to do so, the were likely to succeed on appeal.

Outcome
Motion for stay pending appeal and motion to expedite appeal granted.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > ... > Stays of Judgments > Appellate Stays > Nonmoney Judgments

HN1[] **Standards of Review, Abuse of Discretion**

In considering whether to stay a preliminary injunction the court of appeals examines the district court's grant of the preliminary injunction for abuse of discretion, reviewing de novo any underlying legal conclusions and for clear error any findings of fact.

Civil Procedure > ... > Stays of Judgments > Appellate Stays > Nonmoney Judgments

HN2[] **Appellate Stays, Nonmoney Judgments**

A court considering whether to issue a stay considers four factors: (1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. The first two factors are the most critical.

Civil Procedure > Remedies > Injunctions > Grounds for Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Injunctions, Grounds for Injunctions**

To obtain a preliminary injunction, the plaintiffs are required to establish that (1) a substantial likelihood of success on the merits exists, (2) they would suffer irreparable harm absent an injunction, (3) the threatened injury to them outweighs any harm the injunction might cause the defendants, and (4) if issued, the injunction would not be adverse to the public interest.

Civil Rights Law > Protection of Rights > Prisoner Rights > Confinement Conditions

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN4[] **Prisoner Rights, Confinement Conditions**

The *Eighth Amendment to the United States Constitution* provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. The cruel and unusual punishments' standard applies to the conditions of a prisoner's confinement. An *Eighth Amendment* challenge to the conditions of confinement has two components: one objective and the other subjective. First, to satisfy the objective component, the prisoner must show an objectively intolerable risk of harm. He or she must show that the challenged conditions were extreme and presented an unreasonable risk of serious damage to his or her future health or safety. Second, to satisfy the subjective component, the prisoner must show that the prison official acted with deliberate indifference. A prison official acts with deliberate indifference when he or she knows of and disregards an excessive risk to inmate health or safety. A prison official may escape liability for known risks if he or she responded reasonably to the risk, even if the harm ultimately was not averted. Deliberate indifference requires the defendant to have a subjective state of mind more blameworthy than negligence, closer to criminal recklessness.

Civil Rights Law > Protection of Rights > Prisoner Rights > Confinement Conditions

HN5[] **Prisoner Rights, Confinement Conditions**

Resultant harm does not establish a liable state of mind.

Civil Rights Law > Protection of Rights > Prisoner Rights > Confinement Conditions

HN6[] **Prisoner Rights, Confinement Conditions**

The inability to take a positive action likely does not constitute a state of mind more blameworthy than negligence.

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

HN7[] **Postconviction Proceedings, Imprisonment**

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

HN8[] **Grounds for Injunctions, Irreparable Harm**

The question is whether the plaintiffs have shown that they will suffer irreparable injuries that they would not otherwise suffer in the absence of an injunction.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Governments > Local Governments > Claims By & Against

HN9[] **Grounds for Injunctions, Public Interest**

Where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Governments > Local Governments > Claims By & Against

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN10[] **Grounds for Injunctions, Likelihood of Success**

A municipality may not be held liable under *42 U.S.C.S. § 1983* unless a municipal policy or custom caused the plaintiffs' injury. The policy or custom requirement applies to *§ 1983* claims for declaratory or injunctive relief no less than claims for damages. Because a district court cannot award prospective relief against a municipality unless the requirements are satisfied,, the plaintiffs must establish that they are likely to satisfy the requirements to obtain a preliminary injunction against a municipality.

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Exhaustion of Administrative Remedies

HN11[] **Prison Litigation Reform Act, Exhaustion of Administrative Remedies**

The Prison Litigation Reform Act provides: No action shall be brought with respect to prison conditions under *42 U.S.C.S. § 1983*, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted. *42 U.S.C.S. § 1997e(a)*. So long as those remedies are available to the prisoner, a court may not excuse a failure to exhaust, even to take special circumstances into account.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof

Civil Rights Law > ... > Prisoner Rights > Prison Litigation Reform Act > Exhaustion of Administrative Remedies

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN12[] **Affirmative Defenses, Burdens of Proof**

Just because failure to exhaust is an affirmative defense and not a pleading requirement, does not render exhaustion irrelevant to determining whether the plaintiffs are entitled to a preliminary injunction. The burdens at the preliminary injunction stage track the burdens at trial. Failure to exhaust is an affirmative defense, so the defendants bear the burden of proving it. Exhaustion under the Prison Litigation Reform Act (PLRA) is a threshold matter that a court must address before reaching the merits. District courts are required to resolve factual disputes regarding PLRA exhaustion, a "preliminary issue," at the outset of a case.

Counsel: For Anthony Swain, Plaintiff - Appellee: Alec George Karakatsanis, Katherine Claire Hubbard, Alexandria Twinem, Civil Rights Corps, Washington, DC; Thomas B. Harvey, Tiffany Yang, Advancement Project, Washington, DC; Meena Jagannath, Community Justice Project, Inc., Miami, FL; Lida Rodriguez-Taseff, DLA Piper, LLP (US), Miami, FL; Katherine A. Sanoja, Rodney Quinn Smith II, Gst, Llp, Miami, FL.

For Alen Blanco, Bayardo Cruz, Ronniel Flores, Winfred Hill, Plaintiffs - Appellees: Thomas B. Harvey, Tiffany Yang, Advancement Project, Washington, DC; Katherine Claire Hubbard, Alec George Karakatsanis, Alexandria Twinem, Civil Rights Corps, Washington, DC; Meena Jagannath, Community Justice Project, Inc., Miami, FL; Lida Rodriguez-Taseff, DLA Piper, LLP (US), Miami, FL; Katherine A. Sanoja, Rodney Quinn Smith II, Gst, Llp, Miami, FL.

For Daniel Junior, Miami-Dade County, Defendants - Appellants: Ezra Saul Greenberg, Bernard Pastor, Oren Rosenthal, Zachary Edward Vosseler, Jennifer L. Hochstadt, Ana Angelica Viciana, Erica S. Zaron, Miami-Dade County Attorney's Office, Miami, FL.

Judges: Before: WILSON, WILLIAM PRYOR **[*2]** and BRANCH, Circuit Judges. WILSON, Circuit Judge, dissenting from the order granting the stay.

Opinion

BY THE COURT:

No part of our country has escaped the effects of COVID-19. It is thus not surprising that several inmates at the Metro West Detention Center ("Metro West")—the largest direct-supervision jail facility in the State of Florida—have tested positive for the virus. This appeal concerns the adequacy of the measures implemented by Metro West to protect its prisoners from the spread of COVID-19.

On April 5, 2020, seven Metro West inmates filed a class action complaint challenging the conditions of the inmates' confinement under *42 U.S.C. § 1983* and seeking habeas relief under *28 U.S.C. § 2241* for the named plaintiffs along with a "medically vulnerable" subclass of inmates.

At issue in this motion for a stay pending appeal is the preliminary injunction issued by the United States District Court for the Southern District of Florida on April 29, 2020, against defendants Miami-Dade County and Daniel Junior, the Director of the Miami-Dade Corrections and Rehabilitations Department ("MDCR"). The injunction requires the defendants to employ numerous safety measures to prevent the spread of COVID-19 and imposes extensive reporting **[*3]** requirements. Pursuant to *Rule 8 of the Federal Rules of Appellate Procedure*, we stay the injunction pending appeal and expedite the appeal.

I.

MDCR, a department of Miami-Dade County, operates Metro West. When the first case of COVID-19 in Miami-Dade County was reported in early March 2020, MDCR began enacting measures to protect inmates. Those measures included cancelling inmate visitation; screening arrestees, inmates, and staff; and advising staff of use of protective equipment and sanitation practices. On March 23, 2020, the U.S. Centers for Disease Control and Prevention ("CDC") issued the *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correction and Detention Facilities*, (the "CDC Guidance"). MDCR reviewed the CDC Guidance and updated its practices. As the situation developed, MDCR continued to implement additional safety measures, including daily temperature screenings of all persons entering Metro West, establishing a "COVID-19 Incident Command Center and Response Line" to track testing and identify close contacts with the virus, developing a social hygiene campaign, and mandating that staff and inmates wear protective masks at all times. MDCR also implemented social distancing efforts, including staggering **[*4]** the dormitory bunks, requiring inmates to sleep head-to-toe to ensure further distancing, and instructing staff to encourage social distancing between inmates. The district court accepted as true that the defendants implemented these measures for purposes of issuing the preliminary injunction and did not resolve any factual disputes in favor of the plaintiffs.

On April 5, 2020, the plaintiffs filed a class action complaint on behalf of "all current and future persons detained at Metro West during the course of the COVID-19 pandemic." Among other deficiencies, the class action complaint alleged that the inmates at Metro West did not have enough soap or towels to wash their hands properly, waited days for medical attention, were "denied basic hygienic supplies" like laundry detergent and cleaning materials, and were forced to sleep only two feet apart. They sought declaratory and injunctive relief for violations of the *Eighth* and *Fourteenth Amendments* pursuant to *42 U.S.C. § 1983* on behalf of the entire class and immediate release from custody pursuant to *28 U.S.C. § 2241* on behalf of the named plaintiffs and the medically vulnerable subclass.

The district court entered a temporary restraining order ("TRO") against the defendants on April 7, two **[*5]** days after the complaint was filed. Consistent with the TRO, the defendants screened all new arrestees and staff as they entered the facilities, enhanced cleaning and sanitation measures, made efforts to increase social distancing, issued masks to all staff and inmates, supplied paper towels in the restrooms, and quarantined inmates showing COVID-19 symptoms.

On April 29, following a telephonic evidentiary hearing, the district court entered a preliminary injunction against the defendants on the plaintiffs' *§ 1983* claim.[1] The preliminary

[1] The district court did not make a finding as to whether the defendants had complied with the TRO. We do note, however, that a

injunction enjoins the defendants to:

• "Effectively communicate to all people incarcerated at [Metro West], including low-literacy and non-English speaking people, sufficient information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices to reasonably ensure that individuals are able to take precautions to prevent infection";

• "To the maximum extent possible considering [Metro West's] current population level, provide and enforce adequate spacing of six feet or more between people incarcerated at Metro West so that social distancing can be accomplished";

• "Ensure that each incarcerated person receives, **[*6]** free of charge (1) an individual supply of soap, preferably liquid as recommended by the CDC, sufficient to allow frequent hand washing each day; (2) hand drying machines, or disposable paper towels as recommended by the CDC, and individual towels, sufficient for daily use; (3) an adequate supply of disinfectant products effective against the virus that causes COVID-19 for daily cleanings; and (4) an adequate supply of toilet paper sufficient for daily use";

• "Provide reasonable access to showers and to clean laundry";

• "Require that all MCDR staff wear personal protective equipment, including masks, and gloves when physically interacting with any person, and require that, absent extraordinary or unusual circumstances, a new pair of gloves is worn each time MDCR staff touch a different person; and require all inmate workers who are cleaning facilities or preparing food to follow this same protocol";

• "Require that all MDCR staff regularly wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol";

• "Ensure access to proper testing for anyone displaying known symptoms of COVID-19 in accordance with CDC guidelines and for anyone who has come in contact **[*7]** with an individual who has tested positive for COVID-19";

• "Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined, with continued access to showers, mental health services, phone calls with family, and communications with counsel; individuals identified as having COVID-19 or having been exposed to COVID-19 shall not be placed in cells normally used for disciplinary confinement absent emergency circumstances";

• "Respond to all emergency (as defined by the medical community) requests for medical attention as soon as possible";

• "Provide sufficient disinfecting supplies consistent with CDC recommendations in each housing unit, free of charge, so incarcerated people can clean high-touch areas or any other items in the unit between each use";

• "Waive all medical co-pays for those experiencing COVID-19-related symptoms";

• "Waive all charges for medical grievances during this health crisis"; and

• "Provide face masks for inmates at Metro West. The face masks must be replaced at medically appropriate intervals, and Defendants must provide inmates with instruction on how to use a face mask and the reasons **[*8]** for its use."

The district court observed that the CDC's Guidance "formed the basis" of these requirements. In order to ensure compliance, it further ordered the defendants to:

• "Continue providing the Court with updated information regarding the number of staff and inmates who have tested positive for, or are being quarantined because of, COVID-19. These notices shall be filed every three days for the duration of [the order]; Defendants shall also continue to provide this information to their state criminal justice partners";

• "Provide the [district court] with weekly reports containing the current population data for Metro West"; and

• "Submit, within 7 days of [the order], a proposal outlining steps Defendants will undertake to ensure additional social distancing safeguards in terms of housing inmates and inmate activity (medical visits, telephones, etc.)."

II.

HN1[↑] "In considering whether to stay a preliminary injunction . . . we examine the district court's grant of the preliminary injunction for abuse of discretion, reviewing *de novo* any underlying legal conclusions and for clear error any findings of fact." *Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1317 (11th Cir. 2019)*.

III.

---

report commissioned by the district court and prepared by experts for each party following a review of the facility and of the TRO appears to indicate that the defendants were in compliance with the TRO.

The district court also denied the plaintiffs' requested habeas relief under *§ 2241* without prejudice.

HN2[] A court considering whether to issue a stay "considers four factors: '(1) **[*9]** whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder, 556 U.S. 418, 426, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)* (quoting *Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987))*. The first two factors are "the most critical." *Id. at 434*. We address each factor in turn and conclude that a stay is warranted.

A. Likelihood of Success on Appeal

In their *§ 1983* claim, the plaintiffs allege that the defendants violated the *Eighth* and *Fourteenth Amendments* through their deliberate indifference to the risk that COVID-19 poses to the plaintiffs. The defendants ask us to stay the injunction pending appeal because they contend that the plaintiffs failed to establish that they were entitled to a preliminary injunction. HN3[] To obtain a preliminary injunction, the plaintiffs were required to establish that (1) "a substantial likelihood of success on the merits" exists; (2) they would suffer irreparable harm absent an injunction; (3) "the threatened injury to the[m] . . . outweighs" any harm the injunction might cause the defendants; and (4) if issued, the injunction would not be adverse to the public **[*10]** interest. *Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1247 (11th Cir. 2016)* (internal quotation marks omitted).

HN4[] The *Eighth Amendment to the United States Constitution* provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The 'cruel and unusual punishments' standard applies to the conditions of a prisoner's confinement." *Chandler v. Crosby, 379 F. 3d 1278, 1288 (11th Cir. 2004)*; *see also Mann v. Taser Int'l, Inc., 588 F.3d 1291, 1306 (11th Cir. 2009)* (explaining that a pre-trial detainee's "rights exist under the *due process clause of the Fourteenth Amendment*" but "are subject to the same scrutiny as if they had been brought as deliberate indifference claims under the *Eighth Amendment*"). An *Eighth Amendment* challenge to the conditions of confinement has two components: one objective and the other subjective. *See Farmer v. Brennan, 511 U.S. 825, 846, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*.

First, to satisfy the "objective component," the prisoner must show "an objectively intolerable risk of harm." *Id.* He must show that the challenged conditions were "extreme" and presented an "'unreasonable risk of serious damage to his future health' or safety." *Chandler, 379 F.3d at 1289* (quoting *Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993))*. The defendants do not contest for purposes of this motion that the plaintiffs can satisfy this component.

Second, to satisfy the "subjective component," the prisoner must show that the prison official acted with deliberate indifference. *Id.* A prison official acts with deliberate indifference when he "knows of and disregards an excessive risk to **[*11]** inmate health or safety." *Farmer, 511 U.S. at 837*; *see also Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004)*. A prison "official may escape liability for known risks 'if [he] responded reasonably to the risk, even if the harm ultimately was not averted.'" *Chandler, 379 F.3d at 1290* (quoting *Farmer, 511 U.S. at 844*). Deliberate indifference requires the defendant to have a subjective "state of mind more blameworthy than negligence," *Farmer, 511 U.S. at 835*, closer to criminal recklessness, *id. at 839-40*.

The defendants are likely to prevail on appeal because the district court likely committed errors of law in granting the preliminary injunction. In conducting its deliberate indifference inquiry, the district court incorrectly collapsed the subjective and objective components. The district court treated the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk. In doing so, it likely violated the admonition that HN5[] resultant harm does not establish a liable state of mind. *See Farmer, 511 U.S. at 844*. The district also likely erred by treating Metro West's inability to "achieve meaningful social distancing" as evincing a reckless state of mind. Although the district court acknowledged that social distancing was "impossible" and "cannot be achieved absent an additional reduction in Metro West's population or some **[*12]** other measure to achieve meaningful social distancing," it concluded that this failure made it likely that the plaintiffs would establish the subjective component of their claim. HN6[] But the inability to take a positive action likely does not constitute "a state of mind more blameworthy than negligence." *Id. at 835*.

The defendants are also likely to succeed on appeal because the plaintiffs offered little evidence to suggest that the defendants were deliberately indifferent. Indeed, the evidence supports that the defendants are taking the risk of COVID-19 seriously. For example, the expert report commissioned by the district court concluded that the staff at Metro West "should be commended for their commitment to protect the staff and inmates in this facility during this COVID-19 pandemic. They are doing their best balancing social distancing and regulation applicable to the facility." According to the expert report, Metro West appears to have implemented many measures to curb the spread of the virus. While perhaps impossible for the

defendants to implement social distancing measures effectively in all situations at Metro West's current population level, the district court cited no evidence to establish **[*13]** that the defendants subjectively believed the measures they were taking were inadequate. *See* Valentine v. Collier, No. No. 20-20207, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *4 (5th Cir. Apr. 27, 2020) ("[T]reating inadequate measures as dispositive of the Defendants' mental state . . . resembles the standard for civil negligence, which *Farmer* explicitly rejected.").

The only other evidence the district court relied on to establish deliberate indifference is that Metro West's social-distancing policies are "not uniformly enforced." But the district court made no finding that the defendants are ignoring or approving the alleged lapses in enforcement of social-distancing policies, so these lapses in enforcement do little to establish that the defendants were deliberately indifferent. *See* Hale v. Tallapoosa County, 50 F.3d 1579, 1582 (11th Cir. 1995) (requiring plaintiffs establish a causal connection between the defendant's conduct and the constitutional violation to prevail on a deliberate-indifference claim). Accepting, as the district court did, that the defendants adopted extensive safety measures such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures, the defendants' actions likely do not amount to deliberate indifference. So the district **[*14]** court likely erred in this regard.

B. Irreparable Injury

The defendants have also shown that they will be irreparably injured absent a stay. *See* Nken, 556 U.S. at 434. Absent a stay, the defendants will lose the discretion vested in them under state law to allocate scarce resources among different county operations necessary to fight the pandemic. Through its injunction, the district court has taken charge of many administrative decisions typically left to MDCR officials. For example, the injunction requires that the defendants provide each Metro West inmate with an individual supply of soap and disinfectant products. Under pain of contempt, therefore, MDCR must divert these high-demand supplies to Metro West, even though they may be more critical at another county facility. Similarly, the injunction requires that the defendants test all inmates with COVID-19 symptoms and everyone with whom they have been in contact. To avoid contempt, then, MDCR must allocate limited testing resources to Metro West at the expense of other county facilities. All the while, the district court has tasked itself with overseeing the steps the defendants are taking to "ensure additional social distancing safeguards," even though **[*15]** it acknowledges that social distancing is "impossible" at the current inmate population level. In short, the district court assumed the role of "super-warden" that our decisions repeatedly condemn. *See* Pesci v. Budz, 935 F.3d 1159, 1167 (11th Cir. 2019); Prison Legal News v. Sec'y, Fla. Dep't of Corr., 890 F.3d 954, 965 (11th Cir. 2018).

HN7[↑] As the Supreme Court has cautioned, "it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" Woodford v. Ngo, 548 U.S. 81, 94, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006). In large measure, the injunction transfers the power to administer the Metro West facility in the midst of the pandemic from public officials to the district court. The injunction hamstrings MDCR officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic. They cannot respond to the rapidly evolving circumstances on the ground without first seeking "a permission slip from the district court." Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *5. Such a prohibition amounts to an irreparable harm.

C. Balance of Harms and Public Interest

The final two factors are the balance of harms and the public interest. *See* Nken, 556 U.S. at 426. Here, both those factors weigh in favor of a stay. The district **[*16]** court found that because the inmates "face immediate, irreparable harm from COVID-19," their risk of harm outweighs the harm imposed on the defendants from complying with the preliminary injunction. But the question is not whether COVID-19 presents a danger to the inmates—we do not dismiss the risk of harm that COVID-19 poses to everyone, including the inmates at Metro West. HN8[↑] The question is instead whether the plaintiffs have shown that they will suffer irreparable injuries that they would not otherwise suffer in the absence of an injunction. *See id.*; *cf.* Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *5. Nothing in the record indicates that the defendants will abandon the current safety measures absent a preliminary injunction, especially since the defendants implemented many of those measures before the plaintiffs even filed the complaint. Nor do the plaintiffs contend that they will abandon those measures. For that reason, the balance of harms weighs in the defendants' favor.

HN9[↑] Finally, where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest. Nken, 556 U.S. at 435. We therefore conclude that the defendants have satisfied all four

requirements for a stay.

IV.

Before concluding, we address **[*17]** two other probable errors in the district court's order that make the defendants likely to succeed on appeal: its refusal to address whether the plaintiffs established that the county and defendant Junior were likely liable under *Monell* and its refusal to address the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"). Both inquiries are necessary components of the likelihood of success inquiry a court must undertake in order to issue a preliminary injunction in the first instance. *See Wreal, 840 F.3d at 1247*.

First, the district court likely erred in holding that the plaintiffs are not required to establish municipal liability under *Monell* at the preliminary injunction stage. ***HN10***[↑] A municipality may not be held liable under *§ 1983* unless a municipal policy or custom caused the plaintiffs' injury. *Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*. The policy or custom requirement of *Monell* applies to *§ 1983* claims for declaratory or injunctive relief no less than claims for damages. *Los Angeles Cty. v. Humphries, 562 U.S. 29, 31, 131 S. Ct. 447, 178 L. Ed. 2d 460 (2010)*. Because a district court cannot award prospective relief against a municipality unless the requirements of *Monell* are satisfied, *id*., plaintiffs must establish that they are likely to satisfy the requirements of *Monell* to obtain a preliminary injunction against a municipality. **[*18]** *See Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994)*.

Contrary to *Church*, the district court ruled that the plaintiffs did not need to establish a likelihood of success under *Monell* to obtain a preliminary injunction, and it did not address whether they were likely to satisfy *Monell*. For that reason, Miami-Dade County is likely to succeed in arguing on appeal that the district court erred by enjoining it. And because the plaintiffs sued defendant Junior only in his official capacity, which "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent," *Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)* (quoting *Monell, 436 U.S. at 690*), they must also satisfy the requirements of *Monell* to obtain injunctive relief against him to the extent they challenge his conduct as an officer of Miami-Dade County. *See Barnett v. MacArthur, No. 18-12238, 2020 U.S. App. LEXIS 11856, 2020 WL 1870445, at *3 (11th Cir. Apr. 15, 2020)*; *Familias Unidas v. Briscoe, 619 F.2d 391, 403-04 (5th Cir. 1980)*. The district court did not address whether the plaintiffs were likely to satisfy *Monell* as to defendant Junior, so he is also likely to succeed in having the injunction against him vacated on appeal.

Second, the district court also likely erred in declining to address PLRA exhaustion at the preliminary injunction stage. ***HN11***[↑] In no uncertain terms, the PLRA provides: "No action shall be brought with respect to prison conditions under *section 1983* of this title, or any **[*19]** other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *42 U.S.C. § 1997e(a)*. So long as those remedies are "available" to the prisoner, a "court may not excuse a failure to exhaust, even to take [special] circumstances into account." *Ross v. Blake, 136 S. Ct. 1850, 1856, 195 L. Ed. 2d 117 (2016)*. But the district declined to address exhaustion because failure to exhaust is an affirmative defense, and therefore, according to the district court, is inapplicable at the preliminary injunction stage. That decision was misguided.

HN12[↑] Just because failure to exhaust is an affirmative defense and not a pleading requirement, *see Jones v. Bock, 549 U.S. 199, 216, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)*, does not render exhaustion irrelevant to determining whether the plaintiffs are entitled to a preliminary injunction. "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)*. Failure to exhaust is an affirmative defense, so the defendants bear the burden of proving it. *See Jones v. Bock, 549 U.S. at 216*. Because the defendants correctly raised and briefed the defense in a motion to dismiss and in their opposition to the plaintiffs' motion for a preliminary injunction, the district court was obliged to decide whether the defendants were likely to establish **[*20]** the defense. *See Gonzales, 546 U.S. at 428*; *Chandler, 379 F.3d at 1286* (explaining that exhaustion under the PLRA is "a threshold matter" that a court "must address" before reaching the merits). Although the district court determined that the existence of the defense turned on disputed questions of fact, district courts are required to resolve factual disputes regarding PLRA exhaustion—a "preliminary issue"—at the outset of a case. *See Bryant v. Rich, 530 F.3d 1368, 1376 (11th Cir. 2008)*. The district court could not determine that the plaintiffs were likely to succeed on their *§ 1983* claim without, at the very least, finding that the defendants were unlikely to carry their burden of establishing failure to exhaust. *See Gonzales, 546 U.S. at 428-29*. Because it failed to do so, the defendants are likely to succeed on appeal.

V.

In conclusion, the defendants' motion for a stay pending appeal and motion to expedite the appeal are **GRANTED**. The plaintiffs' "Opposed Motion for Oral Argument on

Appellants' Emergency Motion to Stay Injunction Pending Appeal" is **DENIED**.

The Court **DIRECTS** the Clerk to expedite the appeal for merits disposition purposes and to schedule it for oral argument before the earliest available panel.

The Court sets the following briefing schedule: the initial brief is due on May 18, 2020, the response brief **[*21]** is due on May 28, 2020, and the reply brief is due on June 1, 2020. No motions for extensions of time will be considered.

Dissent by: WILSON

Dissent

WILSON, Circuit Judge, dissenting from the order granting the stay:

To persuade us to grant a stay, the County bore the burden of making "a strong showing" that it is likely to succeed on the merits—a "most critical" factor. *See* *Nken v. Holder, 556 U.S. 418, 433-34, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)*; *Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1317 (11th Cir. 2019)*. It failed to do so. I see no strong showing of error as to the district court's factual findings or legal conclusions about (1) meaningful social distancing and population reduction or other measures to achieve it, or (2) officials' knowledge and the reasonableness of their response. *See* *Brown v. Plata, 563 U.S. 493, 521, 526-30, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011)* (analyzing the necessity of reducing overcrowding after other failed remedial measures in the *Eighth Amendment* context); *Helling v. McKinney, 509 U.S. 25, 36-37, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993)* (describing focus on both society's and prison authorities' current attitudes and conduct). And I otherwise fail to see an abuse of discretion here. Therefore, I dissent from the order granting the stay.

End of Document

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT W

Nellson v. Barnhart

United States District Court for the District of Colorado

April 16, 2020, Decided; April 16, 2020, Filed

Civil Case No. 20-cv-00756-PAB

Reporter
2020 U.S. Dist. LEXIS 66971 *

EDWARD NELLSON, individually, and on behalf of others similarly situated, Plaintiff, v. WARDEN J. BARNHART, in his individual and official capacity, and UNITED STATES FEDERAL BUREAU OF PRISONS, Defendants.

Core Terms

inmates, exhaust, administrative remedy, staff, symptoms, screening, injunction, BOP, testing, preliminary injunction, masks, quarantine, requests, steps, staff member, isolation, merits, soap, prison, temperature, quotations, mandatory, CDC, grievance process, disregarded, implemented, unavailable, distancing, grievance, measures

Counsel: **[*1]** For Edward Nellson, Individually, and a Class of similarly-situated persons, Plaintiff: Mario Bernard Williams, LEAD ATTORNEY, NDH LLC, Atlanta, GA; Alexandra Lee Parrott, Maria-Vittoria G. Carminati, NDH LLC-Denver, Denver, CO.

For J. Barnhart, Warden, in his Official capacity, United States Federal Bureau of Prisons, Defendants: Lauren Marie Dickey, U.S. Attorney's Office-Denver, Denver, CO.

Judges: PHILIP A. BRIMMER, Chief United States District Judge.

Opinion by: PHILIP A. BRIMMER

Opinion

ORDER

This matter is before the Court on Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction [Docket No. 10]. The Court has jurisdiction pursuant to *28 U.S.C. § 1331*.

I. BACKGROUND

Edward Nellson is an inmate at the United States Penitentiary in Florence, Colorado ("USP Florence"). Docket No. 10 at 1. He purports to represent a class of similarly situated inmates. Docket No. 1 at 1, 18. Plaintiff alleges that USP Florence is (1) not screening inmates or staff members for COVID-19, (2) not testing prisoners for COVID-19, (3) not isolating prisoners who test positive for COVID-19, and (4) not preventing infected staff members from working. Docket No. 10 at 1. Mr. Nellson filed a complaint on March 18, 2020, alleging that **[*2]** the failure to take the above steps violates his rights, and those of the class, under the *Eighth Amendment*. *See* Docket No. 1. On March 31, 2020, Mr. Nellson filed a motion for temporary restraining order ("TRO"), requesting that the Court order USP Florence to begin instituting screening, testing, and isolation of both inmates and staff. Docket No. 10 at 1-2.

Defendants filed a response on April 6, 2020, wherein they outline the steps that the Bureau of Prisons ("BOP") and USP Florence have taken to reduce the risk to inmates from COVID-19. *See* Docket No. 17.[1] Defendants indicate that the

[1] The response attaches as Exhibit 1 the declaration of Shari Himlie, the Health Services Administrator for USP Florence and the three other federal prisons located in Florence Colorado. *See* Docket No. 17-1. Ms. Himlie oversees the health services operations at each of

BOP has adopted a multiphase "Action Plan." Docket No. 17-1 at 4, ¶¶ 6-7. On a nationwide basis, the BOP has

> implemented screening requirements for inmates and staff; temporarily suspended social visits, legal visits, inmate transfers, official travel, and contractor access; updated its quarantine and isolation procedures; and instituted a 'modified operations' plan, which directs BOP facilities to adjust their daily operations in a manner that permits inmates to engage in physical distancing while in common areas, such as during mealtimes and recreation.

Docket No. 17 at 2-3 (citing Docket No. 17-1 at 5-7, ¶¶ 8-15). **[*3]** Additionally, on April 1, 2020, the BOP required "all inmates to remain 'secured in their assigned cells' for a period of 14 days . . . to decrease the spread of the virus." *Id.* at 3 (citing Docket No. 17-1 at 7-8, ¶ 16). As a result, "BOP inmates across the country are currently being confined to their cells for the majority of each day." *Id.* (citing Docket No. 17-1 at 8-9, ¶ 17).

At USP Florence, the following measures have been taken regarding inmates: (1) new inmates are screened and quarantined for 14 days regardless of whether the inmate displays symptoms; (2) high-risk individuals, as defined by the Centers for Disease Control and Prevention ("CDC"), are screened, given temperature checks, and provided "additional education regarding COVID-19 prevention"; (3) medical staff check on general population housing units twice a day; (4) inmates with work details are screened for symptoms and have their temperatures taken before shifts begin and then again before returning to their housing units; (5) any inmate presenting COVID-19 symptoms is immediately evaluated to determine whether testing or isolation is appropriate and whether any other inmate who had contact with the symptomatic inmate **[*4]** should be quarantined; (6) designated quarantine and isolation units have been created; and (7) inmate testing is based on CDC guidance, looking to the nature and severity of symptoms, an inmate's potential exposure to COVID-19 and risk profile, and whether an inmate has a work detail that requires contact with other inmates or staff. Docket No. 17-1 at 13-16, 18, ¶¶ 33-50, 58.

Regarding staff and visitors, USP Florence has implemented the following measures: (1) all staff and visitors must have their temperature taken, disclose symptoms of illness, and answer questions designed to evaluate their risk of exposure before entering USP Florence; (2) any staff member or visitor who reports symptoms or has a temperature of above 100.4 degrees Fahrenheit may be excluded from the building; and (3) any staff member who has been tested for COVID-19 is not permitted to return to work until she receives a negative test result. *Id.* at 16-17, ¶¶ 52-53, 55.

USP Florence has taken additional, staff-related steps by: (1) limiting the number of in-person meetings; (2) capping the number of attendees at in-person meetings; (3) replacing in-person meetings with video-conferencing to the extent practicable; and (4) **[*5]** requiring staff members to work at only one institution in the complex where USP Florence is located. *Id.* at 19-20, ¶¶ 65, 69

As to sanitation, USP Florence: (1) provides all inmates with access to sinks, water, and soap at all times; (2) offers new soap weekly; (3) gives all new inmates soap upon arrival; (4) provides soap at no cost to any inmate without sufficient funds to purchase it; (5) cleans housing common areas at least once daily, "typically" multiple times a day, with a disinfectant that kills coronavirus; (6) provides inmates with the disinfectant so that they may clean their cells with it; (7) cleans common areas outside the living areas with the disinfectant on a daily basis and "often multiple times a day"; (8) disinfects staff common equipment, such as radios and keys, whenever an item is checked out or returned; (9) provides personal protective equipment, such as respirator masks, surgical masks, and rubber gloves, to staff in quarantined areas, isolation units, and screening sites; and (10) provides all inmates and staff protective masks for daily use. *Id.*, ¶¶ 62-64, 67-68

As of the date of this order, the BOP website shows no reported COVID-19 cases among prisoners or staff as **[*6]** USP Florence. *See COVID-19 Coronavirus*, Fed. Bureau of Prisons, https://www.bop.gov/coronavirus (last updated Apr. 15, 2020).

II. LEGAL STANDARD

The standard for a TRO is the same as that for a preliminary injunction. *See* *Wiechmann v. Ritter, 44 F. App'x 346, 347 (10th Cir. 2002)*. To succeed on a motion for a preliminary injunction, the moving party must show (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in the movant's favor; and (4) the injunction is in the public interest. *Little v. Jones, 607 F.3d 1245, 1251 (10th Cir. 2010)*; *RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1208 (10th Cir. 2009)* (citing *Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*). "[B]ecause a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC, 562 F.3d 1067, 1070 (10th Cir.*

---

the Florence prisons. *Id.* at 2-3, ¶ 1-4.

2009) (quotations and citation omitted). Granting such "drastic relief," *United States ex rel. Citizen Band Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc., 883 F.2d 886, 888-89 (10th Cir. 1989)*, is the "exception rather than the rule." *GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984)*.

There are three types of preliminary injunctions that are disfavored: (1) injunctions that disturb the status quo, (2) injunctions that are mandatory rather than prohibitory, and (3) injunctions that provide the movant substantially all the relief it could feasibly attain after a full trial on the merits. *See Schrier v. Univ. of Colo., 427 F.3d 1253, 1260 (10th Cir. 2005)*. In seeking a disfavored injunction, "the movant must make a strong showing both with regard to **[*7]** the likelihood of success on the merits and with regard to the balance of harms." *Fish v. Kobach, 840 F.3d 710, 724 (10th Cir. 2016)* (quotations and alterations omitted); *see also Schrier, 427 F.3d at 1259* (stating that such injunctions "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course" (quotations omitted)).

Plaintiff here seeks an injunction that alters the status quo. Therefore, plaintiff's motion falls under the heightened standard for preliminary injunctions. *See Schrier, 427 F.3d at 1260*.

III. ANALYSIS

Before reaching the merits of plaintiff's motion, the Court addresses defendants' argument that plaintiff is required to exhaust administrative remedies before seeking a TRO. The Prison Litigation Reform Act ("PLRA") states that "[n]o action shall be brought with respect to prison conditions under *section 1983* of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *42 U.S.C. § 1997e(a)*. This language is mandatory. *See Ross v. Blake, 136 S. Ct. 1850, 1856, 195 L. Ed. 2d 117 (2016)*; *see also Jones v. Bock, 549 U.S. 199, 211, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)* ("There is no question that exhaustion is mandatory under the PLRA."). "[T]he PLRA's text suggests no limits on an inmate's obligation to exhaust," except **[*8]** that administrative remedies must be "available." *Ross, 136 S. Ct. at 1856*. As a result, "a court may not excuse a failure to exhaust, even to take [special] circumstances into account." *Id. at 1856-57*. Availability, however, does not turn on the types of remedies available through the administrative procedures, but on the administrative procedures themselves. *Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819, 1825, 149 L. Ed. 2d 958 (2001)*. There must be "the possibility of some relief," not all relief an inmate hopes to receive through the grievance process. *Ross, 136 S. Ct. at 1859* (quotations omitted).

A plaintiff is required to exhaust administrative remedies before seeking a TRO or a preliminary injunction, just as he is required to do before seeking other remedies covered by the PLRA. *See Farmer v. Brennan, 511 U.S. 825, 847, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)* ("When a prison inmate seeks injunctive relief, a court not need ignore the inmate's failure to take advantage of adequate prison procedures, and an inmate who needlessly bypasses such procedures may properly be compelled to pursue them."); *Little, 607 F.3d at 1249* (addressing exhaustion before reaching the merits of a plaintiff's request for a preliminary injunction due to prison conditions).

The Supreme Court has described the PLRA as a "mandatory exhaustion" statute and has "reject[ed] every attempt to deviate . . . from its textual mandate." *Ross, 136 S. Ct. at 1857*. "Because **[*9]** the prison's procedural requirements define the steps necessary for exhaustion, an inmate may only exhaust by properly following all of the steps laid out in the prison system's grievance procedure." *Little, 607 F.3d at 1249*. The only "textual exception to mandatory exhaustion" in the PLRA is the "availability" of administrative remedies. *Ross, 136 S. Ct. at 1858*. The Supreme Court has noted three types of administrative remedies that, "although officially on the books, [are] not capable of use to obtain relief." *Id. at 1859*. First, "an administrative procedure is unavailable when . . . it operates as a simple dead end — with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Id.* Second, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use." *Id.* Third, a remedy can become unavailable when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id. at 1860*.

Here, Mr. Nellson has not alleged that he has attempted to "follow[] . . . the steps laid out in the prison system's grievance procedure[s]." *Little, 607 F.3d at 1249*. Plaintiff does, however, argue that the administrative grievance process is unavailable to **[*10]** him because it is a "dead end" that would take ninety days to complete, which would put plaintiff and other inmates at USP Florence at risk of COVID-19. Docket No. 19 at 7-8. However, the dead-end exception to exhaustion is only relevant when "officers [are] unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross, 136 S. Ct. at 1859*. Plaintiff does not argue that defendants are unwilling or unable to implement the type of relief that he requests. The steps outlined by defendants belie plaintiff's argument that defendants are unable or

unwilling to provide relief in response to COVID-19.

Plaintiff's dead-end argument is another formulation of his argument that, because plaintiff is at risk, he is not required to exhaust his administrative remedies since the grievance process can "offer no possible relief in time to prevent the imminent danger." Docket No. 19 at 4 (citing *Fletcher v. Menard Correctional Ctr., 623 F.3d 1171, 1173 (7th Cir. 2010)*). Plaintiff relies on *Fletcher*, a case from the Seventh Circuit, to support his argument. *See 623 F.3d at 1173*. *Fletcher*, however, does not support the unavailability of administrative remedies in plaintiff's situation.

First, *Fletcher* was decided before *Ross*. Second, and more importantly, *Fletcher* did not hold that any inmate in **[*11]** imminent danger is always exempted from exhausting administrative remedies. *Fletcher* held that, where there are no administrative remedies that can redress an immediate danger to inmate health or safety, administrative remedies are unavailable. *623 F.3d at 1173*. But, in *Fletcher*, the Seventh Circuit found that the plaintiff had emergency grievance procedures available to him, which the plaintiff did not exhaust. *Id. at 1175*. As a result, the Seventh Circuit held that the plaintiff had not exhausted his administrative remedies. *Id.* ("[T]he imminent-danger exception does not excuse a prisoner from exhausting remedies tailored to imminent dangers. Fletcher had an available such remedy.").

Here, *28 C.F.R. § 542.18* offers inmates an emergency procedure where, "[i]f the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing." *28 C.F.R. § 542.18*; *see also Ray v. Aztec Well Serv. Co., 748 F.2d 888, 889 (10th Cir. 1984)* ("This court can take judicial notice of agency rules and regulations."). Plaintiff is thus incorrect that "[t]here is no guarantee that any individual responding to Mr. Nellson's requests will, in fact, do so in the time promised." Docket No. 22-1 at 2. Notification of this **[*12]** regulation is provided to prisoners through the BOP's Program Statement for the Administrative Remedy Program. *See* Docket No. 21 at 7 (citing Fed. Bureau of Prisons, Administrative Remedy program (2014), https://www.bop.gov/policy/progstat/1330_018.pdf). Thus, under *Fletcher*, plaintiff had an administrative remedy available to him that takes into account the speed and nature of the COVID-19 emergency. Plaintiff makes no allegation that he attempted to utilize this emergency procedure or that it was a dead end. *See Brown v. Eardley, 184 F. App'x 689, 692 (10th Cir. 2006)* (unpublished) (holding that, if the emergency grievance procedure applies, a plaintiff is "required to exhaust fully those grievances").

Additionally, the Supreme Court defines availability as some relief, not all relief, that an inmate seeks. *See Ross, 136 S. Ct. at 1859*. Plaintiff does not argue that he would be able to receive no relief whatsoever through the administrative grievance process but, rather, that the process would not be able to institute all the relief he requests immediately. But total and immediate relief is not the standard for exhaustion, "the possibility of some relief" is. *Id.* (quotations omitted). Moreover, as defendants point out, plaintiff is not required to complete the **[*13]** entire administrative process before receiving some relief; he may get relief at any stage of the administrative process. *See* Docket No. 21 at 1-2.

The Court finds that plaintiff has failed to exhaust his administrative remedies before seeking judicial relief. In reaching this conclusion, the Court does not overlook the risks of COVID-19 at USP Florence or in the prison system generally. But the Court may not alter the mandatory requirements of the PLRA for COVID-19 or any other special circumstance. *See Ross, 136 S. Ct. at 1856-57* ("[A] court may not excuse a failure to exhaust, even to take [special] circumstances into account.").

Even assuming that plaintiff exhausted his administrative remedies, he still would not be entitled to a TRO because defendants have already implemented the relief that he requests. As a result, plaintiff cannot show "that irreparable injury is *likely* in the absence of an injunction." *Winter, 555 U.S. at 22*. Plaintiff requests the following relief: (1) screening of prisoners and staff for symptoms of COVID-19; (2) testing of prisoners and staff demonstrating symptoms of COVID-19; (3) quarantining of inmates testing positive for COVID-19; and (4) preventing staff testing positive for COVID-19 from contact **[*14]** with inmates. Docket No. 10 at 1-2. The BOP states that it has implemented all four of plaintiff's requests.

First, as to screening, all new inmates and high-risk inmates USP Florence are screened for symptoms of COVID-19. Docket No. 17-1 at 13-14, ¶¶ 33-35, 41. Medical staff checks on general population inmates twice daily to ensure that general population inmates are not exhibiting symptoms. *Id.* at 15, ¶ 46. Additionally, inmates with a work detail are screened and have their temperatures taken each time they begin and end their work detail. *Id.*, ¶ 45. Staff are also screened for symptoms and are required to have their temperatures taken. *Id.* at 16-17, ¶ 52.

Second, as to testing, USP Florence tests inmates in accordance with CDC protocols. *Id.* at 17-18, ¶¶ 56-58. This includes analyzing an inmate's exposure risk profile and determining whether an inmate has had potential exposure to COVID-19 or is exhibiting symptoms. *Id.* at 18, ¶ 58.

Third, as to quarantine, the BOP has instituted a stay in place order, requiring all prisoners to limit movement as much as practicable. *Id*. at 7-8, ¶ 16. USP Florence has set up special units for isolation and quarantine. *Id*. at 16, ¶¶ 48-51. USP Florence also considers quarantining individuals who have had contact **[*15]** with those exhibiting symptoms of COVID-19, even if those individuals do not exhibit symptoms themselves. *Id*.

Fourth, as to exclusion of staff, any staff members exhibiting symptoms or measuring a fever of 100.4 degrees Fahrenheit or above may be excluded, regardless of whether they have tested positive for COVID-19. *Id*. at 16-17, ¶¶ 52-54. Any staff member who has been tested is not allowed to return to work until that staff member tests negative. *Id*. at 17, ¶ 55.

Because defendants have instituted all the relief that plaintiff requests, the Court finds that plaintiff will not suffer likely irreparable harm if the Court denies plaintiff's request for a TRO. *Winter, 555 U.S. at 22*. The lack of an injunction cannot harm plaintiff when the injunctive relief would add no additional measures beyond defendants' current screening, testing, and isolation procedures. Because granting a preliminary injunction requires a showing on each factor and plaintiff cannot show irreparable harm, he cannot succeed on his TRO motion. *See Winter, 555 U.S. at 23-24* (holding that "[a] proper consideration" of the balance of equities and public interest "alone requires denial of the requested injunctive relief" and, therefore, declining to address the likelihood of success on **[*16]** the merits); *see also Big O Tires, LLC v. Felix Bros., Inc. 724 F. Supp. 2d 1107, 1121 (D. Colo. 2010)* (declining to address every factor because "the resolution of them will have no bearing on the outcome").

In reply, plaintiff argues that not all of the defendants' measures are being implemented. Specifically, plaintiff argues that only cloth masks, and not N95 medical masks, are being offered to inmates. Docket No. 19 at 8. Additionally, plaintiff argues that it is impossible to maintain physical distancing in the "restrooms or the law library" and that inmates are not being provided with soap. *Id*. at 8-9. Defendants indicate, however, that when inmates are allowed out of their cells, they have been directed to maintain appropriate physical distancing. Docket No. 17-1 at 8-9, ¶ 17. Plaintiff does not explain why he must use the communal restrooms, as opposed to a toilet in his cell, and why he must use the law library at times when physical distancing is not possible. However, if plaintiff's allegations are true, they would not be enough to show deliberate indifference and, as a result, plaintiff does not have a likelihood of success on the merits.

A claim for deliberate indifference to serious medical needs has an objective and a subjective component. The objective component **[*17]** requires that the medical need be "sufficiently serious." *Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir. 2000)*. The subjective component requires that "a prison official knows of and disregards an excessive risk to inmate health or safety." *Id*. (citation and quotations omitted).

Assuming that the objective component is met, and that prison officials know of the risk of COVID-19, plaintiff has not demonstrated that defendants have disregarded that risk. As outlined above, defendants have taken numerous steps to reduce the risk of transmission at USP Florence. A lack of social distancing in the law library and communal restrooms, as well as the provision of cloth, rather than N95 masks, does not demonstrate that defendants have disregarded the risk of COVID-19 at USP Florence. The CDC has stated that cloth masks are sufficient for non-medical workers and suggests that only medical professionals use N95 masks because they are in short supply. *See Cloth Face Coverings: Questions and Answers*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-faq.html (last updated Apr. 4, 2020) ("Surgical masks and N95 respirators are in short supply and should be reserved for healthcare **[*18]** workers or other medical first responders, as recommended by CDC guidance."). Providing CDC-recommended face masks does not demonstrate that defendants are disregarding a risk to inmate health or safety.

As to plaintiff's contention that inmates have not been provided soap, Ms. Himlie's declaration states that USP Florence is providing prisoners with soap weekly and at no cost if an inmate cannot afford it. Docket No. 17-1 at 19, ¶ 62. Additionally, plaintiff purchased soap as recently as April 14, 2020. Docket No. 21-1 at 3, ¶ 6. Given these considerations, and the steps that defendants have taken, the Cour t finds that defendants have not disregarded a substantial risk to inmate safety and, therefore, plaintiff is not likely to succeed on the merits.

IV. CONCLUSION

For the foregoing reasons it is

ORDERED that Plaintiff's Motion for Leave to File Surreply [Docket No. 22] is **GRANTED**. Accordingly the Clerk's office shall docket Exhibit 1 to Docket No. 22 as plaintiff's surreply. It is further

ORDERED that the portion of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction [Docket No. 10] that requests a temporary restraining order is **DENIED**.

DATED April 16, 2020. **[*19]**

BY THE COURT:

/s/ Philip A. Brimmer

PHILIP A. BRIMMER

Chief United States District Judge

End of Document

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT X

Exhibit X - Dorm Chart

Head Count as of 5/4/2020						
Facility	Capacity	Security Level			Vacancies	Positive COVID-19 Cases in Facility as of 5/5
		I	SI	II		
AMF	252	232			20	0
ARF	1280		973		307	52
DRF	1280		1240		40	0
IBC-A	110	37			73	1
ICF	280			272	8	2
JCF	960		837		123	669
JCS	1600		1450		150	0
KCF	1600	271		1232	97	1
LCF	1378			1216	162	791
MBP	640		451		189	0
NCF	1104		1049		55	1
SMT	1008		774		234	177
URF	1208			1204	4	0
WCC/GO	72	20			52	8
ZLI	52		14		38	N/A
ZPM	100		39		61	N/A
Total	12924	560	6827	3924	1613	1702

OVERALL CAPACITY	40,872		
OCCUPIED CAPACITY	36,980		
NET OPERATING CAPACITY	40,175		
DORM CAPACITY	12,924		
DORM OCCUPIED	11,311		
Dorm %	CAP	31.62%	
	Occupied	30.59%	

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT Y

Baxley v. Jividen

United States District Court for the Southern District of West Virginia, Huntington Division

April 8, 2020, Decided; April 8, 2020, Filed

CIVIL ACTION NO. 3:18-1526; 3:18-1533; 3:18-1436

Reporter
2020 U.S. Dist. LEXIS 61894 *

JOHN BAXLEY, JR., ERIC L. JONES, SAMUEL STOUT, AMBER ARNETT, EARL EDMONDSON, JOSHUA HALL, DONNA WELLS-WRIGHT, ROBERT WATSON, HEATHER REED, and DANNY SPIKER, JR., on their own behalf and on behalf of all others similarly situated, Plaintiffs, v. BETSY JIVIDEN, in her official capacity as Commissioner of the West Virginia Division of Corrections and Rehabilitation and THE WEST VIRGINIA DIVISION OF CORRECTIONS AND REHABILITATION, and SHELBY SEARLS, in his official capacity as the Superintendent of Western Regional Jail and Correctional Facility, Defendants.

Prior History: *Baxley v. Western Reg'l Jail, 2018 U.S. Dist. LEXIS 215724 (S.D. W. Va., Dec. 20, 2018)*

Core Terms

Plaintiffs', inmates, jails, prisons, irreparable harm, pandemic, merits, deliberate indifference, exhaustion, disease, injunction, state prison, preliminary injunction, spread, medical need, infected, virus, injunctive relief, circumstances, facilities, memorandum, furlough, remedies, parties, Reply, public interest, declaration, distancing, responding, Directive

Counsel: **[*1]** For John Baxley, Jr., Amber Arnett, Earl Edmondson, Joshua Hall, Donna Wells-Wright, Robert Watson, Heather Reed, and, Danny Spiker, Jr., on their own behalf and on behalf of all others similarly situated, Plaintiffs (3:18-cv-01526): Jennifer S. Wagner, Lydia C. Milnes, LEAD ATTORNEYS, MOUNTAIN STATE JUSTICE, INC., Morgantown, WV.

For Eric L. Jones, Samuel Stout, Consol Plaintiffs (3:18-cv-01526): Jennifer S. Wagner, Lydia C. Milnes, LEAD ATTORNEYS, Rachel Kincaid, MOUNTAIN STATE JUSTICE, INC., Morgantown, WV.

For Betsy Jividen, in her official capacity as Commissioner of the West Virginia Division of Corrections and Rehabilitation, Defendant, Third Party Plaintiff (3:18-cv-01526): Briana J. Marino, LEAD ATTORNEY, WV ATTORNEY GENERAL'S OFFICE, Charleston, WV; James C. Stebbins, Richard L. Gottlieb, Valerie Harris Raupp, Webster J. Arceneaux, III, LEWIS GLASSER, CASEY & ROLLINS PLLC, Charleston, WV.

For Shelbey Searls, in his official capacity as the Superintendent of, Western Regional Jail and Correctional Facility, Defendant (3:18-cv-01526): Briana J. Marino, LEAD ATTORNEY, WV ATTORNEY GENERAL'S OFFICE, Charleston, WV; James C. Stebbins, Richard L. Gottlieb, Valerie Harris Raupp, Webster J. Arceneaux, III, LEWIS GLASSER, CASEY & ROLLINS PLLC, Charleston, WV.

For Shelbey Searls, in his official capacity as the Superintendent of, Third Party Plaintiff (3:18-cv-01526): Briana J. Marino, LEAD ATTORNEY, WV ATTORNEY GENERAL'S OFFICE, Charleston, WV; James C. Stebbins, Richard L. Gottlieb, Valerie Harris Raupp, Webster J. Arceneaux, III, LEWIS GLASSER, CASEY & ROLLINS PLLC, Charleston, WV.

For Eric L. Jones, Plaintiff (3:18-cv-01533): **[*2]** Jennifer S. Wagner, Lydia C. Milnes, LEAD ATTORNEYS, MOUNTAIN STATE JUSTICE, INC., Morgantown, WV.

For Western Regional Jail, Defendant (3:18-cv-01533): Briana J. Marino, LEAD ATTORNEY, WV ATTORNEY GENERAL'S OFFICE, Charleston, WV.

For Samuel W. Stout, Plaintiff (3:18-cv-01436): Jennifer S.

Wagner, Lydia C. Milnes, LEAD ATTORNEYS, Rachel Kincaid, MOUNTAIN STATE JUSTICE, INC., Morgantown, WV.

For Western Regional Jail Authority, Captain Aldrage, Captain Savilla, Defendants (3:18-cv-01436): Briana J. Marino, LEAD ATTORNEY, WV ATTORNEY GENERAL'S OFFICE, Charleston, WV; James C. Stebbins, Richard L. Gottlieb, Valerie Harris Raupp, Webster J. Arceneaux, III, LEWIS GLASSER, CASEY & ROLLINS PLLC, Charleston, WV.

Judges: ROBERT C. CHAMBERS, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT C. CHAMBERS

Opinion

MEMORANDUM OPINION AND ORDER

Presently pending before the Court is Plaintiffs' "Emergency Motion for Preliminary Injunction Regarding Defendants' Prevention, Management, and Treatment of COVID-19." *Mot. for Prelim. Inj.*, ECF No. 161. Defendants timely filed a Response in Opposition, *Resp. in Opp'n*, ECF No. 168, and Plaintiffs did the same with their Reply, *Reply*, ECF No. 173. The parties also provided supplemental information to the Court, which has all been filed under seal. *See Exs.*, ECF No. 181. The Court held a hearing on Plaintiffs' Motion on April 6, 2020 and determined **[*3]** that the issues had been adequately presented through the parties' submissions and oral argument, and therefore dispensed with the need for further witness testimony. *Video Mot. Hr'g*, ECF No. 180. For the reasons set forth below—as well as for those announced on the record at the hearing—the Court **DENIES** Plaintiffs' Motion.

I. BACKGROUND

This putative class action stems from allegations that the West Virginia Department of Corrections and Rehabilitation ("WVDCR") has "acted with deliberate indifference to serious medical needs of inmates at the time of admission to jails in West Virginia." *Second Am. Compl.*,[1] ECF No. 67, at ¶ 182. The plaintiffs are divided into two putative classes: Class A, which "includes all persons who were at any time on or after December 18, 2018, or who will be, admitted to a jail in West Virginia with a discernable, treatable medical and/or mental health problem," and Class B, which only "includes all persons who were at any time on or after December 18, 2018, inmates housed at Western Regional Jail and Correctional Facility, in Barboursville, West Virginia." *See id.* at ¶¶ 24-241.

As this action entered its second year, **[*4]** the COVID-19 pandemic began its rapid spread across the world and into West Virginia.[2] Elected officials reacted swiftly at the state and federal level, with both the President of the United States and the Governor of West Virginia declaring states of emergency in an attempt to slow the spread of the coronavirus pandemic.[3] Given the unique characteristics of both jails and the disease, commentators and public health officials have remarked upon the outsized danger it may pose to prisoners and pretrial detainees who are housed in confined spaces and who share many communal resources and spaces.[4]

In light of these concerns, Plaintiffs filed the instant Motion for a Preliminary Injunction on March 25, 2020. *See Mot. for*

---

[1] Though styled and docketed as the "First Amended Class Action Complaint for Injunctive and Declaratory Relief," it is really the *Second* Amended Complaint and is referred to as such throughout this Memorandum Opinion and Order. *See Mot. to File Second Am. Compl.*, ECF No. 62.

[2] *See* Phil Kabler, *Justice confirms WV's first case of coronavirus*, Herald-Dispatch (Mar. 17, 2020), *available at* https://www.herald-dispatch.-com/coronavirus/justice-confirms-wv-s-first-case-of-coronavirus/article_7e034a25-949e-5085-8494-87ae9b570016.html .

[3] *See* President Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (Mar. 13, 2020), *available at* https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ ; Anthony Izaguirre, *Justice Declares Emergency as Virus Threatens*, Herald-Dispatch (Mar. 16, 2020), *available at* https://www.herald-dispatch.com/coronavirus/justice-declares-emergency-as-virus-threatens/-article_56b82394-6d70-5f0c-9b67-054200edb616.html .

[4] *See* German Lopez, A Coronavirus Outbreak in Jails or Prisons Could Turn Into a Nightmare, Vox.com (Mar. 17, 2020), *available at* https://www.vox.com/policy-and-politics/2020/3/17/21181515/coronavirus-covid-19-jails-prisons-mass-incarceration ; *see also Beyrer Dec.*, ECF No. 161-1.

Prelim. Inj., at 3. Plaintiffs sought two forms of injunctive relief. First, they moved for an order requiring Defendants to "develop, disclose, and implement a plan that undertakes all appropriate actions **[*5]** to protect Plaintiffs and others who are similarly situated." *Id.* at 12. Second, they requested the Court order "WVDCR to release a sufficient number of inmates [to] reduce overcrowding and allow for appropriate social distancing within the jails and prisons to protect medically vulnerable inmates." *Id.* at 13.

Given the unprecedented nature of the COVID-19 pandemic, the Court ordered an accelerated briefing schedule in response to Plaintiffs' Motion. *Order*, ECF No. 165. Defendants timely filed their Response in Opposition, and raised several objections to Plaintiffs' Motion. *Resp. in Opp'n*, at 3-20. Plaintiffs responded to many of these points in their Reply filed days later. *Reply*, at 1-21. The parties and the Court participated in a telephonic status conference on April 1, 2020, during which Defendants agreed to provide redacted copies of their COVID-19 response plan to opposing counsel and the Court for review. The Court issued an order reflecting these discussions that same day, *Order*, ECF No. 176, and Defendants provided a redacted copy of their response plan. Plaintiffs responded to this plan with a verified declaration from their expert witness, Dr. Homer Venters, *Venters Dec.*, ECF No. 9, and **[*6]** Defendants replied in turn with their own set of affidavits and their own memorandum addressing his concerns, *Second Jividen Aff.*, ECF No. 181-1, *Plumley Aff.*, ECF No. 181-2, *Hissom Aff.*, ECF No. 181-3. The Court proceeded with the hearing scheduled for April 6, 2020, and heard argument from counsel on the merits of their respective positions. After entertaining argument, the Court determined that Plaintiffs had not established a likelihood of success on the merits of their claim for deliberate indifference.

II. LEGAL STANDARD

"[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001)* (internal citations and quotations omitted). It follows that a court may not issue a preliminary injunction absent "a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. "A plaintiff seeking a preliminary injunction must establish that [1] he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id. at 20*. These factors are **[*7]** not weighted equally; instead, "the two most important are those of probable irreparable injury to the plaintiff if an injunction is not issued and likely harm to the defendant if an injunction is issued." *N.C. State Ports Auth. v. Dart Containerline Co., 592 F.2d 749, 750 (4th Cir. 1979)*. The burden of proof rests with the party seeking a preliminary injunction, not with the party opposing its issuance. *Granny Goose Foods, Inc. v. Bhd. of Teamsters, 415 U.S. 423, 445, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974)*.

High though this initial threshold may be for Plaintiffs, it perhaps understates the legal implications raised by the instant case. "[S]weeping intervention in the management of state prisons is rarely appropriate when exercising the equitable powers of the federal courts," and this "is especially true where mandatory injunctive relief is sought and only preliminary findings as to the plaintiffs' likelihood of success on the merits have been made." *Taylor v. Freeman, 34 F.3d 266, 269 (4th Cir. 1994)*. This makes sense, inasmuch as "[m]andatory injunctions alter the status quo" by requiring a party to take a particular action, whereas "prohibitory injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." *League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 236 (4th Cir. 2014)* (internal citations and quotations omitted). In fact, mandatory preliminary relief "goes well beyond simply maintaining the status quo *pendent lite*, is particularly **[*8]** disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Taylor, at 270 n.2* (quoting *Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976)*). Indeed, "absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or substitute their judgment for that of the trained penological authorities charged with the administration of such facilities." *Id. at 268*; *see also Rogers v. Scurr, 676 F.2d 1211, 1214 (8th Cir. 1982)* ("[J]udicial restraint is especially called for in dealing with the complex and intractable problems of prison administration."). Put succinctly: "it is not for the federal courts to . . . micromange the Nation's prisons." *O'Dell v. Netherland, 112 F.3d 773, 777 (4th Cir. 1997)*.

III. DISCUSSION

Both parties raise several arguments in support of their positions that warrant a careful and searching examination of the record. The Court will first consider Defendants' contentions that both exhaustion and the substance of Plaintiffs' operative Second Amended Complaint do not permit consideration of their Motion.[5] Having disposed of

[5] Defendants also expend considerable energy in their Response in Opposition fixating on the fact that portions of Plaintiffs' Motion and

both arguments, the Court will turn to an analysis of the substance of Plaintiffs' Motion. With the evidence presently before the Court, it is clear that Plaintiffs cannot meet their burden and their Motion must be denied.

A. Defendants' Arguments

1. Exhaustion

Defendants first contend that the Prison Litigation Reform Act ("PLRA") imposes an exhaustion requirement that bars Plaintiffs' Motion. *See Resp. in Opp'n*, at 5-6. They point specifically to § 803 of the PLRA, which provides that "[n]o action shall be brought with respect to prison conditions under [*42 U.S.C. § 1983*], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *42 U.S.C. § 1997e(a)*. This exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle, 534 U.S. 516, 532, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002)*. Exhaustion is mandatory, regardless of the type of relief sought or offered through administrative channels. *Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001)*.

Here, Defendants' argument is belied by the plain text of the PLRA's exhaustion requirement. In pertinent part, the provision mandates that "no *action* shall be brought" with respect to prison conditions prior to exhaustion—not that no *motion* may be filed with respect to the same. *See 42 U.S.C. § 1997e(a)*. To the extent Defendants are attempting to argue that this entire action is not properly **[*10]** before the Court for Plaintiffs' failure to exhaust administrative remedies, the Court reminds Defendants that "failure to exhaust available administrative remedies is an affirmative defense, not a jurisdictional requirement, and thus inmates need not plead exhaustion, nor do they bear the burden of proving it." *Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008)* (citing *Jones v. Bock, 549 U.S. 199, 216, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)*). It follows that Plaintiffs' purported failure to exhaust administrative remedies is an insufficient justification for denying their pending Motion.

2. Relevance to this Case

Defendants next point out that this action was initiated long before the COVID-19 pandemic reached the United States (and, indeed, likely long before the disease infected a single person). *Resp. in Opp'n*, at 11-12. They claim that "Plaintiffs are now improperly attempting to bootstrap claims related to the COVID-19 pandemic that have nothing to do with the claims previously pled and which claims did not even exist at the time the Amended Complaint was filed." *Id.* at 11. This is a bold argument, as Defendants themselves recognize that "this case as pled is about . . . statewide claims related to how inmates generally receive medical and mental health treatment upon admission." *Id.* The Court believes this **[*11]** language is sufficiently broad to encompass claims for medical treatment for COVID-19, but even if it were not the Court would grant leave for Plaintiffs to serve a supplemental pleading on Defendants pursuant to *Rule 15(d) of the Federal Rules of Civil Procedure*.[6] Rather than tangle this timely Motion in avoidable procedural knots, the Court construes Plaintiffs' Second Amended Complaint—which, at bottom, seeks to address medical care available in West Virginia jails and prisons—as encompassing just the sort of claims raised by Plaintiffs' Motion.

B. Merits Analysis

Having considered Defendants' procedural defenses, the Court turns to the merits of Plaintiffs' Motion. As part of doing so, it is worthwhile to review the significant amount of evidence that both parties put before the Court prior to oral argument. In responding to Plaintiffs' Motion, Defendants attached an Affidavit from Defendant Betsy Jividen detailing the actions that she and the WVDCR had so far taken with respect to the COVID-19 pandemic. *First Jividen Aff.*, ECF No. 168-1. Jividen affirmed that she issued a memorandum to all WVDCR employees on March 11, 2020 that provided information about the virus and issued instructions for

---

supporting affidavits are drawn from documents filed in *Dawson v. Asher*, Case No. C20-0409JLR-MAT, in the Western District of Washington. *See **[*9]** Resp. in Opp'n*, at 9-11. This may well be the case, but it is of no import whatsoever for the purposes of resolving the pending Motion. The Court will carefully consider Plaintiffs' claims and supporting evidence as it would in any other case, and attaches no significance to the fact that some of Plaintiffs' arguments may be drawn from other material.

[6] In pertinent part, *Rule 15(d)* provides that "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." *Fed. R. Civ. P. 15(d)*. The COVID-19 pandemic is exactly the sort of occurrence or event that would justify service of a supplemental pleading.

responding to it. *Id*. at ¶¶ 2-12. She **[*12]** further explained that the WVDCR adopted a Policy Directive on March 20, 2020 that provided for a comprehensive response to COVID-19 in state prisons and jails. *Id*. at ¶¶ 13-23. Finally, she issued a memorandum on March 26, 2020 that included the Centers for Disease Control and Prevention's ("CDC's") guidance for correctional and detention facilities. *Id*. at ¶ 26.

In reply, Plaintiffs provided a "Sample COVID-19 Plan" that had been developed by VitalCore Health Strategies.[7] *See Sample COVID-19 Plan*, ECF No. 173-1. The forty-three page document provides clear instructions to prison staff for preventing and isolating the disease, as well as a series of worksheets for facilities to complete in order to gauge compliance with the plan. *Id*. Pursuant to this Court's order, Defendants subsequently produced a redacted copy of their COVID-19 response plan to the Court, Plaintiffs' counsel, and Plaintiffs' expert witness. *Policy Directive*, ECF No. 181-4; *CDC Guidance*, ECF No. 181-5. The plan—adapted from an earlier plan prepared by VitalCore—addressed many of the same issues as Plaintiffs' proposed plan, and included many of the same worksheets.[8] Plaintiffs' expert, Dr. Homer Venters, reviewed the **[*13]** plan and provided a declaration addressing its purported weaknesses. *Venters Dec*., at ¶¶ 17-18. Many of his conclusions did not address the adequacy of the plan itself, but rather the adequacy of its implementation.[9] *See id*. at ¶ 18.

Nevertheless, the Court directed Defendants to provide a memorandum[10] responding to Venters' Declaration along with verified affidavits or declarations of their own. *Order*, ECF No. 179. Defendants did so, and their affidavits demonstrated that Defendants had already taken steps to implement the plan they had earlier provided to the Court.[11] *See generally Second Jividen Aff*.*; Plumley Aff*.*; Hissom Aff*. Two of these steps are of particular importance: the expanded use of furlough programs to reduce crowding in West Virginia jails and prisons, *Second Jividen Aff*., at 2, and the timely completion of the worksheets attached to Defendants' response plan, *Plumley Aff*., at 1. All this demonstrates that Defendants are implementing the plan developed by the very sources Plaintiffs themselves have relied on for guidance in their submissions and expert declarations—namely, VitalCore and the CDC.

The probative weight **[*14]** of this evidence is what has permitted the Court to consider Plaintiffs' Motion without further witness testimony.[12] This is reinforced by the witnesses set to testify at the hearing; there is extremely limited probative value in calling several incarcerated witnesses to testify out of a system filled with thousands, and Plaintiffs' expert was permitted to respond to Defendants at whatever length and depth he chose. Moreover, much of what inmates could testify to—say, the crowded conditions in various state correctional facilities—is already apparent from the evidence the parties have provided. *See, e.g., Occupancy Chart*, ECF No. 181-8 (showing over-capacity populations at five state jails). Any notes that Plaintiffs have collected regarding insufficient preparations for COVID-19 are not enough to outweigh Defendants' evidence of ongoing implementation of their plan, including posted signs and notices across jail facilities.

Turning again to the substance of that Motion, Plaintiffs are seeking two forms of injunctive relief: an order requiring Defendants to "develop, disclose, and implement a plan that undertakes all appropriate actions to protect Plaintiffs and others who are similarly **[*15]** situated," and an order directing "WVDCR to release a sufficient number of inmates

---

[7] VitalCore is a private company that aims to improve health care services in correctional facilities. *See* https://vitalcorehs.com/ (last visited Apr. 7, 2020).

[8] The CDC guidance—incorporated by reference into Defendants' plan—accounts for many of the subsequent changes in VitalCore's own plan that Plaintiffs submitted as a sample. *See Sample COVID-19 Plan*, at 1 ("Below are substantive updates primarily based on the new CDC guidance.").

[9] Indeed, Venters urged the WVDCR to fully implement the plan immediately. *Venters Dec*., at ¶ 18(i).

[10] In their Memorandum, Defendants mention that they requested and reviewed notes of conversations with five inmates that formed the basis of Dr. Venters' expert opinions. *Resp*. *Mem*., ECF No. 181-6, at 2 n.1. As Defendants point out, these notes revealed far from uniform condemnation of WVDCR's response to the COVID-19 crisis. *See, e.g., id*. at 6 ("Plaintiff Edmondson . . . thought that his facility had '[r]eally done a good job with disinfectants' . . . . Plaintiff Baxley admitted that . . . the facility is 'pretty decent about getting them hygiene there.'").

[11] Lending further support to this finding are photographs of signs—and examples of the signs themselves—provided to the Court by Defendants in advance of the hearing.

[12] The Court recognizes that Plaintiffs have maintained their objection to its decision to end the hearing without entertaining testimony. Nevertheless, Court notes that *Rule 65 of the Federal Rules of Civil Procedure* "does not require an evidentiary hearing" if "the party opposing the preliminary injunction [has] a fair opportunity to oppose the application and to prepare for such opposition." *McDonald's Corp. v. Robertson, 147 F.3d 1301, 1311 (11th Cir. 1998)*. The Court afforded Defendants every opportunity to oppose Plaintiffs' Motion, and in any event has ruled in their favor.

[to] reduce overcrowding and allow for appropriate social distancing within the jails and prisons to protect medically vulnerable inmates." *Mot. for Prelim. Inj.*, at 12-13. It bears repeating that this injunctive relief is sought in the context of a *42 U.S.C. § 1983* action alleging deliberate indifference to prisoners' medical needs under the *Eighth* and *Fourteenth Amendments to the United States Constitution*. *See Second Am. Compl.*, at ¶ 244. It is this legal and procedural framework that shapes the Court's approach to Plaintiffs' Motion.

1. Likelihood of Irreparable Harm

The Court begins its analysis by considering the likelihood of irreparable harm, as "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray, 415 U.S. 61, 88, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)*. "'Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.'" *Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 812 (4th Cir. 1991)* (quoting *ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987)*). High though this standard may be, the Court concludes that Plaintiffs have met it here.

The COVID-19 pandemic is unprecedented, both as a matter of public health and as a matter of societal disruption. The disease itself appears highly communicable, **[*16]** and evidence suggests that the immediate likelihood of infection is only elevated in prisons. *See, e.g., Meyer Dec.*, ECF No. 161-4. That prisoners have not *yet* been infected with COVID-19 is no bar to a finding of irreparable harm; indeed, as the United States Supreme Court has clarified, prison officials may be deliberately indifferent "to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms." *Helling v. McKinney, 509 U.S. 25, 34, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993)*. The question for West Virginia prisons is not the current rate of infection—to date, there have been no reported cases of COVID-19 in West Virginia jails or prisons—but rather the immediate likelihood of such infection. Given the rapidly-increasing numbers of infected individuals in West Virginia's general population,[13] the risk of transmission to prisoners is quite high.

Provided the likelihood of serious illness and even death accompanying the COVID-19 pandemic, the Court has little trouble concluding that the absence of a plan to mitigate its effects could result in irreparable harm to Plaintiffs. This reasoning aligns with that of many other **[*17]** courts that have confronted this issue in the context of the COVID-19 pandemic. *See, e.g., Coronel v. Decker, No. 20-cv-2472 (AJN), 2020 U.S. Dist. LEXIS 53954, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020)*; *Castillo v. Barr, CV 20-00605 TJH (AFMx), 2020 U.S. Dist. LEXIS 54425, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020)*; *Zhang v. Barr, No. ED CV 20-00331-AB (RAOx), 2020 U.S. Dist. LEXIS 54424, 2020 WL 1502607 (C.D. Cal. Mar. 27, 2020)*; *Basank v. Decker, 20 Civ. 2518(AT), 2020 U.S. Dist. LEXIS 53191, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020)*. Even Defendants concede that the disease poses a degree of risk, though they characterize it as "low and certainly not any greater than the risk of the public at large."[14] *Resp. in Opp'n*, at 18. The possibility that Plaintiffs could face a life-threatening—or even deadly—infection in prison constitutes exactly the sort of irreparable harm that injunctive relief is intended to remedy. It follows that the Court finds that Plaintiffs have made a clear showing that irreparable harm will result from inaction on Defendants' part during the COVID-19 pandemic. As has already been discussed, however, Defendants have been far from inactive in preparing for the disease.

2. Likelihood of Success on the Merits

Having determined that Plaintiffs would likely suffer irreparable harm absent a plan to mitigate the spread of COVID-19 in state prisons, the Court next considers whether they are likely to succeed on the merits of their deliberate indifference **[*18]** claims. As an initial matter, the Court recognizes that "the *Eighth Amendment's* proscription of cruel and unusual punishments is violated by deliberate indifference to serious medical needs of prisoners." Deliberate indifference, in turn, "is a very high standard [and] a showing of mere negligence will not meet it." *Grayson v. Peed, 195 F.3d 692, 695 (4th Cir. 1999)*. For a prisoner to state a claim for deliberate indifference to her medical needs under *§ 1983*, she "must demonstrate (1) a deprivation of [her] rights by the defendant that is, objectively, sufficiently serious and (2) that the defendant's state of mind was one of deliberate indifference to inmate health or safety." *Carroll v. W. Va.*

---

[13] *See* Fred Pace, *COVID-19 Cases Increase In West Virginia, Ohio, Kentucky*, Herald-Dispatch (Apr. 4, 2020), *available at* https://www.herald-dispatch.com/coronavirus/covid-19-cases-increase-in-west-virginia-ohio-kentucky/article_93faca28-6bd9-515f-b5a2-b44234c36e9a.html.

[14] As noted throughout this Memorandum Opinion and Order, Plaintiffs have presented substantial evidence suggesting that the risk of contracting COVID-19 is higher in prisons than within the general population. *See generally Meyer Dec.* The Court is persuaded by this evidence.

*Reg'l Jail & Corr. Facility Auth., No. 3:14-1702, 2015 U.S. Dist. LEXIS 37581, 2015 WL 1395886, at *6 (S.D.W. Va. Mar. 25, 2015)* (citing *Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)*) (internal quotations omitted). Regarding the second prong in particular, a plaintiff must demonstrate that a defendant "actually knew of and disregarded a substantial risk of serious injury to the detainee." *Young v. City of Mount Rainer, 238 F.3d 567, 575-76 (4th Cir. 2001)*. "The subjective component therefore sets a particularly high bar to recovery." *Iko v. Shreve, 535 F.3d 225, 241 (4th Cir. 2008)*. It is this high bar that makes it unlikely that Plaintiffs could succeed on the merits of their claims.[15]

This is true for several reasons. First, the evidence before the Court suggests that Defendants have been anything **[*19]** but unresponsive to the threat posed by COVID-19. Although "[f]ailure to respond to an inmate's known medical needs raises an inference [of] deliberate indifference to those needs," *Miltier v. Beorn, 896 F.2d 848, 853 (4th Cir. 1990)*, no such failure is apparent here. In fact, Defendants have produced what appears to be a comprehensive plan addressing the spread of COVID-19 in state jails and prisons. The plan addresses procedures to limit the entrance of COVID-19 into the corrections system, as well as methods to limit intra-facility transmission and to transport infected individuals to hospitals for medical care. *Policy Directive*, at 2-3. Of course, a legal education is not a medical education and the Court is cognizant of its own limitations in reviewing the Defendants' proffered plan. Yet Plaintiffs' medical expert was provided an opportunity to review Defendants' plan and comment upon it, and Defendants have provided what the Court considers adequate responses to each alleged shortcoming. The existence and ongoing implementation of Defendants' COVID-19 response plan makes it impossible to conclude that Defendants "actually knew of and disregarded a substantial risk of serious injury to the detainee." *Young, 238 F.3d at 575-76*. In fact, the opposite seems to be the case: Defendants **[*20]** have demonstrated actual knowledge of the risk of COVID-19, and regard it with the seriousness it deserves.

A second consideration for the Court is the intangibility of Plaintiffs' actual requests. The Court notes that this Motion was filed with the principal goal of obtaining an order that would require Defendants to develop and execute an adequate COVID-19 response plan. This goal has since somewhat evolved, as Plaintiffs now recognize that Defendants have adopted a COVID-19 response plan drawn from the same source as their own proposed response plan. Instead of focusing on the adequacy of the plan, Plaintiffs argue that its implementation has been ineffective and that an indeterminate number of prisoners and detainees must be released to provide for increased social distancing within prisons and jail facilities. With respect to the first contention, the Court is mindful that—even apart from questions of its own authority—it cannot act as an administrator of state prison facilities to ensure that every element of Defendants' plan is implemented to the letter. With respect to the second contention, Plaintiffs have been unable to provide any clear guidance to the Court as to how it **[*21]** could begin to approach the process of reducing crowding in state prisons. The Court is unwilling (and potentially unable) to simply pick an arbitrary occupancy target that would allay Plaintiffs' concerns, and lacks the capacity to administer any sort of release or furlough policy based on "reasonableness" or another imprecise standard.[16] As Defendants' justifiably note, they are already attempting to reduce jail populations through the use of furlough programs. *Second Jividen Aff.*, at 2. Yet determinations regarding release and furlough must be made on a case-by-case basis, taking into account the seriousness of an inmate's underlying offense and the support network into which she will be discharged. Defendants have continually represented to the Court that they are already taking steps to reduce overcrowding and are considering others, and any order requiring them to do the same would be superfluous.

Finally, the timing of Plaintiffs' Motion factors into the Court's decision. At present, there have been no reported cases of COVID-19 in West Virginia prisons. This will likely change in the coming days and weeks, and Defendants' plan will be stress-tested by the virus. It is possible **[*22]** that the measures Defendants propose to implement will be insufficient in confronting the virus, and may eventually give rise to a finding that Defendants are acting with deliberate indifference to the medical needs of West Virginia inmates. Yet, at present, it is impossible to conclude that Defendants have acted with the sort of deliberate indifference that could give rise to a constitutional violation under the *Eighth* and *Fourteenth Amendments*. As such, the Court finds that Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claims.

---

[15] For the purposes of this analysis, the Court assumes that COVID-19 is "sufficiently serious" to warrant medical attention. *See Iko, 535 F.3d at 241*.

[16] At the hearing, Plaintiffs suggested the appointment of a Special Master or an order directing the parties to engage in mediation as potential means for increasing the administrability of any injunction. The Court does not believe either option deals effectively with the problems inherent in making case-by-case determinations regarding the furlough or release of inmates.

3. Balance of Equities

As Plaintiffs have succeeded in showing a likelihood of irreparable harm but failed in showing a likelihood of success on the merits, the Court is left to weigh the equities presented by this case. The threat of COVID-19 is the primary factor in the Court's analysis, and would likely be dispositive had Defendants not taken *any* action to plan for the arrival of the virus in the West Virginia correctional system. Of course, this is not the case here; as noted earlier, Defendants have prepared a plan that appears to mitigate the threat of the disease. And mitigation is all that can be demanded in this case, as no technology **[*23]** yet exists that can cure or entirely prevent COVID-19. The best scientists in the world have been unable to eliminate the risk of the disease, and the Court can expect no more of Defendants. This alters the Court's analysis significantly, and lessens the weight that Plaintiffs' risk of irreparable harm would otherwise carry.

On the opposite side of the scale, Defendants maintain a strong interest in promulgating their own policies for prison management outside the rare circumstances where the intervention of a court is absolutely necessary. *See O'Dell, 112 F.3d at 777*. There is also Defendants' obvious interest in ensuring that incarcerated individuals actually complete their terms of incarceration. Defendants have also already made use of various state-authorized furlough programs, which allow them to advance their interests alongside Plaintiffs' stated interest in increased social distancing. *Second Jividen Aff.*, at 2. Finally—and perhaps most importantly—it is readily apparent that COVID-19 is a fast-moving threat that requires efficient and efficacious responses from state authorities. Defendants will need to make rapid decisions and take immediate action to stem the spread of the virus, and the Court's **[*24]** intervention in these considerations would only inhibit their ability to do so. It is likely that any injunction would leave Defendants unsure of precisely what actions they could take without notifying Plaintiffs and the Court, thereby slowing any response and making disease prevention more difficult.

As the Court has noted at several points, evidence of an outbreak and the insufficiency of Defendants' plan could alter this calculus. Yet, for the moment, Plaintiffs have failed to show that their interest in fending off COVID-19—which is tempered by Defendants' plan to aid them in doing so—outweighs Defendants' strong interest in managing state prisons.

4. Public Interest

The fourth and final factor for the Court's consideration asks whether a preliminary injunction would favor the public interest. This factor does not weigh heavily in either direction, as any injunction would likely be narrowly tailored to the West Virginia prison system rather than the public at large. Nevertheless, the Court sees obvious implications for public safety were it to issue a broader injunction and order the immediate release of a certain number of incarcerated individuals to allow for greater social distancing **[*25]** within prisons. On the other hand, public health is naturally a matter of public concern and limiting the spread of the COVID-19 virus is therefore well within the public interest. Preventing an outbreak within a prison from overwhelming local hospitals is another consideration in Plaintiffs' favor, though the Court is not entirely sure an injunction could do more to prevent any such outbreak than Defendants' current plan. It follows that, once again, Defendants' policy tempers public health worries and persuades the Court that a preliminary injunction is not in the public interest at this time.

5. Result

Plaintiffs are right to be concerned for their health the midst of an unprecedented pandemic that has already transformed American life in fundamental ways. The likelihood that Plaintiffs will face irreparable harm from the spread of COVID-19 is no small matter, and is one that will only grow in significance as this pandemic progresses. Yet the Court is not free to ignore the steps Defendants have already taken to address the virus, which are comprehensive and based on best practices promulgated by a source Plaintiffs already appear to trust. These facts make it exceedingly unlikely **[*26]** that Plaintiffs could succeed on the merits of their claim that Defendants have acted with deliberate indifference toward inmates' medical needs in light of COVID-19. It would be redundant for the Court to order relief that Defendants are in the midst of granting, and so the Court concludes that a preliminary injunction is not warranted here.

Nevertheless, it is worth reiterating that the coronavirus pandemic is an ever-changing crisis that evolves by the hour more often than by the day. If Defendants' plan is unable to adequately address the spread of COVID-19 in state prisons, Plaintiffs will likely have a much stronger likelihood of succeeding on the merits of their claims. As noted at the hearing, the Court believes that Defendants would be served well by consulting experts on disease transmission in prisons and taking their advice seriously. The Court similarly believes that exercising available furlough and other crowd-reduction policies available under West Virginia law is a prudent step in view of the recommendations contained in Defendants' own plan. Nevertheless, the Court will not "immerse [itself] in the management of state prisons" absent the most extraordinary circumstances. **[*27]** *Taylor, 34 F.3d at 268*. Given

Defendants' actions, such circumstances do not exist in West Virginia jails or prisons at this time. Plaintiffs' Motion is therefore denied.

IV. CONCLUSION

For the foregoing reasons and for those announced on the record at the hearing, the Court **DENIES** Plaintiffs' Motion, ECF No. 161, and **DIRECTS** the Clerk to send a copy of this Memorandum Opinion and Order to counsel of record and any unrepresented parties.

ENTER: April 8, 2020

/s/ Robert C. Chambers

ROBERT C. CHAMBERS

UNITED STATES DISTRICT JUDGE

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT Z

Amos v. Taylor

United States District Court for the Northern District of Mississippi, Greenville Division

April 24, 2020, Decided; April 24, 2020, Filed

NO. 4:20-CV-7-DMB-JMV

Reporter
2020 U.S. Dist. LEXIS 72532 *

MICHAEL AMOS, et al., PLAINTIFFS v. TOMMY TAYLOR, et al., DEFENDANTS

Prior History: *Amos v. Hall, 2020 U.S. Dist. LEXIS 11931 (N.D. Miss., Jan. 24, 2020)*

Core Terms

inmates, staff, symptoms, cleaning, screening, deliberate indifference, visitors, distancing, quarantine, injunctive relief, recommendations, injunction, measures, soap, visitation, plaintiffs', practices, sanitizer, isolated, housed, fever, masks, wear, preliminary injunction, conditions, co-pays, testing, defendants', facilities, Disease

Counsel: **[*1]** For Michael Amos, Pitrell Brister, Antonio Davis, Willie Friend, Charles Gayles, Daniel Guthrie, Jonathan J. Ham, Desmond Hardy, Billy James, Jr., Justin James, Quenten Johnson, Challis Lewis, Deaunte Lewis, Larry Maxwell, Terrance McKinney, Derrick Pan, Brandon Robertson, Kuriaki Riley, Derrick Rogers, Tyree Ross, H. D. Alexander Scott, Deangelo Taylor, Lemartine Taylor, Conti Tillis, Demarcus Timmons, Adrian Willard, Curtis Wilson, Carlos Varnado, Plaintiffs: Carson H. Thurman, LEAD ATTORNEY, MARON MARVEL BRADLEY ANDERSON & TARDY LLC, Jackson, MS; Lawrence S. Blackmon, LEAD ATTORNEY, THE BLACKMON FIRM, PLLC, Canton, MS; Marcy Bryan Croft, LEAD ATTORNEY, Maron Marvel Bradley Anderson & Tardy, Jackson, MS.

Judges: Debra M. Brown, UNITED STATES DISTRICT JUDGE.

Opinion by: Debra M. Brown

Opinion

ORDER

The plaintiffs, all inmates at the state penitentiary in Parchman, Mississippi, seek emergency injunctive relief requiring the Mississippi Department of Corrections' interim commissioner and superintendent to implement certain measures to prevent or mitigate the spread of COVID-19. Because the plaintiffs have not satisfied the requisite elements for injunctive relief, their request for injunctive relief will be denied. **[*2]**

I

Procedural History

On January 28, 2020, thirty-three inmates at the Mississippi State Penitentiary at Parchman filed a "First Amended Class-Action Complaint and Demand for Jury Trial" against Tommy Taylor, in his official capacity as the Interim Commissioner of the Mississippi Department of Corrections, and Marshal Turner, in his official capacity as the Superintendent of Parchman. Doc. #22. In their complaint, the plaintiffs allege that the defendants' policies and practices caused years of neglect at Parchman, which placed them in imminent danger of serious physical injury, in violation of the *Cruel and Unusual Punishment Clause of the Eighth*

Amendment, as incorporated by the *Fourteenth Amendment*. The pleading, which includes a proposed class action, seeks monetary and injunctive relief.

On March 16, 2020, the plaintiffs filed an emergency motion for a temporary restraining order and mandatory preliminary injunction. Doc. #59. The motion seeks an "order directing mandatory and affirmative action to safeguard Plaintiffs at Parchman from SARS-CoV-2, also known as COVID-19." *Id.* at 1.

After this Court directed expedited briefing on the motion, the defendants filed a response on March 19, 2020. Doc. #62. The plaintiffs replied a day later. Doc. #64. Three days after the completion **[*3]** of the expedited briefing, the Centers for Disease Control and Prevention issued a document titled, "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities."[1] Accordingly, the Court directed the parties to supplement their filings in light of the CDC's guidance. Doc. #70. The parties complied with this directive. Docs. #74, #75.

II

Relevant Facts

The facts relevant to this motion are derived from the numerous exhibits submitted by the parties, including (1) an affidavit of Marc Stern, an expert for the plaintiffs; (2) redacted declarations and questionnaires executed under penalty of perjury by six inmates housed in Unit 30; (3) affidavits from various MDOC officials;[2] (4) affidavits from employees of Centurion of Mississippi, LLC,[3] MDOC's third-party health care provider; (5) affidavits from one of the plaintiffs' attorneys and a private investigator retained by the plaintiffs; and (6) an array of documentary evidence. Because these documents reveal no material disputed facts, and because no party has requested an evidentiary hearing, the Court concludes that no hearing on the plaintiffs' motion is unnecessary. *See Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 628 (5th Cir. 1996)*.

A. Background [*4]

The unfortunate backdrop to this case is known to all. The United States of America, and most of the world, is in the midst of an outbreak of a respiratory illness known as COVID-19. As of April 22, 2020, the Centers for Disease Control reported 828,441 cases in American territories, resulting in 46,379 deaths.[4] Also as of April 22, 2020, the State of Mississippi reported 5,153 cases, with 201 resulting deaths.[5]

"The virus that causes COVID-19 is spreading very easily and sustainably between people," typically through respiratory droplets produced by an infected person.[6] Symptoms of the disease include fever, cough, and shortness of breath. Doc. #74-1 at 4. Transmission "mainly" occurs "[b]etween people who are in close contact with one another (within about 6 feet)."[7] Because, according to the CDC, "[l]imiting face-to-face contact with others is the best way to reduce the spread" of the virus,[8] the CDC recommends that people "practice social or physical distancing" by staying at least six feet from other people, not gathering in groups, and avoiding "crowded

---

[1] Accessible at https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.

[2] The officials are Jeworski Mallett, MDOC's Acting Deputy Commissioner of Institutions; Gloria Perry, MDOC's Chief Medical Officer; and Marshal Turner, the Superintendent of Parchman.

[3] The employees are John May, Centurion's Chief Medical Officer; Willie Knighten, Centurion's Health Services Administrator at Parchman; and Clayton Ramsue, Centurion's Mississippi Statewide Medical Director.

[4] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases in the U.S., https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited April 24, 2020). The Court takes judicial notice of this and other CDC statements regarding the virus. *See In re Abbott, 954 F.3d 772, 779 (5th Cir. 2019)* (apparently taking judicial notice of CDC facts related to COVID-19); *Gent v. CUNA Mut. Ins. Soc., 611 F.3d 79, 84 & n.5 (1st Cir. 2010)* (taking judicial notice of CDC guidance and facts related to Lyme disease). The Court will also take judicial notice of state and local statements. *See Coleman v. Dretke, 409 F.3d 665, 667 (5th Cir. 2005)* (taking judicial notice of information on state website).

[5] Mississippi State Department of Health, Coronavirus Disease 2019 (COVID-19): COVID-19 in Mississippi and the U.S., https://msdh.ms.gov/msdhsite/_static/14,0,420.html (last visited April 24, 2020).

[6] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): How COVID-19 Spreads, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited April 24, 2020).

[7] *Id.*

[8] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Social Distancing, Quarantine, and Isolation, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-

places" and "mass gatherings."[9]

B. Pre-COVID-19 Parchman Conditions

According to Marc Stern, a board-certified internist **[*5]** with a specialty in correctional healthcare, the pre-COVID-19 "health-related and environmental conditions" at Parchman were the worst he had seen in his twenty-year career. Doc. #59-6 at ¶¶ 3, 8. In his affidavit, Stern states that a COVID-19 outbreak at Parchman "would be catastrophic, and potentially fatal to many residents with already compromised immune systems and underlying chronic conditions." *Id*. at ¶ 10.

Based on the conditions at Parchman, which Stern observed during a February 11, 2020, inspection of the facility, Stern opines the defendants "should immediately ... mandate[]" the following steps: (1) test patients who require testing, "based on public health recommendations and the opinion of a qualified medical professional; (2) screen on a daily basis every visitor to the facility (including employees) for a fever over 100 degrees, cough, shortness of breath, recent travel to a high risk country, or exposure to a symptomatic individual; (3) isolate inmates "believed to have been exposed to COVID-19" and those "believed to be infected ... and potentially infectious;" (4) "increase the sanitation and cleaning protocol and frequency for all public spaces, highly traveled **[*6]** areas, and cells;" (5) provide inmates sufficient "hand soap, disposable paper towels, and access to water, ... free of charge," and lift Parchman's ban on hand sanitizer and allow use of sanitizer by inmates; (6) "require[] or increase non-contact visitation;" (7) waive copays "related in any way to COVID-19 and/or its symptoms; and (8) "identify the supplies and other materials upon which the institution is dependent, such as food, medical supplies, certain medicines, cleaning products, etcetera and prepare for shortages, delays or disruptions in the supply chain." Doc. #59-6 at ¶ 11.

C. The CDC Guidance

On March 23, 2020, the CDC issued "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities" ("CDC Guidance"). Doc. #74-1. The document "provides ... recommended best practices specifically for correctional and detention facilities." *Id*. at 3.

The CDC Guidance is divided into three categories: (1) "operational preparedness" strategies, which focus "on operational and communications planning and personnel practices" "intended to help facilities prepare for potential COVID-19 transmission in the facility;" (2) "prevention" strategies, which **[*7]** 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); and (3) "management" strategies, such as "medical isolation" and quarantines, "intended to help facilities clinically manage confirmed and suspected COVID-19 cases inside the facility and prevent further transmission." *Id*. at 5.

Of relevance to the plaintiffs' motion, the CDC Guidance, which "may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions,"[10] includes the following recommendations for correctional facilities:

1. Post signage "throughout the facility" which communicates the "symptoms of COVID-19 and hand hygiene instructions," and which informs inmates to "report symptoms to staff." Doc. #74-1 at 6.

2. Provide to inmates on a regular basis "up-to date information about COVID-19," including "[s]ymptoms of COVID-19 and its health risks," and "[r]eminders to report COVID-19 symptoms to staff at the first sign of illness." Doc. **[*8]** #74-1 at 12.

3. "If soap and water are not available," "[c]onsider relaxing restrictions on allowing alcohol-based hand sanitizer in the secure setting where security concerns allow." *Id*. at 8.

4. "Provide a no-cost supply of soap to [inmates], sufficient to allow frequent hand washing." Doc. #74-1 at 8. The soap should preferably be liquid and should be in sufficient quantities to allow the inmate to "[re]gularly wash [his] hands with soap and water for at least 20 seconds." *Id*. at 8, 10.

5. "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)." Doc. #74-1 at 10. Hand sanitizer should be placed "in visitor entrances, exits, and waiting areas." *Id*. at 13.

6. "[C]onsider suspending co-pays for [inmates] seeking

sick/social-distancing.html (last visited April 24, 2020).

[9] *Id*.

[10] Doc. #74-1 at 1.

medical evaluation or respiratory symptoms." Doc. #74-1 at 9.

7. Implement "intensified cleaning and disinfecting procedures" by cleaning and disinfecting "[s]everal times per day ... surfaces and objects that are frequently touched, especially **[*9]** in common areas," such as "doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, and telephones." Doc. #74-1 at 9.
8. Consider eliminating in-person visits and, if eliminated, promote non-contact by reducing or eliminating the cost of telephone calls, and increasing telephone privileges. Doc. #74-1 at 13.

9. "Perform verbal screening ... and temperature checks for all visitors and volunteers on entry" to screen for COVID-19 symptoms and potential exposure to the virus. Doc. #74-1 at 13. The screening process should be administered by staff wearing personal protective equipment (such as respiratory protection) and should exclude visitors who do not clear the screening process or who decline screening. *Id*. Perform the same screening daily for staff. *Id*. at 12.

10. "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)." Doc. #74-1 at 11. Example strategies include, staggering recreation and meal times, rearranging seating in the dining halls, providing meals to inmates in cells, limiting group activities, reassigning **[*10]** bunks, and arranging bunks so that individuals sleep head to foot. *Id*.

11. When an inmate develops COVID-19, the inmate should wear a face mask and "should be immediately placed under medical isolation in a separate environment from other individuals." Doc. #74-1 at 15. Facility staff "should evaluate symptomatic individuals to determine whether COVID-19 testing is indicated." *Id*. at 22.

D. Parchman's COVID-19 Measures and Procedures

Before the issuance of the CDC Guidance, MDOC and Centurion officials were working to implement the provisions of "Centurion Pandemic Preparedness and Emergency Response Plan" ("Centurion Plan"), a document setting forth "protocols for the diagnosis, treatment, and management of conditions related to infectious diseases such as COVID-19." Doc. #62-1 at ¶ 8. Since then, the following measures and procedures have been established at Parchman:

1. Centurion staff distributed COVID-19 informational handouts to health care staff, security staff, and inmates at Parchman. Doc. #75-2 at PageID #1477. The forms all listed the symptoms of COVID-19 and provided additional instructions and procedures for each group. Doc. #75-3 at PageID #1491-97. The inmate forms recommended that **[*11]** inmates wash hands "often with soap and water," practice social distancing of six feet or more, cover coughs and sneezes, and stop smoking. *Id*. at PageID #1497. The healthcare staff forms provided that if an inmate was exposed to COVID-19 or displayed symptoms of COVID-19, the inmate should be placed in a separate and closed room for further testing. *Id*. at PageID #1491-92.
2. MDOC suspended in-person visitation and allowed inmates to make two free phone calls per week through April 13, 2020. Doc. #62-1 at 6 & PageID #1042.

3. MDOC posted signs at the entrances to all housing units at Parchman stating that anyone experiencing fever, coughing, sneezing, cold symptoms, or difficulty breathing should not enter the facility. Doc. #75-2 at PageID #1477. MDOC also posted signs regarding handwashing in Parchman's restrooms. *Id*.

4. MDOC is supplying Parchman inmates extra hand soap and placed signage "in each unit, building, and zone to remind inmates to regularly wash their hands and to do so for at least 20 seconds." Doc. #75-5 at ¶ 8. Hand sanitizer is available to staff "at the areas where they clock-in and clock-out" but has not been made available to inmates. *Id*.

5. MDOC requires that all **[*12]** staff wear masks and gloves "while inside the buildings and zones of a unit at [Parchman] and while interacting with inmates." Doc. #75-5 at ¶ 8. Inmate workers are provided masks and gloves "to wear while they are performing their duties or interacting with other inmates." *Id*. Centurion imposed a similar requirement for its staff on April 15, 2020. Doc. #75-2 at 3.

6. Three times per day, MDOC issues cleaning supplies to inmate workers to disinfect common areas in each zone. Doc. #75-5 at ¶ 9. MDOC staff have also "been instructed to frequently clean any shared equipment and upon conclusion of any use of that equipment." *Id*.

7. MDOC requires screening of "staff and all visitors at [Parchman] daily upon entrance to the facility for symptoms and other indicators of exposure to COVID-19." Doc. #75-5 at ¶ 10. This process "includes questions about symptoms, if any, including headaches, fevers, coughing, shortness of breath, and any trouble breathing,

travel history, and includes the administration of a temperature reading." *Id*. Staff or visitors with temperatures greater than 100 degrees are asked to leave the premises. *Id*.

8. MDOC directed staff "to announce daily to all inmates in each **[*13]** zone that they should immediately report any symptoms of COVID-19 to MDOC staff." Doc. #75-5 at ¶ 10. If an inmate exhibits symptoms of COVID-19, Centurion screens all inmates in that zone. *Id*.

9. When dealing with a symptomatic inmate, Centurion employees are to follow an "Assessment Protocol for Patients Presenting with Febrile Respiratory Illness." Doc. #75-3 at ¶ 23 & PageID #1499. Under this protocol, the on-duty RN must apply a surgical mask to the inmate before conducting an assessment. *Id*. at PageID #1499. If the RN determines the inmate does not have a fever and is "not exhibiting respiratory symptoms consistent with viral illness" then the patient should be educated and returned to housing. *Id*. Otherwise, the RN should confirm whether there is a "flu-like illness" and then administer a rapid Influenza test. *Id*. If the influenza test is positive, the patient should be isolated. *Id*. If the influenza test is negative or not available, the RN may test one or two patients in the area for COVID-19 or presume the population to be positive, if tests are unavailable. *Id*. If the patient has a fever and is otherwise "ill or compromised" the inmate should be transported to the ER. *Id*. ***[*14]***

10. MDOC ceased in-person visits with inmates, except for visits with attorneys. Doc. #75-5 at ¶ 10. Attorneys are asked to wear gowns, gloves, and masks. *Id*. All visitation areas are sanitized after each visit. *Id*.
11. MDOC posted signage at Parchman to advise inmates of social distancing recommendations and directed staff "to verbally encourage social distancing," including encouraging sleeping head to foot. Doc. #75-5 at ¶ 11.
12. MDOC suspended inter-facility transfers of inmates in and out of Parchman, "except for cases of an emergency or a serious security threat." Doc. #75-5 at ¶

12. When a new inmate is transferred into Parchman, the new inmate is screened and isolated for fourteen days. *Id*. However, intra-facility transfers are still occurring. *Id*. Parchman inmates who are transported outside Parchman for medical care are quarantined upon return. Doc. #75-2 at ¶ 12.

13. MDOC implemented a quarantine plan under which if an inmate or staff person is tested for COVID-1 or is suspected of having COVID-19, any housing unit in which the potentially sick person had direct contact is quarantined for fourteen days. Doc. #75-5 at ¶ 13. The potentially sick person is then medically isolated. **[*15]** *Id*. Staff with direct contact with the individual must wear personal protective equipment (PPE), including masks and gloves. Doc. #75-2 at ¶ 16.
14. Centurion waived all co-pays related to COVID-19, effective March 19, 2020. Doc. #75-5 at ¶ 16; Doc. #75-3 at ¶ 20.
15. Inmates with underlying medical conditions are housed separately in Parchman's medical unit. Doc. #75-2 at ¶ 13.

16. Centurion nurses travel to housing units twice a day to answer inmate questions. *Id*. at ¶ 10.

E. Challenges to Implementation of Measures and Procedures in Unit 30

As explained above, the plaintiffs submitted questionnaires and declarations executed under penalty of perjury by six inmates housed in Unit 30, as well as affidavits from a private investigator and the plaintiffs' counsel. *See* Docs. #74-3, #74-4, #74-5, #74-6. Taken together, these documents show:

1. On March 24 and 25, 2020, Parchman staff did not wear personal protective equipment while screening visitors, did not ask screening questions, and did not disinfect the contact thermometer after each use. Doc. #74-5 at ¶¶ 10-11, 14-15. On these dates, vehicles containing MDOC or Centurion employees were allowed to enter Parchman without any screening. **[*16]** *Id*.

2. As of March 25, 2020, the Parchman visitor center had no COVID-19 signage. Doc. #74-6 at ¶ 11. The visitor restroom had no hand soap or hand sanitizer. *Id*. at ¶ 8.

3. Inmates in Unit 30 are receiving two bars of soap weekly, rather than the one they are normally provided. *See* Doc. #74-4 at PageID #1375.

4. Except for the quarantines, the defendants have made no effort to enforce social distancing guidelines between the inmates in Unit 30. *See* Doc.# 74-4 at PageID #1388. For example, inmates can play basketball. Doc. #74-4 at PageID #1392.

5. Inmates in Unit 30 have received limited information on the virus and some were not informed by the defendants that co-pays had been waived.[11] *See* Doc.

[11] Of the six inmate declarants, three stated definitively they were not

#74-3 at PageID #1331, #1338.
6. The defendants did not clean the bedding and property of an inmate in Unit 30 who was taken to the medical unit for COVID-19 related symptoms. Doc. #74-4 at PageID #1375.
7. While inmates in Unit 30 are provided supplies to clean portions of Parchman, bunks are never cleaned, and laundry service is not used often by inmates because inmates believe the laundry "comes back dirty." Doc. #74-4 at PageID #1375.

8. During daily temperature checks in Unit 30, nurses do not **[*17]** ask about symptoms. Doc. #74-4 at PageID #1375. Inmates with fevers and coughs are not consistently referred to the medical unit or evaluated in any way. Doc. #74-4 at PageID #1392. On at least one occasion an inmate was threatened with mace when he tried to inform a nurse of his COVID-19 symptoms. *Id*. at PageID #1376.
9. Inmates in Unit 30 have not been provided paper towels, tissues, or no-touch trash cans. Doc. #74-4 at PageID #1375, #1377-78.
10. Guards in Unit 30 do not always use masks or maintain social distancing. Doc. #74-4 at PageID #1374.
11. "Most" but not all medical staff wear gloves. Doc. #74-4 at PageID #1374.

F. Quarantines in Unit 30

On or about March 26, 2020, Parchman officials learned that a staff member who worked with inmate kitchen workers had tested positive for COVID-19. Doc. #75-2 at ¶ 18. In response to this development, MDOC "quarantined" for fourteen days all inmates housed with the exposed inmate kitchen workers. *Id*. From March 26 until April 2, 2020, inmates in Buildings C and D of Unit 30 (the impacted buildings) were still eating meals with inmates in other buildings. Doc. #74-4 at ¶ 4. It was not until April 2, 2020, that the buildings were locked **[*18]** down. *See id*. at PageID #1373, #1377, #1389, #1383, #1386, #1390. Regardless, no inmates developed a fever before the quarantine ended on April 9, 2020. Doc. #75-2 at ¶ 18.

On April 8, 2020, an inmate previously admitted to the Parchman hospital was tested for COVID-19. *Id*. at ¶ 19. Two days later, after his condition deteriorated, the inmate was transferred to a hospital off the Parchman site. *Id*. On April 11, 2020, the inmate passed away. *Id*. Later that evening, the defendants learned that the inmate tested positive for COVID-19. *Id*.

Following the positive test, Parchman officials cleaned with Biovex and bleach both the medical unit and the building where the inmate had been housed. Doc. #75-2 at ¶ 20. Additionally, the defendants quarantined for fourteen days all inmates housed in the buildings where the sick inmate was previously housed and all inmates housed in the buildings where the sick inmate previously worked. *Id*. at ¶ 21. The quarantined inmates were provided face masks and are being monitored for COVID-19 symptoms two times a day. *Id*. Inmates who had been "in close contact" with the sick inmate were tested for COVID-19 in addition to being placed in quarantine. *Id*. at ¶ 22. **[*19]**

III

Standards for Injunctive Relief

"Federal court procedural rules distinguish preliminary injunctions from temporary restraining orders. Issuance of an injunction may occur only after notice to the parties, while a temporary restraining order may be issued *ex parte* and without notice." *Knoles v. Wells Fargo Bank, N.A., 513 F. App'x 414, 415 (5th Cir. 2013)* (comparing *Fed. R. Civ. P. 65(a)* and *(b)(1)*). Nevertheless, the standards are similar. To issue a temporary restraining order or a preliminary injunction, a court must find (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury in the absence of injunctive relief; (3) the threatened injury outweighs the harm in granting the injunction; and (4) granting the injunction would not harm the public interest. *Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011)* (elements for preliminary injunction); *Turner v. Epps, 460 F. App'x 322, 325 n.3 (5th Cir. 2012)* (elements for TRO).

While the elements are the same, a plaintiff seeking a temporary restraining order must ordinarily make a stronger showing than a plaintiff seeking a preliminary injunction. *Esparza v. Bd. of Trs., 182 F.3d 915 (5th Cir. 1999)* (table decision). "Mandatory preliminary relief, which goes well beyond simply maintaining the status quo pendente lite, is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976)*.

In addition to the **[*20]** above standards applicable to injunction motions generally, the Prison Litigation Reform

told of the waiver, one said he was told "3rd hand," one said it was not "emphasized," and one is "not sure" he was told. *See* Doc. #74-3. In their accompanying declarations, two of the inmates who stated they were not told, and the inmate who stated he was "not sure," all clarified that the waiver was not "emphasized."

Act provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A). Necessarily, "when a district court fashions prospective relief in prison litigation, the relief must meet the standards set forth in the Act." *Williams v. Edwards, 87 F.3d 126, 133 (5th Cir. 1996)*. However, "[a]lthough the PLRA significantly affects *the type* of prospective injunctive relief that may be awarded, it has not substantially changed the threshold findings and standards *required to justify an injunction*." *Gomez v. Vernon, 255 F.3d 1118, 1129 (9th Cir. 2001)* (emphases added).

IV

Analysis

As supplemented, the plaintiffs' motion seeks a court order requiring **[*21]** that the defendants: (1) implement the CDC Guidance;[12] (2) implement the Centurion Plan;[13] (3) enact a variety of screening, visitation, and cleaning protocols;[14] (4) make regular reports to the Court and the plaintiffs;[15] and (5) provide access to a Mississippi Department of Health official who will monitor compliance with the Court's order, and report to the Court and the plaintiffs.[16] Doc. #74 at 18-21.

The defendants contend that the relief the plaintiffs' seek is inappropriate because (1) there is no underlying violation of a federal right which would justify the relief; (2) even if there was an underlying constitutional violation, the requested relief is more intrusive than necessary; and (3) all the requested measures "are either already being undertaken, ... are in many respects not possible or recommended (such as testing every single inmate), or ... have not been shown by Plaintiffs to have any reasonable relation to preventing the alleged harm." Doc. #63 at 7-8.

A. Likelihood of Success

"[T]here must be a relationship between the injury claimed in [a] motion for injunctive relief and the conduct asserted in the underlying complaint." *Pac. Radiation Oncology, LLC v. Queens' Med. Ctr., 810 F.3d 631, 636 (9th Cir. 2015)* (collecting cases). "The relationship between **[*22]** the preliminary injunction and the underlying complaint is sufficiently strong where the preliminary injunction would grant 'relief of the same character as that which may be granted finally.'" *Id.* (quoting *De Beers Consol. Mines v. United States, 325 U.S. 212, 220, 65 S. Ct. 1130, 89 L. Ed. 1566 (1945)*). Accordingly, the substantial likelihood of success inquiry focuses on the "merits of [the] underlying

---

[12] "Defendants shall immediately, or as soon as practicable, implement at Parchman, and shall follow through the life of this pandemic, or until further order of this Court, the [CDC Guidance]." Doc. #74 at 18.

[13] "Defendants shall immediately, or as soon as is practicable, implement at Parchman, and shall follow throughout the life of this pandemic, or until further order of this Court, their plans, policies and procedures pertaining to their response to this pandemic including, without limitation, [the Centurion Plan]." *Id.*

[14] The requested procedures are: (1) daily screening of all persons entering Parchman; (2) active monitoring of all inmates for symptoms of COVID-19; (3) implementation of isolation policies for inmates who test positive for COVID-19, have symptoms of COVID-19, and new inmates; (4) continuing to offer free telephone calls to inmates; (5) ensuring Parchman has "sufficient cleaning agents;" (6) ensuring inmates have "a continuous supply" of soap and access to running water; and (7) waiver of all co-pays related to COVID-19. *Id.* at 19-20.

[15] The plaintiffs ask that the reports include (1) the number of inmates who have tested positive for COVID-19, and the names of such people if they are named plaintiffs; (2) the number of inmates who are in medical isolation related to COVID-19, and the names of such people if they are named plaintiffs; (3) "confirmation" that cleaning supplies are available and being utilized; and (4) "confirmation" that soap is available to each inmate and that each inmate has access to clean running water. *Id.* at 20. The plaintiffs also ask that the defendants "report to the Court weekly by email, with copy to Named Plaintiffs, and provide a copy of all filed reports as required by local, state, and federal laws and regulations, as is required by Centurion's Infectious Disease Prevention and Control Policy, Policy No. PB-02, p. 2." *Id.*

[16] "Defendants shall allow a competent employee of the Mississippi Department of Health, who is educated on the CDC's COVID-19 Guidelines, to be given reasonable access at any given time to Parchman for the purpose of ensuring compliance with the Court's order and reporting his/her findings to the Court, with a copy to Named Plaintiffs." *Id.* at 20.

claim." *Walgreen Co. v. Hood, 275 F.3d 475, 478 (5th Cir. 2001)*. "The importance of this requirement varies with the relative balance of threatened hardships facing each of the parties." *Canal Auth. of State of Fla. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974)*.

The plaintiffs' ground their motion for injunctive relief related to COVID-19 protections in their underlying *Eighth Amendment* claims regarding the defendants' "duty to provide adequate medical care, shelter, and to take reasonable measures to guarantee the safety of inmates." Doc. #60 at 6-7 (quotation marks omitted). The question, therefore, is whether the plaintiffs are likely to succeed on their claims that the defendants' response to COVID-19 violates the plaintiffs' *Eighth Amendment* rights. *See Valentine v. Collier, F.3d , No. 20-20207, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *3 (5th Cir. Apr. 22, 2020)* (prisoners' entitlement to injunctive relief depends on showing of deliberate indifference); *see generally Baxley v. Jividen, 2020 U.S. Dist. LEXIS 61894, 2020 WL 1802935, at *3 (S.D.W.V. Apr. 8, 2020)* ("[T]his case as pled is about statewide claims related to how inmates generally receive medical and mental health treatment upon admission. The Court believes this language **[*23]** is sufficiently broad to encompass claims for medical treatment for COVID-19.") (cleaned up).

Section 1983[17] claims brought against defendants in their official capacities are suits against the entity the officials represent. *Rayborn v. Bossier Par. Sch. Bd., 881 F.3d 409, 417 (5th Cir. 2018)*. "To establish liability against a governmental entity ... a plaintiff must ... show the existence of (1) a policy maker; (2) an official policy; and (3) causation, or a violation of rights whose moving force is the policy." *Doe v. United States, 831 F.3d 309, 317-18 (5th Cir. 2016)*. While this standard ordinarily requires a policy, "a custom may also suffice." *Id.* (quotation marks omitted). A custom is "a persistent widespread practice of governmental officials or employees that is so common and well-settled as to constitute a custom that fairly represents policy." *Id.* (cleaned up). A claim for injunctive relief against a governmental entity or a supervisory official must be likely to satisfy this standard. *Gale v. O'Donohue, 751 F. App'x 876, 884 (6th Cir. 2018)*; *see also Church v. City of Huntsville, 30 F.3d 1332, 1345 (11th Cir. 1994)*; *Zinter v. Salvaggio, No. 5-18-cv-680, 2018 U.S. Dist. LEXIS 179563, 2018 WL 5098785, at *4 (W.D. Tex. Oct. 19, 2018)*; *Proctor v. District of Columbia, 310 F. Supp. 3d 107, 115 (D.D.C. 2018)*.

The *Eighth Amendment* imposes on prison authorities a duty to protect prisoners. *Jason v. Tanner, 938 F.3d 191, 195 (5th Cir. 2019)*. This duty is violated by an official "only when two requirements are met. First, as an objective matter, the deprivation or harm must be sufficiently serious. Second, **[*24]** the official must have been deliberately indifferent." *Id.* (cleaned up). To satisfy the first element, "the plaintiff must show an objectively intolerable risk of harm." *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *3* (quotation marks omitted). The second requirement is subjective and requires that the plaintiff show the defendant "(1) was aware of facts from which the inference could be drawn that a substantial risk of serious harm exists; (2) subjectively drew the inference that the risk existed; and (3) disregarded the risk." *Id.* (cleaned up). Here, the defendants do not dispute that "COVD-19 presents serious health risks." Doc. #63 at 5. Rather, they contend they are not responding to this threat with deliberate indifference. *Id.*

Even if the plaintiffs could establish likelihood of success on the objective prong, they cannot make a similar showing as to the subjective prong. The deliberate indifference standard may be satisfied when officials respond to an infectious disease "outbreak with a series of negligent and reckless actions." *DeGidio v. Pung, 920 F.2d 525, 533 (8th Cir. 1990)*. "[K]nown noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious harm." *Hernandez v. County of Monterey, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015)*. Such guidelines may include CDC **[*25]** guidance, even if the guidance is not mandatory. *Id.* However, mere departure from recommended best practices is insufficient to show deliberate indifference. *See M.D. ex rel Stukenberg v. Abbot, 929 F.3d 272, 289 (5th Cir. 2019)* (Higginbotham, J., concurring in part) ("Best practices are not the handmaiden of deliberate indifference."). Rather, the known noncompliance must result in an excessive risk to inmate health or safety. *Tanner, 938 F.3d at 195*.

Analytically, the deficiencies identified by the plaintiffs fall into one of two categories—deficiencies in Parchman's measures and procedures or deficiencies in implementation of those measures and procedures. Claims premised on deficiencies in the measures and procedures themselves must likely meet the deliberate indifference standard. When a claim is premised on a failure to implement, the failure must be so prevalent to be deemed a custom *and* must rise to the level of deliberate indifference.

Here, the defendants have undoubtedly taken steps to address

---

[17] As this Court has previously explained, *42 U.S.C. § 1983* "is the exclusive vehicle for an *Eighth Amendment* claim against a state actor." *Duren v. Carroll-Montgomery Reg'l Corr. Facility, No. 4:17-cv-154, 2019 U.S. Dist. LEXIS 158702, 2019 WL 4482531, at *4 n.6 (N.D. Miss. Sep. 18, 2019)* (citing ***Berger v. City of New Orleans, 273 F.3d 1095 (5th Cir. 2001)*** (table decision)).

the risk of COVID-19 in Parchman. Such undisputed steps include the creation and updating of the Centurion Plan, posting of signs, promulgation of quarantine and screening policies for both inmates and visitors, suspension of in-person visitation except for attorneys, implementing **[*26]** cleaning procedures in the housing units, the waiving of co-pays for inmates, limitations on transfers, and the provision of extra soap to inmates. However, the record is also undisputed that the implementation of these steps has been inconsistent or ineffectual. On at least two occasions, Parchman staff did not verbally screen attorney visitors, and did not screen staff at the entrance to the facility. Signage and hygiene at the visitors center appears insufficient and contrary to the CDC Guidance. In Unit 30, not all inmates were notified of the waiver of co-pays; not all prison employees wear PPE; bunks are not cleaned; a quarantine was apparently not enforced for a week; and inmates with fevers, sore throats, or coughs are allowed to remain in their units and, in at least one instance, have been threatened with mace when discussing symptoms.

Additionally, portions of the defendants' stated policies conflict in some ways with some of the general recommendations of the CDC Guidance. The CDC Guidance recommends taking affirmative steps to produce social distancing, such as the staggering of meals and recreation times, limiting group activities, and reassigning bunks. Doc. #74-1 at **[*27]** 11. However, it is undisputed the defendants have made no efforts to enforce, rather than merely recommend adherence to, social distancing guidelines.[18] The CDC Guidance also recommends that facilities provide inmates "hand drying machines or disposable paper towels for hand washing" and "tissues and no-touch trash receptacles for disposal." *Id*. at 10. None of these items are provided as a part of Parchman's response.

The facts of this case are very similar to those in *Valentine v*. *Collier*, a case in which the Fifth Circuit stayed pending appeal an injunction issued by a district court against a prison because the plaintiffs were unlikely to be able to show deliberate indifference.[19] *2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *4*. In *Valentine*, as here, the prison took numerous steps to prevent transmission, including employee screenings, copay waivers, suspension of in-person visits, isolation for symptomatic inmates, masks for staff, increased cleaning in inmate areas, and increased soap access. *No. 4:20-cv-1115, 2020 U.S. Dist. LEXIS 68644, 2020 WL 1916883, at *10 (S.D. Tex. Apr. 20, 2020)*. Also as here, the *Valentine* plaintiffs submitted evidence showing that at least one symptomatic inmate was not isolated; some cleaning policies were not being implemented; the prison refused to give inmates hand sanitizer, facial **[*28]** tissues or paper towels; information on co-pays and COVID-19 were not adequately presented to inmates; and social distancing was not being enforced. *2020 U.S. Dist. LEXIS 68644, [WL] at *4-6*.

While the district court in *Valentine* found the plaintiffs were likely to succeed on the deliberate indifference claim, the Fifth Circuit stayed the injunction, concluding the prison was likely to succeed on the merits of its appeal because "the Plaintiffs lack evidence of the Defendants' subjective deliberate indifference" to the risk of COVID-19. *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *4*. In reaching this conclusion, the Fifth Circuit held:

> Though the district court cited the Defendants' general awareness of the dangers posed by COVID-19, it cited no evidence that they subjectively believe the measures they are taking are inadequate. To the contrary, the evidence shows that TDCJ has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus. Although the district court might do things differently, mere "disagreement" with TDCJ's medical decisions does not establish deliberate indifference.

Id. (citations omitted).

Here, as in *Valentine*, there is insufficient evidence to support **[*29]** a finding of deliberate indifference, at least with respect to COVID-19.[20] The defendants have taken

---

[18] The plaintiffs have advanced other arguments regarding alleged non-compliance which are facially frivolous. First, the plaintiffs seem to suggest that the failure to provide sanitizers is contrary to the CDC Guidance. However, the CDC Guidance only recommends the use of sanitizer "[i]f soap and water are not available." Doc. #74-1 at 8. The plaintiffs also contend, without support, that the extra bar of soap provided to the inmates is insufficient to support frequent hand washing. No support is offered for this proposition and no evidence is cited that inmates who run out of soap are denied extra soap. Similarly, the plaintiffs argue in conclusory fashion that the defendants' laundry practices violate the CDC Guidance's provisions requiring that facilities "launder items in accordance with the manufacturer's instructions using the warmest appropriate water setting ...." *Id*. at 18. While the plaintiffs have offered some evidence that the laundry services are not particularly efficient, there is no evidence of what procedures the laundry service follows.

[19] The Fifth Circuit's decision in *Valentine* addressed the issue of a stay of an ordered injunction rather than the ultimate entitlement to the injunction itself. In this sense, the opinion is not dispositive of the case. However, the evaluation of the merits of the *Valentine* plaintiffs' claims should not be ignored.

[20] Stern's affidavit, which is uncontradicted by any evidence, paints a very grim picture of the general conditions at Parchman. *See* Doc.

numerous proactive steps to prevent the transmission of COVID-19, which they believe to be consistent with the CDC Guidance. Doc. #75-2 at ¶ 5. While there is some evidence showing incomplete implementation of the procedures, the evidence is either limited to sporadic instances, limited to two buildings in a single unit of Parchman, or both, and therefore fails to show a policy or custom which would justify the facility-wide injunctive relief sought by the plaintiffs. *See Foster v. Tarrant Cty. Sheriff's Dep't, No. 4:20-cv-113, 2020 U.S. Dist. LEXIS 67582, 2020 WL 1906095, at *3 (N.D. Tex. Apr. 17, 2020)* ("The general rule is that allegations of isolated incidents are insufficient to establish a custom or policy.") (collecting cases).

Similarly, while elements of Parchman's protocols appear to conflict with a handful of provisions in the CDC Guidance (provision of paper towels and tissues and policies enforcing social distancing), these departures are insufficient on their own to show a likelihood of success regarding deliberate indifference, particularly in light of the comprehensive and far reaching steps taken by the defendants. *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at * 4*; *cf. Hernandez, 110 F. Supp. 3d at 943* ("At least since the **[*30]** CDC released its guidelines, and since Puisis issued his report showing Defendants' policies and practices fell below the constitutional standard of care, Defendants have known about the risks of harm but have not changed their practices."). Indeed, as in *Valentine*, the evidence shows that Parchman "has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus." *2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at * 4*. Accordingly, the Court concludes that the plaintiffs are unlikely to succeed on their claims.

B. Substantial Threat of Irreparable Injury

The plaintiffs must show "that they will suffer irreparable injuries *even after* accounting for the protective measures" in place. *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *5*. There is no evidence to support such a finding.

C. Whether Threatened Injury Outweighs Harm to Non-Movant

"[A]ny time a state is enjoined by a court from effectuating from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Valentine, 2020 U.S. App. LEXIS 12941, 2020 WL 1934431, at *4*. Accordingly, when a legislature assigns prison policy to an administration, an injunction modifying such policy "imposes irreparable injury." *Id.* Here, the Mississippi legislature has responsibility for **[*31]** prison policy to MDOC. *See Miss. Code Ann. § 47-5-23*. Accordingly, the injunction sought in this case would impose irreparable injury which outweighs the potential threat to the plaintiffs.

D. Public Interest

When "state officials are the parties against whom the injunction is sought, ... consideration of the harm to them should the injunction issue merges with consideration of the public interest." *Dean v. Leake, 550 F. Supp. 2d 594, 605 (E.D.N.C. 2008)*; *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406, 419 (5th Cir. 2013)* ("As the State is the appealing party, its interest and harm merges with that of the public."). Accordingly, for the reasons above, the Court concludes that the public interest would be harmed by granting the injunction.

V

Conclusion

The plaintiffs' motion for a temporary restraining order and a preliminary injunction [59] is **DENIED**.

SO ORDERED, this 24th day of April, 2020.

/s/ Debra M. Brown

UNITED STATES DISTRICT JUDGE

End of Document

#59-6.

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT AA

Money v. Pritzker

United States District Court for the Northern District of Illinois, Eastern Division

April 10, 2020, Decided; April 10, 2020, Filed

Case No. 20-cv-2093; Case No. 20-cv-2094

Reporter
2020 U.S. Dist. LEXIS 63599 *

JAMES MONEY, et al., Plaintiffs, v. J.B. PRITZKER, et al., Defendants.JAMES MONEY, et al., Petitioners, v. ROB JEFFREYS, in his official capacity as DIRECTOR OF THE ILLINOIS DEPARTMENT OF CORRECTIONS, Respondent.

Core Terms

inmates, prison, subclasses, custody, furlough, cases, three-judge, conditions, prison population, distancing, facilities, home detention, vulnerable, virus, preliminary injunction, federal court, spread, disabilities, congregate, courts, merits, state court, confinement, injunction, pandemic, habeas corpus, violations, crowding, sentence, housed

Counsel: **[*1]** For James Money, William Richard, Gerald Reed, Amber Watters, Tewkunzi Green, Danny Labosette, Carl Reed, Carl "tay Tay" Tate, Patrice Daniels, Anthony Rodesky, on behalf of themselves and all similarly situated individuals, Plaintiffs (1:20cv2093): Sheila A Bedi, LEAD ATTORNEY, Roderick Macarthur Justice Center, Chicago, IL USA; Vanessa Del Valle, LEAD ATTORNEY, Roderick And Solange Macarthur Justice Center, Northwestern University School Of Law, Chicago, IL USA; Alan S. Mills, Elizabeth N. Mazur, Nicole Rae Schult, Uptown People's Law Center, Chicago, IL USA; Amanda C Antholt, Samantha Reed, Equip For Equality, Chicago, IL USA; Carolyn E. Shapiro, Chicago, IL USA; Jennifer Soble, Illinois Prison Project, Chicago, IL USA; Sarah Copeland Grady, Stephen H. Weil, Loevy & Loevy, Chicago, IL USA.

For J.B. Pritzker, n his official capacity as Governor of the State of Illinois, Rob Jeffreys, in his official capacities as Director of the Department of Corrections, Defendants (1:20cv2093): Nicholas Scott Staley, LEAD ATTORNEY, Office Of The Illinois Attorney General, Chicago, IL USA; R. Douglas Rees, LEAD ATTORNEY, Colleen Marie Shannon, Office of the Illinois Attorney General, Chicago, IL USA. **[*2]**

Jennifer Bishop-Jenkins, Intervenor (1:20cv2093), Pro se, Northfield, IL.

For James Money, William Richard, Gerald Reed, Amber Watters, Tewkunzi Green, Danny Labosette, Carl Reed, Carl "tay Tay" Tate, Patrice Daniels, Anthony Rodesky, Plaintiffs (1:20cv2094): Jennifer Soble, LEAD ATTORNEY, Illinois Prison Project, Chicago, IL USA Sheila A Bedi, LEAD ATTORNEY, Roderick Macarthur Justice Center, Chicago, IL USA; Vanessa Del Valle, LEAD ATTORNEY, Roderick And Solange Macarthur Justice Center, Northwestern University School Of Law, Chicago, IL USA; Alan S. Mills, Elizabeth N. Mazur, Nicole Rae Schult, Uptown People's Law Center, Chicago, IL USA; Amanda C Antholt, Samantha Reed, Equip For Equality, Chicago, IL USA; Sarah Copeland Grady, Loevy & Loevy, Chicago, IL USA.

For Director of Idoc Rob Jeffreys, Defendant (1:20cv2094: Gopi Kashyap, Illinois Attorney General's Office (100 West Randolph), Chicago, IL USA; Katherine Marie Doersch, Illinois Attorney General's Office, Chicago, IL USA.

Judges: Robert M. Dow, Jr., United States District Judge. Judge Steven C. Seeger, assigned. Judge John F. Kness, assigned.

Opinion by: Robert M. Dow, Jr.

Opinion

MEMORANDUM OPINION AND ORDER[1]

In these two cases, Plaintiffs have raised issues **[*3]** of great importance concerning the safety and well-being of inmates in the custody of the Illinois Department of Corrections during the current national crisis occasioned by the COVID-19 pandemic. As myriad citations in both sides' briefs confirm, this issue has occupied all three branches of government in both the federal and state governments in recent weeks. News reports are replete with actions taken by Governors, Attorneys General, state Supreme Courts, and individual trial judges to accelerate the release of inmates and detainees where consistent with overall public safety and to protect those who remain in custodial settings. And rightly so, for the stakes are incredibly high for Plaintiffs, their families, and the public at large. As emphasized by the medical experts whose appearances at daily press briefings rivet the nation, nobody is immune from this virus. However, due to the way in which the virus spreads, individuals living in congregate settings—such as nursing homes and prisons—are especially vulnerable because of difficulty of observing social distancing and recommended hygiene practices in close quarters.

At the outset, it is worth mentioning that Plaintiffs do not **[*4]** ask this Court to order the Illinois Department of Corrections to improve the conditions of confinement. That is, Plaintiffs do not ask to improve the cleanliness of the prisons, or increase the amount of space between inmates at each facility, and so on. Instead, Plaintiffs ask this Court to force the state executive branch to start a process for the potential release of thousands of inmates, through medical furlough or home detention under state law, and do so within one week. The scope of the potential release is sweeping. By their own admission, Plaintiffs want a process to potentially release at least 12,000 inmates, almost one-third of the prison population in Illinois. Defendants submit that they have a process and already are doing most of what Plaintiffs are requesting in their proposed remedial plan—albeit not at the pace Plaintiffs would like to see.

The immediate question before the Court is whether Plaintiffs are entitled to some form of immediate relief—in the form of a temporary restraining order, a preliminary injunction, or writs of habeas corpus—imposed by a federal court on state officials. For several reasons explained below, the Court answers that question in the **[*5]** negative and denies the requested relief. Plaintiffs are correct in asserting that the issue of inmate health and safety is deserving of the highest degree of attention. And the record here shows that the authorities in this state are doing just that, with constantly evolving procedures increasing the number of inmates released on a daily basis. But the release of inmates requires a process that gives close attention to detail, for the safety of each inmate, his or her family, and the community at large demands a sensible and individualized release plan—especially during a pandemic. Even if the steps Illinois has taken and the pace with which they are proceeding is not exactly what Plaintiffs want, those steps and that pace plainly pass constitutional muster. Plaintiffs have provided no convincing reason for a federal court to intrude here and now—either to issue a blanket order for the release of thousands of inmates or to superimpose a court-mandated and court-superintended process on the mechanisms currently in place to determine which IDOC inmates can and should be safely removed from prison facilities at this time.

The care of state inmates is entrusted, in the first instance, **[*6]** to state officials, unless the conditions rise to the level of constitutional violations. And state law empowers state officials with the discretion to release individual inmates for medical furlough or home detention, if they deem it appropriate. This Court concludes that Plaintiffs have no likelihood of success on their constitutional claims because the record does not support the notion that the Defendants are showing deliberate indifference to the inmates' plight or discriminating against inmates with disabilities. Even if they had a colorable claim, Plaintiffs' request for release is untenable on a class-wide basis because the possibility of release is an inherently inmate-specific inquiry. Other considerations — such as the public interest from the potential release of thousands of inmates — weigh heavily in the analysis, too. In the end, this Court concludes that Plaintiffs are not entitled to their request for extraordinary relief, even in these extraordinary times.

I. Background[2]

The named Plaintiffs are ten individuals convicted of a range

[1] Judge Dow is addressing this matter as emergency judge pursuant to paragraph 5 of Second Amended General Order 20-0012.

[2] The facts are taken from the plaintiffs' complaints and from materials cited by the parties that are the proper subject of judicial notice. The Court may take judicial notice of material whose contents are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned," *Driebel v. City of Milwaukee, 298 F.3d 622, 622 n.2 (7th Cir. 2002)* (*quoting Fed. R. Evid. 201(b)*), and documents incorporated in a complaint, *Rosenblum v. Travelbyus.com Ltd., 299 F.3d 657, 661 (7th Cir. 2002)*.

of felonies, including murder, aggravated kidnapping, and attempted robbery. See *Money v. Pritzker*, 20-cv-2093 (hereinafter "*Pritzker* **[*7]** "), [26 at ¶¶ 93-102]. They are currently serving sentences in various Illinois Department of Corrections ("IDOC") facilities, none of which are in Cook County. See [*id.* at ¶¶ 8-17.] IDOC operates 28 adult correctional facilities throughout the State of Illinois, houses around 37,000 individuals, and has 11,600 employees. [*Id.* at ¶ 69.] Plaintiffs have brought two purported class action lawsuits—*Pritzker* and *Money v. Jeffreys* (hereinafter "*Jeffreys*"), 20-cv-2094—seeking release of prisoners from IDOC facilities in light of the COVID-19 pandemic.

Money v. Pritzker, 20-cv-2093, contains three counts, of which the first two are brought under *42 U.S.C. § 1983*. Count I asserts that Defendants are violating the *Eighth Amendment* through deliberate indifference to a serious risk of harm, while Count II asserts a violation of Plaintiffs' right to due process under the *Fourteenth Amendment*. Count III asserts violations of the *Americans with Disabilities Act ("ADA")*. The complaint names as defendants J.B. Pritzker, Governor of Illinois, and Rob Jeffreys, Director of the Illinois Department of Corrections. *Money v. Jeffreys*, 20-cv-2094, is a petition for writs of habeas corpus under *28 U.S.C. § 2254* for relief from custody in violation of the *Eighth* and *Fourteenth Amendments to the U.S. Constitution*. It names Rob **[*8]** Jeffreys as the respondent. Both suits are purportedly brought on behalf of the named plaintiffs and all similarly situated individuals.

The foundation of each suit is essentially the same: Plaintiffs argue that the prison setting makes them (and other purported class members) especially vulnerable to COVID-19, that the state government's responses to the danger are insufficient or not fast enough or both, and that the only way to solve the problem is moving prisoners out of prisons.

A. Factual Background

COVID-19 is a disease caused by a novel coronavirus that began infecting humans in late 2019. Symptoms include fever, cough, shortness of breath, congestion, sneezing, fatigue, and diarrhea. *Pritzker*, [1 at ¶ 25.][3] While some cases are mild, others require medical intervention, including hospitalization and intensive care. [*Id.*] The virus spreads from person to person through respiratory droplets, close personal contact, and from contact with contaminated surfaces and objects. [*Id.*] It is highly contagious.

Currently, there is no vaccine to protect against infection by COVID-19. To prevent infection and mitigate the spread of the virus, the Center for Disease Control **[*9]** ("CDC") and other public health agencies have universally prescribed social distancing—every person should remain at a distance of at least six feet from every other person—and rigorous hygiene—including regular and thorough hand washing with soap and water, the use of alcohol-based hand sanitizer, proper sneeze and cough etiquette, and frequent cleaning of all surfaces. [1. at ¶ 31.] The CDC recommends avoiding gatherings of more than 10 people. [*Id.* at ¶ 32.] Individuals in congregate environments—places where people live, eat, and sleep in close proximity—face increased danger of contracting COVID-19, as demonstrated by the rapid spread of the virus through cruise ships and nursing homes. [*Id.*]

Despite social distancing recommendations, the disease has continued to spread. The World Health Organization has declared COVID-19 to be a global pandemic. [1 at ¶ 20.] On March 9, 2020, Illinois Governor J.B. Pritzker issued a proclamation declaring a disaster in the State of Illinois. [*Id.*] On March 13, 2020, President Trump declared a national emergency. [*Id.*] In the United States alone, as of April 1, 2020, there were over 186,000 confirmed cases and over 3,600 deaths. In Illinois, there **[*10]** were over 6,900 confirmed cases and 141 deaths. [*Id.* at ¶ 21.] On the same date, 52 prisoners in IDOC facilities in two different correctional centers (Stateville and North Lawndale ATC) had confirmed cases of COVID-19, and 25 staff in seven different correctional centers (Stateville NRC, Stateville, Sheridan, North Lawndale ATC, Menard, Joliet Treatment Center, and Crossroads ATC) had confirmed cases. [*Id.* at ¶ 71.] St. Joseph Hospital in Joliet, Illinois was, at the time the parties filed briefs in these matters, caring for 17 prisoners from Stateville, 9 of whom are in intensive care on ventilators. [*Id.* at ¶ 44.] On March 30, 2020, health officials announced that a prisoner in his 50s housed at Stateville Correctional Center had died from COVID-19. [*Id.* at ¶ 72.][4]

As things stand, the coronavirus continues to spread. According to the Coronavirus Resource Center of Johns Hopkins University, the United States has reported 461,437

[3] The complaints in the *Pritzker* *Section 1983* action and the *Jeffreys* habeas action are quite similar, and in some places identical. For simplicity and to avoid duplication, where a fact applies to both matters and is cited in both complaints, the Court cites to the *Pritzker* complaint, as it was filed first.

[4] As of today, IDOC reports 134 confirmed cases of COVID-19 among the population of incarcerated individuals in all of its facilities [see 36, at 3]. 118 of those cases involve inmates at Stateville, with the remaining 16 spread out among a handful of the 27 other facilities in the IDOC system. See https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx (last visited April 10, 2020).

cases, and 16,478 deaths, as of yesterday evening. See https://coronavirus.jhu.edu/data/new-cases (last visited April 10, 2020). According to the Illinois Department of Health, there are 16,422 confirmed cases in Illinois, including 528 deaths. See https://coronavirus.illinois.gov **[*11]** (last visited April 10, 2020).

Plaintiffs attached to both complaints a series of affidavits from medical professionals describing the seriousness of COVID-19 in a prison context and the limits of correctional facilities' ability to prevent or mitigate the spread of the disease. See *Pritzker*, [2]; *Jeffreys*, [1-1 through 1-10]. Among the primary points of those declarations are the following. Plaintiffs allege that none of the recommended measures for mitigating the spread of COVID-19 are available for persons confined in correctional facilities and for those who must interact with them. Correctional facilities are congregate environments, where large groups of people live, eat, and sleep in close contact with one another, making social distancing impossible. *Pritzker*, [1 at ¶ 36.] People share toilets, sinks, and showers, and often have limited access to soap, hand sanitizer, hot water, and other necessary hygiene items. Surfaces are infrequently washed, if at all, and cleaning supplies are limited. [*Id*. at ¶ 37.]

B. Responses by the State of Illinois to the COVID-19 Crisis

The State of Illinois has taken a variety of actions in response to the COVID-19 crisis, including Governor Pritzker's **[*12]** March 20, 2020 "stay at home" order directing all non-essential business operations to cease and all residents to stay in their homes except for essential activities. [1 at ¶ 33.] The order is currently in place through April 30, 2020. [*Id*.]

IDOC has enacted measures consistent with CDC guidelines to protect those who are housed and work in Illinois prisons, including a pandemic response plan (including a plan specific to Stateville), enhanced screening and testing for COVID-19, increased hygiene and sanitation, new limits (and now a prohibition) on outside visitors, and increased separation of prisoners through an administrative quarantine. *Pritzker*, [26, at 2.] Governor Pritzker and IDOC have taken a number of actions to address COVID-19 in Illinois' prisons, the most relevant of which are listed below. See [*id*. at 4-6].

- Governor Pritzker suspended admissions of new prisoners from all Illinois county jails, with limited exceptions (Executive Order 2020-13; see also Executive Order 2020-18 (extending Executive Order 2020-13 through April 30, 2020).

- Governor Pritzker activated the Illinois National Guard to provide additional medical support at Stateville. *Pritzker*, [1 at ¶ 91], [9 at 48].

- Governor Pritzker continues to review and grant commutation petitions. **[*13]**
- To allow for faster releases of prisoners, Governor Pritzker suspended the required 14-day notification to State's Attorneys for inmates released early as a result of earned sentence credit for good conduct. Executive Order 2020-11; see also Executive Order 2020-18 (extending Executive Order 2020-11 through April 30, 2020).
- On April 6, 2020, Governor Pritzker suspended the 14-day limit for medical furloughs and allowed furloughs for medical purposes at the Director's discretion and consistent with the guidance of IDOC's medical director. Executive Order 2020-21.
- IDOC created a population management task force for the purpose of prioritizing the review of individuals for possible release through statutorily permissible means.
- IDOC, as of April 6, 2020, had released approximately 450 prisoners through various forms of sentence credit, restoration of credit and electronic detention and had provided an additional 65 furloughs.
- Between March 2 and April 6, 2020, IDOC reduced its population by more than 1,000 prisoners.

- IDOC continues to award up to 180 days of Earned Discretionary Sentencing Credit (EDSC) for eligible offenders pursuant to *730 ILCS 5/3-6-3(a)(3)*.[5]

- On a daily basis, IDOC identifies offenders within nine months of their release date and conducts individualized reviews to determine **[*14]** whether they are eligible for early release. This process requires examining an offender's file for disciplinary history, commitment to rehabilitation, and criminal history.[6]

- IDOC continues to place offenders on electronic monitoring or home detention pursuant to *730 ILCS 5/5-8A-3*, including 16 of 21 pregnant and postpartum offenders on home detention. IDOC is now concentrating

[5] The sentencing credit is within the sole discretion of the Director, but must be based on the results of a risk or needs assessment, circumstances of the crime, any history of conviction for a forcible felony, the offender's behavior and disciplinary history, and the inmate's commitment to rehabilitation, including participation in programming. *730 ILCS 5/3-6-3(a)(3)*. The Director is prohibited from awarding discretionary sentencing credit to any inmate unless the inmate has served a minimum of 60 days. *Id*.

[6] Offenders with forcible felonies, violent criminal histories, significant disciplinary issues, and outstanding warrants are not approved for the sentencing credit.

on inmates who are 55 years or older, have served at least 25% of their sentence and are within 12 months of release. This process also requires individual assessments to determine whether placement outside of a secure facility is appropriate.

• The Prison Review Board ("PRB") continues to conduct release revocation hearings and make individualized assessments that include the alleged violations, the safety of those in custody, and overall public health concerns.

• The Governor's Office is working with outside groups such as the SAFER Foundation[7] and TASC[8] to identify and secure safe host sites and provide wraparound services to support potential releasees.

• Lt. Governor Juliana Stratton, along with the SAFER Foundation, developed the Prison Emergency Early Release Response (PEERR) team, which is creating a referral network of human **[*15]** services, healthcare, housing, and reentry providers that are open, whether in person or remotely, and can deliver services to people being released from IDOC custody.

• Effective March 14, 2020, all correctional facilities, impact incarceration programs, and work camps are under administrative quarantine with no visitors permitted.

• Facilities with confirmed COVID-19 cases are placed on lockdown, which means there is no movement around the facility except for medical care.

• Staff who work with individuals in isolation and quarantine, as well as in healthcare units, are wearing full personal protective equipment (PPE) and all staff are wearing some PPE.

• Staff members' temperatures are checked daily as they enter the facility.

• IDOC has (1) educated staff on infection control, (2) promoted good health habits that interrupt transmission, (3) conducted frequent environmental cleaning of high touch surfaces and high volume locations, (4) made efforts to separate the sick from the well and employ social distancing and (5) provided ongoing infection control education to prisoners.

It also bears mentioning that as of today at noon, 644 inmates have been released from IDOC custody using all **[*16]** of the methods available and the total IDOC inmate population has been reduced by 1,441 since March 2, 2020. [See 36, at 2.] Included within these totals are the commutations of two of the named Plaintiffs, James Money and Carl Reed, announced by Governor Pritzker on April 8, 2020. [34, at 4.]

Plaintiffs assert that reducing the prison population is the only meaningful way to prevent the harms posed by COVID-19 in the prison setting, writing:

> Public health experts with experience in correctional settings have similarly recommended *the release from custody* of people most vulnerable to COVID-19 to protect the communities inside and outside the prisons, and to slow the spread of the COVID-19 infection. *Population reduction* protects the people with the greatest vulnerability to COVID-19 from transmission of the virus, and also allows for greater risk mitigation for all people held or working in a correctional facility. Because prisons are often located in small rural communities, *removing the most vulnerable people from custody* also reduces the burden on those region's limited health care infrastructure by reducing the likelihood that an overwhelming number of people will become seriously **[*17]** ill from COVID-19 at the same time and require hospitalization in these small communities.

Pritzker, [1 at ¶46] (emphasis added).

C. Procedural Background

On April 2, 2020, plaintiffs filed a purported class action complaint under *42 U.S.C. § 1983* alleging violations of the *Eighth Amendment* and the *due process clause of the Fourteenth Amendment*, as well as violations of the ADA. *Pritzker*, [1]. Plaintiffs also filed a motion for class certification, *Pritzker*, [8], seeking to certify a class of "all people who are currently or who will in the future be housed in an IDOC prison during the duration of the COVID-19 pandemic," [*id.* at 5-6], with the following subclasses:

> **Subclass 1**: People who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19 * * * and who are eligible for medical furlough pursuant to *730 ILCS 5/3-11-1*.
>
> **Subclass 2**: People who are medically vulnerable to COVID-19 because they are 55 years of age and older and who are eligible for medical furlough pursuant to *730 ILCS 5/3-11-1*.
>
> **Subclass 3**: People who are 55 years of age and older with less than one year remaining on their sentence and

[7] The SAFER Foundation is a nonprofit social impact organization that focuses on human capital development for people with criminal records.

[8] TASC is a nonprofit organization that provides direct services and performs advocacy and consulting work for individuals and families affected by substance abuse and mental health issues.

eligible for home detention pursuant to 730 ILCS 5/5-8A-3(d).

Subclass 4: People who are currently in custody for Class 2, 3, or 4 offenses and who are eligible for home detention **[*18]** pursuant to 730 ILCS 5/5-8A-3(e).

Subclass 5: People who are currently in custody for Class 1 or Class X offenses with less than 90 days remaining on their sentence and eligible for home detention pursuant to 730 ILCS 5/5-8A-3(b) and (c).

Subclass 6: People who are scheduled to be released within 180 days and eligible to receive sentencing credit pursuant to 20 Ill. Admin. Code 107.210.

[*Id*. at 6-7]. Subclass 1 contains approximately 12,000 individuals, and subclass 2 contains approximately 4,800 individuals. *Pritzker*, [1 at ¶105].

Plaintiffs also filed a motion for a temporary restraining order ("TRO") or a preliminary injunction. *Pritzker*, [9]. That motion asks the Court to preliminarily certify Plaintiffs' proposed subclasses 1 and 2 and to order Defendants to transfer members of subclasses 1 and 2 to their homes to self-isolate via a temporary medical furlough. [*Id*. at 70-71].

On the same day that the Section 1983 complaint was filed, Plaintiffs also filed a petition for writs of habeas corpus, *Jeffreys*, [1], purportedly on behalf of themselves and all other similarly situated individuals. They seek to represent a class consisting of "all people who are currently or who will in the future be housed in an IDOC prison during the duration of the COVID-19 pandemic." [*Id*. at ¶ 111.] Plaintiffs **[*19]** (or Petitioners in habeas parlance) articulate the same six subclasses they claim to represent as are laid out in the Section 1983 complaint. See [*id*.]. The petition seeks immediate medical furlough for individuals in subclasses 1 and 2, immediate transfer to home detention of members of subclasses 3, 4, and 5, and immediate award of 180 days of sentencing credit to members of subclass 6. [*Id*.] With the petition, Plaintiffs filed a motion for an expedited hearing. *Jeffreys*, [3].

II. Legal Standard

Preliminary injunctive relief 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, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997) (emphasis in original) (quotation marks and citation omitted); see also Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 823 (7th Cir. 1998) (same). The Seventh Circuit uses a two-step analysis to assess whether preliminary injunctive relief is warranted. See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc., 549 F.3d 1079, 1085-86 (7th Cir. 2008). This analysis is the same one that is used to determine if a TRO is warranted. Gray v. Orr, 4 F. Supp. 3d 984, 989 n.2 (N.D. Ill. 2013). "In the first phase, the party seeking a preliminary injunction must make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and **[*20]** (3) he has a reasonable likelihood of success on the merits." Turnell v. CentiMark Corp., 796 F.3d 656, 661-62 (7th Cir. 2015). If the movant makes the required threshold showing, then the court moves on to the second stage and considers: "(4) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties," *i.e*., the public interest. Id. at 662. The court must pay "particular regard for the public consequences in employing the extraordinary remedy of injunction." Winter v. NRDC, Inc., 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Court balances the potential harms on a sliding scale against the movant's likelihood of success. The greater the movant's likelihood of success, "the less strong a showing" the movant "must make that the balance of harm is in its favor." Foodcomm Int'l v. Barry, 328 F.3d 300, 303 (7th Cir. 2003).

Plaintiffs seek a mandatory preliminary injunction—that is, an injunction requiring an affirmative act by the defendant. Because a mandatory injunction requires the court to command the defendant to take a particular action, it is "cautiously viewed and sparingly issued." Knox v. Shearing, 637 F. App'x 226, 228 (7th Cir. 2016) (quoting Graham v. Med. Mut. of Ohio, 130 F.3d 293, 295 (7th Cir. 1997)); see also W. A. Mack, Inc. v. Gen. Motors Corp., 260 F.2d 886, 890 (7th Cir. 1958) ("mandatory injunctions are rarely issued **[*21]** and interlocutory mandatory injunctions are even more rarely issued, and neither except upon the clearest equitable grounds" (quotation marks and citation omitted)); ChoiceParts, LLC v. Gen. Motors Corp., 203 F. Supp. 2d 905, 914 (N.D. Ill. 2002) (same).

The preliminary injunction, or even TRO, that Plaintiffs seek would give them much of the relief the *Pritzker* action requests, and likely all of the relief that subclasses 1 and 2 request. This type of request, which "give[s] the movant substantially all the relief he seeks," "is disfavored, and courts have imposed a higher burden on a movant in such cases." Boucher, 134 F.3d at 827 (citing Selchow & Righter Co. v. Western Printing and Lithographing Co., 112 F.2d 430, 431

(7th Cir. 1940); Phillip v. Fairfield University, 118 F.3d 131, 133 (2d Cir.1997); SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1098-99 (10th Cir. 1991); Dakota Indus., Inc. v. Ever Best Ltd., 944 F.2d 438, 440 (8th Cir. 1991); and Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808 (9th Cir. 1963)); see also W.A. Mack, Inc. v. General Motors Corp., 260 F.2d 886, 890 (7th Cir. 1958) ("A preliminary injunction does not issue which gives to a plaintiff the actual advantage which would be obtained in a final decree."); Hanover Ins. Group v. Singles Roofing Co., 2012 U.S. Dist. LEXIS 85813, 2012 WL 2368328, at *11 (N.D. Ill. June 21, 2012) (because the plaintiff amended the complaint to seek both preliminary and permanent relief, granting a TRO or preliminary injunction would not give the plaintiff "the actual advantage which would be obtained in the final decree" (quoting W.A. Mack, 260 F.2d at 890)); Harlem Algonquin LLC v. Canadian Funding Corp., 742 F. Supp. 2d 957, 962 (N.D. Ill. 2010) ("'[i]t is one thing for a court to preserve its power to grant effectual relief by preventing parties from making unilateral and irremediable changes during the course of litigation, and quite another for a court to force the parties to make significant **[*22]** alterations in their practices' before a trial on the merits. So much more so if the alteration would amount to irreversible final relief." (citation omitted)).

III. Discussion

A. *Section 1983*, Habeas, or Both?

Since the initiation of this litigation the question of why Plaintiffs filed two separate lawsuits advancing essentially the same allegations and requesting essentially the same relief has perplexed the Court. It appears to have challenged the parties as well. In their reply brief, Plaintiffs complain that "Respondent cannot have it both ways." [24, at 8.] Indeed, a careful review of the briefs shows that both sides are guilty of taking somewhat inconsistent positions across the two cases. This observation is not surprising, nor is it meant disparagingly, for the briefs were remarkable both in their quantity and quality—and all the more so in the time frame given to accommodate the exigent circumstances. But the question remains, is it even proper to bring a *Section 1983* action and a petition for writ of habeas corpus at the same time on the same facts seeking the same remedy? As explained below, the answer (though not without doubt) seems to be yes.

It is an accepted practice to plead alternative—and **[*23]** even inconsistent—theories of relief, but ordinarily this takes place within a single action. Nonetheless, as the declaration of Professor Resnik filed with Plaintiffs' reply brief explains, "the intersection of habeas and civil rights claims brought under *42 U.S.C. § 1983*" constitutes "a dense area of law and doctrine that can be daunting for litigants and jurists alike."[9] [24-3 at 5-6.] As Professor Resnik notes, the "shorthand" version of the divide between habeas and *Section 1983* goes like this: "when the fact or duration of confinement is at issue and release is the remedy, habeas is the preferred route. If prisoners are challenging conditions of confinement, *§ 1983* is the method." [*Id.* at 6.] This shorthand is a bit too simple, however, because a habeas petitioner seeks release from *custody*. See *28 U.S.C. § 2254(a)* (habeas statute allows challenges to "custody in violation of the Constitution or laws or treaties of the United States"). This is an important point, because Plaintiffs here stress that "they do not seek relief from the underlying criminal judgments * * * [n]or do they seek speedier release from custody." [28, at 9.] See *Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991)* (explaining that a claim seeking to reinstate "work release" with "less confinement than ordinary imprisonment" **[*24]** was a *Section 1983* claim because it did not challenge the inmate's custodial status). Instead, they are asking to be released from prison temporarily, "while remaining in the custody and control of IDOC." [24, at 2.] They also emphasize that they "challenge only the conditions of their confinement." [28, at 9.] Those concessions support the proposition that *Section 1983* provides a proper rubric for analysis. Yet, Plaintiffs do seek as a remedy at least temporary release from the physical confines of not only their cells, but the entire prison environment, which they contend is unsafe because (in Professor Resnik's words) "density puts people at medical risk." [24-3 at 6.]

This conundrum is not simply an academic exercise, for "Congress has channeled and circumscribed some of federal judicial authority" in this area, through the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Prison Litigation Reform Act (PLRA) of 1996, and the Supreme Court too has provided guidance in this area. [24-3 at 5.] The case law clearly holds that the PLRA applies in *Section 1983* suits, but not to habeas petitions. See, e.g., *Jones v. Bock, 549 U.S. 199, 200, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)* ("PLRA claims are typically brought under *42 U.S.C. § 1983*[.]"); *Walker v. O'Brien, 216 F.3d 626, 639 (7th Cir. 2000)* ("the requirements of the PLRA do not apply **[*25]** to

[9] Professor Resnik's work is well-known to the Court. She is unquestionably one of the nation's leading experts in civil procedure and prison litigation, both as an academic and as a practitioner on behalf of plaintiffs. Her succinct discussion of the "legal thicket" in which the parties find themselves in these two cases has provided the equivalent of an amicus brief for which the Court is most appreciative.

properly characterized habeas corpus actions"). And it expressly reflects the traditional shorthand understanding of the differences between the two types of actions, as its provisions apply to civil actions "arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison," but expressly exclude "habeas proceedings challenging the fact or duration of confinement in prison." *18 U.S.C. § 3626(g)(2)*.

Together, the statutes and case law weave a thick and tangled web. As Professor Resnik further explains, "because state prisoners who rely on *28 U.S.C. § 2254* have to exhaust state judicial remedies, they may seek to use *§ 1983*, to which that requirement does not apply. And, because the PLRA affects *§ 1983* litigants, prisoners may hope to avoid its strictures by filing under habeas." [24-3 at 6.] Those two sentences identify the precise dilemma that faced counsel for Plaintiffs as they contemplated their legal options in the present circumstances. On the one hand, many cases view *Eighth Amendment* claims like those asserted here "to be appropriate for *§ 1983* because they relate to conditions." [*Id.*] On the other hand, the unique context in which litigation over **[*26]** COVID-19 arises may cast some doubt on that seemingly obvious proposition because the sudden threat to mortality from the spread of the virus in a congregate setting may affect the fact or duration of confinement. These unprecedented circumstances, Professor Resnik posits, "collapse the utility and purpose of drawing distinctions between what once could be coherently distinguished" and lead to the conclusion that "COVID-19 claims ought to be cognizable under both provisions." [*Id.*]

The upshot of the foregoing analysis is that it is abundantly clear that Plaintiffs may proceed on their claims under *Section 1983* and at least plausible—though far less certain—that they also have a right to seek habeas relief as well. To test the latter proposition, the Court looks to the controlling decisions of the Supreme Court and the Seventh Circuit. Those cases reveal neither a ringing endorsement nor an outright prohibition. See, e.g., *Ziglar v. Abbasi, 137 S. Ct. 1843, 1862, 198 L. Ed. 2d 290 (U.S. 2017)* ("we have left open the question whether [detainees] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus"); *Bell v. Wolfish, 441 U.S. 520, 526 n.6, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)* ("we leave to another day the question off the propriety of using a writ of habeas corpus to obtain review of the conditions **[*27]** of confinement"); *Preiser v. Rodriguez, 411 U.S. 475, 499, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973)* ("When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the constraints making custody illegal"); *Glaus v. Anderson, 408 F.3d 382, 387 (7th Cir. 2005)* ("While the Supreme Court left the door open a crack for habeas corpus claims challenging prison conditions, it has never found anything that qualified"). As Petitioners recognize [24, at 17], the Seventh Circuit's reading of *Preiser* "is narrower than that of other circuits." Still, given (1) *Ziglar*'s continued recognition that the question remains open and (2) the exigent circumstances present in this litigation, the Court will consider Petitioners' habeas claim after assessing Plaintiffs' request for the same relief under *Section 1983*.

B. Direct Release or a "Process"?

There is a second threshold issue to note at the outset. In their complaint—and likewise in the habeas action—Plaintiffs requested immediate medical furloughs for subclasses 1 and 2, immediate transfers to home detention for subclasses 3, 4, and 5, and an immediate award of good time credit for subclass 6, along with the appointment of a special master. Their opening brief in support of emergency injunctive relief on **[*28]** behalf of subclasses 1 and 2 likewise sought a direct transfer order [see 9, at 55.] In their reply, Plaintiffs complain that Defendants have "mischaracterize[d] the relief plaintiffs are seeking, suggesting that plaintiffs seek to unleash a tsunami of dangerous 'felons' on unwitting communities, when in reality no such thing is true." [28, at 1.] Perhaps that is not what Plaintiffs intended by initiating this lawsuit, but one can hardly blame Defendants for drawing that conclusion based on how Plaintiffs' request for relief was framed at the start of this litigation.

In an ordinary case, a significant transformation in how the plaintiff frames the object of the case often is dealt with by the filing of an amended complaint that puts Defendants on notice that the game has changed. Needless to say, this is no ordinary case and allowance must be made for adjustments on the fly. As of this Monday, Plaintiffs had provided a clear indication of such a change in direction, explaining that they do not assert a right to an order directly commanding an immediate furlough—as the complaint stated—but instead "seek a process through which subclass members eligible for medical furlough will be identified **[*29]** and evaluated based on a balancing of public safety and public health needs, and transferred accordingly" [24, at 6.] Plaintiffs have further proposed a "remedial plan" pursuant to which this court-ordered and court-supervised process would unfold. [*Id.* at 5.] Given the disconnect between Plaintiffs' initial filings last week and their briefs filed this week, one cannot fault Defendants for characterizing Plaintiffs' revised position as "backpedaling" [26, at 16] or for seeking leave to file a sur-reply [32], which the Court has accepted. Nor can one cast aspersions on Plaintiffs for crafting an evolving proposal to deal with an evolving situation on the ground. The important

thing for purposes of the litigation is that the parties have had an adequate opportunity to understand the claims as they exist today and to state their positions in advance of a ruling. The extensive briefs reflect a fair—indeed, an extensive—exposition of the issues, both as presented in the complaint and initial brief and as modified in the later briefs. In the interest of completeness, the Court will address both iterations of Plaintiffs' claims.

C. *Section 1983* Claim

1. The PLRA

Turning first to Plaintiffs' *Section 1983* claims, the Court **[*30]** must confront yet another threshold issue which the parties have briefed extensively—namely, the application of the PLRA to Plaintiffs' claims. As noted above, through the PLRA, Congress "channeled and circumscribed some of federal judicial authority" in ways that "affect[] *§ 1983* litigants." [24-3 at 5.] Although the PLRA is codified at *42 U.S.C. § 1997e*, it encompasses the provisions of *18 U.S.C. § 3626*, which is titled "appropriate remedies with respect to prison conditions." *Section 3626* begins by stating that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." *18 U.S.C. § 3626(a)(1)*. It also directs courts to "give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief." *Id*. The term "civil action with respect to prison conditions" is defined broadly to include "any civil proceeding arising under Federal law with respect to the conditions of confinement and the effects of actions by government officials on the lives of persons confined in prison," but explicitly "does not include habeas corpus proceedings challenging the fact or duration **[*31]** of confinement in prison." *18 U.S.C. § 3626(g)(2)*. The statute specifically addresses preliminary injunctive relief, mandating that any such relief in a case involving prison conditions "must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." *18 U.S.C. § 3626(a)(2)*.

The application of the provisions discussed in the preceding paragraph is not disputed between the parties. The parties part ways, however, in regard to whether the relief requested falls within the meaning of the PLRA's special procedures for consideration of a "prisoner release order." *18 U.S.C. § 3626(a)(3)*. The statute defines that term to "include[] any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." *18 U.S.C. § 3626(g)(4)*. No court may enter a prisoner release order unless it "has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied" and "the defendant has had a reasonable amount of time to comply with the **[*32]** previous court orders." *18 U.S.C. § 3626(a)(1)-(2)*. If those strictures have been satisfied, only a three-judge court can actually consider and issue a prisoner release order—and even then only if it finds by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right" and "no other relief will remedy the violation." *18 U.S.C. § 3626(a)(3)(E)(i)-(ii)*.

2. Prisoner Release Orders Under the PLRA

In looking for guidance on how to address the parties' dispute concerning the reach of the PLRA's limitations on "prisoner release orders," the Court has endeavored to locate prior decisions in which a federal court has been asked to get involved in the potential transfer of thousands of state inmates out of state prisons through any available vehicle on the basis of their conditions of confinement. The Court has found—and the parties have cited—just two, which went together from the federal district courts in California all the way to the Supreme Court and then back again, and still remain open today, though in a largely dormant phase. See *Coleman v. Newsom, F. Supp. 3d. , 2020 U.S. Dist. LEXIS 62575, 2020 WL 1675775, at *3 (Three-Judge Court 2020)* (explaining that since 2015, the three-judge court has "largely stepped **[*33]** back as the individual *Coleman* and *Plata* courts have continued to work" on the compliance phase of the cases). Because of the uniqueness of the relief requested here, a discussion of the most analogous cases appears in order.

In *Brown v. Plata, 563 U.S. 493, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011)*, the Supreme Court upheld an order of a three-judge district court requiring California to reduce its prison population to 137.5 percent of design capacity within two years. In that case, two lawsuits were brought by California prisoners with serious mental disorders challenging prison crowding and inadequate mental health care as *Eighth Amendment* violations. In one of the cases, a special master was appointed to oversee development and implementation of a remedial plan. In the other case, the state stipulated to a remedial injunction, but failed to comply with the injunction, after which the district court appointed a receiver to oversee remedial efforts. The plaintiffs in both cases requested that a three-judge panel of the district court be convened pursuant to

the PLRA, 18 U.S.C. § 3626(a)(3). Both district courts granted the motions and the cases were consolidated before a three-judge panel. The three-judge court, after determining that plaintiffs suffered from constitutional violations that **[*34]** were caused primarily by overcrowding, entered a remedial order requiring the State of California to reduce its prison population to 137.5 percent of design capacity within two years.

The Governor appealed and the Supreme Court affirmed. The Court determined that the PLRA's requirement of allowing the state a reasonable amount of time to comply with previous court orders was satisfied where, when the three-judge district court was convened, 12 years had passed since the appointment of a special master to oversee development and implementation of a remedial plan and the basic plan to solve the crisis through construction, hiring, and procedural reforms had remained unchanged for years. Plata, 563 U.S. at 514-15. The Court also held that the evidence supported the three-judge court's determination that crowding was the primary cause of the Eighth Amendment violations and that no other relief would remedy the violations. The evidence showed that there were severe, months-long delays and backlogs for prisoners needing urgent mental health and physical care, as well as unsafe and unsanitary living conditions caused by crowding. Id. at 519-20. Further, the Court determined that the three-judge court properly gave substantial weight to public **[*35]** safety, finding various available methods of reducing overcrowding that would have little or no impact on public safety, such as expansion of good-time credits and diversion of low-risk offenders to community programs such as drug treatment, day reporting centers, and electronic monitoring. The Court noted that the three-judge court's order "took account of public safety concerns by giving the State substantial flexibility to select among these and other means of reducing overcrowding." Id. at 537. Finally, the Court concluded that the cap of 137.5 percent capacity was supported by evidence in the record, including expert witnesses who recommended a 130 percent population limit and the federal BOP's own long-term goal of 130 percent. Id. at 539-40.

As the foregoing illustrates, the only instance of which the Court is aware that a federal court has been involved in ordering the release of thousands of state prisoners took place in radically different circumstances—after the passage of 12 years, the development of a full record, the input of both a special master and a receiver, and a trial lasting almost three weeks. Clearly there is no time for even a fraction of that attention, so the *Coleman*/*Plata* experience **[*36]** may have little to offer in the way of guidance, except in its application of the order of operations under the PLRA—the preliminary requirements for issuing a less intrusive order, the reasonable opportunity to comply, and what type of claim requires the appointment of a three-judge court. But there is a recent postscript that may offer greater insight on how the PLRA should apply in this case.

Less than a week ago, the same three-judge panel in California whose work was reviewed by the Supreme Court in *Plata* issued an order denying an emergency motion seeking release of "an unspecified, but significant, number of prisoners so that the prison population can be reduced to a level sufficient to allow physical distancing to prevent the spread of COVID-19." Coleman & Plata, 2020 U.S. Dist. LEXIS 62575, 2020 WL 1675775, at *1. As in this case, the plaintiffs there sought an order directing the Governor of California and other state officials "to release to parole or post-release community supervision" certain categories of inmates who were low risk, non-violent, and/or close to their release dates and "to release or relocate inmates who, because of their age or other medical conditions, are at a high risk of developing a severe form of COVID-19." 2020 U.S. Dist. LEXIS 62575, [WL] at *3. Although **[*37]** the plaintiffs did not specify a number of inmates who fall within those categories, they argued that the number should be sufficient "to allow all remaining inmates to practice physical distancing, especially those who reside in crowded dorm housing." *Id*. They requested that specific relief based on the CDC's guidance that "[t]hus far, the only way to stop [COVID-19's] spread is through preventive measures—principal among them maintaining *** physical distancing sufficient to hinder airborne person-to-person transmission," which is "uniquely difficult in a congregate environment like a prison." 2020 U.S. Dist. LEXIS 62575, [WL] at *5 (citing CDC guidance).

The panel determined that it lacked authority to consider the request because it was "not actually a modification of the 2009 order but rather *new* relief based on the *new* threat of harm posed by COVID-19." Coleman & Plata, 2020 U.S. Dist. LEXIS 62575, 2020 WL 1675775, at *4. But perhaps significantly for present purposes, the panel gave every indication that all phases of the PLRA's remedial scheme—including the appointment of a new three-judge court—could apply to the type of relief sought by the Plaintiffs in California, which closely mirrors the relief sought for subclasses 1 and 2 in the complaint here—especially in regard to the **[*38]** request to "release or relocate" older inmates and those who are especially vulnerable due to medical conditions. To begin, the panel noted that as of the time of its ruling the Plaintiffs "likely cannot satisfy the [PLRA's] prior order requirement because there have not yet been any orders requiring Defendants to take measures short of release to address the threat of the virus; nor have Defendants had a reasonable time in which to comply." 2020 U.S. Dist. LEXIS

*62575, [WL] at *4*.[10] The panel further observed that the plaintiffs retained the option to "go before a single judge to press their claim that Defendants' response to the COVID-19 epidemic is constitutionally inadequate." *2020 U.S. Dist. LEXIS 62575, [WL] at *7*. It added that "[i]f a single-judge court finds a constitutional violation, it may order Defendants to take steps short of release necessary to remedy that violation." *Id*. However, "if that less intrusive process proves inadequate," the Court concluded, "Plaintiffs may request, or the district court may order sua sponte, the convening of a three-judge court to determine whether a release order is appropriate." *Id*. In this Court's view, the clear impression to be drawn from the California panel's opinion is that, in its view, claims seeking an order **[*39]** to "release or relocate" inmates on account of the COVID-19 pandemic may implicate every aspect of the PLRA's remedial scheme, including the appointment of a three-judge court.

3. Are Plaintiffs Requesting a "Prisoner Release Order"?

With that discussion as prelude, the next question is whether Plaintiffs seek a "prisoner release order" within the meaning of *Section 3626(a)(3)* and *(g)(4)*. If one focuses on Plaintiffs' complaint and initial brief, this is obvious. Plaintiffs devote pages to describing the congregate conditions in IDOC facilities in support of the proposition that crowded conditions inherent in living arrangements in a prison setting are unsafe during a pandemic. They then offer the opinions of numerous affiants who universally advance one message: the only solution is the immediate release of inmates in large numbers. A fair summary of the bulk of the complaint and brief in support of immediate injunctive relief is that the crowded conditions of IDOC facilities require the Court to issue an order immediately reducing the prison population in Illinois by ordering the members of proposed subclasses 1 and 2 to medical furloughs. In the Court's view, if that were the relief Plaintiffs seek in **[*40]** this litigation, it unquestionably could be awarded only by a three-judge court under the PLRA.

As noted above, in their more recent filings, Plaintiffs submit that are *not* seeking a "mass release order." Instead, Plaintiffs seek a "process through which subclass members eligible for medical furlough will be identified and evaluated based on a balancing of public safety and public health needs, and transferred accordingly." [24, at 5.] All of Defendants' briefs in this matter contend that such a process already is in place. But Plaintiffs find Defendants' efforts wanting, and thus they request the Court's involvement in the creation and oversight of a remedial plan that would result in "an expedited, individualized review and relocation" of inmates who qualify. [*Id*. at 10.] The order that the Court would issue to set that process in motion, Plaintiffs say, is not a "prisoner release order" within the meaning of the PLRA. Such orders, they argue, involve mass prisoner releases or population caps and issue only to remedy violations primarily caused by overcrowding. [See 24, at 7.] And that is not the kind of order they want.

The Court must look to the language of the PLRA, which speaks in detail and **[*41]** uses broad and categorical language in defining its scope. It does not speak of "mass" releases, "population caps," or even "overcrowding"—though it does refer to "crowding," which must be the "primary cause of the violation of a Federal right" to serve as the predicate for a release order under the statute. *18 U.S.C. § 3626(a)(3)(E)*. What it does say is that any order "that has the purpose or effect of reducing or limiting a prison population, or that directs the release from or nonadmission of prisoners to a prison" lies exclusively within the province of three-judge courts. *18 U.S.C. § 3626(g)(4)*. The reference to "crowding" may have the effect of removing single-plaintiff cases from within the ambit of *Section 3626(a)(3)*, because an order involving only one inmate might not be viewed as reducing a prison population in any meaningful way.[11]

Plaintiffs stress that the transfers they hope to accomplish would not release any class members from custody; they would simply effectuate changes in the inmates' physical locations, and the changes would be of a limited duration. Plaintiffs rely on Illinois statutes to show that they would remain in custody within the meaning of state law. But the PLRA does not focus on custodial status under state law, **[*42]** nor does it say anything about whether the reduction of population is temporary or permanent. The question is not whether Plaintiffs would remain in custody under state law. The question is whether the requested relief would have the "purpose" or the "effect" of "reducing or limiting the prison population," or whether it would "direct[]

[10] The panel recognized, as does this Court, "that what is reasonable in ordinary times may be quite different from what is reasonable in these extraordinary times." *Id*. n.9.

[11] A single judge in California did order an "exclusionary order for medically vulnerable prisoners" during a "Valley Fever" epidemic several years ago. *Plata v. Brown, 2013 U.S. Dist. LEXIS 90669, 2013 WL 3200587, at *9 (N.D. Cal. June 24, 2013)*. In so doing, the judge rejected the notion that "a court could only order that prisoners be transferred from one prison to another if overcrowding were the primary cause of the violation." *Id*. That seems correct and consistent with the orders entered not infrequently in cases involving inmate medical problems that may require hospitalization. [See 24, at 10]. But it does not help Plaintiffs, because there was no crowding issue at all raised in that instance.

the release from * * * a prison." *18 U.S.C. § 3626(g)(4)*. There is no doubt that Plaintiffs' request — even if couched in terms of a process — would have the purpose and the effect of reducing the population in Illinois prisons.

Plaintiffs also suggest that they do not seek a remedy for crowding (as the statute frames the issue) or overcrowding (as Plaintiffs frame it). But that contradicts the allegations of their complaint and their entire theory of the case. One of the central allegations in the complaint is that inmates are particularly vulnerable because they live in "congregate settings" in "close quarters" with each other. See Cmplt. at ¶ 1 (alleging that "[n]early 37,000 people are incarcerated in Illinois, living in close quarters"); *id*. ("social distancing guidelines can never be fully or effectively implemented in prison"); *id*. at ¶ 32 (alleging that "[p]eople **[*43]** in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19."); *id*. at ¶ 36 ("Correctional facilities are inherently congregate environments, where large groups of people live, eat, and sleep in close contact with one another."); *id*. at ¶¶ 37-38 (alleging that inmates are "all congregated together" and cannot "adequately distance themselves"); *id*. at ¶ 43 (alleging the "heightened risk posed by correctional settings" because of the close proximity); *id*. at ¶ 45 (alleging that there is a need to "eliminat[e] close contact in congregate environments").

In addition, as the ultimate aim of these lawsuits Plaintiffs unmistakably seek to reduce the prison population. Reducing the prison population is not just a side effect of the case — it is the whole point. They want to remove inmates from prison because they are vulnerable in those facilities. See Cmplt. at ¶ 1 (alleging that the Governor and the IDOC need to "drastically reduce Illinois's prison population"); *id*. at ¶ 3 ("[T]he state must take urgent steps to reduce, furlough, or transfer to home detention all that qualify."); *id*. at ¶ 4 (alleging that **[*44]** the IDOC is "refusing to reduce the number of people living in IDOC"); *id*. at ¶ 5 ("Class members . . . must be released now."); *id*. at ¶ 103 (discussing "Plaintiffs' request for release from physical custody"). The Complaint cites declarations from five public health and correctional experts, all of whom "recommend[] the release from custody" of certain individuals. *Id*. at ¶ 46; see also *id*. at ¶ 47 (Dr. Robert Greifinger discussing the "release of individuals"); *id*. at ¶ 49 (Dr. Craig Haney discussing that "adult prisons must reduce their populations"); *id*. at ¶ 50 (Prof. Chris Breyer discussing the need to "reduce the number of persons in detention as quickly as possible"); *id*. at ¶ 51 (Dr. Jaimie Meyer discussing "[r]educing the size of the population in jails"); *id*. at ¶ 52 (Dan Pacholke discussing the need to "reduce the prison population").

Moreover, the impetus for Plaintiffs' claims is the living conditions inherent in a congregate setting during the COVID-19 epidemic. They do not distinguish in any respect among the 28 facilities and the myriad living arrangements within those facilities. All prison facilities, by definition, have living conditions that prevent inmates from **[*45]** practicing the social distancing required by current guidance from the CDC and our state government. As Plaintiffs write in their reply brief, there is "no way to make conditions safe within the congregate prison setting." [24, at 11.] Defendants do not contest these allegations; in fact, they have repeated them publicly. But in asking that inmates be physically transferred from inside the prison to outside of it on the basis of these conditions, Plaintiffs plainly are implicating "crowding" as the primary cause of their concern. If prisons could be reconfigured to permit social distancing and observance of the CDC's hygiene recommendations, Plaintiffs would have no claim.

Finally, shifting the focus from an order directly releasing subclasses 1 and 2 (as the complaint requested) to an order imposing a court-ordered and court-managed "process" for determining who should be released (as the briefs request) does not place this case outside of *Section 3626(a)(3)*. Although there is a dispute over the exact number of inmates within proposed subclasses 1 and 2—because some inmates are members of both subclasses—the minimum number of inmates who would be subject to the procedures in any remedial plan is approximately **[*46]** 12,000. See Cmplt. at ¶ 105 ("Plaintiffs estimate that Subclass 1 contains approximately 12,000" inmates).[12] Plaintiffs insist that Defendants must act faster to move as many of those individuals to medical furlough as possible. The "purpose" of any order compelling the State to engage in that process would be to reduce the prison population, and the "effect" of its successful implementation would be the same, albeit indirectly. As Plaintiffs' acknowledge, Defendants already have in place several mechanisms to reduce the IDOC census and hundreds of inmates have already been released. An order granting the requested relief would simply accelerate that process, placing the request squarely within *Section 3626(a)(3)*—which forbids this Court from granting it.

The upshot is that the PLRA prevents this Court from

---

[12] That figure is the floor, assuming that subclass 1 contains all of the inmates in subclasses 2-6. In reality, the number of eligible inmates covered by Plaintiffs' plan is probably much higher. Subclass 1 contains 12,000 inmates. See Cmplt. at ¶ 105. Subclass 2 contains 4,807 inmates. *Id*. Subclass 3 contains 700 inmates. *Id*. Subclass 4 contains over 9,000 inmates. *Id*. Subclass 5 contains 2,401 inmates. *Id*. Subclass 6 contains 5,308 inmates. *Id*.

granting the temporary restraining order on the Section 1983 claim, for a number of reasons. First, the statute provides that "no court shall enter a prisoner release order unless * * * a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right," and the defendants have "had a reasonable amount of time to comply with the previous **[*47]** court orders." 18 U.S.C. § 3626(a)(3)(A)(i), (ii). Here, there is no such "previous court order[]." *Id*. Second, the statute provides that "only" a "three-judge court" can enter a prisoner release order. 18 U.S.C. § 3626(a)(3)(B). So, this Court, standing alone, lacks the authority to issue any order that has the "purpose or effect of reducing or limiting the prison population." *Id*.; 18 U.S.C. § 3626(g)(4). Third, the statute provides that "[p]reliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). Plaintiffs' proposed plan does the opposite. Instead of proposing interim steps, Plaintiffs seek the most sweeping form of relief — a process to potentially release 12,000 inmates — right off the bat.

4. Provisional Class Certification

Even if the Court were incorrect in its conclusion that all of the relief that Plaintiffs request falls within the scope of Section 3626(a)(3), and thus only could be granted by a three-judge court (after Plaintiffs obtain a less intrusive order and Defendants have a reasonable amount of time to comply), Plaintiffs would need to clear other serious obstacles before the Court could even reach the **[*48]** merits of their claims. One is Plaintiffs' request that the Court consider granting conditional relief on a classwide basis.

Federal Rule of Civil Procedure 23 governs class actions. The basic requirements are well-known and simply stated: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. There are other requirements for money damages classes, but those do not apply here because the relief sought is injunctive only. See FRCP 23(a)(2). The first and fourth factors are essentially uncontested; the putative class numbers more than 10,000 individuals, the named Plaintiffs are appropriate, and class counsel are extremely well qualified for this type of litigation. Typicality is satisfied if the named plaintiff's claims "arise from the same event or practice or course of conduct that gives rise to the claims of the other class members and [are] based on the same legal theory." Lacy v. Cook County, 897 F.3d 847, 866 (7th Cir. 2018). Plaintiffs have made enough of a showing to clear that hurdle, too, at least for conditional certification on a motion for preliminary relief. That leaves the second element, commonality.

Commonality requires at least one question common to all of the class members, the answer to which is "apt to drive the resolution of the litigation." Wal-Mart Stores, Inc.v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). For present **[*49]** purposes, the quoted language is key. There are many questions common to the putative class members that bear on the subject of this litigation. Consideration of those questions undoubtedly drove the decisions of counsel in sorting Plaintiffs into six subclasses with particular characteristics held in common. But none of those questions is likely to drive the resolution of the case. The central dispute is not whether aged, infirm, and vulnerable inmates as a group should be given consideration for transfer or release. Defendants agree and by Plaintiffs' own admission "are taking many actions on the list" of mechanisms available under state law for moving inmates out of IDOC facilities. [24, at 1.] Plaintiffs simply want the Court to "prod the defendants to act more quickly." [*Id*. at 2.] And they acknowledge that any plan to do just that would require "individualized safety assessments" and "approve[d] home sites." [28 at 5.]

The Court agrees. Indeed, the public interest—which must be taken into account when considering a TRO or preliminary injunction—mandates individualized consideration of any inmate's suitability for release and on what conditions, for the safety of the inmate, the inmate's **[*50]** family, and the public at large. From the inmate's perspective, his or her own health status at the relevant time is paramount. Any inmate who is exhibiting symptoms of infection may be more suitable for quarantine or even transfer to a hospital. From the family perspective, an inmate who has been exposed to someone (inmate or IDOC personnel) who has tested positive may not be suitable for furlough, particularly if the inmate's proposed destination is a residence already occupied by someone equally or more vulnerable. And from the public's perspective, it is important to bear in mind that some portion of the incarcerated population has been convicted of the most serious crimes—murder, rape, domestic battery, and so on. Seven of the ten named Plaintiffs in fact are serving time for murder. As Plaintiffs rightly acknowledge, some release orders would be appropriate only with conditions, such as home detention or lesser forms of supervision. And those conditions can only be imposed with resources (*e.g*., electronic monitors) and personnel, who are both limited in supply and also subject to the same social distancing imperatives as everyone else.

The imperative of individualized determinations, **[*51]** recognized by both sides in this case, makes this case inappropriate for class treatment. Each putative class member comes with a unique situation—different crimes, sentences,

outdates, disciplinary histories, age, medical history, places of incarceration, proximity to infected inmates, availability of a home landing spot, likelihood of transmitting the virus to someone at home detention, likelihood of violation or recidivism, and danger to the community. As Plaintiffs point out, commonality "does not require perfect uniformity." [28, at 46 (citing cases).] But it does require more uniformity that these Plaintiffs would have on the only matter "apt to drive the resolution of the litigation" (*Wal-Mart, 564 U.S. at 350*)—namely, which class members should actually be given a furlough? And any attempt to use the class device even to formulate standards is destined to fail, because those standards largely are governed by the various state statutes authorizing different forms of release, which then are subject to wide discretion in their application.

Plaintiffs' own plan underscores that they are seeking a highly individualized, inmate-by-inmate form of relief. See Plaintiffs' Draft Proposed Remedial Plan Related **[*52]** to their Request for a Temporary Restraining Order/Preliminary Injunction [24-1]. Plaintiffs want the IDOC to identify, "[w]ithin three days of the date of the order," all inmates who fall within the broad parameters of a list of medical conditions. *Id*. So, the IDOC would need to identify which of the 37,000 inmates have a medical condition that qualifies. Then, "[w]ithin 7 days of the date of this order," the IDOC "will use its discretion to transfer inmates" to medical furlough or home detention, unless the IDOC determines that it would poses a substantial danger to an identified person that outweighs the threat to the inmate's health from incarceration. *Id*. As Plaintiffs acknowledge, an "[a]ssessment of the safety risk must be based on an individualized analysis, and not categorical exclusions (except those excluded offenses for furlough or transfer under the law)." By its very nature, the process would entail a highly individualized inquiry that is ill-suited to class treatment. Simply put, there is no way to decide which inmates should stay, and which inmates should go, without diving into an inmate-specific inquiry.

Although the press of time does not permit deep reflection on **[*53]** the point, the Court can imagine that the analysis might be different if this were a more typical case. Class treatment might be appropriate where the Court has months or years to make decisions on individual aspects of a case—for example, an action arising out a common occurrence where liability would be established on a classwide basis, followed by individual damages assessments—or if the number of permutations were confined in some reasonable manner. But the permutations here are endless, as rarely, if ever, will any two plaintiffs be alike on the factors that matter at the point of decision. These differences are so vast and fundamental that class treatment, especially in the compressed time frame that would allow for effective relief at the height of the pandemic in Illinois, is completely unworkable.

5. Federalism and Separation of Powers Concerns

Plaintiffs' motion also raises serious concerns under core principles of federalism and the separation of powers, especially given their request for sweeping relief in the form of a mandatory injunction. See *Missouri v. Jenkins, 495 U.S. 33, 51, 110 S. Ct. 1651, 109 L. Ed. 2d 31 (1990)* ("[O]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and **[*54]** function of local government institutions."). The Supreme Court repeatedly has cautioned that federal courts must tread lightly when it comes to questions of managing prisons, particularly state prisons. The Court has gone so far as to opine that "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of prisons." *Preiser, 411 U.S. at 492-92*; see also *Turner v. Safley, 482 U.S. 78, 85, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)* ("[W]here a state penal system is involved, federal courts have * * * additional reason to accord deference to the appropriate prison authorities."); *Meachum v. Fano, 427 U.S. 215, 229, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976)* ("Federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States.").

There are serious separation of powers concerns, too, because running and overseeing prisons is traditionally the province of the executive and legislative branches. See *Turner, 482 U.S. at 84-85* ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been **[*55]** committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint."). The judiciary is ill-equipped to manage decisions about how best to manage any inmate population—let alone a statewide population of tens of thousands of people scattered across more than a dozen facilities. And the concern about institutional competence is especially great where, as here, there is an ongoing, fast-moving public health emergency.

It is no accident that the federal judiciary only rarely intrudes into the management of state prisons, and only once in history has actually ordered the release of prisoners on a scale anywhere near what Plaintiffs hope to accomplish through this litigation. And in that instance, inmates were released only after a painstakingly long process, informed by voluminous expert testimony and a weeks-long trial. This is

why the Supreme Court too has noted how "ill equipped" the courts are to deal with the "complex and intractable" problems of prisons and remarked that "[j]udicial recognition of that fact reflects no more than a healthy sense of realism." *Rhodes v. Chapman, 452 U.S. 337, 101 S. Ct. 2392, 2401 n.16, 69 L. Ed. 2d 59 (1981)*.

Plaintiffs insist that they "do not seek to place IDOC under the supervision **[*56]** of this Court." [24, at 12.] But they do intend to place the Court squarely in the middle of refereeing whose plan can best ensure release of inmates and on what conditions. As Plaintiffs note, if their proposal is not agreeable to Defendants, they "are free to proffer other plans to the Court." [*Id*. at 13.] In saying that the Court should hesitate before venturing into such an arrangement, the Court does not mean to say it never is appropriate. *Plata* holds otherwise. But here, and now, even if Plaintiffs could establish a right to the relief they want—and they cannot for reasons stated above (*Section 3626(a)(3)*) and below (the absence of a likelihood of success on the merits)—any effort for the Court to insert itself into this process likely would be ineffectual in dealing with the actual situation at hand. The statistical experts on whose work both the federal and state governments have relied in shaping their expectations estimate that the peak for the current wave of COVID-19 will hit in Illinois within the next few days, and that the number of deaths and the need for invasive medical equipment will decline rapidly in the weeks that follow. See Institute for Health Metrics and Evaluation, University of Washington **[*57]** Medicine, "COVID-19 projections assuming full social distancing through May 2020," available at https://covid19.healthdata.org/united-states-of-america/illinois (last visited Apr. 10, 2020). To be sure, for the reasons acknowledged above, the prison environment presents special challenges and may not bend to the same curve as the rest of the state collectively. Yet today's information shows that only one IDOC facility has more that ten confirmed cases, and IDOC has in place measures to deal with suspected and confirmed cases within its facilities and to limit the chance of the virus being brought into the facility by outsiders. By the time the Court could develop even a partially-informed plan for dealing with an infectious disease in the prison system, the current wave likely will have passed.[13]

Finally, there are potential separation of powers problems, too, with forcing the executive branch to exercise its discretion in a particular way. Here, Plaintiffs want this Court to direct—or, at a minimum, strongly influence—the Governor and an administrative agency to make discretionary decisions under state law to grant a medical furlough or a home detention. See *730 ILCS 5/3-11-1(a)(2)* (providing that the IDOC **[*58]** "may" grant a 14-day medical furlough); *730 ILCS 5/5-8A-3(d)* (providing that certain inmates "may" be placed in home detention under certain conditions); *730 ILCS 5/5-8A-3(e)* (same). Just as the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case," *United States v. Nixon, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)*, so too the executive branch has the discretion to decide whether to end incarceration early.

6. The Merits

In the interest of completeness—and in the event that any or all of the foregoing analysis is incorrect—the Court now turns to the applicable factors for considering a request for preliminary injunctive relief on the merits. As noted at the outset, "[i]n the first phase, the party seeking a preliminary injunction must make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits." *Turnell, 796 F.3d at 661-62*. If the movant makes the required threshold showing, then the court moves on to the second stage and considers: "(4) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving **[*59]** party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties," *i.e*., the public interest. *Id. at 662*. The court must pay "particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter, 555 U.S. at 24*.

As a concession to the press of time, the Court will move directly to the third part of the first phase analysis, for it is sufficient to end the inquiry. As explained below, Plaintiffs cannot show a reasonable likelihood of success on the merits on either of their substantive claims.

a. Likelihood of success on the merits

To state a claim under *§ 1983*, a plaintiff must show: (1) his constitutional rights were violated (2) by a person acting under color of state law. *Reynolds v. Jamison, 488 F.3d 756, 764 (7th Cir. 2007)*. Plaintiffs advance two claims under the *Eighth Amendment* and the ADA. Defendants plainly are state

[13] The Court is aware that experts have warned of a possible second (or third) wave, perhaps in the late fall or early winter when the normal flu season arrives. Nothing in today's ruling forecloses a later request for relief based on future circumstances.

actors, so the only question on the table is whether Plaintiffs' constitutional rights have been violated—or, more precisely, whether Plaintiffs have a reasonable chance of showing that they have been.

i. *Eighth Amendment* claim

In cases involving the conditions of confinement in a prison, two elements are required to establish a violation of the *Eighth Amendment's* prohibition against cruel **[*60]** and unusual punishment: "first, an objective showing that the conditions are sufficiently serious—*i.e.*, that they deny the inmate the minimal civilized measure of life's necessities creating an excessive risk to the inmate's health and safety—and second, a subjective showing of a defendant's culpable state of mind." *Isby v. Brown, 856 F.3d 508, 521 (7th Cir. 2017)* (internal citations and quotation marks omitted). The culpable mental state required to state a claim under the *Eighth Amendment* is "one of deliberate indifference to inmate health and safety." *Daugherty v. Page, 906 F.3d 606, 611 (7th Cir. 2018)* (quoting *Haywood v. Hathaway, 842 F.3d 1026, 1031 (7th Cir. 2016))* (internal quotation marks omitted).

Again, the analysis can be truncated, because nobody contests the serious risk that COVID-19 poses to all inmates and prison staff, and even more so to the most vulnerable inmates like those who comprise the two subclasses encompassed within the instant motion. Likewise, nobody contests Defendants' knowledge of this grave situation. The lead Defendant, Governor Pritzker, has repeatedly made reference to the unique risks faced by incarcerated individuals in his daily press briefings. So, deliberate indifference is the whole ball game on the merits of Plaintiffs' *Eighth Amendment* claim.

Deliberate indifference, as the Seventh Circuit has explained, imposes a "high hurdle," **[*61]** for it requires a showing "approaching total unconcern for the prisoner's welfare." *Rosario v. Brawn, 670 F.3d 816, 821 (7th Cir. 2012)* (internal quotations and citation omitted). Neither "negligence [n]or even gross negligence is enough; the conduct must be reckless in the criminal sense." *Lee v. Young, 533 F.3d 505, 509 (7th Cir. 2008)*. And, given the constantly shifting parameters and guidance regarding how to combat a previously little known virus, it is worth pointing out that "the mere failure * * * to choose the best course of action does not amount to a constitutional violation." *Peate v. McCann, 294 F.3d 879, 882 (7th Cir. 2002)*.

Under this standard, Plaintiffs have no chance of success. Defendants have come forward with a lengthy list of the actions they have taken to protect IDOC inmates. Some are designed to protect inmates in the prison environment; others to consider release under several different programs. On an almost daily basis, the Governor and/or the Department have expanded or modified their procedures, including earlier this week through an executive order making it easier for the Director to approve furloughs. Plaintiffs acknowledge that Defendants "are taking many actions on the list." [24, at 1.] And the numbers prove it—as 644 inmates have been released since March 2. [36, at 2.]

Plaintiffs' complaint **[*62]** is that Defendants "are simply not moving quickly or broadly enough," and that "the Court's intervention is necessary to prod the defendants to act more quickly." [24, at 1-2.] Setting aside the concerns raised above whether judicial intervention would be effective—probably not in the short term; perhaps in the long term—objections about the speed or scope of action and suggestions for altering it through a "prod" do not support either half of the phrase "deliberate indifference." Clearly Defendants are trying, very hard, to protect inmates against the virus and to treat those who have contracted it. The record simply does not support any suggestion that Defendants have turned the kind of blind eye and deaf ear to a known problem that would indicate "total unconcern" for the inmates' welfare. *Rosario, 670 F.3d at 821*. Nor would the record support any claim that Defendants lack a plan for implementing exactly what Plaintiffs have requested—individualized decisions on release through a panoply of vehicles guided by administrative discretion. It may not be the plan that Plaintiffs think best; it may not even be the plan that the Court would choose, if it were sufficiently informed to offer an opinion on the **[*63]** subject. But the *Eighth Amendment* does not afford litigants and courts an avenue for *de novo* review of the decisions of prison officials, and the actions of Defendants here in the face of the COVID-19 outbreak easily pass constitutional muster.

ii. ADA claim

Title II of the ADA prohibits public entities from discriminating against qualified individuals with disabilities by depriving them of opportunity to participate in the services, programs, or activities of the public entity because of their disabilities. *42 U.S.C. § 12132*. Title II of the ADA applies to prisons, as "[s]tate prisons fall squarely within the statutory definition of "public entity" under the ADA. *Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 210, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998)*. To make out a claim under Title II of the ADA, Plaintiffs must show that: (1) each Plaintiff is a "qualified individual with a disability;" (2) Defendants denied Plaintiffs "the benefits of the services, programs, or activities of a public entity;" and (3) Plaintiffs

were discriminated against "by reason of" their disabilities. *Love v. Westville Corr. Ctr., 103 F.3d 558, 560 (7th Cir. 1996)* (quoting *42 U.S.C. § 12132*). Plaintiffs may establish discrimination in one of three ways: "(1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's **[*64]** rule disproportionally impacts disabled people." *Washington v. Ind. High Sch. Athletic Ass'n, Inc., 181 F.3d 840, 847 (7th Cir. 1999)*.

Here, there is no allegation of intentional discrimination on the basis of disability—*i.e.*, that Defendants have singled out disabled inmates and excluded them from consideration for release. And nothing on the face of the many vehicles identified in Defendants' brief for effectuating release even mentions disabilities, much less bars disabled inmates from accessing them. As Plaintiffs recognize, all decisions on release—under the furlough program that is the focus for subclasses 1 and 2 and otherwise—must be made on an individualized basis and subject to the exercise of discretion. Nothing in the record supports the notion that any member of the proposed class, including one who is a qualified individual with a disability, has been denied the reasonable modification of consideration for release—which Plaintiffs now concede is the most they can ask for. Nor is there any basis for concluding that the discretionary decisions on whom to release (and not to release) have a disproportionate impact on disabled inmates, especially when one considers the large number of non-disabled inmates who also may have strong claims to priority for release **[*65]** on account of their susceptibility to COVID-19, such as elderly inmates. In short, Plaintiffs do not have a reasonable likelihood of success under any of the three ways of establishing an ADA discrimination claim.[14]

b. Second stage factors

Having concluded that Plaintiffs do not have a reasonable likelihood of success on either of their *Section 1983* claims, the Court need not move on to the "second stage" of the TRO/preliminary injunction analysis. Nevertheless—and very briefly—the answer to the question "to release or not to release" is by no means obvious. Setting aside Stateville, the current rate of incidence of COVID-19 infection inside the IDOC is mercifully low, and the counties in which the facilities housing the named Plaintiffs (apart from Will) are far less densely populated than the urban areas in which the virus is more prevalent. To the extent that members of the subclasses would be released to homes in those areas, they may have a similar risk of contracting the virus whether they remain in custody or are released in the near future.

The final factor in the "second stage," the public interest, also cuts both ways. As Plaintiffs stress, the public interest surely is served by **[*66]** avoiding widespread outbreaks of COVID-19 infection, and prison environments present a heightened risk of such outbreaks occurring, as evidenced at Stateville and the Cook County Jail. These are good reasons for Defendants to work hard to reduce the prison population, and especially to remove the highest-risk inmates, either though outright release or transfer to some other location while still in custody, provided that doing so is consistent with the public interest. But every release order carries with it some risk to the rest of the community. Has the inmate been exposed to the virus while in custody? Does another vulnerable person—perhaps an 80-year old mother with emphysema—live at the residence where the inmate will be released? Does the inmate have a history of mental instability or domestic violence? Are there adequate safeguards—monitoring or supervision—for releasees who are both vulnerable and dangerous? How does the increased activity associated with release orders in the quantities sought by Plaintiffs comport with the mandate for social distancing? Finally, as alluded to above, the public interest also commands respect for federalism and comity, which means that courts **[*67]** must approach the entire enterprise of federal judicial intrusion into the core activities of the state cautiously and with humility. This is not to say that intrusion would not be justified if the state government sat silently during a pandemic; if that were the case, the Court would be prepared to request *sua sponte* the formation of a three-judge court to take up Plaintiffs' complaint. But the absence of a plausible case on the merits and doubts about the balancing of the harms and public interest reinforce the decision to deny injunctive relief at this time.

Other compelling public interest considerations come into play too. Plaintiffs seek a process that could result in the release of at least 12,000 inmates. That is almost one-third of the prison population in Illinois. See Cmplt. at ¶¶ 1, 105. All of them are incarcerated because a jury convicted them of committing crimes, including some of the most serious crimes

---

[14] Plaintiffs also have no plausible allegations that ADA-qualified inmates have been discriminated against *because of* their disabilities. As noted above, review of the numerous vehicles that Defendants have identified and/or that are authorized by statute reveals none that singles out disabled persons for discrimination. To the contrary, it is likely that the programs in place will have a disparate impact in their favor, as disabled individuals are more likely to be able to demonstrate a need for the services that justify a medical furlough. The fact that disabled persons may be more susceptible to contract or suffer serious consequences from COVID-19 is not disputed, but that disparate impact is not a consequence of "Defendant's rule" or any action by Defendants. As explained above, the "rule" is individual, discretionary decisions on eligibility for release.

against our community. Many of them are violent offenders. Compelling a process to potentially release thousands of inmates on an expedited basis could pose a serious threat to public safety and welfare. The risk of recidivism comes into play, as do concerns about victims' **[*68]** rights. The question is not simply what is best for the inmates — the public has vital interests at stake, too. See Brief of *Amicus Curiae* City of Chicago in *Mays v. Dart*, Case No. 20-cv-2134, Docket Entry [45-1], at 2 (submitted on April 9, 2020).

D. Petition for Writs of Habeas Corpus

As referenced above, Plaintiffs (or, in this context, Petitioners) also have brought a habeas petition under *28 U.S.C. § 2254* arguing that Respondent is "violating Petitioners' *Eighth Amendment* rights by continuing to incarcerate them in conditions where it is virtually impossible to take steps to prevent transmission of an infectious disease that will prove deadly because of Petitioners' vulnerable condition and/or age." *Jeffreys*, [1, at ¶ 124].

Prior to filing a habeas petition in federal court, a petitioner seeking relief from state custody must exhaust available state remedies, which means that the petitioner has "fully and fairly presented his claims to the state appellate courts, thus giving the state courts a meaningful opportunity to consider the substance of the claims that he later presents in his federal challenge." *Bintz v. Bertrand, 403 F.3d 859, 863 (7th Cir. 2005)*; see also *28 U.S.C. § 2254(b)*, *(c)*; *O'Sullivan v. Boerckel, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999)*. This exhaustion requirement "serves an interest in federal-state comity by giving state courts **[*69]** the first opportunity to address and correct potential violations of a prisoner's federal rights." *Perruquet v. Briley, 390 F.3d 505, 513 (7th Cir .2004)* (citing *Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1972))*. It requires the petitioner to assert each of his or her federal claims through one complete round of state-court review, either on direct appeal of his or her conviction or in post-conviction proceedings, before proceeding to federal court. See *O'Sullivan, 526 U.S. at 845*; see also *Lewis v. Sternes, 390 F.3d 1019, 1025 (7th Cir. 2004)*. This includes presentation of the claims to appellate courts where review is discretionary and such review is part of the ordinary appellate procedure in the State. *O'Sullivan, 526 U.S. at 847* (requiring a petitioner to present his claims to the Illinois Supreme Court in a petition for leave to file an appeal even though that Court's review was discretionary).

To fairly present a claim in state court, the petitioner must include both the operative facts and the controlling legal principles on which the claim is based, and must also alert the state court that the claim raised is based on federal law. *Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001)*; *Sweeney v. Carter, 361 F.3d 327, 332 (7th Cir. 2004)*. If the federal court reviewing the habeas petition is not satisfied that the petitioner gave the state courts "a meaningful opportunity to pass upon the substance of the claims [ ] presented in federal court," the Court cannot reach the merits. *Chambers, 264 F.3d at 737*; see **[*70]** also *Sweeney, 361 F.3d at 332*.

"Where state remedies remain available to a habeas petitioner who has not fairly presented his constitutional claim(s) to the state courts, the exhaustion doctrine precludes a federal court from granting him relief on that claim: although a federal court now has the option of denying the claim on its merits, *28 U.S.C. § 2254(d) (2)*, it must otherwise dismiss his habeas petition without prejudice so that the petitioner may return to state court in order to litigate the claim(s)." *Perruquet, 390 F.3d at 514* (citing *Castille v. Peoples, 489 U.S. 346, 349, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989)*; *Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982))*; see also *28 U.S.C. § 2254(b)(1) (A)*; *Coleman v. Thompson, 501 U.S. 722, 731, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)*; *Dressler v. McCaughtry, 238 F.3d 908, 912 (7th Cir. 2001)*. However, where a petitioner already has pursued state court remedies (but without presenting the federal claims in state court) and there is no longer any state corrective process available to him or her, "it is not the exhaustion doctrine that stands in the path of habeas relief, see *28 U.S.C. § 2254(b)(1)(B)(i)*, but rather the separate but related doctrine of procedural default." *Perruquet, 390 F.3d at 514*.

It is undisputed that Petitioners have not complied with the exhaustion requirement. They did institute a direct action in the Illinois Supreme Court. Had that Court exercised its authority to take action on these matters, various abstention doctrines would have come into play and might have compelled (or at least counseled) this Court to stand **[*71]** down. The Court is not aware of any action that the Illinois Supreme Court has taken. Petitioners do not contend that the filing of their direct action to the state High Court satisfies the exhaustion doctrine. Rather, they submit that exhaustion should be excused because of the unavailability of the Circuit Court of Cook County, where Petitioners apparently would have preferred to file within the state court system.

As an initial matter, that may not have been a valid choice in any event, for none of the Petitioners is housed in a facility within Cook County. In general, a habeas petitioner must bring suit against the warden of the facility in which he is detained. See, e.g., *Rumsfeld v. Padilla, 542 U.S. 426, 434-35, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004)*. As the Supreme Court has explained, "[t]he federal habeas statute straightforwardly provides that the proper respondent to a

habeas petition is 'the person who has custody over [the petitioner]'" and "[t]he consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition." *Id.* (citing *28 U.S.C. § 2242*); see also *W.S.R. v. Sessions, 318 F. Supp. 3d 1116, 1123 (N.D. Ill. 2018)* ("the typical habeas petition requires that the warden of the custodial facility, rather than supervisory government **[*72]** officials, be named as the respondents"); *Payne v. Illinois, 485 F. Supp. 2d 952, 952 (N.D. Ill. 2007)* ("the proper habeas respondent is neither a disembodied governmental unit nor the "people" who are collectively the constituents of that unit, but rather the person who has custody over the habeas petitioner"). The presence of multiple petitioners may have afforded a choice in selecting a proper respondent, but it is doubtful that someone other than a warden of a facility housing a petitioner should have been named, for the general rule is that a petitioner may not sue the director of the jail system. See, *e.g.*, *Bridges v. Chambers, 425 F.3d 1048, 1049 (7th Cir. 2005)*. Petitioners apparently sued Respondent Jeffreys, the IDOC Director, because they are proceeding on a representative theory, for which there is some support in Supreme Court and Seventh Circuit law. *Bijeol v. Benson, 513 F.2d 965, 968 (7th Cir. 1975)* (although *Rule 23* "does not apply to habeas corpus proceedings," "a representative procedure analogous to the class action provided for in *Rule 23* may be appropriate in a habeas corpus action under some circumstances) (citing *Fed. R. Civ. P. 23*); compare *Jennings v. Rodriguez, 138 S. Ct. 830, 858 n.7, 200 L. Ed. 2d 122 (U.S. 2018)* (Thomas, J., concurring in part) ("This Court has never addressed whether habeas relief can be pursued in a class action." (citing *Schall v. Martin, 467 U.S. 253, 261, n. 10, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984)* (reserving this question)).[15]

There is no need to resolve the question of the proper **[*73]** respondent, because Plaintiffs have not made a satisfactory showing that the state court system was not every bit as available as the federal courts, if not more so. Assuming that filing in Cook County would have been proper, "Cook County's courts are still available for emergency matters," as Judge Kennelly found earlier this week. *Mays v. Dart, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *5 (N.D. Ill. Apr. 9, 2020)*. Petitioners have made no effort to establish that the trial courts in the numerous other counties where they are housed are unavailable and were so last week when this action was filed. Stateville Correctional Center, where the COVID-19 crisis was most acute within the IDOC system, is located less than five miles from the Will County Courthouse in Joliet, where the Circuit Court for the Twelfth Judicial Circuit sits. Under that court's operative Administrative Order No. 2020-08, effective from March 18, 2020 through April 30, 2020, "[w]ith the exception of Branch Courts, all court facilities will be open normal business hours." Administrative Order No. 2020-08, available at https://www.circuitclerkofwillcounty.com/Portals/0/Covid%20AO%2020-08.pdf (last checked Apr. 10, 2020). Within the Civil Division, where this matter likely would have been assigned, **[*74]** the General Order provides that "[m]atters determined by the Court to be of an emergency nature will be heard in-person, by telephone conference, or by videoconference if possible." *Id.* ¶ 6A.

To be sure, exhaustion requirements can (and should) be waived when relief is truly unavailable. But waiving them here—when state courts clearly were available at least in the two counties identified above and for all Petitioners have shown, every other county and circuit as well—would turn the habeas system upside down. Accordingly, the Court denies Petitioners' request for expedited release pursuant to the issuance of writs of habeas corpus.[16]

* * * *

In closing, the Court can do no better than to quote the three-judge panel from California before whom a group of plaintiffs in a similarly hard-hit state presented a claim seeking release (or relocation) due to the inability to observe social distancing during the COVID-19 pandemic: "We emphasize that Defendants have broad authority to voluntarily take steps that may prevent the life-threatening spread of COVID-19 within their prisons, and we recognize the deference that is due to prison authorities to determine which additional measures must be taken **[*75]** to avoid catastrophic results. * * * Defendants have represented to us that they are continuously

---

[15] Although the Court denies habeas relief based on Petitioners' failure to exhaust their available state remedies, it adds that for all of the reasons stated above (see 30-33, *supra*), this habeas action would be no more suitable for representative or class treatment than the *Section 1983* lawsuit is, as release determinations must be made on an individual basis regardless of the vehicle for considering and effectuating them.

[16] Because Petitioners asked for expedition, which was justified in the circumstances, the Court is reluctant to dismiss the Petition altogether without allowing Petitioners time for reflection on the ruling and the basis for it. However, following Judge Kennelly's approach in *Mays, 2020 U.S. Dist. LEXIS 62326, 2020 WL 1812381, at *6 n.5*, the Court is willing to consider entering a final order of dismissal (or any other viable approach of allowing Petitioners to seek further review) upon the filing of a motion requesting such relief. Any such motion should be presented to the undersigned judge in his capacity as emergency judge, although the motion may be referred to the assigned judge after filing.

evaluating what more they can do to protect the inmates within their prisons, and we urge them to leave no stone unturned. It is likely that only through significant effort will California's prisons be able to minimize the spread of COVID-19." *Coleman & Plata, 2020 U.S. Dist. LEXIS 62575, 2020 WL 1675775, at *8*. So, too, here in Illinois.

IV. Conclusion

For the reasons set forth above, Plaintiffs' motion for temporary restraining order and preliminary injunction in *Money v. Pritzker*, Case No. 20-cv-2093 [9] is denied. Plaintiffs' motions for leave to file oversized brief [5] and for expedited treatment [12] in that same case are granted. Defendants' motion for leave to file sur-reply in that case [32] is granted. Petitioners' motion for expedited treatment in *Money v. Jeffreys*, Case No. 20-cv-2094 [3] is granted, but the Court denies Petitioners' request for expedited release. The petition [1] remains open on the docket, subject to further action by the parties and the judges, both assigned and emergency (see above). No further status hearings will be set at this time by the emergency judge.

Dated: April 10, 2020

/s/ Robert M. Dow, Jr.

Robert M. Dow, Jr.

United **[*76]** States District Judge

End of Document

Abrams, et al. v. Chapman
USDC-ED No. 2:20-cv-11053
Honorable Mark A. Goldsmith
Magistrate Judge R. Steven Whalen

EXHIBIT BB

Gulley v. Ogondo

United States District Court for the District of Connecticut

April 13, 2020, Decided; April 13, 2020, Filed

Nos. 3:19-cv-612 (SRU); 3:18-cv-858 (SRU); 3:18-cv-941 (SRU); 3:19-cv-310 (SRU)

Reporter
2020 U.S. Dist. LEXIS 64193 *

CHAZ GULLEY, Plaintiff, v. OGONDO, et al., MULLIGAN, et al., LIMMER, et al., LIZON, et al., Defendants.

Prior History: *Gulley v. Limmer, 2018 U.S. Dist. LEXIS 122334 (D. Conn., July 23, 2018)*
Gulley v. Ogando, 2019 U.S. Dist. LEXIS 100555 (D. Conn., June 17, 2019)

Core Terms

confinement, excessive force, motions, merits, deliberate indifference, preliminary injunction, asserting, preliminary injunctive relief, immediate release, injunction, requesting, temporary restraining order, irreparable harm, state prisoner, first degree, give rise, incarcerated, retaliation, Correction, unrelated, sentence, reasons, Inmate, movant, prison, cases, http

Counsel: **[*1]** Chaz O. Gulley, Plaintiff (3:18-cv-00858-SRU), Pro se, Uncasville, CT.

For Cashman, Correction Officer, Rodriquez, Correction Officer, Gonzalez, Correction Officer, Defendants (3:18-cv-00858-SRU): James W. Donohue, LEAD ATTORNEY, Office of the Attorney General, Hartford, CT; Edward Wilson, Jr, Office of the Attorney General--Sherman, Hartford, CT.

Chaz O. Gulley, Plaintiff (3:18-cv-00941-SRU), Pro se, Uncasville, CT.

For Limmer, L.T., Sullivan, C/O, Defendant (3:18-cv-00941-SRU): James Michael Belforti, Office of the Attorney General, Hartford, CT.

For Chaz O. Gulley, Plaintiff (3:19-cv-00310-SRU): Gregory John Ligelis, LEAD ATTORNEY, Robinson & Cole, Stamford, CT.

For Lizon, Captain, Blackstock, L.T., Caron, C/O, Severance, C/O, Ellen Durko, Medical Nurse, Victoria Scruggs, Medical Nurse, Defendants (3:19-cv-00310-SRU): Zenobia Gertrude Graham-Days, LEAD ATTORNEY, Office of the Attorney General--Sherman, Hartford, CT.

Chaz O. Gulley, Plaintiff (3:19-cv-00612-SRU), Pro se, Uncasville, CT.

For Ogando, Captain, Mulligan, Warden, Delpeschio, L.T., Harris, C/O, Annear, C/O, Baez, C/O, Sullivan, C/O, Brown, C/O (Mrs.), Correction Officer Roach, Deputy Warden, Brito, C/O, Defendants (3:19-cv-00612-SRU): **[*2]** James W. Donohue, LEAD ATTORNEY, Office of the Attorney General, Hartford, CT.

Judges: Stefan R. Underhill, United States District Judge.

Opinion by: Stefan R. Underhill

Opinion

RULING ON MOTIONS FOR RELEASE

Chaz Gulley, currently confined at Corrigan-Radgowski Correctional Center, filed the instant motions seeking immediate release from confinement. For the reasons that follow, the motions are **denied**.

I. Background

On June 18, 2012, Gulley pled guilty to assault in the first degree, in violation of Conn. Gen. Stat. § 53-59(a)(1) and attempted armed robbery in the first degree, in violation of Conn. Gen. Stat. § 53-134(a)(2). *Chaz Gulley*, Criminal/Motor Vehicle Conviction Case Detail, STATE OF CT JUDICIAL BRANCH, https://www.jud2.ct.gov. He was sentenced to twenty years of imprisonment, execution suspended after ten years, and five years of probation. *Id*. His sentence ends on May 18, 2020. *Chaz Gulley*, Inmate Information, CT STATE DEP'T OF CORR., http://www.ctinmateinfo.state.ct.us.

On March 26, 2020, Gulley filed motions for a preliminary injunction and/or temporary restraining order in four of his pending *42 U.S.C § 1983* cases, requesting early and immediate release from prison because of the risk of contracting Coronavirus Disease-2019 ("COVID-19") while incarcerated.[1] He posits that, if **[*3]** he were "to catch the virus, it [would] most definitely be from a correctional officer while incarcerated." *See, e.g*., Mot., Doc. No. 40, *Gulley v. Ogando, et al*., 19-cv-612, at 1-2. The defendants filed objections on April 1, 2020.

II. Discussion

The defendants first argue that I cannot order Gulley's release because the cases at bar are civil rights actions pursuant to *42 U.S.C § 1983*. I agree.

As a state prisoner seeking relief in federal court, Gulley can challenge the duration of his confinement only by petition for writ of habeas.[2] *Preiser v. Rodriguez, 411 U.S. 475, 487-90, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973)* (holding that a state prisoner challenging the length of confinement and requesting immediate release must do so by a habeas petition, not by a *section 1983* suit); *Murphy v. Travis, 36 F. App'x 679, 681 (2d Cir. 2002)* (holding that a state prisoner's request for injunctive relief in a *section 1983* case was "tantamount to seeking relief from confinement and is thus barred by the Supreme Court's decision in *Preisier*"). Accordingly, I do not have the authority to grant the relief that Gulley seeks.

Even if Gulley was not barred from requesting release in the present actions, his motion for a preliminary injunction would nonetheless fail on the merits. "A party seeking a preliminary injunction ordinarily must show: (1) a likelihood **[*4]** of irreparable harm in the absence of the injunction; and (2) either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in the movant's favor." *Doninger v. Niehoff, 527 F.3d 41, 47 (2d Cir. 2008)*. "When the movant seeks a 'mandatory' injunction—that is, as in this case, an injunction that will alter rather than maintain the status quo—she must meet the more rigorous standard of demonstrating a 'clear' or 'substantial' likelihood of success on the merits." *Id*. (internal citations omitted).

Significantly, "[t]o prevail on a motion for preliminary injunctive relief, the moving party must establish a relationship between the injury claimed in the motion and the conduct giving rise to the complaint." *Vega v. Lantz, 2006 U.S. Dist. LEXIS 65477, 2006 WL 2642416, at *2 (D. Conn. Sept. 14, 2006)* (internal citations omitted); *see also Taylor v. Rowland, 2004 U.S. Dist. LEXIS 1556, 2004 WL 231453, at *2-*3 (D. Conn. Feb. 2, 2004)* (concluding that a motion for preliminary injunctive relief was not proper because it was "unrelated to the issues in the amended complaint"). That is because preliminary injunctive relief is intended to "prevent irreparable harm until the court has an opportunity to rule on the lawsuits merits." *Taylor, 2004 U.S. Dist. LEXIS 1556, 2004 WL 231453, at *2* (citing *Devose v. Herrington, 42 F.3d 470, 471 (8th Cir. 1994)*).

Further, the defendants must be capable of providing the relief sought **[*5]** by the plaintiff. *Wells v. Jacobs, 2004 U.S. Dist. LEXIS 30854, 2004 WL 1146028, at *2 (W.D.N.Y. Mar. 22,*

---

[1] Because the motions filed in each case are identical, and because my analysis of the issues presented overlaps across the cases, this opinion addresses each motion.

[2] I note that, as amended by the First Step Act of 2019, *18 U.S.C. § 3582* authorizes courts to reduce a term of imprisonment if, after considering the factors set forth in *section 3553(a)*, it concludes, in relevant part, that "extraordinary and compelling reasons warrant such a reduction" and that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *18 U.S.C. § 3582(c)(1)(A)*. That relief, however, is available only to individuals incarcerated for federal offenses and thus cannot be granted here. *United States v. Rivernider, 2020 U.S. Dist. LEXIS 21292, 2020 WL 597393, at *2 (D. Conn. Feb. 7, 2020)* ("The First Step Act . . . modified the compassionate release statute to enable a *federal prisoner* to petition the sentencing court for a reduction in his sentence.") (emphasis added).

2004) (denying motion for temporary restraining order and preliminary injunction because none of the defendants could provide the plaintiff with the requested relief).

Here, the injury that Gulley now asserts—his continued confinement during the COVID-19 pandemic—is entirely unrelated to the conduct giving rise to his section 1983 complaints, which assert claims of excessive force, deliberate indifference, and retaliation, and challenge specific actions by various correctional staff and nurses. *Gulley v. Mulligan, et al.*, 18-cv-858 (D. Conn. May 22, 2018) (asserting Eighth Amendment excessive force and deliberate indifference claims); *Gulley v. Ogando, et al.*, 19-cv-612 (D. Conn. April 23, 2019) (asserting First Amendment retaliation and Eighth Amendment deliberate indifference and excessive force claims); *Gulley v. Limmer, et al.*, 19-cv-941 (D. Conn. June 7, 2018) (asserting Eighth Amendment excessive force claim); *Gulley v. Lizon, et al.*, 19-cv-310 (D. Conn. March 4, 2019) (asserting Eighth Amendment excessive force and deliberate indifference claims).

Moreover, as the defendants argue, they would not have the authority to release Gulley from prison even if I were to direct them to do so. Although Gulley claims that "the Commissioner of Correction has the authority **[*6]** to discharge, transfer or detain any inmate in the custody of corrections," *see, e.g.*, 19-cv-612, doc. no. 40, I do not have personal jurisdiction over the Commissioner because the Commissioner is not a defendant and has not been served in any of the actions at bar. *Wells, 2004 U.S. Dist. LEXIS 30854, 2004 WL 1146028, at *2 (W.D.N.Y. Mar. 22, 2004)*.

III. Conclusion

For all the foregoing reasons, I must **deny** Gulley's motions for release. Doc. No. 38, *Gulley*, 18-cv-858; Doc. No. 40, *Gulley*, 19-cv-612; Doc. No. 38, *Gulley*, 19-cv-941; Doc. No. 33, *Gulley*, 19-cv-310.

So ordered.

Dated at Bridgeport, Connecticut, this 13th day of April 2020.

/s/ STEFAN R. UNDERHILL

Stefan R. Underhill

United States District Judge