

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

**ELLIOTT ABRAMS**, et. al,

*Plaintiffs,*

-v-

**WILLIS CHAPMAN**, et. al,

*Defendants.*

Case No. 2:20-cv-11053

Hon. Mark A. Goldsmith

Ex. Mag. R. Steven Whalen

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**PLAINTIFFS' REPLY BRIEF  
TO DEFENDANTS' RESPONSE TO  
PLAINTIFFS' MOTION FOR AN EMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

## TABLE OF CONTENTS

|                                                                                                                                                                               |     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Table of Contents.....                                                                                                                                                        | ii  |
| Index of Authorities.....                                                                                                                                                     | iii |
| Concise Statement of Issues Presented.....                                                                                                                                    | iv  |
| Introduction.....                                                                                                                                                             | 1   |
| Supplemental Statement of Facts.....                                                                                                                                          | 1   |
| I.    Introduction.....                                                                                                                                                       | 1   |
| II.   Declarations of Experts                                                                                                                                                 |     |
| A. Supplemental Declaration of Dr. Adam Luring.....                                                                                                                           | 2   |
| B. Declaration of Paul Draus.....                                                                                                                                             | 3   |
| III.  Summaries of Statement of Facts.....                                                                                                                                    | 3   |
| A. Robert G. Cotton Correctional Facility (JCF) (Exhibit 2) .....                                                                                                             | 4   |
| B. Parnall Correctional Facility (SMT) (Exhibit 3) .....                                                                                                                      | 5   |
| C. Macomb Correctional Facility (MRF) (Exhibit 4) .....                                                                                                                       | 6   |
| D. Lakeland Correctional Facility (LCF) (Exhibit 5) .....                                                                                                                     | 7   |
| ARGUMENTS.....                                                                                                                                                                | 8   |
| I.    Contrary To Defendants’ Argument [I., PageID.1245-47], Plaintiffs Have Established A Factul And Legal Basis For This Court To Grant An Injunction.....                  | 8   |
| II.   Contrary To Defendants’ Argument [A.1, PageID.1247-50], Plaintiffs’ Claims For Injunctive Relief Is Not Barred By The Eleventh Amendment.....                           | 10  |
| III.  Contrary To Defendants’ Argument [I.A.1, PageID.1248-50], <i>Penhurst</i> Is Not Applicable On The Facts In This Lawsuit.....                                           | 12  |
| IV.   Contrary To Defendants’ Argument [I.A.2, PageID.1250-55], The Grievance Process Was “Unavailable” To The Plaintiffs.....                                                | 14  |
| V.    Contrary To Defendants’ Argument [I.A.3, PageID.1256-62], This Court Can Issue An Injunction If Defendants Is Subjecting Plaintiffs To Unconstitutional Conditions..... | 20  |
| VI.   Based On The Jurisdictional Pleadings In The Complaint, This Court Can’t Issue An Order For The Release Of Prisoners [I.A.4, PageID.1262-64] .....                      | 33  |

|                                                                                                                                                                 |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| VII. Contrary To Defendants’ Argument [B., PageID.1265-66], Plaintiffs Has Shown That They Will Suffer Irreparable Injury Absent This Court’s Intervention..... | 33 |
| VIII. Contrary To Defendants’ Argument [C., ECF No. PageID.1266-69], It Is In The Public Interest To Limit The Spread Of Covid-19 In Prisons.....               | 35 |
| IX. Conclusion.....                                                                                                                                             | 37 |

## INDEX OF AUTHORITIES

| Cases                                                                                                      | Page       |
|------------------------------------------------------------------------------------------------------------|------------|
| <i>Arias v. Decker</i> , 2020 WL 2306565, at *11 (S.D.N.Y. May 8, 2020).....                               | 36         |
| <i>Awshana v. Adducci</i> , ___ F. Supp. 3d ___,<br>2020 WL 1808906, at *8 (E.D. Mich. Apr. 9, 2020) ..... | 30         |
| <i>Banks v. Booth</i> , 2020 WL 1914896 at *8 (D.D.C. Apr. 19, 2020) .....                                 | 29, 30, 35 |
| <i>Basank v. Decker</i> , 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26, 2020) ....                             | 30, 35     |
| <i>Beerheide v. Zavaras</i> , 997 F. Supp. 1405, 1410 (D. Colo. 1998) 34                                   |            |
| <i>Brown v Plata</i> , 563 US 493, 510-11(2011) .....                                                      | 12, 21     |
| <i>Citizens United v. Fed. Election Comm’n</i> , 558 U.S. 310, 331 (2010) .....                            | 29         |
| <i>Cummings v. Klee</i> , 410 F. Supp. 3d 837, 844 (E.D. Mich. 2019) .....                                 | 27         |
| <i>Diaz v. Michigan Dep’t of Corr.</i> , 703 F.3d 956, 964 (6th Cir. 2013).....                            | 8          |
| <i>Does 8-10 v. Snyder</i> , 945 F.3d 951, 963 (6th Cir. 2019).....                                        | 16         |
| <i>Farmer v. Brennan</i> , 511 U.S. 825, 834 (1994).....                                                   | 22         |
| <i>Fiegal v. Bouchard</i> , 89 Fed.Appx. 970, 971 (6th Cir. 2004).....                                     | 18         |
| <i>Fofana v. Albence</i> , ___ F. Supp. 3d ___,<br>2020 WL 1873307, at *9 (E.D. Mich. Apr. 15, 2020).....  | 30         |

|                                                                                                                                                   |        |
|---------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>Foster v. Gueory</i> , 655 F.2d 1319, 1321–22 (D.C. Cir. 1981).....                                                                            | 19     |
| <i>Fraihat v. U.S. Imm. and Customs Enforcement</i> ,<br>5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020).....                             | 37     |
| <i>G &amp; V Lounge, Inc. v. Michigan Liquor Control Com’n</i> ,<br>23 F.3d 1071, 1079 (6th Cir. 1994).....                                       | 36     |
| <i>Hartman v. Duffey</i> , 88 F.3d 1232, 1235 (D.C. Cir. 1996).....                                                                               | 20     |
| <i>Hattie v. Hallock</i> , 8 F.Supp.2d 685, 689 (N.D. Ohio 1998).....                                                                             | 20     |
| <i>Jolly v. Coughlin</i> , 76 F.3d 468, 477 (2d Cir. 1996).....                                                                                   | 10     |
| <i>Jones v. El v Berge</i> , 164 F. Supp. 2d 1096, 1123 (W.D. Wis, 2001).....                                                                     | 34     |
| <i>Jones v. Texas Dep’t of Criminal Justice</i> ,<br>880 F.3d 756, 760 (5th Cir. 2018).....                                                       | 34     |
| <i>Jones v. Wolf</i> , ___ F. Supp. 3d ___,<br>2020 WL 1643857, at *12 (W.D.N.Y. Apr. 2, 2020).....                                               | 30     |
| <i>Lareau v. Manson</i> , 651 F.2d 96, 109 (2d Cir. 1981).....                                                                                    | 10     |
| <i>Malam v. Adducci</i> , 2020 WL 2468481 (E.D. Mich. May 12, 2020).....                                                                          | 26, 30 |
| <i>Martinez-Brooks v. Easter</i> ,<br>2020 WL 2405350, at *21–22 (D. Conn. May 12, 2020).....                                                     | 25     |
| <i>Mays v. Dart</i> , 2020 WL 1987007, at *34 (N.D. Ill. Apr. 27, 2020).....                                                                      | 35     |
| <i>McCarthy v. Place</i> , 313 Fed.Appx. 810, 814 (6th Cir. 2008).....                                                                            | 27     |
| <i>Metro. Detroit Plumbing &amp; Mech. Contractors Ass’n v. Dep’t of Health, Ed. &amp; Welfare</i> , 418 F. Supp. 585, 586 (E.D. Mich. 1976)..... | 34     |
| <i>Nader v. Blackwell</i> , 230 F.3d 833, 834 (6th Cir. 2000).....                                                                                | 9      |
| <i>Nashville, C. &amp; St. L. R. Co. v. Browning</i> , 310 U.S. 362, 369 (1940).....                                                              | 29     |

|                                                                                                                  |           |
|------------------------------------------------------------------------------------------------------------------|-----------|
| <i>Ne. Ohio Coal. v. Blackwell</i> , 467 F.3d 999, 1009 (6th Cir. 2006).....                                     | 9         |
| <i>Peatross v. City of Memphis</i> , 818 F.3d 233, 242 (6th Cir. 2016).....                                      | 29        |
| <i>Peoples v. Bauman</i> , 2017 WL 7050280, at *4 (6th Cir. Sept. 5, 2017).....                                  | 18        |
| <i>Pugh v. Caruso</i> , 2008 WL 1868990, at *1–2 (W.D. Mich. Apr. 24, 2008).....                                 | 18        |
| <i>Refunjol v. Adducci</i> , 2020 WL 1983077, at *5 (S.D. Ohio Apr. 27, 2020).....                               | 37        |
| <i>Rhinehart v. Scutt</i> , 894 F.3d 721, 737 (6th Cir. 2018).....                                               | 31        |
| <i>Rose v. Blake</i> , 136 S.Ct. 1850, 1858 (2016).....                                                          | 16, 17    |
| <i>S. Galzer’s Distribs. of Ohio, LLC v. Great Lakes Brewing Co.</i> ,<br>860 F.3d 844, 849 (6th Cir. 2017)..... | 9         |
| <i>Salami v. Rewerts</i> , 2020 WL 1316510, at *6 (W.D. Mich. Mar. 20, 2020)...                                  | 10, 20    |
| <i>Surles v. Andison</i> , 678 F.3d 452, 457 (6th Cir. 2012).....                                                | 15        |
| <i>Thomas v. City of Chattanooga</i> , 398 F.3d 426, 429 (6th Cir. 2005).....                                    | 29        |
| <i>United States v. Frost</i> ,<br>2020 WL 1899561, at *3 (E.D. Mich. Apr. 17, 2020).....                        | 26        |
| <i>Verizon Maryland, Inc.</i> , 535 U.S. 635, 645 (2002).....                                                    | 8, 13, 20 |
| <i>Virginia Office for Prot. &amp; Advocacy v. Stewart</i> ,<br>563 U.S. 247, 255 (2011).....                    | 8         |
| <i>Will v. Michigan Dept. of State Police</i> , 491 U.S. 58, 66 (1989).....                                      | 9         |
| <i>Wilson v. Williams</i> , – F.Supp.3d --,<br>2020 WL 1940882 at *14 (N.D. Ohio, April 22, 2020).....           | 32, 35    |
| <i>Will v. Michigan Dept. of State Police</i> , 491 U.S. 58, 66 (1989).....                                      | 9         |
| <i>Zacdydas v. Davis</i> , 533 U.S. 678, 697 (2001).....                                                         | 19        |

*Zaya v. Adducci*, 2020 WL 2487490, at \*2 (E.D. Mich. May 14, 2020).....36

*Zynda v Arwood*, 175 F Supp 3d 791, 800 (E.D. Mich. 2016).....12

**Statutue:**

42 U.S.C. § 1997e(a).....14

**Other Authorities:**

John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1013 n.99 (2008).....13

**CONCISE STATEMENT OF ISSUE PRESENTED**

Where MDOC’s has not implemented an effective “social distancing” and “testing” procedures, should this Court grant the request for a TRO and/or preliminary injunction?

## **SUPPLEMENTAL STATEMENT OF FACTS.**

### **I. Introduction**

Plaintiffs are seeking a temporary restraining order and permanent injunction immediately as to the issue of “**social positioning**” and “**testing**” because it is their position Defendants provided very little evidence that meaningful steps are being taken to implement effective “social distancing” and “testing.” As to the other issues raised in the complaint (ECF No. 1) and the motion (ECF No.7), this Court should find that Plaintiffs have stated a cause of action, issue an expedited discovery schedule as to those issues, refer this matter to the Magistrate Judge for a settlement conference as to those issues, and, if it cannot be settled, set an evidentiary hearing.<sup>1</sup>

### **II. Declaration of Experts:**

#### **A. Supplemental Declaration of Dr. Adam Luring (Exhibit 1).**

Dr. Luring first provided a declaration in this lawsuit that is attached to the motion for temporary restraining order and permanent injunction (ECF No. 22-26, PageID.1035-49). Based on the filing of the Response and some of its attachments, he has provided a Supplemental Declaration, *see* **Ex. 1**. In this Declaration it is

<sup>1</sup> After Plaintiffs’ counsel reviewed some reports provided to the Legislature by the MDOC, it became apparent that there are probably another 3. if not 4, prisons that are closed which could be opened. The total single room available in these facilities is probably over 2,000, if not 2,500, beds (ECF 1, PageID.39, para. 10). Plaintiffs’ counsel suggested opening either some or all of these prisons mentioned in the complaint and use their empty cells. There is likely a total of 4,000 – 5,000 cells that could be brought back online with the help of the National Guards.

against emphasized that “social distancing” is considered by the CDC as “the cornerstone” for infection control in these [prison] settings.” He goes on to provide his expert’s opinion as to “testing” and that the process MDOC is using will not be sufficient to bring the COVID-19 virus under control, especially since MDOC will not test its guards and staff.

A system of testing inmates just once will likely be insufficient to control an outbreak in a correctional facility. Absent repeat testing of inmates and/or testing of all guards and staff, it is possible for the virus to be re-introduced into a prison and spread among inmates and staff, regardless of the prior test result. A testing-based strategy for infection control must include testing of all guards and staff with likely repeat testing of inmates, guards, and staff. [Para. 2]

Dr. Luring then goes on to explain why cohorting will only work if certain procedures are applied. Nowhere in the Response or attached affidavits, there to, do Defendants describe a medically sufficient methods for cohorting.

As the incubation period for COVID19 is approximately 5-7 days, testing of individuals exposed to a known case should be performed between 7-14 days after exposure, or with the onset of symptoms (<https://www.idsociety.org/practice-guideline/covid-19-guideline-diagnostics/> ). Exposed individuals should be separated for 14 days before returning to the general population. [Para. 4]

Effective cohorting requires testing of staff and potentially having dedicated staff for “test positive” and “test negative” populations. If staff move back and forth between these groups, there is the potential for spread of the virus from the positive to the negative group. [Para. 5]

Dr. Luaring then discusses the shortcomings of antibody testing in the management of COVID-19 (Paragraph 7). It seems that MDOC is doing such



testing now and likely will seek to implement a system that is not medically approved.

Finally, the last two paragraphs of Dr. Laurant's declaration relates to statements made by Dr. McIntyre, the Chief Medical Officer for MDOC ([ECF No. 27-7] paragraphs 48-49), that lacks factual support and seems to be nothing more than uneducated statement to cover for MDOC.

### **B. Declaration of Paul Draus, PhD**

PhD Draus has worked as an Epidemiologist for a number of years. *See* attached Ex. 30. He is also familiar with the Michigan's prison system. In this Declaration, PhD Draus discusses the extensive need for testing that is required if the COVID-19 virus is to be contained. One of his recommendations is the testing of all guards if a successful containment plan is to be implemented. It is his opinion that testing only symptomatic individuals or suspected cases is not sufficient. He has also suggested that if social distancing cannot be achieved then universal testing must be implemented. He confirms that without ongoing testing, the prisons will not have a system that will protect inmates, guards, and the communities.

### **III. Summaries of Statement of Facts**

Plaintiffs will provide a condense summary of what the Warden from each of the four prisons are claiming that they are engaged in to control the COVID-19 pandemic and affidavits from inmates saying this is not factual or accurate.

**A. Robert G. Cotton Correctional Facility (JCF) (Exhibit 2)**

Social distancing at JCF is an oxymoron (Ex. 2 has attached numerous affidavits of prisoners confined at JCF)). Whether inmates are eating, recreating, sleeping, communicating with those on the outside, moving about the unit, or any other activity, they are within six feet of at least one other inmate, usually many more. While Defendant-Nagy and his staff at JCF have taken some cursory actions to suggest inmates should social distance, the obvious realities of life in prison prove that much more action is needed: the conditions are crowded, and six feet of separation from others is a mythical concept, nothing more (Ex. 2, Affidavits of inmates confined in pole barns at JCF). The social distancing's policy written by MDOC Chief Medical Officer does not provide for social isolation if you are confined in a pole barn or in a two-person cell (ECF No. 27-5, PageID.1318).

Warden Nagy has not created a medical plan for continuing testing or inmates, and the testing of guards. As Dr. Luring has testified, an effective testing plan must be created. Ex. 1. Cotton is going to test prisoners for anti-bodies, which is not a medically approved method (Ex. 1, Luring). Inmates are shuffled around like with guesswork testing that disregards the grave risk to his health.

The cleaning methods and supplies are not much better at Cotton. Each unit shares a single mop or broom. No individual “cubes” are given cleaning supplies. Inmates can get individual cleaning supplies only through one process: they take a “rag” up to the officers’ station, who then sprays the rag with the bleach mix (**Ex. 2**). Plaintiffs have and are “complain[ing] or express[ing] concern over not having adequate supply of hand soap, cleaning supplies, or PPE” and yet Defendant-Nagy fails to address those complaints in this lawsuit. (ECF No. 27-15, PageID.1535 at ¶ 24).

### **B. Parnall Correctional Facility (SMT) (Exhibit 3)**

In her affidavit, Defendant Braman acknowledges that “...the physical structure and layout of SMT does not always allow for maintaining a six-foot social distancing at all times (as recommend by the CDC)...” (*Id.*, PageID. 1512 ¶18(c)).<sup>2</sup> Even with this acknowledgement, this Defendant, and the Director Washington, have not created a plan for social distancing. Dr. Laurant stated that “social distancing” is considered by the CDC as ““the cornerstone” for infection control in these [prison] settings.” **Ex. 1**. Is Plaintiffs required to ask how many deaths are needed before MDOC will open these other cellblocks and housing units.

<sup>2</sup> After stating this, Defendant Braman states that contradicts herself, by stated that I “receive[s] daily update from custody staff through their chain of command that... social distancing is being enforced....” (*Id.* at PageID.1509 ¶ 15). Why the double-talk?

Plaintiffs have presented numerous affidavits that there is no social distancing on the yard and at the chow hall when sitting at tables. It seems that social distancing is only practiced by the officers **Ex. 5**.

### **C. Macomb Correctional Facility (MRF) (Exhibit 4)**

Defendant Warden Chapman is in charge of MRF and states it has seven housing units, which can hold a capacity of one thousand four hundred and sixteen (“1,416”) inmates (ECF No. 27-16, PageID.1574-75 at ¶¶ 3;7). Most inmates are housed in two person cells, with sixteen inmates now housed in the day room common area. (**Ex. 4**, Affidavits from prisoners confined at MRF). They all have been given two masks, report intermittent cleaning and social distancing practices, and almost none have been tested (**Ex. 4**).

Inmates confined at MRF states that there is little, if any, social distancing in the units (**Ex. 4**). The inmates are not provided adequate supplies (*id.*). The bathrooms and other common areas are not cleaned regularly (*id.*).

MRF is also primarily testing only those with major symptoms, so most inmates have not been tested. (*See Ex. 4-5*, Affidavit of Shawn Hendrix at ¶ 1; *id.*, **Ex. 4-11**, Affidavit of David Lyons at ¶ 3). Shockingly, no inmates who answered the questionnaire reported that they had been tested (**Ex. 4**). The infectious disease doctors warn that these measures are insufficient because of the virus’s asymptomatic spread. (**Ex. 1**, Luring , at ¶¶ 2-3) (advising “repeat testing of inmates

and/or testing of all guards and staff” because it is “increasingly recognized that many individuals infected with SARS-CoV-2 may be asymptomatic or have mild symptoms only”).

#### **D. Lakeland Correctional Facility (LCF) (Exhibit 5)**

Defendant Morrison states that “[s]ocial distancing measures were and continue to be implemented throughout the facility... requiring that there be a distance of at least six feet between all individuals, including...chow lines... to the fullest extent possible.”<sup>3</sup> (ECF No. 27-13, PageID.1466, PageID.1472-73 ¶ 9(c)). Further, “[w]here six feet distancing cannot be completely achieved in certain areas (such as in pole barns with cubicle living arrangements), we have modified those living spaces to the extend feasible.”<sup>4</sup> (*Id.* at ¶ 9(d)). Prisoners from LCF have provided affidavits that there is no attempt to create social distancing in the pole barns or any place at LCF (Ex. 5-2 through -14). Even though Lakeland is now feeding the prisoners in the pole barns, there is no social distancing because there is no space in these pole barns for social distancing.

It is known that at LCF, out of a prison population of 1428 inmates that 792 tested positive. Dr. Lauring testified that MDOC does not have a retesting

<sup>3</sup> All of the Defendants have used the term “to the extend possible.” The use of this terms in the affidavit to explain what they should be doing but are not is just that – a smoke screen.

<sup>4</sup> Nowhere in Morrison’s affidavit or the Response is it explained how the pole barns have been modified so that social distancing can be achieved.

program to test both the inmates and guards so that to stop the spread of COVID19 is impossible. MDOC is engaged in antibody testing even though it is not something recommended by the medical community and such testing can result in a high percentage of false positive (Ex. 1, Laurant), which can cause further spreading of the COVID-19 virus.

### **ARGUMENTS**

#### **I. CONTRARY TO DEFENDANTS' ARGUMENT [I., PageID.1245-47], PLAINTIFFS HAVE ESTABLISHED A FACTUL AND LEGAL BASIS FOR THIS COURT TO GRANT AN INJUNCTION.<sup>5</sup>**

The United States Supreme Court precedent indicates this Court has jurisdiction under the Eleventh Amendment's *Ex Parte Young* exception to hear this § 1983 claim to vindicate Plaintiffs' Eighth Amendment rights. *See Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (describing legal "fiction" of *Ex Parte Young* doctrine, which "when a federal court commands a state official to do nothing more than refrain from violating federal law, [she] is not the State for sovereign-immunity purposes"). Plaintiffs' complaint clearly alleges an ongoing violation of the Eighth Amendment that seeks prospective relief. That is all the Eleventh Amendment and *Ex Parte Young* require. *Verizon Maryland, Inc.*, 535 U.S. 635, 645 (2002); *Diaz v. Michigan Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013)

<sup>5</sup> Plaintiffs' Reply will address each argument raised in Defendants' Response in the same order as presented therein.

(noting, “[i]n order to fall within the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law”). Defendants’ policies are not the constitutional source of Plaintiffs’ claim, but rather the Eighth Amendment is, using § 1983 as a vehicle for enforcing those federal, constitutional rights. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989) (noting that the “principle purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims”).

In seeking an injunction, Plaintiffs must demonstrate to this Court that they meet four prongs criteria of such. *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000). A court has discretion whether to issue an injunction or not. *See Ne. Ohio Coal. v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). In exercising that discretion, this Court

must consider whether plaintiff has established the following elements: (1) a strong or substantial likelihood of success on the merits; (2) the likelihood of irreparable injury if the preliminary injunction does not issue; (3) the absence of harm to other parties; and (4) the protection of the public interest by issuance of the injunction.

*Nader, supra*. These factors are to be balanced by this Court and are “not prerequisites to be met.” *S. Galzer’s Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017).

Generally, “[d]ecisions concerning prison security are vested in prison officials, in the absence of a constitutional violation.” *Salami v. Rewerts*, 1:20-CV-

21, 2020 WL 1316510, at \*6 (W.D. Mich. Mar. 20, 2020), *See* Ex. 16. As demonstrated below and in the motion for a temporary restraining order, Plaintiffs have established an Eighth Amendment violation in the failure of these Defendants to protect the Plaintiffs from COVID-19.

**CONTRARY TO DEFENDANTS' ARGUMENT [A.1, PageID.1247-50], PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF IS NOT BARRED BY THE ELEVENTH AMENDMENT.**

Defendants argue that Plaintiffs claims are barred by the Eleventh Amendment because they are asking the Court to enforce Michigan laws within the Michigan prisons (ECF No. 27, PageID.1247-50). Plaintiffs seek no such thing and Defendants failed to cite to a section of the Complaint [ECF No. 1] or the motion for an injunction [ECF No. 22] where such relief is requested. Plaintiffs are asking the Court to enforce the Eighth Amendment that has long guaranteed that state prisoners have a right to be protected from highly contagious and deadly disease [*see* ECF No. 1, PageID.53, Conclusion, B., “Find that Defendants have violated the Eighth Amendment in providing medical care as to the COVID-19 virus....”].

The federal courts have long recognized that prison officials have an Eighth Amendment duty to protect inmates from exposure to communicable disease. *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect inmates from infectious disease.”); *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (“[F]ailure to adequately screen newly



arrived inmates for communicable disease” represents an “(omission) sufficiently harmful to evidence deliberate indifference to serious medical needs” (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *id.* (“[I]t is unnecessary to require evidence that an infectious disease has actually spread in an overcrowded jail before issuing a remedy.”).<sup>6</sup>

The federal courts cannot abdicate their responsibility to enforce the Eighth Amendment simply because state officials claim that they have policies that address the serious medical issues facing their prison populations (especially when those policies are not being implemented on a wide scale basis),<sup>7</sup> or simply because prison officials choose to take certain measures to address the problems (especially when the measures chosen are largely ineffective).<sup>8</sup> As the Supreme Court explained:

To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison's failure to provide sustenance for inmates “may actually produce physical 'torture or a lingering death. . . . Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. . . .

**If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.** See *Hutto v. Finney*, 437 U.S. 678, 687, n. 9, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978). Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for

<sup>6</sup> See, e.g., *Prisons and Jails Change Policies to Address Coronavirus Threat Behind Bars*, NPR, available at <https://www.npr.org/2020/03/23/818581064/prisons-and-jails-change-policies-to-address-coronavirus-threat-behind-bars> (March 23, 2020) (stating that “jails and prisons are considered perfect incubators for the coronavirus to potentially take hold”).

<sup>7</sup> See Exhibits 2, 3 4 and 5, for a discussion of the practices at each of the prisons where a Defendant is a warden.

<sup>8</sup> The experts of Plaintiffs have file Supplemental Expert Reports, Plaintiffs’ Exhibit

deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals. *See Bell v. Wolfish*, 441 U.S. 520, 547-548, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Courts nevertheless must not shrink from their obligation to “enforce the constitutional rights of all 'persons,' including prisoners.” *Cruz v. Beto*, 405 U.S. 319, 321, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972) (per curiam). **Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.**

*Brown v Plata*, 563 US 493, 510-11(2011) (emphasis added).

In this case, Plaintiffs are asking the Court to impose various prospective measures, injunctive relief that does not offend the Eleventh Amendment.

[T]he Eleventh Amendment does not prohibit federal courts from issuing injunctions ordering prospective relief against state officials to prevent future constitutional violations. *Barton v. Summers*, 293 F.3d 944, 948 (2002) (citing *Ex parte Young*, 209 U.S. 123, 159-160, 28 S. Ct. 441, 52 L. Ed. 714 (1908)). Even an injunction that would require the state to spend substantial sums of money may not be barred, so long as the injunction is prospective. *See Nelson v. Miller*, 170 F.3d 641, 646 (1999).

*Zynda v Arwood*, 175 F Supp 3d 791, 800 (E.D. Mich. 2016).

Here, Plaintiffs are asking the Court to order prison officials to ensure social distancing, testing all prisoners and guards, separate infected populations from uninfected populations, and ensure prisoners and guards have medically adequate PPE and other cleaning supplies. Since all of Plaintiffs’ claims for relief are prospective, their claims are not barred by the Eleventh Amendment.

**CONTRARY TO DEFENDANTS’ ARGUMENT [I.A.1, PAGEID.1248-50], *PENHURST* IS NOT APPLICABLE ON THE FACTS IN THIS LAWSUIT.**

Defendants’ argues that Plaintiffs’ claims have a *Pennhurst* problem because they are asking this Court to order the Defendants to comply with prison policy. ECF No. 27, PageID.1249 (citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 103-23 (1984)). Nowhere in the Complaint or the injunctive motion do the Plaintiffs make such a request. Plaintiffs’ counsel does claim that the Defendants were not “applying” the prison policy correctly or at all prisons around Michigan. “In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Verizon Maryland, Inc. v. Pub. Serv. Comm’n of Maryland*, 535 U.S. 635, 645 (2002) (quotation and citation omitted); *Diaz v. Michigan Dep’t of Corr.*, 703 F.3d 956, 964 (6<sup>th</sup> Cir. 2013) (noting “[i]n order to fall within the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law”); John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1013 n.99 (2008) (explaining doctrine works like the “well-pleaded complaint rule”).

A review of Plaintiffs’ Complaint show that they alleged an ongoing Eighth Amendment violation and seek prospective relief. In the Complaint, Plaintiffs claim that the manner in which Defendants have sought to implement social distancing and “testing” have created a dangerous situation for each of them. ECF No. 1, PageID.5.,

paragraphs 4-6. Prisoners are dying and even though that are recovering from COVID-19 can have long-term medical complications.

As to each Plaintiffs, the complaints set forth their factual allegation as to the constitutional violations that led up to the lawsuit and what has continued in many, many aspects as of the filing of this Reply. [ECF No. 1, PageID.7-17; PageID.36-39, “Factual Allegation in Michigan Prisons”; PageID.39-41, “Facts from Other Inmates”.] The “Conclusion” requests that this Court finds an Eight Amendment violation and then issue an injunction with some suggestions as to what should be included in that order, such as social distancing of at least six feet and testing (ECF No. 1, PageID.53-54).

**CONTRARY TO DEFENDANTS’ ARGUMENT [I.A.2, PageID.1250-55], THE GRIEVANCE PROCESS WAS “UNAVAILABLE” TO THE PLAINTIFFS.**

Pursuant to the Prison Litigation Reform Act (PLRA), MDOC’s inmates are required to exhaust the available prison grievance process prior to the filing of a lawsuit. 42 U.S.C. § 1997e(a). In seeking dismissal of this lawsuit based on the failure to exhaust, Defendants have the burden of raising the affirmative defendant of failure to exhaust and to prove it. *Risher v. Lappin*, 639 F.3d 236, 240 (6th Cir. 2011) (“Non-exhaustion is an affirmative defense under the PLRA, with the burden of proof falling on the Bureau.”); *Does 8-10 v. Snyder*, 945 F.3d 951, 961 (6th Cir. 2019) (“Because the Defendants bear the burden of proof on exhaustion, they bear

an ‘initial summary judgment burden [that] is higher in that [they] must show that the record contains evidence satisfying [their] burden of persuasion’ and ‘that no reasonable jury would be free to disbelieve it.’” (citation omitted)).<sup>9</sup> Defendant never attached the grievances of Plaintiffs to their *Response* so that the Court could evaluate whether what is being claimed by Counsel is factual. As discussed *infra*, Defendants have failed to meet their burden of proof that Plaintiffs failed to exhaust, and, therefore their request for dismissal based on failure to exhaust must be denied.

In their *Response*, Defendant conceded the following as to the grievances filed by the Plaintiffs. First, Plaintiff Seegmiller “filed one COID-19 related grievance ... which was rejected because the proper procedure is to address the issue at the Warden’s Forum, and it has not been appealed through Step III.” ECF No. 27, pageID.1253. Second, Plaintiff Reeves “filed one COVID-19 grievance” which was rejected for the same reason as the rejection of Seegmiller’s grievance.<sup>10</sup> *Id.*, PageID.1253-54. Third, Defendant claims that the two grievances filed by Plaintiff Abrams were “too general” but does not tell this Court why they were too general.<sup>11</sup>

<sup>9</sup> *Surles v. Andison*, 678 F.3d 452, 457 (6th Cir. 2012) (concluding that the plaintiff’s failure to provide enough evidence to demonstrate that he exhausted his administrative remedies did “not mean that Defendants have met their[ ]” burden.).

<sup>10</sup> Because Defendants did not attach the grievances filed by Plaintiffs, Counsel for Plaintiffs asked a couple of the Plaintiffs to type into a JPay the actual response and sent it to Counsel. Plaintiff Reeves’ grievance response from Step 1 is attached as **Ex.10**.

<sup>11</sup> Plaintiff Abrams typed the response to one of the grievances in a JPay and it is attached as **Ex. 9**. The response shows that the grievance was rejected as “Non-grievable issue....” The second step response says that “Per PD 03.02.130 duplicate issue grievances will not be processed.” Defendants made the grievance process unavailable to Plaintiff Abrams.

*Id.*, PageID.1922. Fourth, Defendant claims that Plaintiff Heard filed two grievances regarding COVID-19 but were “rejected as being too general and they were not appealed through Step III.”<sup>12</sup> *Id.*, PageID.1253. Fifth, Plaintiff Campbell filed two grievances and Defendant only states that they are still pending. *Id.* Plaintiffs’ counsel received an affidavit from a prisoner who grieved the treatment he received that resulted in his testing positive for COVID-19. The prison grievance coordinator told him he “couldn’t put any grievances in about covid 19 issues.” *See* **Ex. 8**.

In *Rose v. Blake*, the United States Supreme Court recognized that exhaustion is not required if the grievance process is not available. 136 S.Ct. 1850, 1858 (2016). In defining when a grievance process was not available, the Court explained that whether remedies are “available” depends on whether they are “capable of use for the accomplishment of a purpose,” “is accessible or may be obtained . . . to obtain ‘some relief for the action complained of.’” *Id.* at 1858-59 (citing *Booth v. Churner*, 532 U.S. 731, 738 (2001)). *See also Does 8-10 v. Snyder*, 945 F.3d 951, 963 (6th Cir. 2019) (holding “MDOC’s PREA grievance process is, in practice, unavailable”). As discussed *infra*, the manner that the grievance process is operated makes it unavailable for some of the Plaintiffs.

<sup>12</sup> Based on footnote, *supra*, this Court cannot be sure whether Heard’s grievances were rejected for “being too general” or for some other reason.

The *Rose* Court described three ways an administrative grievance process would be “unavailable” for purposes of the exhaustion requirement. The first way is when a prison officer responds that their office does not have the authority to consider such a claim, “(despite what regulations or guidance materials may promise) it operates as a simple dead end -with officers unable or consistently unwilling to provide any relief to aggrieved inmates.” *Ross*, 136 S. Ct. at 1859. The second way that a grievance remedy might become unavailable is when “an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use.” *Id.* An opaqueness problem arises where “some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it. . . . When rules are so confusing that ... no reasonable prisoner can use them, then they’re no longer available.” *Id.* The third way is when prison officials threaten, inhibit, or mislead a prisoner from following the proper grievance channels. *Id.* at 1860 n.3.

Plaintiffs will focus on the first way listed in *Ross*. First, MDOC’s grievance policy does not allow a prisoner to grieve the “content of the policy or procedure except as it was specifically applied to the grievant.”<sup>13</sup> **Ex. 12**, Grievance Policy, PD

<sup>13</sup> This PD goes on to state that if the inmate wants to challenge the content of a policy, they may submit that concern to the Warden’s Form as provide in PD 04.01.105....” *Id.* A review of PD 04.01.150 shows that only elected members of the forum can submit issues to be considered by the warden forum. **Ex. 11**, Pars. J, K, and N, Prisoner Housing Unit Representatives/Warden’s Forum. Paragraph K does not mandate that an elected representative to the warden’s forum submit a request from an inmate that they represent, such as one of the named Plaintiffs, to the warden’s forum. Therefore, MDOC has made the warden’s forum / grievance process unavailable to the Plaintiffs.

03.02.130, Para. J.8. This PD states, “[a] grievance is to be rejected by the Grievance Coordinator if: \*\*\* 8. The prisoner is grieving content of the policy or procedure except as it was specifically applied to the grievant.” Courts have ruled that such restriction makes the grievance process unavailable.

The grievance policy expressly prohibits prisoners from filing grievances challenging the content of a policy. *See* MICH. DEP'T OF CORR., Policy Directive 03.02.130, ¶ E (“A grievant may not grieve the *content* of policy or procedure; such grievances shall be rejected by the grievance coordinator.”). *See also Harbin-Bey v. Rutter*, 420 F.3d 571, 581 (6th Cir.2005). Michigan prisoners cannot grieve the content of a policy. As a consequence, the grievance policy was not an available remedy to Plaintiff to resolve his claims against Defendants concerning the content of the policy. *See* 42 U.S.C. § 1997e(a) (requiring exhaustion of “available” remedies); *Woodford*, 126 S.Ct. at 2386; *Figel v. Bouchard*, 89 F. App'x 970, 971 (6th Cir. 2004) (prisoner may not be required to exhaust administrative remedies regarding non-grievable issues). Defendants' motion for summary judgment therefore should be denied with respect to Plaintiff's challenges to the content of the prison policies.

*Pugh v. Caruso*, 1:06-CV-138, 2008 WL 1868990, at \*1–2 (W.D. Mich. Apr. 24, 2008), *id.* at \*7, *Order Adopting Report and Recommendation*, *Id.* at 7, *see Ex.* 13. In *Figel v. Bouchard*, prison officials rejected the prisoner's grievance as being non-grievable and the district court dismissed the lawsuit for failure to exhaust. On appeal, the Sixth Circuit held when the prison rejects a grievance as being non-grievable, that a prisoner's “complaint was not subject to dismissal for failure to exhaust administrative remedies.” 89 Fed.Appx. 970, 971 (6th Cir. 2004); *see also Peoples v. Bauman*, 16-2096, 2017 WL 7050280, at \*4 (6th Cir. Sept. 5, 2017)



(“Peoples' claims in this grievance were not subject to dismissal for failure to exhaust administrative remedies.” (citing *Fiegal, supra*)), see **Ex. 28**.

Defendants argue that if the inmate wants to challenge the content of a policy, they “may submit that concern to the Warden’s Form as provide in PD 04.01.105....”<sup>14</sup> See **Ex. 11**. A review of PD 04.01.150 shows that only elected members of the forum can submit issues to be considered by the warden forum. See attached Exhibit 16, PD 04.01.150, Paras. J, K, and N, Prisoner Housing Unit Representatives / Warden’s Forum. Since Plaintiffs are not elected members of the warden’s forum, they have no means to force the warden’s forum to consider a challenge to the content of a policy that is applied to them. This Court should find that Plaintiffs have exhausted all “available” remedies in compliance with the PLRA.

Courts have held that in a class action not every named Plaintiff has to exhaust the grievance process. See *Foster v. Gueory*, 655 F.2d 1319, 1321–22 (D.C. Cir. 1981) (explaining that each individual plaintiff in a class-action suit need not have pursued the available administrative remedies “if at least one member of the plaintiff class has met the filing prerequisite” (cited in *Jackson v. District of Columbia*, 89 Fed.Supp.2d 48, 59-60 (D. D.C. 2000))). This is commonly called the doctrine of “vicarious exhaustion,” which holds “that exhaustion of administrative remedies by

<sup>14</sup> The word “may” generally is considered discretionary and not mandatory. *Zacdydas v. Davis*, 533 U.S. 678, 697 (2001) (“‘may’ suggests discretion”).

one member of the class satisfies the requirement for all others with sufficiently similar grievances.” *Hartman v. Duffey*, 88 F.3d 1232, 1235 (D.C. Cir. 1996). This doctrine, however, is only available to plaintiffs in a class-action lawsuit. *Hattie v. Hallock*, 8 F.Supp.2d 685, 689 (N.D. Ohio1998).

**CONTRARY TO DEFENDANTS’ ARGUMENT [I.A.3, PAGEID.1256-62], THIS COURT CAN ISSUE AN INJUNCTION IF DEFENDANTS IS SUBJECTING PLAINTIFFS TO UNCONSTITUTIONAL CONDITIONS.**

As discussed *infra*, Defendants have not implemented essential measures to protect prisoners and mitigate the spread of COVID-19. Based on these failures, Plaintiffs and members of the class are likely to succeed on their claim that defendants have violated the eighth amendment.

Defendants are claiming that their minimal steps of providing some “social distancing” and limited “testing” is a sufficient basis for this Court to deny Plaintiff’s injunction request. *Salami v. Rewerts*, 1:20-CV-21, 2020 WL 1316510, at \*6 (W.D. Mich. Mar. 20, 2020) (“[d]ecisions concerning prison security are vested in prison officials, in the absence of a constitutional violation.”), *see* **Ex. 16**; *see also* *Verizon Maryland, Inc. v. Pub. Serv. Comm’n of Maryland*, 535 U.S. 635, 646 (2002) (the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim. *See Coeur d’Alene, supra*, at 281, 117 S.Ct. 2028 (“An *allegation* of an ongoing violation of federal law ... is ordinarily sufficient” (emphasis added))”).

The Eighth Amendment protects the rights of prisoners to be free from cruel and unusual punishment while confined to state custody, and in fact, the government has an affirmative duty to provide conditions of reasonable health and safety. *Brown v. Plata, supra*, 563 U.S. at 510 (“Prisoners retain the essence of human dignity inherent in all persons. . . . To incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care”).

The MDOC flaunts its “unprecedented leadership” and boasts that it began implementing protective measures before any prisoner tested positive,<sup>15</sup> even before the CDC issued its guidelines. (ECF No. 27, PageID.1257). However, these measures are plainly insufficient, and most are in reality absent in its prisons. Defendants are exposing their prison populations so extensively that some prisons, such as Lakeland Correctional Facility, have reported a 54.3% positive test rate (*See* Ex. 19, Michigan highest rate of death from coronavirus, Detroit Free Press).

The cornerstone of all preventative measures against COVID-19 is social distancing. (Ex. 1, Loring ¶ 1). For social distancing to be effective, it is also imperative to understand who among the prison population has tested positive. (*Id.*).

<sup>15</sup> The MDOC did not begin testing prisoners until March 24, 2020. The first prisoner who tested positive died of COVID-19 on April 1, 2020. (MDOC Response and Information on coronavirus <https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronavirus-covid-19-250f43144337>).

MDOC refuses to implement common sense measures, either out of presumed inconvenience or alleged impracticability. Even many of their quarantine and testing procedures expose inmates to the virus unnecessarily. MDOC admits that in some cases, social distancing is impossible because of the very nature of the institutional setting. (ECF No. 27, PageID.1259). With regard to testing, the MDOC provides undetailed and general claims that they have a plan for testing staff and iterates the testing measures taken at some prisons in the Lower Peninsula and the Upper Peninsula facilities (where notably, there are limited outbreaks). Unfortunately, one of its primary testing plans utilizes antibody testing, which force inmates to involuntarily provide blood for no medical purpose. (Ex. 1, Luring ¶ 7). Finally, the MDOC maintains that it is not feasible to take the temperature of its prisoner population, though it provides them three meals a day, every day, and does rounds multiple times per day (ECF No. 27-5, PageID.1326-1327). The Department cannot favor convenient policies over efficacious ones.

Eighth Amendment claims have objective and subjective components. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Defendants essentially concede that the risk of contracting COVID-19 is sufficiently serious to trigger Eighth Amendment protections. (ECF No. 27, PageID.1256-62). The Department goes so far as to tout its early response to the dangerous pandemic. (*Id.*, PageID.1257). It is undisputed that there is an active, serious outbreak at many of the facilities within

the MDOC, with thousands of prisoners who have tested positive and it is now common knowledge that COVID-19 presents a serious risk of severe illness and death. Defendants acknowledge as much, focusing on the subjective component of Plaintiffs' Eighth Amendment claim, rather than the objective seriousness of the COVID-19 risk (*Id.*). Plaintiffs will do the same.

Prison officials must also have a “sufficiently culpable state of mind” where “the official acted or failed to act despite his knowledge of a substantial risk of serious harm.” *Farmer*, 511 U.S. at 842.

There is no doubt that the Defendants were aware of the grave threat posed by the pandemic and the exacerbated risk caused by the close quartering of prisoners in pole barns and two-person per cell at many of MDOC prisons.<sup>16</sup> As of February of 2020, the world knew that COVID-19 was lethal and one of the primary manner to prevent its spread was through “social distancing” and “testing”. Defendants have not denied in their Response that they were not aware of the dangerous nature, in facts, they issued memorandums that show they were aware of the deadly nature of

<sup>16</sup> See *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited May 8, 2020) (explaining that measures ordered by the CDC to reduce person-to-person contact present unique challenges for prisons and detention facilities, because “[i]ncarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced”). See also Executive Orders 2020-29 on March 29, 2020 issued by the Governor to MDOC to implement a COVID-19 plan. The Complaint also contains an extensive discussion of how Defendants were knowledgeable about the dangerous of COVID-19. ECF No. 1, PageID.19-34.

COVID-19.<sup>17</sup> The finding in *There* is no doubt that the Defendants were aware of the grave threat posed by the pandemic and the exacerbated risk caused by the close quartering of prisoners in pole barns and two-person per cell at many of MDOC prisons.<sup>18</sup> As of February of 2020, the world knew that COVID-19 was lethal and one of the primary manner to prevent its spread was through “social distancing” and “testing”. Defendants have not denied in their Response that they were not aware of the dangerous nature, in facts, they issued memorandums that show they were aware of the deadly nature of COVID-19.<sup>19</sup> The finding in *Martinez-Brooks v. Easter* also applies here.

Further, given the pervasive daily media coverage of the pandemic, the seriousness of the threat posed by COVID-19—and the particular vulnerability of elderly individuals as well as those with certain preexisting medical conditions—are so well known that it would be implausible to suggest that prison officials are unaware of this risk. *See Farmer*, 511 U.S. at 842 (“[A] fact finder may conclude that

<sup>17</sup> The Governor’s EOs establishes that Defendants knew of the risk. The Governor ordered MDOC to develop several “risk reduction protocols” related to COVID-19, which included social distancing and testing.

<sup>18</sup> *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited May 8, 2020) (explaining that measures ordered by the CDC to reduce person-to-person contact present unique challenges for prisons and detention facilities, because “[i]ncarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced”). *See also* Executive Orders 2020-29 on March 29, 2020 issued by the Governor to MDOC to implement a COVID-19 plan. The Complaint also contains an extensive discussion of how Defendants were knowledgeable about the dangerous of COVID-19. ECF No. 1, PageID.19-34.

<sup>19</sup> The Governor’s EOs establishes that Defendants knew of the risk. The Governor ordered MDOC to develop several “risk reduction protocols” related to COVID-19, which included social distancing and testing.

a prison official knew of a substantial risk from the very fact that the risk was obvious.”).

3:20-CV-00569 (MPS), 2020 WL 2405350, at \*21–22 (D. Conn. May 12, 2020), *see* **Ex. 27.**

Courts have held that a prison “official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer*, 511 U.S. at 837. This standard is met where “the official acted or failed to act despite his knowledge of a substantial risk of serious harm.” *Id.* at 842.

Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

*Id.* (citations omitted). Put another way, prison officials have a duty to provide inmates with “reasonable safety.” *Id.* at 844. When a lawsuit is filed alerting officials that “reasonable safety” is not present because of certain conditions of confinement, officials must reasonably respond to that risk. *Farmer*, 511 U.S. at 846 n.9. “Whether one puts it in terms of duty or deliberate indifference, prison officials who [do not] act reasonably can[] be found liable under the Cruel and Unusual Punishments Clause.” *Id.* at 844.

Experts predicted that “[a]ll prisons and jails should anticipate that the coronavirus will enter their facility.”<sup>20</sup> Courts also recognized the dangerous of the spread of COVID19 in correctional facilities. *See, e.g., Malam v. Adducci*, 20-10829, 2020 WL 2468481, at \*5 (E.D. Mich. May 12, 2020) (“The number of COVID-19 cases in detention facilities nationwide further highlights the stark reality that communal confinement, even with the precautions Defendants have employed, creates a significant risk of COVID-19 infection.”), *see Ex. 15; United States v. Frost*, No. 18-CR-20206, 2020 WL 1899561, at \*3 (E.D. Mich. Apr. 17, 2020) (explaining “COVID-19 is dangerous everywhere, but the novel disease is especially harmful within correctional institutions, where incarcerated individuals have a limited ability to exercise encouraged community practices such as social distancing and frequent handwashing”), *see Ex. 14*. This is especially true for the Plaintiffs who are confined to 8-person cubes in pole barns, where social distancing cannot exist. *See* ECF No. 1, PageID.9 (Seegmiller); 15 (Campbell); 16 (Heard). Government experts agree that such a communal style of living can increase the infection rate.<sup>21</sup>

<sup>20</sup> *See* Nicole Wetsman, *Prisons and jails are vulnerable to COVID-19 outbreaks*, The Verge (Mar. 7, 2020), <https://flipboard.com/article/china-says-more-than-500-cases-of-the-new-coronavirus-stemmed-from-prisons/f-5db96100fa%2Fcnbc.com> (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis).

<sup>21</sup> *See Former ICE Director: Release Immigrants from Detention or COVID-19 Will Spread Like Wildfire* *Inside, Democracy Now* (Mar. 23, 2020); [www.democracynow.org/2020/3/23/ice\\_detention\\_centers\\_covid\\_19](http://www.democracynow.org/2020/3/23/ice_detention_centers_covid_19); *FAQs for administrators, staff, people who are incarcerated, families*, Ctrs. for Disease Control and Prevention (Mar. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html>.



Where the claim is for injunctive relief, Plaintiffs have brought the risk to Defendants' attention, so the only issue is whether Defendants' "current attitudes and conduct" reflect continued disregard of the risk. *Id.* at 846 n.9 (noting liability of "prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware"). Put another way, prison officials have a duty to provide inmates with "reasonable safety." *Id.* at 844.

While Defendants are free to exercise discretion in choosing among equally effective measures to protect inmates from serious risks, choosing inevitably inadequate measures to the exclusion of a plainly superior one constitutes deliberate indifference.<sup>22</sup> Defendants claim they have taken some measures, yet "officials may not entirely insulate themselves for liability under § 1983 simply by providing some measure of treatment." *Cummings v. Klee*, 410 F. Supp. 3d 837, 844 (E.D. Mich. 2019) (quoting *Jones v. Muskegon Cnty.*, 625 F.3d 935, 944-45 (6th Cir. 2010); *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 843 (6th Cir. 2002) (noting "grossly inadequate care" or making a "decision to take an easier but less

<sup>22</sup> Defendant Washington mentions some additional units that were opened to handle the COVID-19 positive inmates (ECF 27-5, PageID.1325). However, Defendant Washington did not address Plaintiffs' reference to numerous closed prison units that likely were available to bring back online with the help of the National Guards. *See* Complaint, ECF No. 1, PageID.36-39 (seven cell blocks at Jackson Prison and the entire Standish Prison; for an approximately 3000 additional single housing cells being available). There is also the Riverside Correctional Facility, Ionia Temporary Prison, the closed Kinross Correctional Facility, and Ojibway Prison for another three thousand or more beds.

efficacious course of treatment” may deliberate disregard health risk); *McCarthy v. Place*, 313 Fed.Appx. 810, 814 (6th Cir. 2008).

The science on preventing the spread of COVID-19 may be evolving, but this much is beyond peradventure: To stop the spread of the virus, infected populations must be quarantined from uninfected populations. (Ex. 1, Luring ¶ 5). The virus can be spread by infected persons who are asymptomatic. (*Id.* at ¶ 3). “Absent repeat testing of inmates and/or testing of all guards and staff, it is possible for the virus to be re-introduced into a prison among inmates and staff, regardless of the prior test result.” (*Id.* ¶ 2). For Defendants, they believe one test insulates them from liability. Plaintiffs were provided three masks at the outset, and yet Defendants refuse to provide any more no matter the circumstances, such as falling apart by repeated use age.

Even with the alleged social distancing measures that Defendants put in place, due to the impossibility of adequate social distancing, confinement at the pole barn facilities—due to their very structure and configuration—continues to pose a grave risk to vulnerable inmates’ health. The same is true in the double bunking and open-barred cells throughout various facilities. Defendants refuse to fix these intolerable conditions despite full awareness of their risks. Under the circumstances of the present crisis, Defendants’ failure to make prompter, broader use of their authority to protect the lives of inmates constitute deliberate indifference.

Here, there is no doubt that officials are aware of, and have responded to the COVID-19 risk with policies of their own, while obdurate to what is actually going on in their facilities. *See Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940) (“Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010) (noting “the distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint”). Many of these policies are unreasonable, outdated, and have proven unsuccessful to abate the risk of spreading the virus, especially given the widespread outbreaks at the Lakeland and Cotton prisons. While Defendants claim they have “swiftly implemented and enforced robust COVID-19 response measures for the specific purpose of protecting prisoners from the spread and impact of COVID-19[,]” (ECF No. 27, PageID.1261), the experience of inmates reflects system-wide neglect of the most basic common-sense measures to combat the virus. *Banks v. Booth*, 2020 WL 1914896 at \*8 (D.D.C. Apr. 19, 2020) (noting “some uncertainty as to whether [officials’] declarations are based on policies which are on the books or the actual conditions of the facilities”). Defendants at least implicitly authorize or knowingly acquiesce to these unconstitutional conditions in the prisons they oversee. *Peatross v. City of Memphis*, 818 F.3d 233, 242 (6th Cir. 2016); *Thomas v. City of Chattanooga*, 398 F.3d 426,

429 (6th Cir. 2005). Defendants are flippant about their response to the virus and fail to provide with any meaningful detail exactly what measures they have taken, beyond a recitation of their general policy and vague references to “plans.”

Some courts have referred to similar measures as “patently insufficient” to combat the virus. *See Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503, at \*5 (S.D.N.Y. Mar. 26, 2020) (referencing “screening detainees upon intake for risk factors, isolating detainees who report symptoms, conducting video court appearances with only one detainee in the room at a time, providing soap and hand sanitizer to inmates, and increasing the frequency and intensity of cleaning jail facilities”), **Ex. 20**; *Jones v. Wolf*, \_\_\_ F. Supp. 3d \_\_\_, No. 20-cv-361, 2020 WL 1643857, at \*12 (W.D.N.Y. Apr. 2, 2020), *see Ex. 21*; *Malam v. Adducci*, \_\_\_ F. Supp. 3d \_\_\_, No. 20-cv-10829, 2020 WL 1672662, at \*12 (E.D. Mich. Apr. 5, 2020) (describing similar “precautionary measures” in Calhoun County Correctional Facility), **Ex. 15**; *Fofana v. Albence*, \_\_\_ F. Supp. 3d \_\_\_, No. 20-cv-10869, 2020 WL 1873307, at \*9 (E.D. Mich. Apr. 15, 2020) (referring to Monroe County Jail conditions as “substandard medical care and supervision”), *see Ex. 22*; *Awshana v. Adducci*, \_\_\_ F. Supp. 3d \_\_\_, No. 20-cv-10699, 2020 WL 1808906, at \*8 (E.D. Mich. Apr. 9, 2020); *see Ex. 23*; *Banks v. Booth*, No. 20-cv-849, 2020 WL 1914896, at \*9 (D.D.C. Apr. 19, 2020) (granting injunction regarding COVID-19 issues in the

correctional context because “there is no record evidence that these procedures are being implemented”), *see* **Ex. 24**.

In one obvious example, Defendants label their “head-to-toe” bunking arrangements as adequate social distancing measures. (ECF No. 27, PageID.1259-60). First of all, no inmate has reported even hearing about this policy. Secondly, policies like this are so cursory as to amount to no protection at all. *See Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018) (noting that in the medical context, Eighth Amendment violation may be proved by “showing that the prison failed to provide treatment, or that it provided treatment so cursory as to amount to no treatment at all”).

The MDOC’s failure to test and screen all inmates and prison staff for the virus also amounts to deliberate indifference. Their testing efforts are focused on those prisoners who actively present with symptoms. (**Ex. 1**, Lauring ¶ 3). The MDOC further does not test prison staff – those who go in and out of the surrounding community and are therefore the prominent source of constant new infection. (*Id.*). Moreover, even using the MDOC’s data in its Lakeland study, testing only those who present with symptoms misses a large portion of the population. At Macomb, inmates awaiting test results are housed in the same unit as those who have tested positive. (ECF No. 27-16, PageID.1578 at ¶ 14). This unit now consists of the most severe cases, as MDOC ignores obvious symptoms of the virus. (**Ex. 4-11**, Affidavit

of David Lyons at ¶ 3). The key to combating COVID-19 is preventing its asymptomatic spread, yet MDOC fails to take measures to do so, or even to test inmates with obvious symptoms of the virus.

Plaintiffs and the putative class members remain in close proximity under conditions which exacerbate the spread of the virus. The unconstitutionally dangerous conditions within the MDOC will inevitably lead to infections or reinfections, which will result in serious illness and death of prisoners and prison staff alike. The Eighth Amendment bars deadly exposure to COVID-19 while Plaintiffs remain incarcerated under conditions posing a substantial risk of serious harm, and Defendants refuse to implement reasonable measures to abate that risk. Plaintiffs are therefore likely to succeed on the merits of their claims.

In *Wilson v. Williams*, federal inmates sued the Bureau of Prisons over COVID-19 conditions at Elkton Correctional Institution by seeking habeas relief. – F.Supp.3d --, 2020 WL 1940882 at \*14 (N.D. Ohio, April 22, 2020), **Ex. 25**. The court found that the COVID-29 conditions at Elkton violated the Eight Amendment rights of these inmates and issued an injunction. *Id.* at \*8-10. Instead of ordering that these inmates be released from custody, the court ordered that those inmates

who are ineligible for compassionate release, home release, or parole or community supervision **must be transferred to another BOP facility where appropriate measures, such as testing and single-cell placement, or social distancing, may be accomplished.** In transferring subclass members, Respondents must continue to comply

with BOP policy of quarantining inmates for 14 days prior to transfer out of Elkton.

*Id.* \*11 (emphasis added). A motion for stay of the injunction was denied by the Sixth Circuit., Case No. 20-2447 (Entry No. 23, May 4, 2020). Based on *Wilson*, this Court has the authority to order MDOC to open some of its closed cell blocks and closed prisons to achieve social distancing.

**BASED ON THE JURISDICTIONAL PLEADINGS IN THE COMPLAINT, THIS COURT CAN'T ISSUE AN ORDER FOR THE RELEASE OF PRISONERS [I.A.4, ECF NO. 27, PageID.1262-64].**

Plaintiffs agree that the remedy of release is premature at this time under their 1983 claim. However, they request the relief to preserve the claim if and when it ripens. Plaintiffs would note further that release is appropriate in a 1983 action in conjunction with 18 U.S. Code § 3626. § 3626 allows release of state prisoners when certain conditions are met, see Subsection (a)(3), and § 3626 applies to “any civil proceeding arising under Federal law with respect to the conditions of confinement” except for habeas corpus proceedings, Subsection (g)(2). Since Plaintiffs’ 1983 action is a “civil proceeding arising under Federal law with respect to the conditions of confinement”, release of prisoners is an available remedy, so long as the relief comports with section (a)(3). Moreover, release can be ordered even though MDOC does not have the authority to do so, or even when state law prohibits it, see section (a)(1)(B).

**CONTRARY TO DEFENDANTS' ARGUMENT [B., ECF No. 1265-66], PLAINTIFFS HAS SHOWN THAT THEY WILL SUFFER IRREPARABLE INJURY ABSENT THIS CORUT'S INTERVENTION.**

Defendants argue that Plaintiffs cannot establish irreparable harm, particularly in light of the MDOC's existing policies. Courts have held that "the violation of a fundamental constitutional right constitutes irreparable harm, even if temporary." *Jones v. El v Berge*, 164 F. Supp. 2d 1096, 1123 (W.D. Wis, 2001) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Injunctive relief is imperative because the danger presented under these circumstances, a large, confined population, condemned to prolonged illness and potential death, is the quintessential irreparable harm. *Id.*; *Jones v. Texas Dep't of Criminal Justice*, 880 F.3d 756, 760 (5th Cir. 2018) (diabetic complications "establish a sufficient risk of irreparable harm"); *Metro. Detroit Plumbing & Mech. Contractors Ass'n v. Dep't of Health, Ed. & Welfare*, 418 F. Supp. 585, 586 (E.D. Mich. 1976) (noting a "court must consider the irreparability of any harm to the plaintiff"); *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1410 (D. Colo. 1998) (kosher meal deprivation was irreparable injury).

Further, the Supreme Court has determined that substantially increased risk of serious illness and death always constitutes irreparable injury. In *Helling v. McKinney*, 509 U.S. 25, 33 (1993), the Court noted, "it would be odd to deny an injunction to inmates who plainly proved an unsafe, life threatening condition in their prison on the ground that nothing yet had happened to them." Specifically



addressing the issue of COVID-19 in prisons, the Court in *Wilson v. Williams*, *supra*, 2020 WL 1940882, at \*9 stated, “it is more than mere speculation that the virus will continue to spread and pose a danger to inmates if BOP does not increase its efforts to stop the spread.”, *see* **Ex. 25**. The Sixth Circuit affirmed this injunction. No. 20-3447, 2020 WL 2120814, at \*1 (6th Cir. Apr. 30, 2020) (noting “measures the BOP implemented to lessen contagion met with limited success at Elkton: dozens of inmates and staff have contracted the virus; and several have died”).

Indeed, many courts across the country have found that the risk of contracting COVID-19 as a result of the inherently unsafe conditions of incarceration constitutes irreparable harm. *Id.*; *Banks*, 2020 WL 1914896 at \*11 (calling COVID-19 effects “prototypical irreparable harm”), **Ex. 24**; *Mays v. Dart*, No. 20-cv-2134, 2020 WL 1987007, at \*34 (N.D. Ill. Apr. 27, 2020) (holding “severe health consequences, including death, if they contract coronavirus disease” constituted “irreparable harm.”), *see* **Ex. 26**; *Basank*, 2020 WL 1481503, at \*2-\*4, **Ex. 20**

Each of the named Plaintiffs and the members of the putative class face an immense threat of irreparable harm that they will contract, and may suffer severe illness or death from COVID-19 if they continue to be confined under current conditions of insufficient social distancing measures, inadequate hygiene and sanitization, and separation based on speculation because widespread testing is not implemented. A likelihood of irreparable harm is clearly present here the conditions

of Plaintiffs’ and the putative members of the class’ incarceration need to be addressed and changed as soon as possible.

**CONTRARY TO DEFENDANTS’ ARGUMENT [C., ECF No. 1266-69], IT IS IN THE PUBLIC INTEREST TO LIMIT THE SPREAD OF COVID-19 IN PRISONS.**

There is an overwhelming public interest in limiting the spread of COVID-19, in prisons and otherwise, both to minimize further infections and suffering, and to reduce strain on health systems. This is especially true when prison staff acts as a vector between the massive outbreaks in the prisons and the general community. Further, there is a public interest in protecting constitutional rights. *See G & V Lounge, Inc. v. Michigan Liquor Control Com’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.”).

Respondents argue that the public interest is disserved by “constitutionalizing” the Government’s response to a public health crisis. Resp. Opp. at 22. Suffice it to say that the constitutional requirement that the Government eliminate “a condition of confinement that is sure or very likely to cause serious illness and needless suffering” for those it has chosen to imprison is not a novel one. *Helling*, 509 U.S. at 33. When that fundamental obligation is violated, there is no public interest in turning a blind eye. Rather, “the public interest lies with the enforcement of the Constitution.” *Ligon v. City of New York*, 925 F. Supp. 2d 478, 541 (S.D.N.Y. 2013).

*Arias v. Decker*, 20 CIV. 2802 (AT), 2020 WL 2306565, at \*11 (S.D.N.Y. May 8, 2020), *see Ex. 29*; *Zaya v. Adducci*, 20-10921, 2020 WL 2487490, at \*2 (E.D. Mich. May 14, 2020) (“Petitioner had demonstrated a likelihood of success on the merits

because Respondent's precautions could not guarantee Petitioner reasonable safety (*id.* at PageID.673–676); and the public interest in public health and safety outweighed its interest in Petitioner's continued detention. (*Id.* at PageID.676–678.)”), *see* **Ex. 17**; *Refunjol v. Adducci*, 2:20-CV-2099, 2020 WL 1983077, at \*5 (S.D. Ohio Apr. 27, 2020) (“The public interest is served by the vindication of their constitutional rights, to be sure, but the public interest is also served by minimizing the number of COVID-19 infections.”), *see* **Ex. 18**; *see also Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (“the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19”), *see* **Ex. 29**.

While Plaintiffs concede that implementing these protective measures is difficult and expensive, the public interest in doing so weighs heavily in favor of the relief Plaintiffs request. Further, Defendants make the curious and patently ridiculous argument that implementing the measures Plaintiffs request will somehow prevent them from being able to take additional measures and protect the prisoners. (ECF No. 27, ID 1268). Defendants are aware if new procedures are developed that will increase the protections of the Plaintiffs from COVID-19, they only need to call this Court and seek an immediately zoom hearing to get an amendment to any injunction that would hinder such changes. Plaintiffs suggest that their requests for

relief are the floor, as opposed to the ceiling, and Defendants are free to implement additional protective measures.

### **CONCLUSION**

WHEREFORE, Plaintiffs are requesting that Defendants be ordered to provide social distancing and if it cannot that it must transfer inmates to other cellblocks or prisons, which include those facilities that are presently closed, where appropriate measures, such as testing and single-cell placement, or social distancing, may be accomplished. Plaintiffs are requesting that this Court find that the other issues raised in the complaint are found to state a complaint and these issues be set for discovery.

Respectfully submitted,

/s/ Daniel E. Manville

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### **PROOF OF SERVICE**

I, Daniel E. Manville certify, under penalty of perjury, that on May 18, 2020, I caused a copy of the above document to be served by ECF on counsel for the Defendants.

/s/ Daniel E. Manville  
Daniel E. Manville

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

**ELLIOTT ABRAMS, et al.,**

Plaintiffs,

-v-

**WILLIS CHAPMAN, et al.,**

Defendants.

Case No. 20-cv-11053

Hon. Mark A. Goldsmith

Maj. Judge R. Steven Whalen

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**Exhibit Listings**

1. Supplemental Declaration of Dr. Adam Luring
2. Summary of Warden of Cotton Prison and Affidavit of Prisoners
3. Summary of Warden of Parnall Prison and Affidavits of Prisoners
4. Summary of Warden of Macomb Prison and Affidavits of Prisoners
5. Summary of Warden of Lakeland Prison and affidavits of Prisoners
6. Pictures of Masks produced by MDOC
7. Affidavit of Jesse Mack
8. Affidavit of Desmond DeRoo
9. Grievance Response at First Step to Plaintiff Abrams
10. Grievance of Plaintiff Reeves
11. PD 04.01.150, Warden Form Policy
12. PD 03.02.130, Grievance Policy
13. Pugh v. Causo, 1:06-CV-138, 2008 WL 1868990 (W.D. Mich. Apr. 24, 2008)
14. United States v. Frost, 2020 WL 1899561, at \*3 (E.D. Mich. Apr. 17, 2020)
15. Malam v. Adducci, 2020 WL 1672662, at \*12 (E.D. Mich. Apr. 5, 2020)
16. Salami v. Rewerts, 2020 WL 1316510, at \*6 (W.D. Mich. Mar. 20, 2020)
17. Zayad v. Adducci, 2020 WL 2487490, at \*2 (E.D. Mich. May 14, 2020)
18. Refunjol v. Adducci, 2020 WL 1983077, at \*5 (S.D. Ohio Apr. 27, 2020)

19. “Michigan ranks highest in nation for prisoner deaths from coronavirus,” Detroit Free Press, May 9, 2020, page 3.
20. Basank v. Decker, 2020 WL 1481503, at \*5 (S.D.N.Y. Mar. 26, 2020)
21. Jones v. Fox, --F.Supp.3d --, 2020 WL 1643857 (W.D.N.Y. Apr. 2, 2020)
22. Fofana v. Albene, 2020 WL 1873307, at \*9 (E.D. Mich. Apr. 15, 2020)
23. Awshana v. Adducci, -- F.Supp.3d --, 2020 WL 1808906, at \*8 (E.D. Mich. Apr. 9, 2020)
24. Banks v. Booth, 2020 WL 1914896, at \*9 (D.D.C. Apr. 19, 2020)
25. Wilson v. Williams, -- F.Supp.3d ---, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020)
26. Mays v. Dart, -- F.Suup.3d \_\_\_, 2020 WL 1987007, at \*34 (N.D. Ill. Apr. 27, 2020)
27. Martinez-Brooks v. Easter, 2020 WL 2405350 (D. Conn. May 12, 2020)
28. Peoples v. Bauman, 2017 WL 7050280, at \*4 (6th Cir. Sept. 5, 2017)
29. Arias v. Decker, 2020 WL 2306565, at \*11 (S.D.N.Y. May 8, 2020)
30. Declaration of Paul Draus, PhD, and CV.

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

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

Plaintiffs,

-v-

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

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

Defendants.

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**SUPPLMENTAL DECLARATION OF  
PLAINTIFFS' EXPERT ADAM LAURING**

Pursuant to 28 U.S.C. § 1746, I, Adam Luring, hereby declares the following:

This Supplemental Affidavit is provided in support of the earlier Declaration  
(ECF No. 22-26, PageID. 1035-49) I submitted in support of Plaintiffs' Complaint

(ECF No. 1) and the Motion for Temporary Restraining Order and Permanent Injunction (ECF No. 22).

1. Social distancing is the most important infection control measure in congregate environments. The CDC refers to it as “the cornerstone” for infection control in these settings.
2. A system of testing inmates just once will likely be insufficient to control an outbreak in a correctional facility. Absent repeat testing of inmates and/or testing of all guards and staff, it is possible for the virus to be re-introduced into a prison and spread among inmates and staff, regardless of the prior test result. A testing-based strategy for infection control must include testing of all guards and staff with likely repeat testing of inmates, guards, and staff.
3. Cohorting can be an effective measure for infection control. Here, individuals would be housed together based on testing status (positive, negative, exposed, etc.). Widespread testing is essential for the success of a cohorting strategy. A cohorting strategy based on testing only symptomatic individuals is unlikely to be successful and may lead to increased spread. It is increasingly recognized that many individuals infected with SARS-CoV-2 may be asymptomatic or have mild symptoms only. One study (He et al. Nature Medicine 2020, 10.1038/s41591-020-0869-5) estimated that up to 40% of transmission may occur prior to the onset of symptoms.
4. As the incubation period for COVID19 is approximately 5-7 days, testing of individuals exposed to a known case should be performed between 7-14 days after exposure, or with the onset of symptoms (<https://www.idsociety.org/practice-guideline/covid-19-guideline-diagnostics/> ). Exposed individuals should be separated for 14 days before returning to the general population.
5. Effective cohorting requires testing of staff and potentially having dedicated staff for “test positive” and “test negative” populations. If staff move back and forth between these groups, there is the potential for spread of the virus from the positive to the negative group.
6. Inmates, guards, and staff should be evaluated daily for symptoms (i.e. fever, cough, shortness of breath). If there is concern for under-reporting of



symptoms in these populations, then daily temperature checks should be implemented as an objective assessment.

7. There is currently no role for antibody testing in the management of COVID19 or in infection control (<https://www.idsociety.org/globalassets/idsa/public-health/covid-19/idsa-covid-19-antibody-testing-primer.pdf>). Many tests have relatively high false negative and false positive rates. A false negative antibody test is when someone who is known to have been infected has a negative antibody test. This can happen due to a poorly performing test. It can also occur if the antibody test is performed too soon after the person is infected. A false positive test is when someone who was never infected has a positive test. This can occur with a poorly performing test. Furthermore, at present, it is not clear if a positive antibody test means that an individual is immune to SARS-CoV-2 infection.
8. In an affidavit, Dr. McIntyre argues that prisoners are better off than their counterparts in the metro Detroit area due to improved access to care ([ECF No. 27-7] paragraphs 48-49). I disagree. Over the last three months, I have had extensive experience evaluating and treating patients with COVID19, many of whom have had severe disease. In my experience, the risk factors for severe disease and death are higher include diabetes, high blood pressure, chronic liver disease, poor access to routine medical care, and being a person of color. This is supported by the recent medical literature. While these risk factors may be particularly common among individuals in the Metro Detroit Area and in correctional facilities, the risk of being infected with SARS-CoV-2 is almost certainly higher in prisons and other congregate settings. Given the same background risk of severe disease, more individuals will be infected the virus - and therefore more will have worse outcomes.
9. Dr. McIntyre's states that "prisoners, compared to their Southeastern Michigan comparators, while likely equal in pre-morbid health conditions, have far greater access to healthcare, testing, and quality clinical care resulting in better outcomes than those in the communities from where they came." This point is debatable. It is not clear what measures of healthcare access and quality Dr. McIntyre is using. At a minimum, Dr. McIntyre would need to provide some sort of evidence that the quality of care to prisoners with COVID19 is better than the quality of care provided by the Detroit Medical Center, Henry Ford Health System, Beaumont Health System, University of

Michigan Health System – all of which provided care to COVID19 patients from the Metro Detroit Area.

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

Executed on this 17th day of May 2020.

A handwritten signature in black ink, appearing to read 'A. Luring', with a stylized flourish at the end.

Adam Luring, MD, PHD

**Exhibit 2 - Robert G. Cotton Correctional Facility (JCF)**

Defendant Noah Nagy is the Warden of Robert G. Cotton Correctional Facility (hereinafter “JCF”) in Jackson, Michigan. (ECF No. 27-15, PageID.1524-71). The facility consists of over twenty structures, as relevant here, including six pole barn housing buildings, eleven brick housing buildings, an administration building, an education building and two food service buildings. (*Id.*, PageID.1526). Inmates at JCF testify that they are constantly forced to be within six feet of one another in nearly every aspect of their lives. See Exhibit 2, Affidavits from Prisoners confined at Cotton. Because cleaning is so limited, the virus is allowed to run rampant.

**A. *Social Distancing***

Social distancing at JCF is an oxymoron. Whether inmates are eating, recreating, sleeping, communicating with those on the outside, moving about the unit, or any other activity, they are within six feet of at least one other inmate, usually many more. While Defendant-Nagy and his staff at JCF have taken some cursory actions to suggest inmates should social distance, the obvious realities of life in prison prove that much more action is needed: the conditions are crowded, and six feet of separation from others is a mythical concept, nothing more (Ex. 2, Affidavits of inmates confined in pole barns).

The first issue at JCF is inmates being housed in pole barns. One of the proposed subclasses includes all inmates in pole barns. A “pole barn” is an open plan

environment originally built in the 1980s as temporary housing for around eighty men per each of the two sides. The units now house twice that capacity, as approximately one hundred and sixty inmates live in each of these six units. The floor plan is divided into twenty “cubes” per side that measure roughly fourteen by twenty feet. Each cube houses eight men, with four sets of bunk beds with two inmates in each bunk. (Ex. 2, Affidavit of Justin Brophy at ¶ 4). No one can seriously contend that any inmate is free to “social distance” in these conditions of confinement. As one inmate describes, “It is physically impossible to remain [six] feet from anyone because these pole barns are way too overcrowded.” (Ex. 2, Affidavit of Joshua Zuazo at ¶ 5). In the questionnaire Plaintiffs’ counsel submitted to inmates at JCF, seventeen (“17”) inmates indicated they sleep in one of these eight-man cubes in pole barns. Defendant Nagy claims that his action in splitting these pole barns between positive and negative inmates somehow addresses the lack of social distancing in these pole barns. (ECF No. 27-15, PageID.1542-43 ¶ 31). He does not address his disregard of the health risk posed to inmates in eight-man pole barns.

Housing units present a different cell size, where inmates are confined with one other individual in two-man cells, that was originally designed for one person.

Defendants’ suggestion that inmates should sleep “head-to-toe” to try to social distance demonstrates the continued neglect of these conditions. (ECF No. 27,

PageID.1259-60). This sort of half-hearted social distancing effort is the exact sort of “attitude and conduct” that evinces deliberate indifference in this request for an equitable relief. When asked whether he was “instructed that each of you should have your head on the oppos[it]e end of the bed to created [six]-feet [of] separation[,]” one inmate, Mr. Brophy, noted that inmates “were never instructed to sleep on opposite sides.” (Ex. 2, Affidavit of Justin Brophy at ¶ 4; Affidavit of Joshua Zuazo at ¶ 4). Five other inmates answered this question, and all noted they had been given no instructions to sleep “head-to-toe” at all. Somewhere in this “top-down coordinated effort” even the most futile of advice is lost in translation.

#### B. *Testing and Quarantine*

Defendants claim they have swiftly implemented COVID-19 protocols written by their Chief Medical Officer, Dr. Carmen McIntyre. (ECF No. 27, PageID.1241).<sup>1</sup> Section (e) of the Director’s memorandum outlines part of a plan on testing and quarantining:

“• Separate isolation areas shall also be developed 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.

<sup>1</sup> Shockingly, in another charade for the Court, Dr. McIntyre avers that inmates confined against their will in prison are somehow better off than their “Southeastern Michigan comparators” in the outside world. (ECF No. 27-7, Defendant’s Exhibit F, at ¶¶ 48-49). Common sense notions of human decency tell otherwise, and Dr. Lauring, an immunologist who has worked with COVID-19 patients in these hospitals, disagrees with Dr. McIntyre’s solution, *See* Ex. 1, Supplemental Declaration of Dr. Lauring.

- The isolation areas for PUIs shall follow the same criteria as the isolation areas for prisoners with confirmed cases of COVID-19.
- A PUI shall be placed alone in a cell pending the outcome of their test results.
- Staff transporting a PUI shall wear the same PPE that is required for transporting a prisoner with confirmed COVID-19.”

(ECF No. 27-5, PageID.1318). This policy does not provide for social separation for prisoners. It provides social separation if you are tested positive or have had contact with those tested positive.

In part because of the close quarters at JCF, intermixing positive and negative testing individuals has been a problem for Defendants.<sup>2</sup> The contagious nature of this virus undoubtedly makes this job a hard one. The difficulty of this task does not give Defendants a free pass to shrug off serious risks with flawed policies that risk erroneous exposure to the virus at every step of the way.

For example, Defendant-Nagy testifies about the struggles for testing at JCF. *See* (ECF No. 27, PageID.1537) (noting “limited number of COVID test kits available across all MDOC facilities, but this shortage situation quickly improved in the month of April as more testing kits became available”). Plaintiffs do not claim that this negligent or accidental oversight is the reason their testing system has failed. Instead,

<sup>2</sup> As noted above, many of the housing units are these pole barns with an open floor plan. Insofar as a pole barn is used as “isolation areas” their protections are simply insufficient. These cubicle-like structures are identical conditions to that which many Americans work in. Yet, the common sense on the outside is to encourage staying home, because “cubes” have such trivial protections.

Defendant-Nagy explains their claim, as “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.” (*Id.*). In the meantime, JCF seeks to separate and quarantine inmates, often unsuccessfully. (*Id.* at ¶ 29(g) (blaming “very few exceptions” of exposure on “reasonable and unavoidable time lag” in testing). Many inmates testify that this is how they caught the disease. The frequency of these mishaps should ring an alarm that something needs to change.

Warden Nagy has not created a medical plan for continuing testing or inmates, and the testing of guards. As Dr. Luring has testified, an effective testing plan must be created. Ex. 1.

A few inmates’ experiences with testing and quarantine demonstrate some shocking examples of disregard for human decency. The first is Charles Brooks, an inmate who tested positive and also suffers from asthma, chronic bronchitis, and hypertension. (Ex. 2, Affidavit of Charles Brooks at ¶ 25). He testifies that he was moved into one of JCF’s pole barn cubicles “less than an hour after they removed someone from that cubicle, that they suspected of having COVID-19, and who subsequently tested positive for the virus. After being in that cubicle, I tested positive for COVID-19, even though I was negative when tested prior to moving to that unit.” (*Id.* at ¶ 27). Even worse, on May 15, Brooks was told he was being transferred to another unit, and “Deputy Warden Rurka came to inform me that I had been moved

because my Coronavirus test had been misdiagnosed.” (*Id.*). Why was Brooks misdiagnosed and forced to live with inmates who tested positive? Defendants decided to test his unit with antibody testing and conflate that with diagnostic testing. (*Id.*). While even MDOC recognizes this is an improper use of antibody testing, “but apparently [Brooks’] was.” (*Id.*).<sup>3</sup> The antibody tests given to Mr. Brooks significantly increased his likelihood of exposure to the virus, all because Defendants created this Kafkaesque confusion which did very little to actually combat the virus. Further, Dr. Lauring stated that

There is currently no role for antibody testing in the management of COVID19 or in infection control (<https://www.idsociety.org/globalassets/idsa/public-health/covid-19/idsa-covid-19-antibody-testing-primer.pdf> ). Many tests have relatively high false negative and false positive rates. A false negative antibody test is when someone who is known to have been infected has a negative antibody test. This can happen due to a poorly performing test. It can also occur if the antibody test is performed too soon after the person is infected. A false positive test is when someone who was never infected has a positive test. This can occur with a poorly performing test. Furthermore, at present, it is not clear if a positive antibody test means that an individual is immune to SARS-CoV-2 infection.

Ex. 1, Declaration of Dr. Lauring, para. 7.

<sup>3</sup> Plaintiffs’ expert, Dr. Adam Lauring, is of the medical opinion that “[t]here is currently no role for antibody testing in the management of COVID-19 or in infection control (<https://www.idsociety.org/globalassets/idsa/public-health/covid-19/idsa-covid-19-antibody-testing-primer.pdf>). Many tests have relatively high false negative and false positive rates.” (Affidavit of Dr. Lauring).



Another Plaintiff's experience, Craig Seegmiller, tells a similar story. Seegmiller is concerned about "[c]onstantly being moved around between units, Level 1 and Level 2." He notes that a couple of his eight man cube cellmates are "being tested [but they do] not get[] tested until facility wide testing putting [them] back around other inmates who may or may not have it who may infect me or who I may infect. I have been put around sick people, and sick people also are being moved around possibly infecting others." (Ex. 2, Affidavit of Craig Seegmiller at ¶ 20). Defendant Washington's policy does not help Seegmiller in any way, shape or form. Seegmiller is shuffled around like the rest of inmates with guesswork testing that disregards the grave risk to his health.

Worse yet, the information prison officials provide to Plaintiffs evinces a disregard for the consequences of this virus. Mr. Jesse Nichols reports that a group of inmates "in the gym were told by the administration that there are 8 different strains of Corona virus so 'it doesn't matter how they move people around because we're going to keep getting each other sick anyway'." (Ex. 2, Affidavit of Jesse Nichols at ¶ 20). The culture in prison Nichols testifies aptly sums up Defendants arguments: "the prison did as little as possible every step of the[] way, sending out puffed up notices of how good their doing while the virus has spread through the majority of the level 1 compound." (*Id.* at ¶ 20(g)). Mr. Nichols point hits home, as

most of Defendants' responsive measures are bureaucratic instead of medically premised.

*C. Cleaning and PPE*

Cleaning is another issue at JCF, as Plaintiffs' provide varying responses on the cleaning efforts, none of which is done by anyone who is not incarcerated there against their will. Who carries the primary responsibility for cleaning at JCF? Inmate porters. (Ex. 2, Affidavit of Nicholas **Spirione** at ¶ ; Affidavit of Brophy at ¶ 8). While some of these porters may be reliable front-line warriors against the virus, this delegation of the only cleaning responsibilities to these porters suffers from implementation problems because of the varying reliability. For that reason, the frequency of cleaning in different units varies. Some inmates report that their units are being cleaned three or four times a day, others say porters only clean the units once or not at all.

Bathrooms, shared by an entire unit of one hundred and sixty inmates, are also rarely cleaned. While some inmates indicate they are supposed to be cleaned a few times a day, porters, for whatever reason, often do not. The cleaning of phones is also apparently an honor system, where after they use the phone each inmate is supposed to wipe it down themselves. Many inmates disagree with the efficacy of this practice at JCF.

In contrast, the cleaning supplies inmates are given is subject to little doubt. As noted, Defendant-Nagy himself testified that he walks around to ensure there are adequate cleaning supplies for all inmates. What cleaning supplies exactly are available? One inmate, Jamel El-Amin, testified that each unit, comprised of one hundred and sixty inmates, splits three spray bottles of watered-down bleach and four bottles of “citrus” multipurpose cleaner. (Ex. 2, Affidavit of Jamel El-Amin ¶ ). Each bottle is filled twice a day. (*Id.*). Nearly all the inmates from the questionnaire refer to those same two types of cleaning supplies (Ex. 2). Each unit shares a single mop or broom. No individual “cubes” are given cleaning supplies. Inmates can get individual cleaning supplies only through one process: they take a “rag” up to the officers’ station, who then sprays the rag with the bleach mix (Ex. 2). Plaintiffs have and are “complain[ing] or express[ing] concern over not having adequate supply of hand soap, cleaning supplies, or PPE” and yet Defendant-Nagy fails to address those complaints in this lawsuit. (ECF No. 27-15, PageID.1535 at ¶ 24).

Personal protection equipment, or three masks, have been provided to inmates. Unfortunately, these masks are also a cursory effort. The masks provided are made from prison blues, and many inmates claim they can see through their masks because the material is so thin. (Ex. 2, Affidavit of Craig Seegmiller at ¶ 21). Worse yet, inmates are told that they cannot get new ones. (*Id.* at ¶ 24). MDOC made and distributed these masks and sell them as “reusable masks that can be laundered.”

(ECF No. 27, PageID.1236). Many inmates tried; the masks fell apart in the wash. (Ex. 2) Now, Defendants refuse to take any further action to replace these masks. Several inmates have been forced to staple their masks together, (Ex. 2, Affidavit of Charles Brooks at ¶ 24), or craft new ones from articles of their own clothing. (Ex. 2, Affidavit of Jessie Nichols at ¶ 24). Defendants and their employees know of this, but claim their only duties ended when they delivered the first three masks.

Even worse than this cursory effort to provide inmates with masks, some guards must supply their own. (Ex. 2, Affidavit of Terrance Carrey). While some N95 masks may be provided to medical or correctional staff, (Ex. 2, Affidavit of **Brooks at** . Defendants do not even provide some of their own employees with the necessary equipment. Little wonder that prison officials, who regularly must pat-down inmates, do not change their gloves unless requested. (Ex. 2) While Director Washington's did order inmates and staff to wear masks, and staff to wear "PPE" like N95 masks, eye protection, face shields, and gloves, (ECF No. 27, PageID.1316-17), she made little effort to actually supply prisons like JCF with the necessary equipment to protect themselves. More efforts must be taken to abate this substantial risk of harm.

DECLARATION OF JUSTIN BROPHY #440838: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes, I tested positive.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No, I was not aware that I had it. I thought it was allergies.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. We are housed in cubes with 8 different inmates. We have 4 sets of bunks with 2 inmates in each bunk. We were never instructed to sleep on opposite sides.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. No, we cannot engage in 6 foot separation when moving in our unit.
6. Are you given cleaning supplies for your cell?
  - a. No, we are not given cleaning supplies for our cells.
7. What cleaning supplies are you given?
  - a. We are not given cleaning supplies.
8. Have you observed the unit being cleaned?

a. Porters come through once maybe twice a day.

9. If yes to Number 8, how often is the unit cleaned?

a. Porters come through once maybe twice a day.

10. Are the telephones cleaned after each use?

a. No, telephones are not cleaned after each use.

11. How often are the bathrooms cleaned?

a. Bathrooms are cleaned once a day.

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. The inmates were placed in there and sat there and I observed guards going in and out.

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. Yes, there is nowhere else to go to the bathroom.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates?

a. No, the separation panels were not set up.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. No.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No, there is no social distancing during bathing and restroom use.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. No, there is people everywhere on yard.

18. Is that rule enforced by the guards?

a. No, this rule is not enforced by guards.

19. Is there social distancing of 6-feet during feeding in the unit?

a. No, there is no social distancing while feeding in unit.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. Our food portions have gone down, food sits outside for over half hour before we get it.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. The masks were prison made. They were not helpful because the whole compound got sick.

22. When you are patted down, are guards using gloves?

a. The guards wear purple gloves.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. The guards never change their gloves.

24. Can you get new masks if you ask for a new one?

a. They have not replaced our masks.

I Justin Brophy Inmate 440838 state this information is true under the perjury of law and give Dan Manville my permission to use my statement and sign.



## DECLARATION OF JOSHUA ZUAZO, COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes I tested positive for covid-19 on 5-1-20.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No I didn't consult health care because they were punishing us for being sick, how? They were placing us in segregation, not allowing us any appliances, they threw whatever food that we purchased from store away & the c/o's didn't want anything to do with us ( for obvious reasons).
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. Healthcare took 8 days after testing positive to give me vitamins & they came twice a day for 14 days to check our vitals.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. No I'm housed in a filthy pole barn & we were never instructed to lay on opposed sides but you can only do that on 2 of the 4 bunks.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. It is physically impossible to remain 6 feet from anyone because these pole barns are way too overcrowded. The phones (inside & outside) are

too close, the jpay computers are too close, the urinals are too close, & the bathroom sinks are too close.

6. Yes we're given bleach but it's watered down, its not 1 part bleach to 10 parts of water & we can only spray rags.

7. Have you observed the unit being cleaned?

a. I'm a unit porter in T-E & I am certified in custodial maintenance, the majority of the prisoners do not know how to properly disinfect surfaces, this is one of the most nastiest conditions that I've ever jailed in. The phones, kiosks & tables are wiped down only after officers does count (which is twice a day), the railings are wiped down frequently, the bathrooms are cleaned twice a day, & I just started thoroughly cleaning them on 3rd shift.

8. Are the telephones cleaned after each use?

a. This is up to the inmate

9. If inmates have been placed in the dayroom, what can you tell me about them?

a. When they were placing inmates in the dayroom for suspicion of being sick guys were sneaking out getting on the phones & jpay computers to notify there family that they were being moved because they may

possibly be sick with covid-19. One guy (Quintin Davis) who ended up being sick was sent back to his cube to wait for shift command.

10. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

- a. No CDC guidelines are being followed here at Cotton Correctional Facility, they do what they want. There is no 6 feet anything being enforced because its impossible. Its not adequate spacing to do nothing but pass germs & this virus.
- b. I understand that there isn't any PD, OP or SOP in place to deal with a pandemic but ignorance is no excuse for the law.
- c. They didn't touch our US mail, for 12 days it sat in the US Mail box.
- d. Our food is always cold or soggy from being moved around during transportation.
- e. Officers who were sick but didn't report it would still come to work.
- f. On 4-8-2020 Heidi Washington put out a DOM 2020-30 that gave Warden's authorization to give prisoners Disciplinary Credits days that would've let guys like me go home before I they got sick because I have a parole but he didn't.
- g. T-E was suppose to be a negative unit so when they tested, they put about 8 or 10 guys with us who had already tested negative in here with

us. The next day, our test results had come in with over 120 guys being positive. They immediately moved those 8 or 10 negative guys into a negative until when they should've quarantined them to make sure that they didn't contract the virus & cross contaminate the negative units.

- h. The virus & medication gave us diarrhea but staff still refuse to give us tissue when we run out.
- i. The prisoner store had run out of Tylenol & we were told that we would receive Tylenol when we received our vitamins, that didn't happen.
- j. Guys aren't properly cleaning because they don't know how to and aren't being taught how.
- k. They just had a guys test come back negative but they kept him in a positive unit around us guys who hasn't been retested.
- l. I thought that I was about to die for 3 days straight, I didn't say anything from fear of dying in discomfort or by myself because that's how they were doing us.

11.If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

- a. When they were patting us down they would only change gloves if we requested it. They never change gloves during cell shake downs, period!

12.Can you get new masks if you ask for a new one?

- a. No we can't get new mask because their aren't any, you have to fabricate your own or pay someone to make you one.

13.Has the prison used portable showers?

- a. Yes, portable showers were placed in the gym 3 days after inmates were already living in the gym, guys went 72 hrs without a shower.

My name is Joshua Zuazo #463189, I'm an inmate at JCF & the above was type be me & it is accurate to the best of my knowledge & belief. I will testify under the penalty of perjury. I give Attorney Dan Manville my permission to act on my behalf & sign any legal documents pertaining to this matter.

DECLARATION OF CHARLES BROOKS: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?

a. Yes I tested positive.

2. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposing end of the bed to created 6-feel separation?

a. I am in a cubicle setting. No one has been instructed to sleep with heads on opposing ends.

3. Can you engage in 6-foot separation when moving about your unit?

a. No.

4. Are you given cleaning supplies for your cell?

a. Not other than the diluted citrus cleaner we could use prior to the pandemic

5. Have you observed the unit being cleaned?

a. Our unit is supposed to be cleaned, by unit porters,

6. If yes to Number 8, how often is the unit cleaned?

a. The unit is supposed to be cleaned at 11am, 4pm, and 11:30pm. Some housing unit porters perform their duties, but most don't.

7. Are the telephones, cleaned after each use?

a. The phones aren't cleaned after each use because there are no rags available to wipe down with. We won't use our toilet paper because our ARUS

only gives out one roll of toilet paper PER WEEK, and tells us that we must buy more from the store. So no one wants to waste their tissue.

11. How often are the bathrooms cleaned?

a. The bathrooms are supposed to be cleaned at the times I listed in my response to question 6. But, as I have already stated, some porters just don't perform their duties.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates?

a. There were no panels to separate us from the initial outbreak here at JCF.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. The PUI unit here at JCG consisted of placing men in segregation.

Anyone who was suspected of being sick was immediately moved to seg, and their cubies were moved to a 'close contact' unit. The guys in the PUI unit were treated as if they were in seg for disciplinary reasons. They weren't allowed access to a phone, or Jpay, until the test results came back.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. There is no ability to socially distance while showering or using the bathroom because our facilities are literally 2 feet apart

17. Is there social distancing of 6-feet during exercise or on the yard?

a. On the yard there is the ability to socially distance, but because there are only 12 phones on the yard, and roughly 12 tables, there tends to be crowding as guys wait to use the phone.

19. Is there social distancing of 6-feet during feeding in the unit?

a. They tried to enforce social distancing in the chow hall. They then moved to feeding everyone inside of their units. Which eliminated social distancing because we only have 4 tables that can seat 16 people in our dayroom. We are forced to eat in our cubes, which places us less than 2 feet from each other.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. They moved people from one unit to another in a way that people who might be carriers of the disease could have spread it. I was in the TB unit, the initial outbreak unit. I was tested and tested negative. Out of 160 guys, 73 were removed from the unit because they were sick. That left 87 of us who were over a week of being symptom free, with no new people ill. On April 23, when people in TC unit were taken out because they showed symptoms, everyone in TB unit was told that we were moving to TC. We protested because we did not understand why they would move us from a unit where no one was getting sick to a unit where they were just starting to get sick. Additionally, according to the posting they had up



about the CDC guidelines, they were supposed to wait at least 24 hours before messing with those guys linens, etcetera. We were told that this came from Lansing and it was happening. If we refused to move, we would go to the hole. So we were moved into a cube less than an hour after 8 people were moved out, at least one of which was COVID-19 positive. Once we were tested this past week, I was now positive.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. The prison gave us 3 masks here at JCF. They were made by Michigan State Industries, from the same material our blues are made from. Staff is provided N95's.

22. When you are patted down, are guards using gloves?

a. Yes

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. Guards do not change gloves in between each individual patdown. They also don't change gloves when packing up a guy's property, or shaking down a cube: they aren't changing gloves between each individuals property and space.

24. Can you get new masks if you ask for new ones?

a. No. I haven't seen anyone get new masks. I have seen guys stapling them to fix them. I used my sewing kit to repair mine.

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. I feel that they wanted us to contract this disease because Lansing made no efforts to provide us with a basic reasonable defense. I am asthmatic and have chronic bronchitis. I also have hypertension, and there was no way to create the spacing needed to try to stay safe. Officers weren't taking this seriously, initially. And we had no choice in the matter.

26. Has the prison placed porters-jones outside the housing units?

a. There are two portajohns on the big yard. There is no tissue out there, nor any cleaning supplies. One of the does not even have a door.

27. The CDC recommendations were NOT followed in that they moved me into a cubicle, less than an hour after they removed someone from that cubicle, that they suspected of having COVID-19, and who subsequently tested positive for the virus. After being in that cubicle, I tested positive for COVID-19, even though I was negative when tested prior to moving to that unit. And the CDC guidelines were removed, nearly immediately, from where they were posted in the windows of the ARUS's office

28. On May 15, I was called to the Corrections Officer's desk in TB unit, via the intercom. Once I got there, they told me I was being moved to TC unit. It was an unusual move, because while the MDOC can move prisoners at any time, they normally make moves here around 5pm. So I was moved, without being informed of any reasons. This morning, at @ 8am, Deputy Warden Rurka came to inform me that I had been moved because my Coronavirus test had been misdiagnosed.

29. When I was tested on 4/29/20, I was initially told I was positive. Then I was moved to TB unit about 10 days ago, and told that the positive test result was actually incorrect. Wednesday, they tested my unit for the antibodies. The MDOC has distributed a memo that says that the antibody test wasn't going to be used to diagnose positive or negative tests for Coronavirus, but apparently mine was.

30. According to P.A. Austin, who came to see me this morning, once they discovered I had antibodies to the Coronavirus, they went back to my results and realized the lab had sent false results on me. So I was moved back to a positive unit because I am positive.

I, Charles Grant Brooks, Sr. #351208, give Daniel E. Manville permission to sign my name, and act as my agent, in any future matters, pertaining to the lawsuit concerning COVID-19 filed against the Michigan Department of Corrections.

My name is Charles Brooks, Sr. I a prisoner 351208, incarcerated at Cotton Correctional Facility. I swear that my answers and statements are completely true, under penalty of perjury, this 4th day of May 2020.

DECLARATION OF CRAIG SEEGMILLER: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?

a. Yes. Positive.

2. Had you sought health care because you thought you had COVID-19 symptoms?

a. No.

3. If yes to question 2. Explain what steps health care took to treat you, if any?

a. N/A.

4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposing end of the bed to created 6-feel separation?

a. Yes I am in a 2-man cell. No instructions of any kind have been provided.

5. Can you engage in 6-foot separation when moving about your unit?

a. With the number of prisoners moving about at any given time, the likelihood of 6-foot separation is remote.

6. Are you given cleaning supplies for your cell?

a. Yes.

7. What cleaning supplies are you given?

a. Bleach and rags when requested.

8. Have you observed the unit being cleaned?

a. Yes.

9. If yes to Number 8, how often is the unit cleaned?

a. One to three times per day depending on staff supervision.

10. Are the telephones, cleaned after each use?

a. Only if we clean them ourselves.

11. How often are the bathrooms cleaned?

a. Similar to question 9.

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. . No inmates living in dayrooms from what I can personally see

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. N/A.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. No dayroom inmates, however, no further changes for GP to assist in separation. Bathroom configuration in this unit consists of about a 4 foot brick divider for privacy and toilets are back to back with about 3 feet of brick to protect plumbing. Despite facing opposite directions when using the toilet, I believe we are still less than 6 feet apart.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. I believe no PUI units exist anymore. All of JCF has been tested, and to my knowledge there are now 4 COVID-19 Positive Units, and 2 COVID-19 Negative Units in Level 1. Level 2 D unit where I am currently housed is also a COVID-19 Positive Unit.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. Yes for me because my unit goes to yard by itself, but not for Level 1 due to more than one unit on the yard at one time. Level 2 is largely unaffected and has the remaining 7 units on the yard at one time. So for all outside of my particular unit, the answer would be no.

18. Is that rule enforced by the guards?

a. No.

19. Is there social distancing of 6-feet during feeding in the unit?

a. No.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. Constantly being moved around between units, Level 1 and Level 2. Cube mates being tested and us not getting tested until facility wide testing putting us back around other inmates who may or may not have it who may infect me or who

I may infect. I have been put around sick people, and sick people also are being moved around possibly infecting others.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. We have been given three masks to date about 3-4 weeks ago. They are prison made out of a single thin layer of State Blue material that is thin enough it is partially see through. I do not believe they help prevent the spread of infection because they are very thin and are not equivalent to an N95. They say that "these masks will help to reduce the spread by preventing a sick person from spreading it to another by catching droplets." However, if a N95 respirator is what is recommended to catch particulates, and if this mask were to fail at containing the virus in a sick person, it will also fail to contain the virus in a healthy person and prevent them from getting sick.

22. When you are patted down, are guards using gloves?

a. I have not witnessed anyone get a pat down recently as the number of positives are increasing, however, prior to the facility wide testing (conducted 4/27 to 5/1) staff were conducting pat downs with gloves on.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. They did not change gloves in between shake downs. They remove the gloves after they have reached their daily quota (5 shake downs per shift).

24. Can you get new masks if you ask for new ones?

a. I have asked numerous staff members many different times for new masks as they start falling apart after about the second wash, and they have never provided me with another mask.

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. See No. 20.

26. Has the prison placed porter-jones outside the housing units?

a. No. And there are only 2 on each big yard that prior to this outbreak were cleaned once a week. I do not believe this schedule has changed.

27. If yes, which housing units?

a. No.

28. Has the prison used portable showers?

a. No.

29. If yes, in which housing units?

a. N/A.

30. I have witnessed a gross lack of concern for the safety of the population by the Administration here in Level 2's COVID-19 Positive D Unit. There is a female



Corrections Officer assigned to the unit with the last name of Johnson. I have witnessed prior to this day the exact same thing I am reporting witnessing today on a day that I do not recall. I can however, factually say that today I witnessed her not wear the required PPE in DOM 2020-30 in that by her working this unit, she is at all times within 6 feet of a Close Contact (porters, co-workers assigned to a COVID-19 Positive Unit), as well as confirmed COVID-19 Positive individuals housed in this unit.

31. On 5-6-2020 I witnessed Officer Johnson not wearing the required PPE (for Close Contacts and Positive Individuals requires an "N95 or other mask, a gown, eye protection, and gloves") while working all day today. And at approximately 1420-1445 while the COVID-19 Negative Level 2 population was going to and from the big yard directly outside our housing unit, she was out there improperly wearing her mask. During the time frame above, she then went out wearing only her uniform and mask and was mingling and talking to the Level 2 inmates getting within 6 feet of them.

32. Sergeant Davison entered the unit at approximately 1515 in full awareness of the requirements set forth in DOM 2020-30 pursuant to PD 01.04.110 Paragraph A and did absolutely nothing to correct the problem. I witnessed Sergeant Davison speak to Officer Johnson in the C/O break room in the hallway behind the Officer's Desk. It is currently 1529 and she is still outside the unit without the required PPE

exposing not only herself, but anyone else she comes in contact with (Level 2 inmates and staff) which shows that Sergeant Davison failed to correct the problem despite knowing about it.

33. I have also witnessed her go stand outside of E/F units directly across from us without wearing PPE in the unit and also not wearing it out there potentially contaminating things outside (i.e. garbage cans for the units that inmate porters empty out about 3x daily).

34. I have witnessed something else that takes place daily. Every day either once or twice a day, nurses come in to take vitals of the population (voluntary now). The vitals consist of no more than:

- a) 1) Temperature Check
- 2) Pulse Oximetry
- 3) BP Check for 65 y/o and above or when requested.
- b) The nurses do not change gloves.
- c) The nurses use the same wipe to disinfect the medical instruments

35. During insulin lines, the nurses are not changing gloves in between injections (self administered by inmates but filled by nursing)

I Craig Seegmiller #373625 attest the above information to be accurate and true to the best of my knowledge under penalty of perjury and give Dan Manville permission to sign my name.

## DECLARATION OF JESSE NICHOLS: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes, I am now positive.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No, no symptoms until after the test. I was told to sleep on my stomach and given vitamins a week after the diagnosis.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. See above
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. Was not told to sleep at opposite ends of the bunk. I am in an 8-man cubicle that is about 14×20ft. where I sleep less than 2 feet away from 3 other people and the other 4 aren't much further. The level 1 housing units are 2 hallways of 10, 8-man cubicles each, with half walls and open ceilings for a total of 160 people per unit. Also with an open ventilation system that connects to other units. Positive/ negative units.
5. Can you engage in 6-foot separation when moving about your unit?

- a. Absolutely not. The housing units we have been confined to are designed to cram as many people together as possible.
6. Are you given cleaning supplies for your cell?
  - a. units are supposed to be cleaned periodically throughout the day, but is at each Individual unit porter's discretion.
7. What cleaning supplies are you given?
  - a. We are given state made cleaners and diluted bleach that can be used if we ask, if it's available at the time.
8. Are the telephones cleaned after each use?
  - a. Phones not cleaned after each use.
9. How often are the bathrooms cleaned?
  - a. Supposed to be periodically but lucky if they are cleaned once a day, specially the showers.
10. Is there a PUI unit?
  - a. The PUI unit was a unit cleared out of the level 2 side for people waiting for test results. But the worst area you should know about would be the gymnasium where they put an overflow of nearly 90 positive prisoners, where their property was taken, they weren't given hygiene for nearly a week, and set up a makeshift shower in the adjacent barber room out of pvc pipes coming from 3 sinks. No floor drain but a tarp and trench

system that would run the used shower water with bodily fluids through the other showers, over other peoples feet, to drain in a nearby janitorial sink.

11. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. No
12. Is there social distancing of 6-feet during exercise or on the yard?
  - a. Yard, yes. indoors, no.
13. Is that rule enforced by the guards?
  - a. On the yard, no. In the housing units they try during during med lines when the nurses come in but they rarely say anything because its impossible in here.
14. Is there social distancing of 6-feet during feeding in the unit?
  - a. Absolutely not. The food is now brought to our units in styro foam containers (usually cold), served out of the day room, and eaten in our cubes.  
  
20/25.
15. What other issues are you experiencing with COVID-19?
  - a. A) They are telling the prisoners they will not facilitate private attorney calls because the unit counselors have been pulled from the units. They were in charge of the inner workings of the units and the liaisons

between us and the administration/parole board.

B) They had quit taking our mail/kites for a week now and just yesterday found out.

C) All meals are more often served cold from sitting in the styrofoam and has been making people sick more frequently, since the kitchens are now state run there is no accountability.

D) Prisoners in the gym were told by the administration that there are 8 different strains of Corona virus so "it doesn't matter how they move people around because we're going to keep getting each other sick anyway".

E) There has been no separation in the scheduling or movement of the C.O.s, they'll work in a positive unit one day and a negative unit the next.

F) My family has been messaging me like I could die any day! I feel horrible for adding more worry to them than they already had to begin with.

G) Finally, the atmosphere here has gotten so much worse. Less and less C.O.s are able to come in while more prisoners talk about protesting or even rioting. I've watched so many people around me come down hard with this sickness while the prison did as little as possible every step of

they way, sending out puffed up notices of how good their doing while the virus has spread through the majority of the level 1 compound. People I have met have died that otherwise would have been home within a couple years. I am suspended from my job at MSI. Everything positive I could do is no longer available, library, gym, the A.A. meetings I was chairing. In March we were told the DOC would be working around the clock to release medically vulnerable people and those who are past their earliest release dates. My ERD was in 2017 and they have done nothing for me. I haven't even been able to just get a normal date for a parole interview. This entire ordeal has taken more of a toll on me than I can put into words.

16. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. 3 prison made masks that are 1 layer of cloth that wear out quickly.

17. When you are patted down, are guards using gloves?

a. yes, I have not seen them change gloves between shakedowns once.

18. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. See above

19. Can you get new masks if you ask for a new one?

- a. 24. We are supposed to but they never have any when asked. People are just using random scraps of clothing now.

I, Jesse Nichols, confirm that my statement regarding MDOC and their handling of the covid epidemic is true under the penalty of perjury, I authorize Attorney Daniel Manville to sign the affidavit on my behalf



DECLARATION OF NICHOLAS SPIRDIONE: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes, positive
2. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. Yes to 2 man cell, no to any sort of instructions.
3. Can you engage in 6-foot separation when moving about your unit?
  - a. Realistically, no. The likelihood is beyond remote.
4. Are you given cleaning supplies for your cell?
  - a. Yes
5. What cleaning supplies are you given?
  - a. Bleach is available and clean rags on request.
6. Have you observed the unit being cleaned?
  - a. Yes, but not as adequately as I would like to see.
7. If yes to Number 6, how often is the unit cleaned?
  - a. As of late, perhaps 3x daily? Usually during count (1100, 1600, 2120 hours).
8. Are the telephones cleaned after each use?

- a. No. Phones are only cleaned if we ourselves clean them. Nothing is nearby in my unit specifically for the phones either. Should you leave to get something to clean the phones, you'll lose your spot and opportunity to use the phone.
9. How often are the bathrooms cleaned?
  - a. Not entirely sure. I think the porters here tend to avoid cleaning our bathroom, but sometimes will put things in the bathroom for us sick people to do it ourselves.
10. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
  - a. No alterations in bathroom. Current setup in my unit consists of 2 toilets back to back with approx. 2-3 feet of concrete to protect the plumbing with approx. 3.5-4 foot partitions for privacy. On my floor, only one has a door. Also, 1 urinal <1.5 feet away from the first sink which is roughly <1 foot away from the second sink. I would estimate the sq. footage of the bathroom to be less than the estimated 10 x 20 foot cubes I was in in level 1.
11. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

- a. Not anymore. At this point, there are Positive Units, and Negative Units.  
Each houses individuals that at this time is solely based on COVID-19 lab results.
- 12. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. No
- 13. Is there social distancing of 6-feet during exercise or on the yard?
  - a. Current setup is option for us. However, majority of Level 1 no.  
Distancing on the yard is not mandatory either.
- 14. Is that rule enforced by the guards?
  - a. No
- 15. Is there social distancing of 6-feet during feeding in the unit?
  - a. No
- 16. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
- 17. How many masks have you gotten from MDOC? Are they prison made?
  - a. Currently 4. Only 3 were standard issue. I recently got another on request. Yes they are made at our MSI factory. To prevent "infection" I don't believe so. They are made from a single layer of State Blue T-Shirt material. This layer is thin enough that despite the darkness in color, it is still slightly see-through when held against the light. This material also

is not equal to or greater than a HEPA mask such as a N95 respirator.

With the holes in the material that are evident when held against the light, it is easy to see how ineffective they are. They MIGHT trap half or most particulates released when coughing and/or sneezing, however, there are many more microscopic particles released that will still get through this material.

18. Are they helpful to prevent infection? If no, why not?

a. See above

19. When you are patted down, are guards using gloves?

a. When pat downs were openly taking place, they did not change gloves in between individuals. They also did not change gloves in between bunks and property when shaking down cells and cubes.

20. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. At this time yes for my unit. But for the perhaps 30 days previous, no.

21. Can you get new masks if you ask for a new one?

a. See, #20

22. Has the prison placed porter-jones outside the housing units?

a. No

23. If yes, which housing units?

a. N/A

24. Has the prison used portable showers?

a. No

25. If yes, in which housing units?

a. N/A

26. On May 10, I observed Officer Johnson not wearing mask. It is hanging below her chin at the Officer's Desk. I watched her talk to another inmate and not pull her mask up and also talk into the mic possibly contaminating it for the other staff.

27. Later that day, Johnson did a round wearing only a mask, no other PPE

a. Footage will also show her again wearing only a uniform and mask; no gown, gloves, eye protection. JCF-2313, JCF-2311, JCF-2312, JCF-2332.

28. As a former Emergency Medical Technician, part of our education consists of containment, isolation, and quarantine as we are First Responders going into unknown situations daily and must always be ready and always be prepared. Therefore, I see many things done wrong.

a. First, DOM 2020-30 requires only: "an N95 or other mask, a gown, eye protection, and gloves." This is a first step, but to truly accomplish containment and prevent the spread, it is insufficient. The DOM also

requires "PPE worn in an isolation area shall be removed before going to another area of the facility." By definition, taking off a gown and carrying it with you to another part of the facility is " 'removing' it before going to another part of the facility." It does not explicitly require disposal prior to going to other parts of the facility. I have witnessed once the gown is removed, the nurses take them with them to wherever they go when they leave here. And most of them roll the gown up and bundle it under their arm. Through cross-contamination, their scrubs/clothes are contaminated. There is no "step-up" to don PPE, and no "decon" to remove PPE and keep it isolated from the facility. To my knowledge, PPE is discarded in standard garbage bags. I also witness C/O's remove PPE in the unit sometimes an hour or more before the end of their shift. They then leave the unit like nothing is wrong in their uniform potentially carrying the virus to other parts of the facility.

- b. Despite this being a COVID-19 unit, and also against DOM 2020-30, ["... required PPE shall also be worn by staff at all times when they are in an isolation area, transporting a prisoner with a confirmed or suspected case of COVID-19, packing the property of a prisoner with a confirmed or suspected case of COVID-19, or at any time the staff member has close contact (i.e., within six feet) with an offender (i.e., prisoner,

parolee, probationer) who has a confirmed or suspected case of COVID-19"] I have seen at a minimum a Sergeant and Lieutenant come in without wearing anything other than a mask. Then they leave taking whatever they picked up with them. I have also witnessed our regularly assigned Unit Officer, Ms. Johnson not wear anything more than a mask on several occasions, and also wear her mask improperly. Then she goes outside after being in here for hours in "close contact" with other "close contacts" (porters, coworkers) and known positives, and mingles with other staff and COVID-19 negative Level 2 on the way to/from yard.

- c. I have also received my SARS-CoV-2 lab results. Under comments, it reads: "THESE RESULTS ARE FOR THE DETECTION OF SARS-COV-2 RNA. DETECTED RESULTS ARE INDICATIVE OF THE PRESENCE OF SARS-COV-2 RNA. CLINICAL CORRELATION WITH PATIENT HISTORY AND OTHER DIAGNOSTIC INFORMATION IS NECESSARY TO DETERMINE PATIENT INFECTION STATUS. POSITIVE RESULTS DO NOT RULE OUT BACTERIAL INFECTION OR CO-INFECTION WITH OTHER VIRUSES. NEGATIVE RESULTS DO NOT PRECLUDE SARS-COV-2 INFECTION AND SHOULD NOT BE USED AS THE SOLE

BASIS FOR PATIENT MANAGEMENT DECISIONS. NEGATIVE RESULTS MUST BE COMBINED WITH CLINICAL OBSERVATIONS, PATIENT HISTORY AND EPIDEMIOLOGICAL INFORMATION. IMPROPER SPECIMEN COLLECTION CAN RESULT IN POSSIBLE FALSE NEGATIVE RESULTS."

- d. I provide this because on 4-30-20 when they verbally informed us of our results, a sheet was also provided which reads:

"To recap everything I said since it is likely a lot to absorb at once:

Your swab was positive for coronavirus

This virus is new and is being treated similar to the flu. Meaning symptoms are treated. The majority of people affected by this virus recover.

I am ordering you Tylenol and some vitamins/minerals to boost your immune system

I am also ordering labs that will likely be done today

It is very important that you stay hydrated, stay moving and sleep on your stomach if possible.

It is very important that you let someone know if you have trouble breathing.

Custody is aware of the result and are coordinating a move to a unit



where all positives will be.

From what I am told there will be TVs, phones, ability to move around more and possibly JPAY."

29. When moving here on 4-30-20, my mask fell off about 1/4 of the way from Level 1 TB to Level 2 D Unit. I was already starting to experience DOE (dyspnea on exertion). It was very apparent by the time I came near D Unit. No staff member said anything on the way. However, when I got near D Unit, Officer Stevenson started harassing me about not wearing my mask despite seeing apparent DIB (difficulty in breathing). Once he started, the officers escorting me also started harrasing me about it rather than assist me in pulling an extremely heavy cart with my stuff on it. I wound up giving him my ID and Sergeant Gonzalez apparently talked him out of the ticket and transported the cart the remaining 30 feet or so. I am already sick with unexplained weight loss in excess of 65 pounds in a period of 12 months. To me this shows a gross lack of concern for the health and safety of the population. Also the sheet provided states 2 things: "It is very important that you let someone know if you have trouble breathing," and "Custody is aware of the result and are coordinating a move to a unit where all positives will be." I made it apparent I was having trouble breathing when I first said to Ofc. Stevenson "I'll put my mask back on

when I get my stuff to the block and can sit and catch my breath." All this in full awareness of why I was being moved to a positive unit.

30. I also regularly witness officers being shuffled around daily. I would suggest getting staffing charts and see how often one person works a different place. I know for a fact that Level 2 D Unit is a Positive Unit. I have heard from someone in Level 1 on the yard a few days ago that TA, TD, TE, and TF are Positive Units. I would see how often people are rotated through those units and then assigned elsewhere on their other work days possibly promoting spread.

31. I have also found out today that "routine" transfers still exist. Though DOM 2020-30 only requires them to be "approved by the CFA Deputy Director," someone from RGC transferred here from what he tells me was unrelated to COVID-19.

I Nicholas Alan Spirdione attest the above to be true to the best of my knowledge under penalty of perjury.

I attest the following to be true under penalty of perjury and authorize Dan Manville to sign this document on my behalf.

DECLARATION OF JAMEL EL-AMIN, 347765: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes/Positive.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. Yes.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. Blood draw/vitamins but no tylenol
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If are not in a 2-man cell- describe where you are currently housed.
  - a. No/Pole barn unit/eight man cube.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. No.
6. Are you given cleaning supplies for your cell?
  - a. No.
7. What cleaning supplies are you given?
  - a. Once a week bleach

b. The staff gave the unit only 3 spray bottles of bleach, and 4 bottles of citrus cleaner, the staff only fills these bottles twice out of the day to use between 160 inmates and a lot of times they run out most of the time.

8. Have you observed the unit being cleaned?

a. No.

9. Are the telephones, cleaned after each use?

a. No.

10. How often are the bathrooms cleaned?

a. Once a day/if any day

11. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. No.

12. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No.

13. Is there social distancing of 6-feet during exercise or on the yard?

a. No.

14. Is that rule enforced by the guards?

a. No.

15. Is there social distancing of 6-feet during feeding in the unit?

a. No.

16. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. Three/Yes/No/Because they are made from state blues

17. Can you get new masks if you ask for new ones?

a. No/they say to wash them between each use.

18. Guards are shaking down inmates and not changing their gloves in between.

The above is true under penalty of perjury and Dan Manville can sign my name.

## DECLARATION OF JAMES BALDWIN: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. yes, I tested positive on 4/30/20
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. None
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I am currently being housed in a 14 by 20 cube space with 7 other inmates, and in the cube, we have 4 bunk beds with upper and lower bunks, we have 8 wall lockers, 4 chairs and 2 trash cans and all of our property in one cube. My cell mate above me sleeps right above me but with the way the shelves on our bunks are done we sleep opposite of each other.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. No, you can't because the unit is approximately 70x150 with 160 inmates in such a small area.

6. Are you given cleaning supplies for your cell?
  - a. Yes
7. What cleaning supplies are you given?
  - a. We use watered down citrus cleaner and if we take a rag up then we can spray it with bleach.
8. Have you observed the unit being cleaned?
  - a. Yes
9. If yes to Number 8, how often is the unit cleaned?
  - a. 4 times a day
10. Are the telephones cleaned after each use?
  - a. No
11. How often are the bathrooms cleaned?
  - a. They are supposed to be cleaned every hour by the porters, but they actually get cleaned sometimes only once a day. They are always really bad.
12. If inmates have been placed in the dayroom, what can you tell me about them?
  - a. They are considered PUIs, So if somebody showed symptoms that person was taken to be tested and the other 7 inmates would go in the day room until the nurse came only to screen them by taking their

temperature, pulse and oxygen levels and if they were all normal they went back into population without TESTING.

13. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. Yes
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates?
  - a. No
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
  - a. Yes its d unit in level 2 and they are the inmates that were in contact with somebody who tested positive, but they only did that for the first week or 2 then they started saying if you don't show symptoms than you stayed where you are and they take the one showing symptoms and put them in segregation until their test came back and if they were positive they go to k unit or the gym.
16. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. No
17. Is there social distancing of 6-feet during exercise or on the yard?
  - a. No
18. Is that rule enforced by the guards?



a. No

19. Is there social distancing of 6-feet during feeding in the unit?

a. No

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. I received 3 masks and yes, they are prison made, No I don't believe they're that helpful in preventing infection because guys are always touching their mask to adjust it or take it down and they're touching it all day and then touching the phone and jpay or doorknobs

22. When you are patted down, are guards using gloves?

a. Yes

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. Not unless you say something

24. Can you get new masks if you ask for a new one?

a. No

25. Has the prison placed porter-jones outside the housing units?

i. No

26.If yes, which housing units?

a. Only in the yard

27.Has the prison used portable showers?

a. Yes, only in the gym but I was told that the inmates had to go 5 days without a shower until the portable showers were set up and then they were very crude.

28.If yes, in which housing units?

a. The gym

I James Baldwin, certify that the information above is true under penalty of perjury and I give attorney Dan Manville my permission to sign it on my behalf.

DECLARATION OF KEITH LANE: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. yes I was tested positive on 4/30/2020. My medical status is I'm still feeling some of the symptoms like loss of appetite and the cold chills.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. no I did not seek help from health care because at the time they were putting you In segregation for 3 days without your property. all you would get is a book and I feared that if I got too bad nobody would be able to monitor me and I could possibly die.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. once I testd positive for covid-19 the nurses come in 2 times a day only to take your temp, pulse and blood oxygen level. I didn't receive my vitamins until 5/6/2020.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I am currently being housed in a 14×20 "cube" space with 7 other inmates, and in the cube we have 4 bunk beds with upper and lower

bunks, we have 8 wall lockers, 4 chairs 2 trash cans and all of our property in one cube. my cell mate above me sleeps right above me and the way the bunks are built with shelves there is no way to sleep with our heads at opposite ends. only 2 bunks in my cube are set up were you can sleep at opposite ends.

5. Can you engage in 6-foot separation when moving about your unit?
  - a. no you can't because the unit is approximately 70×150 with 160 inmates in such a small area.
6. Are you given cleaning supplies for your cell?
  - a. yes
7. What cleaning supplies are you given?
  - a. we use watered down citrus cleaner and if we take a rag up to the officers' station they will allow us to spray a rag with bleach.
8. Have you observed the unit being cleaned?
  - a. Yes
9. If yes to Number 8, how often is the unit cleaned?
  - a. 4 times a day
10. Are the telephones cleaned after each use?
  - a. No
11. How often are the bathrooms cleaned?

- a. they are supposed to be cleaned every hour by the porters but they actually get cleaned sometimes only once a day. they are always real bad.
12. If inmates have been placed in the dayroom, what can you tell me about them?
- a. they are considered PUIs, so if somebody showed symptoms that person was taken to be tested and the other 7 inmates would go in the day room until the nurse came only to SCREEN them by taking their temperature, pulse and oxygen levels, and if they were all normal hey went back into population without TESTING.
13. Do the inmates in the dayroom use the bathrooms for the unit?
- a. Yes
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
- a. No
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
- a. yes, its D unit in level 2 and they are the inmates that were in contact with somebody who tested positive, but they only did that for the first week or 2 because then they started saying if you don't show symptoms

than you stayed were you are and they take the one showing symptoms and put them in segregation until their test came back and if they were positive they go to K unit or the gym.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No

17. Is there social distancing of 6-feet during exercise or on the yard?

a. No

18. Is that rule enforced by the guards?

a. No

19. Is there social distancing of 6-feet during feeding in the unit?

a. No

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. mdoc was not prepared at all. they didn't take any precautions to control covid-19 at least not the proper ones.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. I received 2 masks and yes they are prison made. I also work at the MSI factory and I was making the masks and they're made out of cotton fabric that our clothes are made of and no I don't believe they're that

helpful in preventing infection because guys are always touching their mask to adjust it or take it down and they're touching it all day and than touching the phone or jpay or door knobs etc,

22. When you are patted down, are guards using gloves?

a. Yes

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. No they don't unless you say something

24. Can you get new masks if you ask for a new one?

a. no they say you were issued 3.

25. Has the prison placed porter-jones outside the housing units?

a. No

26. If yes, which housing units?

a. Only on the yard

27. Has the prison used portable showers?

a. yes, only in the gym but I was told that the inmates had to go 5 days without a shower until the portable showers were set up, and then they were very crude.

28. If yes, in which housing units?

a. Only the gym

My name is Keith Lane, inmate# 403113 and I'm currently being housed by the MDOC at the G. Robert Cotton facility, Housing Unit TE, at 3510 N Elm Rd in Jackson MI, 49201. I am also the block representative on the warden's forum for TE unit. below are my answers to the questions I was asked in your message.

I Keith Lane, certify that the information above is true under penalty of perjury and I give attorney Dan Manville my permission to sign it on my behalf.



DECLARATION OF SAMER FAWAZ, 570500: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes. I tested positive.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No. Because everyone who was voluntarily coming forward with symptoms was being placed in segregation and not allowed access to his personal property (i.e. food items, clothes, etc.) and not allowed phone or jpay access.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. N/A.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. . I am currently in a 8-man cube (4 bunk beds with about 2 feet separation in between). My bunk mate and I face the same direction. No instructions were given regarding sleeping arrangements.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. There is no way to keep a 6-foot distance while inside the unit. The hallways are about 5-6 feet wide.

6. Are you given cleaning supplies for your cell?
  - a. We are given supplies only when we request them.
7. What cleaning supplies are you given?
  - a. We are only allowed to use citrus cleaner. They have bleach at the officers' desk but they will not part with the bottles. We can spray a rag and bring the rag back to clean with.
8. Have you observed the unit being cleaned?
  - a. Yes.
9. If yes to Number 8, how often is the unit cleaned?
  - a. Every 2 hours, a porter walks around with a bleach bottle and a rag and wipes the sides of the half walls separating the cubes from the hallway. He also wipes down the faucets in the bathroom sinks as well as the door handles to the day rooms. Sweeping and mopping is done during count time
10. Are the telephones cleaned after each use?
  - a. Yes. But it is up to the person using the phone to clean it. It is not enforced, so not everyone does it. And there is roughly only about 2 feet between phone.
11. How often are the bathrooms cleaned?

- a. The bathrooms are cleaned during count times (for the most part), which is @11:00 a.m. and 4:00 p.m.
12. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates?
  - a. Don't know.
13. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
  - a. My understanding is that they use segregation for PUI. And those who are there are treated exactly the same as those who are there as punishment!
14. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. There is no way to practice social distancing in the bathrooms or showers. The toilets are separated by a half wall (maybe 4 feet high) with no more than 6 inches between the toilet and each wall. The showers are separated by a 6-inch wall only, and the sinks have maybe 6 inches between them.
15. Is there social distancing of 6-feet during exercise or on the yard?
  - a. No separation on yard either. The track is too narrow, the yard phones are about 2 feet apart and the exercise areas (pull up bars, dip bars, etc.) are always crowded.

16. Is that rule enforced by the guards?
  - a. The guards do not enforce any of these rules.
17. Is there social distancing of 6-feet during feeding in the unit?
  - a. No. Everyone gets in line to be served pre-packaged meals with barely any distance between them. We return to the cube and eat there.
18. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
  - a. We don't get as much yard time. They don't pick up mail and it sits in the mailbox for days on end. We are barely able to use the phones due to long lines (we are literally cramped in a small day room awaiting a turn on the phone. And you can imagine the ones cutting in line or staying on the phone too long, which creates more hostility and tempers flaring).  
  
My family is constantly worried about my health and safety (I have served 16.5 years on a 20-year sentence but because I am under "Truth-In-Sentencing" I am not eligible for parole unless the governor suspends the TIS law.
19. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?
  - a. We were issued 3 masks each. They were made here at MSI factory at G. Robert Cotton facility. I don't think they prevent infection because I

was healthy when I was issued the masks and I was always wearing it properly and I still got infected. I was moved from a 2-man cell a few weeks before the first case here. As far as I'm concerned, the facility was negligent by moving me and allowing me to be exposed and infected because the unit I came from did not have any positive cases when the entire facility was tested

20. When you are patted down, are guards using gloves?

- a. To my knowledge, the guards have not been performing pat downs or cell searches

21. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

- a. I don't know.

22. Can you get new masks if you ask for a new one?

- a. I don't know because I have not requested a new one. I wash my masks and rotate them on a regular basis.

23. Has the prison placed porter-jones outside the housing units?

- a. Not to my knowledge.

24. If yes, which housing units?

- a. I don't know.

25. Has the prison used portable showers?

a. Yes.

26.If yes, in which housing units?

a. Portable showers were installed in the barbershop when the facility was housing inmates (who tested positive) in the gymnasium (48 bunk beds=96 beds) but have since moved everyone out and dismantled the showers.

I, Samer Fawaz, certify that this information is true under penalty of perjury, and I give Attorney Dan Manville my permission to sign on my behalf.

## DECLARATION OF JOHN BRANDON: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes and I am positive.
2. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I'm currently housed at G Robert Cotton Correctional Facility, level one side. I'm currently being housed in a 14' ×20' cube space with 7 other inmates. We sleep on bunk beds. We have 8 lockers in the space. 4 chairs, 2 trash cans and all of our property. My cell mate sleeps right above me. There is no way for us to sleep with our heads at opposite ends. There are 2 bunks that do sleep with their heads at opposite ends
3. Can you engage in 6-foot separation when moving about your unit?
  - a. .No.the unit is only 70'×150' with 160 inmates in it.
4. Are you given cleaning supplies for your cell?
  - a. Yes.
5. What cleaning supplies are you given?
  - a. They have citrus cleaner sometimes that we can use. We can go up to the officer's station where we can spray a rag with bleach.
6. Have you observed the unit being cleaned?

- a. Yes. I see them mop the floors and wipe the half walls and hand rails down. But the unit I've been in, TE unit for over 2 years, I've never seen them thoroughly clean the entire unit. Power washers are not permitted at Cotton.
7. If yes to Number 8, how often is the unit cleaned?
- a. The unit is cleaned by the porters three times a day. Floors are mopped, handrails and half walls are wiped with bleach.
8. Are the telephones cleaned after each use?
- a. No.
9. How often are the bathrooms cleaned?
- a. Three times a day, morning, afternoon and evening.
10. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
- a. No. They keep them with us.
11. Is there social distancing of 6-feet during use of bathrooms, showers?
- a. No. We have two separate bathrooms, one serving each hall of 80 prisoners. Each bathroom has three urinals, four toilets and seven sinks
12. Is there social distancing of 6-feet during exercise or on the yard?
- a. No.
13. Is that rule enforced by the guards?



- a. No. They just sit in the guard shack. No attempt is made to make us observe social distancing or wear our masks, for that matter.
14. Is there social distancing of 6-feet during feeding in the unit?
- a. No. As we are on quarantine, we are eating our meals in the close quarters of our cubes.
15. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
- a. I'm primarily concerned about the inability to observe social distancing; lack of cleanliness; the open plan nature of the building which seems to promote infection as opposed to control it; and the seeming disinterest on the part of the officers to take this all very seriously. (For instance, some officers will call an entire hall at once, 80 men, to pick up their meal at the day room, causing a long line of closely spaced prisoners. Other officers will call two cubes at a time, which allows to some degree for social distancing.)
16. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?
- a. I have three prison-made cloth masks which don't fit very snugly
17. When you are patted down, are guards using gloves?

- a. While on quarantine prisoners have not been patted down at all, which could be considered a security issue.

18. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

- a. When we were patted down and the officers were wearing gloves, they did not change their gloves between patting down prisoners. We'd have to ask them to change their gloves.

19. Can you get new masks if you ask for a new one?

- a. No.

20. Has the prison placed porta-jones outside the housing units?

- a. No. We have two porta-johns on the yard which are cleaned all too infrequently.

My name is John Brandon, inmate #891293. I'm being housed in Jackson at Cotton Correctional Facility, 3510 N Elm Ave. Jackson Michigan. 49201.

I, John Brandon, under penalty of perjury, give you my permission to sign and use my answers above in your materials for the law suit.

DECLARATION OF EUGENE MARR: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes. Positive.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. no because they throw you in the hole and only make rounds every 20-30min I was in fear of my life
3. Can you engage in 6-foot separation when moving about your unit?
  - a. Not at all or at anytime.
4. Are you given cleaning supplies for your cell?
  - a. No.
5. What cleaning supplies are you given?
  - a. No.
6. Have you observed the unit being cleaned?
  - a. only when porters clean
7. If yes to Number 8, how often is the unit cleaned?
  - a. 3 times a day
8. Are the telephones cleaned after each use?
  - a. No.
9. How often are the bathrooms cleaned?

- a. 2-3 times a day
- 10. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. Yes.
- 11. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
  - a. No.
- 12. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
  - a. yes thy place pui in the hole its horrible you get punished for being around something that you have no control over
- 13. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. No.
- 14. Is there social distancing of 6-feet during exercise or on the yard?
  - a. No.
- 15. Is that rule enforced by the guards?
  - a. No.
- 16. Is there social distancing of 6-feet during feeding in the unit?
  - a. no we eat in our 8men cubes
- 17. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

- a. 3 mask and no we have asked for more and we have not received any and there made from state clothing there not fitted so they don't help with protection

18. When you are patted down, are guards using gloves?

- a. Yes.

19. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

- a. They don't change them.

20. Can you get new masks if you ask for a new one?

- a. we've asked and have not gotten any

21. Has the prison used portable showers?

- a. it is like they have purposely helped to spread the covid-19 by continuously cross contaminating positive and negative inmates for 2 months and now 90% of our prison population here at jcf have tested positive, also our deputy warden has told us that there is no reason to complain because we will all most likely catch covid-19

This is the honest truth that I Eugene Marr Jr swears by. I Eugene L. Marr J.R  
gives Daniel E. Manville permission to sign an affidavit on my behalf. Electrically  
sign,  
Eugene L. Marr J.R

DECLARATION OF JERMAINE CAMPBELL (5/6/20): COTTON

1.G. Robert Cotton Correctional Facility (JCF) tested prisoners for coronavirus covid-19.

2.I Jermaine Campbell #745168 was tested for Covid-19, My test result is negative for covid-19 on April 30, 2020.

3. As stated before, Unit TA was scheduled to be tested on April 29, 2020.

4. Over half The Unit tested positive for coronavirus Including some of the Unit TB prisoners that was moved to Unit TA.

5.Unit TE did not get tested for covid-19 until April 30, 2020 as stated in the schedule from Warden Noah Nagy in the JPAY message.

6.Before Unit TE test results came back I ( JERMAINE CAMPBELL ) was moved into Unit TE on April 30, 2020 with out knowing who is potentially infected with covid-19.

7. To the best of my Knowledge and belief Unit TA was made into a Quarantine Unit for prisoners on the level one side.

8. To the best of My Knowledge and Believe I did not see any prisoners get moved into Unit TA on April 30, 2020 from units TB & TC.

9. April 29, 2020 during the testing in TA unit my cubicle mate came clean about being infected and was taken for urgent care. I slept approximately Three feet from this individual. His bunkie as well tested positive for covid-19.

10. On April 30, 2020 Five other cube mates tested positive for covid-19.

11. During the course of the quarantine the prisoners Ate Breakfast, lunch & Dinner in the cubicles, slept in the cubicles and not able to adhere to the social distancing orders. The only thing we were allowed to do was in-house movement go to the day rooms watch TV and go to yard with only our unit separate from other units.

12. All the positive prisoners that tested for covid-19, was separated from the negatives so the negatives can pack and move away from the positives in TA-Unit on April 30. I don't know where they went while we packed but health care came and told "each" person before they left the unit on base of TA-unit that they was positive and gave them some paper work. I don't know what the paper work said.

13. Some guys were scared, nervous, Anxious, some cried because they where uncertain about their health and life in the manner of how the officers was treating us.

14. Once I moved into TE-Unit you hear people coughing, hacking complaining about thier head hurting and they have fevers.

15. On may 1, 2020 over half the unit In Te-Unit tested positive for covid-19 The 8-man horse style cubicle I was moved to everyone was positive. I was again moved from Unit-TE, as the test result came back for more than half the Unit tested positive for covid-19.



16. I had to be separated from the positives again and moved to Unit-TB where every one tested negative. I should not have been moved to TE unit that test result was unknown on April 30, 2020. (they will claim they had no other room for me to go at the time yet they did.)

17. My bunkie was moved to TB-unit And I was Moved Before him and his test result wasn't back until later after mine.

18. As of April 29, 2020 all officers working in TA TC, TD & TE Units must wear PERSONAL PROTECTION EQUIPMENT (PPE) At all times which includes gowns, gloves & face masks. Officers are Deliberately utilizing the staff bathroom between TA & TB UNIT.

19. After being moved to TB-Unit, On May 2nd, about 12:30Am in the morning the officers came to pack prisoners up that test results shows their positive for covid-19, after assuring prisoners moving into TB unit on May 1st that this unit TB is a negative unit.

20. TB-Unit was tested on April 29, no reason for negatives and positives to be mixed together still.

21. All The Units that are quarantined is TA, TC, TD & TE.

22. All The positives units are allowed to go yard together as May 3rd. All the negative units are allowed to go to yard together.

23. Officer Lundy wordked TB unit On may 2nd an stated to me their scared to test

the officers because who will be able to come to work. Which makes no sense were seperate from the outside world.

I JERMAINE CAMPBELL DECLARE UNDER THE PENALTY OF PERJURY (28 U.S.C. SUBSECTION 1746) THAT THE FORGOING IS TRUE AND CORRECT.

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JERMAINE CAMPBELL# 745168

I JERMAINE CAMPBELL GIVE DANIEL MANVILLE PERMISSION TO SIGN ON MY BEHALF ON DOCUMENTS THAT IS DECLARATIONS AND STATMENTS OF FACTS AND ANY OTHER DOCUMENT NEEDED MY SIGNATURE.

Yes Mr. Daniel has my permission TO sign for me (JERMAINE CAMPBELL).

DECLARATION OF GERALD BELL: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?

a . yes...I am positive for covid 19...

2. Had you sought health care because you thought you had COVID-19 symptoms?

a. No.

3. If yes to question 2. Explain what steps health care took to treat you, if any?

a. N/A.

4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposing end of the bed to created 6-feel separation?

a. N/A.

5. Can you engage in 6-foot separation when moving about your unit?

a. no... it's impossible..

6. Are you given cleaning supplies for your cell?

a. no... we are told we can't take the bleach from the desk..

7. What cleaning supplies are you given?

a. Bleach.

8. Have you observed the unit being cleaned?

a. nothing significant, really no change from the regular cleaning of the unit..

9. If yes to Number 8, how often is the unit cleaned?

a. N/A.

10. Are the telephones, cleaned after each use?

a. No... Not unless you clean them yourself.

11. How often are the bathrooms cleaned?

a. During count time.

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. N/A.

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. N/A.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. No.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. yes.. all the inmates that have tested positive

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. No.

18. Is that rule enforced by the guards?

a. No.

19. Is there social distancing of 6-feet during feeding in the unit?

a. No.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. we were told we would get lab draws and vitamins and still haven't received

anything..

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. ) 3...yes..no..because I had negative results before the masks were passed out and tested positive after the fact, so they didn't help..

22. When you are patted down, are guards using gloves?

a. Yes.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. no, not before patting another inmate down..

24. Can you get new masks if you ask for new ones?

a. No.

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. ((same as question 20))

26. Has the prison placed porter-jones outside the housing units?

a. No.

27. If yes, which housing units?

a. N/A.

28. Has the prison used portable showers?

a. No.

29. If yes, in which housing units?

a. N/A.

I Gerald D. Bell #245534 swear that all of the answers I have given are truthful and honest, under the penalty of perjury...I also give attorney Dan Manville the power to sign this document on my behalf..  
Sincerely, Gerald D. Bell #245534

DECLARATION OF DESMOND DEROO: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?

a. Yes, positive.

2. Had you sought health care because you thought you had COVID-19 symptoms?

a. Yes.

3. If yes to question 2. Explain what steps health care took to treat you, if any?

a. . Nothing until last week tested us.

4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposing end of the bed to created 6-feel separation?

a. No. I'm in an 8-man cube.

5. Can you engage in 6-foot separation when moving about your unit?

a. . No and I wrote a grievance stating that we were not able to social distance

and we're force to close together. they sent my grievance back and said I couldn't

put any grievances in about covid19 issues!!!!!!

6. Are you given cleaning supplies for your cell?

a. yes

7. What cleaning supplies are you given?

a. bleach.

8. Have you observed the unit being cleaned?

a. Sometimes.

9. If yes to Number 8, how often is the unit cleaned?

a. 3 times a day

10. Are the telephones, cleaned after each use?

a. No.

11. How often are the bathrooms cleaned?

a. 3 times a day.

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. I don't know.

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. I don't know.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. yes, I'm in it. some people tested positive and were sent to this unit around positives. they then tested negative later but were told they still had to be in here around positive covid people because they believe they had it and couldn't get this again. even though in all actuality no one knows if you can or can't get it again.



15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. No.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. No.

18. Is that rule enforced by the guards?

a. No.

19. Is there social distancing of 6-feet during feeding in the unit?

a. No.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. I have asked for gloves and other protective gear and was told no. I also asked to be moved and separated because I was too close to others and told no

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. I have gotten 3. they are not helpful because I still contracted the virus

22. When you are patted down, are guards using gloves?

a. No.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. No.

24. Can you get new masks if you ask for new ones?

a. Said they were out of them.

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. . I am forced inside with everyone else who is sick, and I had a hard time breathing today and when the nurse came in today all they did was check me vitals and said that's all they can do unless I look like I'm dead

26. Has the prison placed porter-jones outside the housing units?

a. I don't know.

27. If yes, which housing units?

a. I don't know.

28. Has the prison used portable showers?

a. Yes.

29. If yes, in which housing units?

a. People who were moved to the gym.

My name is Desmond Deroo and this is true under the penalty of perjury.

I, Desmond DeRoo, give Dan Manville permission to sign the document on my behalf.

DECLARATION OF GREGGORY RUSSEY: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes on April 29th
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. no
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. no
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. no
5. Can you engage in 6-foot separation when moving about your unit?
  - a. no
6. Are you given cleaning supplies for your cell?
  - a. YES, very watered down version Bleach.
7. What cleaning supplies are you given?
  - a. bleach
8. Have you observed the unit being cleaned?
  - a. Rarely

9. If yes to Number 8, how often is the unit cleaned?
  - a. Not often
10. Are the telephones cleaned after each use?
  - a. no
11. How often are the bathrooms cleaned?
  - a. Twice a day
12. If inmates have been placed in the dayroom, what can you tell me about them?
  - a. this unit has no inmates sleeping in the day rooms im in TB-unit
13. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. n/a
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
  - a. n/a
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
  - a. Not to my knowledge
16. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. no
17. Is there social distancing of 6-feet during exercise or on the yard?

- a. no
- 18. Is that rule enforced by the guards?
  - a. no
- 19. Is there social distancing of 6-feet during feeding in the unit?
  - a. no
- 20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
  - a. within the unit the SIX feet distancing is not being enforced by the guards. The day rooms dont get cleaned often at all the phones and jpays kiosks dont get cleaned after each use this is a very dangerous environment
- 21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?
  - a. No additional masks
- 22. When you are patted down, are guards using gloves?
  - a. Only twice since pandemic
- 23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?
  - a. We are not being shook down right now
- 24. Can you get new masks if you ask for a new one?

a. no

25.Has the prison placed porter-jones outside the housing units?

a. no

26.If yes, which housing units?

a. no

27.Has the prison used portable showers?

a. no

28.If yes, in which housing units?

a. no

I GREGGORY LEE RUSSEY declare under the penalty of perjury the forgoing is true and correct. Yes i give MR DANIEL MANVILLE permission to sign on my half on my responses

DECLARATION OF LAMAR BURGESS, COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. positive 4-30-20
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. yes
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. took vitals a then swab-test
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. in a cube 14 by 12 8-man bunk
5. Can you engage in 6-foot separation when moving about your unit?
  - a. no
6. Are you given cleaning supplies for your cell?
  - a. yes
7. What cleaning supplies are you given?
  - a. Watered down bleach
8. Have you observed the unit being cleaned?
  - a. Yes



9. If yes to Number 8, how often is the unit cleaned?
  - a. 4 times a day
10. Are the telephones cleaned after each use?
  - a. No
11. How often are the bathrooms cleaned?
  - a. 3 times a day
12. If inmates have been placed in the dayroom, what can you tell me about them?
13. Do the inmates in the dayroom use the bathrooms for the unit?
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
16. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. No
17. Is there social distancing of 6-feet during exercise or on the yard?
  - a. No
18. Is that rule enforced by the guards?
  - a. No
19. Is there social distancing of 6-feet during feeding in the unit?

a. No

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. Not helping with meds

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. yes

22. When you are patted down, are guards using gloves?

a. yes

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. Haven't noticed

24. Can you get new masks if you ask for a new one?

a. yes

25. Has the prison placed porter-jones outside the housing units?

a. no

26. If yes, which housing units?

27. Has the prison used portable showers?

a. no

28. If yes, in which housing units?

This is Lamar burgess 219185 and this statement is the truth to the best of my knowledge an I give attorney dan Manville my permission to sign this on my behalf.

DECLARATION OF JOSEPH GALLISON, 241519: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. yes
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. yes, pain in chest, lack of appetite
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. they gave me vitamins
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. no, I'm in a pole barn 8 man cube
5. Can you engage in 6-foot separation when moving about your unit?
  - a. no
6. Are you given cleaning supplies for your cell?
  - a. no
7. What cleaning supplies are you given?
  - a. Once a day (bleach, citrus)
8. Have you observed the unit being cleaned?
  - a. barely

9. If yes to Number 8, how often is the unit cleaned?
  - a. Once a day
10. Are the telephones cleaned after each use?
  - a. no
11. How often are the bathrooms cleaned?
  - a. Once a day
12. If inmates have been placed in the dayroom, what can you tell me about them?
  - a. n/a
13. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. n/a
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
  - a. n/a
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
  - a. n/a
16. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. no
17. Is there social distancing of 6-feet during exercise or on the yard?

- a. no
- 18. Is that rule enforced by the guards?
  - a. no
- 19. Is there social distancing of 6-feet during feeding in the unit?
  - a. no
- 20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
  - a. I have more problems with my asthma, cpod,c-pap
- 21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?
  - a. 3,yes,no, no because they are made from state blues
- 22. When you are patted down, are guards using gloves?
  - a. n/a
- 23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?
  - a. n/a
- 24. Can you get new masks if you ask for a new one?
  - a. no, they told us to wash them between each use  
not getting proper care

This is all true and Dan Manville can sign, respectful Joseph Gallison

DECLARATION OF JEFFREY WIMBERLY, 428466: COTTON CF

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. I was tested on April 27, 2020 for covid-19. My temp was 99.9. I was never told my medical status from the nose swab. On May 12, 2020 the national guard came in and drew blood for an antibody test. No results as of yet.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. I asked to be retested on May 5, 2020.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. On May 12, 2020, medical just took my temp and asked was I having symptoms. Which I told them I was having headaches. No actual test was administered. And I was sent back to population.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. Our bunks were positioned head to toe before the pandemic.
5. Can you engage in 6-foot separation when moving about your unit?



- a. You can't engage in 6feet distancing in prison.
6. Are you given cleaning supplies for your cell?
  - a. We are given cleaning supplies regularly.
7. What cleaning supplies are you given?
  - a. We are given bleach and citrus only.
8. Have you observed the unit being cleaned?
  - a. The unit is supposed to be bleached when we are locked down.
9. If yes to Number 8, how often is the unit cleaned?
  - a. This is supposed to occur during count times. 3 times daily.
10. Are the telephones cleaned after each use?
  - a. The phones have a bottle of bleach spray next to them and its on you to clean before each call.
11. How often are the bathrooms cleaned?
  - a. The bathroom is cleaned once daily.
12. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. . There is no 6 feet separation in the bathrooms or shower.
13. Is there social distancing of 6-feet during exercise or on the yard?
  - a. You can find 6 feet distancing on the yard.
14. Is that rule enforced by the guards?

a. The guards does not enforce this rule.

15. Is there social distancing of 6-feet during feeding in the unit?

a. There is no 6 feet distancing in the chowhall. Its impossible.

16. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. On April 24, 2020, administration placed a guy into my cell. He told me he had been quarantined twice for suspicion of coronavirus and was placed back in population after passing a temp test. On April 26, 2020, administration announced facility wide testing here at G. Robert Cotton. On April 30, 2020, at 7AM in the morning, medical staff and correction officers told me to step out the cell, then they proceeded to extract my cellmate stating that he was positive for the virus. His former cellmate was also positive in the unit he arrived from. I was not quarantined at all after living in a cell for 6 days with a known to be infected individual. I have visited the psych because of the stress and terror I have endured from this situation. Dr. Wang suggested I kite for a retest (see #2 of this questionnaire) and to grieve the issue. Which I am in the process of doing.

17. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

- a. We have three prison made mask. They are hard to breath through as the material is the same as our pants are made out of. These three are all we get and we have to make our own out of any material we can find if we lose them.

18.If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

- a. The guards wear gloves when we are patted down.
- b. The guards does not change there gloves after each pat down.

I declare under the penalty of perjury that the forgoing statements are true to the best of my knowledge, information and belief.

I give Attorney Daniel Manville authority to sign and submit this form on my behalf in the civil suit for injunctive relief, with a copy to be returned to me by U.S. First Class Mail.

Dated: May 14, 2020 Jeffrey Ricardo Wimberly

DECLARATION OF KEVIN MASON, 972344: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?

a. Yes, I have tested positive.

2. Had you sought health care because you thought you had COVID-19 symptoms?

a. No.

3. If yes to question 2. Explain what steps health care took to treat you, if any?

a. They gave me vitamins.

4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.

a. No.

5. Can you engage in 6-foot separation when moving about your unit?

a. No.

6. Are you given cleaning supplies for your cell?

a. Rarely.

7. What cleaning supplies are you given?

a. Watered down multipurpose cleaner.

8. Have you observed the unit being cleaned?

a. Rarely.

9. If yes to Number 8, how often is the unit cleaned?

a. 1-2 times a day.

10. Are the telephones cleaned after each use?

a. No.

11. How often are the bathrooms cleaned?

a. 1-2 times a day.

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. The others went and got tested and put back in the cube until the test came back.

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. Yes.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates?

a. No.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. That varied.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. No one enforces the rules.

18. Is that rule enforced by the guards?

a. No.

19. Is there social distancing of 6-feet during feeding in the unit?

a. No.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. The Corrections Officers and staff just move infected inmates into housing units with noninfected inmates and don't seem to care that they (M.D.O.C.) are just moving guys around. They are not in compliance with any proper health standards or prepared for a pandemic, especially in a level 1 pole-barn setting like myself and 159 others are housed in. They have been serving food that is supposed to be hot, whatever the proper safe temperature by state standards are. It is cold and not served in a safe quality. The cleaning supplies Multipurpose cleaner is watered down and it is not a sanitizing solution. They

have just been recently giving us beach water to spray if we request it. There are so many health codes being violated. The bathrooms and showers haven't been properly disinfected in a long time. There is black mold in the showers, vomit, urine and "other stuff" riddles the rest rooms and we can't properly clean because the institution is not providing the proper cleaners for what needs to be done.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. 3 prison made masks made from state blues materials. Only one layer of material.

22. When you are patted down, are guards using gloves?

a. Sometimes.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. No they are not.

24. Can you get new masks if you ask for a new one?

a. No.

25. Has the prison placed porter-jones outside the housing units?

a. Yard only and they are not cleaned often.

I, Kevin Mason, Inmate 972344 state this information is true under the perjury of law and give my permission to use my statement.

DECLARATION OF DAVID MCKAY: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. yes, I tested positive
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. yes, two weeks earlier from the date I tested positive.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. they only took me for my vital check which consist of checking my temperature, heart rate, oxygen level, blood pressure.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. we are housed 14×20 cube settings 4 bunk beds 8 men cube ( no social distance at all.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. No
6. Are you given cleaning supplies for your cell?
  - a. No



7. What cleaning supplies are you given?
  - a. they keep the cleaning supplies behind officers' desk and the supplies they give us are watered down bleach and smell good citrus which doesn't sanitize nothing we requested for pink sanitizer but was told no.
8. Have you observed the unit being cleaned?
  - a. Barely
9. If yes to Number 8, how often is the unit cleaned?
  - a. once a day since I been in unit TE and it's not till 4:00 count
10. Are the telephones cleaned after each use?
  - a. No
11. How often are the bathrooms cleaned?
  - a. Once daily
12. If inmates have been placed in the dayroom, what can you tell me about them?
  - a. when an inmate has symptoms the other 7 inmates are placed in the day room till a health care nurse comes which can take 2-3 hours and when they come, they take our vitals and only thing they look for like I stated in previous answer temperature, heart rate ,oxygen, blood pressure.

13. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. No, they are tooling to intake then to L unit if they feel you meet the covid-19 criteria.
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates?
  - a. No
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
  - a. yes, they are housing P.U.I's in level 2 D unit with inmates who already tested positive
16. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. No
17. Is there social distancing of 6-feet during exercise or on the yard?
  - a. No
18. Is that rule enforced by the guards?
  - a. No, the c/o's treat us like crap like it's our fault that we are sick and when out on yard they don't even do they usual round around yard when we let out to yard, they close gate and literally run to the shack.
19. Is there social distancing of 6-feet during feeding in the unit?

- a. No, they make us line up in single foul line coming in and out the same doors with other inmates

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

- a. when I found out I was positive which was 4-24-20 I went to the hole ( L unit)then I was housed in the 300 building GYM then which I was assaulted over the phone cause the prison officer was creating a hostile environment between inmates it was horrible and the guy who assaulted me was never took to segregation he was moved to level 2 D unit I told my family wrote them on jpay it was a man who died who had his parole after serving 24 years (last name porter) and he kept asking to speak with a nurse for literally 4 days then when he saw them his oxygen level was really low it was nasty they had inmate porters who wasn't positive sleeping in one of the chapel room in the 300 building and lied to us telling us it was a request from Lansing that we be housed in the 300 building GYM also they are withholding our mail telling us the arus isn't coming to the unit and the mail will get sent out after they test us and we come back negative but I'm not understanding none of this cause after we told our families that we are being housed

in the 300 building GYM they throw us in a unit that had just tested positive and I have already been recovering for 2 weeks at that time so I don't understand how I can get better I wrote my family on jpay letting them know that also.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. 3 mask per prisoner. yes, their prison made from state clothing. no because when we first was informed about covid-19 I slept in it and still got sick plus we was told to put them up to light and if we can see through it they aren't the right ones and they told us to deal with it when we asked to have the ones they have.

22. When you are patted down, are guards using gloves?

a. some use them others don't one of the c/o's are out of TA level 1 the officer name detloff he uses the same gloves on purpose to piss us off he the one who brought it into unit TA he tested positive less than a month ago and back already.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

- a. some say it's a shortage of supplies and what does it matter they say if they use the gloves or not, we already sick

24.Can you get new masks if you ask for a new one?

- a. No, we have been asking and sending kites to warden bout new mask and the unit officers tell us to hand wash them or throw them in with our state laundry which isn't sanitized

25.Has the prison used portable showers?

- a. Yes, in the 300 building where I was housed for 10 days and it took them a few days to even get them and when they did, they had them set up in the barber shop space in the 300 building

I DAVID MARCEL MCKAY BEING OF FULL AGE AND SOUND MIND MAKE THIS STATEMENT UNDER THE PENALTIES OF PERJURY AND BELIEF HEARBY STATE THAT THE FORGOING FACTS ARE TRUE AND ACCURATE AND I GIIVE FULL PERMISSION FOR DAN MANVILLE TO SIGN MY NAME.

DECLARATION OF DANIEL BARNES, 464880: COTTON

My name is Daniel Barnes. inmate # 464880 I'm being housed in cotton correctional facility 3510 n Elm st Jackson mi, 49201.

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. yes, I tested positive on 5-1-2020
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No, I wasn't aware that I had it I showed no signs of it none at all
3. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I'm housed in TE UNIT and we have a cube set up of 4 bunks 8 different inmate and we were never told to sleep opposite ends of each other also all of our belonging are also in this cube
4. Can you engage in 6-foot separation when moving about your unit?
  - a. we cannot engage in a 6 ft separation when we are moving about in the unit
5. Are you given cleaning supplies for your cell?
  - a. we are not giving cleaning supplies for our cubes to be cleans

6. What cleaning supplies are you given?
  - a. they come by with bleach and wipe down the rails and walls
7. Have you observed the unit being cleaned?
  - a. porters clean the unit at count time if you call moping cleaning
8. Are the telephones cleaned after each use?
  - a. phones are not wiped after every use
9. How often are the bathrooms cleaned?
  - a. porters clean the bathroom at count times only
10. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
11. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. there is not at the time
12. Is there social distancing of 6-feet during exercise or on the yard?
  - a. there is no separation on the yard
13. Is that rule enforced by the guards?
  - a. No
14. Is there social distancing of 6-feet during feeding in the unit?
  - a. Not at all

15. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. some of the guards they don't wear their masks

16. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. they gave us 3 masks and they are prison made with are prison blue material

I Daniel Barnes certify under penalty of perjury that the above is true to the best of my knowledge and give Dan Manville my permission to sign this and use m above answers in any way necessary thank you for your time.



DECLARATION OF TYRONE REYES: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. I have been tested and my results came back negative.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No, I have not contacted health service for any symptoms.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. No, we were not told to sleep at separate ends for six foot separation.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. Six foot is not being enforced inside of the units. Which is why some people take it upon themselves to keep their distance.
6. Are you given cleaning supplies for your cell?
  - a. We are getting cleaning supplies, but do I think it's effective? No, because no matter how much you clean if officers have the Covid-19, we're all at risk every single day. These cleaning supplies are only good

for a limited amount of time. Phones is not being cleaned after every use, unless a prisoner take it upon themselves. But the unsanitary thing with that is the fact that its rag is unsanitary. No corrective measures is being put in place.

7. Is there social distancing of 6-feet during use of bathrooms, showers?

a. Social distancing is only being enforced in the chow Hall, in the unit and on the yard there is no enforcement. Wearing of the mask for the most part is not being enforced 100%, guys is going to chow without their mask, forcing the food supervisors to enforce it while they are at least in their service line waiting to be fed. But coming out of their units and passing the guard shack, they're not being stopped.

8. How many masks have you gotten from MDOC? Are they prison made?

Are they helpful to prevent infection? If no, why not?

a. We were given 3 prison (M.S.I.) masks. I don't know if they're working, because too many people has tested positive in my unit and for other reasons that will be explained later...Since M.S.I. is no longer making masks, there's no more available.

9. When you are patted down, are guards using gloves?

10. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. Guards are not changing gloves after each shake down of a prisoner or when they do cell search.

11. This facility did not become infected with its first Covid-19 patients until they transferred prisoners from Lakeland Corr. Fac. and housed them in K-unit outside the facility. But, strict protocols was not implemented at first. Somehow a prisoner on Level I side became positive.

12. This facility then thought it was a good idea to housed (P.U.I.'s) in Level II D-unit. Several days later I talked to Warden Nagy in food service where I work. I voiced my concern about housing them there because if someone test positive, it will put everyone's health at risk in my unit that's connected to D-unit. I am in C-unit, and we share the same ventilation system as D-unit. I explained all off this to him and he stated that the unit was picked because it was the safest. I asked him did they bring in a ventilation expert to make that determination. His answer was no. Several days later someone tested positive in that unit.

13. On a daily basis, guys started testing positive and had to be escorted pass all of our units, school building, medical building and factory building to K-unit,

with prisoners having to stand to the side until they pass by. Issue: This is an airborne virus, prisoners were forced to walk into or from that same air path that sometimes 6-8 Covid-19 patients has just walked a crossed. Scientists has stated it can linger for several minutes in that area.

14. Since then, Covid-19 patients has been housed in our Gymnasium, in which food service prisoners was responsible and made to deliver the food.

15. Once Level II was tested, 92% of the positive cases came from my unit. Due to my last calculation, out of 25 positive, 23 was connected to C-unit. This facility once again thought it was okay to further put our lives at risk by turning D-unit into a Covid-19 unit instead of a quarantine unit. Now we're sharing the same ventilation system with Covid-19 patients. Everyday those officers is having contact with other officers and possibly spreading this virus.

16. We will never stop the spread of this virus because of MDOC is reluctant to have all of its officers tested. They're trying to treat prisoners as if we're the reason why it's in the facility. They're bringing it in, they need mandatory testing. Then we can begin the process of managing and stopping the spread. I had one officer state, " I'm not getting tested because I want all of the

overtime money and hazard pay he's getting". This type of selfish thinking is the reason why we need mandatory testing of all officers, staff and prisoners.

17. We've asked to be taken out of this unit, but they refuse. This is creating a hostile environment for C-unit prisoners because prisoners and officers from other units is shunning us because they're putting us in the same category as the Covid-19 unit.

I, Tyrone Lee Reyes, do swear under perjury of law that the above information is true to the best of my knowledge. I give Attorney Dan Manville permission to sign this document on my behalf.

DECLARATION OF NICHOLAS RUPRIGHT, 485499: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes, positive.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. Healthcare has taken no steps to treat me.
3. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. Polebarn, TC. 8-man cubes.
4. Can you engage in 6-foot separation when moving about your unit?
  - a. No
5. Are you given cleaning supplies for your cell?
  - a. Citrus cleaner
6. Have you observed the unit being cleaned?
  - a. No more than usual
7. If yes to Number 6, how often is the unit cleaned?
8. Are the telephones cleaned after each use?
  - a. No

9. How often are the bathrooms cleaned?
  - a. Sometimes during count
10. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. No.
11. Is there social distancing of 6-feet during feeding in the unit?
  - a. No. And there is no social distancing when we get our trays.

DECLARATION OF RUEMONDO MURRAY, 591102: COTTON

1. I've been infected with COVID-19.
2. There were nights I honestly felt I was gonna die from such shortage of breath.
3. As someone with existing health issues, its devastating some moments when fevers arise and dizziness take over.
4. Before the discovery of my diagnosis I was housed in T/A unit amongst other infected officers (officer detloff and officer divish to be specific) to which my health was compromised and put in jeopardy.
5. Shortly after myself and my peers became very ill
6. We were tested and removed from T/A unit (level 1 temp side)and sent to level 2 side housing unit D.
7. Myself and 80 something other inmates were placed in the gym after our positive results came back.
8. In the gym I felt I was making progress despite the conditions of the gym...(portable showers that barley worked, no out going mail or jpay, no yard, etc.)
9. Then administration started bringing other sick inmates into the gym.



10. Shortly after the other sick inmates were placed in the gym, my symptoms have been slowly returning.

I'm having headaches more than usual and now a slight cough.

11. We were all moved from the gym Sunday may 3rd and placed in T/D unit with newly infected inmates who just tested days before

I give my authorization for my signature to be signed by Mr Manville on behalf of these legal matters, and all of these statements are true under penalty of perjury.

## Declaration Under The Penalty Of Perjury Of Thomas Butler

I, Thomas Butler(# 246650), being competent to make this declaration and having personal knowledge of matters stated herein, declares pursuant to 28 U.S.C .

1746, the following:

1. I am presently incarcerated at the G. Robert Cotton Correctional Facility (JCF), and am presently confined in security level II. Pursuant to Policy Directive (PD) 04.01.150 (Prisoner Housing Unit Representative/Warden's Forum), I was elected on of E-Unit's Representatives.

2. On the morning of 5-12-2020, at approximately 10:30 a.m., I was summoned to report to the Warden's Forum Meeting being held in the JCF Visiting Room. The Warden was not in attendance and the meeting was being conducted by A/Deputy Rurka.

3. As the meeting started questions about the covid-19 antibody testing that was conducted the previous day were asked. Prisoner Lane (#403113), raised his hand and indicated he tested positive on the 30th. A/Deputy Rurka asked prisoner Lane

what he tested positive for. Mr. Lane responded: "covid-19."

4. A/Deputy Rurka rushed all seated representatives out of the room.

5. Prisoner Lane is housed in TE-Unit where everyone in the unit has tested positive for covid-19. Upon returning to the meeting after several minutes I asked A/Deputy Rurka about the cross-contamination going on and he stated: "guess it is good we are social distancing."

6. For prisoner Lane to attend the aforementioned Warden's Forum meeting , someone had to call TE-Unit where 'everyone' is supposedly quarantined. Someone had to write the prisoner a pass authorizing movement. Prisoner Lane had to walk across the compound, enter Control Center and was cleared to enter JCF's Visiting Room (Forum Meeting).

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

Executed on May 13, 2020

Signed /s/ Thomas Butler

### Declaration Under The Penalty Of Perjury Of Duane Sparks

I, Duane Sparks (#929615), being competent to make this declaration and having personal knowledge of matters herein, declares pursuant to 28 U.S.C. 1746, the following:

1. I am presently incarcerated at the G. Robert Cotton Correctional facility (JCF), and am presently confined in security level II, and housed in E-Unit (85/86).
2. On the morning of 5-12-20, at approximately 12:10 a.m., my cellmate Aguilar (#742688), reported to staff he was not feeling well. Both Aguilar and myself were escorted over to segregation.
3. At approximately 8:30 a.m., I was released from segregation and ordered back to E-Unit 85/86. I was not tested during or before my release, but was told if I was not feeling well to notify staff.
4. Prisoner Aguilar (#742688) notified me he tested positive for covid-19, and was placed in D-Unit under quarantine status. My cell was NOT bleached or cleaned while I was in segregation.

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

Executed on May 13, 2020

Signed: /s/ Duane Sparks

## Declaration Under The Penalty Of Perjury Of Nicholas Cottrell

I, Nicholas Cottrell (#585279), being competent to make this declaration and having personal knowledge of matters herein, declares pursuant to 28 U.S.C. 1746, the following:

1. I am presently incarcerated the the G.Robert Cotton Correctional Facility (JCF), and am presently confined in security level II and housed in E-Unit.
2. On the morning of 5-13-20, at approximately 8:07 a.m., I asked Guard Fridd for sanitizer (bleach), to wipe down unit tables that prisoners were eating their breakfast at.
3. I was told: "We don't have any." I offered to go to any location to get some and was not answered.
4. Being in Housing Unit E for over six months. I have never witnessed sanitizer being placed at the telephones, or kiosks. The phones are NOT wiped down after every use. Prisoners have to take it upon themselves to wipe the materials down

before using.

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

Executed on May 13, 2020

Signed /s/ Nicholas Cottrell



## Declaration Under Penalty Of Perjury Of Kevin King

I, Kevin King, (#171671), being competent to make this declaration and having personal knowledge of matters stated herein, declares pursuant to 28 U.S.C .

1746, the following:

1. I am presently incarcerated at the G. Robert Cotton Correctional Facility (JCF), and am presently confined in security level II, and housed in E-Unit and have been since March 12, 2012.

2. On the morning of 5-13-20, at approximately 6:40 a.m., I asked Guard Castilla for bleach to wipe down the bathroom sinks. The bathroom is a community bathroom and dozens of prisoners were brushing their teeth and spitting in the sinks.

3. I was told: "there is no bleach and it's not my problem."

4. Being housed in Unit E for over eight (8) years, I have never witnessed any sanitizer being placed at the telephones, or kiosks. The phones and kiosks are

NOT wiped down after every use. Prisoners have to take it upon themselves to wipe the materials down before using with whatever method they use.

5. I have asked for soap and bleach several times over the past few months and have been told: "we are all out."

6. I have only gone to the chow hall twice since March, 2020, because I can not social distance and it is obviously not clean. The two times I attempted to go to the chow hall, I could not eat and just walked out.

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

Executed on May 13, 2020

Singed: /s/ Kevin King

DECLARATION OF JAMES ADRIAN: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. I was tested on 4-30-20 and told I was positive on 5-1-20
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. I was not thinking I would catch it because I was not around anyone but inmates
3. If yes to question 2. Explain what steps health care took to treat you, if any?
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. Most of the bunks only allow you to sleep one way
5. Can you engage in 6-foot separation when moving about your unit?
  - a. 6ft separation is not possible in 8-man cubes
6. Are you given cleaning supplies for your cell?
  - a. they give bleach to the porters and put citrus in the bathroom for use
7. What cleaning supplies are you given?

- a. we are not given any personal supplies; it is two bathrooms to use by 80 in the front hall and 80 in the back hall
- 8. Have you observed the unit being cleaned?
  - a. The unit is supposed to be cleaned 3 times a day during count times
- 9. If yes to Number 8, how often is the unit cleaned?
- 10. Are the telephones cleaned after each use?
  - a. telephones, jpay's are not wiped down after use, and there is no rags most of the time to wipe them down
- 11. If inmates have been placed in the dayroom, what can you tell me about them?
  - a. dayrooms have 4 tablet that hold 4 inmates and we are all in front of each other.
- 12. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. bathrooms are nasty all the time
- 13. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
  - a. there are no doors on the bathrooms and no privacy, we have asked the warden o to fix this several times

14. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. the have 4 units that are corona positive ta, tc, td, and te they all hold 160 inmates

15. Is there social distancing of 6-feet during use of bathrooms, showers?

a. TA unit is where I am housed with another inmate Scott Winburn who also knows about this. the back hall has 2 showers one is broke, there is no separation for sinks, shower or toilets

16. Is there social distancing of 6-feet during exercise or on the yard?

a. yard hold about 300 to 400 inmates on any given day

17. Is that rule enforced by the guards?

a. c/o do not like how we are treated they are frustrated also because they are being over worked

18. Is there social distancing of 6-feet during feeding in the unit?

a. we are eating in 8-man cubes and when we ate in the chow hall, we sat 2 ft apart

19. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. I did not get the prescribe treatment until 5 days later after being diagnosed. we cannot get toilet paper upon request, the food is delivered cold, we get 1 yard a day sometimes, the phone disbursements is not being processed, the mail is not going out regularly. we have 3 masks made out of our state issue blues and are told to wash them with our laundry. the bleach is water downed. medical staff is not responding timely and the c/o don't want to call them when a person is having problems breathing. we still have not seen a doctor; I was given a piece of paper with my name wrote on it that said I was positive. I requested my covid lab report and they told me to fill out an authorization form to get my own results.

20. I have not had an opportunity to speak with mental health. I spoke with the HUM, and they said they are not coming into the units to speak with guys.

21. On May 15, I just spoke with the nurse and now they are trying to send us to a step-down unit if we test negative after 29 day in here. I asks if I can see a doctor because I have not seen one since being diagnosed. They told me that I can only see one if I am having trouble breathing or something like that.

My name is James Adrian and the statement I am writing is true and under the penalty of perjury I will testify. I give Dan Manville the authority to sign on my behalf.

### **Exhibit 3 - Parnall Correctional Facility (SMT)**

Defendant Melinda Braman is the Warden at the Parnall Correctional Facility (hereinafter “SMT”) in Jackson, Michigan. SMT is a 1,679-bed facility housing Secure Level I prisoners.<sup>1</sup> (ECF No. 27-14. PageID.1499 ¶ 3) There are five housing units: three pole-barn style units, as described above, and two units which are open-bar gallery style and have single cell occupancy. (*Id.*).

In her affidavit, Defendant Braman acknowledges that “...the physical structure and layout of SMT does not always allow for maintaining a six-foot social distancing at all times (as recommend by the CDC)...” (*Id.*, PageID. 1512 ¶18(c)). While this Defendant’s claim that she had advised inmates in cube settings to sleep head-to-toe, *see supra*, prisoners’ declarations continue to tell a different story. Prisoner Mannion, who went through the COVID-19 response process at Parnall states, “...I was never instructed or informed that I should lay the opposite direction as my bunkie. Every step of my recovery I had a bunkie.” (Exhibit 3, Affidavits from prisoners confined at SMI, Affidavit of John Mannion **at** ¶ ). The same is true for those housed in cubes in the pole barns. Inmate Strozier writes “I am housed in an 8-person cubicle on bunk beds. No staff at this facility instructed us to sleep with

<sup>1</sup> SMT consists of cellblocks that are approximately a football fiend long, with a base and four floors that open to a wide-open center from base to ceiling. Each cell block holds about 450 prisoners confined in single-person cells.

one person in the opposite direction of one another to social distance ourselves....” (Ex. 3, Affidavit of Xaiver Strozier at ¶ 4).

Defendant Braman further states that she “receive[s] daily update from custody staff through their chain of command that... social distancing is being enforced....” (*Id.* at PageID. 1509 ¶ 15). However, Prisoners’ declarations disagree. One prisoner states “[t]here is no social distancing enforced on the yard. Multiple inmates sit together at tables, use exercise equipment and stand close together in groups.” (Ex. 3, Affidavit of Daniel Tesen at ¶ 10). Further, Mr. Davis declares that “[t]here is no 6ft distancing during exercising on the yard. Inmates sit closely on benches and play board and card games. And closely walk together...No 6ft distancing is enforced by the guards on the yard.” (Ex. 3, Affidavit of Larry Davis ¶ 18). Defendant Braman claims that “if custody staff sees prisoners gathering in close contact groups while using the yard, those prisoners will be instructed to disperse....” (ECF No. 27-14. PageID 1509 ¶ 15). However, prisoner declarations account that “[n]o rules are enforced because different officer’s enforce rules differently. No officer is consistent on enforcing the social distancing rules.” (Ex. 3, Affidavit of Xavier Strozier ¶ 18).

Defendant Braman claims that social distancing is being practiced and enforced in the chow hall. “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.” (ECF 27-14. PageID 1509 ¶ 15. Some prisoner declaration’s share



this fact while others dispute it, but Defendant fails to paint the whole picture for the Court. As Mr. Davis states, “[i]n the chow hall there is 6 ft distancing in the line waiting but we aren’t seated 6ft from each other and the kitchen workers aren’t 6 ft from each other.” (Ex. 3, Affidavit of Larry Davis at ¶ 19). Once inmates arrive in the chow hall, they are to sit “2 inmates to a table.” (Ex. 3, Affidavit of Dominique Cornley at ¶ 19). But as Mr. Tesen states, “...two at a table but well within six feet from inmates all around you.” (Ex. 3, Affidavit of Daniel Tesen at ¶ 11; *see* ECF No. 27-14, PageID.1516, for a picture of the chow hall tables).

Finally, Defendant Braman states that the facility “only allow[s] up to two prisoners to wait for kiosks or telephones at a time. In the dayrooms we are requiring no card games or board games as well as enforcing only two prisoners may sit at a table.” (ECF No. 27-14 PageID 1506 ¶ 10(j)). Mr. Davis’ declaration does describe enforcement of inmates not playing card games, however, he states that “[i]n the dayroom there’s no 6 ft distancing for the phones or at the benches where inmates watch TV. There is no social distancing by the...jpay, or store kiosk.” (Ex. 3, Affidavit of Larry Davis at ¶ 12).

The areas outlined above are high-traffic areas in which inmates are consistently subjected to cross-contamination and close contact with inmates and will continue to be without intervention from this Court.

Affidavits from Parnall Correctional Facility

DECLARATION OF JOHN MANNION: PARNALL

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes, I have been tested for Covid-19. I was originally tested on March 30th, and received a positive result on March 31st. I was tested again on April 28th and received a negative result on April 30<sup>th</sup>.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No, I did not seek health care. I was not sick. I was quarantined in our gym on March 28th because my cubie sought medical care. He tested positive and I was moved to the quarantined housing unit on March 29th for those infected. It was there that I started to have symptoms. I was checked by a nurse on March 30th, had a fever and was tested at that time. I was moved the next day to Cotton Correctional Facility for being covid-19 positive.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. The only steps that MDOC took to treat me was tell me to lay on my bunk and offer me Tylenol if I needed it. I was transferred to Cotton where positive cases were and confined to a two man room with a bunkie. There was no other care given to me.

4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.

a. No, I was never instructed or informed that I should lay the opposite direction as my bunkie. Every step of my recovery I had a bunkie. The way the bunks are set up, with stands at our feet, we can't lay opposite. I was at Cotton, Adrian, and even now that I am back at Parnall no bunks do bunkies lay opposite. You writing me is the first I was informed of laying opposite. I am surprised.

5. Can you engage in 6-foot separation when moving about your unit?

a. No, when I was at Cotton I was stuck in a two man room where we even had to eat. When I was at Adrian I was again in a two man room, we had a chow hall where we had to sit across a 3 foot table, and with roughly 120 men we had two small day rooms and with no regulation from the officers they were always crowded. And even back at Parnall I lock in a cube with 7 other men and none are six feet away. The bathrooms, dayrooms, and even yards are not regulated for six feet distance. With bathrooms and chow halls we cannot be six feet away.

6. Are you given cleaning supplies for your cell?

a. Yes, we are given bleach and rags.

7. What cleaning supplies are you given?
  - a. Yes, we are given bleach and rags.
8. Have you observed the unit being cleaned?
  - a. Yes and No, When I was at Cotton there was only one porter that worked 24/7 and the bathrooms were not regularly cleaned. When I was at Adrian the bathrooms and common areas were cleaned only two or three times a day. And at Parnall it is one to three times a day, but some days there are areas that are not cleaned, like the showers. And our sinks are brown
9. If yes to Number 8, how often is the unit cleaned?
  - a. Answered in 8.
10. Are the telephones cleaned after each use?
  - a. No, at no place are the phones or Jpays cleaned after every use.
11. How often are the bathrooms cleaned?
  - a. Answered in 8 and 9.
12. If inmates have been placed in the dayroom, what can you tell me about them?
  - a. I was not at a facility where people had to lock in dayrooms. At Parnall we did lock in the gym for a few weeks. We locked there if we were in contact with someone that was suspected of having covid-19. Once their

results came in we were moved. The bathrooms weren't cleaned while I was there. There was one instance where a cube was quarantined in the unit for three days. They used the bathroom in unit. They had to shower at 12:30 am. They were only allowed to use the bathroom at certain times, when it was empty and the bathroom was cleaned after each use.

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. See number 12.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. See Number 12.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. At Parnall in the beginning PUIs were only questioned by health care and their vitals taken. Then one unit, 10 block, was turned into a quarantine unit even though it housed roughly 350 people who were not sick at the time. The unit is a open cell, 4 gallery unit with bars on the front and back of the cells. Eventually most did get sick, and most did not report that they were sick. After a couple weeks the gym was turned into a quarantine, with 30 bunks for those classified as PUI

16. Is there social distancing of 6-feet during use of bathrooms, showers?

- a. No, there is no social distancing in the bathrooms. On the yard and in the unit there is one or two signs describing social distancing, but the Officers do not enforce social distancing in any way. In the chow hall we sit at tables that are about three feet across. We sit with someone across from us without masks because we are eating and the tables are only a couple feet apart. There is no social distancing she we eat.
17. Is there social distancing of 6-feet during exercise or on the yard?
- a. N/A.
18. Is that rule enforced by the guards?
- a. N /A.
19. Is there social distancing of 6-feet during feeding in the unit?
- a. N/A.
20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
- a. . I have pretty much outlined all the issues. MDOC has been reactionary the entire time, only act when they had too. I was sick at the beginning so I received the worst of the treatment. I went 5 days without being able to take a shower and a week without a change of clothes. I was not allowed access to my property or needed cosmetic items. I have severe dry scalp and did not have shampoo. My scalp developed lesions for two

and a half weeks before I was given my property, along with dry and painful patches on my skin from the soap they supplied. I was not able to call my family for 5 days. My wife was worry sick and lied to by MDOC. Their was no treatment. We were forced to lay on our bunks and only given Tylenol. When I was at Adrian there was not a nurse on duty at night or periods of the day. One night someone was throwing up, coughing up blood and had an oxygen level of around 40%. It took 30 minutes for a nurse to arrive and another 30 to get him out of the unit to get help. The inmates were scared and came out of there cells which caused trouble. There was a lot of tickets wrote. I didn't get sick until they quarantined me around others that were sick. Parnall refused to restrict the compound to essential staff until it was too late. They considered Vocational Village, GED and pysch classed essential. Those staff members were the ones that brought the virus in.

21. How many masks have you gotten from MDOC? Are they prison made?

Are they helpful to prevent infection? If no, why not?

- a. I have two masks. They are made by prisoners working at MSI. I don't know if they work or not. I just where it because I have no other option.

22. When you are patted down, are guards using gloves?

- a. The officers do wear gloves for pat downs, but do not change gloves for each inmate.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

- a. N/A.

24. Can you get new masks if you ask for a new one?

- a. We can get more masks, but we are hassled and questioned as to why and where our others masks are.

I, John Mannion, certified that the information above is true under the penalty of perjury and give Dan Manville permission to sign.



DECLARATION OF XAIVER STROZIER, 465916: PARNALL

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. No I have not been tested for Covid-19 and don't know my medical status.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No because when I had symptoms they were forcing inmates to be quarantined in the gymnasium and not giving them showers or access to phones or any sort of communication with relatives.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. Health care forced myself and other cell mates to go have our temperatures checked because a couple inmates were infected with the virus living in close quarters with our 8 man cube setting.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. No I am not in a 2 person cell. I am housed in an 8 person cubicle on bunk beds. No staff at this facility instructed us to sleep with one person in the opposite direction of one another to social distance ourselves whatsoever

5. Can you engage in 6-foot separation when moving about your unit?
  - a. There is absolutely no way possible for us to socially distance ourselves because we are forced to use the same restrooms, phones and sit and eat with each other in close contact with those even infected with the virus that show no symptoms.
6. Are you given cleaning supplies for your cell?
  - a. We are given cleaning supplies but they are diluted to the point where there ineffective.
7. What cleaning supplies are you given?
  - a. They give us bleach but the bleach is constantly being diluted with water and still not stopping the spread of this virus.
8. Have you observed the unit being cleaned?
  - a. The unit isn't cleaned because they leave the inmates responsible for doing the cleaning with insufficient cleaning supplies.
9. If yes to Number 8, how often is the unit cleaned?
  - a. No the unit isn't cleaned daily at all and that's because we are deprived of the necessary supplies to do so.
10. Are the telephones cleaned after each use?
  - a. No not unless there's bleach sitting out in plain sight which is rare
11. How often are the bathrooms cleaned?

- a. The bathrooms are cleaned regularly but like I said before, supplies are limited
12. If inmates have been placed in the dayroom, what can you tell me about them?
- a. The dayrooms are very small and closed in. There's only four tables with 192 inmates being housed in one unit. 192 grown men are split up into 8 person cubicles and forced to sleep on bunk beds.
13. Do the inmates in the dayroom use the bathrooms for the unit?
- a. Everyone uses the same restroom in the whole entire unit.
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
- a. Absolutely not. There is no separation at all in the unit besides having inmates divided into 8 person cubes
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
- a. Yes there is a PUI unit. Prisoners that are under investigation are housed in those units.
16. Is there social distancing of 6-feet during use of bathrooms, showers?
- a. No there is not anyway possible for inmates to social distance themselves in the bathrooms

17. Is there social distancing of 6-feet during exercise or on the yard?
  - a. No there is no way possible to socially distance on the yards we're given to exercise on the way their set up
18. Is that rule enforced by the guards?
  - a. No rules are enforced because different officer's enforce rules differently. No officer is consistent on enforcing the social distancing rules.
19. Is there social distancing of 6-feet during feeding in the unit?
  - a. No there is not any social distancing in our chow hall where we eat
20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
  - a. They have me sleeping on a bunk that is basically called a hallway bunk in which high volumes of traffic are constantly walking past me and forcing me into close contact with potentially ill inmates infected with Covid-19.
  - b. They are writing inmates major misconduct tickets for not wearing mask or practicing social distancing but we're forced to be housed not even a foot apart and we sleep in close quarters daily.
21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

- a. I have been given 2 mask in which I have to re-wash until they see fit to give me another.

22. When you are patted down, are guards using gloves?

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

- a. I don't see the guards changing their gloves too often around here even when they are simply scanning inmates I.D's.

24. Can you get new masks if you ask for a new one?

- a. They very seldom give out masks when we ask for them because they run out.

25. Has the prison placed porter-jones outside the housing units?

26. If yes, which housing units?

27. Has the prison used portable showers?

28. If yes, in which housing units?

I, Xavier D. Strozier #465916 hereby certify that everything in this statement is true and to the best of my knowledge under the penalty of perjury and give Attorney Dan Manville permission to sign on my behalf.

DECLARATION OF DANIEL TESEN, 692644: PARNALL

1. I was tested before I left Adrian and was negative, but during test I told the nurse I wasn't feeling good, headache, and cough, was told it didn't matter.
2. Tables, phones, cells, JPAY and kiosks are all well less than six feet apart.
3. We are given cleaning supplies when we ask for them at the co office.
4. we are given cleaner and bleach, but no rags to wipe with.
5. The showers are cleaned once a day usual in the morning
6. The privacy walls from the base have not been cleaned for at least a year.
7. There is no dayroom but there is a base area where inmates sit two to a table less than six feet apart.
8. There is no separate unit for pui. They are located in ten block directly above me on the first tier.
9. There is no social distancing in the showers except inmate discretion
10. There is no social distancing enforced on the yard. Multiple inmates sit together at tables, use exercise equipment and stand close together in groups.
11. There is no social distancing while in the chow hall, two at a table but well within six feet from inmates all around you.
12. I have arrived in new cells and had the old persons property and dirty bedding left in the cell.

13.I haven't seen a doctor nor a psychologist since I was infected with the Covid 19 virus, and I had repeatedly asked to do so.

14.I have been given four masks that where prisoner made. they are made from inmate pant material. They do not close off the nose area and are too small for me to wear.

I,Dan Tesen inmate number 692644, certify that all answers given are true under the penalty of perjury.

DECLARATION OF LARRY DAVIS: PARNALL

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. No. I haven't been tested for Covid-19.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. . Yes, I sought healthcare because I thought I had Covid- 19 symptoms
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. I attempted to go to healthcare on a Friday night but CO Anderson informed me that they were closed So early Saturday morning I was able to go. My lymph nodes were swollen and I didn't feel well. I don't have a spleen so when I'm feeling I'll I take it very serious because my immune system is weakened. After the doctor checked my vitals he informed me he can't do any further treatments or testing because I don't have a high temperature. So he gave me a Tylenol and told me to follow up if things get worse. This occurred over a month ago.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. We have single man cells in my unit.
5. Can you engage in 6-foot separation when moving about your unit?



- a. No we can't engage in 6ft separation when moving about in unit.
6. Are you given cleaning supplies for your cell?
  - a. We are allowed to spray our cleaning rag with bleach but not allowed to bring the bottle to our cell. We are given about 6 disinfectant bottles for our unit of about 300 or more inmates. We are allowed to take those bottles to our cells for cleaning.
7. What cleaning supplies are you given?
  - a. See Number 6.
8. Have you observed the unit being cleaned?
  - a. We have inmate porters that clean our unit daily, but they do a poor job.  
There hasn't been any extreme cleaning fit for an outbreak.
9. If yes to Number 8, how often is the unit cleaned?
  - a. See Number 8.
10. Are the telephones cleaned after each use?
  - a. The individual inmates were instructed to clean phones before and after use, but most inmates don't follow instructions.
11. How often are the bathrooms cleaned?
  - a. Our showers are cleaned daily but very poorly
12. If inmates have been placed in the dayroom, what can you tell me about them?

- a. In the day room there's no 6 ft distancing for the phones or at the benches where inmates watch TV. There is no social distancing by the showers, jpay, or store kiosk. Not even for the waiting line for the counselors. The COs do enforce no board or card games and only 2 people to a table but its still not 6 ft.
- 13. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. . We have our own bathrooms in our cells, but we share showers
- 14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates?
  - a. We have an open shower of about 6 shower heads and we have another shower that is separated by one panel that has about 4 shower heads on each side
- 15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
  - a. I asked two COs and the block rep and they informed me they have not heard of a PUI unit.
- 16. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. There is no 6 ft distancing during showers
- 17. Is there social distancing of 6-feet during exercise or on the yard?

- a. There is no 6 ft distancing during exercising on the yard. Inmates sit closely on benches and play board and card games. And closely walk together
18. Is that rule enforced by the guards?
- a. No 6 ft distancing is enforced by the guards on the yard.
19. Is there social distancing of 6-feet during feeding in the unit?
- a. In the chow hall there is 6 ft distancing in the line waiting but we aren't seated 6 ft from each other and the kitchen workers aren't 6 ft from each other
20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
- a. This facility to my knowledge rode in inmates from different facilities that had covid 19 before they restricted transfers. My unit even housed covid inmates along with 10 block. Next they kept covid inmates in 10 block then would send them to the gym. And after tests came back positive they would transfer them to other facilities. It took them weeks to react to this outbreak and even give us masks. I just feel that the MDOC wasn't prepared and I heard on the news that they were instructed over 10 years ago to prepare for a major outbreak. Its nearly impossible to do social distancing in these facilities. I believe you need the zero

pressure cells for such. These are open cells so germs can easily spread. I believe the MDOC should have followed the steps of the 17+ states that released inmates due to the covid 19 outbreak to home confinement/ tether until they find a vaccine and get this pandemic under control. I told them my condition and its like they don't care.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. . I believed I received about 4 masks. I don't know if they are made by the facility. But they aren't the M95 masks. These are just the cloth masks which to my understanding from the news is inadequate.

22. When you are patted down, are guards using gloves?

a. Yes guards wear gloves when patting down inmates.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. I don't believe they change gloves after each inmate pat down.

24. Can you get new masks if you ask for a new one?

- a. To my knowledge you can't get new masks when you ask. The COs randomly pass them out.

25.Has the prison placed porter-jones outside the housing units?

- a. . No Porter johns

26.If yes, which housing units?

- a, N/A.

27.Has the prison used portable showers?

- a. No portable showers.

28.If yes, in which housing units?

- a. N/A.

The above statement is true and I give Dan Manville permission to use my statement and permission to sign it on my behalf.

DECLARATION OF DOMINIQUE CORNLEY, 237854: PARNALL

1. Have you been tested for COVID-19? If yes, what is your medical status?

a. No.

2. Had you sought health care because you thought you had COVID-19 symptoms?

a. Yes, I am in a eight man cube here at Parnall correctional facility.

3. If yes to question 2. Explain what steps health care took to treat you, if any?

a. Over a month ago a inmate in my cube was having chest pain, he tested positive for covid 19. as a result of that everyone in my cube was sent to healthcare only to be screen not tested, during the screen I was asked a few questions like have I had shortness of breath, do I have a cough or chest pain then they take my temperature which was like 98.9 I asked her since someone in my cube might have covid 19 can I be tested she said no. I am in bunk 22 and he was in bunk 23 next to me.

4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposing end of the bed to created 6-feet separation?

a. I'm in an 8 man cube.

5. Can you engage in 6-foot separation when moving about your unit?

a. Not really. It's house 160 inmates, I think as of today it's like 145 in the unit.

6. Are you given cleaning supplies for your cell?

a. Yes. I am the caustic clerk/porter that pass out cleaning supplies to all units and building at this facility.

7. What cleaning supplies are you given?

a. bleach and citrus. I mix the bleach

8. Have you observed the unit being cleaned?

a. Yes.

9. If yes to Number 8, how often is the unit cleaned?

a. We can clean everyday

10. Are the telephones, cleaned after each use?

a. No.

11. How often are the bathrooms cleaned?

a. When the porters clean them however some officers don't make sure they are clean when they should be

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. No.

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. N/A (did not answer)

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. Did not answer.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. No.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. No.

18. Is that rule enforced by the guards?

a. For the most of the time

19. Is there social distancing of 6-feet during feeding in the unit?

a. Not in the lines, they do seat two inmates to each tables

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. I feel that the officers could enforce the rules more like make everyone wear their mask all the time. have us all tested, have us more distance from each other in the units and yard, make sure each unit is being cleaned. I know that all



units isn't being clean I they should cause for one I see how much each use bleach and citrus, citrus isn't a disinfectant.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. like five yes, they are prison made. I don't know if they will prevent infection

22. When you are patted down, are guards using gloves?

a. I don't see that many pat down since the covid 19, but when I do see them patting down, they are using the same gloves.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. When they are patting down more then one they are using the same gloves

24. Can you get new masks if you ask for new ones?

a. Yes.

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. I feel it shouldn't be as many inmates in one cube and on top of each other.

26. Has the prison placed porter-jones outside the housing units?

a. No.

27. If yes, which housing units?

28. Has the prison used portable showers?

a. No.

29. If yes, in which housing units?

I give Mr.Dan Manville my consent to sign this document on my behalf.

DECLARATION OF ROBERT THOMAS, 567141: PARNALL

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. No
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. n/a
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I am in a 8 Men cell ,Head on the opposite end No ,Im in B unit 14/2
5. Can you engage in 6-foot separation when moving about your unit?
6. Are you given cleaning supplies for your cell?
  - a. Yes
7. What cleaning supplies are you given?
  - a. Watered down bleach, half and half
8. Have you observed the unit being cleaned?
  - a. Yes once every shift
9. If yes to Number 8, how often is the unit cleaned?

- a. Yes every shift
10. Are the telephones cleaned after each use?
- a. Yes we clean them after every use
11. How often are the bathrooms cleaned?
- a. Once every shift
12. If inmates have been placed in the dayroom, what can you tell me about them?
- a. We are suppose to be 6 feet apart but that would be impossable because because we have to many people in the unit.
13. Do the inmates in the dayroom use the bathrooms for the unit?
- a. Yes
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
- a. No
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
- a. no
16. Is there social distancing of 6-feet during use of bathrooms, showers?
- a. No
17. Is there social distancing of 6-feet during exercise or on the yard?

- a. Its supposed to be
- 18. Is that rule enforced by the guards?
  - a. yes
- 19. Is there social distancing of 6-feet during feeding in the unit?
  - a. Sometimes
- 20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
  - a. 8 men in a cube
- 21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?
  - a. 8
- 22. When you are patted down, are guards using gloves?
  - a. They are not patting us down
- 23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?
  - a. n/a
- 24. Can you get new masks if you ask for a new one?
  - a. yes
- 25. Has the prison placed porter-jones outside the housing units?

- a. We are not that confined because we have a lot of people still lock up in prison. Alot of people are catching colds there is not enough room to spead out priod. We just have a lot of people here to spread out for social distance.

26.If yes, which housing units?

- a. no

27.Has the prison used portable showers?

- a. no

28.If yes, in which housing units?

- a. no

DECLARATION OF JESSE MACK: PARNALL

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes, I am covid recovered
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. Yes, On 3 -23 -20
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. Medical quarantine and generic Tylenol
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If are not in a 2-man cell- describe where you are currently housed.
  - a. No
5. Can you engage in 6-foot separation when moving about your unit?
  - a. I am currently in a single cell at SMT (Parnall)
6. Are you given cleaning supplies for your cell?
  - a. No
7. What cleaning supplies are you given?
  - a. Only diluted sanitizer
8. Have you observed the unit being cleaned?
  - a. Rarely and not thoroughly

9. If yes to Number 8, how often is the unit cleaned?

a. unknown

10. Are the telephones, cleaned after each use?

a. no

11. How often are the bathrooms cleaned?

a.

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. no

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. no

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. no

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. 15. No, Covid +'s are housed in a GP unit until transferred to Cotton or Carson for quarantine

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. no



17. Is there social distancing of 6-feet during exercise or on the yard?

a. no

18. Is that rule enforced by the guards?

a. no

19. Is there social distancing of 6-feet during feeding in the unit?

a. yes, two per table in chow hall

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. . No access to grievance process while in covid quarantine or library material. I have grievances pending

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. 3 , Yes, Unsure on effectiveness

22. When you are patted down, are guards using gloves?

a. yes

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. no

24. Can you get new masks if you ask for new ones?

a. unsure

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

- a. I was not sent back to my sending facility after testing negative for Covid. I was dumped at Parnall with no explanation or reasoning. Parnall is a Covid hotspot.

26. Has the prison placed porter-jones outside the housing units?

- a. no

27. If yes, which housing units?

- a. no

28. Has the prison used portable showers?

- a. no

29. If yes, in which housing units?

- a. No

30. I was the first Covid positive prisoner at WCC on 3 27 20 and one the first to go through the quarantine process at cotton and Adrian.

31. I have not been evaluated or examined by a doctor since my initial covid test on 3 26 20.

I certify under the penalty of perjury that all statements made by me, JESSE MACK, in the forgoing email are true to the best of my understanding and

knowledge.

Jesse Mack

MDOC ID 823808

DOB 4 - 27 - 1988

I grant permission to attorney Daniel Manville to sign this documentation on my behalf.

Jesse Mack

MDOC ID 823808

DOB 4 - 27 - 1988

DECLARATION OF DWAYNE CRAGGETTESMITH, 818038: PARNALL

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. I tested positive on for coronavirus on March-30-2020 && then days later I was sent to J.C.F prison to K-unit were they was housing coronavirus prisons.
2. Had you sought health care because you thought you had COVID-19 symptoms?
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. I've NEVER received No treatment for coronavirus at all.. all I was offered was cold water && pain pills when I asked & Vitals that's all... So it was up to my body to fight off coronavirus
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I was housed in a cell with a roommate that also had tested positive for coronavirus.... but the thing that I was mostly scared of was... if the person that they put in my room still had coronavirus && how bad also I'm a G.I.D prisoner mean that I'm a transgender woman && I'm not supposed too have a roommate.. I have a single cell detail... that was giving to me throw health care && when I told they that they said that

they don't care that this was intake && nothing like a regular unit so they do what they won't && feel... So I have to lock with man that wasn't G.I.D like myself...

5. Are the telephones cleaned after each use?

a. no the phones are not cleaned after each use they leave it up to you to clean the phone off before you use it.

6. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. C/O who are sick are still coming to work too... I truly believe that I got coronavirus from are ARUS because she was sick for weeks && one day before they gave us mask I walked into her official to ask her a question && she was just coughing like crazy then 2 days later I was sick I can't eat or hold nothing down at all I was throwing up everything even water

7. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. I've only have got 3 mask since they started all this && I've haven't got NO more && when I ask they say that they don't have no new ones but yet the C/O have new one.

I Dwayne Craggettesmith give Dan Manville permission to sign my name on the document on my behalf and I also swear that the statements that I gave and made about the M.D.O.C are true under the penalty of perjury.

#### **Exhibit 4 - Macomb Correctional Facility (MRF)**

Defendant Willis Chapman is the Warden of Macomb Correctional Facility (hereinafter “MRF”) in Lennox Township, Michigan. (ECF No. 27-16, PageID.1574 at ¶¶ 1-2).

Testing does not make any sense at MRF, as they house inmates awaiting tests, who might be negative, and inmates who are positive in the exact same housing unit: Housing Unit 5. Defendant Chapman describes of testing at MRF

MRF established a room in healthcare to be utilized for all suspected COVID-19 prisoners. Prisoners determined to be PUIs are swabbed and placed in isolation in Housing Unit (HU) 5 (COVID-19 Unit) pending the test results. All close contacts are identified and placed (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.

(ECF No. 27-16, PageID.1578 at ¶ 14).

The problem with this policy is it essentially rounds up cohorts of inmates who all have close contact with one another every day and placing them in the same unit with other inmates confirmed to have the virus. For the inmates who do get tested,<sup>1</sup> Defendant risks exposure of the virus in Housing Unit 5 while Plaintiffs wait around for the test results, unnecessarily exposing them to COVID-19. PUIs, Close

<sup>1</sup> MRF also does not have enough tests, so they disregard notable symptoms of the virus to avoid sending them to HU5. *See* (Ex. 4, Affidavit of David Lyons at ¶ 3) (describing symptoms of “severe breathing problems, loss of smell and taste, fever and chills and loss of appetite” with no treatment).

Contacts, and positive inmates will continue to grow, and false negative tests will spread the virus back into the general population. Defendant Chapman is knowingly exposing those awaiting test results to the virus, rendering many of the tests useless because inmates will contract the virus *as a result* of moving to HU-5 after they are tested.

MRF is also primarily testing only those with major symptoms, so most inmates have not been tested. (**See Ex. 4, Affidavit** of Shawn Hendrix at ¶ 1; *id.*, Affidavit of David Lyons at ¶ 3). Shockingly, no inmates who answered the questionnaire reported that they had been tested (Ex. 4). The infectious disease doctors warn that these measures are insufficient because of the virus’s asymptomatic spread. (Ex. 1, Affidavit of Dr. Luring at ¶¶ 2-3) (advising “repeat testing of inmates and/or testing of all guards and staff” because it is “increasingly recognized that many individuals infected with SARS-CoV-2 may be asymptomatic or have mild symptoms only”). Defendants’ willful ignorance regarding their insufficient testing system necessitates this Court’s action.

The only other way to prevent the asymptomatic spread of the virus would be social distancing and aggressive cleaning. As Mr. Dwight Henley notes, “If the system that is currently in place was actually followed, it would provide for distancing in the unit. The bathroom, hallway, and getting in line for meds are the biggest problem areas for distancing.” (Ex. 4, Affidavit of Dwight Henley at ¶ 17).



Inmates do not get adequate cleaning supplies, forcing many to forego cleaning inside their cells or necessary areas like phones or bathrooms (Ex. 4, Affidavit of Casey Stapp (describing how his requests for soap were denied)); (Ex. 4, Affidavit of David Lyons at ¶¶ 10; 11 (stating bathrooms and phones are not cleaned).

Social distancing policies also vary, as Defendant-Chapman notes these “measures were and continue to be implemented throughout the facility . . . 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.*” (ECF No. 27-16, PageID.1579 at ¶ 15(c) (emphasis added)). This is one of those situations where the exception swallows the rule, as all of the inmates report you cannot social distance in their unit where they are confined most of the day (Ex. 4). Defendant-Chapman also describes inmates “being on lockdown with restricted movement to the bathrooms, showers, phones, Kiosks, and yard.” (ECF No. 27-16, PageID.1580 at ¶ 15(j)). More efforts are necessary to implement this policy.

While less inmates may be present in these places, they report that social distancing among them is primarily only enforced in the yard (Ex. 4). Elsewhere, like in the units, bathrooms, and phone and JPAY kiosks, social distancing is more of an issue. (Ex. 4, Affidavit of Brandon Robertson at ¶ 5 (describing “you are always passing someone”)); (Ex. 4, Affidavit of Travell Henry at ¶ 5) (noting social

distancing implementation “depends on where I’m at[. By] the phones there is no 6 feet [of separation] nor is it being enforced but in the Hallways yes there is 6 feet separation”)); (Ex. 4, Affidavit of David Lyons at ¶ 17 (noting that if “the system that is currently in place was actually followed, it would provide for distancing in the unit. The bathroom, hallway, and getting in line for meds are the biggest problem areas for distancing”)). Mr. Martell Smith describes the “use of bathroom we are only able to go 2 at a time, but there’s no separation panel line inside of the bathroom but there is 2 panel boxes outside the bathroom were 2 guys have to wait inside until 1 come out.” (Ex. 4, Affidavit of Martel Smith at ¶ 16).

These constant flows of inmates might be sufficient if the bathroom is cleaned after each use, but, again, that duty falls to inmate porters who clean these bathrooms only a couple of times a day even though used by hundreds of individuals. (Ex. 4, Affidavit of Shawn Hendrix at ¶ 11 (noting “our bathroom is only being cleaned once a day because officers don’t check and make sure the job is done”)). These bathrooms are an issue and Defendants have a duty to adequately cleanse them of COVID-19 or risk passing it off to the entire facility. Like other facilities, no individualized cleaning supplies are available, as inmates may only use community mops, dust pans, and rags with disinfecting spray. (Ex. 4, Affidavit of Martel Smith at ¶ 7 (noting “cleaning supplies we get is a broom, dust pan, mop with plain water, a bottle with disinfection spray which we not always able to use”)).

Social distancing, the “cornerstone” of the fight against this virus is only available in the limited yard time Plaintiffs get. Testing has hardly been implemented at all at Macomb, and the only major symptom patients that enter Macomb’s Housing Unit 5 better be sure they have it, or else they enter a unit compiled of all positive inmates.

DECLARATION OF SHAWN HENDRIX: MACOMB

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. no, they are only testing people who have major symptoms
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. no, I have not sought health care
3. If yes to question 2. Explain what steps health care took to treat you, if any?
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. yes and no one has informed me or my bunkmate to sleep facing opposite directions of the bed for 6-foot separation
5. Can you engage in 6-foot separation when moving about your unit?
  - a. it would be almost impossible to move around the unit with 6-foot separation
6. Are you given cleaning supplies for your cell?
  - a. no, we have to seek out cleaning supplies
7. What cleaning supplies are you given?
  - a. very very diluted sanitizer and very very diluted bleach
8. Have you observed the unit being cleaned?

- a. they are not cleaning any more than normal
9. If yes to Number 8, how often is the unit cleaned?
- a. very rarely is the unit being cleaned
10. Are the telephones cleaned after each use?
- a. no, the phones are only being wiped down 2-3 times a day and there are 60 people using 2 phones all day and on our wing one phone is broken
11. How often are the bathrooms cleaned?
- a. our bathroom is only being cleaned once a day because officers don't check and make sure the job is done
12. If inmates have been placed in the dayroom, what can you tell me about them?
- a. yes, and the inmates in the day room came from a unit that multiple people tested positive to covid-19
13. Do the inmates in the dayroom use the bathrooms for the unit?
- a. yes, the day room inmates go to any bathroom in the unit they want they often just walk to the bathrooms and talk to their friends
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
- a. no separation walls have been put up anywhere and we have direct contact with day room inmates

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. I don't know about pui unit if there is one

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. no there is not 6foot separation in the bathroom the bathroom is approximately 10 by15 foot and any given time there are about 6 people in the bathroom at a time

17. Is there social distancing of 6-feet during exercise or on the yard?

a. I don't go to the yard

18. Is that rule enforced by the guards?

a. No

19. Is there social distancing of 6-feet during feeding in the unit?

a. on the wings the inmates bring our trays to the doors

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. just the fact they don't give us new masks when we need them and the officers get them whenever they need them we are treated like we are less than human also no gloves at all and they don't clean the bathrooms phones showers j pay machines and store machines enough these are things that are used over and over again by countless people especially

the jpay and store kiosk the whole unit uses them and that is about 138 people

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. approximately 4 weeks ago they gave us 1 mask and then about 4 days later they gave us 1 more so we can alternate and wash the other one.

The mask is crudely made up of one layer of prison pants or prison shirt material with 2 straps they fall apart very easily, and I personally don't think they would help prevent anybody from covid-19 they are way too thin

22. When you are patted down, are guards using gloves?

a. yes, the guards wear gloves while patting down

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. no, they don't change their gloves before patting someone else down

24. Can you get new masks if you ask for a new one?

a. no one of my masks broke and I asked my officer and my unit ARUS if I could get a new one and she said " we don't have anymore; I don't know what to tell you" I filed a grievance on this issue

25. Has the prison placed porter-jones outside the housing units?

- a. if a person says they have symptoms they isolate them and don't let them contact their family via phone or j pay and don't let them get store so people feel like their being punished so they don't tell anybody that they are having symptoms unless they get real bad and they feel they have no choice

26.If yes, which housing units?

- a. no there are no porter johns outside the units

27.Has the prison used portable showers?

28.If yes, in which housing units?

- a. no there are no portable showers

I Shawn Hendrix confirm that the information is true under the penalty of perjury and that I give Attorney Dan Manville permission to sign this document on my behalf



DECLARATION OF DAVID LYONS (5/4/20): MACOMB

1. Have you been tested for COVID-19? If yes, what is your medical status?

a. No.

2. Had you sought health care because you thought you had COVID-19 symptoms?

a. Yes.

3. If yes to question 2. Explain what steps health care took to treat you, if any?

a. I sent a kite to health care explaining that I believed I contracted COVID-19; explaining I had severe breathing problems, loss of smell and taste, fever and chills and loss of appetite. No response made. Kite sent on 03/24/2020.

4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation?

a. No, never.

5. Can you engage in 6-foot separation when moving about your unit?

a. Sometimes, but staff allows prisoners to just hang out and crowd the restroom, and you are literally rubbing elbows with other prisoners.

6. Are you given cleaning supplies for your cell?

a. No.

7. What cleaning supplies are you given?

a. None in the Unit. Sometimes a porter might come by spraying the cell door handles.

8. Have you observed the unit being cleaned?

a. Down on base area where the officers are sitting at their station.

9. If yes to Number 8, how often is the unit cleaned?

a. Every day in this area.

10. Are the telephones, cleaned after each use?

a. . No they never are.

11. How often are the bathrooms cleaned?

a. Never. As the porters do not clean them or care to keep these facilities clean.

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. The inmates living in the day room walk around without their masks, but wear them if they come out to base area or going to use the rest room..

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. Yes.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. No. And I've made a complaint about it. Have a copy of this complaint.

(04/14/2020).

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. I am not aware of such a name of any program/ unit like this.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No, again the staff allows prisoners to hang out in the restroom. Showers are single men, and has a divider between them.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. Yes.

18. Is that rule enforced by the guards?

a. Yes, outside.

19. Is there social distancing of 6-feet during feeding in the unit?

a. Yes.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. We have no law library access what so ever. State clothing is not being cleaned properly. Comes back dirtier.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent injection? If no, why not?

a. .One mask. No made a company. They come in a big bag. But they don't are about giving us one.

22. When you are patted down, are guards using gloves?

a. No, but sometime they do.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. I do not see them changing their gloves

24. Can you get new masks if you ask for new ones?

a. No, they do not give them out to us.

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. We are not being able to use Jpay, and sometimes it takes (3) days for us to access to it, because staff do not pay attention to calling them out.

Pursuant to MCR 2.114(c); 28 U.S.C. Sec. 1746, I declare that the foregoing is true and correct, to the best of information, knowledge and belief, under the penlty of perjury.

David M. Lyons-Bey, #231703

Macomb Correctional Facility

34625 26 Mile Road

Lenox Twp., Michigan 48048

**DECLARATION OF DWIGHT HENLEY, 246521**

I, Dwight Henley, under the penalty of perjury, state the following:

1. I am presently confined within the Michigan Department of Corrections at Macomb Correctional Facility in Lenox, Michigan.
2. I am housed in Housing Unit 2, B-wing, top-bunk.
3. My Bunkie and I have been given cloth face masks. We are told to wash our masks- inmates are permitted to do laundry twice per week.
4. My temperature is not being taken.
5. In Housing Units 1, 2, and 3, the middle dayroom has been turned into a dorm and houses 16 prisoners. The dayroom is approximately 30 feet by 50 feet.
6. Prisoners in the dayroom use the toilets in the Housing Units.
7. Inmate porters are responsible for cleaning the toilets and showers, and each one cleans differently, if they choose to clean. Porters are given diluted bleach with water.
8. I have been told that the gym and a few classrooms have also been turned into dorms.
9. For the first week of quarantine, prisoners were still being fed in the chow hall. Now we are being fed in our cells.

10. Prisoner's that require medications are to line up in the Unit to receive their medication and are not told to stand 6-feet apart.
11. Officers are required to do a set number of pat downs per shift. I have observed officers using the same gloves to search multiple prisoners.
12. On April 15, 2020, I submitted two grievances, one against Warden Chapman, and the other against Director Washington.
13. My grievance against Warden Chapman and Director Washington was for failing to properly protect grievant from contracting COVID-19 in all, but not limited to, the following ways:
  - a. Failed to implement measures to ensure staff don't carry COVID-19 into the prison and infect prisoners;
  - b. Failed to ensure that staff engage in and enforce social distancing during food distribution, in the hallways, at prisoner phones, in prisoner bathrooms, and on base;
  - c. Failed to test and segregate appropriately all prisoners who complain of COVID-19 symptoms;
  - d. For moving prisoners from unit to unit without testing them for COVID-19;
  - e. Failed to ensure prisoners report COVID-19 symptoms and determine which prisoners are infected.

14. The grievance coordinator returned the grievance against Director Washington to me because it was identical to the other grievance. However, while identical, the grievances grieved two different people.
15. I spoke to the grievance coordinator about this and submitted another grievance against Director Washington.
16. I have not been tested for COVID-19.
17. If the system that is currently in place was actually followed, it would provide for distancing in the unit. The bathroom, hallway, and getting in line for meds are the biggest problem areas for distancing.
18. We are allowed to clean our cell from 6:30-8:30AM.
19. We usually get disinfectant, mop, water, and broom. Inmates can request bleach. Some officers will allow us to clean anytime.
20. There is little oversight to ensure that porters are cleaning the bathrooms and unit's property.
21. The bathroom and showers are cleaned 3-4 times per day.
22. The phones are not being wiped down.
23. The dayroom is housing inmates in an open dorm setting. They are using the bathrooms of the housing unit.
24. We are fed in our cell. The porter who distributes the trays comes within 6 feet. When we drop off our trays, there is also no distancing.



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

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

## DECLARATION OF CASEY STAPP: MACOMB CORRECTIONAL FACILITY

1. During my time in quarantine from March 26, 2020 while at Macomb Corr. Facility I was forced to live in a cell with another positive tested covid-19 patient without cleaning supplies and the ability sterilize my cell.
2. I was given a shower once every two days and phone use every two days as well.
3. I was forced to take showers in a unsanitized or cleaned shower after about 20 people and I was forced to live in a cell within 6 feet of my cell mate who was very sick.
4. I asked and requested on numerous occasions for cleaning supplies to clean my cell and was denied such.
5. I was denied my personal property the entire time which meant I went without hygiene for about two and a half weeks and I didn't start to receive state soap until Bruce-X Parker #593090 began to complain about it and demand hygiene and cleaning supplies which the prison never supplied.
6. I only received state soap on two occasions.
7. I complained to Resident Unit Manager Regina Jenkins-Grant as well as Co. Wright and C/o Sanders and Assistant Deputy Warden Kristopher Steece and Malloy to no avail.
8. Rum Jenkins-Grant said we weren't allowed to have cleaning supplies.

9. My experience at Macomb during the Covid outbreak was traumatizing and life shattering as I heard and say other inmates wheeled out breathless and borderline lifeless and denied proper care on numerous occasions.
10. Prisoners plea for assistance and help was ignored by healthcare staff such as RN Smith, Donuhue, Wolfe, Phaneuf and Physician's Assistant Kim Farris and Nurse PR actioners Juliano Martio.

The above is true under penalty of perjury and I give Dan Manville permission to sign this.

Casey Stapp

DECLARATION OF BRANDON ROBERTSON: MACOMB CORRECTIONAL

1. Have you been tested for COVID-19? If yes, what is your medical status?

a. No.

2. Had you sought health care because you thought you had COVID-19 symptoms?

a. No.

3. If yes to question 2. Explain what steps health care took to treat you, if any?

a. N/A.

4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposing end of the bed to created 6-feel separation?

a. No ( In two man cell but wasn't told to sleep at other end of the bed as your bunkie).

5. Can you engage in 6-foot separation when moving about your unit?

a. No because you are always passing someone.

6. Are you given cleaning supplies for your cell?

a. Yes once a day in the morning between 630am 830am. So if you ain't a morning person you can't clean til next day no other shift let's you clean room.

7. What cleaning supplies are you given?

a. Disinfectant, sometimes bleach depending on who is working

8. Have you observed the unit being cleaned?

a. Yes.

9. If yes to Number 8, how often is the unit cleaned?

a. 3 times a day bearily.

10. Are the telephones, cleaned after each use?

a. No.

11. How often are the bathrooms cleaned?

a. 2 times daily.

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. . Inmates in the dayroom are just put in there can't really do nothing hey like right on top of each other.

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. Yes.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. No.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. Yes! It is mix with people who has covid19 and those who are on the step

down.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. Bathroom yes they want two prisoners in there at a time but showers all there

is a wall between the two of you.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. yes what yard we do get. We only get 2 hours a week.

18. Is that rule enforced by the guards?

a. Yes.

19. Is there social distancing of 6-feet during feeding in the unit?

a. No not between my bunkie and not between the people severing our food..

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. People who has been in a room with someone who had covid19 are put back in population with the others instead of putting them somewhere else

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. 2 Masks and yes prison made and no there not helpful at there are very thin and you still can breathe in anything through it, doesn't meet the standard.

22. When you are patted down, are guards using gloves?

a. Yes.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. No, they don't change them.

24. Can you get new masks if you ask for new ones?

a. No its hard to get a new mask you ask the officer and the officer will send you to the aris and they tell you to wash out the ones we got.

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. They way they running things are messed up and the officers tell us this.

Everything that I said in this jpay is true and real under penalty of perjury. And i Brandon Robertson gave attorney Dan Manville the right to sign this document for me.

DECLARATION OF TRAVELL HENRY: MACOMB

1. Have you been tested for COVID-19? If yes, what is your medical status?

a. No I have not.

2. Had you sought health care because you thought you had COVID-19 symptoms?

a. No.

3. If yes to question 2. Explain what steps health care took to treat you, if any?

a. N/A.

4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposing end of the bed to created 6-feel separation?

a. I am in a 2-person cell and I was not instructed that me or my bunkie should sleep on separate sides of the bed to create 6 feet separation.

5. Can you engage in 6-foot separation when moving about your unit?

a. It depends on where I'm at on the phones there is no 6 feet seperation nor is it being enforced but in the Hallways yes there is 6 feet separation.

6. Are you given cleaning supplies for your cell?

a. yes but we are only allowed to clean between the hours of 6am and 8am.

There is only two mops two brooms and two dust pans and it is expected that 60 inmates should use that within the allotted time

7. What cleaning supplies are you given?



a. we are given Disinfectant solution and, bleach that is mostly filled up with water.

8. Have you observed the unit being cleaned?

a. Yes... but Not outside of regular porter requirements they haven't changed the regulations for cleaning since Covid-19.

9. If yes to Number 8, how often is the unit cleaned?

a. The unit is being cleaned On (am shift:) once at 6am for 30 mins and then again at 11:00am for 30 mins. (pm shift) Once at 2pm for 15 minutes and once at 4pm for 30 minutes. (3rd) shift only cleans up once usually at Midnight. until 1am.

10. Are the telephones, cleaned after each use?

a. The telephones are not cleaned after each use, an neither is the Jpays/ kiosk.

11. How often are the bathrooms cleaned?

a. The bathrooms are cleaned twice per each shift.

12. If inmates have been placed in the dayroom, what can you tell me about them?

a. Inmates are placed in a dayroom In the unit that I'm in; Housing unit 2. Its a total of 16 inmates in one room, double bunked they were told that they would be place in the dayroom until the quarantine was over. but they still interact with

general population and share physical contact with everything that we use.

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. The inmates in the day rooms do use general population bathrooms regularly.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. There has NOT been any separation panels set up so that the inmates in the dayroom are separated from general population in the bathroom.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. There are a few different places designated as the PUI unit but more specifically the gym located in the programs building. Prisoners who report symptoms or are high risk because of there closeness to people who've tested possitive normally go there I'm not sure how long they stay or what's actually being done there.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. The bathrooms are not marked for social distancing but some officers enforce two prisoners being allowed in the restroom at one time but more than not the bathroom is usually crowded with atleast 7 inmates unless being told to leave the restroom. The shower is devided by a 12 inch wall and a walk in curtain. aside

from that divided wall there is no real separation.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. Yes there is social distancing on the yard during exercise we are only allowed to be accompanied by one other person.

18. Is that rule enforced by the guards?

a. That rule is not enforced by the guards

19. Is there social distancing of 6-feet during feeding in the unit?

a. Yes Prisoners are required to eat in their cells with their bunkie.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. The other issues that i have about how we are confined during the covid 19 are as follows.

1.) We are required to eat in our cells we are normally fed at count time and because its count we are not allowed to step out of our cells and wash our hands before eating our food. also when our meals are passed out In my unit specifically Housing Unit 2. they are not being passed out by a food service worker but rather another inmate who volunteered. The problem with that is that the three inmates who normally pass our trays out have different job descriptions that they are usually working minutes before passing our food to us. One of the three inmates is a unit base porter, who vacuums sweeps and handles dust and blood spills literally

minutes before he passes out our trays. The other 2 out of three is a Dog handler who usually picks up poop, Handles hair fleas and everything else that comes with having a dog then minutes later comes and serves our trays, these inmates are wearing gloves but I'm not sure if they are Washing there hands before transitioning from handling these potential things that can expose us to bacteria, to handling this food that we are going to put in our bodies. also. The Unit can hire inmates who have no detail and assign them to the job to where they are only handling food but instead they use these other inmates who are can potentially spread bacteria.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. I have recieved 4 masks since March 4th up until present,. the mask are prison made masks made from the same material our shirts are made from, I don't believe that these masks are proactive in preventing the spread of Covid simply because there were so many inmates who wore their mask regularly but still became aerosymptomaic carriers. They lost their taste and smell, that was the most common symptom in my unit. And almost every prisoner on my wing claimed that they had that symptom.

22. When you are patted down, are guards using gloves?

a. YES.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. The guards are not changing their gloves, they go from one inmate to the other wearing the same gloves.

24. Can you get new masks if you ask for new ones?

a. They tell us to ask the officer, the officer tells us to ask the ARUS, and the ARUS tells us to wash the ones that we have and use it again.

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. Another issue that I have about how we are confined during covid 19 is our yard schedule we are only receiving two hours a week outside. And outside of those two hours we don't receive no fresh air what so ever.

26. Has the prison placed porter-jones outside the housing units?

a. There aren't any porter-Jones outside of our units.

27. If yes, which housing units?

a. N/A.

28. Has the prison used portable showers?

a. No.

29. If yes, in which housing units?

a. No.

I Travell Henry certify that this information is true under the penalty of perjury.

And I give attorney Dan Manville to sign this document on my behalf.

DECLARATION OF MARTELL SMITH: MACOMB

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. No, I have not been tested for covid-19
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. No, I have not sought health care do to any symptoms.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. No, I was not instructed that me an cell mate should have our heads on the opposing end of the beds to create 6 feet separation.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. Yes, but not really its kind of impossible.
6. Are you given cleaning supplies for your cell?
  - a. We are not given individual cleaning supplies for our rooms, they make us use the same cleaning supplies.
7. What cleaning supplies are you given?
  - a. The cleaning supplies we get is a broom, dust pan, mop with plain water, a bottle with disinfection spray which we not always able to use.

8. Have you observed the unit being cleaned?
  - a. Yes, I observed the unit getting cleaned but not properly, No bleach, the bottles that suppose to have bleach in it be filled with majority water.
9. If yes to Number 8, how often is the unit cleaned?
  - a. The unit being clean everyday but not properly
10. Are the telephones cleaned after each use?
  - a. No, the telephones is not cleaned after each use.
11. How often are the bathrooms cleaned?
  - a. The until being cleaned about maybe 3 to 4 times a day starting 6am, but the cleaning don't be proper cleaning, they don't use bleach for everything even for the floors when moping, the floors only being moped with water n a lil disinfection spray. Also the porters don't always clean so the bathrooms be nasty an also the phones an reels be wiped down with da same towels.
12. If inmates have been placed in the dayroom, what can you tell me about them?
  - a. The inmates in the dayrooms are not 6 feet apart which is kinda impossible to do.
13. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. Yes, the inmates in the day rooms use the same bathrooms for the unit.



14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. No, there's not been any separation panels set up in the bathrooms so that the dayroom inmates will not come in contact with us.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. Yes, an the prisoners that are housed in the PUI unit are the ones that sick an also recovered from being sick. They also have porters housing in that same unit that's not sick an never was sick. A guy I know that was housed in that same until that never was sick or had any symptoms just got moved back into my unit his name is William jonec Jr #284400

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. Doing use of bathroom we are only able to go 2 at a time, but there's no separation panel line inside of the bathroom but there is 2 panel boxes outside the bathroom were 2 guys have to wait inside until 1 come out

17. Is there social distancing of 6-feet during exercise or on the yard?

a. They tell us to be 6 feet part while talking but they did t mentioned exercising.

18. Is that rule enforced by the guards?

a. no

19. Is there social distancing of 6-feet during feeding in the unit?

a. We have to eat in our rooms, so yes.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. There's inmates who have jobs outside the units who come back in the room after coming from being around people that's coming in and out from the outside world everyday, he could be bringing the virus into the cell. I believe all kitchen workers or any one that works outside the unit should be cell mates. Also guys are being placed in Quarantine but aren't being treated for covid 19 and are being released back into GP as potential carriers. Health care staff are neglecting to take vitals and check for symptoms, they just started about 4 maybe 5 days ago. Quarantine prisoners are not being given an opportunity to use Jpay to write family, they also not able to go outside to the yard and are essentially being treated as high custody level prisoners and also there kites are not being responded to by P.c or Arise. There is also guys who have or had symptoms of the virus like lost of taste and smell who never got checked or questioned by a nurse and still around guys who may not have symptoms. There's guys that I believe had the virus but may already recovered and I also believe there's a guy that's in on my floor that

have the virus and never been tested. He looked really bad at one moment and had a consistent cough. He still has a cough but not as bad.

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. I got 2 mask from MDOC, yes they are prison made. No they are not helpful to prevent infection because they are very thin, they also have 0% percent cotton. They are made out of MDOC clothing.

22. When you are patted down, are guards using gloves?

a. Yes guards are using gloves.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?

a. No guards are not changing their gloves after a consistent shake down.

24. Can you get new masks if you ask for a new one?

a. No I can't get a new mask whenever I ask or needed, they will say they don't have any, even if they do, there are guards who abuse their authorities everyday.

25. Has the prison placed porta-jones outside the housing units?

a. The showers are not being cleaned after each prison and also not being cleaned after the day room prisoners.

26. If yes, which housing units?

a. no

27.Has the prison used portable showers?

28.If yes, in which housing units?

a. no

### **Lakeland Correctional Facility (LCF) (Exhibit 5)**

Defendant Bryan Morrison is the Warden of Lakeland Correctional Facility (hereinafter “LCF”) in Coldwater, Michigan. LCF is a 1,458-bed facility which houses Level II MDOC prisoners, including a geriatric unit. (ECF No. 27-13. PageID. 1468). Defendant Morrison states that “[s]ocial distancing measures were and continue to be implemented throughout the facility... requiring that there be a distance of at least six feet between all individuals, including...chow lines... to the fullest extent possible.”<sup>1</sup> (*Id.*, PageID. 1472-73 ¶ 9(c)). Further, “[w]here six feet distancing cannot be completely achieved in certain areas (such as in pole barns with cubicle living arrangements), we have modified those living spaces to the extend feasible.”<sup>2</sup> (*Id.* at ¶ 9(d)). What Plaintiffs seek to do through prisoner’s declarations is provide the Court a picture of how these policies play out in practice. One prisoner states, “I am in a housing unit with approximately 160 other inmates...it is impossible to social distance.” (Ex. 5, are the affidavits provided by prisoners confined at LCF, Affidavit of Anthony Legion at ¶ 15). Director Washington’s states in her affidavit “[a]dditional measures such as sleeping head-to-toe and every other bunk where space allows have been implemented at the facilities.” (ECF No. 27-5

<sup>1</sup> All of the Defendants have used the term “to the extend possible.” The use of this terms in the affidavit to explain what they should be doing but are not is just that – a smoke screen.

<sup>2</sup> Nowhere in Morrison’s affidavit or the Response is it explained how the pole barns have been modified so that social distancing can be achieved.

DECLARATION OF ANTHONY LEGION, 380930: LAKELAND

I, Anthony Legion, hereby, declare, depose and attest that:

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. I was tested negative for COVID-19;
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. Yes
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. I informed one of the nurses that I had chills, dry cough, body aching and sore throat, in response, the nurse asked me did I have a shortness of breath, lack of appetite or a fever, and I said no. The nurse then said if I experience ethose additional issues then kite health care.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the oppose end of the bed to created 6-feel separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I am in an 8-man cube
5. Can you engage in 6-foot separation when moving about your unit?
  - a. No
6. Are you given cleaning supplies for your cell?
  - a. Yes
7. What cleaning supplies are you given?
  - a. Watered down bleach bottles and disinfectant;
8. Have you observed the unit being cleaned?
  - a. Yes, 3 times per day
9. Are the telephones cleaned after each use?
  - a. No
10. How often are the bathrooms cleaned?

- a. Three times per day
- 11. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. No
- 12. Is there social distancing of 6-feet during exercise or on the yard?
  - a. No
- 13. Is that rule enforced by the guards?
  - a. No
- 14. Is there social distancing of 6-feet during feeding in the unit?
  - a. No
- 15. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
  - a. I am in a housing unit with approximately 160 other inmates, we roam through the unit at arms length, it is impossible to social distance. We don't have access to the law library unless we can show a deadline approaching within 30-days, and the counselors expect the court Order to specifically state a pleading is due within 30 days. The counselors have no clue that the courts never indicate the deadlines on their orders, which prevents us from being able to prove that we have a deadline. This creates hostility between staff and inmates.
- 16. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?
  - a. They gave me two "so called" mask that are made out of prison clothes while the staff wears "real" masks.
- 17. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?
  - a. The officers do not change gloves after they pat us down.
- 18. Can you get new masks if you ask for a new one?

- a. No. They don't give out new mask and we have to wash them in the laundry with all the other inmate's dirty clothes.

I declare that the foregoing statements are true to the best of my recollection.  
/s/Anthony Legion 28 USC 1746

With sound mind, I also give, attorney Dan Manville limited permission to sign my name to this document only.  
/s/Anthony Legion.



DECLARATION OF MOSES KIRSCHKE: LAKELAND CF

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes. I'm currently "Positive" for COVID-19.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. Yes. Last week when I developed symptoms and lost my sense of taste and smell; developed a severe headache; a cough; and noticed that my lungs hurt when I breathed.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. When I spoke to the nurse who took my vitals last Thursday or Friday, she told me that Health Care would monitor me and if I developed any worse symptoms for me to contact Health Care and in the meantime, take some Tylenol (which I don't have).
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. No instructions" have been given by staff to lay in your bunk at opposite ends of the bunk to create a 6-foot separation. And I'm currently housed in a cubical-type of setting at Lakeland Correctional Facility in the Pool Barns which are 8 man cubes (bunk-beds set up right next to each other) wherein even if you wanted to lay head at the opposite end of the bunk, it is impossible cause there's a shelf there and you would hit your head every time you raised your head from under it.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. No. Cause the Pool Barns are "overcrowded." You're right next to a person in the bathroom; the Dayroom; the Quiet Room; when using the phones; the JPay Machine; and in the hallway in-between the cubes. And it's like that in the other Units too (C-Unit & B-Unit) excluding the Dayroom cause those Units can't utilize their Dayroom right now.

6. Are you given cleaning supplies for your cell?
  - a. Yes.
7. What cleaning supplies are you given?
  - a. Disinfectant and bleach.
8. Have you observed the unit being cleaned?
  - a. Yes.
9. If yes to Number 8, how often is the unit cleaned?
  - a. In the mornings and afternoons, Monday-Friday from what I've seen.
10. Are the telephones cleaned after each use?
  - a. No.
11. How often are the bathrooms cleaned?
  - a. Once a day from what I've seen. Monday-Friday. And the showers are not cleaned -- You have to do that yourself.
12. If inmates have been placed in the dayroom, what can you tell me about them?
  - a. There are currently "no inmates" in Day Rooms at this facility. But in the beginning when the outbreak first started (around 3-13-20) the facility was moving prisoners to the Recreation Rooms/Day Rooms for B-Unit and C-Unit. Wherein the facility set up bunks there for those who were thought to be infected. But when prisoners complained, the facility moved prisoners [back] to their Housing Units and changed their stance and stated in a memo I believe that if prisoners were suspected of being infected or if they had been in close contact with someone who had, that they would be left in their Housing Unit and monitored. In which in a JPay message to prisoners by officials of the facility on April 3rd 2020, officials stated that prisoners who were thought to be infected or had been in close contact with someone that had and returned to their Housing Unit, would be "escorted to and from the bathroom and the shower" of their Unit by their Unit officer. And that those areas would be "disinfected afterwards." And also, that those prisoners would receive "a different yard time." But none of that was actually done "in actuality" and

enforced by officers in my Unit (C-4) before I was moved to Unit F-2. And in D-School/Segregation, where I was moved to on April 26th (before being moved to F-2 --cause my test results hadn't come back yet--) inmates were in there too, but I'm not sure if any inmates are there now. And when I was in D-School, inmates who were 'positive' were in the same Rooms as those who were negative or were waiting on their test results --like me-- in which inmates were coughing and hacking. And I heard the same (that inmates were coughing and hacking in the Dayrooms for C-Unit and B-Unit too) in which inmates who were not exhibiting "any symptoms" or showing "any signs" or "indications" of being sick and were being forced to be housed there complained, which brought about the JPay message being issued by officials of the facility.

13. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. Yes. The inmates who were in C-Unit Day Room used C-5 Unit's bathroom and the inmates who were in B-Unit Day Room used B-5 Unit's bathroom. Which were other Units with inmates in them 'not' exhibiting symptoms. And all the inmates who were in D-School used D-School's bathroom.
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?
  - a. No. There were "no separation panels" set up in either C-5 Unit's bathroom or B-5 Unit's bathroom. Nor was there any set up in D-School's bathroom either.
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
  - a. No. There is "no PUI Unit." But D-School/Segregation I guess would be its equivalent from the way is been operating.
16. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. No. The toilet stalls are right next to each other as are the urinals and the showers as well.
17. Is there social distancing of 6-feet during exercise or on the yard?

- a. No. You have to take it upon yourself to do it. Otherwise people are clustered together
- 18. Is that rule enforced by the guards?
  - a. No. "Social distancing" is not enforced by officers/guards.
- 19. Is there social distancing of 6-feet during feeding in the unit?
  - a. No. People are lined up and clustered together to get their Styrofoam trays in the Unit. And because there's "no seating" cause of the limited number of tables in the Day Room and the Quiet Room (6 altogether for a 160 people) a person has to sit on their bunk which is right next to other bunks and bunks above you and on the side of you.
- 20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
  - a. See other message sent. [Bottom of document]
- 21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?
  - a. : (3) Three. Yes by MSI. No. Because they're made out of "thin cloth" material -- the same exact material that our State Blues are made out of.
- 22. When you are patted down, are guards using gloves?
  - a. Yes.
- 23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after?
  - a. No. The guards are not changing their gloves. And two guards told me that they didn't have to change their gloves. And a guard who shook me and my Bunkie down said the same thing.
- 24. Can you get new masks if you ask for a new one?

a. Yes. But I'm still currently waiting on mine

25. Has the prison placed porter-jones outside the housing units?

a. See another message sent

26. If yes, which housing units?

a. No.

27. Has the prison used portable showers?

a. No.

28. If yes, in which housing units?

a. N/A.

29. I have been knowingly exposed to COVID-19 by way of moving me to a Housing Unit designated as a "Positive Housing Unit" for prisoners who had tested positive [before] my test results even came back and then being moved to Segregation where I was housed with more prisoners who were positive and also were showing symptoms, wherein shortly after that I developed symptoms and now am sick and am having somewhat trouble breathing now. In which I filed a Step I grievance wherein it just came back rejected as a "Non Grievable Issue" and/or that the grievance was "filed on behalf of another prisoner..." which was done to avoid addressing the issue and having to disclose the officials "who" compiled the lists for the Housing Units designating prisoners as "positive and negative."

30. When the outbreak first occurred, staff and prisoners at Lakeland Correctional Facility were both given "cloth masks" for protection. But when the infection rate began to surge the week of April 19th, and substantial numbers started coming back showing a multitude of prisoners 'positive,' staff were given high quality masks such as "N-95's and KN-95's" upon entering the facility. While prisoners still remained

with the same lowly inferior cloth-type of mask thereby placing staff lives' above of prisoners.

31. The MDOC and/or Lakeland Correctional Facility is not testing staff to determine if any staff members are 'positive,' allowing for the cycle and/or the chain of the virus to continue to spread. Thereby putting prisoners' lives at risk, wherein it was indicated that if the MDOC/Lakeland Correctional Facility did test staff, that "staff wouldn't be able to work... and that [they] would be short of staff if some staff came back positive."
32. On or about April 6th, 2020, the facility instructed maintenance go to each Unit and disable the fans in each Unit. When 99% of the time the windows in each Unit are closed by prisoners who don't want air blowing in on them. In which staff wouldn't address the issue regarding the windows, wherein the CDC recommended "fresh air" and "ventilation" to combat the spread of the virus. In which I personally almost got into a couple of fights with other prisoners about opening up windows in my Unit and/or in the community bathroom before I was recently moved from my Unit to another Unit (F-2).
33. When prisoners who were experiencing symptoms were not given "any medical treatment" and were turned away by Health Care here at Lakeland Correctional Facility, they were sent back to their Units wherein the prisoners around them inevitably became infected and sick. In which they were left in their Unit "a day or two" sometimes or more before Health Care would take any real action. In which I personally know of (2) two prisoners who were in my Unit and were turned away and not given "any medical treatment" by Health Care thereby aiding in the continuation of the spread of the virus.

I certify that the information is true and correct under the penalty of perjury and I give Attorney Dan Manville permission to sign this document on my behalf.

## DECLARATION OF LAMONT HEARD

I, Lamont Heard, have personal knowledge in this matter and state:

1. I am currently housed at Lakeland Correctional Facility.
2. The prison is allowing all the people that tested positive for COVID-19 to go to the outside yard together. There is no social distancing policies being enforced.
3. All the people that tested negative for COVID-19 go to the outside yard together. There is no social distancing policies being enforced.
4. We use the same exercise equipment, tables and telephones on the outside yards.
5. There is no cleaning supplies for me to use to clean the outside equipment and phone before and after I or others use it.
6. Prison staff have been ordered to stop giving me and other people plastic gloves to use for cleaning. They claim it is a state wide shortage and only staff can use them.
7. We are given bleach, citrus and disinfect to use for cleaning. However it frequently runs out and we have to wait hours for a refill.
8. There is no increase in cleaning cubes. There is not enough mop buckets, mop heads and mop sticks. We are not provided cloths to clean our areas.
9. Common areas are being cleaned once in the morning, once in the afternoon, once at 10pm and once at midnight.
10. Officers in the housing unit call breakfast and lunch. We are told to stand in a single file line bunched together to get our trays. We are told we do not have to stand six feet apart.

The above facts are true under penalty of perjury and I give Dan Manville permission to sign on my behalf.

Lamont Heard

DECLARATION OF DEJUAN TAYLOR, 342805: Lakeland Correctional

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes I was tested for the virus and my results were negative.
2. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I am housed in an 8 man cube setting. And no we were not informed to lay opposite to each other.
3. Can you engage in 6-foot separation when moving about your unit?
  - a. and No we have no way almost at no time a day to have 6 feet space. sometimes we are still forced to be in large lines for meals of maybe 50 inmates or so. Just yesterday we were instructed that we had to give blood! Not a request but an instruction either that or be forced to house with the infected inmates! That was insane and on top of that they had about 40 or so inmates stuffed in a maybe 20 by 20 cell for that! so against my wishes I gave blood in fear of being forced to house in the unit with the infected!
4. If yes to Number 8, how often is the unit cleaned?
5. Are the telephones cleaned after each use?
  - a. And no one cleans the phones or juke machines
6. How often are the bathrooms cleaned?
  - a. And the bathrooms are cleaned twice daily maybe 3 times that I can see.
  - b. And no there is no cleaning supplies left in bathrooms for easy use! we have to constantly try and contact an officer just to get a spray bottle of disinfectant or some watered down bleach.

yes I give Dan Manville permission to sign and yes I swear everything said is true.

signed DeJuan Taylor



DECLARATION OF DEJUAN TAYLOR, 342805: Lakeland Correctional

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes I was tested for the virus and my results were negative.
2. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I am housed in an 8 man cube setting. And no we were not informed to lay opposite to each other.
3. Can you engage in 6-foot separation when moving about your unit?
  - a. and No we have no way almost at no time a day to have 6 feet space. sometimes we are still forced to be in large lines for meals of maybe 50 inmates or so. Just yesterday we were instructed that we had to give blood! Not a request but an instruction either that or be forced to house with the infected inmates! That was insane and on top of that they had about 40 or so inmates stuffed in a maybe 20 by 20 cell for that! so against my wishes I gave blood in fear of being forced to house in the unit with the infected!
4. If yes to Number 8, how often is the unit cleaned?
5. Are the telephones cleaned after each use?
  - a. And no one cleans the phones or juke machines
6. How often are the bathrooms cleaned?
  - a. And the bathrooms are cleaned twice daily maybe 3 times that I can see.
  - b. And no there is no cleaning supplies left in bathrooms for easy use! we have to constantly try and contact an officer just to get a spray bottle of disinfectant or some watered down bleach.

yes I give Dan Manville permission to sign and yes I swear everything said is true.

signed DeJuan Taylor

DECLARATION OF MITCHELL HODGES, 495599: Lakeland

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. I was tested a month after being sick and was negative
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. When I was sick, it was five days before I saw healthcare and all they did was ask me some questions and take my temperature.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. They separated positive and negative inmates, but some CO's still let negative inmates interact with positive inmates.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If you are not in a 2-person cell- describe where you are currently housed.
  - a. I'm in an 8-man cell.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. Not at all.
6. Are you given cleaning supplies for your cell?
  - a. Yes, watered down bleach.
7. Is there social distancing of 6-feet during feeding in the unit?
  - a. We eat in our cubes but have to line up to get trays. There is no distancing during the line up.



Exhibit 6 - Mask - two pics of





Exhibit 6 - Mask - two pics of

## DECLARATION OF JESSE MACK: PARNALL

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes, I am covid recovered
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. Yes, On 3 -23 -20
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. Medical quarantine and generic Tylenol
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposite end of the bed to create 6-foot separation? If are not in a 2-man cell- describe where you are currently housed.
  - a. No
5. Can you engage in 6-foot separation when moving about your unit?
  - a. I am currently in a single cell at SMT (Parnall)
6. Are you given cleaning supplies for your cell?
  - a. No
7. What cleaning supplies are you given?
  - a. Only diluted sanitizer
8. Have you observed the unit being cleaned?
  - a. Rarely and not thoroughly
9. If yes to Number 8, how often is the unit cleaned?
  - a. unknown
10. Are the telephones, cleaned after each use?
  - a. no
11. How often are the bathrooms cleaned? .
  - a.
12. If inmates have been placed in the dayroom, what can you tell me about them?
  - a. no
13. Do the inmates in the dayroom use the bathrooms for the unit?
  - a. no
14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates?
  - a. no
15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?
  - a. 15. No, Covid +'s are housed in a GP unit until transferred to Cotton or Carson for quarantine



16. Is there social distancing of 6-feet during use of bathrooms, showers?
  - a. no
17. Is there social distancing of 6-feet during exercise or on the yard?
  - a. no
18. Is that rule enforced by the guards?
  - a. no
19. Is there social distancing of 6-feet during feeding in the unit?
  - a. yes, two per table in chow hall
20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
  - a. . No access to grievance process while in covid quarantine or library material. I have grievances pending
21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?
  - a. 3 , Yes, Unsure on effectiveness
22. When you are patted down, are guards using gloves?
  - a. yes
23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?
  - a. no
24. Can you get new masks if you ask for new ones?
  - a. unsure
25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?
  - a. I was not sent back to my sending facility after testing negative for Covid. I was dumped at Parnall with no explanation or reasoning. Parnall is a Covid hotspot.
26. Has the prison placed porter-jones outside the housing units?
  - a. no
27. If yes, which housing units?
  - a. no
28. Has the prison used portable showers?
  - a. no
29. If yes, in which housing units?
  - a. No
30. I was the first Covid positive prisoner at WCC on 3 27 20 and one the first to go through the quarantine process at cotton and Adrian.
31. I have not been evaluated or examined by a doctor since my initial covid test on 3 26 20.

I certify under the penalty of perjury that all statements made by me, JESSE MACK, in the forgoing email are true to the best of my understanding and knowledge.

Jesse Mack  
MDOC ID 823808  
DOB 4 - 27 - 1988

I grant permission to attorney Daniel Manville to sign this documentation on my behalf.

Jesse Mack  
MDOC ID 823808  
DOB 4 - 27 - 1988

*Jesse Mack signed with permission*  


Debra E. Brown  
Debra E. Brown



## DECLARATION OF DESMOND DEROO: COTTON

1. Have you been tested for COVID-19? If yes, what is your medical status?
  - a. Yes, positive.
2. Had you sought health care because you thought you had COVID-19 symptoms?
  - a. Yes.
3. If yes to question 2. Explain what steps health care took to treat you, if any?
  - a. . Nothing until last week when they tested us.
4. If you are in a 2-person cell, were you instructed that each of you should have your head on the opposing end of the bed to created 6-feel separation?
  - a. No. I'm in an 8-man cube.
5. Can you engage in 6-foot separation when moving about your unit?
  - a. No and I wrote a grievance stating that we were not able to social distance and we're force to close together. they sent my grievance back and said I couldn't put any grievances in about covid19 issues.
6. Are you given cleaning supplies for your cell?
  - a. yes
7. What cleaning supplies are you given?
  - a. bleach.
8. Have you observed the unit being cleaned?
  - a. Sometimes.
9. If yes to Number 8, how often is the unit cleaned?
  - a. 3 times a day
10. Are the telephones, cleaned after each use?
  - a. No.
11. How often are the bathrooms cleaned?
  - a. 3 times a day.
12. If inmates have been placed in the dayroom, what can you tell me about them?

a. I don't know.

13. Do the inmates in the dayroom use the bathrooms for the unit?

a. I don't know.

14. Has there been any separation panels, etc., set up in the bathrooms so that the dayroom inmates will not have contact with the unit inmates.?

a. yes, I'm in it. some people tested positive and were sent to this unit around positives. they then tested negative later but were told they still had to be in here around positive covid people because they believe they had it and couldn't get this again. even though in all actuality no one knows if you can or can't get it again.

15. Is there a unit known as PUI? Do you know what prisoners are housed in that unit?

a. No.

16. Is there social distancing of 6-feet during use of bathrooms, showers?

a. No.

17. Is there social distancing of 6-feet during exercise or on the yard?

a. No.

18. Is that rule enforced by the guards?

a. No.

19. Is there social distancing of 6-feet during feeding in the unit?

a. No.

20. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. I have asked for gloves and other protective gear and was told no. I also asked to be moved and separated because I was too close to others and told no

21. How many masks have you gotten from MDOC? Are they prison made? Are they helpful to prevent infection? If no, why not?

a. I have gotten 3. they are not helpful because I still contracted the virus

22. When you are patted down, are guards using gloves?

a. No.

23. If the guards are using gloves when patting you down, do you notice if the guards are changing their gloves after? When?

a. No.

24. Can you get new masks if you ask for new ones?

a. Said they were out of them.

25. Tell me about any other issues that you have as to how you are confined during the COVID-19 issue?

a. . I am forced inside with everyone else who is sick, and I had a hard time breathing today and when the nurse came in today all they did was check me vitals and said that's all they can do unless I look like I'm dead

26. Has the prison placed porter-jones outside the housing units?

a. I don't know.

27. If yes, which housing units?

a. I don't know.

28. Has the prison used portable showers?

a. Yes.

29. If yes, in which housing units?

a. People who were moved to the gym.

My name is Desmond Deroo and this is true under the penalty of perjury.

I, Desmond DeRoo, give Dan Manville permission to sign the document on my behalf.

*Desmond DeRoo signed by Dan Manville*

Desmond DeRoo  
Desmond DeRoo



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From:

ELLIOTT ABRAMS

Date:

5/13/2020 8:43:14 PM

To:

Daniel Manville

[Stamp Balance \(38\)](#)[Transaction History](#)

Attachments:

**Subject: Receipt/Rejection/Denial for Step 1 Grievance**

Your Step 1 grievance regarding Other issues- was received in this office on 04/13/2020 and was rejected due to the following reason:

Non-grievable issue- Grievances may be submitted regarding alleged violations of policy or procedure or unsatisfactory conditions of confinement which directly affect the grievant, including alleged violations of PD 03.02.130, "Prisoner/Parolee Grievances and related procedures.

Any future references to this grievance should utilize this identifier:  
MRF/2020/04/0561/27Z

**Subject: Receipt/Rejection/Denial Step 1 Grievance**

Your step 1 grievance regarding Duplicate Issue was received in this office on 04/13/2020 and was rejected due to the following reason:

Your grievance is being returned to you without processing for the issue is a duplicate of the grievance listed at the end of this paragraph that has already been processed. Per PD 03.02.130 duplicate issue grievances will not be processed. Grievance is rejected. MRF/20/04/561/27.

Any future references to this grievance should utilize this identifier:  
MRF/2020/04/562/28A

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From: ROBERT REEVES  
 Date: 5/13/2020 2:18:07 PM  
 To: Daniel Manville

Attachments:

COPY OF GRIEVANCE &amp; DENIAL

#SMT2020-04-0491-27 Z

MY ATTEMPTS TO RESOLVE PRIOR TO WRITING:

I was quarantine from. 3/27 till 4/28/20 and denied the filing of any grievances, due to fear of contaminating the mailroom./ Grievance Dept.

## STATED PROBLEM:

This grievance is against he warden Braman. The violation is failure to protect. On he date stated I was infected which covid 19 and prior to that staff started putting positive tested prisoners in the unit/block which I resided. I could see each prisoner from my open cell. They coughed all day and all night. Which is one of the symptoms and this is a air bourn virus/disease. Due to the out breaks my entire unit was quarantined for days WHICH TRAPPED ME IN AN OPEN SETTING/ BREATHING THE SAME INFECTED AIR OF COVID 19. Not once was the negative prisoners issued any masks or personally protection while these prisoners were housed in his unit. The only people giving mask were ones on quarantine. I SUFFERED FROM A HISTORY OF UNDERLINED MEDICAL ISSUES WHICH MADE ME A GREATER RISK OF FATALITY. BECAUSE OF BEING TRAPPED IN A BLOCK WITH HE POSITIVE COVID 19 PRISONERS.... I STARTED TO GET A FEVER, WHICH LEAD TO ME BEING TESTED AND PERSONALLY QUARANTINED. I TESTED POSITIVE AND WENT THROUGH THE PROCESS, that was not all thought out. I WAS SENT TO JCF AND ARF. WHICH I WAS ISOLATED ONLY 1 DAY, THEN FORCE TO BUNK WITH ANOHE POSITIVE TESTED PRISONER ON 3 OCCASIONS. I COUGHED UP BLOOD, HAD A FEVER OVER 103 FOR 5 DAYS AND COUGHED FOR MORE THAN 3 WEEKS ETC. I COMPLAINED QND WAS NOT TREATED, ONLY TOLD TO FIGHT IT. Per policy it was the staff responsibility to protect. NOTE: I AM ENGAGING IN PROTECTIVE CONDUCT AND PER DEP. DIRECTOR IT IS PROHIBITED TO RETALIATE AGAINST THIS PRISONER. EG. BY WAY OF TRANSFER ETC. THIS IS A FIRST AMENDMENT RIGHT WHICH GUARANTEES PROTECTION

## DENIAL RESPONSES:

Prisoner notice of rejections draft (CSJ-247RJ)

Reason for rejection (PD 93.02.130.J)

no. 8. The prisoner is grieving content of he policy or procedure EXCEPT as it was specially applied to the grievant. If a prisoner has a concern with the content o policy and procedure, s/he may direct comments to the warden forum as provided in PD 04.01.150. ".prisoner housing unit representative/warden forum."

## I APPEALED TO STEP 2:

This appeal clearly satisfied the EXCEPTION as I was infected (personally). To not give an answer or some type of understanding to this is evasive and denied this prisoner a right to complain, exercise my first amendment right and seek resolve. therefore this issue is not resolved...

That is my step 1 and 2. I am awaiting the response to my step 2 and will be filing my step 3 thereafter. AGAIN I WAS DENIED TO FILE ANYTHING AND THAT STAFF NCLUDE SENDING ANY MAIL OUT. BECAUSE I TESTED POSITIVE.

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Exhibit 10 - Grievance of Reeves



|                                                                 |                                      |                     |
|-----------------------------------------------------------------|--------------------------------------|---------------------|
| MICHIGAN DEPARTMENT OF CORRECTIONS<br><b>POLICY DIRECTIVE</b>   | EFFECTIVE DATE<br>10/01/2019         | NUMBER<br>04.01.150 |
| SUBJECT<br>PRISONER HOUSING UNIT REPRESENTATIVES/WARDEN'S FORUM | SUPERSEDES<br>04.01.150 (11/01/2010) |                     |
| AUTHORITY<br>MCL 791.203                                        |                                      |                     |
| PAGE 1 OF 3                                                     |                                      |                     |

**POLICY STATEMENT:**

Michigan Department of Corrections (MDOC) prisoners shall be provided with a systematic means of communication and problem-solving with staff.

**POLICY:**GENERAL INFORMATION

- A. This policy applies only to general population housing units for security Level I through V prisoners. In other units, prisoners should contact their Resident Unit Manager (RUM) with concerns regarding conditions of confinement that affect groups of prisoners or the entire unit. If the RUM cannot resolve the concerns, they shall submit them to the appropriate Assistant Deputy Warden (ADW). If the concern cannot be resolved by the ADW, they shall submit the concerns to the Deputy Warden. If the concern cannot be resolved by the Deputy Warden, they shall refer the matter to the Warden for resolution.
- B. The role of prisoner housing unit representatives is to assist housing unit staff in identifying and resolving problems that exist in the unit. Housing unit representatives serve solely in an advisory capacity to the administration and shall in no way jeopardize the custody, security, or good order of the facility. A housing unit representative who abuses their position by engaging in conduct that jeopardizes the custody, security, or good order of the facility may be removed and/or permanently prohibited from serving as a housing unit representative as set forth in Paragraph I.

ELECTION OF HOUSING UNIT REPRESENTATIVES

- C. Only prisoners who volunteer to be representatives for their housing unit shall be candidates. Candidates must be free of Class I and Class II misconducts for at least the six-month period immediately preceding the election. If there are no candidates who satisfy this requirement, the Warden may waive the requirement. Prisoners designated as Security Threat Group members pursuant to PD 04.04.113 "Security Threat Groups" are not eligible to be candidates.
- D. Elections for housing unit representatives shall be conducted by secret ballot by the RUM or designee. Notice of the election shall be provided to the unit's prisoner population at least one week before the election.
- E. One housing unit representative of a minority race and one housing unit representative of a non-minority race shall be elected from each unit. The non-minority and minority candidate receiving the second highest number of votes shall serve as alternate housing unit representatives. An alternate shall serve in place of the housing unit representative of the same race whenever they are unable to perform their duties.
- F. Housing unit representatives shall serve six-month terms; however, prisoners shall not serve more than two consecutive terms, except as identified in Paragraph G. After completing two consecutive terms or when not elected to a second term, a prisoner must wait at least six months after the end of the term before again being a candidate. A prisoner removed as a housing unit representative pursuant to Paragraph H or I must wait at least 12 months after the date of removal before again being a candidate.
- G. If a vacancy occurs before the expiration of a prisoner's term as housing unit representative, the vacancy shall be filled by the alternate of the same race as the representative who created the vacancy.

|                                   |                              |                     |             |
|-----------------------------------|------------------------------|---------------------|-------------|
| DOCUMENT TYPE<br>POLICY DIRECTIVE | EFFECTIVE DATE<br>10/01/2019 | NUMBER<br>04.01.150 | PAGE 2 OF 3 |
|-----------------------------------|------------------------------|---------------------|-------------|

If the vacancy cannot be filled by the alternate (e.g., alternate transferred), the vacancy shall be filled by the prisoner of the same race who received the third highest number of votes in the most recent election. If the vacancy cannot be filled in this manner, the RUM or designee shall conduct a special election by secret ballot. If the housing unit representative who fills the vacancy will be serving less than 90 days of the unexpired term, they shall be eligible, if elected, to serve two additional consecutive terms.

#### REMOVAL OF HOUSING UNIT REPRESENTATIVES

- H. A housing unit representative may be removed by a two-thirds vote of the prisoners assigned to the housing unit. To remove a housing unit representative, a recall election shall be conducted by secret ballot by the RUM or designee. Notice of the recall election shall be provided to the prisoner population at least one week before the election.
- I. A housing unit representative who is found guilty of a Class I and/or Class II misconduct or designated as a Security Threat Group member shall be removed immediately as a housing unit representative by the Warden or designee. The Warden also may remove a prisoner who engages in conduct that jeopardizes the custody, security, or good order of the facility. A prisoner shall be permanently prohibited from being a housing unit representative only with prior written approval of the CFA Deputy Director or designee. The Warden shall ensure that a prisoner removed or permanently prohibited from being a housing unit representative pursuant to this Paragraph is notified in writing of that decision, including the reason for the decision.

#### RESPONSIBILITIES OF HOUSING UNIT REPRESENTATIVES

- J. Housing unit representatives shall meet at least monthly with the RUM or designee and other staff designated by the RUM or designee to discuss matters of concern to the unit population. The RUM or designee shall notify unit staff and representatives of meeting dates at least one week before meetings. Housing unit representatives shall submit any agenda items in writing to the RUM or designee at least three business days before the scheduled meeting. If agenda items are not submitted, a meeting is not required. Following the meeting, the RUM or designee shall provide the housing unit representatives with written responses to each agenda item, copies of which shall be provided to the Warden and posted in the housing unit.
- K. Housing unit representatives are encouraged to solicit input from those they represent and to give consideration to the views expressed. Housing unit representatives shall not use their position to present individual complaints to the administration.

#### WARDEN'S FORUM

- L. The purpose of the Warden's Forum is to assist the Warden in identifying and resolving problems that exist in the general population of the facility. The Warden's Forum shall be comprised of the facility's housing unit representatives. A Warden of a multi-level facility may have separate Warden's Forums for the different custody levels of the facility. The Warden shall determine whether the facility's housing unit representatives shall alternate attendance at Forum meetings or whether all representatives shall attend each meeting.
- M. Each Warden's Forum may establish offices within the Forum, such as chairperson and secretary. These offices shall be filled by either an elective process or on a rotating basis, as determined by the representatives at the first meeting following housing unit representative elections.
- N. The Warden's Forum shall meet with the Warden at least monthly to discuss matters of concern to the general prisoner population. The Warden shall notify Warden's Forum members and appropriate staff of the meeting date at least one week before the scheduled meeting. The Warden's Forum shall submit any agenda items in writing to the Warden at least three business days before the scheduled meeting. If agenda items are not submitted, a meeting is not required. Minutes of the meeting shall be maintained by staff designated by the Warden.
- O. Following each Warden's Forum meeting, the Warden shall provide the Warden's Forum with written responses to each agenda item, copies of which shall be posted in each housing unit and forwarded to



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| DOCUMENT TYPE<br>POLICY DIRECTIVE | EFFECTIVE DATE<br>10/01/2019 | NUMBER<br>04.01.150 | PAGE 3 OF 3 |
|-----------------------------------|------------------------------|---------------------|-------------|

the appropriate Assistant Deputy Director (ADD).

- P. The Warden's Forum's duties shall include the selection of Forum members to serve as members of the Prisoner Benefit Fund Committee, to serve on the Prisoner Store Committee, to participate in the movie selection process, and to establish radio and television schedules. With approval of the Warden, members also may be selected to conduct food quality inspections in the dining room and to serve on ad hoc committees established for special purposes by the Warden.

#### PROCEDURES

- Q. If necessary, to implement requirements set forth in this policy directive, Wardens shall ensure that operating procedures are developed or updated.

#### AUDIT ELEMENTS

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

APPROVED: HEW 08/06/2019

**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

Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

2008 WL 1868990

Only the Westlaw citation is currently available.

United States District Court,  
W.D. Michigan,  
Southern Division.

Mitchell D. PUGH, Plaintiff,

v.

Patricia CARUSO, et al., Defendants.

No. 1:06-cv-138.

|

April 24, 2008.

#### Attorneys and Law Firms

Mitchell D. Pugh, Muskegon Heights, MI, pro se.

Clifton B. Schneider, Michigan Dept. Attorney General, Lansing, MI, for Defendants.

#### *ORDER ACCEPTING REPORT AND RECOMMENDATION OVER OBJECTIONS*

PAUL L. MALONEY, District Judge.

\*1 This Court has before it a Report and Recommendation (Dkt. No. 56). Magistrate Judge Scoville recommends granting in part and denying in part Defendants Caruso, Armstrong, Lafler and Mayfield's (Defendants) motion for summary judgment (Dkt. No. 25) based on lack of exhaustion. Defendants filed an objection (Dkt. No. 58). Plaintiff filed a response to the objection (Dkt. No. 60).

After being served with a Report and Recommendation issued by a Magistrate Judge, a party has ten days to file written objections to the proposed findings and recommendations.  28 U.S.C. § 636(b)(1) (C);  FED. R. CIV. P. 72(b);  *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir.2005). A district court judge reviews de novo the portions of the R & R to which objections have been filed.  28 U.S.C. § 636(b)(1)(C);  FED. R. CIV. P. 72(b). Only those objections that are specific are entitled to a de novo review under the statute.   *Mira v. Marshall*, 806 F.2d 636, 637 (6th

Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

[Cir.1986](#)) (per curiam) (holding the district court need not provide de novo review where the objections are frivolous, conclusive or too general because the burden is on the parties to “pinpoint those portions of the magistrate's report that the district court must specifically consider”). The United States Supreme Court has held that the statute does not “positively require[ ] some lesser review by the district court when no objections are filed.” [Thomas v. Arn](#), 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Failure to file an objection results in a waiver of the issue and the issue cannot be appealed. [Sullivan](#), 431 F.3d at 984. See also [Arn](#), 474 U.S. at 155 (upholding the Sixth Circuit's practice). The district court judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. [28 U.S.C. § 636\(b\) \(1\)\(C\)](#); [FED. R. CIV. P. 72\(b\)](#).

This Court conducted a de novo review. Having read the file, including the report, objection and relevant authority, the Report and Recommendation is **ACCEPTED OVER OBJECTIONS**.

Magistrate Judge Scoville advances several recommendations, only one of which is the subject of an objection. Accordingly, all recommendations not specifically objected to by either party are **ACCEPTED**. More specifically, all recommendations that Defendants' motion be granted in part are accepted as Plaintiff has filed on objection to those recommendations.

Defendants, through their motion, allege Plaintiff failed to exhaust his administrative remedies because the grievances Plaintiff submitted did not name the individual defendants. Plaintiff's response includes the assertion that prison policy prohibits him from grieving the content of a prison policy. (Dkt. No. 51-Brief in Response at 10-13). Plaintiff contends he raised the issues in his complaint in the Warden's Forum, the alternative forum provided by the prison policy. To support his allegation, Plaintiff attaches the minutes of the Warden's Forum and his affidavit. (Exhibits B and D to Dkt. No. 51). The minutes of the Warden's Forum on September 23, 2005 state

**\*2** 5. The prisoners of SLF would like a definitive ruling on the application of the Religious Land Use, and Institutionalized Persons Act of 2000 ([42 U.S.C. § 2000cc-1](#)) to all policies, procedures and practices, at SLF relating to religious exercise.

**Response:** This question sounds like a declaratory ruling is being requested and we cannot do this. We have to abide by MDOC policy and procedure requirements.

(Exhibit B to Dkt. No. 51). In paragraph 17 of his affidavit, Plaintiff avers he “officially submitted to Defendant Lafler the claims contained within Plaintiff's Complaint regarding the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and the burdens placed upon Plaintiff's

Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

religious exercise by SLF employees and MDOC P.D. 05.03.118 and P.D. 05.03.150.” (Exhibit D to Dkt. No. 51).

The Report recommends denying Defendants' motion on the basis that Plaintiff exhausted his “available” administrative remedies because no grievance procedure was available for Plaintiff to challenge the content of the prison policy. Defendants' object on the basis that the same prison policy allows for concerns about the content of a policy or procedure to be raised at the Warden's Forum. Indeed, MDOC Policy Directive 03.02.120(E) provides

A grievant may not grieve the *content* of policy or procedure; such grievances shall be rejected by the grievance coordinator. If a CFA 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 04.01.150 “Prison Housing Unit Representatives/Warden's Forum”.

Defendants conclude “while the filing of a grievance was not an available remedy to the plaintiff to resolve his claims regarding permissible items and group services for practitioners of Wicca at the St. Louis Correctional Facility, the Warden's Forum provided the remedy applicable for such claims.” (Objection at 3). Plaintiff's response to the objection reiterates his response to Defendants' motion.

Defendants' objection ignores the basis for the Magistrate Judge's recommendation. In Plaintiff's response, he alleges he complied with the prison policy and raised the issues in his complaint at the Warden's Forum. The documents submitted create a genuine issue of material fact regarding whether Plaintiff exhausted his available administrative grievances. The minutes of the Warden's meeting summarily characterize the issue raised as the application of RLUIPA to religious exercise and declines to issue a declaratory ruling. Plaintiff's affidavit suggests the issue was more narrowly presented. This Court notes the prison policy relating to the Warden's Forum prohibits the prisoner representatives, which Plaintiff was, from using their position to “present individual complaints to the administration. Individual complaints may be pursued through the grievance process as set forth in PD 03.02.130.” (Dkt. No. 58-Exhibit B to Objection-MDOC PD 04 .01.150(K). The minutes of the Warden's Forum demonstrate that policy is enforced. *See* Exhibit B to Dkt. No. 51 ¶ 1.

**\*3 The Report and Recommendation (Dkt. No. 56) is ACCEPTED OVER OBJECTIONS. Defendants' Motion for Summary Judgment (Dkt. No. 25) raising the issue of exhaustion is GRANTED IN PART AND DENIED IN PART. IT IS SO ORDERED.**

Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

### ***REPORT AND RECOMMENDATION***

JOSEPH G. SCOVILLE, United States Magistrate Judge.

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. §§ 1983 and 2000cc-1. On June 8, 2007, this Court ordered service of Plaintiff's complaint on Defendants Patricia Caruso, James Armstrong, Blaine Lafler, Julius Mayfield, Daniel Abrams<sup>1</sup> and Carron Caldwell. On August 2, 2007, Defendants Caruso, Lafler and Mayfield filed a motion for summary judgment (docket # 25) on the ground that Plaintiff failed to exhaust his available administrative remedies. Plaintiff filed a response and attachments (docket # 51) on or about October 15, 2007. Upon review, I recommend that Defendants' motion for summary judgment based on Plaintiff's failure to exhaust his available administrative remedies be granted in part and denied in part.

<sup>1</sup> Defendant Abrams has not yet been served in this action.

#### ***Applicable Standard***

Summary judgment is appropriate when the record reveals that there are no genuine issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Kocak v. Comty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 468 (6th Cir.2005); *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir.2005). The standard for determining whether summary judgment is appropriate is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *State Farm Fire & Cas. Co. v. McGowan*, 421 F.3d 433, 436 (6th Cir.2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)); see also *Tucker v. Union of Needletrades Indus. & Textile Employees*, 407 F.3d 784, 787 (6th Cir.2005). The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 296 (6th Cir.2005).

A prisoner's failure to exhaust his administrative remedies is an affirmative defense, which Defendants have the burden to plead and prove. *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 919-21, 166 L.Ed.2d 798 (2007). A moving party without the burden of proof need show only that

Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

the opponent cannot sustain his burden at trial. See  *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 787 (6th Cir.2000); see also  *Minadeo v. ICI Paints*, 398 F.3d 751, 761 (6th Cir.2005). A moving party with the burden of proof faces a “substantially higher hurdle.”   *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir.2002);  *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1056 (6th Cir.2001). “Where the moving party has the burden-the plaintiff on a claim for relief or the defendant on an affirmative defense-his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party.”  *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.1986) (quoting W. SCHWARZER, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984)). The United States Court of Appeals for the Sixth Circuit repeatedly has emphasized that the party with the burden of proof “must show the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it.”   *Arnett*, 281 F.3d at 561 (quoting 11 JAMES WILLIAM MOORE, ET AL., *MOORE'S FEDERAL PRACTICE* § 56.13[1], at 56-138 (3d ed.2000); *Cockrel*, 270 F.2d at 1056 (same). Accordingly, summary judgment in favor of the party with the burden of persuasion “is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.”  *Hunt v. Cromartie*, 526 U.S. 541, 553, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999).

### *Facts*

\*4 Plaintiff presently is incarcerated with the Michigan Department of Corrections (MDOC) and housed at the Muskegon Correctional Facility, though the actions he complains of occurred while he was housed at the St. Louis Correctional Facility (SLF). In his *pro se* complaint, Plaintiff sues MDOC Director Patricia Caruso and MDOC Prison Affairs Manager James Armstrong, together with the following SLF employees: Warden Blaine Lafler, Classification Director Julius Mayfield, Grievance Coordinator Daniel Abrams and Chaplain Carron Caldwell, in their individual and official capacities.

Plaintiff claims that, in 2005, Defendants refused to accommodate his right to practice and worship Wicca<sup>2</sup> under  § 2000cc-1 of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The RLUIPA provides, in pertinent part, that “[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... unless the government demonstrates that imposition of the burden ...” furthers “a compelling governmental interest” and is done so by the least restrictive means.  42 U.S.C. § 2000cc-1(a)(1)-(2).



Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

- 2 “Wicca is a polytheistic faith based on beliefs that prevailed in both the Old World and the New World before Christianity. Its practices include the use of herbal magic and benign witchcraft.”  *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 400 (7th Cir.2003) (citations omitted).

Plaintiff argues that he was wrongfully denied his right to exercise Wicca because: (1) Defendants Caldwell, Mayfield, Lafler, and Caruso refused his request to purchase religious articles<sup>3</sup>, including herbs and herbal teas, anointing oils, candles, a scrying bowl and/or crystal ball, altar, altar cloth, chalice, athame and/or wand, ceremonial cloak/robe, altar mixing/offering bowl, altar pentacle, bell, the Book of Shadows, incense and incense burner, and crystals, under MICH. DEP'T OF CORR., Policy Directive 05.03.150, ¶ KK (effective 5/24/04)<sup>4</sup>; (2) Defendants Caldwell, Mayfield, Lafler, and Caruso refused to approve the mail-order vendor, “Azure Green,” which sells the above Wiccan religious articles, under Policy Directive 05.03.150, ¶ NN; (3) Defendants Caldwell, Mayfield, Lafler and Caruso refused to allow Wiccan clergy to worship with Plaintiff in violation of Policy Directive 05.03.150, ¶ AAA; (4) Defendant Caruso unlawfully restricted Plaintiff from exercising Wicca in group meetings, ceremonies, and rituals in Policy Directive 05.03.150, ¶ QQ(2); and (5) Defendants Abrams, Lafler, Armstrong, and Caruso wrongfully denied his request for a book titled “Buckland's Complete Book of Witchcraft” because it had been placed on the MDOC restricted book list. Plaintiff alleges that Caldwell failed to grant exceptions to the policy to permit Plaintiff to practice his religion and that Mayfield and Lafler approved Caldwell's actions by denying Plaintiff's grievances. He also alleges that Defendant Caruso has adopted and maintained a policy that discriminates against the practice of Wicca and that fails to comply with RLUIPA.

- 3 Under MICH. DEP'T OF CORR., Policy Directive 05.03.150, ¶ QQQ(2) & Attach. B (effective 05/24/04), prisoners belonging to the religious group of Wicca may possess one deck of tarot cards and one Celtic cross or pentagram.
- 4 Policy Directive 05.03.150, ¶ KK states that prisoners may possess religious property that has not already been authorized only upon written request to the Warden, Technical Rule Violation Director or designee. Plaintiff submitted such a request to Defendant Caldwell, a chaplain. *See* Attach. A to P's Compl.

For relief, Plaintiff requests declaratory and injunctive relief, and monetary damages.

Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

## *Discussion*

### *I. Statutory Exhaustion Requirements*

\*5 Defendants Mayfield, Lafler and Caruso claim that they are entitled to summary judgment because Plaintiff failed to exhaust his available administrative remedies. Pursuant to 42 U.S.C. § 1997e(a), a prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 must first exhaust his available administrative remedies. See *Porter v. Nussle*, 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002); *Booth v. Churner*, 532 U.S. 731, 733, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). A prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. See *Porter*, 534 U.S. at 520; *Booth*, 532 U.S. at 741; *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir.2000); *Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir.1999). In order to properly exhaust administrative remedies, prisoners must complete the administrative review process in accordance with the deadlines and other applicable procedural rules. *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 922-23, 166 L.Ed.2d 798 (2007); *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2386, 165 L.Ed.2d 368 (2006). “Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to ‘properly exhaust.’ ” *Jones*, 127 S.Ct. at 922-23.

### *II. MDOC Policy*

MDOC Policy Directive 03.02.130 (effective Dec. 19, 2003)<sup>5</sup>, sets forth the applicable grievance procedures for prisoners in MDOC custody at the time relevant to this complaint. Inmates must first attempt to resolve a problem orally within two business days of becoming aware of the grievable issue, unless prevented by circumstances beyond his or her control *Id.* at ¶ R. If oral resolution is unsuccessful, the inmate may proceed to Step I of the grievance process and submit a completed grievance form within five business days of the attempted oral resolution. *Id.* at ¶¶ R, X. The Policy Directive also provides the following directions for completing grievance forms: “The issues shall be stated briefly. Information provided shall 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.” *Id.* at ¶ T (emphasis in original). The inmate submits the grievance to a designated grievance coordinator, who assigns it to a respondent. *Id.* at ¶ Y.

<sup>5</sup> The MDOC recently amended Policy Directive 03.02.130 on July 9, 2007. However, the 2003 version of the policy directive was in effect at all times applicable to this lawsuit.



Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

If the inmate is dissatisfied with the Step I response, or does not receive a timely response, he may appeal to Step II by obtaining an appeal form within five business days of the response, or if no response was received, within five days after the response was due. *Id.* at ¶¶ R, DD. The respondent at Step II is designated by the policy, e.g., the regional health administrator for a medical care grievances. *Id.* at ¶ FF. If the inmate is still dissatisfied with the Step II response, or does not receive a timely Step II response, he may appeal to Step III using the same appeal form. *Id.* at ¶¶ R, HH. The Step III form shall be sent within ten business days after receiving the Step II response, or if no Step II response was received, within ten business days after the date the Step II response was due. *Id.* at ¶ HH. The Prisoner Affairs Section is the respondent for Step III grievances on behalf of the MDOC director. *Id.* at ¶ II. Time limitations shall be adhered to by the inmate and staff at all steps of the grievance process. *Id.* at ¶ U. “The total grievance process from the point of filing a Step I grievance to providing a Step III response shall be completed within 90 calendar days unless an extension has been approved ....” *Id.*

\*6 In addition, the grievance policy provides that, where the grievance alleges staff brutality or corruption, the grievance may be submitted directly to Step III. *Id.* at ¶ S. In such instances, the grievance must be filed within the time limits prescribed for filing grievances at Step I. *Id.*

### III. Grievances

Plaintiff filed two grievances concerning the claims asserted in his complaint. First, on July 4, 2005, in Grievance No. SLF-05-07-1456-20a, Plaintiff asserted that Defendant Caldwell refused his requests for various items and services necessary to the practice of his religion of Wicca. Second, Plaintiff filed Grievance No. SLF-05-08-1802-28g on August 11, 2005, alleging that Assistant Librarian (Unknown) Hollenbeck<sup>6</sup> denied Plaintiff's request for “Buckland's Complete Book of Witchcraft.”<sup>7</sup>

<sup>6</sup> Assistant Librarian Hollenbeck is not listed as a Defendant in this action.

<sup>7</sup> Defendants attach to their motion yet another grievance, No. MCF 06-11-0822-07a, which contains allegations about an unrelated mail rejection in October 2006. Plaintiff does not rely on the grievance and makes no allegations related to the grievance in his complaint. Grievance No. MCF-06-11-0822-07a therefore is entirely irrelevant to Plaintiff's exhaustion of the complaint before the Court.

#### A. Grievance No. SLF-05-07-1456-20a

Plaintiff's grievance, No. SLF-0507-1456-20a, against Defendant Caldwell, complained that Caldwell failed to respond to his various requests: (1) for authorization of items beyond the items

Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

approved in the policy, as permitted by PD 05.03.150, ¶ KK; (2) for the addition of a vendor who could supply the additional items requested; (3) for access to a Wiccan clergyperson; and (4) for a meeting with the chaplain. Plaintiff declared in his grievance that Caldwell's inaction violated Plaintiff's rights under the RLUIPA.

After an interview with Plaintiff, Defendant Mayfield denied the grievance at Step I. In his response, Mayfield stated that MDOC policy restricted the religious items to Tarot cards and a Celtic cross or pentagram. Second, Mayfield rejected the request for an additional vendor because the two approved items were available from two approved sources. Third, Mayfield found that Caldwell had been seeking clergy from the Wiccan faith to visit Plaintiff. Fourth, Mayfield found that Chaplain Caldwell had responded by sending the list of vendors and approved property.

Plaintiff appealed his grievance to Step II. Defendant Lafler denied the grievance and affirmed the Step I decision, stating that Plaintiff's requests exceeded the limitations set forth in PD 05.03.150, Attachment B. Plaintiff appealed the grievance to Step III. Prior to filing his original complaint, Plaintiff had not received a response. The Step III response eventually was issued on March 7, 2006. Pursuant to Policy Directive 03.02.130, ¶ U, Plaintiff exhausted this claim on November 9, 2005, because the 90-day period for completing the entire grievance process had expired.

Defendants do not dispute that Grievance No. SLF-05-07-1456-20a fully exhausted Plaintiff's claims against Defendant Caldwell. They contend, however, that the grievance did not name Defendants Mayfield, Lafler or Caruso. As a consequence, they assert that the grievance did not exhaust Plaintiff's claims against them. The grievance policy expressly permits prisoners to file grievances "regarding alleged violations of policy or procedure or unsatisfactory conditions of confinement which directly affect the grievant." MICH. DEP'T OF CORR., Policy Directive 03.02.130, ¶ E. At no stage of the grievance process did Plaintiff name Mayfield, Lafler or Caruso, as required under PD 03.02.130, ¶ T. He therefore has failed to properly exhaust his administrative remedies against these Defendants with respect to any claim based on the misapplication of the religious practices policy, PD 05.03.150.

#### **B. Grievance No. SLF-05-08-1802-28g**

\*7 On July 24, 2005, Plaintiff submitted to Assistant Librarian (Unknown) Hollenbeck a book request for "Buckland's Complete Book of Witchcraft." Hollenbeck denied the book request on August 9, 2005, because the book had been placed on the MDOC Restricted Publications List. Plaintiff filed Grievance No. SLF-05-08-1802-28g on August 11, 2005, naming Hollenbeck and complaining about the denial of the book request. Plaintiff appealed the grievance through all three steps, but he did not receive a response from Step III before he filed his original complaint.

Pugh v. Caruso, Not Reported in F.Supp.2d (2008)

2008 WL 1868990

Pursuant to Policy Directive 03.02.130, ¶ U, Plaintiff exhausted this claim on November 9, 2005, at the expiration of the 90-day time limit for completion of the grievance process.

As with Plaintiff's other grievance, Grievance No. SLF-05-08-1802-28g is exhausted as to the persons named in that grievance, in this case, Assistant Librarian Hollenbeck.<sup>8</sup> It is not, however, exhausted with respect to Defendants Mayfield, Lafler and Caruso, who were not named as required under PD 03.02.130, ¶ E. Accordingly, to the extent Plaintiff claims that these Defendants violated MDOC policy by rejecting the book, his claim must be rejected as unexhausted.

<sup>8</sup> Assistant Librarian Hollenbeck is not listed as a Defendant in this action.

### **C. Challenge to Content of PD 05.03.150**

Plaintiff, however, directly challenges the content of PD 05.03.130 and Attachment B with respect to their limitations on religious items available to Plaintiff and with respect to the preclusion of group services for followers of the Wicca religion. He also challenges the MDOC policy decision to include "Buckland's Complete Book of Witchcraft" on the MDOC Restricted Publications List under PD 05.03.118, ¶ RR (prohibiting prisoners from receiving a hearing on items rejected because they have been placed on the MDOC Restricted Publications List).

The grievance policy expressly prohibits prisoners from filing grievances challenging the content of a policy. *See* MICH. DEP'T OF CORR., Policy Directive 03.02.130, ¶ E ("A grievant may not grieve the *content* of policy or procedure; such grievances shall be rejected by the grievance coordinator."). *See also*   *Harbin-Bey v. Rutter*, 420 F.3d 571, 581 (6th Cir.2005). Michigan prisoners cannot grieve the content of a policy. As a consequence, the grievance policy was not an available remedy to Plaintiff to resolve his claims against Defendants concerning the content of the policy. *See*  42 U.S.C. § 1997e(a) (requiring exhaustion of "available" remedies);  *Woodford*, 126 S.Ct. at 2386;  *Figel v. Bouchard*, 89 F. App'x 970, 971 (6th Cir.2004) (prisoner may not be required to exhaust administrative remedies regarding non-grievable issues). Defendants' motion for summary judgment therefore should be denied with respect to Plaintiff's challenges to the content of the prison policies.

### ***Recommended Disposition***

For the foregoing reasons, I recommend that Defendants' motion for summary judgment (docket # 25) based on Plaintiff's failure to exhaust his available administrative remedies be granted in part

**Pugh v. Caruso, Not Reported in F.Supp.2d (2008)**

2008 WL 1868990

and denied in part. Defendants' motion should be granted with respect to any claims by Plaintiff that he was denied religious items, group worship or religious books in violation of MDOC policy, except as to the claims against Defendant Caldwell. I recommend that the motion be denied in all other respects.

## **All Citations**

Not Reported in F.Supp.2d, 2008 WL 1868990

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United States v. Frost, Slip Copy (2020)

2020 WL 1899561

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Only the Westlaw citation is currently available.

United States District Court, E.D. Michigan, Southern Division.

UNITED STATES of America, Plaintiff,

v.

Michael Anthony FROST, Defendant (2).

Case No. 18-cr-20206

|

Signed 04/17/2020

### Attorneys and Law Firms

Mollie E. O'Rourke, U.S. Department of Justice, Detroit, MI, for Plaintiff.

## **OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR PRETRIAL RELEASE AND REVOCATION OF DETENTION ORDER [#132]**

HON. [GERSHWIN A. DRAIN](#), United States District Court Judge

### **I. INTRODUCTION**

\*1 On October 15, 2019, pursuant to a Rule 11 plea agreement, Defendant Michael Anthony Frost ("Defendant") pleaded guilty to conspiracy to distribute controlled substances in violation of [21 U.S.C. §§ 841, 846](#). ECF No. 101. Specifically, Defendant admitted that he conspired to distribute 100 grams or more of heroin and twenty-eight grams or more of crack cocaine with co-defendant Jhamall McGaughy. *Id.* at PageID.467. Defendant has been detained since March 19, 2019. ECF Nos. 50, 54. He is scheduled to be sentenced on June 2, 2020.

Presently before the Court is Defendant's Motion for Pretrial Release and Revocation of Detention Order, filed on April 6, 2020. ECF No. 132. The Government filed a Response on April 10, 2020. ECF No. 134. After reviewing the parties' briefs, the Court finds that no hearing on the Motion is necessary. *See* E.D. Mich. LR 7.1(f)(2). For the reasons that follow, the Court will **DENY** Defendant's Motion [#132].

United States v. Frost, Slip Copy (2020)

2020 WL 1899561

## II. BACKGROUND

The instant action stems from a drug and prostitution enterprise in the Eastern District of Michigan and elsewhere between 2017 and 2018. Beginning in December 2017, Defendant allowed co-defendant Jhamall McGaughy to move into his house on Cheyenne Street to operate the enterprise. ECF No. 65, PageID.216. Defendant was a “regular supplier” of controlled substances, including heroin, cocaine, and crack cocaine, to co-defendant. *Id.*

On March 19, 2019, Defendant was arraigned on a Third Superseding Indictment. ECF No. 50. He consented to detention on that same day, thus waiving his right to a hearing. ECF No. 54. On May 4, 2019, Defendant filed a Motion for Revocation of Detention Order. ECF No. 64. Defendant withdrew this motion on July 19, 2019. ECF No. 78. On October 15, 2019, Defendant pleaded guilty to conspiracy to distribute controlled substances in violation of 21 U.S.C. §§ 841, 846. ECF No. 101. In his Motion, Defendant asserts that he is currently being held at Washtenaw County Jail. ECF No. 132, PageID.610. In its Response, the Government contends that Defendant is in fact detained at Livingston County Jail. ECF No. 134, PageID.627. After receiving the parties’ briefings, the Court confirmed that Defendant is at Livingston County Jail.

Defendant is scheduled to be sentenced on June 2, 2020 before this Court.

## III. LAW & ANALYSIS

### A. COVID-19

COVID-19 is an abbreviation for the novel coronavirus disease of 2019, a respiratory illness that spreads easily and sustainably in the community through respiratory droplets produced when an infected person coughs or sneezes. *See Centers for Disease Control and Prevention Coronavirus Disease 2019 Frequently Asked Questions*, Center for Disease Control <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-COVID-19-Spreads> (last updated April 13, 2020). While it is thought that people are most contagious when symptoms are present, the virus has also been detected in asymptomatic persons. *See id.*

There is no vaccine to prevent COVID-19, nor is there antiviral medication that can treat it. *Id.*; *see also* ECF No. 132, PageID.614. According to the Center for Disease Control (“CDC”), “[t]he best way to prevent illness is to avoid being exposed to the virus.” *Id.* The CDC recommends, among other things, that people clean their hands often or use hand sanitizer when soap is unavailable;



## United States v. Frost, Slip Copy (2020)

2020 WL 1899561

avoid close contact with other people (at least six feet in distance); and clean and disinfect frequently touched surfaces daily, such as tables, doorknobs, light switches, and countertops. *Id.* The CDC also recommends that if an individual becomes sick, he or she should isolate from others by staying in a specific sick room and using a separate bathroom if available. *Id.*

\*2 The CDC has indicated that certain classes of individuals are at higher risk for developing severe illness if exposed to the novel coronavirus of 2019. *Id.* Older adults—65 or older—and people suffering from underlying medical conditions, such as moderate to severe [asthma](#), [chronic lung disease](#), serious [heart disease](#), severe [obesity](#), [diabetes](#), liver disease, [kidney disease](#); or people who are immunocompromised, such as those who are undergoing [cancer](#) treatment, smokers, [bone marrow](#) or [organ transplant](#) recipients or donors, people with immune deficiencies, poorly controlled HIV or AIDS sufferers; and those who have prolonged use of corticosteroids and other immune weakening medications are at higher risk of developing serious illness if they are exposed to COVID-19. *Id.* While it has been accepted that older adults are the most vulnerable, the CDC reported that 38% of the 508 hospitalized patients were younger—between 20 and 54 years of age. *See Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12-March 16, 2020*, Center for Disease Control (Mar. 18, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>.

At the time of this writing, the majority of states have issued stay-at-home orders, including Governor Gretchen Whitmer of Michigan. Governor Whitmer issued a state of emergency when the State's first two cases of coronavirus were reported on March 10, 2020. Executive Order, No. 2020-04 (Mar. 10, 2020). Governor Whitmer has since issued a series of other executive orders to help prevent the spread of this novel disease. *See Executive Orders*, Michigan.gov, [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705---,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html) (last visited April 15, 2020). Even with such executive action, Michigan continues to experience staggering numbers of confirmed COVID-19 cases and deaths. At the time of this writing, a little more than thirty days after the initial two COVID-19 cases were reported the State, there are more than 29,200 confirmed cases in Michigan. *See MDOC Response and Information on coronavirus (COVID-19)*, Medium, <https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronavirus-covid-19-250f43144337> (last updated April 16, 2020) [hereinafter Medium MDOC Response and Information]. There are now 1,921 lives lost to COVID-19 in Michigan alone. *Michigan surpasses 1,900 deaths due to coronavirus; 28,059 cases total in state*, Detroit Free Press (April 15, 2020, 3:03 PM) <https://www.freep.com/story/news/local/michigan/2020/04/15/michigan-coronavirus-cases-deaths/5138838002/>.

\*3 Incarcerated individuals, and the employees who work in correctional institutions, are not immune to this pandemic. *See* ECF No. 132, PageID.613. Indeed, these individuals face an

United States v. Frost, Slip Copy (2020)

2020 WL 1899561

even greater risk. On March 23, 2020, the CDC acknowledged that correctional and detention facilities “present[ ] unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors.” *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [hereinafter CDC Guidance on Correctional and Detention Facilities]; see also *United States v. Eubanks*, No. 17-20184, 2020 WL 1814090, at \*1 (E.D. Mich. April 9, 2020). COVID-19 is dangerous everywhere, but the novel disease is especially harmful within correctional institutions, where incarcerated individuals have a limited ability to exercise encouraged community practices such as social distancing and frequent handwashing. See CDC Guidance on Correctional and Detention Facilities; see also ECF No. 132, PageID.613 (“The recommended social distancing measures are nearly impossible to implement and adhere to in detention facilities where detained individuals share dining, bathing and sleeping areas[.]”). Further, a “low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, [and] highly congregational environments” increase the risk of danger to incarcerated individuals. CDC Guidance on Correctional and Detention Facilities; see also  *United States v. Kennedy*, No. 18-20315, 2020 WL 1493481, at \*2 (E.D. Mich. Mar. 27, 2020). The Court takes notice of the Government’s assertion that “simply going to the grocery store” is analogous to a detention facility’s risk of exposure to COVID-19. ECF No. 134, PageID.631–32. In light of the CDC’s information concerning the unique challenges which COVID-19 presents to the vulnerable communities in correctional facilities, such allegations are disingenuous and incorrect. Indeed, a COVID-19 outbreak in a prison facility is not potentially problematic as suggested by the Government in its Response, ECF No. 134, PageID.631, it is problematic.

As of April 16, 2020, there are 499 prisoners who have tested positive for COVID-19 in MDOC facilities. See Medium MDOC Response and Information. These numbers are growing sharply. According to MDOC, there have been 17 COVID-19 related deaths within its prisons, including thirteen inmates; two corrections professionals; a corrections transportation officer; and a word processing assistant. *Id.* The Court denotes that as of the writing of this Order, there are no confirmed cases at Livingston County Jail, where Defendant is currently being held. See *id.*; see also ECF No. 134, PageID.631 (“[A]s of [April 9, 2020], there were no confirmed cases at the facility.”).

To its credit, MDOC has implemented a number of measures to reduce COVID-19’s spread in its facilities. See *2020 Coronavirus (COVID-19) Response Q&A*, Michigan Department of Corrections, [https://www.michigan.gov/corrections/0,4551,7-119-9741\\_12798-521973--,00.html](https://www.michigan.gov/corrections/0,4551,7-119-9741_12798-521973--,00.html) (last visited April 15, 2020); see also Medium MDOC Response and Information. For example, all MDOC staff transporting prisoners on or off grounds are required to be dressed in full personal



United States v. Frost, Slip Copy (2020)

2020 WL 1899561

protective equipment (PPE). Medium MDOC Response and Information. Visitation at facilities throughout Michigan has been suspended. Transfers of prisoners or staff between facilities will not be authorized without the approval of the Assistant Deputy Director or higher. *Id.* Further, its facilities have been equipped with an increased supply of soap. MDOC is following the Michigan Department of Health and Human Services protocol and is accordingly scheduling appointments between facility healthcare staff and prisoners who have presented COVID-19 symptoms. *Id.*

In its Response, the Government cites to specific measures at Livingston County Jail. For example, the facility has been on lockdown and has been restricting visitors for several weeks. ECF No. 134, PageID.631. Further, the facility has increased the “extent and frequency of cleaning, and has taken steps to decrease the population density[.]” *Id.* Any new detainees must now quarantine for fourteen days. *Id.*

### **B. Defendant’s Due Process Argument**

Defendant first advances an argument based on constitutional protections of pretrial detainees under the Due Process Clause of the Fifth Amendment. ECF No. 132, PageID.614–15. He argues that the conditions of his confinement, which “create an unreasonable risk of exposure to COVID-19,” should be deemed “punitive” in violation of the Fifth Amendment. *Id.* at PageID.615. Notably, while the Government opposes Defendant’s instant Motion, it fails to specifically address Defendant’s Fifth Amendment argument in its Response. ECF No. 134.

In evaluating whether a condition of pretrial detainment violates the Fifth Amendment, courts must determine whether the condition amounts to “punishment.”  *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Supreme Court has explained:

if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

\*4 *Id.* at 539 (internal quotation marks omitted). Accordingly, the question before the Court is whether Defendant’s detention is reasonably related to a legitimate government objective. *See*,

## United States v. Frost, Slip Copy (2020)

2020 WL 1899561

e.g., *United States v. McDonald*, No. 2:19-cr-00312, 2020 WL 1659937, at \*3 (D. Nev. April 3, 2020); *United States v. Cox*, No. 2:19-cr-00271, 2020 WL 1491180, at \*6 (D. Nev. Mar. 27, 2020).

Here, Defendant's detention is reasonably related to the legitimate government interests of protecting the community and ensuring his appearance. The Court initially detained Defendant, to which Defendant consented, in March 2019. *See* ECF No. 54. According to his bail report, which was prepared by Pretrial Services at the time of Defendant's arraignment, Defendant poses a risk of nonappearance for several reasons, including his criminal activity while under supervision; lack of verifiable employment; and his criminal history. Def's Pretrial Services Report 9. Further, Pretrial Services determined that Defendant poses a risk to the community. *Id.* Pretrial Services concluded that there was no condition or combination of conditions that could reasonably ensure Defendant's appearance and the safety of the community. *Id.* In its Response to the instant motion, the Government emphasizes Defendant's "significant criminal history" and "poor track record of complying with conditions of probation." ECF No. 134, PageID.628–29.

Pretrial detention, for purposes of protecting the community and ensuring a defendant's appearance, is not punitive under the Due Process Clause. *See*  *United States v. Salerno*, 481 U.S. 739, 748 (1987). "[E]ven if pretrial detention during a worldwide pandemic seems punitive in the lay sense, that restriction cannot violate due process *unless* there is also an express intent to punish with no rational relationship to legitimate government interests." *United States v. Shelton, et al.*, No. 3:19-cr-14, 2020 WL 1815941, at \*7 (W.D. Ky. April 9, 2020) (internal citation omitted) (emphasis added). The Court finds that there is no arbitrary purpose and punitive intent in detaining Defendant before his sentencing hearing in light of the legitimate government interests of protecting the community and ensuring his appearance.

Finally, Defendant asserts that pretrial detainees have a substantive due process interest in freedom from deliberate indifference to their medical needs. ECF No. 132, PageID.615. He cites to one Seventh Circuit case to support his argument,  *Miranda v. City of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). *See id.* Defendant explains that release is appropriate in his case given his "age and condition" in order to ensure his constitutional rights are protected. *Id.*

The Sixth Circuit has recognized that the government "has an 'obligation to provide medical care for those whom it is punishing by incarceration.' "  *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018) (quoting  *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). "[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Oliver Nissan Awshana, et al. v. Rebecca Adducci, et al.*, No. 20-10699, 2020 WL 1808906, at \*3 (E.D. Mich. April 9, 2020) (internal citation omitted).

United States v. Frost, Slip Copy (2020)

2020 WL 1899561

**\*5** The Court finds that Defendant's analysis as to this point is deficient. Specifically, Defendant cites the lack of testing at the Washtenaw Detention Facility. *Id.* As explained above, Defendant is currently being held at Livingston County Jail; therefore, details concerning the conditions at Washtenaw Detention Facility—while troubling—are not relevant to Defendant's instant Motion.

Furthermore, the Court takes issue with Defendant's lack of information as to how the detention facility is being indifferent towards him or what his specific, current medical needs are. Rather, Defendant cites generally to how "[t]he current conditions of confinement create an unreasonable risk of exposure to COVID-19" and how facilities lack "necessary supplies for personal and environmental hygiene to protect against contraction of the virus." *Id.* While these assertions concerning correctional facilities are true in light of CDC Guidance on Correctional and Detention Facilities, the Court concludes that these generalities are not enough to grant Defendant temporary release on this basis.

### C. Defendant's Arguments Pursuant to 18 U.S.C. §§ 3143, 3145(c)

Next, Defendant argues that his release is warranted due to the exceptional circumstances presented by the COVID-19 pandemic. ECF No. 132, PageID.615. The Government contests Defendant's eligibility for release under both 18 U.S.C. § 3143 and 18 U.S.C. § 3145(c). ECF No. 134, PageID.627, 630.

Defendant pleaded guilty to an offense prescribed in the Controlled Substances Act for which the maximum sentence is at least ten years.<sup>1</sup> See 18 U.S.C. § 3142(f)(1)(C). He is therefore subject to mandatory pre-sentence detention absent an applicable exemption. See 18 U.S.C. 3143(a)(2) (cross-referencing offenses listed under 18 U.S.C. § 3142(f)(1)(A)–(C)); see also ECF No. 134, PageID.628. Section 3143(a)(2) exempts a defendant when there is a "substantial likelihood that a motion for acquittal or new trial will be granted," 18 U.S.C. § 3143(a)(2)(A)(i), or when "the Government has recommended that no sentence of imprisonment be imposed," 18 U.S.C. § 3143(a)(2)(A)(ii). If a defendant can meet either of those prongs, a defendant must then satisfy the remaining requirement of § 3143(a)(2)(B) to be eligible for release. Section 3143(a)(2)(B) requires "clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community." 18 U.S.C. § 3143(a)(2)(B).

<sup>1</sup> The Government notes that Defendant faces a statutory term of imprisonment of 5-40 years since his conviction involved at least 100 grams of heroin under 21 U.S.C. § 841(b)(1)(b)(i). ECF No. 134, PageID.627–28.

United States v. Frost, Slip Copy (2020)

2020 WL 1899561

Defendant acknowledges the “presumption for remand under 18 U.S.C. § 3143(a)(2).” ECF No. 132, PageID.616. In fact, he declines to argue that he is eligible under either prong § 3143(a)(2) (A). The Government argues that Defendant cannot meet either prong. ECF No. 134, PageID.628. First, Defendant pleaded guilty, making neither motion available under § 3143(a)(2)(A)(i). *Id.*; *see also* ECF No. 101. Second, Defendant is subject to a five year mandatory minimum sentence. ECF No. 134, PageID.628. The Government explains further that it will be seeking a “significant term of imprisonment in light of the guideline range of 188-235 months and the 5 year mandatory minimum.” *Id.* The Court thus agrees with the Government that neither of the statutory conditions can be met. The question before the Court, therefore, is whether Defendant may avail himself of the exceptional circumstances under 18 U.S.C. § 3145(c). ECF No. 132, PageID.616.

\*6 Section 3145(c) permits a judicial officer to release a defendant subject to detention under § 3143(a)(2) if he or she “meets the conditions of release set forth in section 3143(a)(1)” and “if it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.” 18 U.S.C. § 3145(c). In order to satisfy 18 U.S.C. § 3143(a)(1), the defendant must show by “clear and convincing evidence” that he or she is “not likely to flee or pose a danger to the safety of any other person or the community if released” under conditions set forth by the Court. 18 U.S.C. § 3143(a)(1). Accordingly, Defendant must demonstrate both (1) clear and convincing evidence that he is not a flight risk or a danger to others and (2) an exceptional reason why his detention is inappropriate. *See*  *United States v. Christman*, 596 F.3d 870, 870 (6th Cir. 2010) (Mem.).

As to the first requirement, Defendant argues that he will self-isolate in an “approved residence while COVID-19 containment efforts continue and as he awaits sentencing.” ECF No. 132, PageID.616. He also asserts that his location can be monitored by a GPS location device. *Id.* According to Defendant, these circumstances mitigate his risk of non-appearance and danger. *Id.* The Government contests Defendant’s assertions, emphasizing Defendant’s lack of provided location to self-isolate. ECF No. 134, PageID.630. The Government sets forth “two possible locations” for Defendant, his grandmother’s or his former girlfriend’s residences. *Id.* It argues that neither of these locations are suitable. *Id.*

The Court agrees with the Government that Defendant’s general assertions as to where he can self-isolate are insufficient to demonstrate that he would not pose a danger to the public if released. The Court recognizes that Defendant pleaded guilty to a serious drug trafficking offense, one that involves more than 100 grams of heroin and more than twenty-eight grams of crack cocaine. ECF No. 101, PageID.467. The Court also takes notice of Defendant’s extensive criminal history in his Pretrial Services Report. *See* ECF No. 134, PageID.629. Several of these past convictions include drug felonies. *Id.* Further, Defendant has committed criminal activity while under supervision. *Id.*

United States v. Frost, Slip Copy (2020)

2020 WL 1899561

Finally, the Court acknowledges Pretrial Services' opinion that no additional information was presented in Defendant's instant Motion that would indicate a change in its initial bail report. As explained above, Defendant's initial bail report, which was prepared at the time of Defendant's arraignment, indicates that Defendant poses both a risk of nonappearance and a risk of danger. Def's Pretrial Services Report 9. Defendant's suggestion for the use of location monitoring, without more, is not enough to demonstrate clear and convincing evidence that he is not a flight risk or a danger to others.

Accordingly, Defendant cannot avail himself of the exceptional circumstances under 18 U.S.C. § 3145(c). The Court need not discuss whether COVID-19 constitutes an "exceptional reason" in this case since Defendant cannot demonstrate that he would not pose a danger to the public if released. *United States v. Eubanks*, No. 17-20184, 2020 WL 1814090, at \*2 (E.D. Mich. April 9, 2020). In sum, while the Court is concerned with the special risks that COVID-19 poses to incarcerated individuals like Defendant, the Court concludes that Defendant does not meet the necessary requirements for release under 18 U.S.C. §§ 3143(a)(2) or 3145(c).

#### IV. CONCLUSION

For the reasons articulated above, **IT IS ORDERED** that Defendant's Motion for Pretrial Release and Revocation of Detention Order is **DENIED** [#132].

**\*7 IT IS SO ORDERED.**

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Slip Copy, 2020 WL 1899561

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Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

2020 WL 2468481

Only the Westlaw citation is currently available.

United States District Court, E.D. Michigan, Southern Division.

Janet MALAM, Petitioner-Plaintiff,

and

Qaid Alhalmi, et al., Plaintiff-Intervenors,

v.

Rebecca ADDUCCI, et al., Respondent-Defendants.

Case No. 20-10829

|

Signed 05/12/2020

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Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

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**OPINION AND ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING ORDER AS A PRELIMINARY INJUNCTION [44]**

JUDITH E. LEVY, United States District Judge

\*1 This opinion marks the seventh time the Court has assessed the constitutionality of continued detention of medically vulnerable noncitizen civil detainees at the Calhoun County Correctional Facility during the pendency of the COVID-19 pandemic. The legal issues before the Court are narrow: whether four civil detainees face a high risk of irreparable injury from COVID-19, whether Defendants<sup>1</sup> have shown deliberate indifference to the medical needs of these Plaintiffs in crafting and implementing their response to the pandemic, and whether the public interest favors Plaintiffs' release. So too is the relief requested: Plaintiffs do not, at this time, seek sweeping injunctive relief that would insert the Court into the day-to-day management of either U.S. Immigration and Customs Enforcement (ICE) or the Michigan Department of Corrections (MDOC); instead, Plaintiffs request the immediate release of four individuals currently detained at the Calhoun County Correctional Facility. Because the Court finds that Plaintiffs Alhalmi and Cardona Ramirez have shown a high risk of irreparable injury absent relief, a likelihood of success on the merits, and that the public interest favors their release, the Court grants a preliminary injunction ordering their immediate release. The Court orders supplemental briefing with respect to Plaintiffs Rodriguez Salabarria and Rosales Borboa's health conditions. The Court denies Plaintiffs' requests for additional relief not initially requested in Plaintiffs' motion.

<sup>1</sup> The individuals bringing this action are Petitioners for purposes of habeas relief and Plaintiffs for purposes of injunctive and declaratory relief. Those against whom the action is brought are Respondents for purposes of habeas relief and Defendants for purposes of injunctive and declaratory relief. For simplicity, the terms Plaintiffs and Defendants will be used throughout. (ECF No. 43, PageID.918.)

**FACTUAL BACKGROUND**

**Qaid Alhalmi**

Plaintiff Qaid Alhalmi is a fifty-four-year-old<sup>2</sup> Yemeni citizen. (ECF No. 44, PageID.1022.) He was admitted to the United States on a B-2 nonimmigrant visitor visa on July 27, 1995. On July 8,

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

1999, after an unsuccessful request for asylum, the Immigration and Naturalization Service (INS), the predecessor to the Department of Homeland Security, initiated removal proceedings against Alhalmi, charging him as removable from the country as a nonimmigrant overstay. (*Id.*) He has been detained at the Calhoun County Correctional Facility since September 17, 2019 based on a finding that Alhalmi faced a significant likelihood of removal in the reasonably foreseeable future. (ECF No. 52-1, PageID.1547.) Alhalmi suffers from [Type 2 diabetes](#), for which he takes a daily oral medication to control blood sugar and which requires a four-times-daily blood sugar test to determine if [insulin](#) is needed. (ECF No. 57, PageID.1670.)

<sup>2</sup> Defendants allege that Plaintiff Alhalmi is fifty-eight-years-old. (ECF No. 52-1, PageID. 1545).

### **Tomas Cardona Ramirez**

Plaintiff Tomas Cardona Ramirez is a thirty-seven-year-old citizen of Guatemala. (ECF No. 52, PageID.1515.) He was detained by ICE officers on January 31, 2020, and was charged on February 5, 2020, for being present in the United States without having been admitted or paroled. (ECF No. 52-2, PageID.1552.) Cardona Ramirez suffers from [Type 1 diabetes](#), [hypertension](#), and [hyperlipidemia](#), each of which requires daily medications to control. (ECF No. 57, PageID.1670.)

### **Damary Rodriguez Salabarria**

\*2 Plaintiff Damary Rodriguez Salabarria is a forty-six-year-old citizen of Cuba. (ECF No. 52, PageID.1516.) She was detained in Texas by U.S. Border Patrol on August 1, 2019. (ECF No. 52-4, PageID.1563.) On August 10, 2019, Plaintiff Rodriguez Salabarria was transferred due to a housing shortage in Texas to the Calhoun County Correctional Facility. (*Id.*) She suffers from [hypertension](#), chronic [gastritis](#), a [peptic ulcer](#), and [gastroesophageal reflux](#), for which she takes a daily medication for each. (ECF No. 44, PageID.1023.) Her medical records show a recent diagnosis of [chronic localized mucocutaneous candidiasis](#), which the Court understands to be a [yeast infection](#). (ECF No. 57, PageID.1675.) Additionally, Plaintiff Rodriguez Salabarria has a history of hospitalizations for acute [pancreatitis](#), an [appendectomy](#), [cholecystectomy](#), and [kidney infections](#). (*Id.*)

### **Emanuel Rosales Borboa**

Plaintiff Emanuel Rosales Borboa is a thirty-five-year-old citizen of Mexico. (ECF No. 52, PageID.1516.) On June 24, 2014, Rosales Borboa applied for—and on December 16, 2014, U.S. Citizenship and Immigration Services denied him—Deferred Action for Childhood Arrivals status. (ECF No. 52-5, PageID.1568.) Although he was initially released on bond on May 15,



Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

2017 after United States Border Patrol initiated removal proceedings on April 27, 2017 (*id.* at PageID.1568–1569), Rosales Borboa was subsequently arrested by the Detroit Police Department and has been in ICE custody at the Calhoun County Correctional Facility since March 10, 2020. (*Id.* at PageID.1569.) Rosales Borboa suffers from [asthma](#), for which he was hospitalized for two days approximately ten years ago. (ECF No. 44, PageID.1023.) At various times, the frequency of which the parties contest, Rosales Borboa has required the use of an inhaler and steroids to control his [asthma](#). (*Id.* at PageID.1024; ECF No. 64, PageID.1812.)

### **Defendants**

Plaintiffs bring suit against Rebecca Adducci, in her official capacity as Detroit District Director of U.S. Immigration & Customs Enforcement; Matthew T. Albence, in his official capacity as Deputy Director and Senior Official Performing the Duties of the Director of the U.S. Immigration & Customs Enforcement; Chad Wolf, in his official capacity as Acting Secretary, U.S. Department of Homeland Security; William P. Barr, in his official capacity as Attorney General, U.S. Department of Justice; and U.S. Immigration and Customs Enforcement. (ECF No. 43.)

### **PROCEDURAL HISTORY**

On March 30, 2020, Petitioner Janet Malam filed an Emergency Petition for Writ of Habeas Corpus.<sup>3</sup> (ECF No. 1.) On April 3, 2020, the Court allowed Plaintiff-Intervenors Amer Toma and Ruby Briselda Escobar to intervene. On April 5, 2020, Plaintiffs Toma and Escobar filed an Emergency Petition for Habeas Corpus and Complaint for Injunctive Relief. (ECF No. 17.) On April 26, fifteen named Plaintiffs filed an amended class action complaint. (ECF No. 43.)

<sup>3</sup> The Court subsequently granted Petitioner Malam’s motion for a temporary restraining order (ECF No. 23), which the Court then converted into a preliminary injunction. (ECF No. 33.)

Plaintiffs’ proposed class consists of “all noncitizens who are detained in ICE custody at Calhoun.” (*Id.* at PageID.994.) The putative class seeks declaratory relief that continued detention under current conditions at the Calhoun County Correctional Facility constitutes impermissible punishment under the Fifth Amendment. (*Id.* at PageID.999.) Named Plaintiffs additionally seek injunctive relief. (*Id.*)

Plaintiffs also seek certification of a subclass of “medically vulnerable individuals,” defined as “all noncitizens who are detained in ICE custody in the Calhoun County Correctional Center, and who have one or more risk factors placing them at heightened risk of severe illness or death if exposed to COVID-19.” (*Id.* at PageID.994–995). The subclass seeks habeas relief and declaratory relief that continued confinement at the Calhoun County Correctional Facility constitutes impermissible

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

punishment and cannot guarantee reasonable safety for medically vulnerable detainees. (*Id.* at PageID.1000.) Named Plaintiffs Alhalmi, Cardona Ramirez, Escobar, Medina Euceda, Rodriguez Salabarria, Rosales Borboa, Toma, and Zhang additionally seek injunctive relief on this claim. (*Id.*)

\*3 Also on April 26, 2020, six named Plaintiffs filed an emergency motion for a temporary restraining order. (ECF No. 44.) Four of these six Plaintiffs—Qaid Alhalmi, Tomas Cardona Ramirez, Damary Rodriguez Salabarria, and Emanuel Rosales Borboa—claim that because of their age and/or underlying medical conditions, their continued civil detention violates their Fifth Amendment rights by exposing them to a substantial risk of serious illness and death related to COVID-19. Accordingly, these Plaintiffs seek a temporary restraining order requiring their immediate release from confinement. (*Id.* at PageID.1043.) Two Plaintiffs—Julio Fernando Medina Euceda<sup>4</sup> and Min Dan Zhang<sup>5</sup>—seek alternative forms of relief. Defendants responded on April 29, 2020 (ECF No. 52), and Plaintiffs replied on May 5, 2020. (ECF No. 57.) The Court granted Defendants leave to file a sur-reply, which Defendants filed on May 6, 2020. (ECF No. 64.) On May 7, 2020, the Court held a hearing by video teleconference and heard oral argument on Plaintiffs’ motion.

<sup>4</sup> In their May 5, 2020 reply brief, Plaintiffs informed the Court that Plaintiff Medina Euceda has been transferred to a detention center in Louisiana and is scheduled to be removed on May 11, 2020. (ECF No. 57, PageID.1670.) Plaintiffs argue that “the Court should order Defendants to provide the information as to what steps Defendants took and plan to take to prevent infection (a) during the transfer; (b) once Mr. Medina Euceda arrived in Louisiana; and (c) during removal.” (*Id.*)

<sup>5</sup> In their May 5, 2020 reply brief, Plaintiffs informed the Court that Plaintiff Zhang “is no longer pursuing immediate release.” (ECF No. 57, PageID.1667.) Instead, Plaintiffs request that “the Court order that, within the next twenty-four hours, Ms. Zhang be tested for COVID-19 and seen by a physician.” (*Id.*)

For the reasons stated below, the Court grants a preliminary injunction requiring Plaintiffs Alhalmi and Cardona Ramirez’ immediate release from detention for the duration of the COVID-19 State of Emergency in Michigan or until further Court order. The Court orders supplemental briefing with respect to Plaintiffs Rodriguez Salabarria and Rosales Borboa’s health conditions and the applicability of a punishment standard to Plaintiffs’ claims. The Court denies Plaintiffs’ motion with respect to their requests for additional relief.

## LAW AND ANALYSIS

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

## I. Jurisdiction

In its April 6, 2020 Opinion and Order, the Court found that it had jurisdiction pursuant to 28 U.S.C. § 2441. (ECF No. 23, PageID.535.) In the alternative, the Court found that it had jurisdiction pursuant to [28 U.S.C. § 1331](#). (*Id.* at PageID.536.) The Court held that sovereign immunity did not apply (*id.* at PageID.544) and that no other statute deprived the Court of jurisdiction. (*Id.* at PageID.547.) Plaintiffs' current motion presents the same jurisdictional questions; Defendants raise no new jurisdictional arguments. With respect to jurisdiction, the Court adopts its April 6, 2020 Opinion and Order in full.

## II. Legal Standard

Plaintiffs seek a temporary restraining order. (ECF No. 54.) Nonetheless, Plaintiffs gave notice to Defendants and did not seek a ruling before Defendants could respond. A temporary restraining order (TRO), which can be issued without notice to the adverse party, is meant to preserve the status quo until a court can make a reasoned resolution of a dispute. [Fed. R. Civ. P. 65\(b\)\(1\)](#); [Procter & Gamble Co. v. Bankers Trust Co.](#), 78 F.3d 219, 226 (6th Cir. 1996). Here, because the Defendants are on notice and the Court allowed time for extensive briefing and heard oral argument on Plaintiffs' motion, the Court will treat the motion as one for a preliminary injunction rather than for a temporary restraining order. See [Perez-Perez v. Adducci](#), No. 20-10833, 2020 WL 2305276, at \*3 (E.D. Mich. May 9, 2020) (doing the same).

"Preliminary injunctions are extraordinary and drastic remedies [ ] never awarded as of right."

[Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.](#), 796 F.3d 636, 642 (6th Cir. 2015). In determining whether to grant such an order, courts evaluate four factors: 1) whether the movant has a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury absent an injunction; 3) whether granting the injunction would cause substantial harm to others; and 4) whether the public interest would be served by granting the injunction.

[Northeast Ohio Coal. for Homeless and Serv. Emps. Intern. Union, Local 1199 v. Blackwell](#), 467 F.3d 999, 1009 (6th Cir. 2006). These four factors "are not prerequisites that must be met, but are interrelated considerations that must be balanced together. For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay." *Id.* (internal quotations omitted).

## III. Application

\*4 Because the Court finds that Plaintiffs Alhalmi and Cardona Ramirez have shown a high risk of irreparable injury absent relief, a likelihood of success on the merits, and that the public interest

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

favors their release, the Court grants in part Plaintiffs' motion. The Court orders supplemental briefing with respect to Plaintiffs Rodriguez Salabarría and Rosales Borboa's health conditions and the applicability of a punishment standard to Plaintiffs' claims. The Court denies Plaintiffs' new requests for additional relief not contained within Plaintiffs' motion.

### A. Likelihood of Irreparable Injury

Plaintiffs Alhalimi and Cardona Ramirez are likely to experience irreparable injury absent an injunction, both in the form of loss of health or life and in the form of an invasion of their constitutional rights. See *Fofana v. Albence*, Case No. 20-10869, 2020 WL 1873307, at \*10 (E.D. Mich. Apr. 15, 2020) (citing *Thakkur v. Doll*, No. 1:20-cv-480, 2020 WL 1671563, at \*8 (M.D. Pa. Mar. 31, 2020)) ("There can be no injury more irreparable than lasting illness or death."); see also *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When constitutional rights are threatened or impaired, irreparable injury is presumed.")

### 1. Loss of Health or Life from COVID-19

In five prior opinions in this case, the Court has held that although there was then no current COVID-19 outbreak at the Calhoun County Correctional Facility, noncitizen civil detainees nonetheless face a high risk of infection from COVID-19 in the coming weeks, months, and possibly years. (See ECF Nos. 23 (granting Petitioner Malam TRO), 29 (granting Plaintiff Toma TRO), 33 (converting Malam TRO into preliminary injunction), 41 (converting Toma TRO into preliminary injunction)); *Zaya v. Adducci*, Case No. 20-10921, 2020 WL 1903172 (E.D. Mich. Apr. 18, 2020) (granting Petitioner Zaya TRO). Evaluating the significant body of public health, medical, and other evidence on the record regarding the pandemic, the Court concluded that "in the face of a deadly pandemic with no vaccine, no cure, limited testing capacity, and the ability to spread quickly through asymptomatic human vectors, a 'generalized risk' is a 'substantial risk' of catching the COVID-19 virus for any group of human beings in highly confined conditions, such as [Plaintiffs] within the CCCF facility." (ECF No. 23, PageID.559.)

On May 11, 2020, counsel for Defendants informed the Court by email that one detainee at the Calhoun County Correctional Facility has tested positive for COVID-19. According to counsel, the detainee was quarantined at intake and was isolated when he became symptomatic. For Plaintiffs, the emergence of COVID-19 at the Calhoun County Correctional Facility transforms a generalized yet substantial risk into a specific and immediate risk.

The rapid rise in COVID-19 cases within ICE detention centers since the Court first ruled on this issue further demonstrates the risk to Plaintiffs: on April 4, 2020, ICE had confirmed thirteen cases

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

of COVID-19 among immigration detainees and seven cases among detention center employees (ECF No. 23, PageID.553); despite precautionary measures, as of May 12, 2020, 881 immigration detainees have tested positive (of 1,736 tested detainees), while ICE has confirmed forty-two cases of COVID-19 among detention center employees. ICE Guidance on COVID-19, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/coronavirus> (updated May 12, 2020 at 5:40pm). This exponential growth represents a doubling rate of approximately six days.

\*5 The number of COVID-19 cases in detention facilities nationwide further highlights the stark reality that communal confinement, even with the precautions Defendants have employed, creates a significant risk of COVID-19 infection. Although the serious outbreak at the Cook County Jail—quickly recognized as the then single greatest source of COVID-19 infections in the United States, *see* Timothy Williams & Danielle Ivory, *Chicago’s Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, NY Times (Apr. 8, 2020), [nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html](https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html)—does not directly increase the risk to Petitioner, it shows how a pandemic can sweep into communal detention environments despite precautionary measures being taken prior to any confirmed cases. *See Sheriff Dart Expands Precautionary Measures for COVID-19 at Cook County Department of Corrections*, Cook County Sheriff’s Office (Mar. 12, 2020), <https://www.cookcountysheriff.org/sheriff-dart-expands-precautionary-measures-for-covid-19-at-cook-county-department-of-corrections> (noting significant precautionary measures similar to those at Calhoun County Correctional Facility); *Update on Efforts to Reduce Population at Cook County Jail and Ongoing Precautions to Prevent COVID-19*, Cook County Sheriff’s Office (Mar. 18, 2020), <https://www.cookcountysheriff.org/update-on-efforts-to-reduce-population-at-cook-county-jail-and-ongoing-precautions-to-prevent-covid-19> (noting expansion of precautionary measures). Despite precautionary measures, cases of COVID-19 among inmates in the Cook County Jail exploded from two to 167 in eight days. (ECF No. 29, PageID.635.) Likewise, on April 1, 2020, the Rikers Island jail complex’s chief physician acknowledged that “infections are soaring” despite the facility’s “following Centers for Disease Control and Prevention guidelines and having moved mountains to protect our patients.” Miranda Bryant, *Coronavirus Spread at Rikers is a ‘Public Health Disaster’, Says Jail’s Top Doctor*, The Guardian (Apr. 1, 2020), <https://www.theguardian.com/us-news/2020/apr/01/rikers-islandjailcoronavirus-public-health-disaster>. As of mid-April, the nationwide curve of COVID-19 infections among Federal Bureau of Prison inmates showed no sign of flattening, again despite significant precautionary measures. *See* Walter Pavlo, *Federal Bureau of Prisons Institutions Not Showing Any Signs of “Flattening Curve,”* Forbes (Apr. 15, 2020), <https://www.forbes.com/sites/walterpavlo/2020/04/15/federal-bureauofprisons-institutions-not-showing-any-signs-offlatteningcurve/#46f2999f54dd>.



Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

The Court commends Defendants for taking what precautions they have, but the record before the Court indicates that at the Calhoun County Correctional Facility, precautionary measures may exist as policy only. Plaintiffs submit the declaration of Dr. Homer Venters, a physician, internist and epidemiologist with over a decade of experience in providing, improving, and leading health services for incarcerated people. (ECF No. 44-4.) Dr. Venters, having reviewed the declarations of Plaintiffs' attorneys, finds that Plaintiffs' experiences at the Calhoun County Correctional Facility show that adequate social distancing remains impossible, access to sanitation and personal protective equipment is scarce, rules regarding the use of masks for staff are lax or nonexistent, and ICE and MDOC are testing neither asymptomatic detainees nor all detainees who present with symptoms. (ECF No. 44-4, PageID.1092–1094.) The widespread lack of testing is of particular concern given that COVID-19 can spread through asymptomatic transmission. Of the 3,277 inmates who tested positive for COVID-19 in Arkansas, North Carolina, Ohio, and Virginia, ninety-six percent were asymptomatic. Linda So & Grant Smith, *In Four U.S. State Prisons, Nearly 3,300 Inmates Test Positive for Coronavirus -- 96% Without Symptoms*, Reuters (Apr. 25, 2020), <https://www.reuters.com/article/us-healthcoronavirus-prisons-testing-in/in-four-u-s-state-prisons-nearly-3300-inmates-test-positive-for-coronavirus-96-without-symptomsidUSKCN2270RX>. The Calhoun County Correctional Facility's failure to successfully implement even general precautionary measures increases the risk of COVID-19 infection to all Plaintiffs.

For Plaintiffs Alhalmi and Cardona Ramirez, this high risk of infection constitutes a high risk of irreparable injury in the form of loss of health or life absent injunctive relief. For Plaintiffs Rosales Borboa and Rodriguez Salabarria, the Court orders supplemental briefing on their underlying health conditions.

### **Plaintiffs Alhalmi and Cardona Ramirez**

Alhalmi suffers from [Type 2 diabetes](#), for which he takes a daily oral medication to control blood sugar and a four-times-daily blood sugar test to determine if he needs [insulin](#). (ECF No. 57, PageID.1670.) Cardona Ramirez suffers from [Type 1 diabetes](#), [hypertension](#), and [hyperlipidemia](#), each of which requires daily medications to control. (ECF No. 57, PageID.1670.) The CDC recognizes [diabetes](#) as a risk factor that increases risk of serious complications from COVID-19, including death. *See Groups at Higher Risk for Severe Illness*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last reviewed Apr. 17, 2020). Dr. Venters concludes that both Plaintiffs Alhalmi and Cardona Ramirez are at “a high risk of severe illness or death if [they contract] COVID-19.” (ECF No. 44-1, PageID.1091–1092.) Defendants do not contest that Plaintiffs Alhalmi and Cardona Ramirez have established that their pre-existing medical conditions place

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

them at a serious risk of substantial harm from COVID-19. (ECF No. 52, PageID.1529 (arguing only that Plaintiffs “Euceda, Salabarría, Borboa, and Zhang fail to establish they have a substantial risk of serious harm from exposure to COVID-19”).)

\*6 The Court concludes that because of their [diabetes](#), both Plaintiffs Alhalmi and Cardona Ramirez are at sufficiently heightened risk of severe complication from COVID-19 such that a high risk of exposure translates into high risk of irreparable injury. Because Plaintiff Alhalmi’s [diabetes](#) is sufficient to find that a high risk of COVID-19 infection constitutes a high risk of irreparable injury in the form of severe illness or death, the Court need not address the extent to which Alhalmi’s age further increases the risk of irreparable injury.

### **Plaintiff Rodriguez Salabarría**

Plaintiff Rodriguez Salabarría suffers from [hypertension](#), chronic [gastritis](#), a [peptic ulcer](#), and [gastroesophageal reflux](#), for which she takes a daily medication for each. (ECF No. 44, PageID.1023.) Her medical records show a recent diagnosis of [chronic localized mucocutaneous candidiasis](#) (CMC). (ECF No. 57, PageID.1675.) Additionally, she has a history of hospitalizations for acute [pancreatitis](#), an [appendectomy](#), [cholecystectomy](#), and [kidney infections](#). (*Id.*) Dr. Venters, upon reviewing Plaintiff’s medical records, concluded that she is “at elevated risk of serious illness or death from COVID-19 based on the CDC guidelines.” (ECF No. 57-2, PageID.1695.) In particular, Dr. Venters found that “the CDC has identified both [hypertension](#) and conditions that can cause a person to be immunocompromised to put a person at higher risk of illness severity and outcomes from COVID-19.” (*Id.* at PageID.1694.)

The record does not support a finding that Plaintiff’s chronic [gastritis](#), [peptic ulcer](#), [gastroesophageal reflux](#), history of hospitalizations, or CMC increase her risk of severe complications from COVID-19. Dr. Venters, without citation to CDC guidance or any other medical study, broadly concluded that Plaintiff Salabarría’s “medical conditions place her at a high risk of severe illness or death if she contracts COVID-19.” (ECF No. 44-4, PageID.1092.) In his supplemental declaration, Dr. Venters pointed only to Plaintiff’s [hypertension](#) and CMC as being risk factors: “the CDC has identified both [hypertension](#) and conditions that can cause a person to be immunocompromised to put a person at higher risk of illness severity and outcomes from COVID-19.” (ECF No. 57-2, PageID.1694.) Absent guidance from the CDC or another public health source that chronic [gastritis](#), [peptic ulcer](#), [gastroesophageal reflux](#), and a history of hospitalizations constitute risk factors, Plaintiffs must provide more than this conclusory statement that Plaintiff Rodriguez Salabarría is at increased risk from these conditions.

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

With respect to Plaintiff's CMC, Dr. Venters declared that "CMC involves an abnormal, localized reaction of immune cells and requires evaluation for an underlying problem with the immune system that may be more widespread." (ECF No. 57-2, PageID.1694.) Dr. Venters' conditional language—that an evaluation *may* show a more widespread problem with the immune system—does not support a finding that Plaintiff *is* immunocompromised.

Accordingly, the Court will assess whether Plaintiff's **hypertension** increases her risk of severe complication from COVID-19 such that a high risk of exposure constitutes a high risk of irreparable injury.

\*7 Defendants argue that the evidence does not show that Plaintiff's **hypertension** increases her risk of serious complications from a COVID-19 infection. As Defendants note, the CDC recognizes "**pulmonary hypertension**," but not general **hypertension**, as a "serious heart condition." *See Groups at Higher Risk for Severe Illness*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last reviewed Apr. 17, 2020). At best, evidence regarding non-pulmonary **hypertension** is unclear. In another publication, the CDC has referred to general **hypertension** as a risk factor. *See Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 — United States, February 12–March 28, 2020*, Centers for Disease Control and Prevention (Apr. 3, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e2.htm>. On May 9, 2020, the Honorable David M. Lawson held that non-pulmonary **hypertension** constituted a risk-factor for severe negative outcomes from COVID-19. *Perez-Perez*, 2020 WL 2305276, at \*8. But on a March 27, Georgina Peacock, the lead of the CDC's COVID-19 Response At-Risk Task Force, described the following with respect to **hypertension**: "We do have observational knowledge that there is an increased risk with **hypertension**, but we don't know whether having **hypertension** alone does increase that risk for severe illness from COVID-19 ... We are working to understand whether **hypertension** is an independent risk factor." Caralyn Davis, *CDC: Protect Staff With Underlying Conditions Against COVID-19*, iAdvance Senior Care (Apr. 7, 2020), <https://www.iadvanceseniorcare.com/cdc-protect-staff-with-underlying-conditions-against-covid-19/>.

The Court cannot conclude, based on the record, that Plaintiff Rodriguez Salabarria's **hypertension** increases her risk of severe complications such that a high risk of exposure to COVID-19 constitutes a high risk of irreparable injury absent an injunction. Nonetheless, the Court is concerned about the public health data suggesting that **hypertension** is the single most frequent comorbidity<sup>6</sup> for patients hospitalized from COVID-19. *See Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 — COVID-NET, 14 States, March 1–30, 2020*, Centers for Disease Control and Prevention (Apr.



Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

17, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm> (identifying **hypertension** as most common underlying condition in adult patients hospitalized from COVID-19); Safiya Richardson *et al.*, *Presenting Characteristics, Comorbidities, and Outcomes Among 5700 Patients Hospitalized With COVID-19 in the New York City Area*, J. of the Am. Medical Ass'n (last updated Apr. 24, 2020), [https://jamanetwork.com/journals/jama/articlepdf/2765184/jama\\_richardson\\_2020\\_oj\\_200043.pdf](https://jamanetwork.com/journals/jama/articlepdf/2765184/jama_richardson_2020_oj_200043.pdf) (identifying same).

6 At oral argument, counsel for Defendants argued that “comorbidity” in this instance referred not to the simultaneous presence of COVID-19 and **hypertension**, but rather to the presence of **hypertension** and another underlying health condition alongside COVID-19. The Court does not share Defendants’ understanding of this term, and it reads the medical evidence to show that for patients hospitalized with COVID-19, **hypertension** was the most frequently occurring underlying health condition, with or without any other underlying health conditions.

Accordingly, the Court will order supplemental briefing on whether Plaintiff’s **hypertension** places her at increased risk of severe illness and/or death from a COVID-19 infection. The parties should focus their briefing on medical and scientific evidence released after March 27, 2020. The parties may also provide additional briefing on Plaintiff’s medical history and other underlying conditions.

### **Plaintiff Rosales Borboa**

Plaintiff Rosales Borboa suffers from **asthma**, for which he was hospitalized for two days approximately ten years ago. (ECF No. 44, PageID.1023.) At various times, the frequency of which the parties contest, Rosales Borboa has required the use of an inhaler and steroids to control his **asthma**. (*Id.* at PageID.1024; ECF No. 64, PageID.1812.)

The CDC explains that moderate to severe **asthma** increases the risk of severe illness and/or death from COVID-19. *People with Moderate to Severe Asthma*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html> (last updated Apr. 2, 2020). The parties disagree as to whether Plaintiff Rosales Borboa’s **asthma** is moderate to severe.

\*8 Plaintiffs allege that “[t]o treat his **asthma**, Mr. Rosales Borboa was prescribed an **Albuterol** inhaler, which he used multiple times per week prior to his detention, and **Prednisone**, an immunosuppressant medication used to treat breathing problems.” (ECF No. 57, PageID.1676.) According to Dr. Venters, “[t]he frequency with which [Plaintiff Rosales Borboa] relies on his inhaler, and the recent need for oral steroids indicates that his **asthma** is not well controlled.” (ECF No. 57-2, PageID.1692.) Dr. Venters implies but does not conclude that **asthma** which is not

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

well controlled is moderate to severe. (*Id.*) Defendants argue that “while detained for the last two months, he has not had any treatment for [asthma](#), nor has he requested any.” (ECF No. 64, PageID.1812.) Moreover, Defendants explain that “Borboa’s [asthma](#), as he stated at intake, is situational when he plays sports or gets too warm.” (*Id.*)

Critically, neither party provides a definition, medical or otherwise, of the phrase “moderate to severe.” The Court cannot apply traditional modes of statutory interpretation to discern the medical meaning of “moderate to severe,” and therefore the Court cannot make a finding with respect to the severity of Rosales Borboa’s [asthma](#). Accordingly, the Court will order supplemental briefing on the meaning of “moderate to severe” and whether Plaintiff’s [asthma](#) qualifies as such. The parties may also address Plaintiff’s medical history and any other underlying health conditions.

## 2. Violation of Constitutional Rights

Plaintiffs Alhalmi and Cardona Ramirez have additionally shown a high risk of irreparable injury in the form of infringement on their Fifth Amendment rights. Plaintiffs argue that “because of their underlying medical conditions which make them especially susceptible to severe infection from COVID-19, [they] confront immediate danger in violation of their Due Process rights.” (ECF No. 44, PageID.1042.) The finding that a constitutional violation is likely is sufficient for a court to find irreparable harm. *See also* [Obama for Am. v. Husted](#), 697 F.3d 423, 436 (6th Cir. 2012) (“When constitutional rights are threatened or impaired, irreparable injury is presumed.”); *Overstreet v. Lexington-Fayette Urban Cty. Gov.*, 305 F.3d 566, 578 (6th Cir. 2002) (citing [Connection Distrib. Co. v. Reno](#), 154 F.3d 281, 288 (6th Cir. 1998)); *see also Rhinehart v. Scutt*, 408 F. App’x 510, 514 (6th Cir. 2018) (suggesting that allegations of “continuing violation of ... Eighth Amendment rights” would trigger a finding of irreparable harm).

Below, the Court finds Plaintiffs Alhalmi and Cardona Ramirez are likely to succeed on the merits of their Fifth Amendment claim. Accordingly, “no further showing of irreparable injury is necessary.” [Mitchell v. Cuomo](#), 748 F.2d 804, 806 (2d Cir. 1984) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”)

Because the success of Plaintiffs’ Fifth Amendment claim hinges on the extent to which Plaintiffs’ underlying health conditions put them at increased risk of severe illness and/or death from COVID-19, the Court will determine whether Plaintiff Rodriguez Salabarría and Rosales Borboa have shown irreparable injury in the form of deprivation of their Fifth Amendment rights upon receiving the parties’ supplemental briefing.

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

## B. Likelihood of Success on the Merits

Plaintiffs bring a claim for “Violation of Fifth Amendment Right to Substantive Due Process: Impermissible Punishment and Inability to Ensure Reasonable Safety For the Medically Vulnerable.” (ECF No. 43, PageID.1000.) Because the Court orders supplemental briefing with respect to Plaintiff Rodriguez Salabarria and Rosales Borboa’s health conditions, the Court will address the likelihood of success on the merits only with respect to Plaintiffs Alhalmi and Cardona Ramirez.

### 1. Legal Standard

\*9 The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. [U.S. Const. amend. V](#). The protection applies to “all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.” [Zadvydas v. Davis](#), 533 U.S. 678, 693 (2001).

#### a. Punishment or Deliberate Indifference

Plaintiffs claim that their continued confinement violates their Fifth Amendment rights both as a form of “impermissible punishment” and for its “inability to ensure reasonable safety.” (ECF No. 43, PageID.1000.) In *Bell v. Wolfish*, the Supreme Court held that “under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.” [441 U.S. 520, 535 \(1979\)](#). The Court explained that “if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees.” [Id. at 539](#). In *Helling v. McKinney*, the Supreme Court held that the Eighth Amendment guarantees inmates “reasonable safety.” [509 U.S. 25, 34 \(1993\)](#). The Sixth Circuit has held that “pretrial detainees have a right to adequate medical treatment that is analogous to the Eighth Amendment rights of prisoners,” [Watkins v. City of Battle Creek](#), 273 F.3d 682, 685–86 (6th Cir. 2001), and, accordingly, this type of Fifth Amendment claim is analyzed “under the same rubric as Eighth Amendment claims brought by prisoners.” [Villegas v. Metropolitan Gov’t](#), 709 F.3d 563, 568 (6th Cir. 2013). Eighth Amendment claims require a showing of deliberate indifference. [Farmer v. Brennan](#), 511 U.S. 825, 835 (1994).

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

The Court has previously analyzed identical claims under only the deliberate indifference standard. In converting Petitioner Malam's temporary restraining order into a preliminary injunction, the Court reasoned:

The Eighth Circuit in *Butler* found that the deliberate indifference test, not the freedom from punishment test, applied to a plaintiff's claim challenging the adequacy of precautionary measures to reduce the risk of infection: "The governmental duty to protect at issue in this case is not based on a pretrial detainee's right to be free from punishment but is grounded in principles of safety and general well-being." 465 F.3d at 344. The court cited to the Supreme Court in *DeShaney v. Winnebago County Dept. of Soc. Serv.*, which held: "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." 489 U.S. 189, 200. The deliberate indifference standard applies in this case.

(ECF No. 33, PageID.724–725.)

Importantly, however, the Court also noted that because Petitioner Malam was likely to succeed on her deliberate indifference claim, "the Court need not determine whether the freedom from punishment standard also applies, and if it does, whether and to what extent it differs from the deliberate indifference standard." (*Id.* at PageID.725.)

\*10 For the same reasoning reproduced above, the Court will analyze Plaintiffs' claim through the lens of deliberate indifference. However, the Court will order supplemental briefing on whether and to what extent a freedom from punishment standard applies to Plaintiffs' claims independent of a deliberate indifference standard.

#### **b. Objective and Subjective Components**

Additionally, there remains an open question as to what the deliberate indifference standard requires Plaintiffs to show. In *Villegas*, the Sixth Circuit recognized that under *Farmer v. Brennan*, deliberate indifference requires a showing of an objective substantial risk of serious harm and a subjective culpable mental state. *Villegas v. Metro. Gov't*, 709 F.3d 563, 568 (6th Cir. 2013) (citing *Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008)). In 2016, the Supreme Court held that a pretrial detainee raising a Fourteenth Amendment excessive force claim satisfied his burden by showing "the force purposely or knowingly used against him was objectively unreasonable," without regards to the mental state of any prison official. *Kingsley v. Hendrickson*, 135 S.

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

Ct. 2466, 2473 (2015). In *Richmond v. Huq*, the Sixth Circuit held that “this shift in Fourteenth Amendment deliberate indifference jurisprudence calls into serious doubt whether [a plaintiff] need even show that the individual defendant-officials were subjectively aware of [the plaintiff’s] serious medical conditions and nonetheless wantonly disregarded them.” 885 F.3d 928, 938 n.3 (6th Cir. 2018). And in *Martin v. Warren Cty.*, the Sixth Circuit reiterated that “[w]hether an objective standard applies to pretrial detainee claims of deliberate indifference and what the standard entails are open questions.” No. 19-5132, 2020 WL 360436, at \*4 n.4 (6th Cir. Jan. 22, 2020), reh’g denied (Feb. 4, 2020).

Despite this uncertainty, the Sixth Circuit has applied both objective and subjective analysis to deliberate indifference claims in at least two cases post-Kingsley. See *J.H. v. Williamson Cty.*, 951 F.3d 709, 717, 722–23 (applying an objective test for solitary confinement claim but two-part objective and subjective test for deliberate indifference claim); *Winkler v. Madison Cty.*, 893 F.3d 877 (2018) (applying two-part standard for deliberate indifference claim without citing *Kingsley*). The Court is unaware of any Sixth Circuit precedent applying *Kingsley* to hold that a deliberate indifference claim only requires an objective component. Absent more guidance from the Sixth Circuit, the Court will require Plaintiffs to show both the objective and subjective components of a deliberate indifference claim.

## 2. Objective Component

The objective component of a deliberate indifference claim is satisfied by showing that “absent reasonable precautions, an inmate is exposed to a substantial risk of serious harm.” *Richko v. Wayne Cty.*, 819 F.3d 907, 915 (6th Cir. 2016) (citing *Amick v. Ohio Dep’t of Rehab. & Corr.*, 521 F. App’x. 354, 361 (6th Cir. 2013)).”

Above, the Court found that Plaintiffs Alhalmi and Cardona Ramirez showed a high risk of irreparable injury in the form of severe illness and/or death from COVID-19 absent an injunction. The Court need not dwell on the distinctions between a high likelihood of irreparable harm and a substantial risk of serious harm—to the extent the former comes in the form of a risk to health or life, it satisfies the latter.

\*11 Nonetheless, Defendants raise three arguments as to why Plaintiffs cannot satisfy the objective component.

### i. Imminence



Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

Defendants argue that the risk of infection—regardless of its magnitude—cannot justify a finding that Plaintiffs will succeed on the merits because the risk is not imminent. Defendants point to the Supreme Court in *Helling v. McKinney*, on which this Court has previously relied.  509 U.S. 25 (1993). Defendants argue that *Helling* “requires that in order to pursue a constitutional claim for a future harm, the danger must be ‘sufficiently imminent.’ ” (ECF No. 52, PageID.1524 (citing  *Helling*, 509 U.S. at 33-34).) In Defendants’ words,

Although the Court did not require the plaintiff to show actual adverse effects from the secondhand smoke, it did require actual exposure to the allegedly harmful condition.... Nowhere in the decision did the *Helling* Court hold potential exposure to disease sufficient to establish standing for a constitutional violation, particularly where the risk of exposure would differ little from the risk if released.

(ECF No. 52, PageID.1525 (citation omitted).)

Defendants made this argument at a time when “there [were] no confirmed cases of COVID-19 at Calhoun.” (ECF No. 52, PageID.1525.) But as of May 11, 2020, Calhoun County Correctional Facility has at least one confirmed case of COVID-19. Moreover, given the percentage of asymptomatic COVID-19 cases and the virus’ incubation period of up to fourteen days, Defendants cannot reasonably assert that the outbreak is—or will continue to be—limited to a single case. This change in factual circumstances alone is enough to rebut Defendants’ argument.

But even if the Court were to find that a confirmed case of COVID-19 within the correctional facility did not constitute an imminent risk of exposure, Defendants misread *Helling* in two ways. First, they are wrong to insist that *Helling* “require[s] actual exposure.” *Helling* dealt with a prisoner who faced actual exposure to secondhand smoke at the time he filed his complaint. The question of whether potential or future exposure would similarly be sufficient to state a claim was not at issue in the case. Accordingly, nowhere did the *Helling* Court hold potential exposure to a disease insufficient to establish standing for a constitutional violation.

Second, and to the contrary, the *Helling* opinion does suggest that potential exposure to a future harm would be—and is here—sufficient to state a constitutional claim and support a finding of irreparable injury. As *Helling* states, “a remedy for unsafe conditions need not await a tragic event,”  *Helling*, 509 U.S. at 33. The *Helling* Court cited favorably to *Gates v. Collier*, a Fifth Circuit opinion addressing when the risk of future injury was sufficient to state an Eighth Amendment

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

claim.  509 U.S. at 34. In *Gates*, the court held that a prison’s insufficient inventory of firefighting equipment constituted an Eighth Amendment violation.   501 F.2d 1291 (5th Cir. 1974). The court noted that “[a]t most camps there is a lack of adequate firefighting equipment making it, as stated by the Penitentiary Superintendent, ‘almost impossible to put out a fire at [the detention facility] with the present water system and the present fire-fighting equipment.’ ”   *Id.* at 1301. It would almost be absurd to suggest that a prisoner would have needed to wait for a fire to break out in the facility prior to being able to allege irreparable injury. Instead, the *Gates* court recognized that the risk of fire itself was enough.

\*12 So too here. COVID-19 does not respect prison walls. The raging global pandemic outside of Calhoun County Correctional Facility and a confirmed case within the facility pose a serious risk to those inside. Accordingly, the Court concludes again that the risk of COVID-19 infection to Plaintiffs Alhalmi and Cardona Ramirez constitutes a substantial risk of serious harm.

## ii. Compliance with Policies

At oral argument, Defendants argued that the Court should not consider any failure of the Calhoun County Correctional Facility to implement CDC or ICE Guidance when determining whether Plaintiffs have shown the objective component of their deliberate indifference claim. If Plaintiffs were challenging only the issuance of Defendants’ policy as deliberately indifferent, Defendants’ argument might have merit. But Plaintiffs’ challenge is broader than contesting ICE guidance: Plaintiffs challenge their continued detention on the grounds that no conditions of confinement can guarantee their reasonable safety. Accordingly, the question for the Court is not whether Defendants have been deliberately indifferent to Plaintiffs’ health in creating COVID-19-related policies and precautions, but whether Defendants, who do not argue that Plaintiffs pose a danger to the community or would be flight risks, have been deliberately indifferent to Plaintiffs’ medical needs by failing to release them given the actual conditions at the Calhoun County Correctional Facility. Accordingly, the exact level of the risk at the correctional facility, as informed by the level of compliance with any precautionary policies, goes both to the nature of the harm faced by Plaintiffs and to Defendants’ state of mind in declining to release them.

## iii. Society’s Tolerance of Risk to Plaintiffs

Defendants properly note that in addition to weighing the seriousness of the risk faced by Plaintiffs, the Court must also “ ‘assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency’—that is, it ‘is not one that today’s society chooses to tolerate.’ ”  *Villegas v. Metro. Gov’t*, 709 F.3d at 568-69 (citing  *Helling v. McKinney*, 509 U.S. 25, 36 (1993)). Defendants argue that “where society is beginning to reduce

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

restrictions and subject society-at-large to that same risk of exposure to COVID-19,” Plaintiffs may not be able to satisfy this requirement. (ECF No. 64, PageID.1814.)

Defendants argument is misguided. First, significant portions of the country remain on lockdown. In Michigan, where Plaintiffs are detained and which now reports a total of 48,021 COVID-19 cases and 4,674 deaths from COVID-19, *see Michigan Data*, Michigan.gov, [https://www.michigan.gov/coronavirus/0,9753,7-406-98163\\_98173---,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html) (last updated May 12, 2020), Governor Gretchen Whitmer recently extended the Stay Home, Stay Safe executive order, under which Michigan residents “must not leave their homes except to run critical errands, to engage in safe outdoor activities, or to go to specified jobs,” until May 28, 2020. *Governor Whitmer Extends Stay Home, Stay Safe Order, Reopens Manufacturing as Part of Her MI Safe Start Plan*, Michigan.gov (May 7, 2020), <https://www.michigan.gov/whitmer/0,9309,7-387-90487-528452--,00.html>.

**\*13** Second, even where restrictions have been relaxed more broadly, there are continued protections for medically vulnerable people. Although Georgia’s shelter-in-place order expired for most Georgia residents on April 30, 2020, Governor Brian Kemp issued a new executive order “requiring medically fragile and elderly Georgians to continue to shelter in place through June 12, 2020.” *Gov. Kemp Extends Protections for Vulnerable Georgians, Releases Guidance for Businesses*, Georgia.gov (Apr. 30, 2020), <https://gov.georgia.gov/press-releases/2020-04-30/gov-kemp-extends-protections-vulnerable-georgians-releases-guidance>. Additionally, Governor Kemp ordered “long-term care facilities – including nursing homes, personal care homes, assisted living facilities, and similar community living homes – to utilize enhanced infection control protocols, ensure safer living conditions, and protect residents and staff from coronavirus exposure.” *Id.*

Finally, Plaintiffs are not at “the same risk of exposure” to COVID-19 as the general population. Plaintiffs are currently in communal confinement. As previously set forth, “in the face of a deadly pandemic with no vaccine, no cure, limited testing capacity, and the ability to spread quickly through asymptomatic human vectors, a ‘generalized risk’ is a ‘substantial risk’ of catching the COVID-19 virus for any group of human beings in highly confined conditions, such as [Plaintiffs] within the CCCF facility.” (ECF No. 23, PageID.559.)

Defendants cannot show that society would tolerate Plaintiffs’ exposure to COVID-19. To suggest that the public would tolerate this risk demeans Plaintiffs’ dignity and humanity.

### 3. Subjective Component



Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

The subjective component is demonstrated by showing that “(1) the official being sued subjectively perceived facts from which to infer a substantial risk to the prisoner, (2) the official did in fact draw the inference, and (3) the official then disregarded that risk.” *Richko*, 819 F.3d at 915–16 (citing *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 446 (6th Cir. 2014)). “Because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence....” *Id.* at 916 (citing *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 550 (6th Cir. 2009)). Additionally, “a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Farmer*, 511 U.S. at 842.

Defendants do not contest that Plaintiffs have satisfied the first two prongs of *Richko*’s subjective component test. The magnitude of the risk from COVID-19 to Plaintiffs Alhalmi and Cardona Ramirez, considering their underlying health conditions, leads the Court to conclude that it is obvious and, consequently, that Defendants are aware of it.

Instead, Defendants argue that because they are responding reasonably to the COVID-19 pandemic, they cannot be said to have disregarded the risk to Plaintiffs. (ECF No. 52, PageID.1533.) Because Defendants have not taken specific precautions to protect medically vulnerable detainees, the Court finds that Defendants have acted unreasonably and have disregarded the risk of COVID-19 to Plaintiffs Alhalmi and Cardona Ramirez.

Since Defendants first filed a brief in this case on April 3, 2020, they have argued that the reasonability of their response precludes their liability. (See ECF No. 11, PageID.180 (“[T]he government has not been deliberately indifferent and instead has taken reasonable precautions to reduce the risk.”).) Defendants argue that “the [C]onstitution does not require or allow judicial inquiry to determine the optimal policy that ICE can employ, assuming no resource constraints or competing governmental interests and priorities, to eliminate risk to Petitioners. The [C]onstitution only requires the precautions taken to be ‘reasonable’ under a deliberate indifference analysis.” (ECF No. 52, PageID. 1537)

**\*14** Defendants rely on two Circuit Court cases for this proposition. See *Wooler v. Hickman Cty.*, 377 F. App’x 502, 503 (6th Cir. 2010) (finding “consistent efforts to reduce [the] risk” of contagion of an infectious skin disease precluded “a finding of deliberate indifference”); *Butler v. Fletcher*, 465 F.3d 340, 345-46 (8th Cir. 2006) (finding precautions to mitigate the risk of tuberculosis reasonable, even if there were other reasonable measures that could have been taken).

The Court has previously found *Wooler* and *Butler* distinguishable

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

because of the scope of the situation today. COVID-19 is neither MRSA nor tuberculosis. *Wooler* and *Butler* suggest precautions can reasonably mitigate the risk of tuberculosis or MRSA in conditions of communal confinement. COVID19 is a global pandemic of unparalleled scope, and the public health evidence available to the Court suggests that communal confinement cannot ensure detainees reasonable safety from infection.

(ECF No. 33, PageID.702.)

Defendants' argument fails for the same reason that their argument regarding risk of irreparable injury fails: a reduction in risk does not automatically render Defendants' response reasonable. Instead, Plaintiffs have provided extensive evidence that the reduction in risk is insufficient for the precautions to be deemed reasonable with respect to medically vulnerable detainees<sup>7</sup>: Dr. Venters explains,

The April 10 ERO Pandemic Response Requirements appear to identify patients at high-risk of serious illness from COVID-19 for the purpose of docket review, but critically fail to encourage or require any higher level of protection that facility officials must provide these detainees in order to protect them from contracting COVID-19.

(ECF No. 44-4, PageID. 1085); Dr. Jonathan Golob, Assistant Professor at the University of Michigan School of Medicine specializing in infectious diseases and internal medicine, writes that

vulnerable people ... living in an institutional setting, such as a prison, or jail, or an immigration detention center, with limited access to adequate hygiene facilities, limited ability to physically distance themselves from others, and exposure to potentially infected individuals from the community are at grave risk of severe illness and death from COVID-19.

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

(ECF No. 44-2, PageID. 1052); Dr. Robert Greifinger, a physician with more than thirty years of experience specific to correctional facilities, declares that

ICE's response has made abundantly clear that they do not plan to establish special protections for high-risk patients, instead waiting for them to become symptomatic. This will lead to unnecessary illness and death for the people most vulnerable to this disease. ICE is walking willingly into a preventable disaster by keeping high-risk and vulnerable patients in detention facilities during the rapid spread of COVID-19.... In my opinion, the public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety, especially given the lack of a viable vaccine for prevention or effective treatment at this stage.

(ECF No. 44-3, PageID. 1064–1065); Dora Schriro, a civil servant with significant correctional and immigration experience, including as former Senior Advisor to DHS Secretary Janet Napolitano, opines that

[b]ased on my experience at DHS, ICE exercises discretion to release or decline to detain medically vulnerable individuals, even when those individuals are, per statute, mandatorily detained. Regardless of statute, ICE has the capacity to, and in fact does, release medically vulnerable individuals when necessary for public health.

**\*15** (ECF No. 44-5, PageID.1161.) She concludes that “best correctional and correctional health care practice requires, at a minimum, the preemptive release of individuals who are at-risk of serious illness or death if they become infected with COVID-19.” (*Id.* at PageID.1169.)

7

In limiting its finding of Defendants' mental state with respect to medically vulnerable detainees, the Court does not hold at this time that Defendants' precautions are a reasonable response to the risk posed to the general population. The Court will consider that question should it find that Plaintiffs Rodriguez Salabarria and Rosales Borboa are not at heightened risk of serious illness and/or death from COVID-19 or when it is otherwise presented to the Court for adjudication.

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

As the extensive body of public health evidence on the record clearly demonstrates, a failure either to implement precautions specific to medically vulnerable detainees or to release them constitutes an unreasonable response.

Defendants point to recent Fifth and Eleventh Circuit opinions to show that the record nonetheless does not include evidence of deliberate indifference. In *Valentine v. Collin*, the Fifth Circuit stayed a district court’s preliminary injunction requiring a correctional facility to impose specific precautionary measures against COVID-19. [No. 20-20207, 2020 WL 1934431 \(5th Cir. Apr. 22, 2020\)](#) The court 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.* at \*4 (citations omitted). The court concluded that in finding objectively “inadequate measures as dispositive of the Defendants’ mental state,” “the district court ... collapsed the objective and subjective components of the Eighth Amendment inquiry.”

In *Swain v. Junior*, the Eleventh Circuit cited to *Valentine* and stayed a similar injunction on the grounds that “the district court cited no evidence to establish that the defendants subjectively believed the measures they were taking were inadequate.” [No. 20-11622, 2020 WL 2161317, at \\*4 \(11th Cir. May 5, 2020\)](#).

Contrary to Defendants’ suggestion and distinct from *Valentine* and *Swain*, the record before the Court demonstrates that Defendants are aware that medically vulnerable detainees require additional protection, but nonetheless have declined to act. “Because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence....” *Richko*, 819 F.3d at 916 (citing [Dominguez v. Corr. Med. Servs.](#), 555 F.3d 543, 550 (6th Cir. 2009)).

At the Court’s May 7, 2020 videoconference hearing, Defendants conceded that they have not implemented any policies specific to the protection of medically vulnerable detainees, arguing

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

instead that general precautionary measures serve to protect the higher risk population. CDC guidance for correctional and detention facilities does not address the specific needs of medically vulnerable detainees; it only notes that “[i]f the number of confirmed cases exceeds the number of individual medical isolation spaces available in the facility, be especially mindful of cases who are at higher risk of severe illness from COVID-19.” *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last reviewed May 7, 2020). Nor does ICE guidance fill the gap; to the extent that ICE Guidance addresses medically vulnerable detainees, it contemplates considering release as an option:

\*16 Upon being informed of a detainee who may potentially be at higher risk for serious illness from exposure to COVID-19, ERO will review the case to determine whether continued detention is appropriate. ICE will make such custody determinations on a case-by-case basis, pursuant to the applicable legal standards, with due consideration of the public health considerations implicated.

(ECF No. 52-7, PageID.1591.) Indeed, as of April 16, 2020, ICE had released almost 700 noncitizen civil detainees nationwide. Matt Katz, *ICE Releases Hundreds of Immigrants as Coronavirus Spreads in Detention Centers*, NPR (Apr. 16, 2020) <https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/835886346/ice-releases-hundreds-as-coronavirus-spreads-in-detention-centers>.

On the one hand, Defendants are aware of the heightened risk posed by COVID-19 to medically vulnerable detainees, and as such ICE has already released hundreds of people from ICE custody. On the other, Defendants have not—and seemingly will not—adopt precautions specific to this vulnerable population that public health evidence shows to be necessary. And despite five opportunities to do so in this case alone, Defendants have not provided the Court with the declarations of any medical professional or public health expert who can reconcile these two conflicting positions. As Defendants explained in another case challenging the constitutionality of civil detention at the Calhoun County Correctional Facility, “In issuing guidance, ICE relied on epidemiologists and also convened a working group between medical professionals, disease control specialists, detention experts, and field operators to identify additional enhanced steps to minimize the spread of the virus.” *Zaya v. Adducci*, Case No. 20-10921 (E.D. Mich. Apr. 23, 2020), ECF No. 10 at PageID.700 (internal citation omitted). Defendants fail to acknowledge or address the evidence submitted by Plaintiffs and the weight of public health evidence recognizing

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

that absent specific precautions, Plaintiffs' release constitutes the only reasonable response to an extraordinary and deadly pandemic. Plaintiffs Alhalmi and Cardona Ramirez have shown the subjective component of their deliberate indifference claim.

Finally, the Court reiterates that at this stage of the litigation, it employs a balancing test to determine if relief is warranted. "[T]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay."

 *Northeast Ohio Coal. for Homeless and Serv. Emps. Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006) (internal quotations omitted). Plaintiffs have shown both a high likelihood of irreparable injury and a near certainty of success with respect to the objective component of their deliberate indifference claim; Defendants only raise a significant challenge to the claim's subjective component. Because the merits will turn on Defendants' state of mind, Plaintiffs need not continue to be exposed to conditions of confinement which present a substantial risk of serious harm while the Court further adjudicates that issue.

### C. Balance of Equities and Public Interest

When the government opposes the issuance of a temporary restraining order, as Defendants do here, the final two factors—the balance of equities and the public interest—merge. "The government's interest is the public interest." *Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 512 (D.C. Cir. 2016) (citing  *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

\*17 The Court finds that the public has an interest in preserving Plaintiffs' constitutional rights and in protecting public health. See   *G & V Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights");  *Neinast v. Bd. Of Trustees*, 346 F.3d 585, 592 (6th Cir. 2003) (recognizing public health and safety as legitimate government interests).

Defendants do not address the public interest in their response (ECF No. 52) or sur-reply (ECF No. 64). Nor do Defendants argue that any named Plaintiff would either pose a danger to the community or be a flight risk upon release.

Accordingly, "[t]he public interest and balance of equities demand that the Court protect [Plaintiffs'] constitutional rights and the public health over the continued enforcement of a detention provision that, as applied to [Plaintiffs'], is unconstitutional." (ECF No. 23, PageID.574.)

Because all four factors favor granting injunctive relief for Plaintiffs Alhalmi and Cardona Ramirez, the Court grants a preliminary injunction requiring their immediate release.



Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

#### IV. Other Requested Relief

In their reply brief, Plaintiffs requested for the first time five additional forms of relief: first, that the Court order that “within the next twenty-four hours, Ms. Zhang be tested for COVID-19 and seen by a physician” (ECF No. 57, PageID. 1667); second, that the Court order “the attending physician to provide a report to Court about whether, because of Ms. Zhang’s medical condition, she should be released” (*id.*); third, that the Court “order Defendants to provide the information as to what steps Defendants took and plan to take to prevent infection (a) during the transfer; (b) once Mr. Medina Euceda arrived in Louisiana; and (c) during removal” (*id.* at PageID.1670); fourth, that the Court “require Defendants immediately to update the Court if there are any changes with respect to Mr. Medina Euceda’s scheduled removal” (*id.* at PageID.1670–1671); and fifth, that the Court order “that Defendants not transfer any further named petitioners to a different detention center without the Court’s permission, and that any request for such permission should include information about the conditions in the facility to which the person is being transferred, and precautions during transfer.” (*Id.* at PageID.1671.)

The Court is unaware of legal authority that would allow it, in this instance, to grant relief unrelated to the merits of Plaintiffs’ claims and not requested in a pleading or motion. The Federal Rules of Civil Procedure contemplate that a claim for relief must appear in a pleading. [Fed. R. Civ. Proc. 8\(a\)](#). This procedural requirement allows for the parties to fully brief any resultant issues and ensures that the Court can make a reasoned determination. Defendants have only had a brief opportunity to address Plaintiffs’ new requests in a sur-reply. (ECF No. 64.)

Accordingly, each additional request for relief is denied without prejudice. Plaintiffs may refile their requests in the form of an amended pleading or a motion for injunctive relief or discovery, as they deem appropriate.

#### V. Conclusion

For the reasons stated above, the Court **GRANTS** a preliminary injunction requiring Plaintiffs Alhalmi and Cardona Ramirez’ immediate release from ICE Custody. Plaintiffs will be subject to the following restrictions: Plaintiffs are subject to fourteen days of home quarantine; Plaintiffs must comply with all Michigan Executive Orders; and Plaintiffs must appear at all hearings pertaining to their removal proceedings. Respondents may impose other reasonable nonconfinement terms of supervision.

Malam v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 2468481

\***18** Respondents are further **RESTRAINED** from arresting Petitioner for civil immigration detention purposes until the State of Emergency in Michigan (related to COVID-19) is lifted or until further Court Order stating otherwise.

The Court orders supplemental briefing with respect to Plaintiff Salabarria and Plaintiff Borboa's health conditions and the applicability of a freedom from punishment standard to Plaintiffs' claims. The parties may each submit a responsive filing, of no more than fifteen pages, by May 18, 2020.

The Court denies without prejudice Plaintiffs' requests for relief other than immediate release.

IT IS SO ORDERED.

### All Citations

--- F.Supp.3d ----, 2020 WL 2468481

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Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

2020 WL 1316510

Only the Westlaw citation is currently available.

United States District Court, W.D. Michigan, Southern Division.

Michael SALAMI, Plaintiff,

v.

Randee REWERTS et al., Defendants.

Case No. 1:20-cv-21

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Signed 03/20/2020

### Attorneys and Law Firms

Michael Salami, Carson City, MI, pro se.

### OPINION

ROBERT J. JONKER, CHIEF UNITED STATES DISTRICT JUDGE

\*1 This is a civil rights action brought by a state prisoner under 42 U.S.C. § 1983. Under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (PLRA), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c). The Court must read Plaintiff's *pro se* complaint indulgently, see *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, the Court will dismiss Plaintiff's complaint for failure to state a claim against Defendants Rewerts, Winger, Woodin, and the Gender Dysphoria Recommendation Committee.

### Discussion

#### I. Factual Allegations

Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

Plaintiff Michael Salami is a transgender female, who uses the female name Nikolai-Memet. She presently is incarcerated with the Michigan Department of Corrections (MDOC) at the Carson City Correctional Facility (DRF) in Carson City, Montcalm County, Michigan. The events about which she complains occurred at that facility. Plaintiff sues Corizon Healthcare, Inc., the Gender Dysphoria Recommendation Committee, and the following DRF officials: Warden Randee Rewerts; Assistant Deputy Warden J. Winger; Resident Unit Manager (RUM) and PREA<sup>1</sup> Coordinator Unknown Niemiec; PREA Coordinator Todd Butler; Dr. Patricia Schmidit; Chief Psychologist Unknown Woodin; and Sergeant Unknown Fountains.

<sup>1</sup> The Prison Rape Elimination Act (PREA), 34 U.S.C. § 30301 et seq., provides national standards and grant funding directed at the prevention, reporting, and enforcement of prison rape.

Plaintiff alleges that she has a gender identity disorder (GID), under which she identifies as a highly feminine woman. She dresses as a woman to the extent possible, including making her own panties, wears her hair in pigtails or a ponytail, and speaks in a high voice. Plaintiff alleges that she passed all of her lab tests and signed a treatment contract and waiver of liability on October 18, 2019. Defendant Schmidit told Plaintiff at that time that she would be prescribed 25 mg. of Androgen within two weeks. Plaintiff complains, however, that Defendant Dr. Schmidit, Corizon, and the Gender Dysphoria Recommendation Committee are denying her hormone treatment and refusing her entry into the rolls of transgender female prison inmates. She alleges that they are doing so because, if she receives hormones for one year, they will be required to authorize sexual reassignment surgery. As a result of these Defendants' failures to permit treatment for Plaintiff's GID, she experiences psychological distress and is forced to remain in a male prison, where she is at risk of continued assaults.

On September 22, 2019, inmate McElrath (a/k/a Nacho) approached Plaintiff and attempted to kiss her and digitally penetrate her anus. Plaintiff pushed Nacho away and swore at him. She felt dirty, so she re-showered. She discovered that Nacho continued to watch her as she showered. Plaintiff called the PREA hotline immediately after her shower. She also sent a kite to Defendants Rewerts, Winger, and Niemiec, asking that Nacho be moved. Plaintiff received no response to her reports until five days later, when she heard from Defendant Butler. She was seen by Defendant Niemiec five to eight days after the PREA report. At that interview, Defendant Niemiec stated that he would have Nacho moved the same day, but that did not happen.

\*2 Sometime within the next week or so, Defendant Niemiec called Plaintiff into his office and interrogated her. Niemiec called Plaintiff a liar and told her that it was her fault and that she should not joke with people. Nacho was moved to the lower level, but he remained in the same unit as

Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

Plaintiff. Plaintiff alleges that Nacho placed “hits” on Plaintiff in front of officers, but they did nothing to protect Plaintiff. (Compl., ECF No. 1, PageID.7.)

On November 6, 2019, at 3:35 a.m., Plaintiff was awakened to go to the office to talk with Defendant Fountains. Plaintiff told Defendant Fountains about Nacho’s threats and asked to either be put in protective custody or have a Special Problem Offender Notice (SPON) issued to keep Nacho from being housed in the same facility as Plaintiff. *See* MDOC Policy Directive 03.03.110. Defendant Fountains told Plaintiff, “Stop it.... The Administration has no intentions of helping you.” (Compl., ECF No. 1, PageID.7.) Following this discussion, Plaintiff again sent kites to Defendants Rewerts, Ringer, and Niemiec, requesting that she be placed in protective custody. Plaintiff alleges that no action was taken by these Defendants in response to the kites.

On November 21, 2019, at approximately 12:35 p.m., Plaintiff began cleaning her room. Nacho’s friend, Williams, yelled out that Nacho had hired him to “[b]eat the f\*\*k out of [Plaintiff].” (*Id.*) Williams then either threw or kicked a bucket containing cleaning chemicals at Plaintiff. The bucket hit Plaintiff in the face, stunning her, and the chemicals blinded her temporarily. Williams left, came back, and again threw or kicked a bucket at Plaintiff. Williams again left to get a shank, saying, “Ima stab you for snitching on Nacho.” (*Id.*, PageID.15.) Williams returned and forced himself into Plaintiff’s cell. Williams began to punch Plaintiff in the skull, face, and sides and tried to pull the knife out of his waistband. At that point, Plaintiff’s bunkmate began yelling, “[H]elp – Police.” (*Id.*) Williams told the bunkmate to “[k]eep quiet, or he’d be stab[b]ed, raped, and lock[ed] up like another white-boy.” (*Id.*) When Williams tried to block the doorway, Plaintiff got up, but Williams punched her to the ground and tried to pull her pants down. Plaintiff escaped Williams’ hold and yelled, “Rape” two times, but no staff responded. Plaintiff kicked Williams hard in the leg. She then threw a number of heavy objects at Williams’ head and neck. Williams ran out of the cell, and, in fear and anger, Plaintiff tried to follow Williams to injure him, but she ended up locking her cell door. She then smashed Williams’ blue glasses, which had been dropped in her cell.

Plaintiff went to health services, where the nurse found multiple bumps on Plaintiff’s head and a cut on her inner lip. Plaintiff did not report the PREA violation, because she was afraid that she would be issued a misconduct charge, as had happened to her previously.

On December 3, 2019, Plaintiff wrote both Keith Barber (not a Defendant) and Defendant Butler, asking for a victim advocate under the PREA, for the placement of SPONs on Nacho and Williams, and for therapy authorized by the PREA. She received no response, but four days later, Nacho was moved to Unit 500 and received a ticket. Plaintiff complains, however, that Nacho still has access to her through fellow gang members, whom he can contact through the unit fence. Plaintiff alleges

Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

that she has been the subject of unspecified new attempts by Nacho to have others attack Plaintiff, and she contends that she remains at a substantial risk of being injured.

\*3 Plaintiff contends that she has suffered physical injury and continues to suffer [post-traumatic stress disorder](#) (PTSD) from an earlier sexual assault at a different MDOC facility, which allegedly has been aggravated by the events at DRF. She alleges that Defendants have deprived her of her rights under the Eighth Amendment by failing to protect her, failing to treat her gender identity disorder, and failing to provide counseling for her PTSD. She seeks a temporary and permanent restraining order against Nacho. Plaintiff also suggests that she is entitled to damages, but she does not detail what damages she may seek.

## II. Failure to State a Claim

A complaint may be dismissed for failure to state a claim if it fails “ ‘to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ ” [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555 (2007) (quoting [Conley v. Gibson](#), 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff’s allegations must include more than labels and conclusions. [Twombly](#), 550 U.S. at 555; [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). The court must determine whether the complaint contains “enough facts to state a claim to relief that is plausible on its face.” [Twombly](#), 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” [Iqbal](#), 556 U.S. at 679. Although the plausibility standard is not equivalent to a “ ‘probability requirement,’ ... it asks for more than a sheer possibility that a defendant has acted unlawfully.” [Iqbal](#), 556 U.S. at 678 (quoting [Twombly](#), 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” [Iqbal](#), 556 U.S. at 679 (quoting [Fed. R. Civ. P. 8\(a\)\(2\)](#)); see also [Hill v. Lappin](#), 630 F.3d 468, 470-71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(i)).

To state a claim under [42 U.S.C. § 1983](#), a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. [West v. Atkins](#), 487 U.S. 42, 48 (1988); [Street v. Corr. Corp. of Am.](#), 102 F.3d 810, 814 (6th Cir. 1996). Because [§ 1983](#) is a method for vindicating federal rights,

Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

### III. Defendant Gender Dysphoria Recommendation Committee

Although Plaintiff sues the Gender Dysphoria Recommendation Committee, the MDOC has no such committee. Instead, decisions concerning gender dysphoria management are the responsibility of the Gender Dysphoria Collaborative Review Committee. *See* MDOC Policy Directive 04.06.184 ¶ C (eff. June 26, 2017). The Court assumes that Plaintiff intends to sue the Gender Dysphoria Collaborative Review Committee

Regardless of the appropriate name of the committee, that committee is entitled to sovereign immunity. The Gender Dysphoria Collaborative Review Committee is a subdivision of the MDOC. Regardless of the form of relief requested, the states and their departments are immune under the Eleventh Amendment from suit in the federal courts, unless the state has waived immunity or Congress has expressly abrogated Eleventh Amendment immunity by statute. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-101 (1984); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *O'Hara v. Wigginton*, 24 F.3d 823, 826 (6th Cir. 1993). Congress has not expressly abrogated Eleventh Amendment immunity by statute, *Quern v. Jordan*, 440 U.S. 332, 341 (1979), and the State of Michigan has not consented to civil rights suits in federal court. *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986). In numerous opinions, the Sixth Circuit has specifically held that the MDOC is absolutely immune from a § 1983 suit under the Eleventh Amendment. *See, e.g., Harrison v. Michigan*, 722 F.3d 768, 771 (6th Cir. 2013); *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 962 (6th Cir. 2013); *McCoy v. Michigan*, 369 F. App'x 646, 653-54 (6th Cir. 2010). Where, as here, the committee in issue is merely a subdivision of the MDOC, it too is immune. *C.f. Harrison v. Michigan*, 722 F.3d 768, 771 (6th Cir. 2013) (holding that both the MDOC and its subdivision, the Michigan Parole Board, are entitled to immunity under the Eleventh Amendment); *Horton v. Martin*, 137 F. App'x 773, 775 (6th Cir. 2005) (Michigan Parole Board entitled to Eleventh Amendment immunity). Therefore, Plaintiff's complaint seeks monetary relief against a defendant who is immune from such relief, Plaintiff's claim against the Gender Dysphoria Collaborative Review Committee is properly dismissed under 28 U.S.C. § 1915(e)(2)(B)(iii) and 42 U.S.C. § 1997e(c).

\*4 In addition, the State of Michigan (acting through the MDOC and its subdivisions) is not a "person" who may be sued under § 1983 for money damages. *See Lapidus v. Bd. of Regents*, 535 U.S. 613, 617 (2002) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989));



Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

*Harrison*, 722 F.3d at 771. Therefore, Plaintiff's claim against the Gender Dysphoria Collaborative Review Committee is also properly dismissed for failure to state a claim.

#### IV. Defendants Rewerts, Winger, & Woodin

Plaintiff's only factual allegations against Defendants Rewerts and Winger, are that she sent kites to both Rewerts and Winger, as well as to Defendant Niemiec, complaining about Nacho's initial attempted sexual assault and shortly thereafter about Defendant Niemiec's response to Plaintiff's first kite. Plaintiff's allegations against Defendants Rewerts and Winger amount to a simple claim that they failed to supervise their subordinates and failed to personally respond to Plaintiff's kites about Nacho's earliest actions and about Niemiec's unsatisfactory response to the first kite. Plaintiff makes no factual allegations about Defendant Woodin in the body of the complaint, though she suggests that she sent a kite to a lower-level mental health provider in December 2019, and she arguably suggests that Defendant Woodin is responsible for his subordinate's actions.

Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior or vicarious liability. *Iqbal*, 556 U.S. at 676; *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691(1978); *Everson v. Leis*, 556 F.3d 484, 495 (6th Cir. 2009). A claimed constitutional violation must be based upon active unconstitutional behavior. *Grinter v. Knight*, 532 F.3d 567, 575-76 (6th Cir. 2008); *Greene v. Barber*, 310 F.3d 889, 899 (6th Cir. 2002). The acts of one's subordinates are not enough, nor can supervisory liability be based upon the mere failure to act. *Grinter*, 532 F.3d at 576; *Greene*, 310 F.3d at 899; *Summers v. Leis*, 368 F.3d 881, 888 (6th Cir. 2004). Moreover, § 1983 liability may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance. See *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). "[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676.

To the extent that Plaintiff intends to allege that Defendants Rewerts, Winger, and Woodin failed to supervise their subordinates, she alleges nothing more than respondeat superior, which will not support a § 1983 claim. To the extent that Plaintiff alleges that Defendants Rewerts or Winger engaged in any conduct beyond failing to respond to two kites, Plaintiff also fails to state a claim. Section 1983 liability may not be imposed simply because a supervisor denied an administrative grievance or failed to act based upon information contained in a grievance or complaint. See *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999). Defendants Rewerts and Winger therefore will be dismissed.

Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

With respect to Defendant Woodin, Plaintiff's complaint is devoid of factual allegations. It is a basic pleading essential that a plaintiff attribute factual allegations to particular defendants. *See Twombly*, 550 U.S. at 544 (holding that, in order to state a claim, a plaintiff must make sufficient allegations to give a defendant fair notice of the claim). The Sixth Circuit "has consistently held that damage claims against government officials arising from alleged violations of constitutional rights must allege, with particularity, facts that demonstrate what each defendant did to violate the asserted constitutional right." *Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008) (citing *Terrance v. Northville Reg'l Psych. Hosp.*, 286 F.3d 834, 842 (6th Cir. 2002)). Where a person is named as a defendant without an allegation of specific conduct, the complaint is subject to dismissal, even under the liberal construction afforded to *pro se* complaints. *See Frazier v. Michigan*, 41 F. App'x 762, 764 (6th Cir. 2002) (dismissing the plaintiff's claims where the complaint did not allege with any degree of specificity which of the named defendants were personally involved in or responsible for each alleged violation of rights); *Griffin v. Montgomery*, No. 00-3402, 2000 WL 1800569, at \*2 (6th Cir. Nov. 30, 2000) (requiring allegations of personal involvement against each defendant); *Rodriguez v. Jabe*, No. 90-1010, 1990 WL 82722, at \*1 (6th Cir. June 19, 1990) ("Plaintiff's claims against those individuals are without a basis in law as the complaint is totally devoid of allegations as to them which would suggest their involvement in the events leading to his injuries."); *see also Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994); *Krych v. Hvass*, 83 F. App'x 854, 855 (8th Cir. 2003); *Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974); *Williams v. Hopkins*, No. 06-14064, 2007 WL 2572406, at \*4 (E.D. Mich. Sept. 6, 2007); *McCoy v. McBride*, No. 3:96-cv-227RP, 1996 WL 697937, at \*2 (N.D. Ind. Nov. 5, 1996); *Eckford-El v. Toombs*, 760 F. Supp. 1267, 1272-73 (W.D. Mich. 1991). Plaintiff fails to even mention Defendant Woodin in the body of his complaint.

\*5 Moreover, Plaintiff's complaint against Defendant Woodin is not saved by his general references to actions by "Defendants." "Summary reference to a single, five-headed 'Defendants' does not support a reasonable inference that each Defendant is liable for retaliation." *Boxill v. O'Grady*, 935 F.3d 510, 518 (6th Cir. 2019) (citing *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 564 (6th Cir. 2011) (" 'This Court has consistently held that damage claims against government officials arising from alleged violations of constitutional rights must allege, with particularity, facts that demonstrate what each defendant did to violate the asserted constitutional right.' ") (quoting *Lanman*, 529 F.3d at 684)). Because Plaintiff fails to make allegations about Defendant Woodin's own active conduct, her complaint against Woodin falls far short of the minimal pleading standards under Fed. R. Civ. P. 8 (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). The Court therefore will dismiss Defendant Woodin from the action.

Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

## V. Remaining Defendants

Upon initial review, the Court concludes that Plaintiff's allegations are sufficient to state an Eighth Amendment claim against remaining Defendants Niemiec, Corizon, Schmidit, Butler, and Fountains.

## VI. Pending Motions

Plaintiff has filed three motions that are presently pending before the Court. The first is a motion seeking a temporary restraining order (TRO) (ECF No. 3). The second seeks a preliminary injunction (ECF No. 4). Plaintiff also has filed a motion to amend the complaint to seek relief from Defendants solely in their individual capacities (ECF No. 14).

Preliminary injunctions are "one of the most drastic tools in the arsenal of judicial remedies." [!\[\]\(e474458956c9a37fbf9586ddb60a7fa1\_img.jpg\) \*Bonnell v. Lorenzo\*, 241 F.3d 800, 808 \(6th Cir. 2001\)](#) (quoting [!\[\]\(4d1d3f2547aeece54bb6babd23f4121b\_img.jpg\) \*Hanson Trust PLC v. ML SCM Acquisition Inc.\*, 781 F.2d 264, 273 \(2d Cir. 1986\)](#)). The issuance of preliminary injunctive relief, whether in the form of a TRO or a preliminary injunction, is committed to the discretion of the district court. See [!\[\]\(ec45aa71601db5755c5e2662ad427708\_img.jpg\) \*Ne. Ohio Coal. v. Blackwell\*, 467 F.3d 999, 1009 \(6th Cir. 2006\)](#); [\*Nader v. Blackwell\*, 230 F.3d 833, 834 \(6th Cir. 2000\)](#). In exercising that discretion, a court must consider whether plaintiff has established the following elements: (1) a strong or substantial likelihood of success on the merits; (2) the likelihood of irreparable injury if the preliminary injunction does not issue; (3) the absence of harm to other parties; and (4) the protection of the public interest by issuance of the injunction. *Id.* These factors are not prerequisites to the grant or denial of injunctive relief, but factors that must be "carefully balanced" by the district court in exercising its equitable powers. [!\[\]\(8f6ad92394b094baf6a51f98af6c5abc\_img.jpg\) \*Frisch's Rest., Inc. v. Shoney's, Inc.\*, 759 F.2d 1261, 1263 \(6th Cir. 1985\)](#); see also [\*S. Galzer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.\*, 860 F.3d 844, 849 \(6th Cir. 2017\)](#) ("[T]hese are factors to be balanced, not prerequisites to be met."); [\*National Viatical, Inc. v. Universal Settlements Int'l, Inc.\*, 716 F.3d 952, 956 \(6th Cir. 2013\)](#) (same); [!\[\]\(f9f9ea03f3583772c68aa68b93940c29\_img.jpg\) \*Ne. Ohio Coal.\*, 467 F.3d at 1009](#) (same). Moreover, where a prison inmate seeks an order enjoining state prison officials, the court is required to proceed with the utmost care and must recognize the unique nature of the prison setting. See [!\[\]\(59f46dd5c4cd11cb2951365660a49a8d\_img.jpg\) \*Glover v. Johnson\*, 855 F.2d 277, 284 \(6th Cir. 1988\)](#); [\*Kendrick v. Bland\*, 740 F.2d 432, 438 n.3 \(6th Cir. 1984\)](#). The party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances. See [\*Overstreet v. Lexington-Fayette Urban Cty. Gov't\*, 305 F.3d 566, 573 \(6th Cir. 2002\)](#); [!\[\]\(b4637413b40d218566beec27b76416e4\_img.jpg\) \*Stenberg v. Cheker Oil Co.\*, 573 F.2d 921, 925 \(6th Cir. 1978\)](#).



Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

Under controlling Sixth Circuit authority, Plaintiff's "initial burden" in demonstrating entitlement to preliminary injunctive relief is a showing of a strong or substantial likelihood of success on the merits of his  [section 1983](#) action. *NAACP v. Mansfield*, 866 F.2d 162, 167 (6th Cir. 1989). Plaintiff has not made such a showing. Although the Court concludes that Plaintiff's allegations are sufficient to state an Eighth Amendment claim against the remaining officials for failure to treat his GID and failure to protect Plaintiff, it is not at all clear at this juncture that Plaintiff has a substantial likelihood of success on his Eighth Amendment claim.

\*6 Second, the presence of irreparable harm is not evident. A plaintiff's harm from the denial of a preliminary injunction is irreparable only if it is not fully compensable by monetary damages. See *Overstreet*, 305 F.3d at 578. Since the filing of Plaintiff's complaint and motions, Plaintiff has not attempted to supplement his complaint with allegations about new instances of assault. Moreover, Plaintiff admits in her complaint that inmate Nacho has been moved to a part of the unit where he has less ability to instigate harm to Plaintiff. Although Plaintiff may yet face some risk, she has not set forth specific facts showing an immediate, concrete and irreparable harm in the absence of an injunction.

Finally, the interests of identifiable third parties and the public at large weigh against an injunction. Decisions concerning prison security are vested in prison officials, in the absence of a constitutional violation. Any interference by the federal courts in the administration of state prisons is necessarily disruptive. The public welfare therefore militates against the issuance of extraordinary relief in the prison context, absent a sufficient showing of a violation of constitutional rights. See  *Glover*, 855 F.2d at 286-87. That showing has not been made here. Moreover, these factors predominate over any residual risk to Plaintiff of irreparable harm.

Accordingly, Plaintiff's motions seeking a TRO (ECF No. 3) and seeking a preliminary injunction (ECF No. 4) will be denied.

In his final pending motion, Plaintiff seeks to amend his complaint to sue all Defendants solely in their individual capacities. The Court will grant Plaintiff's motion.

### **Conclusion**

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Defendants Rewerts, Winger, Woodin, and the Gender Dysphoria Recommendation Committee will be dismissed for failure to state a claim, under  [28 U.S.C. §§ 1915\(e\)\(2\)](#) and

Salami v. Rewerts, Slip Copy (2020)

2020 WL 1316510

1915A(b), and  42 U.S.C. § 1997e(c). Plaintiff's Eighth Amendment claims against Defendants Niemiec, Corizon, Schmitz, Butler, and Fountains remain in the case. The Court will deny Plaintiff's motion for temporary restraining order (ECF No. 3) and motion for preliminary injunction (ECF No. 4). The Court will grant Plaintiff's motion to amend his complaint to seek relief from Defendants solely in their individual capacities.

An order consistent with this opinion will be entered.

### All Citations

Slip Copy, 2020 WL 1316510

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Zaya v. Adducci, Slip Copy (2020)

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2020 WL 2487490

Only the Westlaw citation is currently available.

United States District Court, E.D. Michigan, Southern Division.

Fawzi ZAYA, Petitioner,

v.

Rebecca ADDUCCI, et al., Respondents.

Case No. 20-10921

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Signed 05/14/2020

#### Attorneys and Law Firms

[Shanta Driver](#), Driver, Schon and Associates PLC, Detroit, MI, for Petitioner.

[Jennifer L. Newby](#), U.S. Attorney, Detroit, MI, for Respondents.

### **OPINION AND ORDER CONVERTING TEMPORARY RESTRAINING ORDER INTO PRELIMINARY INJUNCTION [9]**

[JUDITH E. LEVY](#), United States District Judge

\*1 On April 18, 2020, the Court issued an order granting a temporary restraining order and requiring Petitioner Fawzi Zaya's immediate release from Immigration and Customs Enforcement (ICE) Custody. (ECF No. 9.) On April 30, 2020, the Court, finding good cause, extended the TRO until May 14, 2020 and requested additional supplemental briefing. (ECF No. 12, PageID.768.) The Court now grants a preliminary injunction requiring Petitioner's continued release.

#### **I. Background**

Petitioner Fawzi Zaya is a forty-two-year-old citizen of Iraq. (ECF No. 7-1, PageID.509.) He has lived in the United States since March 1982. (ECF No. 1, PageID.21.) On December 19, 1997, Petitioner was convicted of Delivery over 50 Grams of Cocaine. (ECF No. 7-1, PageID.509.) Petitioner has also been convicted of domestic violence. (ECF No. 10, PageID.684.) On January 17, 2008, Petitioner was convicted of Second-Degree Murder. (ECF No. 7-1, PageID.509.) Upon Petitioner's parole from the Michigan Department of Corrections, ICE took him into custody

Zaya v. Adducci, Slip Copy (2020)

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pursuant to  8 U.S.C. § 1231(a)(2). (*Id.*) Petitioner has been detained at the Calhoun County Correctional Facility (CCCF) since March 24, 2020. (*Id.*)

Petitioner has several serious health conditions. He is obese (ECF No. 10, PageID.685) and suffers from high blood pressure, diabetes, and asthma. (ECF No. 2-2, PageID.247.) He also suffers from neural foraminal stenosis, a kind of spinal stenosis requiring the use of a wheelchair and a TENS (transcutaneous electrical nerve stimulation) unit. (*Id.*) Petitioner also has gout. (*Id.*) Respondent alleges that Petitioner has exaggerated his health conditions, but Respondent does not contest that Petitioner is obese and suffers from high blood pressure, diabetes, and asthma. (*Id.*)

On April 13, 2020, Petitioner filed both a Petition for Writ of Habeas Corpus (ECF No. 1) and an Emergency Motion for Temporary Restraining Order. (ECF No. 2.) The case was assigned to the Honorable Bernard A. Friedman. On April 13, 2020, the undersigned accepted reassignment of this case as a companion to Case No. 20-10829, *Malam v. Adducci*. Both cases involve Petitioners with serious underlying health conditions challenging on Fifth Amendment grounds their continued confinement at the Calhoun County Correctional Facility in light of the risks posed by the COVID-19 pandemic. The Court granted Petitioner's motion on April 18, 2020. (ECF No. 9.) After receiving supplemental briefing, the Court found good cause to extend the TRO until May 14, 2020 and ordered an additional round of supplemental briefing on whether additional precautions could be and were being implemented at the Calhoun County Correctional Facility. (ECF No. 12.) Respondent filed a supplemental brief on May 7, 2020. (ECF No. 13.) Petitioner filed a supplemental brief on May 11, 2020.<sup>1</sup> (ECF No. 14.)

<sup>1</sup> In its April 30, 2020 opinion, the Court noted that “[g]iven the significance of the issues presented by this case and the seriousness of Petitioner’s constitutional claims, particularly as they relate to the high risk to Petitioner’s health and life, the Court did not find [Petitioner’s April 29, 2020 brief] helpful to its consideration of his claims.” (ECF No. 12, PageID.747.) Petitioner’s most recent supplemental brief is no more useful. Again, Petitioner failed to address the majority of Respondent’s arguments or to provide a single legal citation in support of his own.

\*2 Because the Court finds that balancing the irreparable injury faced by Petitioner, his likelihood of success on the merits, and the public interest favors continued injunctive relief, the Court converts the TRO into a preliminary injunction.

## II. Legal Standard

Zaya v. Adducci, Slip Copy (2020)

“[P]reliminary injunctions are extraordinary and drastic remedies [ ] never awarded as of right.”

 *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015).

In determining whether to grant a preliminary injunction, courts evaluate four factors: 1) whether the movant has a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury absent an injunction; 3) whether granting the injunction would cause substantial harm to others; and 4) whether the public interest would be served by granting the injunction.

 *Northeast Ohio Coal. For Homeless and Serv. Emps. Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). These four factors “are not prerequisites that must be met but are interrelated considerations that must be balanced together. For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay.” *Id.* (internal quotations omitted).

### III. Analysis

In granting Petitioner a temporary restraining order, the Court found that his high risk of **COVID-19** infection in communal confinement and serious underlying health conditions supported a finding of irreparable injury absent an injunction (ECF No. 9, PageID.668–673); Petitioner had demonstrated a likelihood of success on the merits because Respondent’s precautions could not guarantee Petitioner reasonable safety (*id.* at PageID.673–676); and the **public interest** in public health and safety outweighed its interest in Petitioner’s continued detention. (*Id.* at PageID.676–678.)

The Court was unable to fully determine by the initial date for the expiration of the Temporary Restraining Order whether a preliminary injunction was warranted. Given Respondent’s uncontested argument regarding Petitioner’s danger to the community and risk of flight (ECF No. 10, PageID.704–706), the Court ordered supplemental briefing to better inform its adjudication. In particular, the Court sought additional information regarding the feasibility and implementation of additional precautionary measures at the Calhoun County Correctional facility, including testing for staff and detainees, mandatory personal protective equipment in the form of masks for staff and detainees, and guaranteed single-cell housing for Petitioner. (ECF No. 12, PageID.768.) Respondent informed the Court that

Respondents are able to guarantee individual housing for Petitioner. Calhoun has already begun providing surgical grade masks to all detainees and inmates. They are required to wear them outside the housing unit, but are permitted to wear them inside the housing unit. Detainees are issued a new mask upon request free of charge. Staff are required to wear masks while performing booking and

Zaya v. Adducci, Slip Copy (2020)

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intake, but are encouraged to wear masks at all times. At this time, Calhoun does not have plans to implement mandatory COVID-19 testing for all staff and detainees.

**\*3** (ECF No. 13, PageID.770–771 (internal citations omitted).)

The Court finds that Petitioner continues to demonstrate a high risk of irreparable injury absent an injunction. Although Petitioner’s likelihood of success on the merits is mixed, the public interest favors his continued release. On balance, the factors support granting a preliminary injunction.

### **A. Irreparable Injury**

In its April 30, 2020 Order, the Court found that “[i]n order for Respondent to sufficiently reduce the risk of irreparable injury to Petitioner—because of Petitioner’s heightened risk of severe illness and death—Respondent, ICE, and the Calhoun County Correctional Facility would need to provide COVID-19 testing to all staff and detainees.” (ECF No. 12, PageID.761.) On May 7, 2020, Respondent explained that “Calhoun does not have plans to implement mandatory COVID-19 testing for all staff and detainees.” (ECF No. 13, PageID.770–771.)

Moreover, on May 11, 2020, counsel for Respondent informed the Court by email that one detainee at the Calhoun County Correctional Facility has tested positive for COVID-19. According to counsel, the detainee was quarantined at intake and was isolated when he became symptomatic. On May 14, 2020, counsel for Respondent sent this supplemental email: “In an update to the below, four detainees had contact with the positive detainee and were also isolated and tested, none had been in general population. Three tested negative and one tested positive.”

As the Court recently held in a companion case, “emergence of COVID-19 at the Calhoun County Correctional Facility transforms a generalized yet substantial risk into a specific and immediate risk.” *Malam v. Adducci*, Case No. 20-10829 (E.D. Mich. May 12, 2020), ECF No. 68 at PageID.1914–15 (hereinafter *Malam* Order). Accordingly, the Court adopts, with one exception, the reasoning from its April 18, 2020 and April 30, 2020 Orders in this case with respect to irreparable injury.

The Court no longer finds that Petitioner’s [high blood pressure](#) or [asthma](#) increase his risk of an adverse outcome from COVID-19. In its April 30, 2020 Order, the Court found that “Respondent does not contest that Petitioner is obese and suffers from [high blood pressure](#), [diabetes](#), and [asthma](#), each of which places him at heightened risk of severe illness and/or death from COVID-19.



Zaya v. Adducci, Slip Copy (2020)

(ECF No. 12, PageID.748.) In *Malam*, the Court recently found that the public health evidence is uncertain regarding whether [high blood pressure](#) constituted an independent risk factor for a severe negative outcome from COVID-19, *see Malam* Order at PageID.1924, and that [asthma](#) constituted a risk factor if it is “moderate to severe.” *See id.* at PageID.1926. Petitioner does not directly address whether his [high blood pressure](#) increases his risk of a negative outcome from a COVID-19 infection. With regards to his [asthma](#), Petitioner alleges that “he has [asthma](#), for which he uses an inhaler. He is not allowed to keep his inhaler on him at Calhoun so if he needs it he has to find a guard and wait for someone to bring it to him” (ECF No. 2, PageID.225); additionally, he alleges that he “was denied treatment during [asthma](#) attacks.” (ECF No. 14, PageID.788.) Petitioner neither provides the Court with a definition of moderate to severe [asthma](#) nor describes the severity of his own. Accordingly, the Court no longer finds that Petitioner’s [high blood pressure](#) and [asthma](#) increase his risk of serious illness and/or death from COVID-19.

\*4 Nonetheless, Petitioner’s [obesity](#) and [diabetes](#) place him at a high risk of serious illness and/or death from COVID-19. Given the confirmed cases of COVID-19 at CCCF, and absent widespread testing to determine the scope of the outbreak and to prevent asymptomatic transmission, Petitioner has shown a high risk of irreparable injury in the form of loss of health or life from COVID-19 absent an injunction.

## **B. Likelihood of Success on the Merits**

Civil detainees’ Fifth Amendment claims are analyzed “under the same rubric as Eighth Amendment claims brought by prisoners.”  [Villegas v. Metropolitan Gov’t](#), 709 F.3d 563, 568 (6th Cir. 2013). Eighth Amendment claims require a showing of deliberate indifference,  [Farmer v. Brennan](#), 511 U.S. 825, 835 (1994), which includes showing an objective substantial risk of serious harm and a subjective culpable mental state.  [Villegas v. Metro. Gov’t](#), 709 F.3d 563, 568 (6th Cir. 2013) (citing  [Harrison v. Ash](#), 539 F.3d 510, 518 (6th Cir. 2008)).

### **1. Objective Component of Deliberate Indifference**

In its April 30, 2020 Order, the Court held that “[a]lthough the ... precautions taken at the Calhoun County Correctional Facility are important, they do not yet go far enough to be a reasonable response to a global pandemic with respect to detainees at heightened risk of severe illness and death from COVID-19.” (ECF No. 12, PageID.762.) And as the Court explained in *Malam*, “[t]he Court need not dwell on the distinctions between a high likelihood of irreparable harm and a substantial risk of serious harm—to the extent the former comes in the form of a risk to health or life, it satisfies the latter.” *Malam* Order at PageID.1934.

Zaya v. Adducci, Slip Copy (2020)

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Nonetheless, Respondent argued in her May 7, 2020 brief that “Petitioner does not establish that his exposure to COVID-19 is imminent, where reasonable precautions are in place, he already has a single cell, and there are no confirmed cases of COVID-19 at Calhoun.” (ECF No. 13, PageID.771.)

There are now two confirmed cases of COVID-19 at the Calhoun County Correctional Facility, and no widespread testing to determine the scope of the outbreak and whether Petitioner would be exposed to the virus upon return to the facility. Moreover, given the percentage of asymptomatic COVID-19 cases and the virus’ incubation period of up to fourteen days, Respondent cannot reasonably assert that the outbreak is—or will continue to be—limited to these two cases.

Additionally, the Court explained in detail in its April 30, 2020 Order why, “with respect to Petitioner, [Respondent’s] precautions do not go far enough to constitute a reasonable response to COVID-19.” (ECF No. 12, PageID.764.) The Court concluded that

in light of Petitioner’s underlying health conditions, the public health evidence available, and the exponential growth of COVID-19 infections within ICE detention centers, a reasonable response would include, at minimum, the following additional precautions: [m]andatory face masks for all detainees and staff; and g]uaranteed individual housing for Petitioner should he return to CCCF.

(*Id.* at PageID.765.)

The Court commends Respondent for her guarantee that Petitioner would have individual housing upon his return. However, as Petitioner argues,

Petitioner is wheelchair-bound and must wear adult diapers. Individual housing would not protect him from exposure to COVID-19. He is dependent on others to change his diapers and to bathe him, and therefore he cannot practice social distancing from Calhoun staff who will need to make extensive physical contact with him to care for him. Furthermore, Calhoun’s common areas do not allow for social distancing: [As Zaya declares,] “No one I encountered, guards or inmates, were practicing social distancing. It was impossible for inmates to stay at a safe distance from one another in the pod. We ate together in a collective room that could not accommodate social distancing.”

\*5 (ECF No. 14, PageID.789.)



Zaya v. Adducci, Slip Copy (2020)

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The Court finds that guaranteed individual housing in combination with Respondent's other existing precautions would still be insufficient to guarantee Petitioner's reasonable safety. The Court adopts the reasoning in its April 18 and 30, 2020 Orders with respect to the reasonability of Respondent's precautions and holds that the risk of COVID-19 infection to Petitioner, were he to return to the Calhoun County Correctional Facility, would be both imminent and substantial, satisfying the objective component of Petitioner's claim.

## 2. Substantial Component of Deliberate Indifference

Respondent argues that Petitioner cannot show the subjective component of his deliberate indifference claim. Respondent cites to two recent Circuit Court opinions, both of which held that without specific evidence of mental state, prisoners could not show deliberate indifference on the part of the Texas or Florida correctional systems where the jails alleged substantial compliance with CDC guidance for detention and correctional facilities. (ECF No. 13, PageID.775–778 (citing  *Valentine v. Collin*, No. 20-20207, 2020 WL 1934431 (5th Cir. Apr. 22, 2020) and  *Swain v. Junior* No. 20-11622, 2020 WL 2161317 (11th Cir. May 5, 2020)).)

In *Valentine*, 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.

 2020 WL 1934431 at \*4 (citations omitted). The court concluded that in finding objectively “inadequate measures as dispositive of the Defendants' mental state,” “the district court ... collapsed the objective and subjective components of the Eighth Amendment inquiry.” *Id.*

In *Swain*, the Eleventh Circuit cited to *Valentine* and stayed a similar injunction on the grounds that “the district court cited no evidence to establish that the defendants subjectively believed the measures they were taking were inadequate.”  2020 WL 2161317, at \*4.

Zaya v. Adducci, Slip Copy (2020)

Petitioner did not address this caselaw in his May 14, 2020 supplemental brief. (ECF No. 14.) Nor did Petitioner address the subjective component of his deliberate indifference claim in his initial motion (ECF No. 2), reply brief (ECF No. 8), or response to the Court’s April 18, 2020 Order.<sup>2</sup> (ECF No. 29.) However, Respondent raised a similar argument in *Malam*. There the Court found that “[c]ontrary to Defendants’ suggestion and distinct from *Valentine* and *Swain*, the record before the Court demonstrates that Defendants are aware that medically vulnerable detainees require additional protection, but nonetheless have declined to act.” *Malam* Order at PageID.1947–48. The Court relied on the Sixth Circuit in *Richko v. Wayne Cty.*, which held that “[b]ecause government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence.” *Id.* at PageID.1948 (citing 819 F.3d at 916 (6th Cir. 2016)).

<sup>2</sup> Petitioner’s only argument on this issue is that the Court “can simply apply the *Bell* test, [rather than the *Farmer* test], as recently reaffirmed by the Sixth Circuit in *Williamson Cty.*” (ECF No. 2, PageID.234.) Petitioner misreads Sixth Circuit precedent. Although the court in *J.H. v. Williamson Cty.* applied the *Bell* freedom from punishment standard to a pretrial detainee’s solitary confinement claim, it applied the dual-prong deliberate indifference standard to the detainee’s claim alleging inadequate medical and mental health care. 951 F.3d 709, 717, 722 (6th Cir. 2020.) As the Court held in *Malam*, “Absent more guidance from the Sixth Circuit, the Court will require [Petitioner] to show both the objective and subjective components of a deliberate indifference claim.” *Malam* Order at PageID.1934.

\*6 The Court explained,

At the Court’s May 7, 2020 videoconference hearing, Defendants conceded that they have not implemented any policies specific to the protection of medically vulnerable detainees, arguing instead that general precautionary measures serve to protect the higher risk population. CDC guidance for correctional and detention facilities does not address the specific needs of medically vulnerable detainees; it only notes that “[i]f the number of confirmed cases exceeds the number of individual medical isolation spaces available in the facility, be especially mindful of cases who are at higher risk of severe illness from COVID-19.” Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last reviewed May 7, 2020). Nor does ICE guidance fill the gap; to the extent that ICE Guidance addresses medically vulnerable detainees, it contemplates considering release as an option: “Upon being informed of

Zaya v. Adducci, Slip Copy (2020)

a detainee who may potentially be at higher risk for serious illness from exposure to COVID-19, ERO will review the case to determine whether continued detention is appropriate. ICE will make such custody determinations on a case-by-case basis, pursuant to the applicable legal standards, with due consideration of the public health considerations implicated.” (ECF No. 52-7, PageID.1591.) Indeed, as of April 16, 2020, ICE had released almost 700 noncitizen civil detainees nationwide. Matt Katz, ICE Releases Hundreds of Immigrants as Coronavirus Spreads in Detention Centers, NPR (Apr. 16, 2020) <https://www.npr.org/sections/coronavirus-liveupdates/2020/04/16/835886346/ice-releases-hundreds-as-coronavirusspreads-in-detention-centers>.

On the one hand, Defendants are aware of the heightened risk posed by COVID-19 to medically vulnerable detainees, and as such ICE has already released hundreds of people from ICE custody. On the other, Defendants have not—and seemingly will not—adopt precautions specific to this vulnerable population that public health evidence shows to be necessary. And despite five opportunities to do so in this case alone, Defendants have not provided the Court with the declarations of any medical professional or public health expert who can reconcile these two conflicting positions. As Defendants explained in another case challenging the constitutionality of civil detention at the Calhoun County Correctional Facility, “In issuing guidance, ICE relied on epidemiologists and also convened a working group between medical professionals, disease control specialists, detention experts, and field operators to identify additional enhanced steps to minimize the spread of the virus.” *Zaya v. Adducci*, Case No. 20-10921 (E.D. Mich. Apr. 23, 2020), ECF No. 10 at PageID.700 (internal citation omitted). Defendants fail to acknowledge or address the evidence submitted by Plaintiffs and the weight of public health evidence recognizing that absent specific precautions, Plaintiffs’ release constitutes the only reasonable response to an extraordinary and deadly pandemic. Plaintiffs Alhalmi and Cardona Ramirez have shown the subjective component of their deliberate indifference claim.

\*7 *Id.* at PageID.1950.

Unlike in *Malam*, Respondent has taken at least one precaution specific to Petitioner: guaranteed individual housing. Although this additional precaution is insufficient to obviate the substantial risk of serious harm Petitioner would face at the Calhoun County Correctional Facility in light of his mobility impairment and other personal care needs, it demonstrates Respondent’s willingness to provide Petitioner additional protection and makes Petitioner’s success on the merits less likely with respect to the subjective component of his claim.

The Sixth Circuit in *Six Clinics Holding Corp., II. v. Cafcomp Sys.* recognized that “in order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere

Zaya v. Adducci, Slip Copy (2020)

possibility of success.” 119 F.3d 393, 402 (6th Cir. 1997) (citing *Mason Cty. Med. Ass'n v. Knebel*, 563 F.2d 256, 261 n. 4 (6th Cir. 1977)). Given Petitioner’s failure to address the subjective component of his claim, and the fact that Respondent has promised to take an additional precaution specific to Petitioner, the Court finds Petitioner’s likelihood of success on the merits with respect to the subjective component of his deliberate indifference claim is not strong.

But as the court in *Six Clinics Holding Corp.*, II. further explained, “it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Id.* (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1989)). Petitioner has met this standard, though barely. The Court has found Respondent’s precautionary measures to be an unreasonable response to the COVID-19 pandemic considering Petitioner’s very serious underlying health conditions. Respondent has refused to implement additional precautions identified by public health experts as necessary to protect the health and lives of medically vulnerable detainees, even as ICE has issued guidance calling for the consideration of medically vulnerable detainees’ release. Petitioner’s likelihood of success on the merits may be uncertain, but circumstantial evidence raises substantial and difficult questions about Respondent’s mental state regarding Petitioner’s continued detention.

Accordingly, the Court finds the second factor to favor granting a preliminary injunction at this time.

### C. Public Interest

In her April 23, 2020 response, Respondent provided the Court with evidence pertaining to Petitioner’s serious criminal history and history of fleeing law enforcement. (ECF No. 10, PageID.705.) Petitioner failed to address Respondent’s argument in his response. (ECF No. 11.) Accordingly, in its April 30, 2020 Order, the Court found that Petitioner “is a danger to the community and a flight risk.” (ECF No. 12, PageID.752.) Petitioner again failed to address this evidence or the Court’s conclusion in his May 11, 2020 response. (ECF No. 14.) That said, Petitioner has now been released for twenty-five days; the Court has not received any reports that Petitioner has violated the terms of his release. His current age and medical condition would certainly limit his ability to flee or commit further crimes. The Court understands Respondent’s argument that Petitioner solicited, rather than directly participated in, the events leading to his conviction for Second-Degree Murder. (ECF No. 10, PageID.684.)

\*8 Nonetheless, the Court finds that the changes in Petitioner’s circumstances since that time significantly decrease Petitioner’s danger and risk of flight. In October 2019, a parole officer with the Michigan Department of Corrections (MDOC) found Petitioner eligible for parole. (ECF No.

Zaya v. Adducci, Slip Copy (2020)

1, PageID.27.) Petitioner was released from MDOC custody on parole on March 24, 2020. (ECF No. 7-1, PageID.509.) But for an ICE detainer, he would have been living in the community as of that date. With the help of a parole officer, Petitioner had even secured potential employment. (ECF No. 2-2, PageID.250.) During his incarceration, Petitioner took thirty classes relating to job skills, anger management, and religion. (ECF No. 2-2, PageID.250.) Petitioner received his GED and more than twenty certificates structured around cognitive reframing. (ECF No. 14-1, PageID.293.) Additionally, Petitioner has had two [strokes](#), suffers from [high blood pressure](#), [asthma](#), [diabetes](#), neural foraminal stenosis, and incontinence, and relies on a wheelchair for mobility. (ECF No. 14-1, PageID.792.) The Court concludes that Petitioner’s current condition, educational achievements, and completion of his criminal sentences mitigate his danger and risk of flight.

Moreover, the Court found in its April 30, 2020 order that “public health provides a countervailing interest against which the Court must balance Petitioner’s danger and risk of flight. Protecting public health and safety is in the public interest.” (ECF No. 12, PageID.767 (citing [Neinast v. Bd. Of Trustees](#), 346 F.3d 585, 592 (6th Cir. 2003) (recognizing public health and safety as legitimate government interests)).) The Court held that “absent testing, mandatory personal protective equipment, and individual housing for Petitioner, the public’s interest in public health in the midst of a global pandemic takes precedence over the public’s interest in Petitioner’s continued detention.” (*Id.* at PageID.768.) Respondent has shown a willingness to provide only one of those three additional precautions.

The Court recognizes the serious nature of Petitioner’s criminal history. However, given the severity of the public health crisis created by [COVID-19](#) and the change in Petitioner’s personal circumstances, the Court finds that the [public interest](#) favors his continued release.

#### **D. Balancing**

Petitioner has shown a high risk of irreparable injury in the form of loss of health or life from COVID-19 absent an injunction, a high likelihood of success on the merits of the objective component of his deliberate indifference claim, and a possibility of success on the merits of its subjective component. The public interest favors Petitioner’s continued release.

As the Sixth Circuit held in *Blackwell*, these factors “are not prerequisites that must be met but are interrelated considerations that must be balanced together. For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay.” [467 F.3d at 1009](#). (internal quotations omitted). Petitioner has a high risk of serious irreparable injury absent an injunction. See [Thakkur v. Doll](#), No. 1:20-cv-480,



Zaya v. Adducci, Slip Copy (2020)

2020 WL 1671563, at \*8 (M.D. Pa. Mar. 31, 2020) (“There can be no injury more irreparable than lasting illness or death.”). Although Petitioner’s likelihood of success on the merits is not assured, the Court finds Petitioner to nonetheless have a possibility of success. Under *Blackwell*, that is enough. Indeed, as the Supreme Court has stated,

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing.

 *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Furthermore, because the merits will most likely turn on Respondent’s state of mind, Petitioner need not continue to be exposed to conditions of confinement which present a substantial risk of serious harm while the Court further adjudicates that issue.

\*9 The public interest further warrants continued injunctive relief. The Court recognizes the public interest in Petitioner’s continued detention given his criminal history and history of fleeing law enforcement. But when considering Petitioner’s serious underlying health conditions, the two confirmed cases of **COVID**-19 at the Calhoun County Correctional Facility, and Respondent’s refusal to implement mandatory personal protective equipment or widespread testing, the **public’s interest** in safety and public health wins out.

On balance, the factors favor granting an injunction for the limited duration of the State of Emergency in Michigan (related to COVID-19). The Court will convert Petitioner’s temporary restraining order into a preliminary injunction.

### **E. Scope of Injunctive Relief**

Respondent argues that “[t]o the extent the Court elects to impose the conditions identified in this case, they are beyond what is required to defeat a deliberate indifference claim and would intrude on the purview of the Executive Branch.” (ECF No. 13, PageID.774.) Petitioner does not, at this time, seek sweeping injunctive relief that would insert the Court into the day-to-

Zaya v. Adducci, Slip Copy (2020)

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day management of either U.S. Immigration and Customs Enforcement (ICE) or the Michigan Department of Corrections (MDOC); instead, Petitioner requests only his continued release. The Court's preliminary injunction is limited to that narrow relief. It does not require affirmative action from Respondent, nor does the Court make a finding regarding whether implementing the identified precautions would constitute a reasonable response to COVID-19. The Court will adjudicate those issues if and when they are before it.

#### **IV. Conclusion**

For the reasons stated above, the Court **GRANTS** a preliminary injunction mandating Petitioner Zaya's continued release. Petitioner remains subject to the following restrictions: he must comply with all Michigan Executive Orders; and he must appear at all hearings pertaining to his immigration proceedings. Respondent may impose other reasonable nonconfinement terms of supervision. Respondent is further **RESTRAINED** from arresting Petitioner for civil immigration detention purposes until the State of Emergency in Michigan (related to COVID-19) is lifted or until further Court Order stating otherwise.

IT IS SO ORDERED.

#### **All Citations**

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Refunjol v. Adducci, Slip Copy (2020)

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United States District Court, S.D. Ohio, Eastern Division.

Adenis Enrique Prieto REFUNJOL, et al., Plaintiffs,

v.

Director Ice Rebecca ADDUCCI, et al., Defendants.

Case No. 2:20-cv-2099

|

Filed 04/27/2020

**Attorneys and Law Firms**

Elizabeth Bonham, ACLU of Ohio, Cleveland, OH, for Plaintiffs.

**OPINION AND ORDER****SARAH D. MORRISON**, UNITED STATES DISTRICT JUDGE

\*1 This matter is before the Court on a Motion for Temporary Restraining Order (“TRO”) for three individuals in the custody of Immigration and Customs Enforcement (“ICE”). (ECF No. 2.) On April 27, 2020, the Court held a preliminary conference (the “Conference”) on the TRO pursuant to Local Rule 65.1. For the reasons discussed below, the Motion for TRO is **GRANTED**. During the Conference, Petitioners also made an oral motion to file their medical records under seal. That motion is **GRANTED**.

**I. FACTUAL BACKGROUND**

Petitioners’ motion comes against the backdrop of a global pandemic of an infection so widely known at this point that it requires little explanation. COVID-19 has ravaged the nation and the world at whirlwind speed, and the infection, hospitalization, and death counts are changing so quickly that they are outdated as quickly as they are published. Regardless, numbers are one of the best ways to describe the real danger that Petitioners fear. As of this writing, the United States has at least 977,256 COVID-19 cases and 50,134 deaths. The New York Times, *Coronavirus in the U.S.: Latest Map and Case Count* (Apr. 27, 2020, 1:37 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>. Ohio has seen at least 16,325 infected, while at least 3,232 have



Refunjol v. Adducci, Slip Copy (2020)

been hospitalized and 753 have died. <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/home> (Apr. 27, 2020, 2:00 PM).

While there is much that remains unknown about the virus, we know that some individuals are more susceptible to infection than others, including individuals housed in close quarters, like those in jails and prisons. *See* <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited Apr. 27, 2020). We also know that some individuals are at risk of more severe consequences from infection than others, including those with particular health conditions. *See* <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited Apr. 27, 2020). Individuals with [asthma](#), some types of heart conditions and [hypertension](#), and those with compromised immune systems are particularly vulnerable. *Id.*; <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last visited Apr. 27, 2020). ICE also recognizes that individuals with [asthma](#) and those who are immunocompromised are in the “high-risk” category. (ECF No. 2-5, at 6–7.)

Petitioners ask this Court for relief because they argue that they fall into these high-risk categories and that Respondents are jeopardizing their health and safety. Each is held in ICE detention at the Butler County Jail (“Butler”)<sup>1</sup> or the Morrow County Jail (“Morrow”), and each claims to have medical conditions placing him at high risk of severe consequences were he to contract COVID-19. (Pet. for Writ of Habeas Corpus ¶¶ 3, 12, ECF No. 1.)

<sup>1</sup> Although Butler County is in the Western Division of this District, the Court finds that Petitioners are similarly-situated and that it is a sensible allocation of the Court’s resources to decide Petitioners’ cases together.

\*2 Petitioner Adenis Enrique Prieto Refunjol is a Venezuelan national who has been in ICE detention since November 2019 and currently is detained at Butler. (Karla Donado Decl. ¶¶ 2, 3(a), ECF No. 2-3.) He is not subject to a final removal order. (ECF No. 1 ¶ 61.) Mr. Refunjol has [hypertension](#) and [asthma](#). (Donado Decl. ¶ 4.) If he is released, Mr. Refunjol plans to drive to Florida with his brother where he intends to quarantine for fourteen days with his fiancé’s neighbor. (*Id.* ¶ 6.) However, counsel represented during the Conference that he would stay in Ohio if required to do so.

Petitioner Mory Keita is believed to be a Guinean national, and he was brought to the United States at the age of three. (Mory Keita Decl. ¶ 3.) He has been in ICE detention since February 2020 and is currently detained at Morrow. (*Id.* ¶ 5.) He is not subject to a final removal order. (ECF No. 1 ¶ 54.) Mr. Keita has been in ICE custody before and has been previously released. (Keita

Refunjol v. Adducci, Slip Copy (2020)

Decl. ¶ 5.) He has [asthma](#) but has been denied access to an inhaler since being detained at Morrow. (*Id.* ¶ 6.) If he is released, Mr. Keita intends to quarantine for fourteen days in a friend's house in Columbus, Ohio. (*Id.* ¶ 13.)

Petitioner Sidi Njie is a Gambian national who has been in ICE detention since June 2019. (Nazly Mamedova Decl. ¶ 3.) Mr. Njie has been detained at Morrow since January 2020. (*Id.* ¶ 3.) He was transferred from Butler where he had been detained since June 2019. (*Id.*) Mr. Njie is recovering from [thyroid cancer](#), and he has not been deemed cancer-free. (Brandy Jatta Decl. ¶ 5.) After his [cancer diagnosis](#), Mr. Njie underwent surgery to have his thyroid removed. (*Id.*) He is still supposed to go to the doctor for regular scans and treatments, although he has not been able to do so since his detention. (*Id.*; Mamedova Decl. ¶¶ 9–10.) The [thyroid cancer](#) has compromised Mr. Njie's immune system, and he has been told that he is more susceptible to infection as a result of his surgery. (Mamedova Decl. ¶ 9.) If he is released, Mr. Njie intends to quarantine in a room in his family home outside of Columbus, Ohio. (*Id.* ¶ 13; Jatta Decl. ¶ 8.)

Butler and Morrow are both used as long-term detention facilities for ICE detainees. (ECF No. 1 ¶ 2.) ICE transfers detainees between the two facilities and also transfers detainees from the Franklin County Jail ("Franklin") to both facilities. (*Id.*) All three facilities have now seen confirmed cases of COVID-19.<sup>2</sup> Morrow continues to accept new detainees from the public, from Butler, and from Franklin, and new detainees are not quarantined. (Jatta Decl. ¶¶ 7(a), (b); Keita Decl. ¶ 8.)

<sup>2</sup> See Jail inmate tests positive for COVID-19, <https://www.morrowcountysentinel.com/news/31606/jail-inmate-tests-positive-for-covid-19>, (last visited Apr. 27, 2020); Butler Cty. Sheriff's Office, *First Confirmed COVID-19 Case in Butler County Jail*, <https://www.butlersheriff.org/2020/04/13/first-confirmed-covid-19-case-in-butler-county-jail/> (last visited Apr. 27, 2020); *2 inmates at Franklin County jail test positive for COVID-19*, <https://www.nbc4i.com/community/health/coronavirus/2-inmates-at-franklin-county-jail-test-positive-for-covid-19/> (last visited Apr. 27, 2020).

Morrow detainees are confined to one room containing around eighty men. (Jatta Decl. ¶ 6; Keita Decl. ¶ 7.) The detainees eat, sleep, and spend all of their time in this room. (Jatta Decl. ¶ 6; Keita Decl. ¶ 7.) The room contains about 100 beds, with approximately one foot between each bed. (Jatta Decl. ¶ 6.) The detainees share one bathroom, one telephone, and one water fountain. (*Id.* ¶ 6; Keita Decl. ¶ 7.) Until recently, detainees were not provided with soap but had to buy it from the Morrow commissary. (Mamedova Decl. ¶ 8(e).) While Respondents represent that a local news story has reported that Morrow is cleaning the facility three times per day, Petitioners contend that detainees are only provided with soap that is so watered-down that it does not lather. (*Id.*) They are not provided with alcohol-based hand sanitizers. (*Id.*)

Refunjol v. Adducci, Slip Copy (2020)

\*3 At some point during the week of April 13, 2020, an ICE detainee was introduced into Morrow's general population. (Jatta Decl. ¶ 7(d).) This detainee was febrile and had a cough. (*Id.*) That individual was then transferred to Butler (*Id.*) During that same week, ICE transferred two detainees from Franklin to Morrow's general population, both of whom began exhibiting flu-like symptoms within a few days. (*Id.* ¶ 7(f).) Approximately one week later, one of these individuals was quarantined and was confirmed to be infected with COVID-19. (*Id.* ¶7(f), (g).) It does not appear that other detainees have been tested.<sup>3</sup> (*See id.* ¶ 7(h).)

<sup>3</sup> According to local news, no other individuals at Morrow "have met the criteria for testing." <https://www.morrowcountysentinel.com/news/31606/jail-inmate-tests-positive-for-covid-19>.

While it Butler has taken steps to reduce its headcount and to isolate new transfers, it appears that detainees are still confined to shared cells. (*See* Donado Decl. ¶ 3(a).) And as with Morrow, there are individuals in the jail's general population with flu-like symptoms. (*See id.* ¶ 3(b).) Butler provides detainees with soap but not disinfectants. (*Id.* ¶ 3(c).)

Most of the information above comes from Petitioners, and the Court recognizes the potential for unreliability and even puffery in this information. For their parts, Respondents were unable to offer much information during the Conference. This is not a criticism but an observation. The Court recognizes that Respondents had little time to gather the necessary information and that accurate information is exceptionally difficult to gather in this ever-changing environment. Infection rates at Butler and Morrow are currently unknown as are testing rates. Respondents were not able to confirm Petitioners' health conditions and were not willing to concede that they were unusually susceptible to dangerous consequences were they to become infected.

## II. STANDARD OF REVIEW

The Court must consider four factors in determining whether to issue a TRO: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable harm; (3) whether the TRO would substantially harm third parties; and (4) whether the TRO would serve the public interest. *York Risk Servs. Grp., Inc. v. Couture*, 787 F. App'x 301, 304 (6th Cir. 2019). These four factors are not prerequisites, but rather they are to be balanced.  *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). Dispositive weight should not necessarily be given to one factor over the others. *York*, 787 F. App'x at 304–05.

Refunjol v. Adducci, Slip Copy (2020)

### III. ANALYSIS

Petitioners have brought a Fifth Amendment claim alleging that their conditions of confinement amount to “punishment” and thus violate their Fifth Amendment rights. Under the Fifth Amendment’s due process clause, “ ‘a detainee may not be punished prior to an adjudication of guilt.’ ” *J.H. v. Williamson Cty.*, 951 F.3d 709, 717 (6th Cir. 2020) (quoting *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)). This same standard applies in the civil detention context. See *Youngberg v. Romeo*, 457 U.S. 307, 320–21 (1982). A pretrial detainee can demonstrate that he has been unconstitutionally “punished” under the Fifth Amendment by showing intentional punishment or “by showing that a restriction or condition is not rationally related to a legitimate government objective or is excessive in relation to that purpose.” *J.H.*, 951 F.3d at 717. The question is whether the latter—unintentional punishment—exists here.<sup>4</sup>

<sup>4</sup> Petitioners also argue that the Eighth Amendment may apply here but that they are primarily asserting their claims under the Fifth Amendment. The Court agrees that the Fifth Amendment governs and warrants the TRO and thus does not address the Eighth Amendment’s deliberate indifference standard.

#### 1. Likelihood of Success on the Merits

\*4 Respondents undoubtedly have a legitimate interest in detaining immigrants in removal proceedings in order to ensure that they will appear for future court proceedings and that the government will be able to deport them. And in “normal times,” this interest may well carry the day in most cases of detainees seeking release from ICE custody. See *Rafael L.O. v. Tsoukaris*, No. 20-3481, 2020 WL 1808843, at \*7 (D.N.J. Apr. 9, 2020). But this is not an interest that will necessarily supersede any catastrophic conditions in a detention center. A court in another jurisdiction has constructed an apt analogy:

[C]onsider if civil detainees were being housed in a facility in the direct path of a hurricane and that the facility was unlikely to withstand the force of the storm. The government would still have a legitimate governmental interest in ensuring that the detainees appeared for immigration court – but the government would not have a legitimate interest in housing the detainees in that particular facility during the hurricane. COVID-19, and its associated risks, is the difference maker – it changes the equation in evaluating the government’s legitimate objectives.

*Id.* Morrow and Butler are in the eye of a storm. Based on the information currently before this Court, Petitioners are uniquely in the path of that storm, and temporary release is the only way to safeguard them.

While Respondents have an interest in detaining Petitioners, that interest gives way where the circumstances of detention may severely jeopardize Petitioners' health. See *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at \*9–12 (E.D. Mich. Apr. 5, 2020). Although Respondents are not yet willing to concede the fact of Petitioners' medical conditions, Respondents' own guidance acknowledges that some of Petitioners' asserted conditions place them in a high-risk category. (See ECF No. 2-5, at 6–7 (classifying immunocompromised detainees and those with “moderate to severe asthma” as “high-risk”).)

Moreover, the balance of Petitioners' and Respondents' interests is particularly skewed because Petitioners are not apparent flight risks.<sup>5</sup> All have family in the United States, and Mr. Keita and Mr. Njie have family in Ohio. Mr. Njie and Mr. Refunjol are both pursuing immigration relief in the hopes of remaining in the country. And Mr. Keita has been in and out of ICE custody multiple times with no apparent attempts to flee. It is not clear that Respondents have any interest in detaining Petitioners beyond ensuring their appearance at future proceedings, so without any risk of flight, the interest in detention is small.

<sup>5</sup> Nor does it appear that Petitioners pose any danger to the community, although it is not clear how any such risk should factor into the Court's analysis here. Mr. Refunjol and Mr. Njie have minimal, nonviolent criminal histories. While Mr. Keita has a more extensive criminal history, there is still no evidence in the record that he is a danger to the community. This is bolstered by the fact that ICE has previously released Mr. Keita from detention multiple times.

In contrast to this minimal risk of flight, the risk of infection and potentially catastrophic consequences is great. There is no dispute that Butler and Morrow each has at least one confirmed COVID-19 infection. Nor is there any dispute that infection easily spreads in a jail setting. Even assuming that Butler and Morrow isolate symptomatic prisoners (and there is presently a question whether they have taken that step), that is inadequate under the circumstances. COVID-19 can be transmitted by asymptomatic individuals. <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html> (last visited Apr. 27, 2020). Neither Butler nor Morrow has taken any precautions against such transmission, nor does the Court imagine that they could, short of quarantining each person in the facility.



Refunjol v. Adducci, Slip Copy (2020)

\*5 And while many prisoners may not be severely impacted by the virus, Petitioners are different. Each has identified an underlying condition that may result in severe health effects were he to become infected. In short, the risk of infection for these three men is too great to bear under the circumstances.

The Court acknowledges that Respondents have not been able to respond fully to the Motion for TRO based on an inability to confirm many of the facts that Petitioners allege. But this is not a reason to deny a request for a TRO. In fact, Rule 65 specifically contemplates that there will be circumstances where granting a TRO is appropriate even before a respondent has had an opportunity to respond at all. *See Fed. R. Civ. P. 65(b)* (outlining circumstances where TRO may issue without notice to adverse party). Respondents will have a full opportunity to present any facts that they may gather at a preliminary injunction hearing. In addition, the Court has offered to hold a hearing this week. If, based on their evidence, Respondents are able to satisfy the Court's concerns, the Court can decline to issue an injunction. But that is not reason to deny the request for a TRO given the dangerous circumstances that Petitioners allege.

### a. Irreparable Harm

Regarding irreparable harm, it is well documented that COVID-19 has terrorized the world with many dying and many growing severely ill. The most vulnerable among us have borne the brunt of this disease, including those with underlying medical conditions. Petitioners all have underlying medical conditions that place them in the group who is most at risk of serious consequences from infection. As explained above, then, there is a great risk of irreparable harm by Petitioners.

### b. Risk of Harm to Third Parties and Public Interest

In a constitutional case, as here, “an inquiry into the public interest is difficult to separate from the likelihood of success on the merits because ‘the public interest is promoted by the robust enforcement of constitutional rights.’ ”  *Rhinehart v. Scutt*, 509 F. App'x 510, 516 (6th Cir. 2013) (quoting  *Am. Freedom Def. Initiative v. Suburban Mobility for Reg. Transp.*, 698 F.3d 885, 896 (6th Cir. 2012)). And “[i]t is always in the public interest to prevent the violation of a party’s constitutional rights.”   *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). It is also in the public interest to ensure the just and humane treatment of the populace as a whole, inclusive of those detained in our jails and prisons. *Cf.*  *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (“The Constitution ‘does not mandate comfortable prisons,’ but neither

Refunjol v. Adducci, Slip Copy (2020)

does it permit inhumane ones....” (internal citation omitted) (quoting  *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)).

As explained above, based on the evidence in the record, the Court sees minimal risk to the community by ordering the release of Petitioners and subjecting them to quarantine. And in terms of the public interest, the Court finds that the public interest is served by Petitioners’ release. The **public interest** is served by the vindication of their constitutional rights, to be sure, but the **public interest** is also served by minimizing the number of **COVID-19** infections. More infections in Butler and Morrow means not only putting those who are detained and work there in danger, but also the surrounding community where those employed at the jails live. More infections beget more infections. That is the whole point of social distancing. It protects us all because it helps to minimize the spread of this dangerous infection and it ensures that our hospitals do not become overwhelmed.

### c. Balancing the Factors

\*6 The Court concludes that all four factors weigh in Petitioners’ favor at this time. Respondents’ minimal interest in detaining individuals who are not a risk of flight is heavily outweighed by the strong interest of Petitioners and the community as a whole in protecting the health of Petitioners and the rest of us.

## IV. CONCLUSION

For the reasons described above, the Court **GRANTS** Petitioners’ Motion for TRO and **ORDERS** the following:

Petitioners are to be released immediately.<sup>6</sup> Petitioners are ordered to quarantine themselves for the next fourteen days in compliance with the guidelines issued by the Centers for Disease Control and Prevention (“CDC”) and the Ohio Department of Health (“ODH”). Petitioners are ordered to file declarations, as soon as possible after their release, confirming that they will comply with this quarantine order and that they will comply with CDC and ODH guidelines.

<sup>6</sup> During the Conference, the Court ordered the Petitioners to provide certain information to Respondents prior to their release. Respondents represent that Petitioners have provided the requisite information, so the Court finds immediate release to be appropriate.

Refunjol v. Adducci, Slip Copy (2020)

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Petitioners are ordered to remain on home detention following the conclusion of this fourteen-day quarantine. Petitioners will not be subject to GPS monitoring.

In the case of Petitioner Adenis Enrique Prieto Refunjol, he may not leave Ohio until Respondents have approved his planned living arrangements in Florida. Any objections by Respondents regarding Mr. Refunjol's living arrangements or by Petitioners in the event Respondents withhold approval are to be filed with this Court as soon as possible.

The Court **GRANTS** Petitioners' Motion to File their relevant medical records under seal, and Petitioners shall file these medical records as soon as possible.

The Court will hold a preliminary injunction hearing on Monday, May 11, 2020, at 1:30pm. This TRO is to remain in effect until the conclusion of the preliminary injunction hearing.

**IT IS SO ORDERED.**

#### **All Citations**

Slip Copy, 2020 WL 1983077

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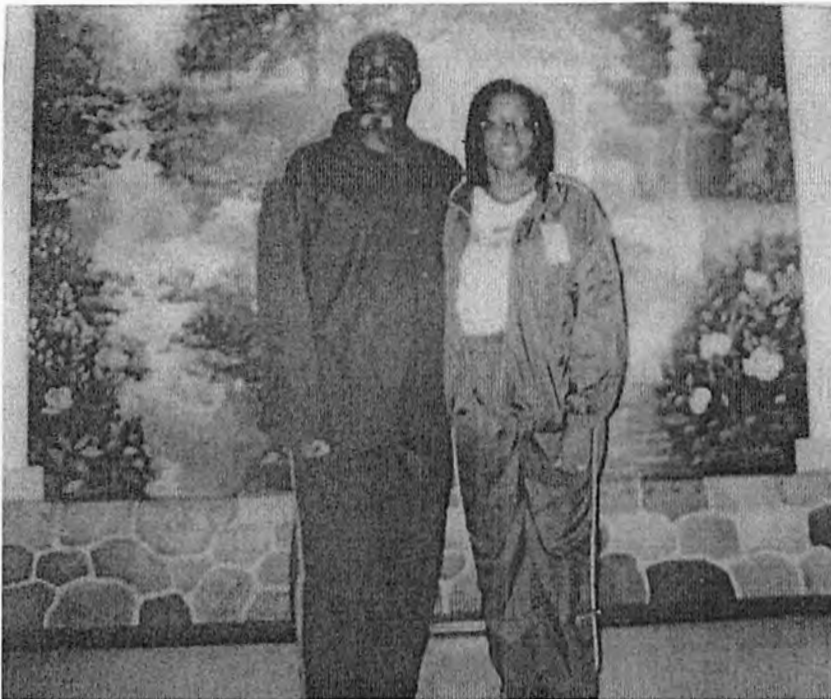
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## Michigan ranks highest in nation for prisoner deaths from coronavirus

Angie Jackson and Kristi Tanner, Detroit Free Press Published 6:01 a.m. ET May 9, 2020 | Updated 9:05 a.m. ET May 9, 2020



**Debra Matthews is pictured with her brother John Thompson during a visit in prison in 2014. Thompson died May 4 of COVID-19. (Photo: Debra Matthews)**

The last time Debra Matthews spoke to her brother, a nurse held the phone to his ear as he lay in a hospital bed on a ventilator.

John Thompson, 64, had COVID-19 and had been on life support for nearly two weeks after becoming ill at Lakeland Correctional Facility in Coldwater. Over the phone from her home in Indianapolis on May 2, Matthews encouraged her older brother to keep fighting.

"I was still hopeful," she said. "I had spoken with one of his doctors, and they were looking for the plasma antibodies for him."

Thompson died two days later. Reflecting now, Matthews realizes her brother was tired. He was tired from illness that had plagued him in recent years. Tired from 37 years in prison.

Thompson is among 49 state prisoners who have died of complications of COVID-19. The Michigan Department of Corrections has logged more coronavirus deaths than any other state prison system and ranks second nationwide behind New Jersey for prisoner deaths per capita, according to The Marshall Project ([https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20200502-1975&utm\\_source=The+Marshall+Project+Newsletter&utm\\_campaign=65f6ef5966-EMAIL\\_CAMPAIGN\\_2020\\_05\\_02\\_11\\_03&utm\\_medium=email&utm\\_term=0\\_5e02cdad9d-65f6ef5966-174599736](https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20200502-1975&utm_source=The+Marshall+Project+Newsletter&utm_campaign=65f6ef5966-EMAIL_CAMPAIGN_2020_05_02_11_03&utm_medium=email&utm_term=0_5e02cdad9d-65f6ef5966-174599736)), a nonprofit journalism outfit that reports on the criminal justice system and is tracking the virus in prisons across the country.

#### ADVERTISEMENT

MDOC also has more deaths from COVID-19 than the federal prison system, which houses more than 172,000 people nationwide, a population that's nearly five times larger than MDOC's population of roughly 38,000.

Two MDOC staff have died from COVID-19.

As the death toll behind bars rises, families and advocates say they grapple with feelings of helplessness.

"When you have been in prison yourself and almost every single day you read about more incarcerated people dying from COVID-19, it is devastating," said Joshua Hoe, policy analyst for Safe and Just Michigan, who was formerly incarcerated. "None of these people were sentenced to die from this virus and how we choose to respond says a lot about how much worth as a society we place on incarcerated lives."

More: [Prisoners sue Michigan Department of Corrections over coronavirus response \(/story/news/local/michigan/2020/04/30/michigan-department-of-corrections-class-action-lawsuit-coronavirus-in-prisons/3047921001/\)](#)

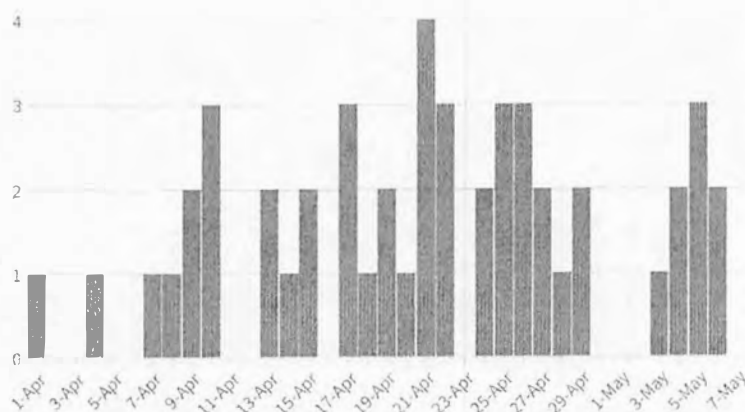
More: [Prison officers with allergies can sue over inmate leader dog training program \(/story/news/local/michigan/2020/05/08/macomb-corrections-officers-allergies-lawsuit-prison-leader-dog-program/3094800001/\)](#)

## Prisoners vulnerable to illness

A prisoner at Parnall Correctional Facility near Jackson was the [first to die of the virus \(/story/news/local/michigan/2020/04/04/michigan-prisoner-dies-coronavirus-joe-kearney/2943364001/\)](#) on April 1. Just over a month later, a total of 49 prisoners have succumbed to COVID-19.

**Number of Michigan COVID-19 prisoner deaths by day**

Number of deaths



SOURCE Michigan Department of Corrections • NOTE Date of death is identified as the listed discharge date in the Offender Tracking Information System.

✱ A Flourish chart ([https://public.flourish.studio/visualisation/2302423/?utm\\_source=showcase&utm\\_campaign=visualisation/2302423](https://public.flourish.studio/visualisation/2302423/?utm_source=showcase&utm_campaign=visualisation/2302423))

([https://public.flourish.studio/visualisation/2302423/?utm\\_source=embed&utm\\_campaign=visualisation/2302423](https://public.flourish.studio/visualisation/2302423/?utm_source=embed&utm_campaign=visualisation/2302423))

Those who have died range from 47 to 86 years old. Just over half were 65 years or older.

Eighteen deaths, or more than a third, were prisoners at Lakeland Correctional Facility. There, about 17% of prisoners are 65 and older, and many prisoners have chronic health conditions ([/story/news/local/michigan/2020/04/25/coronavirus-cases-michigan-prison-surge-widespread-testing-prisoners/3002811001/](https://story/news/local/michigan/2020/04/25/coronavirus-cases-michigan-prison-surge-widespread-testing-prisoners/3002811001/)).

**Prisoner COVID-19 cases and deaths by location**

Search in table

Page 1 of 4 &gt;

| Correctional facility      | % of confirmed tests | Number of confirmed cases | Deaths |
|----------------------------|----------------------|---------------------------|--------|
| Lakeland (Coldwater)       | 54.3%                | 791                       | 18     |
| Parnall (Jackson)          | 10.8%                | 177                       | 10     |
| Detroit Reentry Center     | 7.5%                 | 19                        | 2      |
| Macomb (Lenox Twp)         | 7.3%                 | 100                       | 5      |
| G. Robert Cotton (Jackson) | 38.6%                | 680                       | 1      |

Note: Facility prison population data used to calculate rates are from March 22, when the first COVID-19 case was identified. Only locations with confirmed prisoner COVID-19 cases as of Thursday evening are included.

Source: Free Press analysis of Michigan Department of Corrections data • Created with Datawrapper

"The elderly are more at risk," said Dr. Marc Stern, former medical director of the Washington Department of Corrections and faculty member at the University of Washington's School of Public Health. "And whereas we use 65 as the definition of elderly in the community, in prison, we should be using an age that's 10 or 15 years younger."

**Exhibit 19 - Michigan ranks highest in Death from coronavirus**

Experts say prisoners are more likely to suffer from infectious disease than the general public. An estimated 40% of people incarcerated (<https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf>) in jails and prisons have at least one chronic medical condition.

A number of factors — environmental living conditions, physical trauma, living in close quarters — can make incarcerated individuals vulnerable to illness, said Dr. Warren Ferguson, professor and senior vice chair of the Department of Family Medicine and Community Health at the University of Massachusetts Medical School.

The quality of food in prisons puts people at higher risk for diabetes and obesity. People who inject drugs in prison are at higher risk for infection such as HIV and hepatitis C, said Ferguson, who is also director of academic programs for the Health and Criminal Justice Program at UMass Medical School.

As of Friday morning, 2,090 state prisoners were confirmed to have the coronavirus. Results (<https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronavirus-covid-19-250f43144337>) were pending for nearly 7,500 prisoners as the Department of Corrections wrapped up testing of all inmates (<https://story/news/local/michigan/2020/05/02/coronavirus-michigan-prisoners-upper-peninsula-testing-national-guard/3072875001/>) at six prisons in the Upper Peninsula, a collaboration with the Michigan National Guard.

Michigan has tested nearly 12,000 prisoners, which far exceeds testing by any of the 38 other states that reported that data to The Marshall Project.

MDOC has the third highest number of COVID-19 cases after Ohio and the Federal Bureau of Prisons. The department ranks fourth in cases per capita.

## COVID-19 prisoner cases by state

Search in table

Page 1 of 4 >

| Prison system  | Cases per 10,000 prisoners | Total COVID-19 cases ▼ |
|----------------|----------------------------|------------------------|
| Ohio           | 884                        | 4,312                  |
| Federal        | 157                        | 2,701                  |
| Michigan       | 548                        | 2,090                  |
| Tennessee      | 926                        | 1,959                  |
| Texas          | 95                         | 1,336                  |
| Arkansas       | 519                        | 944                    |
| North Carolina | 186                        | 627                    |
| Kansas         | 622                        | 615                    |
| Virginia       | 203                        | 580                    |
| Indiana        | 186                        | 500                    |
| Connecticut    | 391                        | 478                    |
| New York       | 97                         | 415                    |
| California     | 34                         | 398                    |
| Florida        | 43                         | 393                    |
| Massachusetts  | 429                        | 351                    |

Note: A dash "-" reflects that data were not available or a state did not respond as of May 6. Michigan COVID-19 prisoner cases are as reported by the Michigan Department of Corrections on May 7.

Source: The Marshall Project • Created with Datawrapper

Nationwide, at least 20,119 people in prison have tested positive for the virus and 304 have died as of Wednesday, according to The Marshall Project.

Fifty Michigan prisoners were hospitalized with the virus as of Wednesday evening, said Chris Gautz, Department of Corrections spokesman.

As of Friday, 303 staff members across the state have tested positive.

In correctional facilities where there are high rates of infection, Stern says it is important to consider the quality of health care that prisoners receive.

## Exhibit 19 - Michigan ranks highest in Death from coronavirus

"Generally, in the prison system, if health care delivery was inadequate prior to the COVID-19 outbreak, then there's a very good likelihood that the quality of health care is even worse now," Stern said.

"It may explain not only the infection rate but more importantly, the death rate. Because patients may have trouble getting seen for their symptoms. And when they're seen, the care that they get maybe suboptimal."

The Michigan Department of Corrections has a rate of 13 deaths per 10,000 prisoners. As of Wednesday, the New Jersey Department of Corrections had a rate of 21 deaths per 10,000 prisoners, according to data from The Marshall Project. New Jersey's prison population is about half the size of MDOC.

## COVID-19 prisoner deaths by state

Search in table

Page 1 of 6 >

| Prison system | Deaths per 10,000 prisoners | Number of deaths ▾ |
|---------------|-----------------------------|--------------------|
| Michigan      | 13.0                        | 49                 |
| Ohio          | 8.6                         | 42                 |
| Federal       | 2.4                         | 42                 |
| New Jersey    | 21.0                        | 38                 |
| Texas         | 1.6                         | 23                 |
| New York      | 3.5                         | 15                 |
| Indiana       | 4.8                         | 13                 |
| Illinois      | 3.3                         | 12                 |
| Georgia       | 1.8                         | 10                 |
| Florida       | 0.8                         | 7                  |

Note: A dash "-" reflects that data were not available or a state did not respond as of May 6. Michigan prisoner deaths are as reported by the Michigan Department of Corrections on May 7.

Source: The Marshall Project • Created with Datawrapper

Statewide, Michigan ranks sixth in the nation in the number of overall COVID-19 deaths per capita, with four deaths per 10,000 residents, according to [The New York Times \(https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html\)](https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html).

## Calls to release prisoners

Stern said prison systems should do "everything they can to downsize the population" in light of COVID-19 outbreaks.

The Department of Corrections says the parole board is working overtime to [accelerate paroles \(/story/news/local/michigan/detroit/2020/04/20/michigan-parolees-coronavirus-high-infection-rates-mdc-testing-rates/2983605001/\)](https://www.detroitnews.com/story/news/local/michigan/detroit/2020/04/20/michigan-parolees-coronavirus-high-infection-rates-mdc-testing-rates/2983605001/) for eligible prisoners who have reached their earliest release date.

Prisoner advocates say that's not enough. They continue to call on Gov. Gretchen Whitmer to use her clemency powers to free elderly and medically vulnerable prisoners who are not likely to re-offend.

"We don't have the death sentence in Michigan," said Monica Jahner, who is formerly incarcerated and works with people returning home from prison through the Ingham County program Advocacy, Reentry, Resources, and Outreach.

Gautz pointed out that of the prisoners who have died, about half were serving life sentences for murder or other serious crimes.

"These are the kind of people that would not have been released under any sort of executive order that could possibly be envisioned," Gautz said.

Hoe of Safe and Just Michigan points to [new research out of the University of Michigan \(https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3571912\)](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3571912) that suggests prisoners over the age of 50 who were convicted of violent crimes pose a low risk of recidivism. His group wants Whitmer to use her clemency powers and expand the parole board to process more releases.

## 'They still are human beings'

Exhibit 19 - Michigan ranks highest in Death from coronavirus



Thompson, the man who died of COVID-19 earlier this month, was serving a life sentence without the possibility of parole.

Matthews said the 1982 killing that landed her brother in prison for first-degree murder devastated their family. It still hurts today.

The siblings grew up in a loving home in Muskegon, Matthews said. She and Thompson were adopted from separate biological families. "I think that John was broken when my parents got him," she said.

Thompson struggled as a young man, going on drinking binges that would alter his personality, Matthews said. He started borrowing money from their longtime pastor. During an episode fueled by alcohol and drugs, Thompson and another person went to the pastor's home for money. The encounter ended in the pastor's death.

In prison, Matthews said her brother repented to God, the pastor's family and the church.

"He had taken ownership of his crimes. He was not that person anymore," she said.

Matthews holds onto fond memories of her brother, recalling his big laugh that always made her laugh. He was four years older than her and a big guy — 6 feet tall and 250 pounds before he died — and fought her battles at school.

"He was good to me as a kid," she said.

Thompson's health had worsened in recent years. He had his knees replaced. He had diabetes, and a stroke last year left him legally blind. Matthews suspects he had pancreatic cancer.

Given her brother's underlying health conditions, Matthews thinks Lakeland Correctional Facility should have taken more preventive steps to protect him and other vulnerable prisoners from COVID-19.

"It really hurts to think that ... nobody really cares about these people," she said. "They still are human beings."

*Angie Jackson covers the challenges of formerly incarcerated citizens as a corps member with Report for America, an initiative of The GroundTruth Project, with support from the Hudson-Webber Foundation. Click here ([https://checkout.fundjournalism.org/donateform?org\\_id=reportforamerica&campaign=701f4000000nNUT&theme=Detroit%20Free%20Press](https://checkout.fundjournalism.org/donateform?org_id=reportforamerica&campaign=701f4000000nNUT&theme=Detroit%20Free%20Press)) to support her work. Contact Angie: [ajackson@freepress.com](mailto:ajackson@freepress.com) (<mailto:ajackson@freepress.com>); 313-222-1850. Follow her on Twitter: [@AngieJackson23](https://twitter.com/AngieJackson23) (<https://twitter.com/AngieJackson23>)*

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Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Sacal-Micha v. Longoria](#), S.D.Tex., April 9, 2020

2020 WL 1481503

United States District Court, S.D. New York.

Vasif “Vincent” BASANK; Freddy Barrera Carrerro; Manuel Benitez Pineda; Miguel Angel Hernandez Balbuena; Latoya Legall; Carlos Martinez; Estanlig Mazariegos; Manuel Menendez; Antar Andres Pena; and Isidro Picazo Nicolas, Petitioner,  
v.

Thomas DECKER, in His Official Capacity as Director of the New York Field Office of U.S. Immigrations & Customs Enforcement; and Chad Wolf, in His Official Capacity as Acting Secretary, U.S. Department of Homeland Security, Respondents.

20 Civ. 2518 (AT)

|  
Signed 3/26/2020

### Synopsis

**Background:** Alien detainees, who suffered from serious chronic medical conditions and were detained in connection with their removal proceedings in county jails where cases of COVID-19 had been identified, petitioned for § 2241 writ of habeas corpus, requesting release from custody of Immigration and Customs Enforcement (ICE) because of public health crisis posed by coronavirus and also moved for temporary restraining order (TRO) releasing them on their own recognizance, subject to reasonable and appropriate conditions, and restraining Director of New York Field Office of ICE and Acting Secretary of Department of Homeland Security (DHS) from arresting detainees for civil immigration detention purposes during pendency of their immigration proceedings.

**Holdings:** The District Court, [Analisa Torres](#), J., held that:

- [1] detainees would suffer irreparable harm absent TRO;
- [2] detainees would likely succeed on merits of due process claim;
- [3] balance of equities weighed in favor of TRO; and
- [4] public interest supported TRO.

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

Motion granted.

**Procedural Posture(s):** Motion for Temporary Restraining Order (TRO).

West Headnotes (20)

**[1] Injunction** 🔑 Grounds in general; multiple factors

A plaintiff seeking a temporary restraining order (TRO) must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

1 Cases that cite this headnote

**[2] Injunction** 🔑 Relation or conversion to preliminary injunction

The standard for entry of a temporary restraining order (TRO) is the same as for a preliminary injunction.

**[3] Injunction** 🔑 Irreparable injury

The showing of irreparable harm is the single most important prerequisite for a preliminary injunction.

**[4] Injunction** 🔑 Irreparable harm

**Injunction** 🔑 Adequacy of remedy at law

Under the irreparable harm prong of the test for a temporary restraining order (TRO), the movant must show that the injury it will suffer is likely and imminent, not remote or speculative, and that such injury is not capable of being fully remedied by money damages.

**[5] Injunction** 🔑 Irreparable harm



Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

To satisfy the irreparable harm requirement for a temporary restraining order (TRO), a movant must demonstrate that he would suffer irreparable harm if the TRO does not issue.

[2 Cases that cite this headnote](#)

**[6] Injunction** 🔑 Discretionary nature of remedy

The district court has wide discretion in determining whether to grant a preliminary injunction.

**[7] Injunction** 🔑 Irreparable injury

Irreparable harm required for issuance of a preliminary injunction must be actual and imminent rather than speculative.

**[8] Civil Rights** 🔑 Preliminary Injunction

Alien detainees, who suffered from chronic medical conditions and were detained by Immigration and Customs Enforcement (ICE) in county jails where cases of COVID-19 were confirmed, would suffer irreparable harm absent temporary restraining order (TRO) releasing them on their own recognizance and preventing their arrest for civil immigration detention purposes during pendency of their immigration proceedings; detainees risked imminent, severe, and possibly fatal infection if they remained in detention, as well as deprivation of their right to due process from deliberate indifference to their health. [U.S. Const. Amend. 5](#).

[5 Cases that cite this headnote](#)

**[9] Evidence** 🔑 Facts relating to human life, health, habits, and acts

On motion for temporary restraining order (TRO) by alien detainees seeking release from Immigration and Customs Enforcement (ICE) custody in county jails in which cases of COVID-19 had been confirmed, judicial notice would be taken that for people of advanced age, with underlying health problems, or both, COVID-19 caused severe medical conditions and had increased lethality. [Fed. R. Evid. 201\(b\)](#).

[25 Cases that cite this headnote](#)

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

**[10] Civil Rights** 🔑 Preliminary Injunction

An alleged constitutional violation constitutes irreparable harm required for grant of temporary restraining order (TRO).

3 Cases that cite this headnote

**[11] Constitutional Law** 🔑 Protections Provided and Deprivations Prohibited in General

The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. [U.S. Const. Amend. 5](#).

**[12] Constitutional Law** 🔑 Persons and Entities Protected

**Constitutional Law** 🔑 Non-citizens; aliens

Due process protection applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. [U.S. Const. Amend. 5](#).

**[13] Habeas Corpus** 🔑 Limitations and conditions; treatment and discipline

An application for § 2241 habeas corpus is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing.  28 [U.S.C.A. § 2241](#).

**[14] Constitutional Law** 🔑 Arrest, detention, supervision, and parole

Immigration detainees can establish a due process violation for unconstitutional conditions of confinement by showing that a government official knew, or should have known of a condition that posed an excessive risk to health and failed to take appropriate action. [U.S. Const. Amend. 5](#).

7 Cases that cite this headnote

**[15] Civil Rights** 🔑 Preliminary Injunction

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

Alien detainees seeking temporary restraining order (TRO), releasing them on their own recognizance and preventing their arrest for civil immigration detention purposes during pendency of their immigration proceedings, were likely to succeed on merits of due process claim that Director of New York Field Office of Immigration and Customs Enforcement (ICE) and Acting Secretary of Department of Homeland Security (DHS) were deliberately indifferent to detainees' conditions of confinement in county jails, where cases of COVID-19 cases were identified, that posed excessive risk of life-threatening illness to detainees who suffered from chronic medical conditions; officials knew or should have known of risk and failed to take sufficient action to protect detainees' future health. [U.S. Const. Amend. 5](#).

[15 Cases that cite this headnote](#)

**[16] Constitutional Law** 🔑 [Restraint, commitment, and detention](#)

Government authorities may be deemed deliberately indifferent to an inmate's current health problems in violation of due process, where authorities ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year, including exposure of inmates to a serious, communicable disease, even when the complaining inmate shows no serious current symptoms. [U.S. Const. Amend. 5](#).

[1 Cases that cite this headnote](#)

**[17] Constitutional Law** 🔑 [Restraint, commitment, and detention](#)

Inmates need not demonstrate that they actually suffered from serious injuries to show a due process violation from deliberate indifference to their medical needs; instead, showing that the conditions of confinement pose an unreasonable risk of serious damage to their future health is sufficient. [U.S. Const. Amend. 5](#).

[13 Cases that cite this headnote](#)

**[18] Civil Rights** 🔑 [Preliminary Injunction](#)

Balance of equities weighed in favor of temporary restraining order (TRO) releasing alien detainees on their own recognizance from county jails, where they were in Immigration and Customs Enforcement (ICE) custody and COVID-19 cases had been identified, and preventing their arrest for civil immigration detention purposes during pendency of their immigration proceedings; detainees faced irreparable harm to their due process rights

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

and their health from continued detention in unsafe conditions, and interest of Director of New York Field Office of ICE and Acting Secretary of Department of Homeland Security (DHS) in detainees' in-person participation in future immigration proceedings was safeguarded by grave consequences of their failure to appear. [U.S. Const. Amend. 5](#).

[5 Cases that cite this headnote](#)

**[19] Aliens, Immigration, and Citizenship**  [Judicial Review or Intervention](#)

**Civil Rights**  [Judgment and relief in general](#)

Courts have the authority to order those detained in violation of their due process rights released, notwithstanding statute requiring mandatory detention of criminal aliens. [U.S. Const. Amend. 5](#); Immigration and Nationality Act, § 236,  [8 U.S.C.A. § 1226\(c\)](#).

[3 Cases that cite this headnote](#)

**[20] Aliens, Immigration, and Citizenship**  [Judicial Review or Intervention](#)

Public interest supported grant of temporary restraining order (TRO) releasing alien detainees on their own recognizance from county jails, where they were in Immigration and Customs Enforcement (ICE) custody and COVID-19 cases had been identified, and preventing their arrest for civil immigration detention purposes during pendency of their immigration proceedings, since public interest in health and safety was served best by rapidly decreasing number of individuals detained in confined and unsafe conditions.

[6 Cases that cite this headnote](#)

**Attorneys and Law Firms**

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[Michael James Byars](#), U.S. Attorney's Office, SDNY (Chambers Street), New York, NY, for Respondents.

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

## **MEMORANDUM AND ORDER**

**ANALISA TORRES**, District Judge:

\*1 Petitioners, Vasif “Vincent” Basank, Freddy Barrera Carrerro, Manuel Benitez Pineda, Miguel Angel Hernandez Balbuena; Latoya Legall, Carlos Martinez, Estanlig Mazariegos, Manuel Menendez, Antar Andres Pena, and Isidro Picazo Nicolas, are currently detained by Immigration and Customs Enforcement (“ICE”) in county jails where cases of COVID-19 have been identified. Petition ¶ 1, ECF No. 9.

Last night after 11:00 p.m., Petitioners filed an amended petition for a writ of habeas corpus under  28 U.S.C. § 2241, requesting release from ICE custody because of the public health crisis posed by COVID-19. *See* Petition. Petitioners also submitted an application for a temporary restraining order (“TRO”) pursuant to [Rule 65 of the Federal Rules of Civil Procedure](#), seeking an order (1) releasing them on their own recognizance, subject to reasonable and appropriate conditions, and (2) restraining Respondents, Thomas Decker, in his official capacity as Director of the New York Field Office of ICE, and Chad Wolf, in his official capacity as Acting Secretary of the U.S. Department of Homeland Security, from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings. TRO at 1, ECF No. 6.

For the reasons stated below, the TRO is GRANTED, and (1) Respondents, and the Hudson, Bergen, and Essex County Correctional Facilities, are ORDERED to **immediately** release Petitioners today on their own recognizance, and (2) Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings.

## **BACKGROUND**

Petitioners were detained by ICE in connection with removal proceedings pending at the Varick Street Immigration Court. They are housed in New Jersey county jails where either detainees or staff have tested positive for COVID-19. TRO at 3–4. Specifically, Basank, Benitez Pineda, and Mazariegos are detained at the Hudson County Correctional Facility (“Hudson County Jail”). Petition ¶¶ 5, 7, 11. Barrera Carrerro, Hernandez Balbuena, Legall, Martinez, and Menendez are detained at the Bergen County Correctional Facility (“Bergen County Jail”). *Id.* ¶¶ 6, 8, 9, 10, 12.

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

Pena and Picazo Nicolas are detained at the Essex County Correctional Facility (“Essex County Jail”). *Id.* ¶¶ 13–14.<sup>1</sup>

<sup>1</sup> During oral argument, Respondents represented to the Court that five Petitioners—Hernandez Balbuena, Legall, Menendez, Basank, and Benitez Pineda—are expected to be released today. However, because Petitioners are not yet released, and because counsel for Petitioners indicated, and Respondents did not dispute, that ICE may take as long as a day to complete the release process, the Court enters the TRO as to all Petitioners directing their immediate release today without fail.

Each Petitioner suffers from chronic medical conditions, and faces an imminent risk of death or serious injury in immigration detention if exposed to COVID-19. Basank is 54 years old and has a lengthy history of smoking. *Id.* ¶ 5. Barrera Carrerro, age 39, has underlying health conditions, including [obesity](#), respiratory problems, a history of [gastrointestinal problems](#), and colorectal bleeding. *Id.* ¶ 6. Benitez Pineda is 44, with pulmonary issues and a history of hospitalization for severe [pneumonia](#). *Id.* ¶ 7. Hernandez Balbuena suffers from [diabetes](#) and [diabetes-related complications](#). *Id.* ¶ 8. Legall is 33 years old, and suffers from respiratory problems, including [asthma](#). *Id.* ¶ 9. Martinez, age 56, suffers from severe [heart disease](#), and has a history of hospitalization for [congestive heart failure](#), severe aortic [valvular insufficiency](#), and acute systolic failure, requiring immediate heart valve replacement surgery. *Id.* ¶ 10. Mazariegos is 44, and suffers from [high blood pressure](#) and pre-diabetes. *Id.* ¶ 11. Menendez is 31 years old and suffers from chronic [asthma](#). *Id.* ¶ 12. At 36, Pena is asthmatic and has [chronic obstructive pulmonary disease](#) (“COPD”), which require inhalers and other medical treatment. *Id.* ¶ 13. Picazo Nicolas, age 40, suffers from Type II [diabetes](#) and [morbid obesity](#). *Id.* ¶ 14.

\*2 On March 16, 2020, Hannah McCrea, an attorney with Brooklyn Defender Services, emailed Assistant United States Attorney Michael Byars, requesting that ICE release particularly vulnerable individuals, including Petitioners Basank, Legall, Martinez, and Picazo Nicolas. Harper Decl. ¶ 2, ECF No. 6-1. On March 18, 2020, AUSA Byars responded that he did “not have a timeframe for ICE's response.” *Id.* ¶ 3. On March 24, 2020, Alexandra Lampert, also a lawyer with Brooklyn Defender Services, emailed Byars to request the release of additional individuals identified as particularly vulnerable, including Barrera Carrerro, Benitez Pineda, Hernandez Balbuena, Mazariegos, Menendez, and Pena. *Id.* ¶ 4. On March 25, 2020, Lampert again emailed Byars and informed him of Petitioners' intent to seek a temporary restraining order in the Southern District of New York, with the amended petition attached, thus putting Respondents on notice of Petitioners' serious medical conditions and their request for injunctive relief. *Id.* ¶¶ 5, 7.

At 12:30 p.m. today, the Court held a telephonic hearing on Petitioners' request for a TRO.

## DISCUSSION

### I. Legal Standard

[1] “A plaintiff seeking a temporary restraining order must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Natera, Inc. v. Bio-Reference Labs., Inc.*, No. 16 Civ. 9514, 2016 WL 7192106, at \*2 (S.D.N.Y. Dec. 10, 2016) (internal quotation marks, citation, and alteration omitted).

[2] [3] [4] [5] [6] “It is well established that in this Circuit the standard for an entry of a TRO is the same as for a preliminary injunction.” *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008) (collecting cases). “The showing of irreparable harm is perhaps the single most important prerequisite for a preliminary injunction.” *CF 135 Flat LLC v. Triadou SPY N.A.*, No. 15 Civ. 5345, 2016 WL 2349111, at \*1 (S.D.N.Y. May 3, 2016) (internal quotation marks, citation, and alteration omitted). Under this prong, the movant “must show that the injury it will suffer is likely and imminent, not remote or speculative, and that such injury is not capable of being fully remedied by money damages.” *NAACP v. Town of E. Haven*, 70 F.3d 219, 224 (2d Cir. 1995). To satisfy this requirement, a movant must demonstrate “that he would suffer irreparable harm if the TRO does not issue.” *Andino*, 555 F. Supp. 2d at 419. “The district court has wide discretion in determining whether to grant a preliminary injunction.” *Almontaser v. N.Y.C. Dep’t of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (internal quotation marks and citation omitted) (per curiam).

### II. Analysis

#### A. Irreparable Harm

[7] In the Second Circuit, a “showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citations omitted). That harm must be “actual and imminent” rather than speculative. *Id.*

[8] Petitioners have shown irreparable injury by establishing the risk of harm to their health and to their constitutional rights.



Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

## 1. Risk of Death

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. Petition ¶ 26. At that time, there were more than 118,000 cases in 114 countries, and 4,291 people had died. *Id.* ¶ 27. Merely two weeks later, there have been at least 458,927 cases identified in 172 countries and at least 20,807 people have died. *Id.* New York and its surrounding areas have become one of the global epicenters of the outbreak. *Id.* ¶ 35. Petitioners are held at detention facilities located in northern New Jersey. *See id.* ¶¶ 5–14.

As of March 26, 2020, New Jersey has 4,407 confirmed cases of COVID-19—the second highest number of reported cases by any state after New York. Niko Kommenda and Pablo Gutierrez, *Coronavirus map of the US: latest cases state by state*, The Guardian (Mar. 26, 2020), <https://www.theguardian.com/world/ng-interactive/2020/mar/26/coronavirus-map-of-the-us-latest-cases-state-by-state>. New Jersey also has the fourth most COVID-19 related deaths in the country. *Id.* The three counties where the jails are located—Bergen, Essex, and Hudson counties—comprise one-third of the confirmed cases of COVID-19 in New Jersey, with Bergen County reporting 819 positive results, Essex reporting 381 positives, and Hudson 260. Petition ¶ 36. The jails are no exceptions. Each of the jails where a Petitioner is being housed has reported confirmed cases of COVID-19. *Id.* ¶ 41. This includes two detainees and one correctional officer in the Hudson County Jail; one detainee at the Bergen County Jail; and a “superior officer” at the Essex County Jail. *Id.*

**\*3** The nature of detention facilities makes exposure and spread of the virus particularly harmful. Jaimie Meyer, M.D., M.S., who has worked extensively on infectious disease treatment and prevention in the context of jails and prisons, recently submitted a declaration in this district noting that the risk of COVID-19 to people held in New York-area detention centers, including the Hudson, Bergen, and Essex County Jails, “is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” Meyer Decl. ¶ 7, *Velesaca v. Wolf*, 20 Civ. 1803 (S.D.N.Y. Feb. 28, 2020), ECF No. 42.

Moreover, medical doctors, including two medical experts for the Department of Homeland Security, have warned of a “tinderbox scenario” as COVID-19 spreads to immigration detention centers and the resulting “imminent risk to the health and safety of immigrant detainees” and the public. Catherine E. Shoichet, *Doctors Warn of “Tinderbox scenario” if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>. “It will be nearly impossible to prevent widespread infections inside the Hudson, Bergen, and Essex County jails now that the virus is in the facilities because



Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

detainees live, sleep, and use the bathroom in close proximity with others, and because ‘[b]ehind bars, some of the most basic disease prevention measures are against the rules or simply impossible.’ ” Petition ¶ 47 (internal quotation marks and citation omitted).

[9] Petitioners face serious risks to their health in their confinement. Each has underlying illnesses, including [asthma](#), [diabetes](#), [heart disease](#), [hypertension](#), [obesity](#), and respiratory problems including COPD. *Id.* ¶¶ 5–14. The Court takes judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality. *People at Risk for Serious Illness from COVID-19*, Centers for Disease Control (Mar. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (“Older people and people of all ages with severe underlying health conditions—like [heart disease](#), lung disease and [diabetes](#), for example—seem to be at higher risk of developing serious COVID-19 illness.”); *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, Centers for Disease Control (Mar. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html> (listing, among other medical diagnoses, “moderate to severe [asthma](#),” “[heart disease](#),” “[obesity](#),” and “[diabetes](#)” as conditions that trigger higher risk of severe illness from COVID-19); see [Fed. R. Evid. 201\(b\)](#) (“The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.”); [Brickey v. Superintendent, Franklin Corr. Facility](#), No. 10 Civ. 085, 2011 WL 868148, at \*2 n.3 (N.D.N.Y. Feb. 17, 2011) (taking judicial notice of the meaning and symptoms of the condition sciatica), *report and recommendation adopted*, 2011 WL 868087 (N.D.N.Y. Mar. 10, 2011); [Lin v. Metro. Life Ins. Co.](#), No. 07 Civ. 03218, 2010 WL 668817, at \*1 (S.D.N.Y. Feb. 25, 2010) (“In its decision, the Court took judicial notice of certain medical background information about [Hepatitis B](#).”).

A number of courts in this district and elsewhere have recognized the threat that COVID-19 poses to individuals held in jails and other detention facilities. See [United States v. Stephens](#), No. 15 Cr. 95, 2020 WL 1295155, at \*2 (S.D.N.Y. Mar. 19, 2020) (“[I]nmates may be at a heightened risk of contracting COVID-19 should an outbreak develop.”) (collecting authorities); [United States v. Garlock](#), 18 Cr. 418, 2020 WL 1439980, at \*1 (N.D. Cal. Mar. 25, 2020) (“By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations. The chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual.” (citations omitted)); see also Letter from Mike McGrath, Chief Justice, Montana Supreme Court, to Montana Courts of Limited Jurisdiction

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

Judges (Mar. 20, 2020), [https://courts.mt.gov/Portals/189/virus/Ltr% 20to% 20COLJ% 20Judges % 20re% 20COVID-19% 20032020.pdf?ver=2020-03-20-115517-333](https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333) (“Because of the high risk of transmittal of COVID-19, not only to prisoners within correctional facilities but staff and defense attorneys as well, we ask that you review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for nonviolent offenses.... Due to the confines of [correctional] facilities, it will be virtually impossible to contain the spread of the virus.”). Indeed, at least one court has ordered the release on bail of a non-citizen in immigration detention on the ground that detention conditions have been rendered unsafe by COVID-19. *Calderon Jimenez v. Wolf*, No. 18 Civ. 10225 (D. Mass. Mar. 26, 2020), ECF No. 507. Addressing the situation in New Jersey specifically, the New Jersey Supreme Court has held that “reduction of county jail populations, under appropriate conditions, is in the public interest to mitigate risks imposed by COVID-19” in light of “the profound risk posed to people in correctional facilities arising from the spread of COVID-19,” and has ordered the release of many individuals serving sentences in New Jersey county jails. *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Case No. 84230 (N.J. Mar. 22, 2020).

\*4 Courts have also recognized this health risk to be particularly acute—and of constitutional significance—for inmates who are elderly or have underlying illnesses. See [United States v. Martin](#), No. 19 Cr. 140-13, 2020 WL 1274857, at \*2 (D. Md. Mar. 17, 2020) (“[T]he Due Process Clauses of the Fifth or Fourteenth Amendments, for federal and state pretrial detainees, respectively, may well be implicated if defendants awaiting trial can demonstrate that they are being subjected to conditions of confinement that would subject them to exposure to serious (potentially fatal, if the detainee is elderly and with underlying medical complications) illness.”). At least one court has ordered the release on bail of an inmate facing extradition on the basis of the risk to his health the pandemic poses. [Matter of Extradition of Toledo Manrique](#), No. 19 MJ 71055, 2020 WL 1307109, at \*1 (N.D. Cal. Mar. 19, 2020) (“These are extraordinary times. The novel coronavirus that began in Wuhan, China, is now a pandemic. The nine counties in the San Francisco Bay Area have imposed shelter-in-place orders in an effort to slow the spread of the contagion. This Court has temporarily halted jury trials, even in criminal cases, and barred the public from courthouses. Against this background, Alejandro Toledo has moved for release, arguing that at 74 years old he is at risk of serious illness or death if he remains in custody. The Court is persuaded. The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.”).

The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO. See [Shapiro v. Cadman Towers, Inc.](#), 51 F.3d 328, 332 (2d Cir. 1995) (upholding finding of irreparable injury “premised ... upon [the district court's] finding that [plaintiff] was subject to risk of injury, infection, and

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

humiliation”);  *Mayer v. Wing*, 922 F. Supp. 902, 909 (S.D.N.Y. 1996) (“[T]he deprivation of life-sustaining medical services ... certainly constitutes irreparable harm.”).

## 2. Constitutional Violations

[10] Second, Petitioners have also shown irreparable injury because, as discussed below, they face a violation of their constitutional rights. In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm. *See, e.g., Connecticut Dep’t of Env’tl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (“[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.” (internal quotation marks and citations omitted)); *Statharos v. New York City Taxi & Limousine Comm’n*, 198 F.3d 317, 322 (2d Cir. 1999) (“Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.”);  *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (clarifying that “it is the alleged violation of a constitutional right that triggers a finding of irreparable harm” and a substantial likelihood of success on the merits of a constitutional violation is not necessary);   *Sajous v. Decker*, No. 18 Civ. 2447, 2018 WL 2357266, at \*12 (S.D.N.Y. May 23, 2018) (finding that immigration detainee established irreparable injury by alleging that prolonged immigration detention violated his constitutional due process rights).

The Court finds, therefore, that Petitioners have established the threat of irreparable harm absent the TRO.

### B. Likelihood of Success on the Merits

The Court concludes that Petitioners have met their burden of showing a likelihood of success on the merits. Petitioners argue that their continued confinement in ICE detention centers where COVID-19 is present and without adequate protection for their health violates their due process rights. TRO at 8. The Court agrees.

[11] [12] [13] The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. The protection applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”  *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). An application for habeas corpus under  28

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

U.S.C. § 2241 is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing. See *Roba v. United States*, 604 F.2d 215, 218–19 (2d Cir. 1979) (allowing a § 2241 application to challenge an inmate's “transfer while seriously ill” where that transfer posed a risk of fatal heart failure).

\*5 [14] [15] [16] [17] Immigration detainees can establish a due process violation for unconstitutional conditions of confinement by showing that a government official “knew, or should have known” of a condition that “posed an excessive risk to health,” and failed to take appropriate action. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) (“Deliberate indifference ... can be established by either a subjective or objective standard: A plaintiff can prove deliberate indifference by showing that the defendant official recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to the plaintiff's health or safety.” (internal quotation marks, citation, and alterations omitted)). The risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious.<sup>2</sup> It can no longer be denied that Petitioners, who suffer from underlying illnesses, are caught in the midst of a rapidly-unfolding public health crisis. The Supreme Court has recognized that government authorities may be deemed “deliberately indifferent to an inmate's current health problems” where authorities “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” including “exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.” *Helling v. McKinney*, 509 U.S. 25, 33, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). Petitioners need not demonstrate that “they actually suffered from serious injuries” to show a due process violation. *Darnell*, 849 F.3d at 31; see *Helling*, 509 U.S. at 33, 113 S.Ct. 2475. Instead, showing that the conditions of confinement “pose an unreasonable risk of serious damage to their future health” is sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35, 113 S.Ct. 2475) (alteration omitted).

<sup>2</sup> Other courts have recognized of the heightened risk to detainees in contracting COVID-19. See, e.g., *Xochihua-Jaimes v. Barr*, 18-71460, Doc. No. 53 (9th Cir. Mar. 23, 2020) (unpublished) (“In light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petitioner be immediately released from detention ....”); *Stephens*, 2020 WL 1295155, at \*2 (ordering “conditions of 24-hour home incarceration and electronic location monitoring”); Chris Villani, *Releasing ICE Detainee, Judge Says Jail No Safer Than Court*,

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

Law360, March 25, 2020 (“We are living in the midst of a coronavirus pandemic, some infected people die, not all, but some infected people die,” U.S. District Judge Wolf said. “Being in a jail enhances risk. Social distancing is difficult or impossible, washing hands repeatedly may be difficult. There is a genuine risk this will spread throughout the jail.”).

Respondents have exhibited, and continue to exhibit, deliberate indifference to Petitioners' medical needs. The spread of COVID-19 is measured in a matter of a single day—not weeks, months, or years—and Respondents appear to ignore this condition of confinement that will likely cause imminent, life-threatening illness. At oral argument, Respondents represented that ICE and the detention facilities in which Petitioners are housed are taking certain measures to prevent the spread of the virus: screening detainees upon intake for risk factors, isolating detainees who report symptoms, conducting video court appearances with only one detainee in the room at a time, providing soap and hand sanitizer to inmates, and increasing the frequency and intensity of cleaning jail facilities.

These measures are patently insufficient to protect Petitioners. At today's hearing, Respondents could not represent that the detention facilities were in a position to allow inmates to remain six feet apart from one another, as recommended by the Centers for Disease Control and Prevention (“CDC”). *See How to Protect Yourself*, Centers for Disease Control (Mar. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>. Nor could Respondents provide the Court with any information about steps taken to protect high-risk detainees like Petitioners. And though Respondents represented that the detention facilities are below their full capacity, the appropriate capacity of a jail during a pandemic obviously differs enormously from its appropriate capacity under ordinary circumstances. Confining vulnerable individuals such as Petitioners without enforcement of requisite social distancing and without specific measures to protect their delicate health “pose[s] an unreasonable risk of serious damage to [their] future health,” *Phelps*, 308 F.3d at 185 (internal quotation marks and citation omitted), and demonstrates deliberate indifference.

\*6 The Court holds, therefore, that Petitioners are likely to succeed on the merits of their due process claim that Respondents knew or should have known that Petitioners' conditions of confinement pose excessive risks to their health.<sup>3</sup>

<sup>3</sup> The Court does not reach Petitioners' additional argument that they are likely to succeed on the merits of the claim that their due process rights were violated because their current conditions of confinement are punitive. TRO at 8–9.



Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

### C. Balance of Equities and Public Interest

[18] The equities and public interest weigh heavily in Petitioners' favor. First, Petitioners face irreparable injury—to their constitutional rights and to their health.

Second, the potential harm to Respondents is limited. At today's hearing, Respondents were unable to identify a single specific reason for Petitioners' continued detention. And the Court finds that there is none. Petitioners' counsel committed to ensuring the continued appearance of Petitioners at immigration hearings. And, of course, Petitioners' failure to appear at those hearings would carry grave consequences for their respective cases. The Court finds that those incentives are sufficient to safeguard Respondents' interest in Petitioners' in-person participation in future immigration court proceedings.

[19] At oral argument, Respondents raised the fact that Petitioners Martinez and Pena are currently mandatorily detained pursuant to 8 U.S.C. § 1226(c).<sup>4</sup> However, courts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c). See *Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases). Thus, Respondents have failed to justify Petitioners' continued detention in unsafe conditions.

4

As represented by Petitioners' counsel, Martinez's § 1226(c) detention was triggered by his conviction for controlled substances trafficking in 2014, an offense for which he served no term of imprisonment. Pena's § 1226(c) detention was triggered by misdemeanor marijuana convictions from 2002.

[20] Finally, the public interest favors Petitioners' release. Petitioners are confined for civil violations of the immigration laws. In the highly unusual circumstances posed by the COVID-19 crisis, the continued detention of aging or ill civil detainees does not serve the public's interest. See Declaration of Dr. Homer Venters ¶ 12, *Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that “the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19”); Declaration of Dr. Carlos Franco-Paredes, *id.* at ECF No. 81-12 at 1 (“Immigration detention centers in the U.S. are tinderboxes for the transmission of highly transmissible infectious pathogens including the SARS-CoV-2, which causes COVID-19. Given the large population density of immigration detention centers and the ease of transmission of this viral pathogen, the attack rate inside these centers will take exponential proportions, consuming significant medical and financial resources.”); *Urgent action needed to prevent COVID-19 “rampaging through places*

Basank v. Decker, --- F.Supp.3d ---- (2020)

2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

*of detention*” – *Bachelet*, UNHCR (Mar. 25, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=e> (United Nations High Commissioner for Human Rights urging that detention of people in jails “should be a measure of last resort, particularly during this crisis”). To the contrary, public health and safety are served best by rapidly decreasing the number of individuals detained in confined, unsafe conditions. *See, e.g.,*  *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”).

## CONCLUSION

\*7 For the reasons stated above, the TRO is GRANTED. Respondents, and the Hudson, Bergen, and Essex County Correctional Facilities are ORDERED to **immediately** release Petitioners today on their own recognizance without fail. Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings.

The TRO will expire on **April 9, 2020**, at **6:30 p.m.** No later than **April 2, 2020**, at **12:00 p.m.**, Respondents must show cause why the TRO should not be converted to a preliminary injunction. Petitioners may file a response no later than **April 7, 2020**, at **12:00 p.m.**

SO ORDERED.

## All Citations

--- F.Supp.3d ----, 2020 WL 1481503, 111 Fed. R. Evid. Serv. 1324

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Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857



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2020 WL 1643857

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United States District Court, W.D. New York.

Vernon JONES, et al., Petitioners,  
v.  
Chad WOLF, et al., Respondents.

20-CV-361

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Signed 04/02/2020

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[Adam A. Khalil](#), U.S. Attorney's Office, Rochester, NY, United States Attorney's Office, Western District of New York, for Respondents.

#### DECISION & ORDER

[LAWRENCE J. VILARDO](#), UNITED STATES DISTRICT JUDGE

\*1 On March 25, 2020, the petitioners, civil immigration detainees held in the custody of the Department of Homeland Security, Immigration and Customs Enforcement (“ICE”) at the Buffalo Federal Detention Facility in Batavia, New York (“BFDF”), filed an “Emergency Petition for Writ of Habeas Corpus Pursuant to  28 U.S.C. § 2241 and Complaint for Injunctive Relief.” Docket Item 1. The following day, the petitioners filed a motion for a temporary restraining order (“TRO”). See Docket Item 8. The petitioners allege that their continued civil detention in the wake of the COVID-19 pandemic violates their substantive rights under the Due Process Clause of the Fifth Amendment to the United States Constitution, and they seek their immediate release from ICE custody. Docket Item 1 at 23-24. Each petitioner is “either over the age of fifty and/or [has] a



Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

serious underlying medical condition, making [him] more vulnerable to complications arising from COVID-19.” *Id.* at 4. On March 31, 2020, this Court held oral argument on the TRO. *See* Docket Item 43.

For the reasons that follow, the Court GRANTS IN PART and DENIES IN PART the petitioners’ motion for a TRO. More specifically, the Court finds that holding the petitioners in the current conditions at the BFDF during the COVID-19 epidemic violates their substantive Due Process rights. Immediate release, however, is not the appropriate remedy—at least at this juncture. The Due Process violation stems from failing to take the steps recommended by public health officials to protect high-risk individuals from contracting COVID-19. Thus, as explained in more detail below, **the respondents shall submit a detailed plan to the Court by 5:00 p.m. on April 3, 2020**, demonstrating how they will provide those petitioners who are vulnerable individuals, as defined by the Centers for Disease Control and Prevention (“CDC”), with a living situation that facilitates “social distancing.” No later than **9:00 a.m. on April 6, 2020, the respondents shall report to the Court** as to whether any or all of the steps outlined in the plan have been taken and, if so, which ones. They also shall identify for which petitioners the measures have been taken and provide a brief explanation why any petitioner does not meet the CDC’s high-risk criteria.

### **BACKGROUND**

The petitioners are twenty-two<sup>1</sup> civil immigration detainees,<sup>2</sup> currently held in the custody of ICE at the BFDF. Docket Item 1. Each petitioner is “either over the age of fifty and/or [has] a serious underlying medical condition, making [him] more vulnerable to complications arising from COVID-19,” a novel coronavirus that has created a global pandemic. *Id.* at 4. In less than four months, 951,901 people have been diagnosed with the disease. *See Coronavirus Resource Center*, Johns Hopkins Univ. & Med. (Apr. 2, 2020, 6:31 AM), <https://coronavirus.jhu.edu/>. 48,283 have died. *Id.*

<sup>1</sup> Petitioner Shantadewie Rahmee was released on March 30, 2020. *See* Docket Item 42-5 at 1 n.1.

<sup>2</sup> An exhaustive review of the law governing immigration detention is not possible—or necessary—here. It is sufficient, for purposes of this motion, to state that immigration detention is a form of civil detention. *See*  *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

\*2 Most of the petitioners allege that they suffer from one or more of the following “medical conditions that influence higher risks of severe illness or death from COVID-19”: “lung disease, including moderate to severe [asthma](#); [heart disease](#); [immunodeficiency](#), including [cancer](#); [diabetes](#); and severe [obesity](#).” Docket Item 1 at 2. The petitioners’ medical expert, Joe Goldenson, M.D., classifies such petitioners as being “at grave risk of developing serious complications or dying if [they] contract[ ] COVID-19.” Docket Item 14 at 4-7 (“Goldenson Decl. II”). The remaining petitioners allege that they are at a “higher risk” because of their age or other serious medical conditions. Docket Item 1 at 2. Dr. Goldenson classifies these petitioners as being “at increased risk of developing serious complications or dying if [they] contract[ ] COVID-19.” Docket Item 14 at 3, 5 (Goldenson Decl. II).

Medical professionals, including professionals employed by the United States government, are advising individuals vulnerable to serious complications from COVID-19 to self-isolate in order to reduce their risk of exposure—a measure the petitioners allege is not possible in the congregate settings in which they currently are housed at BPDF. *See* Section (I)(B), *infra*. The petitioners have not pointed to any confirmed cases at BPDF but highlight that there are at least two confirmed cases at the Wende Correctional Facility, through which all persons transferring from a New York State prison into ICE custody at BPDF are processed. Docket Item 1 at 4.

### **LEGAL STANDARD**

“A preliminary injunction is an equitable remedy and an act of discretion by the court.”  [Am. Civil Liberties Union v. Clapper](#), 804 F.3d 617, 622 (2d Cir. 2015). The same standard governs consideration of an application for a TRO. [Andino v. Fischer](#), 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”  [Trump v. Deutsche Bank AG](#), 943 F.3d 627, 640 (2d Cir.), *cert. granted*, — U.S. —, 140 S. Ct. 660, 205 L.Ed.2d 418 (2019) (quoting  [Winter v. Natural Resources Defense Council, Inc.](#), 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)).<sup>3</sup> Moreover, the Second Circuit has instructed that a mandatory injunction—that is, an injunction commanding a positive act, as opposed to one that merely maintains the status quo—“should issue ‘only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.’ ”  [Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.](#), 60 F.3d 27, 34 (2d Cir. 1995) (quoting   [Abdul Wali v. Coughlin](#), 754 F.2d 1015, 1025 (2d Cir. 1985)).

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

3

Although the Second Circuit also recognizes a “less rigorous standard” of “sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly in their favor,” that standard “cannot be used”—as the petitioners here seek to do—“to preliminarily enjoin governmental action.” *Deutsche Bank*, 943 F.3d at 637 (citations omitted); *see also* *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) (“As long as the action to be enjoined is taken pursuant to a statutory or regulatory scheme, even government action with respect to one litigant requires application of the ‘likelihood of success’ standard.”).

## DISCUSSION

### **I. LIKELIHOOD OF SUCCESS**

The petitioners allege that their continued detention during the COVID-19 pandemic violates their substantive rights under the Due Process Clause of the Fifth Amendment to the United States Constitution. *See* Docket Item 1. The Due Process Clause prohibits the federal government from depriving any “person ... of ... liberty without due process of law.” U.S. Const. amend. V. “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). The protection applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Id.* at 693, 121 S.Ct. 2491.

\*3 “[G]overnment detention violates the Due Process Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual’s constitutionally protected interest in avoiding physical restraint.” *Id.* (citations omitted) (alteration in original); *see also* *United States v. Haymond*, — U.S. —, 139 S. Ct. 2369, 2373, 204 L.Ed.2d 897 (2019) (explaining that, other than those unique, special, and narrow circumstances, “[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty”—a “promise [that] stands as one of the Constitution’s most vital protections against arbitrary government”); *United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”).

### **A. Substantive Due Process Violation: Deliberate Indifference**

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

The petitioners' claim is best understood as an amalgam of two theories of substantive Due Process violations: unconstitutional conditions of confinement and deliberate indifference to serious medical needs.<sup>4</sup> Both theories derive from the same principle:

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being.... The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment ....

 *Helling v. McKinney*, 509 U.S. 25, 32, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (alterations in original) (quoting  *DeShaney v. Winnebago Cty. Dept. of Soc. Svcs.*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)). This rationale applies here because a detainee's rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner." See  *City of Revere*, 463 U.S. 239, 244, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983).

<sup>4</sup> Cf.  *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998) ("[The plaintiff] claims that his continuous health problems caused by exposure to friable asbestos in the air went unattended at [the prison] as [the] defendants failed to rid the premises of the asbestos or take measures to insulate [the plaintiff] from the asbestos particles. [The plaintiff's] request to be kept in an asbestos-free environment constituted a serious medical need.").

To evaluate the merits of either a conditions-of-confinement or a denial-of-medical-care claim, courts consider whether the complained-of conditions or deprivation "amount to punishment."  *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).<sup>5</sup> That is so because "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."  *Id.* at 535, 99 S.Ct. 1861; see also  *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) ("A pretrial detainee's claims are evaluated under the Due Process Clause because[ ] pretrial detainees have not been convicted of a crime and thus may not be punished in any manner—neither cruelly and unusually nor otherwise." (citations omitted)).

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

5

See also [Charles v. Orange Cty.](#), 925 F.3d 73, 86 (2d Cir. 2019) (explaining that because “ ‘deliberately indifferent conduct’ is ‘egregious enough to state a substantive due process claim,’ ” a court “need not ... conduct a separate analysis, over and above the deliberate indifference analysis, of whether the state’s conduct ‘shocks the conscience’ ” (quoting [Cty. of Sacramento v. Lewis](#), 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998))).

A complained-of condition or deprivation amounts to punishment if: (a) “the disability is imposed for the purpose of punishment”—that is, there is “an expressed intent to punish on the part of detention facility officials”; (b) no “alternative purpose to which [the condition or deprivation] may rationally be connected is assignable for it”; or (c) the condition or deprivation is “excessive in relation to the alternative purpose assigned [to it].” See [Bell](#), 441 U.S. at 538, 99 S.Ct. 1861 (third and fourth quoting [Kennedy v. Mendoza-Martinez](#), 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)).

\*4 The petitioners here do not advance the first theory. Nor do they advance the second, and wisely so. There is no dispute that an individual’s unlawful presence in this country is a “special justification” that in many circumstances outweighs the individual’s interest in avoiding restraint. See [Zadvydas](#), 533 U.S. at 690, 121 S.Ct. 2491 (recognizing the government’s interests in detaining noncitizens to “ensur[e] the appearance of aliens at future immigration proceedings” and to “prevent[ ] danger to the community” (citations omitted)); see also [Demore v. Kim](#), 538 U.S. 510, 528, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003) (“[D]etention of deportable criminal aliens pending their removal proceedings ... necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.” (alterations omitted)).<sup>6</sup>

6

When analyzing the process due to noncitizens, there is a relevant “distinction between an alien who has effected an entry into the United States and one who has never entered.” [Zadvydas](#), 533 U.S. at 693, 121 S.Ct. 2491; see also [Shaughnessy v. United States ex rel. Mezei](#), 345 U.S. 206, 212, 73 S.Ct. 625, 97 L.Ed. 956 (1953) (explaining that “an alien on the threshold of initial entry stands on a different footing” when it comes to Due Process rights). After all, if release from physical confinement means that noncitizens who have never “entered” our country will “be released into American society,” [Chi Thon Ngo. v. I.N.S.](#), 192 F.3d 390, 394 (3d Cir. 1999) (quoting [Barrera-Eschavarria v. Rison](#), 44 F.3d 1441, 1448 (9th Cir. 1995)), release may “ultimately result in our losing control over our borders,” [id.](#) (quoting [Jean v. Nelson](#), 727 F.2d 957, 975 (11th Cir. 1984)).



Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

Therefore, the nature of protection under the Due Process Clause “may vary depending upon [a noncitizen’s] status and circumstance.”  [Zadvydas](#), 533 U.S. at 694, 121 S.Ct. 2491. Although it appears that petitioner Patrick Maduabuchi Nwankwo was never admitted to the United States, *see* Docket Item 26, this Court does not find that his interests as an excludable alien are materially lower than those of removable aliens *for purposes of this analysis* and, more importantly, *for purposes of the injunctive relief ordered today*. Both the excludable- and removable-alien petitioners claim that the government is forcing them to live in conditions that fall below acceptable societal standards of decency. By holding Nwankwo in detention, the respondents have assumed a burden they cannot ignore—his status as an excludable alien notwithstanding.

This Court also notes that, in light of the injunctive relief it orders today, it need not consider the penological ramifications of releasing the detainees. It nevertheless notes that the analysis in the criminal context would involve a decidedly more intense analysis of the individual’s dangerousness to the community upon release. *Cf.*  [Salerno](#), 481 U.S. at 749, 50, 107 S.Ct. 2095 (“The government’s interest in preventing crime by arrestees is both legitimate and compelling ... [and] heightened when the [g]overnment musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community.” (citation omitted)). While it is true that many immigration detainees have criminal histories—including some of the petitioners in this matter—it also is true that all petitioners with criminal records have served their sentences and so any risk of danger to society is necessarily not as high as that posed by someone who has not yet completed his period of rehabilitation.

The central dispute is therefore whether the petitioners’ detention at the BFDF under current conditions during the COVID-19 pandemic is “excessive” in relation to the government’s legitimate interests in keeping them detained.

### 1. Unsanitary Conditions of Confinement

\*5 A civil detainee may establish that he is subject to “excessive” and therefore unconstitutional conditions of confinement by showing that “officers acted with deliberate indifference to the challenged conditions.”  [Darnell](#), 849 F.3d at 29 (2d Cir. 2017) (citation omitted). That showing requires the detainee to “satisfy two prongs”: (1) an “objective prong showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process,” and (2) a “subjective” or “*mens rea* prong ... showing that the officer acted with at least deliberate indifference to the challenged conditions”—that is, that the official “acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

condition posed ... even though the [official] knew, or should have known, that the condition posed an excessive risk to health or safety.”  *Id.* at 29, 35.

With respect to the first prong, “to establish an objective deprivation, the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health, which includes the risk of serious damage to physical and mental soundness.”  *Id.* at 30 (citations omitted). “There is no static test to determine whether a deprivation is sufficiently serious; instead, the conditions themselves must be evaluated in light of contemporary standards of decency.”  *Id.* (citations omitted). For example, in the context of the Eighth Amendment, the Second Circuit has explained that “whether exposure to [a specific condition] is cruel and unusual depends on both the duration and the severity of the exposure.”  *Willey v. Kirkpatrick*, 801 F.3d 51, 68 (2d Cir. 2015). “The severity of an exposure may be less quantifiable than its duration, but its qualitative offense to a prisoner’s dignity should be given due consideration.”  *Id.* “[A]ny analysis must consider both the duration and the severity of an inmate’s experience of being exposed to unsanitary conditions.”  *Id.* “[A]lthough the seriousness of the harms suffered ... may shed light on the severity of an exposure, serious injury is unequivocally not a necessary element of an [unconstitutional conditions] claim.”  *Id.* (citations omitted).

In  *Helling*, the Supreme Court held that a prisoner could state a cognizable claim under the Eighth Amendment where he alleged that officials had, “with deliberate indifference, exposed him to levels of [environmental tobacco smoke] that pose[d] an unreasonable risk of serious damage to his future health.”  509 U.S. at 35, 113 S.Ct. 2475. To succeed on the subjective prong, the plaintiff would need to show that “the prison authorities’ current attitudes and conduct” evinced deliberate indifference.  *Id.* at 36, 113 S.Ct. 2475. To succeed on the objective prong, the Court explained, the plaintiff would need to show both that “he himself [was] being exposed to unreasonably high levels of [environmental tobacco smoke]” and that “society consider[ed] the risk that the prisoner complain[ed] of to be so grave that it violate[d] contempora[neous] standards of decency to expose *anyone* unwillingly to such a risk”—that is, the plaintiff would need to produce “more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood [of] injury.”  *Id.* at 35, 36, 113 S.Ct. 2475 (emphasis in original).

In so holding, the Court rejected the defendants’ argument that the plaintiff’s claim was not cognizable because he had not alleged any present harm, explaining: “We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate’s current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.”  *Id.* at 33, 113 S.Ct. 2475. The

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

Court noted several other examples of circumstances where inmates might obtain an “injunction” to remedy a “plainly ... unsafe, life-threatening condition in their prison” even though “nothing yet had happened to them.”  *Id.* One such circumstance was “exposure of inmates to a serious, communicable disease [even if the] inmate shows no serious current symptoms.”  *Id.* In short, the Court found that “a remedy for unsafe conditions need not await a tragic event.”  *Id.*

## 2. Serious Medical Needs

\*6 A civil detainee also may show that his detention “amounts to punishment” and therefore violates the Due Process Clause by demonstrating that officials are acting with deliberate indifference to his serious medical needs. “That is true whether the deliberate indifference is manifested by prison doctors in their response to the prisoner’s needs, or by prison guards who intentionally deny or delay access to medical care or intentionally deny or delay access to the treatment once prescribed.”  *Charles v. Orange Cty.*, 925 F.3d 73, 85 (2d Cir. 2019). A civil detainee may establish an unconstitutional deprivation of medical care by showing “(1) that [he has] a serious medical need ..., and (2) that the [d]efendants [have] acted with deliberate indifference to such needs.”  *Id.* at 86 (citation omitted).

The “objective,” serious-medical-needs prong “contemplates a condition of urgency such as one that may produce death, degeneration, or extreme pain.”  *Id.* (citation omitted). “In determining whether a medical need is sufficiently serious to be cognizable as a basis for a constitutional claim for deprivation of medical care, [courts] consider factors such as whether a reasonable doctor or patient would find the injury important and worthy of treatment, whether the medical condition significantly affects an individual’s daily activities, and whether the illness or injury inflicts chronic and substantial pain.”  *Id.* (citation omitted).

The “*mens rea*,” deliberate-indifference prong mirrors the standard discussed above in the context of a conditions-of-confinement claim. See  *id.* at 86-87. “[A] detainee asserting a [Due Process] claim for deliberate indifference to his medical needs can allege either that the defendants *knew* that failing to provide the complained of medical treatment would pose a substantial risk to his health or that the defendants *should have known* that failing to provide the omitted medical treatment would pose a substantial risk to the detainee’s health.”  *Id.* at 87 (emphasis in original). “Whether the state knew or should have known of the substantial risk of harm to the detainee is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.”  *Id.* (citations omitted). “A factfinder may conclude that a prison official knew of a substantial



Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

risk from the very fact that the risk was obvious.”  *Id.* (quoting  *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

## B. Application

### 1. Objective: Unsanitary Conditions and/or Serious Medical Needs

The petitioners make two separate (though related) arguments. The first is that the conditions at BFDF subject them to a heightened risk of contracting COVID-19. They argue that this heightened risk—together with the high death rates among those over a certain age or with underlying conditions like theirs who contract COVID-19, even if they receive treatment—amounts to an unreasonably high risk of serious injury or death. The second is that if they contract COVID-19, they will not receive adequate care at or through BFDF.

This Court is unpersuaded by the second argument. The petitioners have not presented any evidence that BFDF could not provide them with adequate care, including by transporting them to local hospitals. The point of reference must be what someone would receive were he or she not in state custody. And the petitioners have not persuaded the Court that BFDF could not provide, or would deny them, such care. The respondents, on the other hand, have shown that they are providing detainees with 24/7 access to medical professionals, *see* Docket Item 42-4 at 2 (Declaration of Jeffrey Searls, administrator of BFDF (“Searls Decl.”)), and have represented that if a detainee is infected, he or she would be kept in isolation and immediately hospitalized if necessary, *see* Docket 42-1 at 3 (Declaration of Captain Abelardo Montalvo, M.D. (“Montalvo Decl.”)).

\*7 So the question is whether the petitioners’ first argument has any teeth. In other words, is the expected risk to the petitioners’ health and safety from COVID-19 so high that the respondents cannot, as a constitutional matter, force the petitioners to live in conditions that pose a heightened risk of contracting the disease? If so, does their current living situation heighten the risk of contraction? In Due Process language: Does forcing high-risk detainees to live in a congregate setting during the COVID-19 pandemic pose a risk that “society considers ... so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk”? *See*  *Helling*, 509 U.S. at 36, 113 S.Ct. 2475 (emphasis in original). If so, are the efforts the respondents have taken to ameliorate that risk of contraction sufficient?

This Court is trained in the law, not medicine. The best it can do in this situation is turn to the experts. And the guidance from experts, including many government experts, is that the health

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

risks posed by COVID-19 to individuals over a certain age or with certain underlying medical conditions are indeed grave.

*a. Health and Safety Risks Posed by COVID-19*

First, COVID-19 poses a grave risk for those over 65 or with certain underlying health conditions. According to one of the petitioners' medical experts, Robert B. Greifinger, M.D., "COVID-19 is a serious disease, ranging from no symptoms or mild ones for people at low risk, to respiratory failure and death in older patients and patients with chronic underlying conditions." Docket Item 3 at 1-2 ("Greifinger Decl."); *see also* Docket Item 4 at 2 ("Goldenson Decl. I"); Docket Item 7 at 2 (declaration of Jonathan Louis Golob, M.D., Ph.D. ("Golob Decl.")). There is no vaccine to prevent COVID-19, nor is there a known cure or anti-viral treatment at this time. Docket Item 7 at 2 (Golob Decl.). Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, estimated on March 31, 2020, that between 100,000 and 240,000 will die of COVID-19. Michael D. Shear et al., *Coronavirus May Kill 100,000 to 240,000 in U.S. Despite Actions, Officials Say*, N.Y. Times, Mar. 31, 2020, <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-death-toll-united-states.html>.

The CDC has concluded that "[p]eople aged 65 years and older" might be at higher risk for severe illness from COVID-19. *See People who are at higher risk for severe illness*, Ctrs. for Disease Control and Prevention (March 31, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fhigh-risk-complications.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fhigh-risk-complications.html); *see also* Docket Item 3 at 1-2 (Greifinger Decl.) ("[T]he risk of serious disease and death among those with COVID-19 increases with age, with 78% of reported deaths occurring in people over the age of 65. More than 50% of COVID-19 related intensive care admissions and more 80% of COVID-19 deaths were among people 65 years old or older."); *cf.* Docket Item 4 at 2 (Goldenson Decl. I) ("Older individuals ... are at greater risk of becoming seriously ill or dying from the illness. (It is well-accepted within the medical community that, due to the burden of chronic illnesses and unhealthy lifestyle choices of many of many those housed in correctional facilities, incarcerated individuals over the age of 50 years old are considered to be elderly.)"); Docket Item 5 at 1 (Declaration of Marc F. Stern, M.D. ("Stern Decl.)) ("Vulnerable people include people over the age of 50."); Docket Item 7 at 1 (Golob Decl.) ("People over the age of fifty are at higher risk, with those over 70 at serious risk.").

\*8 The CDC also has advised that "[o]ther high-risk conditions could include: [p]eople with chronic lung disease or moderate to severe asthma[; p]eople who have serious heart conditions[;

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

p]eople who are immunocompromised ... [; p]eople of any age with severe **obesity** (body mass index [BMI] of 40 or higher)[; p]eople with **diabetes**[; p]eople with **chronic kidney disease** undergoing dialysis[; or p]eople with liver disease.” See *People who are at higher risk for severe illness, supra*; see also Docket Item 4 at 2 (Goldenson Decl. I) (“[T]hose with serious chronic medical conditions, such as **heart disease**, **diabetes** and lung disease, are at greater risk of becoming seriously ill or dying from the illness.”); Docket Item 5 at 1 (Stern Decl.) (“The effects of COVID-19 are very serious, especially for people who are most vulnerable[,] ... includ[ing] people ... of any age with underlying health problems such as—but not limited to—weakened immune systems, **hypertension**, **diabetes**, blood, lung, kidney, heart, and liver disease, and possibly pregnancy.”).

The CDC recently released an analysis of 7,162 cases of COVID-19 in the United States for which data on the patient’s underlying health was available. CDC COVID-19 Response Team, *Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019—United States, February 12–March 28, 2020*, Morbidity and Mortality Weekly Report, at 1-2 (Mar. 31, 2020), <http://dx.doi.org/10.15585/mmwr.mm6913e2>. 78% of those admitted to the intensive care unit had at least one pre-existing condition, including **diabetes**, lung disease, **cardiovascular disease**, **renal disease**, or an otherwise compromised immune system. *Id.*

This Court therefore “takes judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality.”

📄 *Basank v. Decker*, — F.Supp.3d —, —, 2020 WL 1481503, at \*3 (S.D.N.Y. Mar. 26, 2020) (citing Fed. R. Evid. 201(b)) (additional citations omitted). Numerous Courts, including several in this circuit, have reached similar conclusions. See 📄 *Coronel v. Decker*, — F.Supp.3d —, —, 2020 WL 1487274, at \*4 (S.D.N.Y. Mar. 27, 2020); 📄 *Hernandez v. Decker*, 2020 WL 1547459, at \*3 (S.D.N.Y. Mar. 31, 2020); 📄 *Basank*, — F.Supp.3d at —, 2020 WL 1481503, at \*5.

### *b. Risk of COVID-19 Infection in a Congregate Setting*

The petitioners also have shown that they face a heightened risk of contracting COVID-19. At oral argument, the respondents confirmed that the petitioners are currently being housed within the general population at the BFDF. They eat communally, use shared restrooms, and are housed in either shared cells or in dorm-style housing.<sup>7</sup> Government experts and the petitioners’ experts agree that such a communal-living style congregate setting increases the infection rate.

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

7

The government could not confirm, however, how many individuals are in each room in the dormitories.

For example, the CDC advises:

People in correctional and detention facilities are at greater risk for some illnesses, such as COVID-19, because of close living arrangements with other people. The virus is thought to spread mainly from person-to-person, through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or be launched into the air and inhaled into someone's lungs. It is possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or eyes; however, this is not the most likely way the virus spreads.

*See FAQs for administrators, staff, people who are incarcerated, families*, Ctrs. for Disease Control and Prevention (Mar. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html>. The United States Attorney General largely concurs. *See, e.g.*, Docket Item 15 at 4 (United States Attorney General, *Memorandum to the Director of the Federal Bureau of Prisons: Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic* (March 26, 2020)) (“I am hereby directing you to prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic. Many inmates will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care. But for some eligible inmates, home confinement might be more effective in protecting their health.”).

\*9 For their part, the petitioners’ experts assert strongly that congregate settings like those at BPDF heighten the risk of contracting COVID-19. “The conditions of congregate settings, such as jails and immigration detention facilities, pose a heightened public health risk to the spread of COVID-19, even greater than other non-carceral institutions.” Docket Item 3 at 3 (Greifinger Decl.). The experts point to a host of reasons for this heightened risk of contraction, including crowding, the proportion of vulnerable people detained, the lack of ventilation, and often scant medical-care resources. Docket Item 3 at 4-5 (Greifinger Decl.); Docket Item 5 at 2 (Stern Decl.). They point in particular to the fact that detainees cannot practice the “social distancing” measures needed to contain the spread because detainees share toilets, sinks, and showers; sleep in communal dorms or barracks-style rooms and eat communally; and eat food prepared and served communally

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

as well. Docket Item 3 at 5 (Greifinger Decl.); Docket Item 5 at 2 (Stern Decl.). They also highlight that daily staff rotations increase the risk of infection. Docket Item 3 at 5 (Greifinger Decl.); Docket Item 5 at 2 (Stern Decl.); *see also* Docket Item 5 at 2 (Stern Decl.) (“To the extent that detainees are housed in close quarters, unable to maintain a six-foot distance from others, and sharing or touching objects used by others, infectious diseases that are transmitted via the air or touch are more likely to spread, placing people at risk.... For these reasons, if—but more likely when—COVID-19 is introduced into the facility, the risks of spread is greatly, if not exponentially, increased as already evidenced by spread of COVID-19 in two other congregate environments: nursing homes and cruise ships.”).

What is more, the findings regarding the risk of contracting COVID-19 in a communal setting are true even though there presently are no reported cases at BFDF. Docket Item 42-1 at 4.<sup>8</sup> Community spread is nationwide at this point, and there are reported cases in all eight of Western New York’s counties. *See Live: Coronavirus Cases in Western New York*, Rochester Regional Health (Apr. 1, 2020), <https://www.rochesterregional.org/news/2020/02/coronavirus-in-new-york>. Moreover, there are least two confirmed cases at the Wende Correctional Facility, through which all persons transferring from a New York State prison into ICE custody at BFDF are processed. Docket Item 1 at 4. And the petitioners’ expert has concluded that “it is highly likely, and perhaps inevitable, that COVID-19 will reach the immigration detention facilities in New York.” Docket Item 3 at 3 (Greifinger Decl.). “[A] remedy for unsafe conditions need not await a tragic event.”  *Helling*, 509 U.S. at 33, 113 S.Ct. 2475; *see also*  *Coronel*, — F.Supp.3d at —, 2020 WL 1487274, at \*1 (granting four immigration detainees’ motion for a TRO and ordering their immediate release where they “represented ... that there [had] been confirmed cases at two of the three facilities where [they were] detained”). What then of the respondents’ efforts to ameliorate the heightened risk of contracting this dangerous disease?

<sup>8</sup> The government argues that the petitioners have not met their burden in this case because they have not shown that they would be at lower risk in many of the locations to which they would travel if released. Indeed, the government asserts that most of the petitioners would be no safer outside BFDF than inside because they plan to travel to areas of the country with significant outbreaks of COVID-19. *See* Docket Item 42-5 at 2, 16-17. A majority of the petitioners represent that, if released, they would reside with friends or family in the New York metropolitan area. *See* Docket Items 16, 28.

In light of the injunctive relief ordered today, the Court need not address this argument in depth. It notes, however, that the government misconstrues the nature of the legal claims at issue here. The Fifth Amendment right to confinement in conditions that do not pose an unreasonable risk to health and safety derives from the fact that “when the State takes a



Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being.... [because] it [has] render[ed] him unable to care for himself.” [Helling](#), 509 U.S. at 32, 113 S.Ct. 2475 (alterations in original) (quoting [DeShaney](#), 489 U.S. at 199-200, 109 S.Ct. 998). So a condition can be unconstitutional only when an individual forcibly is held in state custody. The violation *necessarily* ends when the individual no longer is in state custody. At that point, the state no longer owes him a duty of reasonable care. See [DeShaney](#), 489 U.S. at 199-200, 109 S.Ct. 998.

What is more, the respondents’ argument does not, as a factual matter, address the petitioners’ claim. Even if it is true that the petitioners would face greater hurdles to accessing *treatment and care* in New York, that does not carry the day. As this Court already has found, the petitioners are not being denied access to care. The relevant factual question is whether the petitioners are at an unconstitutionally greater risk of *contracting* the disease at BFDF than if they were not detained. And on that question, the respondents have not presented any data to that effect. If the petitioners follow the “social distancing” measures put in place by the Governor—and the Court has no reason to believe they would not, given their risk factors—there is no reason to believe they would be at greater risk of *contraction* in New York than at BFDF.

## 2. “Mens Rea”: Deliberate Indifference

**\*10** As an initial matter, there is no dispute that the respondents have actual knowledge of the petitioners’ serious needs. On March 22, 2020, and again on March 25, 2020, the petitioners notified the government about the particular circumstances of their cases and their high risk of harm. See Docket Item 9 at 10 (Petitioners’ Memorandum of Law). The question is what the respondents have done with the knowledge.

The respondents have taken substantial steps toward protecting the health and safety of the individuals detained at BFDF. Captain Abelardo Montalvo, M.D., the Eastern Regional Clinical Director with ICE Health Services Corps, reviewed the measures currently being taken at BFDF to protect the detainees’ health and safety. He attests to the following facts. Docket Item 42-1 (Montalvo Decl.).

Since March 12, 2020, incoming detainees at BFDF are “checked with a thermometer for fever.” Docket Item 42-1 at 3. They also are “asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through areas with sustained community [transition](#) in the past two weeks.” *Id.* at 2-3.

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

“Detainees who present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be placed in the BPDF medical bay or referred to a local hospital.” *Id.* at 3. Detainees with known exposure to a person with confirmed COVID-19 but who are asymptomatic “are placed in a quarantine with restricted movement for” up to 14 days and “monitored daily for fever and symptoms of respiratory illness.” *Id.* Quarantine “involves housing [exposed but asymptomatic] detainees together.” *Id.* And new detainees arriving at the facility “will be placed in quarantined dorms and separated from the general population for 14 days until cleared. If new persons are added, or someone becomes ill, then the 14-day quarantine restarts.” *Id.* at 4.<sup>9</sup>

<sup>9</sup> At oral argument, the respondents stated that *all* new arrivals are isolated from the general population upon arrival. The respondents’ declarations leave some question as to whether this policy indeed applies to all new arrivals or only to those who confirm contact with an infected individual, *see* Docket Item 42-1 at 3 (Montalvo Decl.), those arriving from a hospital, *see id.* at 4, and those arriving from other detention facilities, *see* Docket Item 42-4 at 4 (Searls Decl.). The Court assumes the veracity of the respondents’ counsel’s representation at argument but expects confirmation of that fact in the isolation plan it orders today.

BPDF also “has increased sanitation frequency and thoroughness.” *Id.* at 4. The facility uses paid “detainee workers to reduce the contact rate between ICE staff and detainees and ... limit any exposure between populations.” *Id.* at 4. Personal visits have been temporarily suspended—though counsel is able to visit in “no-contact” rooms—and BPDF has been providing and continues to provide education to detainees regarding best practices to prevent the spread of COVID-19. *Id.* at 4-5. Additionally, “[g]atherings of detainees have been cancelled or are being completed in dorms and their respective outdoor areas.” *Id.* at 5.

These measures are commendable and likely have prevented some measure of spread and mitigated some of the risks facing the respondents. But the fact is that none of the steps discussed by Capt. Montalvo includes the “social distancing” measures recommended—especially for high-risk individuals—by the CDC, the New York State Department of Health, and the petitioners’ experts, to name a few.

\*11 The CDC has recommended that people who are at higher risk should “[s]tay home.” *See People who are at higher risk for severe illness, supra.* The State of New York has said even more. On March 20, 2020, the Governor issued an executive order with the following guidance for New Yorkers over 70 and with underlying health conditions: “[r]emain indoors; ... go outside [only] for solitary exercise; [p]re-screen all visitors and aides by taking their temperature and

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

seeing if person is exhibiting other flu-like symptoms; [d]o not visit households with multiple people; [w]ear a mask when in the company of others; [t]o the greatest extent possible, everyone in the presence of vulnerable people should wear a mask; [a]lways stay at least six feet away from individuals; and [d]o not take public transportation unless urgent and absolutely necessary.” *Governor Cuomo Signs the ‘New York State on Pause’ Executive Order*, New York State Office of Governor Andrew Cuomo (Mar. 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order>.

In fact, the Governor and state health officials have concluded that the risks posed by COVID-19 are so grave that it has taken a number of *unprecedented* steps affecting all New Yorkers, even those with no particular vulnerability to the disease. On March 7, 2020, Governor Cuomo declared a state of emergency for all of New York State. *See* N.Y. Exec. Order No. 202 (Mar. 7, 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf). And in stages beginning on March 16, 2020, the Governor ordered the closing of all schools and universities, as well as nearly all businesses and places of public accommodation, and he has prohibited non-essential gatherings of any size through at least April 15, 2020.<sup>10</sup> Governor Cuomo is far from alone in ordering these drastic measures. *See Coronavirus: Three out of four Americans under some form of lockdown*, BBC World News (Mar. 31, 2020), <https://www.bbc.com/news/world-us-canada-52103066>. And the New York State Department of Health advises that “[w]hen in public[,] individuals *must* practice social distancing of at least six feet from others.” *Governor Cuomo Signs the ‘New York State on Pause’ Executive Order*, *supra* (emphasis added).

<sup>10</sup> *See* N.Y. Exec. Order No. 202.3 (Mar. 16, 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.3.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.3.pdf); N.Y. Exec. Order No. 202.4 (Mar. 16, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO%20202.4.pdf>; N.Y. Exec. Order No. 202.5 (Mar. 18, 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202\\_5.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_5.pdf); N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.8.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf); N.Y. Exec. Order No. 202.11 (Mar. 27, 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202\\_11.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_11.pdf); N.Y. Exec. Order No. 202.12 (Mar. 30, 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.13.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.13.pdf).

The petitioners’ experts urge the importance of these same “social distancing” measures. “The only way to mitigate the rapid spread of COVID-19 is to use scrupulous hand hygiene and social distancing, self-quarantine for individuals who may have been exposed, and isolation at a home or care facility for those who have been infected.” Docket Item 3 at 2 (Greifinger Decl.); *see also* Docket Item 4 at 2 (Goldenson Decl. I); Docket Item 5 at 1 (Stern Decl.) (“COVID-19 is a



Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

novel virus. There is no vaccine for COVID-19, and there is no cure for COVID-19. No one has prior immunity. The only way to control the virus is to use preventive strategies, including social distancing.”).

The respondents so far have not made it possible for individuals with the CDC-identified vulnerabilities to take these steps. It has not, for example, isolated higher risk individuals from other detainees or from staff who rotate daily in and out of the facility. Nor is it testing all incoming detainees or the staff that comes and goes. That failure is particularly concerning given that the CDC recently reported that as many as 25 percent of people infected with COVID-19 may not show symptoms. *See* Apoorva Mandavelli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html?action=click & module=Spotlight & pgtype=Homepage>; *see also* Docket Item 5 at 1 (Stern Decl.) (“It is believed that people can transmit the virus without being symptomatic and, indeed, that a significant amount of transmission may be from people who are infected but asymptomatic or pre-symptomatic.”). The petitioners also continue to eat their meals in communal settings and share bathing facilities, indicating that “social distancing” is not possible at this time. And the respondents have not provided the petitioners or other high-risk detainees with masks as recommended by the New York State Department of Health. *Cf.* Docket Item 42-1 at 4 (Montalvo Decl.) (explaining that “[d]etainee workers” are provided goggles” and “gloves” (emphasis added)).

**\*12** In light of the decisions of a number of executive branch officials at both the state and federal level, it seems clear that “social distancing” for those with heightened COVID-19 risks is the most effective form of preventing a serious threat to the health and safety of those persons. Moreover, the recommended measures for preventing the spread of COVID-19 are unprecedented. Indeed, this Court is not aware of any other disease that caused New York State—let alone most of the nation—to decide that the *only* reasonable course of action was to shutter the economy, shelter in place, and isolate at home for weeks on end.

In short, the government’s recommendations to the public suggest that those with certain conditions should not assume the risk of social contact. Indeed, New York State has *prohibited* individuals from assuming that risk. A measure that the government has forcibly—under threat of civil penalties—*imposed* on all persons within its jurisdiction cannot, at the same time, be forcibly denied to some portion of that population. The result compelled by this finding is that the respondents are acting with deliberate indifference to the health and safety of those petitioners with the conditions identified by the CDC by holding them in a congregate, communal-living setting where “social distancing is an oxymoron.” *See* Docket Item 9-1 at 5 (Letter from Scott Allen, M.D., F.A.C.P., and Josiah D. Rich, M.D., M.P.H., to the House Committees on Homeland Security

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

and Oversight and Reform, Mar. 19, 2020) (“Allen Letter”); *see also* [Hernandez](#), 2020 WL 1547459 at \*3 (finding that measures such as “modification of the intake process and increasing sanitation frequency ... [were] ‘patently insufficient’ to protect *any* detainees from infection absent ‘enforcement of requisite social distancing’ ” (alteration in original) (quoting [Basank](#), — F.Supp.3d at —, 2020 WL 1481503, at \*5)).

In other words, the respondents have actual knowledge of serious risks to the health and well-being of individuals with the vulnerabilities identified by the CDC and have not taken adequate steps to protect the petitioners who have such vulnerabilities against those risks. *See also* [Hernandez](#), 2020 WL 1547459 at \*2 (concluding that the civil-immigration-detainee petitioner was likely to succeed on his deliberate-indifference claim because the respondents had “not taken any action to address the particular risks that COVID-19 poses to high-risk individuals like [the p]etitioner”); [Coronel](#), — F.Supp.3d at —, 2020 WL 1487274, at \*6 (same); [Basank](#), — F.Supp.3d at —, 2020 WL 1481503, at \*5 (same). *But see* [Sacal-Micha v. Longoria](#), — F.Supp.3d —, 2020 WL 1518861 (S.D. Tex. Mar. 27, 2020); [Dawson v. Asher](#), 2020 WL 1304557, at \*3 (W.D. Wash. Mar. 19, 2020). Because the high-risk petitioners are held in the respondents’ “custody ... against [their] will” and therefore “unable to care for [themselves],” *see* [Helling](#), 509 U.S. at 32, 113 S.Ct. 2475 (citation omitted), the respondents’ failure to take these steps is a violation of their substantive rights under the Due Process Clause.

### C. Conclusion

This Court finds that those petitioners who have the COVID-19 vulnerabilities identified by the CDC have demonstrated a likelihood of succeeding on their claim that the respondents are acting with deliberate indifference to unreasonably unsafe conditions at BPDF and to those petitioners’ serious medical needs. The Court acknowledges both that such a finding is extraordinary and that the respondents themselves have been impacted by the COVID-19 pandemic in a variety of ways that have affected their ability to respond to the outbreak. But the Court’s goal is neither to assign blame nor to justify past efforts. It is instead to ensure that the petitioners’ constitutional rights—here, their right to liberty and possibly life—are protected.

## II. IRREPARABLE HARM

\*13 “The showing of irreparable harm is ‘[p]erhaps the single most important prerequisite for the issuance of a’ ” temporary restraining order. [Kamerling v. Massanari](#), 295 F.3d 206, 214 (2d Cir. 2002) (quoting [Bell & Howell: Mamiya Co. v. Masel Supply Co.](#), 719 F.2d 42, 45 (2d Cir. 1983)). Under this prong, parties seeking a TRO “must show that, on the facts of their case” and in the

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

absence of the requested injunction, they will suffer a harm that “cannot be remedied after a final adjudication, whether by damages or a permanent injunction.” [Salinger v. Colting](#), 607 F.3d 68, 81-82 (2d Cir. 2010). In addition, the harm must be “neither remote nor speculative, but actual and imminent.” [Freedom Holdings, Inc. v. Spitzer](#), 408 F.3d 112, 114 (2d Cir. 2005) (citation omitted).

The petitioners have established irreparable harm in two different ways. First, “the *alleged* violation of a constitutional right ... triggers a finding of irreparable harm.” [Jolly v. Coughlin](#), 76 F.3d 468, 482 (2d Cir. 1996) (emphasis in original) (citation omitted). As discussed above, the petitioners have adequately alleged that their substantive due process rights have been violated. Accordingly, “no further showing of irreparable injury is necessary.” [Mitchell v. Cuomo](#), 748 F.2d 804, 806 (2d Cir. 1984) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” (citations omitted)).

Second, irreparable harm exists where, as here, the moving individuals “face imminent risk to their health, safety, and lives.” [Henrietta D. v. Giuliani](#), 119 F. Supp. 2d 181, 214 (E.D.N.Y. 2000) (citation omitted), *aff’d sub nom.* [Henrietta D. v. Bloomberg](#), 331 F.3d 261 (2d Cir. 2003). For all the reasons discussed above, those petitioners with the CDC-identified vulnerabilities face a grave, irreparable risk to their health and safety if they remain confined under current conditions at BFDf.

### III. BALANCE OF EQUITIES AND PUBLIC INTEREST

Where the government is the opposing party, the final two factors in the temporary restraining order analysis—the balance of the equities and the public interest—merge. [Planned Parenthood of New York City, Inc. v. U.S. Dep’t of Health & Human Servs.](#), 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018).

The petitioners and the public *both* benefit from ensuring public health and safety. See [Grand River Enterprises Six Nations, Ltd. v. Pryor](#), 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”). Moreover, under the circumstances here, the public interest in ensuring public health is also best served by the petitioners’ being confined in conditions that do not pose a substantial risk of their contracting COVID-19. As one of their medical experts points out, a COVID-19 outbreak at a detention facility “could result in multiple detainees—five, ten or more—being sent to the local community hospital where there may only be six or eight ventilators over a very short period. As they fill up and overwhelm ventilator resources, those ventilators become unavailable for all the usual critical illnesses.” Docket Item 9-1 at 5 (Allen Letter). And ventilators used to treat detainees cannot be used to treat others who contract the

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

virus. *See* Docket Item 5 at 3 (Stern Decl.) (“Reducing the spread and severity of infection in a federal immigration detention center slows, if not reduces, the number of people who will become ill enough to require hospitalization where they will be using scarce community resources (ER beds, general hospital beds, ICU beds) which in turn reduces the health and economic burden to the local community at large.”); Docket Item 3 at 5 (Greifinger Decl.) (“Releasing individuals, and prioritizing the most vulnerable, reduces the burden on local health care resources, as it reduces the risk of transmission of the disease to a large number of people living in close proximity for an extended period of time. It also reduces the risk of transmission to staff.”). “In the alternate scenario where detainees” are either confined in conditions facilitating “social distancing” or are released, “the tinderbox scenario of a large cohort of people getting sick all at once is less likely to occur, and the peak volume of patients hitting the community hospital would level out.” Docket Item 9-1 at 5 (Allen Letter).

**\*14** The respondents argue that the Western New York community would be able to serve the needs of the petitioners and that the public interest therefore tips in their favor. In support of that claim, they have presented data on available health beds in the area surrounding BFDF. *See* Docket Item 42-3 at 6. But they have not provided data on, for example, the number of available ventilators. Nor have they provided projections on the rate of spread in the surrounding community or any expert testimony to the effect that the community could sustain an outbreak at BFDF as community spread outside the facility—including in other carceral facilities—also increases. The Court therefore finds that the public interest favors the petitioners.

#### IV. REMEDY

For the reasons stated above, the petitioners have met the criteria for a TRO. The next question is what remedy is appropriate under the circumstances. The petitioners seek their immediate release under conditions of supervision and, ultimately, a writ of habeas corpus under  22 U.S.C. § 2241.

 Section 2241(c)(3) provides: “The writ of habeas corpus shall not extend to a prisoner unless ... [h]e is in custody in violation of the Constitution or laws or treaties of the United States.” Courts are divided on whether  section 2241 provides a vehicle for challenging (and a remedy for addressing) allegedly unconstitutional conditions of confinement.<sup>11</sup>

<sup>11</sup>

Compare  *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (“This court has long interpreted [ section] 2241 as applying to challenges to the execution of a federal sentence” [and seeking injunctive relief], “including such matters as the administration of parole, ... prison disciplinary actions, prison transfers, type of detention and prison

Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

conditions.” (citations omitted)), with *Spencer v. Haynes*, 774 F.3d 467, 469 (8th Cir. 2014) (drawing a bright line between claims that challenge the “validity” or “length” of a conviction, which may be brought under  section 2241, and those that challenge “the conditions of confinement,” which may not) and *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005) (distinguishing between a  section 2241 petitioner who requests a “quantum change in the level of custody, which must be addressed by habeas corpus,” and a petitioner who requests “a different program or location or environment, which raises a civil rights claim” and holding that “[i]f an inmate establishe[s] that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option.” (citation omitted)) and  *Gomez v. United States*, 899 F.2d 1124 (11th Cir. 1990) (same) and  *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979) (same) and *Cook v. Hanberry*, 596 F.2d 658, 660 (5th Cir. 1979) (same). Cf.  *Bell*, 441 U.S. at 526 n.6, 99 S.Ct. 1861 (1979) (“[L]eav[ing] to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself.” (citation omitted)).

This Court need not resolve these difficult questions at this junction because the Second Circuit “has long interpreted [ section] 2241 as applying to challenges to ... prison conditions,”  *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (citation omitted)—at least to the extent the petitioners seek a remedy short of release—and this Court is not convinced that the unconstitutional conditions at BDFD cannot be remedied through an injunction.

That is so because BDFD currently is at roughly half of its capacity to house detainees. Docket Item 42-1 at 4. So it remains plausible that the respondents could rectify the ongoing violation by providing those petitioners who meet the CDC’s definition of vulnerable individuals with a living situation that facilitates “social distancing.”<sup>12</sup> The respondents might, for example, house those individuals in individual cells or units with a limited number of individuals akin to a family unit outside the facility; eat their meals, bathe, and shower in isolation or only among those in their smaller unit; have extremely limited contact with both other detainees and staff, all of whom are screened for fevers; and are provided masks to wear when contact is necessary. The Court leaves the task of identifying which petitioners satisfy the CDC criteria, and how to facilitate their “social distancing,” to the respondents’ medical staff—at least in the first instance.<sup>13</sup>

<sup>12</sup> Governor Cuomo, in concert with the New York State Department of Health, advises the following actions: “[r]emain indoors; ... go outside [only] for solitary exercise; [p]re-screen all visitors and aides by taking their temperature and seeing if person is exhibiting other flu-like symptoms; [d]o not visit households with multiple people; [w]ear a mask when in the



Jones v. Wolf, --- F.Supp.3d ---- (2020)

2020 WL 1643857

company of others; [t]o the greatest extent possible, everyone in the presence of vulnerable people should wear a mask; [a]lways stay at least six feet away from individuals; and [d]o not take public transportation unless urgent and absolutely necessary.” *Governor Cuomo Signs the ‘New York State on Pause’ Executive Order, supra.*

- 13 As discussed above, the CDC explains that “[o]ther high-risk conditions could include: [p]eople with [chronic lung disease](#) or moderate to severe [asthma](#)[; p]eople who have serious heart conditions[; p]eople who are immunocompromised ... [; p]eople of any age with severe [obesity](#) (body mass index [BMI] of 40 or higher)[; p]eople with [diabetes](#)[; p]eople with [chronic kidney disease](#) undergoing dialysis[; or p]eople with liver disease.” *See People who are at higher risk for severe illness, supra.*

### **ORDER**

**\*15 The respondents shall report to the Court no later than 5:00 p.m. on April 3, 2020,** with a detailed plan explaining how they will identify which petitioners meet the CDC’s high-risk criteria and how they will facilitate those individuals’ taking any or all of the “social distancing” measures recommended by the CDC and New York State Department of Health. **No later than 9:00 a.m. on April 6, 2020, the respondents shall report to the Court** as to whether any or all of the steps outlined in the plan have been taken and, if so, which ones. They also shall identify for which petitioners the measures have been taken and provide a brief explanation why any petitioner does not meet the CDC’s high-risk criteria. The Court then will decide whether the constitutional violation has been remedied and whether further action of the Court is required.

IT IS SO ORDERED.

### **All Citations**

--- F.Supp.3d ----, 2020 WL 1643857

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Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

2020 WL 1873307

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United States District Court, E.D. Michigan, Southern Division.

Ibrahim FOFANA, et al., Petitioners,

v.

Matthew ALBENCE, in his official capacity as Acting Director,  
U.S. Immigration and Customs Enforcement, et al., Respondents.

Case No.: 20-10869

|

Signed 04/15/2020

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**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PETITION  
FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 [#1],  
REQUIRING RESPONDENT TO RELEASE PETITIONER IBRAHIM FOFANA FROM  
CUSTODY WITHIN 36 HOURS AND REQUIRING RESPONDENT TO SHOW CAUSE**

[GERSHWIN A. DRAIN](#), United States District Judge

#### I. INTRODUCTION

\*1 On April 3, 2020, Petitioners Ibrahim Fofana, Abdulrahman Mawas, Mhdmamdouh Kheshfeh, Emilian Hila and Jurgen Sterbyci filed a petition for a writ of habeas corpus pursuant to  28 U.S.C. § 2241, along with a request for a temporary restraining order. Petitioners request their immediate release from detention while they await decisions in pending removal or asylum proceedings before the immigration courts. Petitioners are currently detained by the United States Immigration Customs and Enforcement Agency (ICE) at Monroe and Chippewa County Jails. Petitioners argue their continued detention violates the Fifth Amendment because Respondent Rebecca Adducci, the District Director for ICE's Detroit Office<sup>1</sup> and Petitioners' custodian for purposes of this habeas action, is unable to adequately respond to the COVID-19 pandemic which exposes Petitioners to a substantial risk of serious illness or death.

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

1 Respondent correctly notes that Rebecca Adducci is the proper respondent for the instant habeas proceeding. As the ICE Detroit District Director, she has “power over” Petitioners.

 *Roman v. Ashcroft*, 340 F.3d 314, 320 (6th Cir. 2003).

Respondent opposes Petitioners’ requested relief arguing Petitioners are not among the class of persons considered to be high risk for serious illness or death if exposed to COVID-19, nor are any of the Petitioners housed in locations where a confirmed COVID-19 case has occurred.

For the reasons that follow, the Court will grant in part and deny in part Petitioners’ petition for a writ of habeas corpus and request for a temporary restraining order. The Court will grant Petitioner Fofana a temporary restraining order and writ of habeas corpus releasing him from ICE custody. The Court will deny Petitioners Mawas’s, Hila’s, Kheshfeh’s, and Sterbyci’s petition for a writ of habeas corpus and request for a temporary restraining order.

## II. FACTUAL BACKGROUND

### A. PETITIONERS

#### 1. Ibrahim Fofana

Petitioner Ibrahim Fofana is a 52-year old citizen of Mali, who was admitted to the United States as a non-immigrant entertainer on November 12, 1994, with authorization to remain for a temporary period not to exceed January 20, 1995. Fofana is currently married to a United States citizen and they have three minor children together. He also has custody of another minor child from a previous marriage. Fofana suffers from [high blood pressure](#), swelling of the hands and legs and shortness of breath. He is currently taking medication for his [high blood pressure](#).

In 2000, Fofana was convicted of immigration fraud for his involvement with arranging marriages between foreign nationals and United States citizens in violation of  [8 U.S.C. § 1325\(c\)](#) and  [18 U.S.C. § 1546](#). In March of 2001, Fofana was placed in removal proceedings based in part on his conviction for immigration fraud, and an Immigration Judge ordered his removal to Mali. However, by October 2, 2001, Fofana was released on an order of supervision after efforts to effectuate his removal were unsuccessful.



Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

\*2 In October of 2016, Fofana was placed in the Alternatives to Detention (ATD) program, with monthly telephonic reporting, office visits every 2 weeks, home visits every 4 weeks, and instructions to obtain a passport. In March of 2017, he applied to reopen his removal proceedings for an adjustment of status to lawful permanent resident based on his marriage to a United States citizen. His motion to reopen was granted and an individual hearing on the merits of his application to adjust status is scheduled to occur on June 12, 2020.

On February 19, 2020, ICE detained Fofana pursuant to  8 U.S.C. § 1226(a) due to purported noncompliance with his ATD program requirements, including violations of telephonic reporting rules, a failed home visit on February 18, 2020, and a lack of progress in obtaining a passport as instructed. Fofana argues that he has followed ATD reporting, however on three occasions the voice recognition system was not functioning properly. He also insists that he failed to answer the door on February 18, 2020 because he was asleep, but when he awakened, he contacted ICE to let someone know what had happened.

## **2. Emilian Hila**

Petitioner Emilian Hila is a 29-year-old citizen of Albania, who was admitted to the United States as a nonimmigrant visitor on January 24, 2018, with authorization to remain for a temporary period until July 24, 2018. On September 29, 2018, Hila filed an application to adjust status based on his marriage to a United States citizen. On November 7, 2019, removal proceedings were initiated based on Hila having obtained admission to the United States by willful misrepresentation of a material fact on a tourist visa application—namely, that he had claimed to be a priest and was attending a religious conference in Michigan. The Immigration Judge denied Hila’s request for custody redetermination concluding that Hila was a flight risk with no guarantee that he “will appear for future proceedings if granted bond.” On March 11, 2020, the Immigration Judge ordered Hila’s removal to Albania. Hila appealed this decision to the BIA, and his appeal remains pending.

## **3. Abdulrahman Mawas**

Petitioner Abdulrahman Mawas is a 20-year-old citizen of Syria, who was admitted to the United States as a nonimmigrant visitor on April 16, 2016, with authorization to remain for a temporary period until October 15, 2016. On September 6, 2016, Mawas filed an application for temporary protected status. This application was denied on April 26, 2019.

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

On February 13, 2017, Mawas applied for asylum and for withholding of removal which remained pending when removal proceedings were initiated and he was taken into custody on February 19, 2020. Mawas was charged as removable for having overstayed his authorized period of admission under  8 U.S.C. § 1227(a)(1)(B).

On November 24, 2019, Mawas was arrested for shooting BB guns from his apartment balcony. He pled guilty to an amended charge of disorderly person in violation of  MICH. COMP. LAWS § 750.167 in the 47<sup>th</sup> Judicial District Court in Farmington Hills, Michigan. He has not been sentenced on this offense. Mawas also has prior convictions for operating a vehicle on a suspended license in September of 2018 and December of 2019.

At a hearing on March 20, 2020, the Immigration Judge denied his request for a custody redetermination, finding that he was a danger to persons and property based on his recent criminal activity. Mawas has until April 20, 2020 to appeal this decision. Mawas has a hearing on his application for asylum scheduled for June 11, 2020.

#### **4. Mhdmamdouh Kheshfeh**

**\*3** Petitioner Mhdmamdouh Kheshfeh is a 22-year-old citizen of Syria, who was admitted to the United States on a nonimmigrant visitor visa as part of a robotics team on April 16, 2016, with authorization to remain for a temporary period until October 15, 2016. On August 24, 2016, Kheshfeh filed an application for protected status, which may still be pending. In February of 2017, he filed an application for asylum and withholding of removal, which remained pending when removal proceedings were initiated. Kheshfeh was taken into custody on February 19, 2020.

On November 24, 2019, Kheshfeh was also arrested for shooting BB guns from his apartment balcony. Kheshfeh and Mawas are roommates. He likewise pled guilty to an amended charge of disorderly person in violation of  MICH. COMP. LAWS § 750.167 in the 47<sup>th</sup> Judicial District Court in Farmington Hills, Michigan. He has also not been sentenced on this offense.

At a hearing on March 20, 2020, the Immigration Judge denied Kheshfeh's request for custody redetermination finding that he was a flight risk and a danger to persons and property evidenced by his recent criminal activity. Kheshfeh has until April 20, 2020 to appeal this decision. Kheshfeh has an individual hearing scheduled on his asylum application in June of 2020.

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

## 5. Jorgen Sterbyci

Sterbyci is a 30-year-old citizen of Albania who was admitted to the United States as a visa waiver program tourist under  8 U.S.C. § 1187, on August 3, 2014. Sterbyci gained admission by using a fraudulent Italian passport in the name of Massimo Romanelli. On July 29, 2015, he applied for asylum and withholding of removal. On December 19, 2019, the Immigration Judge ordered him removed and he was arrested at his Macomb, Michigan residence on February 11, 2020. Sterbyci's individual hearing for asylum and relief from removal is scheduled for May 20, 2020.

Sterbyci is the sole breadwinner in his family and he has a 3-month old child who is taken care of by his mother, who has also applied for immigration relief.

## B. COVID-19

COVID-19 is an abbreviation for the novel coronavirus disease of 2019, a respiratory illness that spreads easily and sustainably in the community through respiratory droplets produced when an infected person coughs or sneezes. *See Centers for Disease Control and Prevention Coronavirus Disease 2019 Frequently Asked Questions*, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-COVID-19-Spreads> (last visited April 11, 2020). The novel coronavirus of 2019 “is a serious disease, ranging from no symptoms or mild ones for people at low risk, to respiratory failure and death in older patients and patients with chronic underlying conditions.” ECF No. 7, PageID.121. While it is thought that people are most contagious when symptoms are present, the virus has also been detected in asymptomatic persons *See id.*, *Centers for Disease Control and Prevention Coronavirus Disease 2019 Frequently Asked Questions*, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-COVID-19-Spreads> (last visited April 11, 2020). The incubation period is believed to be up to fourteen days in duration. *Id.*

There is no vaccine to prevent COVID-19, nor is there antiviral medication that can treat it. *Id.* According to the CDC, “[t]he best way to prevent illness is to avoid being exposed to the virus.” *Id.* The CDC recommends, among other things, that people clean their hands often or use hand sanitizer when soap is unavailable, avoid close contact with other people (at least six feet in distance), and clean and disinfect frequently touched surfaces daily, such as tables, doorknobs, light switches, and countertops. *Id.* The CDC also recommends that if an individual becomes sick, he or she should isolate from others by staying in a specific sick room and using a separate bathroom if possible. *Id.*

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

\*4 The CDC has indicated that certain classes of individuals are at higher risk for developing severe illness if exposed to the novel coronavirus of 2019. *Id.* Older adults – 65 or older – and people suffering from underlying medical conditions such as moderate to severe [asthma](#), [chronic lung disease](#), serious [heart disease](#), severe [obesity](#), [diabetes](#), liver disease, [kidney disease](#) or people who are immunocompromised such as those who are undergoing [cancer](#) treatment, smokers, [bone marrow](#) or [organ transplant](#) recipients or donors, people with immune deficiencies, poorly controlled HIV or AIDS sufferers and those who have prolonged use of corticosteroids and other immune weakening medications are at higher risk of developing serious illness if they are exposed to COVID-19. *Id.*

While it has been accepted that older adults are the most vulnerable, a March 18, 2020 CDC report noted that 38% of the 508 hospitalized patients were younger – between 20 and 54 years of age. *See Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)* United States, February 12 – March 16, 2020 (Mar. 18, 2020); <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>. An April 8, 2020 CDC report on hospitalization rates among COVID-19 patients notes that out of the 1,482 hospital patients studied, 74.5% were aged 50 years or older and 54.4% were male. *See* Centers for Disease Control, Morbidity and Mortality Weekly Report (April 8, 2020), *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 – COVID-NET, 14 States, March 1–30, 2020*, <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6915e3-H.pdf>. Additionally, the CDC reports that “[a]pproximately 90% of hospitalized patients identified ... had one or more underlying conditions, the most common being [obesity](#), [hypertension](#), [chronic lung disease](#), [diabetes mellitus](#), and [cardiovascular disease](#).” *Id.*

The swift and stunning spread of the novel coronavirus of 2019 has changed the world in record speed. At the time of writing, the majority of states have issued stay at home orders, including Governor Gretchen Whitmer of Michigan, who issued a state of emergency when the State’s first two cases of coronavirus were reported on March 10, 2020. On March 24, 2020, Governor Whitmer issued a stay-at-home order requiring all but essential workers to report to work. All primary and secondary schools, as well as colleges and universities have shuttered. Dining at restaurants is prohibited and retailers, small businesses included, have closed doors unless they sell “essential” merchandise.

Moreover, even with the Governor’s stay-at-home order, Michigan continues to experience staggering numbers of confirmed COVID-19 cases and deaths. On April 9, 2020, Governor Whitmer extended the stay-at-home order through May 1, 2020. At the time of this writing, a little more than thirty days after the initial two COVID-19 cases were reported in Michigan, the

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

total confirmed number of COVID-19 cases now totals 27,001, with 1,768 lives lost. Those that have died range in age from 20 to 107. The United States alone accounts for 614,180 confirmed COVID-19 cases representing roughly 25% of the total cases worldwide at 1,981,239. Since the virus was first reported on January 21, 2020 by a Washington State man, the United States has lost 26,061 lives to COVID-19.

### C. MONROE & CHIPPEWA COUNTY JAILS

Immigration detention facilities and jails are enclosed environments that the CDC has acknowledged “present[ ] unique challenges for control of COVID-19 transmission among [ ]detained persons, staff, and visitors.” ECF No. 1, PageID.4. Another court reviewing a similar habeas petition has noted that “[c]ounty jails were not designed with pandemics in mind. To the contrary, they were made to house persons in relatively close contact.” [Rafael L.O. v. Tsoukaris](#), No. 20-3841 (JMV), 2020 WL 1808843, at \*3, 2020 U.S. Dist. LEXIS 62389, \*7 (D.N.J. Apr. 9, 2020).

\*5 Petitioners Fofana, Mawas, Kheshfeh, and Sterbyci are detained at the Monroe County Jail. Petitioner Hila is detained at the Chippewa County Jail. The Petitioners maintain that the conditions of confinement at Monroe and Chippewa County Jails make it impossible for Respondent to protect the Petitioners from risk of COVID-19 infection. Respondent argues that there are no confirmed cases in either facility, thus Petitioners should be denied relief on this basis alone.

COVID-19 has already entered some of Michigan’s jails and prisons and begun to wreak havoc therein. Jackson County’s Parnell Correctional Facility has the most confirmed COVID-19 cases with 144. A total of 454 inmates in MDOC custody, including 10 deaths, have tested positive for COVID-19. ICE detention facilities, including county jails, had at least 13 confirmed COVID-19 cases as of April 4, 2020. *See* ICE Guidance on COVID-19, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/coronavirus> (updated Apr. 4, 2020). As of the date of this writing, roughly a week and a half later, that number has increased to 77 COVID-19 cases among the nation’s immigrant detainees. *Id.* (updated Apr. 11, 2020). This number is likely lower than the actual number as access to testing for COVID-19 has been difficult across the United States, including in Michigan.

James Jacobs is an Assistant Field Office Director with the Detroit Field Office of Enforcement and Removal Operations with ICE. While Jacobs has oversight over detention facility matters, he has not personally visited either Monroe County Jail or Chippewa County Jail. ECF No.9, PageID.243.



Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

Jacobs indicates that the Monroe facility houses immigration detainees in POD B, which has a capacity of 95 detainees. ECF No.9, PageID.243. Jacobs claims that the facility is at half capacity and is not accepting new detainees. *Id.* POD B's housing unit aligns bunks in rows with beds roughly two feet apart. *Id.* Staff have assigned detainees to bunks with empty bunks separating them from the next detainee. *Id.* Detainees eat in the housing unit at tables with 4 to 6 inmates per table. *Id.* Jacobs asserts that inmates have daily access to sick calls in a clinical setting. *Id.* Monroe County Jail does not have an onsite medical infirmary. *Id.*

Contrary to Jacobs' claims, Petitioner Fofana maintains that the medical care at the Monroe County facility has been substandard. ECF No. 11, PageID.287. Fofana has [high blood pressure](#) and he began experiencing symptoms on February 28, 2020 when he awoke in the middle of the night feeling ill. *Id.* Fofana sent a kite to see a doctor, but his request was not fulfilled until March 23, 2020. *Id.* From that date on, a nurse irregularly monitored Fofana's blood pressure. *Id.* On April 2, 2020, he was prescribed 2 medications for his [high blood pressure](#). *Id.* A doctor finally examined him on April 8, 2020 and adjusted the dosage of his blood pressure medication. *Id.* Petitioner Fofana continues to feel unwell. Most recently, he asked the nurse to take his blood pressure and she refused, stating, "we only take blood pressure once a week." *Id.*

Jacobs further indicates that the Monroe County Jail has increased sanitation frequency with daily sanitation of the building and housing units. The facility uses a mobile Kaivac cleaning system with disinfectant cleaner. He notes that detainees are provided soap, Lysol wipes and cleaning solution for cleaning their assigned sleeping areas. He further asserts that masks are available as needed. Monroe County Jail has identified housing units for quarantine of patients who are suspected of, or test positive for, COVID-19. ICE detainees requiring segregation or quarantine will be moved from their separate housing unit in the dormitory to the main jail.

**\*6** Conversely, Petitioner Sterbyci asserts that people who are sick and coughing continue to remain in his housing unit. ECF No.11, PageID.290. He notes the shared bathroom facilities are moldy and the detainees are only given water, soap and a bucket to clean with. *Id.* Detainees deny access to Lysol wipes. *Id.* Jail trustees from Pod A enter the Petitioners' unit and do not wear masks or gloves. *Id.* Petitioner Khesfeh maintains that detainees who are sick must place a request to see a nurse, which usually takes about 24 hours. *Id.*, PageID.292. He notes that detainees who have been coughing in his unit were removed for a period of two days and returned. *Id.*

Jacobs also advises that Chippewa County Jail has a detainee population within its approved capacity. Detainees are housed in 24-man cells with bunk beds spaced between 31" and 38" apart. Chippewa County Jail has also increased sanitation frequency, with additional workers sanitizing and disinfecting throughout the day and night. Detainees are provided personal soap, hygiene

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

items, and disinfectant supplies for cleaning their assigned sleeping areas. Detainees must share two sinks and showers.

Jacobs asserts that detainees at Chippewa County Jail have access to daily sick calls in a clinical setting. Chippewa likewise does not have a medical infirmary. As of March 25, 2020, all new detainees are screened when they enter the facility, including questions concerning travel history, contact with confirmed COVID-19 cases, and taking detainees' temperatures.

In support of their petition and motion for temporary restraining order, Petitioners have included the declaration of Dr. Robert B. Greifinger, a 30-year physician specializing in health care for prisoners. ECF No. 7, PageID.121. In a separate case, Dr. Greifinger was asked to evaluate ICE's response to COVID-19 in another detention facility in Michigan – Calhoun County Detention Center – which has implemented similar measures to those implemented by ICE at the Monroe and Chippewa County Jails. Dr. Greifinger concluded that ICE's "protocols are wholly insufficient to adequately face the crisis[.]" *Id.* Dr. Greifinger opined that ICE "must release all people with risk factors to prevent serious illness including death." *Id.* Dr. Greifinger also indicated that release of the most vulnerable will reduce the burden on the facilities' limited healthcare infrastructure. *Id.* Also noteworthy is Dr. Greifinger's opinion that isolation for suspected COVID-19 cases is not a medically appropriate method for abating the substantial risks of COVID-19. Detainees in isolation are monitored less frequently, and COVID-19 can cause severe symptoms that escalate in a short amount of time placing detainees in serious and grave danger. *Id.*

### III. LAW & ANALYSIS

#### A. Standard of Review for Temporary Restraining Order

In order to prevail on a motion for injunctive relief, Petitioners must demonstrate that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) the relief sought is in the public interest.  *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

#### B. Likelihood of Success on the Merits

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

## 1. Standing

As an initial matter, Respondent argues that Petitioners lack standing to bring the instant action. “Before bringing a case in federal court, a plaintiff must establish standing to do so.” *Klein v. United States DOE*, 753 F.3d 576, 579 (6th Cir. 2014). The law of Article III standing “serves to prevent the judicial process from being used to usurp the powers of the political branches.” *Id.* (citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 133 S.Ct. 1138, 1146, 185 L. Ed. 2d 264 (2013)).

\*7 “To establish Article III standing, a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘likelihood’ that the injury ‘will be redressed by favorable decision.’ ” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 134 S.Ct. 2334, 2341, 189 L.Ed. 2d 246 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

“An injury sufficient to satisfy Article III must be ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’ ” *Id.* (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). “An allegation of future injury may suffice if the injury is ‘certainly impending,’ or there is a ‘substantial risk that harm will occur.’ ” *Id.* (quoting *Clapper*, 133 S. Ct. at 1148). “Redressability is a likelihood that the requested relief will redress the alleged injury.” *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 493 F.3d 644, 659 (6th Cir. 2007) (internal quotation and citation omitted).

Respondent argues that Petitioners cannot show an injury in fact because their claim that detention *per se* poses an increased risk of contracting COVID-19 is purely speculative; the virus is not in either facility. Additionally, Respondent has taken adequate measures to respond to the pandemic. Moreover, only Petitioner Fofana complains of any underlying health condition – **high blood pressure** – and this is not one of the conditions listed by the CDC that increases the risk of serious illness from COVID-19. Nor does Petitioner Fofana’s age put him in the class of persons at higher risk. Finally, Respondent complains that the remaining Petitioners have no underlying health conditions and they are all young – in their twenties or early thirties.

Respondent’s argument is foreclosed by the Supreme Court’s decision in *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475, 125 L. Ed. 2d 22 (1993). Contrary to Respondent’s contention, “a remedy for unsafe conditions need not await a tragic event.” *Id.* at 33-34, 113 S.Ct. 2475. In



Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

 *Helling*, the Supreme Court held that a prisoner could allege a valid Eighth Amendment claim when prison officials exposed him to an unreasonable risk of serious damage to his future health by exposing him to environmental tobacco smoke.  *Id.* at 28, 113 S.Ct. 2475 (concluding that deliberate indifference can be established where prison officials “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year”).  *Id.* The  *Helling* court explained that in  *Hutto v. Finney*, 437 U.S. 678, 682, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978):

[W]e noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though the possible infection might not affect all of those exposed. We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery.

 *Id.* at 33-34; see also   *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (concluding that inmates were entitled to Eighth Amendment relief when they established threats to their personal safety from, among other conditions, “the mingling of inmates with serious contagious diseases with other prison inmates.”).

\*8 Accordingly, Petitioners do not need to allege that the jails currently have confirmed COVID-19 cases or that they have contracted the virus to demonstrate standing. It is well documented that detention facilities increase the risk of contracting infectious diseases because of the inherent nature of confinement. As will be more fully discussed below, Respondent has not undertaken adequate measures to protect Petitioners from the risk of serious illness or death from exposure to COVID-19. The Constitution does not require that Petitioners be seriously ill from COVID-19, or that they await the introduction and spread of COVID-19 in their detention facility before they may assert their Fifth Amendment rights. Respondent’s standing argument lacks merit.

## 2. Fifth Amendment Due Process

Respondent also argues Petitioners cannot establish a Fifth Amendment violation because they cannot show ICE has failed to undertake adequate measures to prevent the spread of COVID-19,

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

or that Respondent has allowed dangerous conditions to persist at these facilities. Respondent contends that Petitioners cannot show release from these facilities, which do not have any cases, into the general population where the COVID-19 virus is spreading, will reduce the risk of contracting the virus.

The Fifth Amendment’s Due Process Clause applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.”  *Zadvyas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). The Sixth Circuit has recognized that the government “has an ‘obligation to provide medical care for those whom it is punishing by incarceration.’ ”  *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018) (quoting  *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). In order to establish their Fifth Amendment claim, Petitioners must establish a subjective and objective component.  *Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013); see also  *Watkins v. City of Battle Creek*, 273 F.3d 682, 685-86 (6th Cir. 2001) (claims relating to health concerns of detainees are governed by the Eighth Amendment’s deliberate indifference standard).

Petitioners must establish that Respondent is deliberately indifferent to a substantial risk of harm to Petitioners.  *Farmer v. Brennan*, 511 U.S. 825, 837-38, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). In this regard, Petitioners must show that the constitutional deprivation was “objectively, ‘sufficiently serious’ ” and that the Respondent’s “current attitude and conduct amount[s] to deliberate indifference.”  *Id.*;  *Helling*, 509 U.S. at 35, 113 S.Ct. 2475.

Petitioners have satisfied the subjective prong. Respondent is aware of the problems posed by institutional confinement and the novel coronavirus of 2019 and has failed to take adequate steps to reduce the risk that Petitioners are exposed to serious harm. “The Government cannot act with a callous disregard for the safety of our fellow human beings.” *Castillo v. Barr*, No. 20-00605, 2020 WL 1502864, 2020 U.S. Dist. LEXIS 5425 (W.D. Cal. Mar. 27, 2020).

The Court acknowledges that Respondent has taken some steps to address the COVID-19 pandemic.<sup>2</sup> However, as recognized by Dr. Greifinger with respect to Respondent and the Calhoun County Jail, Respondent’s precautionary measures at Monroe and Chippewa County Jails are “wholly insufficient to adequately face the crisis at hand.” ECF No.7, PageID.123. The detainees eat 4 to 6 people per table. While Monroe County Jail has ceased accepting new detainees and is operating at half capacity, roughly 48 detainees are confined to one housing unit. This violates recommended guidelines to socially distance with at least six feet distance between people and for no more than ten people to gather in one space. See *Awshana v. Aducci*, No. 20-10699, 2020 WL 1808906, \*8, 2020 U.S. Dist. LEXIS 62415, \*24 (E.D. Mich. Apr. 9, 2020) (“[W]hile these

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

measures are certainly commendable, ‘the fact is that none of the steps [taken] ... includes the ‘social distancing’ measures recommended—especially for high-risk individuals—by the CDC ...’” (quoting  *Jones v. Wolf*, No. 20-361, 2020 WL 1643857 (W.D.N.Y. Apr. 2, 2000)).

2 It is problematic that the only evidence offered from the Government concerning the jails’ condition is from ICE employees who have no personal knowledge of the jails’ current condition because they have not been there. This is the subject of Petitioners’ Motion to Strike. *See* ECF No. 12.

\*9 Additionally, Monroe County Jail is ill equipped to address a COVID-19 outbreak with substandard medical care and supervision. Respondent’s contention that Petitioners have access to more medical monitoring than the general public is without basis in the record. Dr. Greifinger, a thirty-year veteran of medical care in the penological setting, indicates that detention facilities are ill suited to attend to the medical needs of detainees should a communicable disease be introduced into the facility. This is evident by not only the facility’s lack of an infirmary, but also by Petitioner Fofana, who sought a doctor on February 28, 2020, but was not seen by a doctor and prescribed needed **high blood pressure** medication until early April. Monroe County Jail’s failure to take sufficient precautions is also evidenced by the lack of enough quarantine rooms for sick detainees so that sick and coughing detainees can be separated from Petitioners.

While Monroe County Jail has apparently increased cleaning, it does not appear that the shared bathroom facilities are cleaned frequently throughout the day as recommended. Moreover, jail staff are permitted to freely walk between the main jail and the unit where Petitioners are housed.

Chippewa County Jail also cannot adequately protect Petitioner Hila from COVID-19. It is still accepting new detainees, however contrary to recommendations, these new detainees are not quarantined from the rest of the detainee population for a period of 14 days. Because persons with the virus may be asymptomatic, “nearly everyone who is not practicing social distancing is in contact with someone who has the virus.” ECF No. 7, PageID.123. As such, new detainees may bring the virus into the facility and spread the virus to Petitioner Hila. Chippewa County Jail likewise lacks an infirmary to treat detainees. Respondent also fails to indicate how many ICE detainees are held at the jail, and how many people are in Hila’s cell, which holds up to 24 people. Respondent merely indicates the “[j]ail has a population within its approved capacity and is not overcrowded.” ECF No. 9, PageID.250. This information is unhelpful to the Court’s analysis as another district court has recognized, “the appropriate capacity of a jail during a pandemic obviously differs enormously from its appropriate capacity under ordinary circumstances.”  *Decker*, 2020 WL 1481503, \*5, 2020 U.S. Dist. LEXIS 53191, \*6.

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

It is also notable that Respondent is silent as to how many, if any, detainees have been tested for COVID-19 in the Monroe County and Chippewa County Jails. It is well documented that access to testing for COVID-19 has been difficult. The MDOC has only tested 707 inmates, with 454 testing positive for the virus, and a total inmate population of more than 40,000.

While it appears that Petitioners can easily satisfy the objective prong, Fofana's case is markedly stronger than the other Petitioners. Fofana is a 52-year-old male with [high blood pressure](#). Fofana falls in the category of persons who are at risk of serious illness and potential death if exposed to the novel coronavirus of 2019.

Respondent improperly minimizes the seriousness of the risk to Fofana by arguing he does not have the characteristics that put him in a high-risk category. While the CDC has noted that persons 65 years and older are at greater risk for serious complications, it has also produced a report noting that younger individuals are at risk for serious illness as well. Numerous medical professionals have indicated that adults over 50 years old, especially those with underlying health conditions, are likely to suffer serious illness. A CDC study of hospitalization rates reported on April 8, 2020 revealed that 74% of hospitalized patients were aged 50 years old or older, 54.4% were male and 49.7% had [hypertension](#).

Additionally, the lack of adequate medical care for Fofana further supports his claim. He waited more than a month to be prescribed needed [high blood pressure](#) medication and his requests for continued monitoring by nursing staff have been ignored. Thus, contrary to Respondent's argument, Petitioner Fofana has established Respondent is deliberately indifferent to Fofana's serious risk of illness and death from exposure to COVID-19 by her failure to impose adequate precautions and ensure proper healthcare for Fofana. Petitioner Fofana is likely to succeed on the merits of his Fifth Amendment claim.

**\*10** As to Petitioners Mawas, Kheshfeh, Hila and Sterbyci, the Court lacks evidence that they suffer from any underlying medical condition or conditions that place them at high risk for serious illness if exposed to COVID-19. Moreover, Petitioners Mawas, Kheshfeh, Hila and Sterbyci are in their twenties and thirties, respectively. Without more evidence to support the objective prong of their Fifth Amendment claim, the Court cannot conclude that Petitioners Mawas, Kheshfeh, Hila and Sterbyci have a strong likelihood of success on the merits of their Fifth Amendment claim.

### C. Irreparable Injury

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

Respondent also argues Petitioners cannot show irreparable injury because release will not prevent the risk of adverse consequences from COVID-19 when neither prison has any confirmed cases. Contrary to Respondent's argument, it is beyond dispute that detention facilities are built to house as many people as possible, which makes it virtually a guarantee that these facilities "will be hit by COVID-19 when the rest of the community is, staff and their families included." ECF No. 7, PageID.123; *see also* [Rafael L.O.](#), 2020 WL 1808843, at \*8, 2020 U.S. Dist. LEXIS 62389, at \*7 (granting immigration detainees release because the "conditions of confinement raise serious concerns about the ability to stop transmission of the virus.") As another federal judge in this district stated, "[i]n the face of a deadly pandemic with no vaccine, no cure, limited testing capacity, and the ability to spread quickly through asymptomatic human vectors, a 'generalized risk' is a 'substantial risk' of caching the COVID-19 virus for any group of human beings in highly confined conditions, such as" Petitioners at Monroe and Chippewa County Jails. [Malam v. Adducci](#), No. 20-10829, 2020 WL 1683453, \*9, 2020 U.S. Dist. LEXIS 59709, \*25 (E.D. Mich. Apr. 6, 2020).

The only legitimate governmental objective advanced by Respondent is the Government's interest in ensuring illegal aliens do not abscond into the United States and evade their immigration proceedings. However, Petitioners have a strong interest in avoiding an unreasonable risk of serious illness and damage to their future health. None of the Petitioners are subject to mandatory detention under [8 U.S.C. § 1226\(c\)](#). Continued confinement under these conditions is not reasonably related to the Government's interest. *See* [Malam](#), 2020 WL 1683453, 2020 U.S. Dist. LEXIS 59709 (E.D. Mich. Apr. 6, 2020) (finding irreparable harm where petitioner with underlying health conditions was housed at a facility with no confirmed COVID-19 cases but that had imposed measures that were "insufficient to stem deadly prison outbreaks" based on the inherent nature of detention and "this particular global public health crisis."); *see also* [Thakkur v. Doll](#), No. 1:20-cv-480, 2020 WL 1671563, \*8, 2020 U.S. Dist. LEXIS 59459, \*24 (M.D. Pa. Mar. 31, 2020) ("unsanitary conditions, which include overcrowding and a high risk of COVID-19 transmission" are not rationally related to government objective of ensuring that the petitioners appear for removal proceedings).

In [Thakkur](#), the district judge determined the "[p]etitioners face the inexorable progression of a global pandemic creeping across our nation—a pandemic to which they are particularly vulnerable due to age and underlying medical conditions." *Id.* at \*9. He further opined that, "[a]t this point, it is not a matter of *if* COVID-19 will enter Pennsylvania prisons, but *when* it is finally detected therein." (emphasis in original). "There can be no injury more irreparable" than "lasting illness or death." *Id.* The [Thakkur](#) court ultimately released more than ten immigrant detainees including several in their fifties with underlying health conditions such as high blood pressure. *Id.*; *see also* [Castillo v. Barr](#), No. 20-00605, 2020 WL 1502864, 2020 U.S. Dist. LEXIS 54425 (C.D. Cal.



Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

2020) (releasing immigrant detainees due to COVID-19 pandemic and the respondent's deliberate indifference to the detainees exposure to the virus and irreparable, serious illness); [Rafael L.O.](#), 2020 WL 1808843, at \*6, 2020 U.S. Dist. LEXIS 62389, at \*23 (same); [Basank v. Decker](#), No. 20 Civ. 2518, 2020 WL 1481503, 2020 U.S. Dist. LEXIS 53191 (S.D.N.Y. Mar. 26, 2020) (same).

\*11 The record is replete with evidence that Respondent has exposed Petitioners to a serious risk of harm. Given the accelerating count of confirmed COVID-19 cases in ICE detention facilities throughout the nation and Respondent's inadequate precautionary measures, as discussed above, Respondent has exposed the Petitioners to risk of serious and irreparable harm.

#### D. Balance of Interests

Because the government's interest is the public's interest, the final factors for injunctive relief are considered together because " 'the government's interest is the public interest.' " [Malam](#), 2020 WL 1683453, at \*13, 2020 U.S. Dist. LEXIS 59709, at \* 36 (quoting *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 512, 425 U.S. App. D.C. 31 (D.C. Cir. 2016))(citing [Nken v. Holder](#), 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)). Respondent argues the balance of factors does not favor the Petitioners. The public has a significant interest in the enforcement of the immigration laws and Respondent has valid reasons and statutory bases for detaining the Petitioners. Moreover, Petitioners Hila and Fofana have already been declared flight risks.

Contrary to Respondent's argument, the balance of interests favor release. The public has a strong interest in preventing the rapid spread of COVID-19 in immigration detention facilities so that sick detainees do not place further strain on an already taxed healthcare system. [Thakkur](#), 2020 WL 1671563, at \*9, 2020 U.S. Dist. LEXIS, at \*27 ("Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest.")

As to Petitioner Fofana, the likelihood that he would abscond appears minimal considering the current restrictions in the State and that he is a married father of four minor children with every incentive to appear for his immigration proceedings. Finally, the Court notes that Fofana has lived in the United States from 2001 through February of this year and has not engaged in further criminal conduct. In an abundance of caution; however, the Court will order ICE to set up electronic monitoring for Petitioner Fofana, among additional conditions of release.

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

Because Petitioner Fofana has a strong likelihood of success on the merits of his Fifth Amendment claim, has shown irreparable injury and the balance of interests are in his favor, the Court will grant his requested relief.

As to Petitioners Mawas, Khesfeh, Hila and Sterbyci, the Court is without sufficient information to assess whether they can establish a likelihood of success on the merits of their Fifth Amendment claim. The entry of preliminary injunctive relief is an extraordinary remedy and the Court cannot conclude at this juncture that Petitioners Mawas, Khesfeh, Hila and Sterbyci have met their burden to justify their requested relief.  *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015).

#### IV. CONCLUSION

Accordingly, for the reasons articulated above, Petitioners' Petition for a Writ of Habeas Corpus and Request for Temporary Restraining Order [#1] is GRANTED IN PART and DENIED IN PART.

IT IS ORDERED that Respondent Rebecca Adducci, within 36 hours from the entry of this Opinion and Order, release Petitioner Fofana on his own recognizance with the conditions that he (1) quarantine for 14 days at home upon his release from custody, (2) obey all Michigan Executive Orders, and (3) appear for his immigration proceedings.

IT IS FURTHER ORDERED that Respondent is RESTRAINED from arresting Petitioner Fofana for civil immigration purposes until the State of Emergency related to COVID-19 is lifted or until further Order of this Court.

**\*12** IT IS FURTHER ORDERED that Petitioner Fofana submit to electronic monitoring by ICE.

IT IS FURTHER ORDERED that Petitioners Mawas's, Khesfeh's, Hila's and Sterbyci's petition for a writ of habeas corpus and request for a temporary restraining order is denied.

IT IS FURTHER ORDERED that this temporary restraining order will expire within fourteen days of the entry of this Opinion and Order. Respondent SHALL SHOW CAUSE, in writing, why this Opinion and Order granting Petitioner Fofana's request for a temporary restraining order should not be converted to a preliminary injunction no later than April 20, 2020. Petitioner Fofana may file a Response no later than April 23, 2020.

SO ORDERED.

Fofana v. Albence, --- F.Supp.3d ---- (2020)

2020 WL 1873307

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## All Citations

--- F.Supp.3d ----, 2020 WL 1873307

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Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

2020 WL 1808906

Only the Westlaw citation is currently available.

United States District Court, E.D. Michigan, Southern Division.

Oliver Nissan AWSHANA, Ali Najim Al-Sadoon, and Wisam Gharib Hamana, Plaintiffs,

v.

Rebecca ADDUCCI, Detroit District Director, United States Immigration and Customs Enforcement, Matthew T. Albence, Director, United States Immigration and Customs Enforcement, Kevin McAleenan, Secretary of the United States Department of Homeland Security, and William P. Barr, United States Attorney General. Respondents.

Case Number 20-10699

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Signed April 9, 2020

#### Attorneys and Law Firms

[Shanta Driver](#), Driver, Schon and Associates PLC, Detroit, MI, for Petitioners.

[Bradley Darling](#), U.S Department of Justice, Detroit, MI, for Respondents.

#### **OPINION AND ORDER DENYING IN PART PETITION FOR WRIT OF HABEAS CORPUS**

[DAVID M. LAWSON](#), United States District Judge

\*1 “[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general wellbeing.”  [Helling v. McKinney](#), 509 U.S. 25, 32, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (citation omitted). Citing concerns for their safety due to potential exposure to the novel coronavirus and contracting COVID-19, petitioners Oliver Nissan Awshana, Ali Najim Al-Sadoon, and Wisam Gharib Hamana, Iraqi refugees currently detained by the United States Immigration Customs and Enforcement Agency (“ICE”), ask this Court to order their release in a petition for a writ of habeas corpus filed under  28 U.S.C. § 2241. They base their petition on a vague reference to an undeveloped theory of substantive due process embodied in the Fifth

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

Amendment. The government opposes their request due in part to their criminal histories that would disfavor release under normal circumstances. But these are not normal times, and the Court has the authority to order the petitioners' release if their continued detention violates a constitutional right for which the only remedy is release. Nonetheless, the present circumstances do not warrant relief: there are no confirmed or suspected COVID-19 cases in the one of detention facilities mentioned in the petition, and none of the petitioners are burdened with conditions that place them in an enhanced risk category. The petition will be denied in part, but it may be renewed if conditions change. The respondents promptly must furnish additional information about the conditions at the St. Clair County Detention Facility, where COVID-19 cases have been reported.

## I. The Petition

Although the petitioners have styled their petition as an “emergency,” they have not moved for a temporary restraining order or preliminary injunction or any other form of immediate consideration. The petition cites no legal authority except for references to [28 U.S.C. § 2241](#). The petitioners filed no memorandum of law to support their request. And they have not coupled their petition with any claim for violations of their constitutional rights under, for example, [Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics](#), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

The government believes that the petitioners' exclusive reliance on [section 2241](#) is fatal to their claim. Generally, [section 2241](#) provides a remedy for prisoners and detainees in two circumstances: (1) to “challeng[e] the execution of a sentence,” and (2) to “test the legality of a detention where [28 U.S.C.] § 2255 is otherwise inadequate.” [Terrell v. United States](#), 564 F.3d 442, 447-48 (6th Cir. 2009). The government characterizes the petition as a challenge to the petitioners' conditions of confinement. It argues that [section 2241](#) cannot provide a basis for relief for such a challenge.

It is generally accepted in this circuit that [section 2241](#) “is not the proper vehicle for a prisoner to challenge conditions of confinement.” [Luedtke v. Berkebile](#), 704 F.3d 465, 466 (6th Cir. 2013) (citing [Martin v. Overton](#), 391 F.3d 710, 714 (6th Cir. 2004)). That is because the purpose of a writ of habeas corpus is to contest “the very fact or duration of ... physical imprisonment.” [Lutz v. Hemingway](#), 476 F. Supp. 2d 715, 718 (E.D. Mich. 2007). It is employed when “the relief that [a petitioner] seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment.” *Ibid.* (citing [Preiser v. Rodriguez](#), 411 U.S. 475, 500, 93 S.Ct. 1827, 36

Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

L.Ed.2d 439 (1973)). If the remedy a detainee is seeking is a change in the *conditions* of his custody arrangements, or to obtain compensation for past unconstitutional conditions of confinement, then he must file an action under 42 U.S.C. § 1983, or for a federal detainee, under *Bivens*. *Ibid*.

\*2 The petitioners here, however, are not seeking to change the conditions of their confinement or to obtain damages for past constitutional violations. Instead, they describe the close living conditions typical of custodial confinement, they recount the current commands for social distancing necessary to inhibit the spread of the novel coronavirus, and they argue that no custodial condition will protect them from infection. Therefore, they argue, the *only* remedy that will vindicate their due process right under the Fifth Amendment is release from custody.

That form of relief falls squarely within the purview of section 2241. “The statute is an affirmative grant of power to federal courts to issue writs of habeas corpus to prisoners being held ‘in violation of the Constitution or laws or treaties of the United States.’ ” *Rice v. White*, 660 F.3d 242, 249 (6th Cir. 2011) (quoting 28 U.S.C. § 2241(c)). Courts generally look to the form of relief sought when deciding if section 2241 is applicable. In cases involving medical decisions, sometimes fine distinctions must be drawn. See *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005) (distinguishing between a section 2241 petitioner who requests a “quantum change in the level of custody, which must be addressed by habeas corpus,” and a petitioner who requests “a different program or location or environment, which raises a civil rights claim” and holding that “[i]f an inmate establishe[s] that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option.” (citation omitted)); cf. *Bell v. Wolfish*, 441 U.S. 520, 526 n.6, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (“[L]eav[ing] to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself.” (citation omitted)). But section 2241 has been pressed into service in medical condition cases where the line of demarcation is fuzzy. See *Roba v. United States*, 604 F.2d 215, 218-19 (2d Cir. 1979) (allowing a section 2241 petition to challenge an inmate’s “transfer while seriously ill” where that transfer posed a risk of fatal heart failure).

Other courts that have granted relief to detainees based on the current pandemic have relied on section 2241 for their authority. Most of them, however, also have considered coordinated requests for a temporary restraining order and the attending relevant equitable factors. See *Jones v. Wolf*, No. 20-361, 2020 WL 1643857 (W.D.N.Y. Apr. 2, 2020); *Basank v. Decker*, —

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

F.Supp.3d —, No. 20-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020);  *Coronel v. Decker*, — F.Supp.3d —, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020).

The petitioners allege that their continued detention violates their constitutional right under the Fifth Amendment, which forbids depriving a person of life, liberty, or property without due process of law. They contend that their continued detention will compromise their health and may kill them. They are entitled to advance their claim — and seek release from custody — under  [section 2241](#).

## II. Immigration Status and Constitutional Detention

The petitioners are natives and citizens of Iraq admitted at various times to the United States as refugees. The statuses of Awshana and Hamana were adjusted to lawful permanent residents. All three were placed in removal proceedings because of criminal convictions. And all eventually were scheduled for deportations, which were stayed when Immigration Judges granted requests for withholding of removal under the Immigration and Naturalization Act, the United Nations Convention Against Torture, or both.

\*3 Congress has prescribed that once an alien has been ordered to be deported, “the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the ‘removal period’).”  [8 U.S.C. § 1231\(a\)\(1\)\(A\)](#). During this removal period, “the Attorney General shall detain the alien.”  *Id.* [§ 1231\(a\)\(2\)](#). Congress has authorized the Attorney General (now the Secretary of the Department of Homeland Security) to detain certain aliens beyond the 90-day removal period under certain circumstances.  *Id.* [§ 1231\(a\)\(6\)](#). “By its terms, this provision applies to three categories of aliens: (1) those ordered removed who are inadmissible under § 1182, (2) those ordered removed who are removable under § 1227(a)(1)(C), § 1227(a)(2), or § 1227(a)(4), and (3) those ordered removed whom the Secretary determines to be either a risk to the community or a flight risk.”   *Clark v. Martinez*, 543 U.S. 371, 377, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005). The petitioners here all fall within the second category, and possibly the third as well.

Detention of removable aliens, however, must be consistent with the Constitution. The protection of the Fifth Amendment's Due Process Clause applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”  *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). The petitioners allege that their continued detention during the COVID-19 pandemic violates their substantive

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

rights under the Due Process Clause of the Fifth Amendment to the United States Constitution because it jeopardizes their health and medical wellbeing.

It is well known that the State “has an ‘obligation to provide medical care for those whom it is punishing by incarceration.’ ”  *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018) (quoting  *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). “[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.”  *Helling*, 509 U.S. at 31, 113 S.Ct. 2475.

However, claims by detainees for due process violations emanating from confinement conditions are not strictly governed by the Eighth Amendment, because the detainees do not stand convicted and are not subject to punishment.  *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983). A detainee's rights are at least as great as the Eighth Amendment protections available to a convicted prisoner.  *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004) (holding that civil detainees are entitled to superior conditions of confinement than prisoners and pretrial detainees). Nonetheless, claims relating to health concerns by detainees are analyzed using an Eighth-Amendment, deliberate-indifference framework.  *Watkins v. City of Battle Creek*, 273 F.3d 682, 685-86 (6th Cir. 2001).

That framework calls for proof that detention officials were deliberately indifferent to a substantial risk of harm.  *Farmer v. Brennan*, 511 U.S. 825, 837–38, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). The applicable test has two elements.  *Id.* at 834, 114 S.Ct. 1970. First, the petitioners must demonstrate that the constitutional deprivation was “objectively, ‘sufficiently serious.’ ”  *Ibid.* (quoting  *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). Second, they must demonstrate that the detention official had a “sufficiently culpable state of mind.”  *Ibid.* This element can be proven by circumstantial evidence from which the fact finder can conclude that the state actor perceived the risk,   *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001), or “from the very fact that the risk was obvious.”  *Terrance v. Northville Reg'l Psychiatric Hospital*, 286 F.3d 834, 843 (6th Cir. 2002).

In  *Helling v. McKinney*, the Supreme Court held that a prisoner could state a claim under the Eighth Amendment by alleging that officials “exposed him to levels of [environmental tobacco smoke] that pose[d] an unreasonable risk of serious damage to his future health.”  509 U.S. at 35, 113 S.Ct. 2475. To satisfy the objective prong, the plaintiff had to show both that he was “being exposed to unreasonably high levels of [environmental tobacco smoke]” and that “society



Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

consider[ed] the risk that the prisoner complain[ed] of to be so grave that it violate[d] contemporary standards of decency to expose *anyone* unwillingly to such a risk.”  *Id.* at 35, 36, 113 S.Ct. 2475 (emphasis in original). The plaintiff must produce “more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood [of] injury.”  *Id.* at 36, 113 S.Ct. 2475. To succeed on the subjective prong, the plaintiff had to show that “the prison authorities’ current attitude and conduct” amounted to deliberate indifference.  *Ibid.*

\*4 However, “a remedy for unsafe conditions need not await a tragic event,” and the plaintiff need not allege present harm to succeed on an unconstitutional conditions claim.  *Id.* at 33, 113 S.Ct. 2475. In  *Helling*, the Court rejected the government’s argument that the plaintiff’s claim was not cognizable because he had not alleged any present harm. The Court explained that the government may not “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.”  *Ibid.* The Court noted some examples of circumstances where inmates may obtain injunctive relief to remedy life-threatening conditions even though “nothing yet had happened to them.”  *Ibid.* One example was the “exposure of inmates to serious, communicable disease [even if the] inmate shows no serious current symptoms.”  *Ibid.*

### III. COVID-19 Pandemic and Detention Facilities

#### A. Novel Coronavirus in Michigan

On March 22, 2020, the Governor of Michigan announced that “[t]he novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spreads from person to person. There is currently no approved vaccine or antiviral treatment for this disease.” Executive Order, No. 2020-20, Mar. 22, 2020, [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-522626--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--,00.html). Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, estimated that between 100,000 and 240,000 people will die from COVID-19 related complications. Michael D. Shear et al., *Coronavirus May Kill 100,000 to 240,000 in U.S. Despite Actions, Officials Say*, N.Y. Times, Mar. 31, 2020, <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-death-toll-united-states.html>.

The Centers for Disease Control and Prevention (CDC) advised that “[p]eople aged 65 years and older” might be at higher risk for severe illness from COVID-19. *See*

Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

*People Who Are at Higher Risk for Severe Illness*, Ctrs. for Disease Control and Prevention (Mar. 31, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019ncov%2Fspecific-groups%2Fhigh-risk-complications.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019ncov%2Fspecific-groups%2Fhigh-risk-complications.html). The CDC identified other high-risk conditions, which include: [p]eople with [chronic lung disease](#) or moderate to severe [asthma](#)[; p]eople who have serious heart conditions[; p]eople who are immunocompromised ... [; p]eople of any age with severe [obesity](#) (body mass index [BMI] of 40 or higher)[; p]eople with [diabetes](#)[; p]eople with [chronic kidney disease](#) undergoing dialysis[; or p]eople with liver disease.”

*People Who Are at Higher Risk for Severe Illness*, *supra*.

On March 10, 2020, the Governor of Michigan announced the state's first two cases of COVID-19 and simultaneously declared a state of emergency. Executive Order, No. 2020-4 (Mar. 10, 2020). The number of new cases is growing exponentially. As of today, that number is now at 20,346 confirmed cases and 959 known related deaths. *See* Coronavirus, Michigan.Gov, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163-520743--,00.html>. COVID-19 has a high risk of transmission, and the number and rate of confirmed cases indicate broad community spread. *Ibid*.

## B. ICE Detention Facilities

The parties paint very different pictures of the conditions within the ICE detention facilities. The government argues that the situation is no worse than what is occurring throughout the rest of the world. But the petitioners argue that the packed, unsanitary conditions at the facilities are completely inadequate, warning that they will become breeding grounds for the disease.

### 1. ICE Facility Conditions

As of March 30, 2020, when the respondents filed their answer to the petition, there have been no suspected or confirmed cases of COVID-19 in either the Calhoun or St. Clair County detention centers. However, the Court learned from the U.S. Marshal Service that confirmed cases were reported by the St. Clair County Jail on April 8, 2020. The petitioners argue that the poor conditions in the facility will compromise their safety and that exposure to the virus while detained within ICE's facilities is inevitable.

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

\*5 Relying on the following articles from major news outlets, the petitioners believe that ICE detention facilities are rife with overcrowding, neglect, and substandard conditions, making them hotbeds for the virus:

1. Human Rights Watch & American Civil Liberties Union, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention* (June 2018) ECF No. 1-4. (Since March 2010, 74 detainees have died in ICE custody; medical care lapses contributed to 23 of them);
2. Amanda Holpuch, *Coronavirus Inevitable in Prison-Like US Immigration Centers, Doctors Say*, THE GUARDIAN, ECF No. 1-5;
3. *Former ICE Director: Release Immigrants from Detention or COVID-19 Will Spread Like Wildfire Inside*, DEMOCRACYNOW, ECF No. 14-1;
4. Ken Klippenstein, *Exclusive: ICE Detainees Are Being Quarantined*, THE NATION, ECF No. 14-3 (ICE has been quarantining detainees at 10 different facilities, suggesting that there may be outbreaks);
5. Scott A. Allen & Josiah D. Rich, Letter to House Committee on Homeland Security, ECF No. 14-4 (letter from infectious disease specialists urging immediate mitigation strategies to slow the spread of COVID-19 within immigration detention facilities);
6. Julie Mack, *Another Big Jump in Michigan Coronavirus Numbers: Now at 2,295 Cases; 43 Deaths*, MLIVE (Mar. 25, 2020), ECF No. 14-5;
7. Open Letter to ICE from [3,014] Medical Professionals Regarding COVID-19, ECF No. 14-6, at PageID.398 (urging the release of “[i]ndividuals and families, particularly the most vulnerable – the elderly, pregnant women, people with serious mental illness, and those at higher risk of complications”);
8. Dara Lind, *ICE Detainee Says Migrants Are Going on a Hunger Strike for Soap*, PROBULICA, ECF No. 14-6; and
9. Gregory Bull, *Coronavirus: SF D.A., Activists, Doctors Call for Undocumented Immigrants' Release*, ASSOCIATED PRESS, ECF No. 14-11.

On March 23, 2020, the Centers for Disease Control and Prevention (CDC) acknowledged that detention facilities “present [ ] unique challenges for control of COVID-19 transmission among incarcerated/detained persons, staff, and visitors.” *Interim Guidance on Management*



Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

*of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Ctrs. for Disease Control (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>. “The CDC noted that many detention conditions create a heightened risk of danger to detainees. These include: low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, highly congregational environments, inability of most patients to leave the facility, and limited ability of incarcerated/detained persons to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing).”  *United States v. Kennedy*, No. 18-20315, — F.Supp.3d —, —, 2020 WL 1493481, at \*2 (E.D. Mich. Mar. 27, 2020) (Levy, J.).

Both detention facilities at issue — Calhoun and St. Clair — are located within jail complexes where vendors, visitors, attorneys, clergy, and correctional facility staff come and go on a daily basis, according to the petitioners. The government advises, however, that visits are restricted presently and inmates have no direct contact with people from outside the facilities. The petitioners maintain that there is no coronavirus screening testing for new detainees, nor is there coronavirus testing provided to the facility staff. ICE reported that coronavirus testing is provided only when symptoms manifest, which, according to the World Health Organization, is 5 to 14 days after the virus is contracted.

**\*6** Awshana and Hamana are both detained in the Calhoun Facility. The facility has two types of dorms. The first type contains 30 to 40 cells that house two people each. The second type of dorm “has simple bed rows that each have 8 to 16 people.” All detainees share common eating and social areas. The petitioners report that they have no masks to wear, people come and go every day, they must share five phones among each other, and there is only one sink for everyone to wash their hands. Although the facility has hand sanitizer, detainees are not allowed access to it after 5:00 p.m. They wear the same jumpsuits every day, which are washed twice a week. The petitioners allege that the facilities in the St. Clair County jail, where Al-Sadoon is held, “are virtually identical to those at Calhoun County.”

Through this morning, Calhoun County has reported 541 total cases of COVID-19 and one death, and St. Clair County reported 140 cases and 3 deaths. *See* Coronavirus, Michigan.Gov, <https://www.michigan.gov/coronavirus/0,9753,7-406-98163-520743--,00.html>

## 2. Steps Taken to Ameliorate the Situation

Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

Jennifer Moon, the Deputy Assistant Director for Healthcare Compliance with ICE Health Service Corps (IHSC), filed a declaration describing the steps ICE has taken to stem the spread of COVID-19 within the Calhoun and St. Clair County detention facilities.

Following guidance from the CDC, facility staff assess detainees for fever and respiratory illness during intake medical screenings. Detainees are also asked if they traveled through areas with sustained community spread or if they had close contact with anyone with a laboratory-confirmed COVID-19 diagnosis within the past two weeks. Asymptomatic detainees with known exposure to COVID-19 “are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness.” Those detainees who present with symptoms associated with COVID-19 are placed in isolation where they will be tested. And if they test positive, they will remain isolated, treated, and hospitalized if necessary. And on Friday, March 13, 2020, the Federal Bureau of Prisons announced that incarcerated people will not be allowed visits from family, friends, and attorneys for 30 days. *Federal Bureau of Prison Action Plan*, Federal Bureau of Prisons, (Mar. 13, 2020), [https://www.bop.gov/resources/news/20200313\\_covid-19.jsp](https://www.bop.gov/resources/news/20200313_covid-19.jsp).

The facilities, working with their local Health Departments, also provide staff and detainee services to help curb the spread of the virus. Calhoun County and St. Clair County provide education on COVID-19, which includes guidance on identifying symptoms and the importance of hygiene. The facilities also provide daily access to sick calls, specialty services, and hospital care.

ICE also insists that the conditions at the detention facilities are adequate. The facilities maintain “populations within their approved capacities and are not overcrowded.” And they both provide “disinfectants, soap, and personal protective equipment when needed.”

#### IV. Petitioners' Individual Circumstances

The petitioners argue that the conditions at the Calhoun and St. Clair detention centers subject them to a heightened risk of contracting COVID-19, going so far as calling the facilities soon-to-be “death camps.” That language does little to advance the arguments, but the Court is mindful of the petitioners' legitimate concern — shared by society in general — over minimizing exposure to the novel coronavirus. The increasing number of courts that have addressed pleas for release because of the fear of COVID-19 infection have ruled both ways, denying relief when the concern is too generalized, and granting relief when specific and heightened risks of exposure to complications have been shown. Courts have been more inclined to grant relief where the detention facility has reported confirmed cases of COVID 19 or where the petitioners fall into one of the high-risk

Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

categories for COVID-19. *See decisions granting relief:* [Jones](#), 2020 WL 1643857 (W.D.N.Y.) (granting relief for detainees with chronic medical conditions held in a detention facility with no confirmed COVID-19 cases); [Basank](#), — F.Supp.3d at —, 2020 WL 1481503 (S.D.N.Y.) (granting relief for detainees with chronic medical conditions held in a facility with confirmed cases of COVID-19); [Coronel](#), — F.Supp.3d —, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020) (same); [Malam v. Adducci](#), — F. Supp. 3d —, No. 20-10829, — F.Supp.3d —, —, 2020 WL 1672662, at \*1 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) (granting relief for petitioner in high-risk category but held in facility with no confirmed cases); *and see decisions denying relief:* [Dawson v. Asher](#), No. 20-0409, 2020 WL 1304557 (W.D. Wash. Mar. 19, 2020) (denying petition where petitioners were not in high-risk group and no detainees or staff at the facility at issue tested positive for COVID-19); [Sacal-Micha v. Longoria](#), No. 20-37, — F.Supp.3d —, 2020 WL 1518861 (S.D. Tex. Mar. 27, 2020) (same); [Xuyue Zhang v. Barr](#), — F.Supp.3d —, —, 2020 WL 1502607, at \*4 (C.D. Cal. Mar. 27, 2020) (denying relief for petitioners in high-risk categories held a detention facility with no confirmed cases of COVID-19).

\*7 That pattern is consistent with a deliberate indifference analysis. Objectively, the health risks posed by COVID-19 are abundantly clear. The parties do not dispute that the virus is particularly dangerous to those over 65 years old or with certain underlying health conditions. *See People Who Are at Higher Risk for Severe Illness, supra*. There is no vaccine to prevent COVID-19, nor is there a known cure or antiviral treatment at this time. *Ibid*. Dr. Fauci estimated on March 31, 2020, that between 100,000 and 240,000 will die of COVID-19. Shear et al., *supra*. And the Southern and Western Districts of New York have “take[en] judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality.” [Basank](#), — F.Supp.3d at —, 2020 WL 1481503, at \*3 (S.D.N.Y.); [Jones](#), 2020 WL 1643857, at \*8 (W.D.N.Y.).

The petitioners are also housed in a manner that increases their risk of exposure to the coronavirus. They are held in the general population of the Calhoun County and St. Clair County detention centers, use shared restrooms, and are confined in shared cells or dorm-style housing. Government experts agree that such a communal style of living can increase the infection rate. *See Former ICE Director: Release Immigrants from Detention or COVID-19 Will Spread Like Wildfire Inside*, DEMOCRACYNOW, ECF No. 14-1; *FAQs for administrators, staff, people who are incarcerated, families*, Ctrs. for Disease Control and Prevention (Mar. 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html>.

However, unlike the petitioners in the cases for which courts granted relief, the petitioners in this case do not allege that they are in a high-risk category as defined by the CDC. Petitioners Awshana

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

and Hamana, presently detained at the Calhoun County Detention Center, have not alleged that any detainees or staff have tested positive for the illness in that detention facility. The petitioners assert generally that they “are older adults and/or people with medical conditions who are at particularly grave risk of severe illness or death if they contract COVID-19.” But they never have alleged that any of them suffered from a medical condition that placed them in a high-risk category, per the CDC's guidelines. As of July 2019, Hamana was 39 years old. And although the parties never stated the Awshana's age, he never claimed that he was over 45. *See People Who Are at Higher Risk for Severe Illness, supra*. Despite Awshana's assertions that his medical condition has deteriorated over the past two weeks, he was given consistent medical attention. After visiting the clinic at the Calhoun facility six times over the course of nine days, medical staff never noted that he presented any symptoms beyond seasonal allergies or dehydration. Although the seriousness of the pandemic cannot be doubted, petitioners Awshana and Hamana are in an objectively better situation than the petitioners in [Jones](#), [Basank](#), and [Coronel](#), who were either in high-risk categories, were held in facilities with confirmed cases, or both.

Petitioner Al-Sadoon's circumstances are different, because the United States Marshal reported on Wednesday that two inmates at the St. Clair County jail tested positive for COVID-19. An ICE Assistant Field Office Director reports that each inmate was isolated in his respective housing unit, and that Al-Sadoon does not reside in either unit. No further information was provided. The government will be required promptly to investigate and report to the Court and petitioners' counsel the details. Al-Sadoon has not alleged that he falls in one of the high-risk categories that portend complications from a [coronavirus infection](#). He is approximately 32 years old.

\*8 To satisfy the subjective element of their claim, the petitioners must demonstrate that the government subjected them to objectively poor confinement conditions with deliberate indifference to their health and safety. [Farmer](#), 511 U.S. at 834, 114 S.Ct. 1970. There is no doubt that the respondents are aware of the grave threat posed by the pandemic and the exacerbated risk caused by the close quarters of the detention facilities. *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited April 8, 2020) (explaining that measures ordered by the CDC to reduce person-to-person contact present unique challenges for prisons and detention facilities, because “[i]ncarcerated/detained persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced”).

According to Deputy Assistant Director Moon, the government has put in place specific measures to stem the spread of the pandemic. Following CDC guidance, Calhoun and St. Clair facility staff

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

assess detainees for fever and respiratory illness during intake medical screenings and ask about any possible exposure to the virus. Those with confirmed exposure will be segregated in separate cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee). And the government will place detainees who present with COVID-19 symptoms in isolation where they are tested and treated if necessary. However, while these measures are certainly commendable, “the fact is that none of the steps [taken] ... includes the ‘social distancing measures recommended — especially for high-risk individuals — by the CDC ...’” [Jones](#), 2020 WL 1643857, at \*10 (W.D.N.Y.). It is unlikely that any operating detention facility will be able to achieve that goal.

### V. Release as a Remedy

The premise of this habeas corpus petition is that the conditions of confinement in these ICE detention facilities are so intolerable because of the risk of contracting COVID-19 that release is the only remedy. With appropriate proof, that may indeed be true. But the petitioners have leveled only generalized allegations; if those were deemed sufficient, then all inmates would be entitled to release until the pandemic subsides. The petitioners have not stated as much in so many words, but neither have they attempted to articulate any limiting principle.

Limits, however, are imposed by the Due Process Clause itself, and the manner of its application. The seminal case dealing with the constitutionality of conditions of confinement of non-convicted detainees is [Bell v. Wolfish](#), 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). There, the Supreme Court held that such claims are governed by the Due Process Clause, a proposition that is now well accepted. *See, e.g.*, [Phillips v. Roane County](#), 534 F.3d 531, 539 (6th Cir. 2008) (reiterating that when a conditions-of-confinement claim “is asserted on behalf of a pre-trial detainee, the Due Process Clause ... is the proper starting point”). But the Court also emphasized that those constitutional rights implicated by conditions of confinement, when analyzed for pretrial detainees under the Due Process Clause, must be balanced against the “Government[’s] ... legitimate interests that stem from its need to manage the facility in which the individual is detained.” [Bell](#), 441 U.S. at 540, 99 S.Ct. 1861. Courts, therefore, must strike a balance “between institutional needs and objectives and the provisions of the Constitution that are of general application.” [Id.](#) at 546, 99 S.Ct. 1861 (quoting [Wolff v. McDonnell](#), 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)). In striking that balance, courts must give great deference to the custodians “in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional



Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

security,”  *id.* at 547, 94 S.Ct. 2963, lest courts become “enmeshed in the minutiae of prison operations.”  *Id.* at 562, 94 S.Ct. 2963.

\*9 The institutional interests here circle back to ICE's interest in continuing the detention of those removable aliens whom the Secretary determines “to be a risk to the community or unlikely to comply with the order of removal.”  8 U.S.C. § 1231(a)(6). When considering the remedy of a complete release from detention (albeit with conditions for supervision), the Court must strike a balance between the gravity of the risk of contracting COVID-19 (with uncertain outcomes for recovery and a path that could lead to death) with the danger to the public that could result from releasing the petitioners into the community. The petitioners each contend that they are neither a danger nor a flight risk. In light of those arguments, it is relevant to review their backgrounds. The following information came from the petition and declarations furnished by the respondents.

#### A. Oliver Nissan Awshana

According to the declaration of deportation officer Christopher Labadini, Oliver Nisan Awshana came to the United States as a refugee on April 20, 2009, and became a lawful permanent resident on January 21, 2011. He has not revealed his age, but there is no allegation that he is over 45 years old.

#### 1. Immigration Proceedings

Awshana was convicted of possession of cocaine and two counts of retail fraud in the second degree in state court. Due to his convictions, the Bureau of Immigrations and Customs Enforcement (ICE) detained Awshana in April 2018 and placed him in removal proceedings under  8 U.S.C. § 1227(a)(2). He filed applications for relief from removal, but the Immigration Court denied them on August 2, 2018, and ordered him deported to Iraq. Awshana's removal was scheduled to occur on April 23, 2019.

On April 1, 2019, Awshana filed a petition for a writ of habeas corpus in the Northern District of Ohio under  28 U.S.C. § 2241. He argued that his continued detention under  8 U.S.C. § 1231(a) was unlawful and that he should be released from ICE custody because the United States was unable to obtain travel documents necessary to remove him to Iraq. The district court in Ohio denied the petition on July 10, 2019.

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

ICE began the physical removal process on April 23, 2019, flying Awshana from Detroit to Chicago. But Awshana “refus[ed]” to board the plane for his trip to Iraq from Chicago. So ICE transferred him to the Calhoun County Detention Center in Battle Creek, Michigan, where he remains in custody.

Three days later, on April 26, Awshana filed two motions with the Immigration Court in Detroit, Michigan: the first to reopen his case, and the second to stay his removal proceedings. On April 30, 2019, the Immigration Court granted Awshana's motion to stay his removal, and on May 14, 2019, the court reopened his immigration case.

After holding hearings in November and December 2019, the Immigration Court issued a written decision on February 4, 2020, granting Awshana's applications for withholding of removal under the Immigration and Nationality Act and alternatively withholding removal under the United Nations Convention Against Torture due to the deteriorating conditions in Iraq. The court concluded that Awshana would face torture and persecution in Iraq because he is a Christian, he will be identified as a supporter of the United States, and he has no social network to protect him in Iraq. ICE then filed a notice of appeal with the Board of Immigration Appeals (BIA) on March 3, 2020. The appeal currently is pending, awaiting the issuance of the BIA's briefing schedule and hearing transcripts.

## 2. Medical History at Calhoun Detention Facility

In a reply to the government's response, Awshana asserts that his medical condition has deteriorated over the past two weeks while at the Calhoun Detention Center. His attorney alleges that when she visited him on March 20, 2020, he looked “sick.” He allegedly had a fever, a runny nose, and a [cough](#), and he had difficulty swallowing, was sweating profusely, and was slightly jaundiced. The government adamantly disputes this account, contending that attending nurses saw nothing wrong with Awshana, aside from seasonal allergies and dehydration. The government detailed Awshana's recent medical history in its sur-reply:

**\*10** March 20, 2020: Awshana visited the clinic complaining of a stuffy nose and nausea that started the day before. He denied being around anyone that had been sick. “The practitioner noted that it appears Awshana has [allergic rhinitis](#) and that there are no signs of infection.” He was prescribed Cetirizine for his allergy symptoms and was told to increase his fluids.

Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

March 24, 2020: Awshana visited the clinic complaining about sneezing and fatigue. He denied having a cough or nausea. He stated that he gets dizzy after laying down and rising quickly. He also admitted that he had only been drinking three glasses of water because it tastes bad.

March 25, 2020: Awshana visited the clinic for unusual behavior. He denied feeling suicidal or homicidal. But he reported feeling anxious and wanted to be released.

March 26, 2020: He visited the clinic again for unusual behavior. He complained of “feeling bad,” that his ears were plugged, and that he had been coughing. No cough was noted during the encounter. He was housed and placed in observation.

March 26, 2020: Awshana returned to the clinic by the request of command staff, as he had been kiting the night before stating that he needed to go to the hospital. He appeared very anxious, had no fever, was slightly tachycardic, and said he was not sleeping. He did not cough during the exam or observation period. He received an x-ray of his chest, which came back normal. He was cleared and returned to general population.

March 29, 2020: Awshana visited the clinic complaining about a cold or the flu. He claimed that he had a fever, chills, nasal drainage, and a cough. A physical exam showed that his vital signs were fine, and the nurse did not detect a cough, runny nose, or congestion. No signs or symptoms of a cold or the flu were noted.

## B. Ali Najim Al-Sadoon

Ali Najim Al-Sadoon is an Iraqi Shi'a Muslim. He and his family fled Iraq and sought refuge in the United States on June 23, 1994. He is roughly 32 years old. He has not identified any health problems.

### 1. Immigration Proceedings

After being convicted of safe breaking and breaking and entering in state court, ICE initiated removal proceedings against Al-Sadoon on August 20, 2013, charging him as removable under 8 U.S.C. §§ 1227(a)(2). He did not contest the charges. While Al-Sadoon was serving his sentence, an Immigration Judge in Detroit ordered him removed on March 24, 2015. Al-Sadoon waived his



Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

right to appeal the decision and was transferred from the custody of the Michigan Department of Corrections (MDOC) to ICE on May 17, 2016.

Al-Sadoon moved to reopen his removal proceedings in September 2017, and an Immigration Judge denied the motion on November 8, 2017. Al-Sadoon appealed the decision to the BIA but withdrew his appeal on August 31, 2018.

In the meantime, Al-Sadoon was a member of a class action lawsuit filed in this Court in 2018 in which Iraqi aliens in ICE custody sought a writ of habeas corpus to preclude their detention pending removal. See [Hamama v. Adducci \(E.D. Mich.\)](#) (Goldsmith J.). Judge Goldsmith granted the petitioners' motion for a preliminary injunction on November 20, 2018. See [Hamama v. Adducci, 349 F. Supp. 3d 665 \(E.D. Mich. 2018\)](#) (Goldsmith, J.), *vacated and remanded*, [946 F.3d 875 \(6th Cir. 2020\)](#). Per the order, ICE released Al-Sadoon from custody and placed him on a GPS tether.

**\*11** The Iraqi government then issued a one-way *Laissez-Passer* travel document for Al-Sadoon's removal on March 13, 2019. The travel document was valid for six months.

Al-Sadoon was ordered to report to the Detroit Metropolitan Airport on June 23, 2019, at 4:00 p.m. for removal. But he had filed on June 20, 2019 in the Immigration Court in Detroit a motion to reopen and a motion to stay his removal. Because he had not yet heard from the immigration court, Al-Sadoon cut his tether on the morning of June 23 and did not report to the airport as instructed. The immigration court denied Al-Sadoon's motion to reopen removal proceedings on June 25. ICE officers found Al-Sadoon at his house about a month later on July 26, 2019. He barricaded himself in his home using a couch and a washing machine. A Special Response Team had to break in to arrest him.

The government filed a criminal complaint charging Al-Sadoon with hampering removal in violation of [8 U.S.C. 1253\(a\)\(1\)\(C\)](#). The court denied bond on August 5, 2019, finding that Al-Sadoon was a flight risk and danger to the community. The court eventually dismissed the indictment on the government's motion "to allow ICE to effectuate [Al-Sadoon's] removal."

Al-Sadoon was then re-detained by ICE on December 18, 2019. But on January 10, 2020, the BIA granted Al-Sadoon's request for a stay of removal, pending the decision of Al-Sadoon's appeal of the immigration court's June 25, 2019, denial of his motion to reopen removal proceedings. Al-Sadoon's removal, which was planned on January 12, 2020, was therefore cancelled.

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

Al-Sadoon currently is detained at the St Clair Detention Center. Most recently, on February 14, 2020, Judge Goldsmith explicitly authorized his continued detention in a sealed order in the ongoing class action.

## 2. Criminal History

In addition to the hampering removal charge, Al-Sadoon has an extensive criminal history. He has been arrested for the following conduct:

August 2, 2001: arrested by Dearborn, Michigan, police for “an offense related to a stolen vehicle.” Al-Sadoon received a juvenile order of guilt for receiving and concealing stolen property valued at \$20,000 or more;

December 6, 2003: arrested by Detroit, Michigan, police for “a public order crime”;

December 9, 2004: arrested by Dearborn police and convicted of unlawfully taking a motor vehicle without authority;

December 4, 2006: arrested and convicted of “domestic violence in Detroit”;

January 23, 2007: arrested by Detroit police and convicted of “larceny in a building and breaking and entering a building”;

July 6, 2007: arrested by Detroit police “for an offense relating to assault”;

July 7, 2007: arrested by Dearborn police and convicted of “operating a vehicle with no license or multiple licenses”;

July 17, 2007: arrested by Detroit police “for a traffic offense”;

September 26, 2007: arrested by Detroit police for an “offense related to the obstruction of justice”;

December 3, 2007: arrested by Detroit police for “an offense related to robbery”;

June 8, 2008: arrested by Detroit police “for a public peace offense”;

June 23, 2008: arrested by Detroit police for “a dangerous drugs offense”;

Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

August 14, 2008: arrested by Detroit police and convicted of “breaking and entering by illegal entry without the owner's permission”;

\*12 October 19, 2008: arrested by Detroit police for “an offense related to burglary”;

December 4, 2008: arrested by the Detroit police for “an offense related to obstruction of justice”;

December 9, 2008: arrested by Detroit police for “a traffic offense”;

January 9, 2009: arrested by Detroit police for “an armed robbery offense”;

January 29, 2009: arrested by the Westland, Michigan, police “for a traffic offense”;

February 20, 2009: arrested by the Dearborn police for traffic and controlled substance related offenses, resulting in a conviction of “operating a vehicle with a suspended, revoked or denied license”;

March 28, 2009: arrested by Sidney, Ohio, police and convicted of “fleeing a police officer in a vehicle”;

April 9, 2009: arrested by Dearborn police and convicted of “fleeing a police officer in a vehicle”;

April 15, 2009: arrested by Dearborn police and convicted of “operating while intoxicated and controlled substance possession”;

June 5, 2009: arrested by Dearborn police and convicted of “operating a vehicle with no license or multiple licenses”;

June 15, 2011: arrested by Wayne, Michigan, police and convicted of “breaking and entering outside a showcase”;

September 27, 2011: arrested by Dearborn police for a “public peace offense”;

October 26, 2011: arrested by the Dearborn police department for safe-breaking — convicted and sentenced to three years and six months to 15 years imprisonment with the MDOC; and

April 16, 2012: arrested by Redford, Michigan, police for breaking and entering — convicted and sentenced as a habitual offender to three years and six months to 15 years imprisonment with the MDOC.

Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

The last two convictions were the basis of the removal proceedings.

### C. Wisam Gharib Hamana

Wisam Gharib Hamana is an Iraqi Christian who, along with his family, was granted asylum in 1983. He is around 39 years old. He left Iraq when he was eight weeks old. He does not speak Arabic or Chaldean fluently and knows little about Iraqi social and cultural norms. On July 27, 1984, he became a lawful permanent resident of the United States. He has not identified any health problems.

#### 1. Immigration Proceedings

ICE began removal proceedings against Hamana on August 6, 2010, charging him as removable under  8 U.S.C. § 1227(a)(2)(A)(ii) and (B)(i) based on convictions of “controlled substance offenses,” receiving and concealing stolen property, and retail fraud. On September 29, 2010, an immigration judge ordered his removal from the United States. The case was reopened in August 2017, and on February 26, 2018, an Immigration Judge again ordered his removal.

Like Al-Sadoon, Hamana was a class member in the  *Hamana* class action before Judge Goldsmith. After Judge Goldsmith granted the petitioners' motion for a preliminary injunction on November 20, 2018, ICE released Hamana from custody on December 19, 2018, and placed him on a GPS tether.

On March 13, 2019, the Iraqi government issued a one-way, *Laissez-Passer* travel document for Hamana's removal from the United States, which was valid for six months. ICE scheduled Hamana's removal to begin on June 25, 2019, and instructed him to meet ICE officers at the Detroit Metropolitan Airport that day at 3:30 p.m.

**\*13** Hamana filed a motion to reopen and a motion to stay his removal with the immigration court in Detroit on June 18, 2019, several days before he was scheduled to leave. The immigration court denied both motions on June 24, 2019. Hamana appealed, and the BIA denied his request to stay his removal proceedings pending his appeal of the Immigration Court's decisions.

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

Hamana never reported to the airport on June 25, 2019, as ordered. Instead, he cut his tether around 6:40 p.m. Acting on a complaint and warrant charging him with hampering removal in violation of 8 U.S.C. 1253(a)(1)(C), ICE found Hamana and arrested him about a month later on July 22, 2019. Hamana was arrested without further incident. Two days later, a magistrate judge in this district detained Hamana pending trial on his criminal charges, finding that he was a flight risk and posed a danger to the community. Hamana was indicted on the hampering removal charge on August 6, 2019.

On November 25, 2019, the Iraqi government issued another six-month travel document for Hamana's removal. ICE arranged to deport him on February 9, 2020, and the government dismissed its indictment against him on January 8, 2020, to facilitate his removal.

ICE re-detained Hamana on January 14, 2020. But days before his second deportation date, Hamana filed a supplemental motion with the BIA for an emergency stay on February 6, 2020. He argued that his family had been granted the right to emigrate to Italy before coming to the United States and asked that he be removed there instead of Iraq. Luck was on his side, it seems, because the next day, the flight that ICE booked to remove him was cancelled. And that same day — February 7, 2020 — the BIA granted Hamana's request to stay removal pending his appeal of the Immigration Court's June 24, 2019, denial of his motion to reopen removal proceedings.

Hamana currently is detained by ICE at the Calhoun County Detention Facility. Most recently, on March 31, 2020, Judge Goldsmith explicitly authorized his continued detention in a sealed order in the ongoing class action.

## 2. Criminal History

In addition to his hampering removal, it appears that Hamana also has a criminal record:

July 21, 1998: arrested by Troy, Michigan, police and convicted of “retail fraud”;

June 7, 2002: arrested by Oakland County, Michigan, sheriffs and convicted of “receiving and concealing stolen property”;

July 13, 2002: arrested by the Warren police and convicted of “controlled substance offenses”;

July 24, 2003: arrested by Hazel Park, Michigan, police and convicted of “disorderly conduct”;

Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

July 19, 2010: arrested by Warren police and convicted of “assault with a dangerous weapon and controlled substance possession”;

October 21, 2011: arrested by Warren police and convicted of “assault with a dangerous weapon”; and

January 18, 2013: arrested by Detroit police and convicted of “receiving and concealing a motor vehicle.”

The first three entries are the convictions that served as a basis for Hamana's removal.

\* \* \* \* \*

In normal times, the petitioners' respective criminal records, interference with supervision, and resistance to lawful deportation orders would justify their continued detention. When striking the balance between ICE's institutional need for continued detention and the petitioners' legitimate concerns over an unreasonable risk of serious damage to their future health, it is fair to require the petitioners to articulate something more than a generalized fear of exposure to disease in a detention facility. That only makes sense, since “the requirements of due process are fluid and fact dependent.”  *Shoemaker v. City of Howell*, 795 F.3d 553, 559 (6th Cir. 2015). A detainee who poses a greater flight risk or danger to the community will need to make a stronger showing of risk to his life and health to win release.

**\*14** In their criticism of the government, the petitioners point only to the lack of social distancing measures implemented at the facilities. They have not argued that the government ignored their high-risk status, failed to treat someone suffering from COVID-19 adequately, or ignored the threat level when someone associated with the detention facilities tested positive for the virus. In fact, the briefings reveal the opposite. The Calhoun facility medical staff were attentive to Awshana's complaints, caring for him each time he visited the clinic, monitoring his condition, providing advice about managing his hydration levels, and giving him allergy medications.

To prevail, the petitioners must show that the government, “with deliberate indifference, exposed [them] to [an environment] that pose[s] an unreasonable risk of serious damage to [their] future health.”  *Helling*, 509 U.S. at 35, 113 S.Ct. 2475. Petitioners Awshana and Hamana have not done so; they have not offered specific proof that the respondents' facilities “[are] incapable of protecting [them] from contracting COVID-19 or providing appropriate medical attention should



Awshana v. Adduccl, --- F.Supp.3d ---- (2020)

2020 WL 1808906

[they] be infected.” *Sacal-Micha*, — F.Supp.3d at —, 2020 WL 1518861, \*5 (S.D. Tex.). The petitioners offer only conclusory arguments based on articles regarding the contagious nature of COVID-19 and the potential to spread in detention facilities. But none of the exhibits concern the Calhoun or St. Clair detention centers specifically. The relatively healthy petitioners are left with the argument that the government acted with deliberate indifference by failing to implement social distancing measures in its facilities in which no one tested positive for COVID-19.

More information is needed to assess petitioner Al-Sadoon' claim.

## VI. Conclusion

The petitioners understandably seek release from their crowded detention facilities as the world reels from the effects of the global coronavirus pandemic. And courts across the country have released inmates and civil detainees to stem the spread of COVID-19. But in the immigration context, courts have released only those individuals who fell within one of the CDC's high-risk categories, were housed in detention facilities with confirmed cases, or both. Petitioners Awshana and Hamana do not fit this mold: they are relatively healthy people detained in facilities with no confirmed cases. And when one of them sought medical attention, it was promptly provided. Petitioners Awshana and Hamana have not shown that they are in custody in violation of the Constitution. Therefore, they are not entitled to relief under 28 U.S.C. § 2241.

Petitioner Al-Sadoon's claim is on a slightly different footing. There are reports of a confirmed case of COVID-19 at the St. Clair County detention facility. That changes the nature of the concern beyond mere generalities. But more information is required to determine if release is an appropriate remedy.

Accordingly, it is **ORDERED** the petition for a writ of habeas corpus (ECF No. 1) is **DENIED** as to petitioners Oliver Nissan Awshana and Wisam Gharib Hamana, **only**.

It is further **ORDERED** that the respondents must furnish to the Court and petitioners' counsel by **noon on Friday, April 10, 2020**, detailed information describing the extent of COVID-19 infestation at the St. Clair County jail, including the number of suspected and confirmed cases, the location of the infected inmates, whether petitioner Al-Sadoon was present in any areas visited by the infected inmates within the last 14 days, the steps taken to address the infections, the number of inmates in each housing unit (including the housing units where those inmates with confirmed COVID-19 cases are quarantined), and all remedial measures undertaken at the facility in light of the presence confirmed or suspected cases.

Awshana v. Adducci, --- F.Supp.3d ---- (2020)

2020 WL 1808906

**\*15** It is further **ORDERED** that petitioners Awshana and Hamana may reapply for appropriate relief under this case number of conditions at the Calhoun County Detention Facility change with respect to suspected or confirmed cases of COVID-19 at that facility.

## All Citations

--- F.Supp.3d ----, 2020 WL 1808906

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Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

2020 WL 1914896

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United States District Court, District of Columbia.

[Edward BANKS](#), et al., Plaintiffs

v.

Quincy L. BOOTH, et al., Defendants

Civil Action No. 20-849(CKK)

|

Signed 04/19/2020

#### Attorneys and Law Firms

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#### MEMORANDUM OPINION

[COLLEEN KOLLAR-KOTELLY](#), United States District Judge

\*1 This case is brought by various inmates of the District of Columbia’s Department of Corrections (“DOC”) detained in the Central Detention Facility (“CDF”) and the Correctional Treatment Facility (“CTF”). Plaintiffs bring claims against Quincy Booth, in his official capacity as Director of the DOC, and Lennard Johnson, in his official capacity as Warden of the DOC. Plaintiffs’ claims are brought pursuant to the due process clause of the Fifth Amendment of the United States Constitution and the Eighth Amendment of the United States Constitution relating to the conditions of their confinement during the COVID-19 pandemic.

Before the Court is Plaintiffs’ [5] Motion for a Temporary Restraining Order (“TRO”), which is opposed. Upon consideration of the pleadings,<sup>1</sup> the relevant legal authorities, and the record for purposes of this motion, the Court GRANTS IN PART AND DENIES IN PART Plaintiffs’ [5] Motion. The Court concludes that Plaintiffs have shown a likelihood of success on the merits,

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

irreparable harm, and that the balance of the equities and the public interest favors injunctive relief. However, as will be further explained below, the Court concludes that some of the relief requested by Plaintiffs is not appropriate at this time.

- 1 The Court's consideration has focused on the following documents:
- Pls.' App. For a Temp. Restraining Order ("Pls.' Mot."), ECF No. 5;
  - Defs.' Opp'n to Pls.' App. For a Temp. Restraining Order ("Defs.' Opp'n"), ECF No. 25; and
  - Pls.' Reply Brief in Support of App. For a Temp. Restraining Order ("Pls.' Reply"), ECF No. 26.

## I. BACKGROUND

Prior to proceeding through the procedural background of this case, the Court notes that the hearings held in this matter have been conducted either telephonically or through video conferencing. Due to the restrictions of the COVID-19 pandemic, the United States District Court for the District of Columbia postponed all civil hearings to occur before June 1, 2020. In Re: Extension of Postponed Court Proceedings in Standing Order 20-9 and Limiting Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic, Standing Order No. 20-19 (BAH), April 1, 2020. As such, in compliance with the standing order and recommended precautionary measures, the Court has conducted these emergency matters virtually.

On March 30, 2020, Plaintiffs filed their Complaint in this matter. That same day, Plaintiffs also filed a Motion to Certify a Class of all persons confined or to be confined in DOC facilities, a Motion for a Temporary Restraining Order—the motion currently before the Court, and a Motion for a Preliminary Injunction. ECF Nos. 3, 5, 6.

On March 31, 2020, the Court ordered that a teleconference be held to discuss scheduling for Plaintiffs' pending Motion for a TRO. March 31, 2020 Minute Order. During the hearing, the Court ordered Defendants to provide specific, relevant information to the Court over the following two days. For example, the Court ordered Defendants to provide a list of the names of the approximately 94 inmates who have been sentenced to misdemeanors and who could be released; the numbers of people who had been tested for COVID-19 and a break-down of the identities of those individuals (such as inmates, visitors, etc.) and the results of those tests; the date on which Defendants began testing people coming into the jails; the number and a breakdown of the results of COVID-19 tests which had been done on those who were incarcerated prior to the date on which Defendants began testing all incoming inmates; all relevant written procedures and practices

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

concerning COVID-19; and Defendants' process which is in place or will be put in place to allow legal counsel to communicate with their clients electronically or by other means. April 1, 2020 Minute Order. The Court also ordered Defendants to provide Declarations about the processes and procedures in place and the current conditions of DOC facilities in light of COVID-19. *Id.* The Court further set a briefing schedule for Plaintiffs' Motion for a TRO and stayed Defendants' Responses to Plaintiffs' Motion for a Preliminary Injunction, Complaint, and Motion for Class Certification pending the resolution of the TRO. *Id.* A court reporter was present at the hearing and a transcript of the hearing is on the docket. ECF No. 18.

**\*2** On April 1, 2020 and April 2, 2020, Defendants filed Responses to the Court's Order. ECF Nos. 19, 20, 21.

On April 2, 2020, the Fraternal Order of Police for the District of Columbia Department of Corrections Labor Committee filed for leave to submit an amicus curiae brief in support of Plaintiffs' Motion for a TRO. ECF No. 23. After considering Defendants' opposition, the Court granted the motion, finding that the amicus brief could assist the Court in its analysis of certain, relevant issues. April 3, 2020 Minute Order.

On April 3, Plaintiffs filed an Emergency Motion to Expedite the Hearing on the Application for a TRO. ECF No. 24. In consideration of Plaintiffs' arguments, the Court scheduled a videoconference on the merits of Plaintiffs' Motion for a TRO for April 7, 2020. April 3, 2020 Minute Order.

Prior to the hearing on Plaintiffs' Motion for a TRO, Defendants filed their Opposition to Plaintiffs' Motion for a TRO on April 3, 2020, and Plaintiffs filed their Reply in support of their Motion on April 4, 2020. ECF Nos. 25, 26.

On April 7, 2020, the court conducted a two-hour video conference on the merits of Plaintiffs' Motion for a TRO. A court reporter was present and a transcript of the hearing is on the docket. ECF No. 37. Also, on that day, the Court conducted a second teleconference with the parties. The parties determined that they would confer and propose names for an amicus of the Court to inspect the conditions of CTF and CDF. April 8, 2020 Minute Order.

On April 8, 2020, the Court again conducted a teleconference with the parties to ascertain their proposed amicus of the Court. The parties ultimately agreed to the appointment of Grace Lopes and Mark Jordan as amici of the Court to provide information on the actual conditions of CTF and CDF and to make findings on Defendants' responses to COVID-19. A court reporter was present

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

and a transcript of the hearing is on the docket. ECF No. 33. On April 9, 2020, the Court issued a consent order appointing Ms. Lopes and Mr. Jordan as amici. ECF No. 34.

The amici reviewed records from the DOC facilities and conducted unannounced and unescorted site visits on multiple shifts at both CDF and CTF on April 10, 11, and 12, 2020. Defendants cooperated with amici in providing them with necessary materials and in providing them access to the facilities, staff, and inmates during their visits.

On April 15, 2020, the Court held a telephone conference at which the amici presented their oral preliminary findings and both parties as well as the Court asked questions. A court reporter was present and a transcript of the hearing is on the docket. ECF No. 45.

On April 18, 2020, the amici submitted their final written report. Attachment 1. The Court incorporates that report into this Memorandum Opinion. The Court has excerpted portions of the report in this Memorandum Opinion, focusing on the issues which are most exigent and most relevant to the resolution of Plaintiffs' Motion for a TRO.

The Court further notes that on April 17, 2020, following the amici's oral presentation of their preliminary findings, Mr. Booth provided a memorandum to all DOC employees and contractors entitled "Reminders and Updated COVID-19 Policies and Procedures." Exhibits to Report Submitted by Amicus Curiae, Attachment 2, Ex. 11. In this memorandum, Mr. Booth addresses some of the deficiencies identified by the amici. The Court commends Defendants for their prompt response. However, the Court has no record evidence that the updates discussed in Mr. Booth's memorandum have been implemented. Accordingly, in resolving Plaintiff's Motion for a TRO, the Court relies on the record evidence as it currently stands, including the findings in the amici's final report.

**\*3** In consideration of the above information, the materials which have been provided, and the present factual record, the Court now issues its decision on Plaintiffs' Motion for a TRO.

## II. LEGAL STANDARD

A temporary restraining order is an extraordinary form of relief. An application for a TRO is analyzed using factors applicable to preliminary injunctive relief. *See, e.g.,* [Gordon v. Holder](#), 632 F.3d 722, 723-24 (D.C. Cir. 2011) (applying preliminary injunction standard to district court decision denying motion for TRO and preliminary injunction); [Sibley v. Obama](#), 810 F. Supp. 2d 309, 310 (D.D.C. 2011) (articulating TRO elements based on preliminary injunction case law).

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

Preliminary injunctive relief is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” [Sherley v. Sebelius](#), 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting [Winter v. Nat. Res. Def. Council, Inc.](#), 555 U.S. 7, 22 (2008)); *see also* [Mazurek v. Armstrong](#), 520 U.S. 968, 972 (1997) (per curiam) (“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” (internal quotation marks omitted)). A plaintiff seeking preliminary injunctive relief “must establish [1] that 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.” [Aamer v. Obama](#), 742 F.3d 1023, 1038 (D.C. Cir. 2014) (quoting [Sherley](#), 644 F.3d at 392 (quoting [Winter](#), 555 U.S. at 20) (alteration in original; internal quotation marks omitted)). When seeking such relief, “the movant has the burden to show that all four factors, taken together, weigh in favor of the injunction.” [Abdullah v. Obama](#), 753 F.3d 193, 197 (D.C. Cir. 2014) (quoting [Davis v. Pension Benefit Guar. Corp.](#), 571 F.3d 1288, 1292 (D.C. Cir. 2009)) (internal quotation marks omitted). “The four factors have typically been evaluated on a ‘sliding scale.’ ” [Davis](#), 571 F.3d at 1291. Under this sliding-scale framework, “[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor.” [Id.](#) at 1291-92.

The Court notes that it is not clear whether the United States Court of Appeals for the District of Columbia Circuit’s (“D.C. Circuit”) sliding-scale approach to assessing the four preliminary injunction factors survives the Supreme Court’s decision in *Winter*. *See Save Jobs USA v. U.S. Dep’t of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015). Several judges on the D.C. Circuit have “read *Winter* at least to suggest if not to hold ‘that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.’ ” [Sherley](#), 644 F.3d at 393 (quoting [Davis](#), 571 F.3d at 1296 (Kavanaugh, J., concurring)). However, the D.C. Circuit has yet to hold definitively that *Winter* has displaced the sliding-scale analysis. *See id.*; *see also Save Jobs USA*, 105 F. Supp. 3d at 112. In light of this ambiguity, the Court shall consider each of the preliminary injunction factors and shall only evaluate the proper weight to accord the likelihood of success if the Court finds that its relative weight would affect the outcome.

### III. DISCUSSION

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

\*4 The Court will proceed to analyze each of the requirements for granting a TRO. However, first, the Court will address a preliminary issue—standing.

### A. Standing

As a threshold matter, Defendants contend that Plaintiffs do not have standing to seek the requested relief. Four named Plaintiffs filed this lawsuit. D’Angelo Phillips is currently in the custody of DOC at CDF where he is being held pre-trial. Edward Banks is currently in the custody of DOC at CDF awaiting sentencing. Eric Smith is currently in the custody of DOC at CTF where he is being held pre-trial. Compl., ECF No. 1, ¶¶ 14-16. Keon Jackson was in the custody of DOC at CTF where he was awaiting sentencing; but, he has since been released from custody and is no longer party to this suit. April 7, 2020 Tr., ECF No. 37, 38: 22-24. In order to meet the requirements for standing, a plaintiff must plead an injury, causation, and redressability. “[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.”

 *Davis v. FEC*, 554 U.S. 724, 733-34 (2008) (internal quotation marks and citations omitted). Defendants contend that Plaintiffs have failed to show that their injuries are redressable by certain forms of requested relief which would flow to inmates other than Plaintiffs.

To begin, the Court notes that Plaintiffs have filed a motion to certify a class consisting of all persons confined or to be confined by DOC in CDF or CTF. ECF No. 3. However, at this point in the litigation, the Court has not ruled on Plaintiffs’ Motion to certify the class. As such, Defendants contend that the standing analysis should focus only on the named Plaintiffs, and Plaintiffs do not dispute this assertion.

Considering only the named Plaintiffs, the Court finds that Plaintiffs have pled an injury which was caused by Defendants and is redressable by the relief requested. Plaintiffs’ claimed injury is the risk of contracting COVID-19. The Court finds that the risk of contracting a disease is a legally cognizable risk for purposes of standing.  *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015) (explaining that pleading an increased risk of foodborne illness is sufficient for standing). Additionally, Plaintiffs have pled that they have an increased risk of contracting COVID-19 due to Defendants’ failure to take appropriate precautionary measures. Finally, Plaintiffs have pled that their injury of an increased risk of contracting COVID-19 would be redressed by the requested relief.

Plaintiffs have produced un rebutted expert declarations positing that the requested relief would redress the claimed Plaintiffs’ injuries by reducing their risk of contracting COVID-19. “The risk posed by infectious diseases in jails and prisons is significantly higher than in the community, both in terms of the risk of transmission, exposure, and harm to individuals who become infected.”



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

Dec. of Jaimie Meyer, ECF No. 5-2, ¶ 9. The risk of infectious diseases, such as COVID-19, is higher in jails and prisons because they are congregate settings which “allow for rapid spread of infectious diseases that are transmitted person to person.” *Id.* at ¶ 11. In settings such as these, it is often difficult to appropriately socially distance and many facilities are poorly ventilated which allows disease to spread faster. *Id.*

\*5 Due to the unique posture of jails and prisons, steps taken to reduce the risk of infection among any inmates, such as reducing the inmate population or providing adequate cleaning supplies, would also reduce the named Plaintiffs’ risk of contracting COVID-19. Additional precautions which directly affect inmates who are not a party to this suit also affect the named Plaintiffs by reducing the risk that the disease will spread amongst the population and eventually infect the named Plaintiffs. See  [Brown v. Plata, 563 U.S. 493, 531-32 \(2011\)](#) (explaining that all prisoners, even those that remain detained, benefit from the release of some inmates to counter overcrowding because the detained inmates “are that system’s next potential victims”).

For these reasons, the Court concludes that Plaintiffs have stated an injury—an increased risk for contracting COVID-19—which is caused by Defendants’ untimely and insufficient precautions and would be remedied by the requested relief. As such, Plaintiffs have standing to request a TRO.

**B. Plaintiffs Establish a Likelihood of Success on the Merits**

Moving to the standards for granting a TRO, first the Court considers whether or not Plaintiffs have established a likelihood of success on the merits. In order to meet this first requirement, Plaintiffs must show that they have a likelihood of success on the merits of their Fifth Amendment claim for pre-trial detainees and of their Eighth Amendment claim for post-conviction detainees. The Court concludes that Plaintiffs have made a sufficient showing.

It is undisputed that the proper avenue for relief for pre-trial detainees, such as Plaintiffs Phillips and Smith, is the Fifth Amendment due process clause and the proper avenue for relief for post-conviction detainees, such as Plaintiff Banks, is the Eighth Amendment. However, the parties dispute whether or not the standards for sustaining a claim under the different Amendments are the same. Defendants state that the standard for sustaining a claim under the due process clause and Eighth Amendments are the same. Defendants contend that to show a violation of either Amendment, jail officials must have (1) exposed inmates to an unreasonable risk of serious damage to their health and (2) acted with deliberate indifference in posing such a risk. Defs.’ Opp’n, ECF No. 25, 14-15. Plaintiffs agree that Defendants have stated the correct standard for an Eighth Amendment claim by post-conviction detainees, but they argue that the standard for a due process claim for pre-trial detainees is different. Pls.’ Reply, ECF No. 26, 7. Under the due process clause,

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

Plaintiffs argue that they need only show that the Defendants knew or should have known that the conditions posed an excessive risk to the health of the inmates. The main difference being that the due process clause analysis does not require a finding of deliberate indifference.

The rights of pre-trial detainees are different than the rights of post-conviction detainees. Because pre-trial detainees are presumed innocent, they are “entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”  *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). “While a convicted prisoner is entitled to protection only against ‘cruel and unusual’ punishment [under the Eighth Amendment], a pretrial detainee, not yet found guilty of any crime, may not be subjected to punishment of any description.”  *Hardy v. District of Columbia*, 601 F. Supp. 2d 182, 188 (D.D.C. 2009) (quoting *Hill v. Nicodemus*, 979 F.2d 987, 991 (4th Cir. 1992)).

In  *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), the United States Supreme Court considered the differences between pre-trial and post-conviction detainees in deciding that, to state an excessive force claim, a pre-trial detainee need only show that the use of force was objectively unreasonable.  135 S.Ct. at 2473-74. The officers’ subjective state of mind in using the force was irrelevant. *Id.* While *Kingsley* relates to excessive force rather than prison conditions, in making its decision, the *Kingsley* court relied on  *Bell v. Wolfish*, 441 U.S. 520 (1979), a case pertaining to prison conditions. According to the *Kingsley* court, “as *Bell* itself shows (and as our later precedent affirms), a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.” *Id.* Together *Kingsley* and *Bell* provide persuasive authority that a pre-trial detainee need only show that prison conditions are objectively unreasonable in order to state a claim under the due process clause.

\*6 The parties did not cite and the Court could not find a D.C. Circuit case interpreting *Kingsley* in the context of a claim for deficient prison conditions. However, many circuit courts have extended *Kingsley*’s objective standard to apply to other due process claims by pre-trial detainees. For example, the United States Court of Appeals for the Second Circuit has held that, following *Kingsley*, in the context of challenged prison conditions for pre-trial detainees, “the Due Process Clause can be violated when an official does not have subjective awareness that the official’s acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm.”  *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); see also  *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (applying *Kingsley* standard to failure to protect claims by pre-trial detainees); *Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019) (finding that “*Kingsley*’s objective inquiry applies to all Fourteenth Amendment conditions-of-confinement claims brought



Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

by pretrial detainees”). And, at least one district court within this Circuit has also applied *Kingsley*’s objective standard to due process claims brought by pre-trial detainees. See *United States v. Moore*, Case No. 18-198-JEB, 2019 WL 2569659, \*2 (D.D.C. June 21, 2019) (explaining that a pretrial detainee could prevail on a due process claim “if she either introduces evidence of a subjective intent to punish or demonstrates that a restriction is objectively unreasonable or excessive relative to the Government’s proffered justification”).

Based on the pertinent reasoning of *Kingsley* and the persuasive authority of other courts, the Court concludes that pre-trial detainee Plaintiffs Phillips and Smith do not need to show deliberate indifference in order to state a due process claim for inadequate conditions of confinement. As such, under the due process clause, pre-trial detainee Plaintiffs Phillips and Smith are likely to succeed on the merits by showing that the Defendants knew or should have known that the jail conditions posed an excessive risk to their health. And, under the Eighth Amendment, post-conviction detainee Plaintiff Banks must show that the jail conditions exposed him to an unreasonable risk of serious damage to his health and that Defendants acted with deliberate indifference in posing such a risk.

Despite recognizing that pre-trial detainee Plaintiffs need not demonstrate deliberate indifference to show a likelihood of success on their due process claims, the Court will also analyze the deliberate indifference prong as such a showing is still required for post-conviction Plaintiff’s Eighth Amendment claim.

### 1. Unreasonable risk to Plaintiffs’ Health

Now that the Court has determined the standards under the due process clause and the Eighth Amendment, the Court will assess whether or not Plaintiffs have shown a likelihood of success in proving that they have been exposed to an unreasonable risk of damage to their health. Determining whether or not Plaintiffs have been exposed to an unreasonable risk is an objective analysis which “requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.”  *Helling v. McKinney*, 509 U.S. 25, 36 (1993) (emphasis in original). In sum, Plaintiffs “must show that the risk of which [they] complain[ ] is not one that today’s society chooses to tolerate.” *Id.*

Both parties and the Court recognize the seriousness of the threat posed by COVID-19. Despite the seriousness of the threat, Defendants argue that Plaintiffs are unlikely to succeed in establishing that they have been exposed to an unreasonable risk to their health. Specifically, Defendants argue

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

that Plaintiffs “have not shown that the risk posed by DOC’s practices raises plaintiffs’ risk of exposure substantially over the risk experienced by the outside community.” Defs.’ Opp’n, ECF No. 25, 16. Defendants further argue that, for the most part, Plaintiffs are able to take the same precautions to prevent infection as those not detained. The Court disagrees.

As an initial matter, the data for COVID-19 infection rates decries Defendants’ argument that Plaintiffs’ risk of infection is the same as that of the outside community. It is undisputed that, as of April 4, 2020, the infection rate in DOC facilities was over seven times the infection rate of the District of Columbia at large. Pls.’ Reply, ECF No. 26, 8. This statistical data is also supported by Plaintiffs’ unrefuted expert declaration. In her Declaration, Dr. Jaimie Meyer, who reviewed reports on conditions in DOC facilities, posited that “individuals placed in [CDF and CTF] are at a significantly higher risk of infection with COVID-19 as compared to the population in the community and that they are at significantly higher risk of harm if they do become infected.” Dec. of Jaimie Meyer, ECF No. 5-2, ¶ 33.

\*7 Additionally, Plaintiffs have provided evidence that they cannot take the same precautions as those who are not detained. There are many precautionary policies which Defendants contend are in place and are disputed by Plaintiffs. However, one of the most important risk-reduction policies which has not been adequately addressed by Defendants is social distancing. Plaintiffs have provided expert evidence that social distancing is a crucial part of containing the spread of COVID-19. Dec. of Marc Stern, ECF No. 1-1, ¶ 13. With the closures of schools, theaters, and restaurants, governments across the nation have emphasized social distancing as a way to slow the spread of the disease. In the District of Columbia, Mayor Muriel Bowser has implemented an order for social distancing which requires “[m]aintaining at least six (6)-foot social distancing from other individuals.” Stay Home DC Order, <https://coronavirus.dc.gov/stayhome> (March 30, 2020). However, Defendants have produced no evidence that Plaintiffs are able to comply with social distancing precautions.

Plaintiffs have produced uncontroverted evidence that social distancing was slow to be instituted and has not been fully operationalized in CTF or CDF. Plaintiffs have submitted a declaration from a DOC inmate stating that, as of April 4, 2020, “[n]o one from DOC has ever told us about social distancing. There are no signs about social distancing.” Dec. of James Guillory, ECF No. 26-2, ¶ 14. And, Plaintiffs have also submitted a declaration from a DOC staff member who works in the age-50-and-over unit asserting that, as of April 3, 2020, “[s]ocial distancing is not happening in my unit.” Dec. of Lennette Nesbitt, ECF No. 24-2, ¶ 14.

During the April 7, 2020 hearing, Defendants asserted that they have recently implemented new social distancing practices, such as limiting the number of inmates who can use the recreation areas

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

at the same time. April 7, 2020 Tr., ECF No. 37, 40:2-41:11. However, Defendants have yet to submit any evidence that these practices are being implemented. Nor, have Defendants provided specifics such as the number of inmates who can use the common areas at the same time or the steps that are being taken to ensure that individuals maintain a suitable distance when in a shared space.

When the amici of the Court visited the DOC facilities, they reported that, in defiance of social distancing regulations, “[m]ore than five inmates were consistently out of their cells at one time, and sometimes between 10 and 20 inmates were out of their cells at one time.” Report Submitted by Amicus Curiae, Atch. 1, 20. Additionally, the amici reported that “[s]ocial distancing practices were not enforced and there were no attempts by the correctional staff to enforce social distancing even when numerous inmates crowded into a contained area.” *Id.* The amici attributed the failure to enforce social distancing, at least in part, to an understaffing of correctional officers and their supervisors. *Id.* The DOC has a current workforce of 994 funded correctional positions, of which 45 positions are vacant. Of the 949 filled positions, 281 correctional staff were unavailable for duty as of April 16, 2020. *Id.* Understaffing during a crisis situation such as the COVID-19 pandemic makes it difficult to enact and enforce the necessary precautionary measures.

The Court recognizes that Defendants’ response to this sudden and unprecedented pandemic is ongoing. Additionally, the Court recognizes that additional evidence will likely be provided as litigation proceeds. But, based on the current record, the Court finds Defendants’ argument that the risk of infection experienced by Plaintiffs is equivalent to that experienced by the general population is disputed by statistical evidence, Plaintiffs’ expert evidence, the declarations of DOC inmates and staff, and the amici report. Accordingly, based on the limited record before the Court, the Court finds that Plaintiffs have established a likelihood that they will be able to show that they have been exposed to an unreasonable risk of damage to their health.

\*8 Before the Court proceeds to analyzing deliberate indifference, the Court notes that based on the unreasonable risk to Plaintiffs’ health, pre-trial detainee Plaintiffs Phillips and Smith have already established a likelihood of success on the merits of their due process claim. Nevertheless, the Court will proceed to analyze deliberate indifference.

## 2. Deliberate Indifference

The Court will next determine whether or not Plaintiffs have shown a likelihood of success in establishing Defendants’ deliberate indifference. A showing of deliberate indifference requires “that officials had subjective knowledge of the serious medical need and recklessly disregarded the excessive risk to inmate health or safety from that risk.” *Baker v. District of Columbia*, 326 F.3d

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

1302, 1306 (D.C. Cir. 2003). In order to establish deliberate indifference, “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”  *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

There does not appear to be any dispute that Defendants are aware of the threat that COVID-19 poses to the health of Plaintiffs. Instead, the only dispute appears to be whether or not Defendants have recklessly disregarded the risk to Plaintiffs’ health.

In analyzing this standard, the Court recognizes that COVID-19 poses an unprecedented challenge and that the precautionary measures taken by Defendants are rapidly evolving. As evidence of COVID-19 precautions, Defendants have provided the Declarations of Lennard Johnson, the Warden of the DOC, and Beth Jordan, the Medical Director and Health Services Administrator for the DOC. ECF Nos. 20-1, 20-2. Both declarations outline policies designed to combat the threat of COVID-19. For example, Mr. Johnson claims that residents have access to proper cleaning materials, that residents receive a free bar of soap each week, and that the common areas in DOC facilities are cleaned regularly. Dec. of Lennard Johnson, ECF No. 20-1, ¶¶ 6-12. And, Ms. Jordan claims that everyone entering a DOC facility is screened for symptoms using a thermometer and a survey, that all new inmates are quarantined for 14 days before they are assigned to a housing unit, and that the DOC medical staff meets regularly with staff and residents to discuss preventative measures. Dec. of Beth Jordan, ECF No. 20-2, ¶¶ 5-8.

However, it is not clear whether or not these declarations are based on Mr. Johnson and Ms. Jordan’s personal observations of the conditions at the facilities. Both declarations state that the information is based on personal knowledge “including information provided to me by other District of Columbia employees in the course of my official duties.” ECF No. 20-1, ¶ 1; ECF No. 20-2, ¶ 1. As such, there is some uncertainty as to whether these declarations are based on policies which are on the books or the actual conditions of the facilities. And, Plaintiffs have submitted the declaration of at least one DOC staff member strongly suggesting that, as of April 2, 2020, Defendants’ written policies have not been adequately communicated to DOC staff for operationalization. *See* Dec. of Doreen Deterville, ECF No. 24-1, ¶¶ 5-8.

To compound this uncertainty, Plaintiffs have also submitted numerous declarations from inmates and DOC staff rebutting that Defendants’ policies are being fully implemented. For example, Plaintiffs have submitted declarations stating that they have not been given free bars of soap. Dec. of Edward Banks, ECF No. 5-2, ¶ 8; Dec. of Keon Jackson, ECF No. 5-2, ¶ 10; Dec. of Eric Smith, ECF No. 5-2, ¶ 8. And, Plaintiffs have submitted declarations stating that inmates do not receive adequate cleaning supplies. Dec. of Keon Jackson, ECF No. 5-2, ¶ 12. And, Plaintiffs have submitted declarations stating that not all new inmates are properly screened and quarantined

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

when transferred between units. Dec. of Michael Cohen II, ECF No. 26-4, ¶ 18. Having a written policy in place but not fully implemented cannot protect Defendants from a finding of deliberate indifference.  *Daskalea v. District of Columbia*, 227 F.3d 433, 442 (D.C. Cir. 2000) (explaining that “a ‘paper’ policy cannot insulate a municipality from liability where there is evidence, as there was here, that the municipality was deliberately indifferent to the policy’s violation.”).

\*9 The written findings of the amici support some of these declarations. In conducting their visits, the amici determined that “the need for more intensified education of staff and inmates [about COVID-19] is apparent.” Report Submitted by Amicus Curiae, Atch. 1, 15. Amici further noted that access to cleaning supplies varied from unit to unit. *Id.* at 30. In some units, cleaning supplies were depleted and, in other units, inmates could not access the supplies to clean their cells. *Id.* Additionally, no inmates had facility-issued rags for cleaning their cells. Instead, many inmates used “tattered and soiled” rags that they made by tearing facility issued towels or t-shirts. *Id.* Moreover, “[i]t was evident that knowledge regarding the appropriate use of the different cleaning and sanitizing agents was generally at a very low level.” *Id.* Challenges with cleanliness persisted outside the inmates’ cells, with the cleanliness of common spaces inconsistent among housing units with little quality control. *Id.* at 31-32.

The Court further notes that, while amici reported that Defendants screened all staff and visitors at the entrances to both CDF and CTF, there are issues with the screening procedures. On entering DOC facilities, all visitors and staff are questioned as to whether or not they have experienced COVID-19 symptoms. *Id.* at 15-16. And, all visitors and staff have their temperatures checked with a non-contact infrared thermometer. *Id.* at 16. However, amici reported that two out of eight reported temperature readings appeared to be inaccurate, registering in the low 90 degrees. *Id.* Amici posit that the inaccurate temperature readings are caused by user error and inadequate training with the thermometer. *Id.* While it is not clear if the medical staff use the same type of thermometer to measure the temperatures of inmates in the medical unit, amici indicated that a “review of electronic health records also identified a number of questionably low temperature readings.” *Id.*

Additionally, there are certain precautionary steps that Defendants do not address. For example, as already explained, social distancing is one of the most crucial precautionary measures in slowing the spread of COVID-19. However, Defendants’ declarations make little to no mention of social distancing measures. During the hearing, Mr. Bluming stated, “pre-COVID-19, we had 80 people in the recreational area together. At the end of last week, we were down to half that, so 40 people at a time.” April 7, 2020 Tr., ECF No. 37 41: 7-11. Mr. Bluming further stated that, the DOC’s website indicated that they may be allowing no more than 10 individuals in the recreational area at a time. *Id.* at 41: 1-3.



Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

The Court notes that, besides counsel's argument, there is no record evidence that these procedures are being implemented. As recently as April 4, 2020, an inmate stated that "[p]eople on my unit still give each other high fives. People still eat and drink each other's food and beverage bottles. Staff do not warn people these things are unsafe." Dec. of Michael Cohen II, ECF No. 26-4, ¶ 51. Additionally, as per Defendants' own argument, three weeks into the COVID-19 pandemic, Defendants were still allowing 40 inmates to congregate in the recreation yard. Given the spread of infection at DOC facilities, such a delayed response is not a sufficient or a timely response to the risk posed to Plaintiffs' health. And, as previously discussed, in their review of the facilities, the amici determined that, as recently as April 12, 2020, as many as 10 to 20 inmates were out of their cells at one time and correctional staff were not able to implement or enforce social distancing practices. Report Submitted by Amicus Curiae, Atch. 1, 20.

Additionally, while Defendants' declarations addressed screening for new inmates and isolation for those who test positive for COVID-19, it remains unclear what steps are being taken to prevent the spread of COVID-19 by those inmates who already reside in DOC facilities and have not yet tested positive for infection. This is especially concerning as Defendants primarily rely on inmates to self-report symptoms in order to determine who may be infected. *Id.* at 9. Plaintiffs have submitted an un rebutted declaration that "at least three DOC staff members ... have tested positive and alerted DOC" but "[n]o contact tracing has been done for at least one if not all of the staff members with regard to whether inmates or other staff should be quarantined." Dec. of Michael Hannon, ECF No. 23-11, ¶ 59. Additionally, amici reported one case in which an inmate who worked in the Culinary Unit tested positive for COVID-19. Report Submitted by Amicus Curiae, Atch. 1, 26-27. While that inmate was placed in isolation, the DOC did not attempt to determine whether the contract staff who had worked with that inmate in the Culinary Unit were close contacts of the inmate and should self-quarantine at home for 14 days. *Id.* at 27-28. Additionally, it appeared that "the detail inmate who tested positive was not contacted about any individuals with whom he had close contact." *Id.* at 28.

**\*10** Plaintiffs have also presented un rebutted evidence that Defendants are slow to respond to those inmates who display symptoms of COVID-19. Multiple PDS attorneys and investigators have reported that their clients display COVID-19 symptoms such as [coughs](#) and fevers which have not been adequately addressed by the medical unit. Dec. of Rachel Cicurel, ECF No. 5-2, ¶ 6(b); Dec. of Katherine Kuenzle, ECF No. 5-2, ¶ 4. And, inmates who have requested medical aid for COVID-19 symptoms report long waits for medical care, testing, or separation from the general population. Dec. of D'Angelo Phillips, ECF No. 5-2, ¶ 4 (stating that "it takes days before you get a visit from anyone from the medical unit"); Dec. of Eric Smith, ECF No. 5-2, ¶ 5 ("It takes days before anyone can get medical staff to come see them, even if you say you are having

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

trouble breathing”). According to Plaintiffs’ expert, “[t]he failure of these facilities to adequately manage single individuals in need of emergency care is a strong sign that they will be seriously ill-equipped and under-prepared when a number of people will need urgent care simultaneously, as would occur during a COVID-19 epidemic.” Dec. of Jaimie Meyer, ECF No. 5-2, ¶ 28(d)(ii).

Plaintiffs have also presented evidence that the quarantine unit is not properly sealed off from the general population. An inmate next to the unit explained that air could travel freely between his cell and the quarantine unit. Dec. of Eric Smith, ECF No. 5-2, ¶ 3. And, Plaintiffs have submitted evidence that those in the general population share a television remote control with those in the quarantine unit. *Id.* at ¶ 4. The lack of separation for those in quarantine is especially concerning due to Plaintiffs’ evidence that “[t]he ventilation conditions described in the District of Columbia’s Auditor’s report ... will increase the rate of the spread of the virus.” Dec. of Jaimie Meyer, ECF No. 5-2, ¶ 28(c).

In addition to the quarantine unit not being properly secluded, the amici identified several other issues with both the quarantine and isolation units. Anyone entering a quarantine housing unit, except for inmates, is required to wear gloves and a mask at all times. Report Submitted by Amicus Curiae, Atch. 1, 18. Despite this requirement, most of the correctional staff in the quarantine unit wore a variety of masks which they purchased for themselves and were often ill-fitting and soiled. And, generally, correctional staff did not wear gloves. *Id.* Inmates housed in quarantine units are also required to wear masks outside their cells. However, the amici found that the inmates were not consistently wearing their masks and many of the masks did not fit and were soiled. *Id.* Amici did note an abrupt increase the personal protective equipment distributed to correctional officers over the course of their multiple visits. *Id.* at 25. However, this delayed response in providing protective equipment to those working and living in quarantine units is notable.

Amici also highlighted the conditions for inmates living in isolation units. Some inmates have already spent 12 to 15 days in isolation units. Those in the isolation units are not permitted to shower. *Id.* at 22. And, laundry services for inmates in isolation have been limited with some inmates wearing the same soiled clothes for the duration of their stay in isolation. *Id.* Some inmates with sinks in their cells can use those for cleaning, and, as of April 14, 2020, the DOC intended to provide inmates in isolation with body wipes. *Id.* However, these punitive conditions for those in isolation are not acceptable. Additionally, inmates in isolation at CTF are not permitted to use the telephone for any reason, including legal calls. *Id.* It was unclear whether or not inmates in CDF are permitted to use the telephone. *Id.* As the DOC is primarily relying on inmates to self-report symptoms of COVID-19, the punitive conditions of isolation make it more likely that inmates will hide their symptoms to avoid the potential for isolation and continue to infect others in the general population.

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

The Court will address one other deficiency highlighted by amici—lack of access to confidential legal calls. As the Court already stated, it appears that individuals in isolation units have no access to telephones. *Id.* And, this issue persists for those in other housing units. Telephone calls in confidential settings are generally organized by DOC case management staff; however, most of those staff are either on quarantine or working remotely. *Id.* at 21. “Thus, as a general matter, there has been no access to confidential legal calls for inmates confined on quarantine and non-quarantine housing units.” *Id.* Some inmates have been able to make calls using telephones in the day rooms; however, these calls are monitored and do not afford the confidentiality required to communicate about legal issues with counsel. *Id.*

\*11 Based on the current record, Plaintiffs have provided evidence that Defendants are aware of the risk that COVID-19 poses to Plaintiffs’ health and have disregarded those risks by failing to take comprehensive, timely, and proper steps to stem the spread of the virus. Again, the Court acknowledges that additional development of the record may show that Defendants are taking sufficient precautions and that Defendants’ response continues to evolve. However, on the current record, the Court finds that Plaintiffs have established a likelihood of success in showing deliberate indifference.

### C. Plaintiffs Show Irreparable Harm

Next, the court considers whether or not Plaintiffs have made a showing of irreparable harm. “[P]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.” *Sierra Club v. United States Army Corps of Engineers*, 990 F. Supp. 2d 9, 38 (D.D.C. 2013) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed.2013)). “[P]roving irreparable injury is a considerable burden, requiring proof that the movant’s injury is *certain, great and actual*—not theoretical—and *imminent*, creating a clear and present need for extraordinary equitable relief to prevent harm.”  *Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005) (citations and internal quotation marks omitted, emphasis in original).

Plaintiffs’ theory of irreparable harm rests on the risk of contracting COVID-19 and the resulting health complication. The Court concludes that Plaintiffs’ risk of contracting COVID-19 and the resulting complications, including the possibility of death, is the prototypical irreparable harm. See  *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 766 (9th Cir. 2004) (finding irreparable harm from pain, infection, and possible death due to delayed treatment from the reduction of hospital beds). “Facing requests for preliminary injunctive relief, courts often find



Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

a showing of irreparable harm where the movant's health is in imminent danger." *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 20 (D.D.C. 2005) (citing *Wilson v. Group Hosp. & Med. Servs., Inc.*, 791 F. Supp. 309, 314 (D.D.C. 1992) (granting preliminary injunction where cancer patient's "health and future remain[ed] in serious doubt" and insurance would not pay for life-saving treatment)).

Defendants do not appear to contest that the risk of contracting COVID-19 constitutes irreparable harm. Instead, Defendants contend that, "because Plaintiffs fail to make any showing of a specific injury that is not generalized to the inmate population, plaintiffs fail to meet their burden of demonstrating irreparable harm." Defs.' Opp'n, ECF No. 25, 22. However, Defendants cite no authority for the proposition that, because the threat of COVID-19 infection is widespread among the inmate population, Plaintiffs' threat of irreparable harm is somehow diminished. And, Plaintiffs have produced expert evidence that they are "at a significantly higher risk of infection with COVID-19 as compared to the population in the community" and "at a significantly higher risk of harm if they do become infected." Dec. of Jaimie Meyer, ECF No. 5-2, ¶ 33. The fact that many other inmates face this same risk does not diminish the risk faced by Plaintiffs.

Defendants, as well as society at large, are facing an unprecedented challenge. The risks of contracting COVID-19 are very real for those both inside and outside DOC facilities. However, Plaintiffs have produced evidence that inadequate precautionary measures at DOC facilities have increased their risk of contracting COVID-19 and facing serious health consequences, including death. The Court further notes that the number of inmates testing positive for COVID-19 is growing daily. Given the gravity of Plaintiffs' asserted injury, as well as the permanence of death, the Court finds that Plaintiffs have satisfied the requirement of facing irreparable harm unless injunctive relief is granted.

#### **D. The Balance of Hardships and the Public Interest Weigh in Plaintiffs' Favor**

\*12 The Court moves to the final factors to be considered in granting a temporary restraining order—the balance of the equities and the public interest. In this case, where the government is a party to the suit, the harm to Defendants and the public interest merge and "are one and the same, because the government's interest *is* the public interest." *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (emphasis in original). The Court finds that the public interest weighs in favor of granting injunctive relief.

First, the Court notes that Plaintiffs have established a likelihood that they will prevail on the merits of their due process and Eighth Amendment claims. And, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F. Supp.

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

[2d 90, 105 \(D.D.C. 2012\)](#) (internal quotation marks omitted). There is no harm to the Government when a court prevents unlawful practices.

Additionally, granting injunctive relief which lessens the risk that Plaintiffs will contract COVID-19 is in the public interest because it supports public health. No man’s health is an island. If Plaintiffs contract COVID-19, they risk infecting others inside the DOC facilities. Plaintiffs also risk infecting DOC staff members who work inside DOC facilities but also live in the community, thus increasing the number of people vulnerable to infection in the community at large. Additionally, if Plaintiffs contract COVID-19 and experience complications, “they will be transported to community hospitals—thereby using scarce community resources (ER beds, general hospital beds, ICU beds).” Dec. of Marc Stern, ECF No. 1-1, ¶ 13. As such, ordering Defendants to take precautions to lower the risk of infections for Plaintiffs also benefits the public.

And, the Court finds that the relief which will be granted, to be detailed below, does not impose an undue burden on Defendants. The Court begins by noting that the D.C. Circuit “has rejected any distinction between a mandatory and prohibitory injunction.” [League of Women Voters of United States v. Newby](#), 838 F.3d 1, 7 (D.C. Cir. 2016). Declarations by DOC officials claim that Defendants are already complying with much of the requested relief. *See, e.g.*, Dec. of Lennard Johnson, ECF No. 2-1, ¶ 6 (housing unit common areas cleaned every two hours during the day and twice each night); ¶ 7 (residents provided proper material to clean cells); ¶¶ 8-9 (each resident provided access to hot running water as well as weekly bar of soap, roll of toilet paper, and clean linens); ¶ 10 (hand sanitizer available to residents in CTF despite shortage); ¶ 12 (signs posted to alert residents of COVID-19 prevention measures); Dec. of Beth Jordon, ECF No. 20-2, ¶ 8 (DOC medical staff regularly meet with residents to discuss COVID-19 prevention); ¶ 12 (testing for those with specified symptoms). And, the Court does not order Defendants to take precautions that are not already being undertaken by the majority of the population. Moreover, in lessening the number of inmates infected with COVID-19, Defendants actually lessen the healthcare burden that they will be facing in the weeks and months to come.

The Court acknowledges the public interest in permitting the government discretion to carry out its authorized functions. However, “[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.” [Brown](#), 563 U.S. at 511. The D.C. Circuit has previously authorized injunctive relief against correctional facilities, even where the injunctive relief imposes a particular set of conditions. *See* [Campbell v. McGruder](#), 580 F.2d 521, 551-52 (D.C. Cir. 1978) (finding specific conditions not unduly intrusive because there was “no alternative if the rights of pretrial detainees are to be respected”).

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

\*13 For the foregoing reasons, the Court finds that the balance of the equities and the public interest weigh in favor of granting injunctive relief.

### E. Specific Relief Granted

While the Court has concluded that, on the current factual record, Plaintiffs are entitled to some injunctive relief, the Court is not granting the totality of the relief requested.

The Court is not ordering the release of any inmates currently detained in DOC facilities. In addition to the many individual release petitions which are currently being filed by DOC inmates, the Superior Court of the District of Columbia has granted District law enforcement the discretion “to release an individual not otherwise eligible for release ... upon approval of the prosecuting authority.” *See* Superior Court of the District of Columbia Order, March 16, 2020, available at [http://www.dccourts.gov/sites/default/files/Order\\_3-16-20.pdf](http://www.dccourts.gov/sites/default/files/Order_3-16-20.pdf). Additionally, based on the authority granted to the DOC by the COVID-Emergency Act amended Section 24-221.0(c) “during a period for which a public health emergency has been declared ..., [DOC] shall have discretion to award additional credits” to those serving misdemeanor sentences “to effectuate immediate release of persons sentenced for misdemeanors ... consistent with public safety.” *See*  [D.C. Code § 24-221.01c\(c\) \(2020\)](#). DOC has since doubled the maximum number of monthly sentencing credits which a misdemeanant may receive from 10 to 20. *See* DOC Change Notice #20-002, March 18, 2020 [19-2], ¶ 2c.

Since beginning these practices, all but nine misdemeanants have been released from custody. April 15, 2020 Tr., ECF No. 45, 72: 22-23. Eight of those misdemeanants have been considered for release and denied, and one misdemeanant has not requested release. *Id.* 72: 24-73: 3. Based on the actions of D.C. Superior Court, Plaintiffs agree that the release of misdemeanants is no longer at issue in this case. *Id.* at 73: 15-18. As such, the Court does not find that injunctive relief on this ground is appropriate at this time. For this same reason, and due to ongoing processes for assessing individual inmates for release, the Court is not granting Plaintiffs’ request for an expert in prison population reduction at this time.

However, the Court does grant the following injunctive relief, in line with the amici recommendations. In light of the medical surveillance and monitoring that is occurring currently in the quarantine units, Defendants shall ensure that the triage process associated with sick call requests on the non-quarantine units is expedited and reflects appropriate sensitivity to the wide variety of symptoms associated with COVID-19 disease. Correctional officers and other staff who are in contact with inmates should ensure that the medical staff are promptly informed about inmates who present with symptoms of COVID-19 and medical staff should respond to the

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

housing unit on an expedited basis. Any inmate grievances that include allegations of delay in medical assessment should be prioritized and submitted to the DOC medical director immediately. Additionally, in light of the fact that the DOC is relying on inmates to self-report symptoms of COVID-19, Defendants shall provide better documentation as to the dates and times of sick calls and urgent care calls, the inmates' reported symptoms, the dates and times the inmates are seen by medical professionals, and the outcomes to allow for better tracking of the response to inmates' complaints of COVID-19 symptoms.

**\*14** If the Defendants are not already doing so, they shall that ensure that cell restrictions are appropriately monitored, tracked, and corrective action is undertaken on an expedited basis if warranted.

In instances in which inmates are transferred from the intake unit to a different unit before the 14-day quarantine period expires, Defendants shall ensure that appropriate housing, surveillance and monitoring is afforded to the inmate in the receiving unit.

Defendants shall consult with public health professionals regarding strategies that can be implemented to strengthen the COVID-19-related education program for both staff and inmates. Moreover, Defendants shall explore appropriate supports that can be provided on an expedited basis to both staff and inmates who are living and working in an extremely stressful and high-risk environment and are at substantial risk of exposure.

Defendants shall conduct additional staff training on the use of the non-touch, infrared thermometers consistent with manufacturer guidelines and provide guidance to staff regarding what to do when thermometers produce results that appear on their face to be inaccurate.

Defendants shall take immediate steps to provide consistent and reliable access to legal calls, personal telephone calls, daily showers, and clean clothing and clean linens to all inmates on isolation status.

Defendants shall ensure appropriate and consistent implementation of social distancing policies by addressing limitations in current staffing levels, supervisory oversight of line staff, and provide enhanced education related to the importance of social distancing.

Defendants shall communicate clear expectations, in writing, to correctional staff about the types of PPE required to perform the various supervision and operational functions that are conducted throughout the facility, including the PPE they should expect to be given on each shift for each specific category of post assignment; the proper donning, doffing and disposal of the PPE; and

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

an explanation of the related rationale. Clear communication to staff regarding differences in risk exposures and providing consistent PPE over time could help lower anxiety levels among staff.

In addition, Defendants shall also ensure that all PPE issued is properly fitted. For example, N95 respirators must be properly fitted to ensure that they provide the intended protection. During the site visits that amici conducted, none of the correctional staff who were wearing N95 respirators in isolation units reported that they had been fitted for the respirators.

Defendants shall ensure that all DOC staff receive instruction on the proper disposal of PPE, and appropriate and accessible receptacles for immediate disposal must be readily available. During the site visits, amici observed that receptacles for disposal of PPE were not accessible on a consistent basis, including to staff assigned to isolation units at the CTF.

There is a critical need for the defendants to strengthen the environmental health and safety program at both the CDF and the CTF. It is recommended that the DOC immediately retain a registered sanitarian to oversee the environmental health and safety programs at both facilities and provide training so that cleaning tools and products are used properly. A registered sanitarian should bring the appropriate knowledge, oversight, and quality control necessary to mitigate at least some of the critical public health concerns that are evident in both facilities.

**\*15** In addition to engaging a sanitarian, supervisory correctional staff must ensure that housing unit staff properly manage the work performed by the inmate detail workers. In order to accomplish that goal, correctional staff and detail workers require guidance from a sanitarian trained to oversee the facility's environmental health program.

In addition to engaging a sanitarian, the defendants shall consider contracting for professional cleaning services on the non-secure side of the facility at least until a sanitarian is hired to bolster the existing environmental health and safety program at both facilities. Additionally, proper cleaning supplies that have been sanitized regularly shall be immediately provided to each unit, and a schedule for cleaning common areas and cells shall be established and enforced.

Defendants shall reduce the extent to which common spaces encourage inmates to congregate in close quarters (e.g., around a single television in a small enclosed area, or next to one another in order to use telephones that are mounted closer than six feet apart). The effectiveness of this strategy would increase if Defendants were to consistently apply their stated policy of allowing no more than small groups of inmates out of their cells at any given time. Whatever strategies Defendants adopt, increased active and direct supervision will be required by both housing unit correctional officers and the midlevel managers responsible for overseeing and supporting the

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

correctional officers assigned to housing units. Enforcing social distancing standards as a public health measure is a new responsibility for correctional staff and they must be supported as they adjust to this new role. Moreover, Defendants shall assess whether any additional security staff are needed to provide appropriate supervision, on a unit-by-unit basis, taking into consideration the layout of the housing units, the number of inmates housed on the units, and the security designation of the unit, in order to enforce social distancing policies.

Finally, Defendants shall ensure that all inmates, including those on isolation, have access to confidential, unmonitored legal calls of a duration sufficient to discuss legal matters.

As relief, the Court has adopted in general the recommendations set out by the amici in their final report. The Court has not set out each detail in the report which supports these recommendations. However, the Court expects Defendants to address those specific deficiencies set out in the final report, which support the recommendations, and to rectify those deficiencies.

#### **IV. CONCLUSION**

For the foregoing reasons, Plaintiffs' [5] Motion for a TRO is GRANTED IN PART AND DENIED IN PART. Plaintiffs have demonstrated a likelihood of success on the merits, irreparable harm, and that the balance of the hardships and the public interest weigh in their favor. Accordingly, Plaintiffs are entitled to the injunctive relief which is detailed above. However, the Court finds that some of the relief requested by Plaintiffs, such as the immediate release of inmates and the appointment of a downsizing expert, is inappropriate at this time on the current factual record.

An appropriate Order accompanies this Memorandum Opinion.

Exhibits

**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLUMBIA**

EDWARD BANKS, *et al.*,

v.



Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

QUINCY BOOTH, in his official capacity as Director of the District of Columbia Department of Corrections, *et al.*, Defendants.

No. 1:20-cv-849 (CKK)

**REPORT SUBMITTED BY *AMICUS CURIAE*  
PURSUANT TO APRIL 9, 2020 CONSENT ORDER\***

\* This filing corrects two typographical errors that appear in the version of this report that was submitted to the Court and the parties on April 18, 2020 by deleting the word “not” in line three on page 25 and substituting the word “secure” for “non-secure” in line eight on page 33.

**\*16** Pursuant to the April 9, 2020 Consent Order issued in the above-captioned matter, *Amici*, Grace M. Lopes and Mark Jordan, submit the following report for the Court’s consideration.

**I. INTRODUCTION**

On April 9, 2020 *amici* were appointed to provide specific information to the Court regarding medical services and environmental health and hygiene at two detention facilities operated by the District of Columbia Department of Corrections (“DOC”), the Central Detention Facility (“CDF”) and the Correctional Treatment Facility (“CTF”). In the wake of the order, *amici* collected and analyzed data obtained from site visits at both facilities; conducted structured interviews with DOC managers, line staff, inmates, and contractors; reviewed electronic health records; and analyzed multiple electronic datasets extracted from information management systems maintained by the DOC or its contract services providers. On April 15, 2020, *amici* participated in a teleconference with the Court and the parties and provided a preliminary summary of their findings, which are explained in greater detail below. At the conclusion of the teleconference, the Court directed *amici* to include in this report recommendations regarding issues that *amici* have identified.

This report describes the methodology *amici* relied upon to conduct their assessment, the facilities subject to the assessment, and *amici*’s findings and recommendations related to the questions delineated in the April 9, 2020 order. Throughout this one-week investigation, the defendants have fully cooperated with *amici*’s requests for information and actively facilitated *amici*’s work. DOC and contract staff at every level, as well as representatives from the Office of the Attorney General, have made themselves available on short notice, on every day of the week, and well after traditional officer hours. Data reports and other records were produced on abbreviated timelines. *Amici* acknowledge and appreciate the efforts the defendants have made to cooperate with and expedite their review.

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

## II. METHODOLOGY

Following the issuance of the April 9, 2020 order, *amici* reviewed the documents identified in the order and conducted unannounced and unescorted site visits on multiple shifts at both the CDF and CTF on April 10, 11, and 12, 2020. During the site visits, at both facilities *amici* visited general population, maximum and medium security housing units, including housing units on isolation or quarantine status, as well as intake, special management, and mental health units. Seven housing units at the CDF (S1, NW1, S2, NE2, N3, NE3, and N2) and five housing units at the CTF (D2A, D1B, C2A, C2B, and C4B) were visited. Observations in housing units included cells, dayrooms, restrooms, and shower facilities. At both facilities, medical units (including the CTF infirmary), visitor entry areas, Command Centers, and the Culinary Unit at the CDF,<sup>1</sup> were visited.

<sup>1</sup> The Culinary Unit at the CTF was not operational at the time of the site visits and as a result the Culinary Unit at the CDF has been servicing both facilities.

Structured in-person interviews were conducted with the DOC Medical Director, the Medical Director and Deputy Medical Director for Correctional Health at Unity Health Care, Inc. (“Unity”),<sup>2</sup> the CDF/CTF Warden and his deputies, and dozens of correctional officers assigned to various posts throughout the facilities, including housing unit, environmental, and culinary posts. In-person interviews were also conducted, in groups and individually, with over 100 inmates on isolation and quarantine status as well as in the general population at both facilities.

<sup>2</sup> Unity provides medical services on a contractual basis to inmates at the CDF and CTF.

\*17 In addition, *amici* conducted informal in-person or telephone discussions with Unity staff, including infection control staff and managerial clinical health care providers, to obtain and/or verify information. A range of DOC managers and staff with responsibility for administrative matters, including cleaning, hygiene and medical supplies, data management and analysis, warehouse functions, contractual cleaning services and human resources were also contacted and provided information that is reflected in this report.

In addition to the information collected during site visits and from interviews, *amici* requested and received access from the DOC to the electronic health records of inmates confined at the CDF and CTF.<sup>3</sup> Review and analysis of samples from these records has been conducted and the results are described below. The following data were also obtained from the DOC and analyzed:

- Admissions data for both facilities for the period February 15, 2020 to April 10, 2020;



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- Daily census data, including inmate housing assignments, for the period February 15, 2020 to April 13, 2020;
- Data related to sick call requests for the period February 5, 2020 to April 12, 2020;
- Data related to all COVID-19 tests conducted on inmates housed at both facilities through April 10, 2020;
- Data related to all urgent care encounters for the period February 15, 2020 through April 15, 2020;
- Inventory data for cleaning supplies as of April 13, 2020;
- Inventory data for personnel protective equipment as of April 17, 2020; and
- Data related to cleaning supplies and soap deliveries to both facilities for the period December 31, 2019 to April 13, 2020.

3 Case record reviews were conducted by Janet Maher, an additional member of the team *amici* assembled. Ms. Maher is an attorney who has extensive experience in working in institutional and health-care settings. Ms. Maher headed the Office of Corporation Counsel's Mental Health Division from 1992 to 2000, worked as Deputy General Counsel and Chief of Staff for the District's Child and Family Services Agency from 2000 to 2007 and as DOJ Compliance Officer at Saint Elizabeths Hospital from 2007 to 2014. From 2013 to her retirement in 2016, she headed the Hospital's Performance Improvement Department. She also has provided consultative services to the Maryland and Pennsylvania behavioral health systems and to the Special Arbiter appointed by the Superior Court in *Jerry M. v. District of Columbia*, Superior Court of the District of Columbia, C.A. No. 1519-85.

Aggregated data related to DOC correctional staffing levels was also reviewed and is addressed below.

### III. BACKGROUND

The CDF is a multi-story, secure detention center. Recent population levels have hovered near 1020 inmates. The facility has 18 housing units, which are both single and double celled. Analysis of DOC housing data shows that as of April 13, 2020, 43 percent of the inmates housed at the CDF were housed in single cells and 56 percent were housed in cells with another inmate.<sup>4</sup> At the time of *amici's* site visits, 16 housing units were open and two were closed. Of the 16 open housing units,

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

two were quarantine units and one was an isolation unit.<sup>5</sup> Cellblocks are divided into two sides, and for most of the facility's housing units, each side contains two tiers with 20 cells per tier.<sup>6</sup> All cells at the CDF are "wet" cells, *i.e.*, they have toilets and sinks. Each cellblock tier of 20 cells has two showers, which are shared by inmates housed in the unit and located in a common area. The CDF Culinary Unit, which is operated by a contractor and up until April 11, 2020 employed inmate workers, currently supports the food service program for both the CDF and the CTF.<sup>7</sup>

<sup>4</sup> Ex. 1, Table, Number of Cells Housing One Inmate and Two Inmates at the Central Detention Facility, March 15 - April 13, 2020. Two inmates did not have a recorded cell assignment.

<sup>5</sup> The number of quarantine and isolation units is, of course, variable. It is *amici's* understanding that since the time of their site visits additional quarantine units have opened.

<sup>6</sup> There are two exceptions: N1 is a restrictive housing unit with 72 cells and NE3 is a mental health step down unit with 36 cells.

<sup>7</sup> The CTF has a separate Culinary Unit that is responsible for that facility's food service program. At the time of *amici's* site visits, DOC staff reported that the Culinary Unit at the CTF was closed due to a COVID-19 issue. *Amici* have confirmed that the food service program at the CTF is not operational and that the CDF Culinary Unit is now supporting the food service program at the CTF. *Amici* have not had an opportunity to confirm the date the CTF Culinary Unit closed, but staff reported it had been up to several weeks before the site visit. The closure of the CTF Culinary Unit has put evident strain on the food service program at the CDF.

**\*18** The CTF, which had a population of approximately 400 inmates at the time of *amici's* site visits, has 25 housing units.<sup>8</sup> Eighteen have a capacity of 50 beds, four have a capacity of 96 beds, and one has a capacity of 65 beds. There are two additional medical housing units and two special management units that have varying capacities and are not intended for general population housing. As of April 13, 2020, 95 percent of the inmates at the CTF were housed in single cells.<sup>9</sup> With the exception of eight housing units,<sup>10</sup> all of the CTF's housing units have wet cells. At the time of *amici's* site visits, nine housing units were closed and there were eight quarantine units and three isolation units. The isolation units and seven of the eight quarantine units operating at the time of *amici's* site visits have wet cells. The CTF also has a 30-room infirmary with 40 beds. The infirmary serves both facilities.

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

- 8 This total includes two special management units. Inmates are also housed in a limited mobility medical unit and the infirmary.
- 9 Ex. 2, Table, Number of Cells Housing One Inmate and Two Inmates at the Correctional Treatment Facility, March 15 – April 13, 2020.
- 10 Three of the eight housings units that do not have toilets and sinks were open during the site visits.

As of April 16, 2020, the DOC reported that 130 inmates have been tested for COVID-19 and a total of 65 inmates have been confirmed positive, 57 at the CTF and eight at the CDF. Forty-three have tested negative, 22 are currently on isolation units and forty-three have recovered. One inmate died while hospitalized and none are currently hospitalized. Data regarding the number of DOC staff who have tested positive for COVID-19 have not been provided. One member of the DOC correctional staff died earlier this week. Not surprisingly, as evidenced by the findings set out below, the COVID-19 pandemic has presented formidable challenges for the defendants and had a significant impact on operations at both the CDF and the CTF.

#### IV. FINDINGS AND RECOMMENDATIONS

*Amici's* findings and recommendations related to the questions delineated in the April 9, 2020 order are set forth below.

##### A. MEDICAL

**Question One: When residents display COVID-19 symptoms, as defined by the CDC, are they seen by medical staff?**

**Question Two: When residents display COVID-19 symptoms are they tested for COVID-19?**

**Question Three: Are there requests for a sick call based on suspected COVID-19 symptoms where there is no response?**

**Question Four: Is the response time for sick call requests of suspected COVID-19 symptoms for a resident to be seen by medical staff reasonable (assuming time of request and response time are recorded)?**

Questions One through Four address the identification of inmates who display symptoms or who are suspected of having contracted COVID-19 and whether those inmates have access to timely

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

health assessments, services, and COVID-19 testing, as indicated. As discussed below, *amici* were not able to address Questions One through Four directly because the available healthcare datasets did not enable identification of either the universe or representative samples of inmates displaying symptoms or suspected of having contracted COVID-19. *Amici* therefore attempted to identify the mechanisms by which inmates with COVID-19 symptoms are identified by medical staff and reviewed a sample of the electronic health records of inmates who had been tested for COVID-19 to assess timeliness and scope of service delivery in those cases.

In order to evaluate DOC performance relative to these questions, *amici* relied on multiple sources of information including the following: interviews with DOC and contract medical staff, including executive staff; interviews with inmates; interviews with correctional officers; custom data reports from Unity's electronic health record system, including data regarding sick call requests and encounters and urgent care encounters; data regarding all COVID-19 testing conducted on inmates at the CDF and CTF through April 10, 2020; data regarding all sick call requests and encounters between February 5, 2020 and April 12, 2020;<sup>11</sup> data regarding all urgent care encounters between February 15, 2020 and April 15, 2020; and, two random samples of individual inmate health records, one drawn from the population of inmates tested for COVID-19 through April 10, 2020, and the second from a dataset of all sick call requests submitted between March 1, 2020 and April 12, 2020.<sup>12</sup>

<sup>11</sup> In some cases, clinical encounters are recorded as sick call visits, but they do not have an associated written sick call request. Medical staff have explained that when they visit housing units to conduct sick call, they allow inmates who did not submit sick call requests to access services.

<sup>12</sup> Records of 28 of the 83 inmates who were tested as of April 10, 2020 were reviewed. In addition, records of 40 inmates who submitted sick call requests during the review period were reviewed. There were no overlapping cases in the two samples.

<sup>\*19</sup> According to medical staff, the two primary methods by which inmates access health care are through a sick call process, in which inmates complete a written sick call form and insert it into a locked box on their housing units and an urgent care process, whereby an inmate can inform a correctional officer that s/he would like to see medical staff.<sup>13</sup> According to medical staff, in these circumstances the correctional officer contacts the medical unit and a nurse, in consultation with a medical provider,<sup>14</sup> triages the telephone call and either instructs the correctional officer to have the inmate escorted to the medical suite or schedules the inmate for sick call on the next day.<sup>15</sup>

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- 13 There are also chronic care clinics operating Monday through Friday at both the CDF and CTF for inmates with chronic health conditions.
- 14 Advanced medical providers are considered to be MDs, DOs, nurse practitioners, and physician assistants.
- 15 Triage decisions require symptomatic information from the patient. Medical staff stated that at times the correctional officer will allow an inmate requesting urgent care to speak directly with the nurse and at times the inmate informs the correctional officer of their symptoms and the correctional officer reports that information to the nurse. It is not appropriate to require inmates to disclose health information to correctional staff in order to access medical services. The possibility of doing so could deter inmates from seeking necessary medical care.

*Amici* initially analyzed sick call request data for the period between February 5, 2020 and April 12, 2020 to assess whether the data could be used to identify sick call requests for CDC-defined COVID-19 symptoms (*i.e.*, fever, cough, and shortness of breath) and thereafter to assess the time from the request to the time of any responsive medical evaluation. The data included a total of 6,840 records.

For two principal reasons, *amici* determined that these data could not be used as the basis for findings related to identification of inmates with COVID-19 symptoms and assessment of the timeliness of their access to medical services. First, nearly 5,000 of the records did not include a description of the symptoms for which the inmate requested medical care, making it impossible to identify either the universe of or a representative sample of inmates with COVID-19 symptoms.<sup>16</sup> Second, *amici* reviewed data regarding all 83 COVID-19 tests administered to inmates through April 10, 2020 and cross referenced the names of the tested inmates against sick call request records. Of the 83 inmates tested, 69 did not submit a sick call request at any point between February 5, 2020 and the date of their test. Based on a review of a sample of electronic health records of the 13 inmates who tested positive for COVID-19 for whom there was a record of a sick call request between February 5, 2020 and the date of their test, *amici* found that the sick call request was not associated with COVID-19 symptoms in any of the cases.

- 16 For example, the relevant data field in many cases recorded “initial visit,” “follow-up visit,” or “SC [sick call] slip.”

However, based on *amici*’s review of data related to inmates tested for COVID-19, it appeared that most inmates displaying symptoms or suspected of having contracted COVID-19 were presenting to medical staff by a method other than through the submission of a sick call request. Managers of

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

the DOC medical program confirmed this impression. One manager stated that the first positive COVID-19 cases were identified after inmates presented to health care staff through the urgent care process. Once they were confirmed positive for COVID-19, the DOC began to quarantine housing units in which the COVID-19 positive inmates were housed as a containment precaution. Medical staff implemented a practice of monitoring quarantined inmates' temperatures twice daily and reported that this daily surveillance process identified multiple subsequent positive COVID-19 cases, principally at the CTF.

\***20** Medical staff members stated that inmates who are not subject to daily monitoring in a quarantine unit also are most likely to be identified as having symptoms of COVID-19 through the urgent care process. Accordingly, *amici* obtained and analyzed data regarding urgent care encounters at the CDF and CTF for the period February 15, 2020 through April 15, 2020. The data indicate that during that period there were a total of 3,439 urgent care encounters, 2,488 at the CDF and 951 at the CTF.<sup>17</sup> In comparison, over approximately the same time period there were a total of 5,244 sick call requests and encounters, 4,360 at the CDF, 525 at the CTF, and 359 at locations that could not be determined from the available data.<sup>18</sup> Based on these totals, it appears that during the period reviewed urgent care represented 40 percent of the combined volume of sick call and urgent care encounters, and sick call represented 60 percent of the total.

<sup>17</sup> Ex. 3, Chart, Urgent Care Visits at Central Detention Facility and Correctional Treatment Facility, by Day, February 15 – April 15, 2020.

<sup>18</sup> Ex. 4, Chart, Sick Call Requests and Encounters, by Day, February 15 – April 12, 2020.

To assess whether inmates with symptoms of COVID-19 utilize the urgent care process, *amici* analyzed the urgent care dataset for any references to the term “COVID.” The data indicate that the first reference to COVID-19 in the data was on March 15, 2020 at the CDF (for an inmate who was later ruled out for COVID-19), and March 21, 2020 at the CTF. Beginning on March 26, 2020, there were nearly daily and steadily increasing references to COVID-19 in the urgent care encounter data.<sup>19</sup> Thus, it appears that inmates who are not housed in quarantine units are using the urgent care system to present with COVID-19 symptoms to medical staff at the CDF and CTF.

<sup>19</sup> Ex. 5, Chart, Urgent Care Medical Encounters With Clinical Summary Descriptions Including the Word “COVID,” by Day, February 15 – April 15, 2020. The data appear to include daily follow-up assessments of isolated inmates, which explains in part the dramatic increase in volume over time.



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

Given time constraints, it was not possible for *amici* to assess how accessible the urgent care system is to inmates. Available data sources included only records of completed visits and do not reflect attempts to access the system. Numerous factors could impact inmate access to the urgent care system, including the availability of escort staff, willingness of correctional officers to facilitate calls to medical staff while they perform other duties on the unit, and the willingness of inmates to disclose confidential health information when they are within earshot of non-medical staff.

Notwithstanding the evidence that most inmates with symptoms or who are suspected of having contracted COVID-19 appear to present to medical staff by a method other than sick call, in order to evaluate and to assess the responsiveness of the sick call process more generally, in the instances in which inmates submit sick call requests, *amici* assessed whether those requests are collected and the inmate is seen by medical staff on a timely basis. *Amici* selected a random sample of 41 sick call requests submitted by inmates between March 1, 2020 and April 12, 2020 and reviewed the individual health records associated with each request. One sick call request was excluded from the analysis.<sup>20</sup> Of the 40 requests reviewed, 31 included a date of request recorded by the inmate. Of those 31 requests, 26 included a time stamp reflecting when medical staff collected the form. The time stamp was used to analyze the time that elapsed between the date recorded by the inmate on the sick call request form and the date of pick up. Of those 26 requests, 23 requests, 89 percent, were collected within one day. The remaining three were collected within two, four, and 14 days respectively.

<sup>20</sup> One of the cases sampled was excluded because the corresponding written request form was not available for review.

Among the 31 requests that included a date of request recorded by the inmate, review of the corresponding electronic health records indicate that 23 inmates were seen within three days of submitting their request, 74 percent.<sup>21</sup> One inmate was seen six days after the request was made.<sup>22</sup> In two instances involving the same inmate, the inmate was seen every day for ten days for adult preventative care relating to COVID-19 exposure, but the notes in the electronic health records documenting these encounters do not specifically address the issue reflected in the inmate's sick call request. The other three requests were scheduled for appointments, but the inmates were not seen.<sup>23</sup> Two requests that were recorded as scheduled for appointments were cancelled.<sup>24</sup>

<sup>21</sup> In 22 of the 23 cases the inmates were seen within two days and in one case the inmate was seen within three days.

<sup>22</sup> The inmate requested treatment for tooth pain.

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

23 In the three cases, the health record noted that the sick call appointment was cancelled because the inmate was in court, was “unavailable” or was a no show.

24 In one case an inmate indicated he had a “possible” broken finger and in the second the inmate requested fungal cream.

\*21 *Amici* also assessed whether the issue raised by the inmate in his or her sick call request was addressed by the medical provider. In the 33 cases in which the inmate was seen by a medical provider, the medical provider addressed the specific request made by the inmate in 28 cases, 85 percent. In some cases the inmate was referred to specialty providers, but in most cases the inmate received interventions intended to provide immediate relief. In a minority of cases the specific intervention requested by the inmate was not provided but the clinical basis for the decision was reflected in the record.

**Recommendation:** In light of the medical surveillance and monitoring that is occurring currently in the quarantine units, defendants should ensure that the triage process associated with sick call requests on the non-quarantine units is expedited and reflects appropriate sensitivity to the wide variety of symptoms associated with COVID-19 disease. Correctional officers and other staff who are in contact with inmates should ensure that the medical staff are promptly informed about inmates who present with symptoms of COVID-19 and medical staff should respond to the housing unit on an expedited basis. Any inmate grievances that include allegations of delay in medical assessment should be prioritized and submitted to the DOC medical director immediately.

**Question Five: Are residents suspected of COVID-19 isolated from other people?**

Health care staff reported that if an inmate is suspected by a medical provider of having contracted COVID-19, a request for testing is made to the D.C. Department of Health. As of April 10, 2020, all requests for testing made on behalf of DOC inmates had been approved. Health care staff report that pending the testing results, the inmate is placed on cell restriction in their housing unit.

There is evidence that cell restriction practices are being implemented. The sample of electronic health records of inmates who tested positive for COVID-19 that *amici* reviewed document cell restriction orders entered by medical staff at the time COVID-19 testing was ordered by the provider. Inmates on isolation status at both facilities reported being placed on cell restriction prior to testing and before being moved to an isolation unit. During site visits *amici* noted that there were inmates on cell restriction status in some housing units. Correctional officers assigned to housing unit posts who were interviewed by *amici* reported that inmates who are on cell restriction are not permitted to leave their cells for any reason.



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

Moreover, health care and facility management staff report that in instances in which an inmate tests positive for COVID-19, the inmate is moved to an isolation unit. According to those staff, only inmates who have tested positive for COVID-19 are housed in isolation units. DOC records indicate that as of April 10, 2020, 82 inmates were tested for COVID-19. Of the 82 inmates, 52 were COVID-19 positive, 26 were negative, and the balance were pending results. *Amici* reviewed a sample of 28 health records reflecting positives, negatives and pending test results. There were 16 COVID-19 positives in the sample. *Amici's* review of DOC housing records for this cohort indicates that all of the 16 inmates in the sample who tested positive were moved from their housing unit to another housing unit within no more than two days, and most within one day of the positive test result. Based on what *amici* have learned about current DOC business practices, it is likely this cohort was on cell restriction status at the time of testing before being moved to an isolation unit.

**\*22** Accordingly, although *amici* have not had an opportunity to conduct a systematic review related to the implementation of cell restriction orders, it appears that inmates suspected of having COVID-19 are placed on cell restriction and isolated from other inmates.

**Recommendation:** If the defendants are not already doing so, they should that ensure that cell restrictions are appropriately monitored, tracked, and corrective action is undertaken on an expedited basis if warranted.

**Question Six: Are new residents who enter DOC quarantined for 14 days?**

DOC facility executives and medical staff reported a practice of quarantining newly admitted inmates for a 14-day period prior to moving them to another housing unit. To assess whether this practice was being implemented *amici* analyzed intake and housing data for the period from March 15, 2020 to April 10, 2020. The data indicate that starting March 25, 2020 the defendants implemented a practice of housing new admissions on SO2, the intake unit at the CDF, for 14 days, or until the inmate was released from custody, if the release occurred prior to the expiration of the 14-day period.

*Amici* identified six instances after March 25, 2020 in which an inmate was moved out of the intake unit prior to the end of the 14-day period. Five of the six cases involved inmates who were placed on a specialized mental health housing unit before the 14-day quarantine period was completed.<sup>25</sup> *Amici* were not able to determine whether these six inmates were placed on cell restriction after being moved to a non-intake housing unit. *Amici* alerted Unity's medical director of these six transfers so that a determination can be made about the propriety of the transfers and any special precautions that should be implemented on the receiving housing units.

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

25

The sixth case involved an inmate who was moved to a special management housing unit and subsequently to a less restrictive mental health housing unit.

**Recommendation:** In instances in which inmates are transferred from the intake unit to a different unit before the 14-day quarantine period expires, defendants should ensure that appropriate housing, surveillance and monitoring is afforded to the inmate in the receiving unit.

**Question Seven: How frequently do DOC medical staff and/or Unity Health Care staff meet with DOC staff and residents to inform them about COVID-19 symptoms and precautions, and what information is conveyed?**

Unity providers and the DOC Medical Director report that they have conducted multiple education sessions on the housing units and during roll call at both facilities. They indicate that these sessions focus on COVID-19 symptoms and infection-control precautions. More extensive individualized education and counseling is provided on the quarantine and isolation units, which are visited at least twice daily by health care providers. Signage explaining COVID-19 symptoms and precautions is displayed in many common areas throughout both facilities. Nevertheless, the need for more intensified education of staff and inmates is apparent. Most, albeit not all, of the correctional staff and supervisors interviewed expressed substantial concerns about working in the facility in light of what they perceive as their increased risk of contracting COVID-19. Virtually all of the inmates interviewed outside of isolation units expressed fear that they would contract the virus and many of those who tested positive expressed fear that they would **relapse** or become infected again.

**\*23 Recommendation:** The defendants should consult with public health professionals regarding strategies that can be implemented to strengthen the COVID-19-related education program for both staff and inmates. Moreover, the defendants should explore appropriate supports that can be provided on an expedited basis to both staff and inmates who are living and working in an extremely stressful and high-risk environment and are at substantial risk of exposure.

**Question Eight: What visitor screening is conducted? Do the thermometers used for visitor screening work and are they used properly?**

Upon entry to the two facilities, all staff and visitors are required to have their temperature checked and to complete a written questionnaire with three questions. The three questions correspond to the CDC-defined symptoms of COVID-19 (*i.e.*, fever, **cough**, and shortness of breath). An earlier version of the screening questionnaire included questions pertaining to recent travel to areas of the world with known COVID-19 outbreaks and known contacts with individuals with COVID-19. The DOC has updated its visitor and staff screening questionnaire in response to evolving knowledge about COVID-19.

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

The defendants use non-contact, infrared thermometers at the entrances of both the CDF and the CTF. According to the manufacturer's instructions the device is calibrated at the factory and calibration by a user is not necessary. One *amicus* recorded eight temperature readings at the two facilities, five at the CDF and three at the CTF and observed that two of the readings, both on the same night at the CDF, appeared to be inaccurate.<sup>26</sup> In both cases, the temperature reading was taken immediately adjacent to an external door and the ambient temperature outside the facility was substantially colder than the temperature inside the facility.

<sup>26</sup> In both instances the temperature registered in the low 90 degrees. After the second apparently incorrect reading, *amicus* requested that another reading be taken approximately 30 seconds later, and the thermometer registered what appeared to be an accurate temperature reading.

The manufacturer's instructions for the thermometer indicate that users should "avoid drafts."<sup>27</sup> It seems probable that user error may be resulting in some false temperature readings by the staff who are screening visitors. Medical staff report that they also use non-touch, infrared thermometers in their medical practice at both facilities. *Amici* have not had an opportunity to determine whether the thermometers used at visitor entry points are the same model of thermometers that are used by the medical staff. However, review of electronic health records also identified a number of questionably low temperature readings.<sup>28</sup>

<sup>27</sup> The instructions also state that "if there is a significant change in the surrounding temperature, allow the thermometer to adjust to the 'new' temperature for at least 15 minutes before use in order to obtain a reliable result."

<sup>28</sup> In reviewing health records, *amici* also noted several instances of unusually low temperatures recorded on flow sheets or on assessments, with some as low as 93 or 94 degrees.

**Recommendation:** *Amici* recommend that defendants conduct additional staff training on the use of the non-touch, infrared thermometers consistent with manufacturer Guidelines and provide guidance to staff regarding what to do when thermometers produce results that appear on their face to be inaccurate.

**Nine: How do the conditions of the quarantine housing compare to conditions in nonquarantine housing, and are residents deterred from reporting symptoms?**

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

\*24 As explained in detail below, except for the isolation units, quarantine housing units are intended to operate like all other types of housing units except for twice daily monitoring of inmates by medical staff and the use of specified PPE.

#### **A. Daily Monitoring and Specified PPE**

While both facilities have different types of specialized housing,<sup>29</sup> three broad categories of housing are implicated by Question Nine:

- Quarantine housing;
- Isolation housing; and
- Non-Quarantine/Non-Isolation housing (*i.e.*, general population or some type of special housing unit)

<sup>29</sup> For example, both the CDF and CTF have special management units and the CDF has mental health and mental health step down units.

The DOC began operating quarantine housing units in March 2020. These units are designated for the following inmates: inmates suspected of having COVID-19 and inmates who are asymptomatic but determined to have been exposed to someone who has tested positive. Health care staff report that when one inmate on a housing unit tests positive, every inmate in the housing is quarantined on the unit. Moreover, staff who have been assigned to the unit are released from duty for a 14-day self-quarantine period. There is a reported practice of maintaining each discrete cohort of quarantined inmates separately. The anecdotal evidence suggests that there may be deviations from this practice; however, *amici* have not had an opportunity to explore this issue. Additionally, *amici* have not had an opportunity to confirm the quarantine procedures that are implemented when DOC staff who are assigned to posts with inmate contact test positive for COVID-19 (*i.e.*, whether inmates are quarantined after exposure to a staff member who is known to have contracted COVID-19).

According to the current DOC policy guidance, quarantine housing units should operate like all other housing units except for the isolation units, in all respects except two: 1) inmates housed in quarantine units have their temperatures monitored by medical staff twice daily; and 2) except for inmates -- who are required to have masks -- anyone entering a quarantine housing unit is required to wear gloves and a mask at all times.<sup>30</sup> During the site visits *amici* conducted at multiple quarantine units in both facilities, for the most part the correctional staff wore a variety of masks

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

that they had purchased for themselves. In some instances, the masks were ill-fitting and in poor condition. As a general matter, the correctional staff were not wearing gloves.

<sup>30</sup> See § VII. Medical Restrictive Housing Unit (Quarantine), Post Order, dated March 28, 2020. DOC policy requires inmates housed in a quarantine unit to wear masks whenever they are outside of their cells. Many inmates housed in the quarantine units that *amici* visited had masks, but they were not consistently wearing them nor were they required by the correctional staff to do so. In some instances, the masks were ill-fitting, visibly soiled, and ripped.

In contrast to the quarantine units, inmates and staff on non-quarantine units did not have masks during the site visits *amici* conducted.<sup>31</sup> The defendants did not have sufficient quantities of masks for staff or inmates during March; however, as explained in the next section of this report, the DOC received a shipment on April 10, 2020, and on the next day began issuing masks to staff at roll call. The defendants report that earlier this week, subsequent to *amici*'s site visits, they began to replace masks for inmates on a daily basis and are now providing masks to all inmates on all housing units. On April 14, 2020, the defendants reported that they are now requiring all staff and all inmates to wear masks. *Amici* have not had an opportunity to confirm these representations.

<sup>31</sup> A small number of inmates who indicated that they had serious medical conditions had masks that were obtained from health care providers.

## B. Conditions in Quarantine and Other Units Except Isolation

### 1. Cell Restriction

\*<sup>25</sup> The defendants implemented a Medical Stay in Place policy directive on April 4, 2020.<sup>32</sup> Pursuant to the directive, as of April 4, 2020, inmates housed in quarantine and other housing units, except for isolation units, have been restricted to their cells except for 30 minutes each day for phone calls, showers and cleaning their cells. The directive provides contradictory information regarding out-of-cell time. In relevant part it states that inmates “will largely be restricted to their cells with the exception of a modified recreation schedule, where groups no larger than five are out at any one time.”<sup>33</sup> However, the directive also requires staff to “[s]top all group activities and minimize the number of residents participating in recreation on tier (no more than 10 at a time).”<sup>34</sup> It also states that inmates are required to “practice social distancing of six feet to the fullest extent possible.”<sup>35</sup> According to facility management, at some point after the policy was

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

issued, it was modified to require one hour of out-of-cell time; however, during site visits many correctional staff and inmates *amici* interviewed were unaware of this change. Indeed, inmates consistently commented that it is not really possible to shower, make one phone call and clean a cell in 30 minutes.

<sup>32</sup> Ex.6, Medical Stay in Place, effective April 4, 2020.

<sup>33</sup> *Id.* at 1.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 1.

During site visits to quarantine and non-quarantine units, *amici* observed the following:

- More than five inmates were consistently out of their cells at one time, and sometimes between 10 and 20 inmates were out of their cells at one time; and
- Social distancing practices were not enforced and there were no attempts by the correctional staff to enforce social distancing even when numerous inmates crowded into a contained area (*e.g.*, to watch television).

The failure to enforce social distancing requirements is a supervision deficit. This appears at least in part to be attributable to significant understaffing of correctional officers and their supervisors at both facilities. According to data obtained from managers at the CDF and CTF, as of April 10, 2020, the CDF had a total staffing complement of 675 correctional staff (493 correctional officers and 182 supervisory staff) and the CTF had a total staffing complement of 283 correctional staff (259 correctional officers and 24 supervisory staff). In response to inquiries from *amici*, the DOC Human Resources Unit was unable to provide a breakdown of current correctional officer and supervisory staffing levels at the CDF and the CTF, including, for each facility, the number of funded positions that are vacant and the number of staff assigned to the complement who are unavailable for duty for quarantine or some other COVID-19 related status.<sup>36</sup> However, management staff in the DOC Human Resources Unit were able to provide aggregate data regarding the agency's total correctional workforce that provides insight into current staffing level at both facilities. According to these data, the DOC has a current workforce of 994 funded correctional positions, 45 of which are vacant. Of the remaining 949 positions, 281 correctional staff were unavailable for duty as of April 16, 2020. Thus, approximately one third of the total funded correctional work force is unavailable to work.<sup>37</sup>



Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

36 Many categories of leave render staff unavailable for duty, including workers compensation, administrative leave, AWOL status, military leave, leave without pay, and family and medical leave.

37 In addition to the CDF and CTF, the data the defendants provided indicate that the total workforce includes correctional staff assigned to a transportation unit and to the Central Cell Block.

According to DOC managers, the reduction in the size of the workforce that is available for duty has fueled excessive reliance on overtime in order to cover a minimum number of essential posts at both facilities. In response, both facilities converted recently from staffing three eight-hour shifts per day to two, 12-hour shifts per day during weekdays. During this period when the workforce is already stretched thin, there is also an enhanced need for active, direct supervision of inmates to enforce social distancing to mitigate the risk of transmission of the highly infectious novel coronavirus. With fewer available correctional staff and supervisors available to fill essential posts, the DOC has less flexibility to adopt strategies involving increased staff levels to achieve social distancing policies on housing units.

\*26 Telephone calls in settings that allow for confidentiality are arranged at both the CDF and CTF by DOC case management staff. DOC staff report that most of the case managers assigned to provide services for inmates at both facilities are either on quarantine status or working remotely. Thus, as a general matter, there has been no access to confidential legal calls for inmates confined on quarantine and non-quarantine housing units. There is some evidence that the defendants recently began to allow scheduled legal calls using the telephones in the housing unit day rooms. These telephones are used by inmates to make monitored telephone calls. *Amici* have not had an opportunity to determine whether the scheduled legal calls are monitored; however, even if they are not monitored, the telephones in the housing unit day rooms do not afford the confidentiality required to communicate with counsel.

## 2. Conditions in Isolation Relative to Other Units

Inmates housed in isolation units at both the CDF and CTF are restricted to their cells. Inmates in isolation at the CTF are not permitted to use the telephone for any reason, including legal calls. During the site visits *amici* conducted, inmates in isolation at the CDF were able to make monitored telephone calls from their cells. *Amici* were recently informed this may no longer be the case; however, we have not had an opportunity to follow up. Medical staff visit inmates in isolation at least twice per day to check temperatures, vital signs, and conduct assessments if indicated.

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

The first cohort of inmates who were isolated for COVID-19 were housed in a special management unit at the CTF. Several inmates in this cohort report that they were handcuffed when escorted to and from the showers. Showers are no longer afforded to inmates in the isolation housing units. To the extent they can bathe, inmates on isolation status must use the sinks in their cells to do so. The supply of towels does not appear adequate. In lieu of showers, the defendants planned to provide inmates on isolation status with body wipes, which were not available until April 14, 2020.

The evidence indicates that inmates have spent up to and even over two weeks on isolation status. Analysis of housing assignment data associated with the first 15 inmates who tested positive for COVID-19 shows that the inmates in this sample were housed on isolation status for a minimum of five days. Three inmates in the sample had already spent 12, 14, and 15 days, respectively, in isolation status and remained in isolation as of the date of this analysis.

Laundry services for inmates in isolation has been limited. Many inmates reported wearing the same clothes throughout their stays in the isolation units, and in fact most of the inmates *amici* met wore visibly soiled clothing and reported substantial delays in receiving fresh linens. Most of the inmates *amici* interviewed in the isolation units stated the conditions are far too punitive, noting that if they had it to do over again, they would not have reported their symptoms. Deprivation of showers, the absence of any ability to contact family members, the lack of access to legal calls, clean clothing and clean linens are plainly a disincentive and are likely to deter inmates from reporting symptoms of COVID-19.

**Recommendation:** *Amid* recommend that the defendants take immediate steps to provide consistent and reliable access to legal calls, personal telephone calls, daily showers, and clean clothing and clean linens to all inmates on isolation status. The defendants should ensure appropriate and consistent implementation of social distancing policies by addressing limitations in current staffing levels, supervisory oversight of line staff, and provide enhanced education related to the importance of social distancing.

## **B. ENVIRONMENTAL HEALTH & HYGIENE**

**Question One: What are the quantities of personal protective equipment and cleaning products in the DOC stockpile?**

**\*27** As of April 17, 2020, the DOC reported to *amid* the following inventory of PPE:

Personal Protective Equipment:



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- Surgical Mask: 71,680
- N95 Respirators: 12,774
- Face Shields: 190
- Goggles: 200
- Gowns: 2,400
- Gloves: Total Not Available<sup>38</sup>
- Small PPE Kits: 400

<sup>38</sup> DOC representatives provided data indicating that between March 28, 2020 and April 15, 2020, 39,237 pairs of gloves were used.

According to the DOC estimates, based on current usage rates, as of April 17, 2020, the defendants had approximately a 32-day supply of masks on hand. The DOC Compliance Officer informed *amid* that the processing of additional procurement orders was underway.

As of April 13, 2020, the DOC reported to *amid* that the following inventory of cleaning products was stored on site.

Cleaning Products:

- Ecolab Disinfectant: 144, 2.5-gallon cases;<sup>39</sup>
- Ecolab Peroxide Multi Surface Cleaner/Disinfectant: 32, 2-gallon cases;
- Ecolab Multi-Quat Sanitizer: 139, 2.5-gallon cases;<sup>40</sup>
- Ecolab Orange Force: 129, 2.5-gallon cases; and
- Ecolab Glass Cleaner: 30, 2.5-gallon cases.

<sup>39</sup> This product is dilutable to make larger volumes of solution.

<sup>40</sup> This product is dilutable to make larger volumes of solution.

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

**Question Two: Are residents provided with a weekly bar of soap?**

Many inmates *amici* interviewed reported that they purchase soap through the commissary. Most explained they had access to soap through the housing unit officers and everyone interviewed at their cells was able to show *amid* their bars of soap. There were limited supplies of soap available for distribution in a number of the housing units. Inmates housed in special management units are provided with small packets of liquid soap; they are not provided with bars of soap.

**Question Three: Do staff who interact with visitors and residents have access to, and wear, sufficient personal protective equipment?**

Staff who interact with visitors have access to and wear sufficient PPE. *Amici* observed screening staff posted at the entrances of both the CDF and the CTF wearing PPE consistent with CDC Guidelines.<sup>41</sup> Additionally, staff assigned to units housing inmates who are COVID-19 positive wore PPE consistent with CDC Guidelines, including N95 respirators, eye protection, gloves, and a gown. None of the correctional staff interviewed who were wearing N95 respirators reported that they had been fitted for them as required by the Occupational Health and Safety Administration.

<sup>41</sup> CDC Guidelines recommend that staff performing temperature checks on any group of people wear a mask, eye protection, gloves, and a gown or coveralls. *See* Ex. 7, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, March 23, 2020 at 25.

The defendants issued post orders for quarantine and isolation housing units on March 28, 2020 that included minimum PPE requirements.<sup>42</sup> Nevertheless, as of April 10, 2020, the day of the first unannounced site visit, *amici* observed that the post orders were not being adhered to and there was no clear, common understanding among the staff *amici* interviewed regarding what PPE they should wear. Most staff expressed considerable anxiety about not having access to appropriate PPE. Some staff were observed wearing masks that they purchased and brought to the facility themselves, few staff wore gloves, and other staff wore no PPE at all. Multiple staff stated that prior to April 10, 2020, PPE was not widely distributed to correctional officers.

<sup>42</sup> *See supra* note 30 regarding the March 28, 2020 DOC policy applicable to quarantine housing units. On the same day the defendants issued a post order for isolation housing units. The PPE requirements in the post order related to the isolation units includes only a mask and gloves, less than the PPE recommended in the CDC Guidelines. As previously noted, however, in practice, in contrast to the observations *amici* made in the quarantine

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

units, *amici* observed correctional officers on the isolation units wearing PPE consistent with CDC Guidelines.

**\*28** *Amici* were informed that beginning on April 10, 2020, masks and gloves were being distributed to correctional officers at the start of each shift. Over the course of the three days of site visits, *amici* observed that PPE was more consistently worn by staff throughout the facilities and staff stated that there was an abrupt increase in the PPE that was distributed to correctional officers. As noted above, the defendants reported that earlier this week, subsequent to *amici*'s site visits, they began to replace masks for inmates on a daily basis and are now providing masks to all inmates on all housing units. On April 14, 2020, the defendants reported that they are now requiring all staff and all inmates to wear masks at all times. *Amici* have not had an opportunity to confirm these representations.

**Recommendation:** *Amici* recommend that the defendants communicate clear expectations, in writing, to correctional staff about the types of PPE required to perform the various supervision and operational functions that are conducted throughout the facility, including the PPE they should expect to be given on each shift for each specific category of post assignment; the proper donning, doffing and disposal of the PPE; and an explanation of the related rationale. Clear communication to staff regarding differences in risk exposures and providing consistent PPE over time could help lower anxiety levels among staff.

In addition, the defendants should also ensure that all PPE issued is properly fitted. For example, N95 respirators must be properly fitted to ensure that they provide the intended protection. As noted above, during the site visits that *amici* conducted, none of the correctional staff who were wearing N95 respirators in isolation units reported that they had been fitted for the respirators.

Finally, defendants must ensure that all DOC staff receive instruction on the proper disposal of PPE, and appropriate and accessible receptacles for immediate disposal must be readily available. During the site visits, *amici* observed that receptacles for disposal of PPE were not accessible on a consistent basis, including to staff assigned to isolation units at the CTF.

**Question Four: Are staff and prisoner-workers given masks and gloves, particularly in food service, and are they instructed to wear that equipment?**

*Amici* toured the Culinary Unit at the CDF on April 11, 2020. At that time, all correctional staff and contractors were wearing masks, hairnets, and gloves. There were no inmate workers in the Culinary Unit during the site visit. They had been replaced by correctional officers. *Amici* learned that the inmate work detail in the Culinary Unit was suspended because an inmate housed at the CDF, who had been assigned to the detail for at least several months, tested positive for COVID-19

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

on April 10, 2020. *Amici* have not had an opportunity to confirm the instructions regarding the use of masks and gloves that DOC staff, contractors, and inmates working in the Culinary Unit receive; however, during the site visit *amici* observed the consistent use of masks, gloves, and hairnets by the numerous contractors and DOC staff who were working in the food service area.

An interview conducted by *amici* with a supervisor for the food service contractor, (who reported working in the CDF Culinary Unit since the latter part of 2019), revealed that the contract staff assigned to the CDF did not know why the inmate detail workers were no longer working and had been replaced by correctional officers. In light of the fact that it appeared the detail inmate who tested positive prepared and served food along with the contractor's staff for at least several months, *amici* sought to ascertain whether the DOC made any attempt to determine whether the contract staff who worked alongside the detail inmate who tested positive were "close contacts" as defined by the applicable CDC Guidelines.<sup>43</sup> According to the Guidelines, "an individual is considered a close contact of a COVID-19 case if they a) have been within approximately 6 feet of a COVID-19 case for a prolonged period of time or b) have had direct contact with infectious secretions from a COVID-19 case (e.g., have been coughed on)."<sup>44</sup> The Guidelines further provide that all staff who were a close contact of the inmate, whether employed by DOC or by the contractor,<sup>45</sup> should have been placed on self-quarantine status. Specifically, the Guidelines provide that if a staff member or contractor is identified as a close contact of a COVID-19 case (whether in the facility or in the community) that staff member should self-quarantine at home for 14 days and may return to work if symptoms do not develop after the 14-day period.<sup>46</sup> It appears that these Guidelines have not been implemented with respect to any contractors who were in close contact with the detail inmate who tested positive for COVID-19.

<sup>43</sup> See Ex. 7 at 3.

<sup>44</sup> *Id.*

<sup>45</sup> The CDC Guidelines define staff as "all public sector employees as well as those working for a private contractor within a correctional facility (e.g. private healthcare or food service). Except where noted, "staff" does not distinguish between healthcare, custody, and other types of staff including private facility operators." *Id.* at 4.

<sup>46</sup> *Id.* at 12.

**\*29** According to the DOC administrator and staff responsible for the food service contract, on the morning of April 11, 2020, the DOC food contractor was informed that a detail inmate had tested positive and that the contractor's workers should self-quarantine if they did not feel well.

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

It appears that no effort was made to determine whether any of the contract food service workers were a “close contact” of the detail inmate who tested positive. Indeed, *amici* contacted the DOC Medical Director, the Unity Medical Director, the Unity Infection Control Specialist, the DOC Deputy Director responsible for the food service contract, the DOC General Counsel, and lead counsel for the defendants in this litigation to inquire about this matter. Based on the responses they provided to *amici*’s inquiries, it appears that any contact tracing that may have been conducted did not include consideration of whether the food service contractors who worked alongside the detail inmate who tested positive might be deemed a close contact who *should* have been quarantined for 14 days. *Amici*’s understanding is that the detail inmate who tested positive was not contacted about any individuals with whom he had close contact. Moreover, it does not appear that any effort was made to contact public health experts at the D.C. Department of Health to receive guidance about this matter. In light of the implications attendant to having a close contact continue to work in the CDF Culinary Unit, promptly after learning about this matter *amici* alerted counsel for both parties about their concerns.

*Amici*’s inquiries regarding the contact tracing conducted in the wake of the detail inmate’s positive COVID-19 test results revealed that at least in this instance the defendants employed a fractured contact tracing effort that was not centralized nor informed by public health experts.<sup>47</sup>

<sup>47</sup> The DOC Medical Director informed *amici* that she had seen email correspondence regarding the issue but had not been involved in advising staff about how to handle this matter. The Medical Director referred *amici* to the DOC Deputy Director for Administration to determine whether contact tracing related to the contractor’s staff had been conducted. The Deputy Director was contacted and informed *amici* that the contractor was notified that the contractor’s workers should self-quarantine if they did not feel well. There was no recognition of the fact that food service contract workers may have potentially been close contacts of the detail inmate who tested positive and should have been quarantined regardless of how they felt. Moreover, in response to *amici*’s inquiries, the manager of Unity’s infection control program at the CDF advised *amici* that Unity’s involvement was limited to determining the identity of the inmates and health care providers who may have had contact with the detail inmate while he was in the medical unit.

**Recommendation:** If they have not done so in the wake of *amici*’s inquiries, the defendants should seek immediate guidance from public health professionals about identification of the detail inmate’s close contacts. Moreover, it is important to recognize that the defendants are working in an extremely challenging environment that requires a well-coordinated response to the range of infection control issues that are presented throughout the course of each daily shift. Any individuals

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

who are tasked with conducting contact tracing after a confirmed positive COVID-19 test should have appropriate training and be closely supervised.

**Question Five: Do residents have access to cleaning supplies in sufficient quantity and concentration, including rags, to clean their cells?**

*Amici* reviewed records of cleaning supply deliveries to the CDF and CTF to assess whether supplies were made available to the facilities. Department of Corrections records indicate that there have been regular deliveries of cleaning supplies to both facilities since December 31, 2019, the start of the dataset reviewed.<sup>48</sup> Delivery records reflect that historically three types of cleaning and sanitizing agents were made available to clean housing units and that in mid-March 2020 a fourth, peroxide-based multi-surface cleaner was also made available.<sup>49</sup>

<sup>48</sup> Ex. 8, Table, Dates and Quantities of Cleaning Supplies and Soap Delivered to the CDF and CTF, by Date, December 31, 2019 – April 13, 2020.

<sup>49</sup> The manufacturer’s product description states that it is “effective against emerging viral pathogens after the CDC has declared an outbreak.”

Observations and interviews with inmates and staff indicated that inmate access to sufficient cleaning supplies on housing units varied from unit to unit. For example, on one unit, all of the cleaning supplies had been depleted.<sup>50</sup> Furthermore, on several units that had a supply of cleaning agents, inmates reported that they were unable to access them to clean their own cells. *Amici* did not observe any inmates with facility-issued rags that could be used to clean their cells. Most inmates who were interviewed reported that they made rags by tearing facility-issued towels or t-shirts, a phenomenon *amici* observed. For the most part, these make-shift rags were tattered and soiled. *Amici* observed that paper towels were available for inmates to use for cleaning on a small number of housing units, but this was not common and on one of the units, the inventory of paper towels was extremely low.

<sup>50</sup> Ex. 9, Photograph of empty cleaning supply containers, Correctional Treatment Facility, Building D, April 12, 2020.

**\*30** *Amici* could not assess whether the concentrations of disinfecting and sanitizing solutions were mixed in the appropriate concentrations necessary to achieve their intended effects. It was evident that knowledge regarding the appropriate use of the different cleaning and sanitizing agents was generally at a very low level.



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

Access to cleaning and sanitizing solutions is necessary, but not sufficient. Knowledge of proper mixing and appropriate application of cleaning and sanitizing solutions is also necessary. For example, at least two of the products that the DOC distributes – a concentrated surface cleaner and a concentrated sanitizing solution – have prescribed dilution ranges (*i.e.*, must contain a minimum concentration of the chemical agent, which has implications for how much water can be added to the concentrate before the agent is no longer effective). One of these products also has specific prescriptions regarding how long the product must remain on a surface for it to reduce pathogens to indicated levels.

The DOC assigns correctional officers to “environmental posts” and these officers are responsible for cleaning and sanitizing assigned zones of the facilities. One environmental officer informed *amici* that he had never received formal training, but rather reviewed his responsibilities with his supervisor and acknowledged that it had “been a while” since that discussion occurred. The same officer noted that he had begun to mix his own bleach solution to sanitize the areas of the facility he was responsible for and relied on his own judgement regarding the appropriate concentration of bleach solution.

**Recommendation:** There is a critical need for the defendants to strengthen the environmental health and safety program at both the CDF and the CTF. *Amici* recommend that the DOC immediately retain a registered sanitarian to oversee the environmental health and safety programs at both facilities and provide training so that cleaning tools and products are used properly. A registered sanitarian should bring the appropriate knowledge, oversight, and quality control necessary to mitigate at least some of the critical public health concerns that are evident in both facilities.

**Question Six: Do housing units, and particularly common spaces such as bathrooms and showers, appear to be sufficiently cleaned?**

Cleaning the common spaces in housing units is the responsibility of designated inmate “detail workers” at the CDF and CTF, who are supervised by correctional officers. As indicated in the response to Question Five, several different cleaning, disinfecting, and sanitizing solutions are available on the housing unit of both facilities. Nevertheless, the cleanliness of common spaces was inconsistent from one housing unit to the next. With cleaning responsibilities delegated to the inmate level, there is little quality control. Some housing units appeared relatively clean and tidy, others were not. This was especially the case in some of the housing units at the CDF that appeared to have significant inmate management and supervision challenges.<sup>51</sup> In addition to the limitations in the cleanliness of some housing units, some cell block corridors had trash on the

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

floor. Moreover, Building D at the CTF includes showers with tiles and in some of those showers there was visible mold growth.<sup>52</sup>

<sup>51</sup> In at least two housing units at the CDF, *amici* observed food and other refuse scattered on the cellblock floors, including on the floors under stairwells.

<sup>52</sup> Ex. 10, Photograph of a Shower in the Correctional Treatment Facility, Building D, April 12, 2020.

**\*31 Recommendation:** In addition to engaging a sanitarian, supervisory correctional staff must ensure that housing unit staff properly manage the work performed by the inmate detail workers. In order to accomplish that goal, correctional staff and detail workers require guidance from a sanitarian trained to oversee the facility's environmental health program.

**Question Seven: Do professional cleaning crews clean hallways and common areas (not in housing units)? Do inmate details clean the housing units? common spaces?**

A professional cleaning contractor was engaged to clean certain common areas on the non-secure side of both facilities on a daily basis in late March 2020. However, there was an apparent misunderstanding about the scope of the contractor's services and none of the floors in the common areas on the administrative side of both facilities were cleaned, including bathroom floors and floors in the Officer's Dining Room. The DOC Deputy responsible for the administration of the contract informed *amici* earlier this week that this limitation is being corrected.

Inmate detail workers clean the common areas in the housing units. They have not been adequately trained and are not appropriately supervised. The detail workers have inconsistent knowledge about the products they use and do not have adequate equipment. For example, they reuse mops and make-shift rags that do not appear to have been appropriately sanitized between uses. As part of the DOC response to COVID-19, detail workers are required to clean all surfaces in the common areas of the housing units at two-hour intervals. This appears to occur on a consistent basis; however, the efficacy of these efforts is undermined by inadequate training, limitations in supervision, the absence of any quality controls, and the apparent limitations in the equipment and possibly in the cleaning and disinfecting agents that they are using.<sup>53</sup>

<sup>53</sup> On some housing units the detail workers expressed concerns that the cleaning agents they were using had been inappropriately diluted; on others, inmates complained about fumes associated with the apparent strength of the cleaning products the detail inmates were using.



Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

**Recommendation:** In addition to engaging a sanitarian, the defendants should consider contracting for professional cleaning services on the secure side of the facility at least until a sanitarian is hired to bolster the existing environmental health and safety program at both facilities. Additionally, proper cleaning supplies that have been sanitized regularly should be immediately provided to each unit, and a schedule for cleaning common areas and cells should be established and enforced.

**Question Eight: Is hand sanitizer provided, or available to, to residents?**

There is no evidence that hand sanitizer is provided to the inmates at either the CDF or the CTF.

**Question Nine: Is social distancing possible in common areas in units and in the recreation spaces, and what is the approximate size of common areas?**

*Amici* did not have the opportunity to measure the common areas at the CDF and CTF. However, given the configuration of the physical plant in the housing units, social distancing is possible if inmate out-of-cell time is limited to small groups of inmates at one time. However, as noted elsewhere in this report, the defendants are not enforcing social distancing requirements. Enforcing social distancing requires consistent, direct observation by staff. Ensuring that correctional officers carry these functions out requires active supervision by mid-level managers, who must provide both oversight to correctional officers and support (*i.e.*, by ensuring officers get appropriate relief for breaks over the course of their 12-hour shifts). *Amici* observed numerous instances in which correctional officers assigned to housing units left their posts without relief, leaving housing units short staffed. It appears that the DOC does not have sufficient line and supervisory staff available to appropriately enforce social distancing policies.

**\*32 Recommendation:** The defendants should reduce the extent to which common spaces encourage inmates to congregate in close quarters (*e.g.*, around a single television in a small enclosed area, or next to one another in order to use telephones that are mounted closer than six feet apart). The effectiveness of this strategy would increase if the defendants were to consistently apply their stated policy of allowing no more than small groups of inmates out of their cells at any given time. Whatever strategies the defendants adopt, increased active and direct supervision will be required by both housing unit correctional officers and the midlevel managers responsible for overseeing and supporting the correctional officers assigned to housing units. Enforcing social distancing standards as a public health measure is a new responsibility for correctional staff and they must be supported as they adjust to this new role. Moreover, the defendants should assess whether any additional security staff are needed to provide appropriate supervision, on a unit-by-

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

unit basis, taking into consideration the layout of the housing units, the number of inmates housed on the units, and the security designation of the unit, in order to enforce social distancing policies.

**Question Ten: Approximately how many residents share a cell, and what is the approximate size of the cell?**

*Amici* analyzed individual-level inmate housing data for the period between March 15, 2020 and April 13, 2020. At the CDF, as of April 13, 2020, 586 inmates, 56 percent of the population, shared a cell.<sup>54</sup> At the CTF, as of April 13, 2020, 22 inmates, five percent of the population, shared a cell.<sup>55</sup>

<sup>54</sup> See Ex. 1, *supra* note 4.

<sup>55</sup> See Ex. 2, *supra* note 9.

A representative-sized cell was measured at each of the two facilities. The selected cell at the CDF measured 85.6 square feet and the selected cell at the CTF measured 72.4 square feet.

**Question Eleven: Do all residents have access to sinks, soap, and toilets in their cells?**

As noted above, at the CDF, all cells include sinks and toilets. At the CTF, the housing units in the portion of the facility known as Building D contain cells without sinks and toilets. Inmates assigned to housing units in Building D share common sinks and toilets. On each housing unit there are two, double-tiered corridors of cells. Each tier of each corridor is comprised of eight cells. Inmates housed in the eight cells share two sinks, two toilets, and a shower. The cell doors in Building D, by design, do not lock in order for inmates housed in the cells to access the sink and toilet without the intervention of a correctional officer. *Amici* identified multiple sinks and toilets in housing units in Building D that were not functional or out of service at the time of the site visit.

Representatives of the DOC stated that every inmate receives a facility-issued bar of soap each week. Every inmate that *amici* spoke with indicated that they possessed at least one bar of soap. Some inmates verified that soap was distributed to them weekly; however, others stated that they had purchased their soap from the commissary and that soap was not distributed weekly. There were multiple reports that inmates sometimes use their bars of soap to clean their clothes in the shower and under those circumstances a single bar of soap does not last an entire week.

**V. Conclusion**

Communicable disease outbreaks in locked facilities such as jails and prisons where individuals live in close proximity can spread rapidly through a population if not addressed quickly with

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

appropriate prevention, detection, and management systems. The current novel coronavirus pandemic, which is already present within both the CDF and the CTF, poses a serious risk to the health and safety of inmates and staff alike.

This report describes certain efforts undertaken by the DOC to respond to the current public health emergency. DOC staff and Unity's contract providers should be commended for performing essential public health and safety functions while knowingly exposing themselves to significant health risks on a daily basis.

In light of the limitations identified in this report, substantial effort must be undertaken to ensure that the DOC manages its response to COVID-19 in a manner that ensures conformity with CDC Guidelines. This will require active on-site support at both facilities from public health professionals. For example, contact tracing must be strengthened, staff and inmate education on relevant public health considerations must be intensified, and business processes must be refined to ensure inmates and staff presenting with symptoms potentially consistent with COVID-19 are quickly identified, tested and isolated. Moreover, on an expedited basis, the defendants must provide inmates in isolation who have tested positive for COVID-19 with access to showers, clean clothing, clean laundry, personal telephone calls and legal calls.

**\*33** *Amici's* investigation reveals that there is an equally urgent need for the DOC to substantially bolster the agency's environmental health program in the immediate and longer term. A professional sanitarian with appropriate health and safety credentials should be charged with organizing and managing the DOC's environmental health program to ensure, among other matters, appropriate cleaning and sanitizing practices are implemented, regular facility inspections are conducted, and corrective actions are undertaken to resolve systemic risks. In the immediate term, the defendants should ensure that they have a sufficient number of both line level and supervisory staff throughout both facilities to promote appropriate supervision and enforce the altered operational policies adopted to address the contagion during this public health crisis.

As *amici* were in the process of finalizing this report, defendants provided counsel for plaintiffs and amici with a copy of an April 27, 2020 memorandum from the DOC Director, Quincy Booth, to all DOC employees and contractors.<sup>56</sup> The memorandum addresses COVID-19 policies and procedures, including updated policies and procedures that appear to be intended to respond to the matters addressed during the April 15, 2020 teleconference. In light of the current filing deadline, *amici* have not had an opportunity to consider the content of the memorandum, but have included it in the appendix to this report so that the Court can be promptly apprised of the most current information that the defendants have provided.

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

56 Ex. 11, Memorandum from Quincy L. Booth, Director, to All DOC Employees and Contractors, April 17, 2020, Reminders and Updated COVID-19 Policies and Procedures.

*Amici* recognize the substantial challenges that confront both parties and are available to answer any questions the Court or the parties have about the matters addressed in this summary report.

Respectfully submitted,  
/s/ Grace M. Lopes

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Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

Washington, D.C.

# INDEX TO EXHIBITS

- Exhibit 1 Table, Number of Cells Housing One Inmate and Two Inmates at the Central Detention Facility, March 15 – April 13, 2020
- Exhibit 2 Table, Number of Cells Housing One or Two Inmates at the Correctional Treatment Facility, March 15, 2020 – April 13, 2020
- Exhibit 3 Chart, Urgent Care Visits at Central Detention Facility and Correctional Treatment Facility by Day, February 15, 2020 – April 15, 2020
- Exhibit 4 Chart, Sick Call Requests and Encounters By Day, February 15, 2020 – April 12, 2020
- Exhibit 5 Chart, Urgent Care Medical Encounters with Clinical Summary Descriptions Including Word COVID by Day, February 15, 2020 – April 15, 2020
- Exhibit 6 Medical Stay in Place Policy Directive, April 4, 2020
- Exhibit 7 CDC Interim Guidelines on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, March 23, 2020
- Exhibit 8 Table, Dates and Quantities of Cleaning Supplies and Soap Delivered to the CDF and CTF, By Date, December 31, 2019 – April 13, 2020
- Exhibit 9 Photograph of empty cleaning supply containers, Correctional Treatment Facility, Building D, April 12, 2020
- Exhibit 10 Photograph of Shower, Correctional Treatment Facility, Building D, April 12, 2020
- Exhibit 11 Memorandum from Quincy L. Booth, Director to All DOC Employees and Contractors, April 17, 2020, Reminders and Updated COVID-19 Policies and Procedures

## Ex. 1

| Number of Cells Housing One Inmate and Two Inmates at the Central Detention Facility<br>March 15 – April 13, 2020<br>Based on Department of Corrections Data |           |           |           |           |           |           |           |           |           |           |           |           |           |           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
|                                                                                                                                                              | 3/15/2020 | 3/16/2020 | 3/17/2020 | 3/18/2020 | 3/19/2020 | 3/20/2020 | 3/21/2020 | 3/22/2020 | 3/23/2020 | 3/24/2020 | 3/25/2020 | 3/26/2020 | 3/27/2020 | 3/28/2020 |
| Cells Housing One Inmate                                                                                                                                     | 482       | 487       | 448       | 440       | 457       | 507       | 517       | 532       | 545       | 575       | 583       | 623       | 624       | 627       |
| Cells Housing Two Inmates                                                                                                                                    | 117       | 116       | 113       | 118       | 108       | 107       | 104       | 105       | 104       | 103       | 102       | 101       | 101       | 101       |
| Total Population                                                                                                                                             | 600       | 603       | 561       | 558       | 565       | 614       | 621       | 637       | 649       | 678       | 685       | 724       | 725       | 728       |
| Percentage Inmate Single Cells                                                                                                                               | 80%       | 81%       | 79%       | 81%       | 81%       | 83%       | 83%       | 83%       | 84%       | 85%       | 85%       | 86%       | 86%       | 86%       |
| Percentage Inmate Double Cells                                                                                                                               | 20%       | 19%       | 21%       | 19%       | 19%       | 17%       | 17%       | 17%       | 16%       | 15%       | 15%       | 14%       | 14%       | 14%       |

|                                | 4/1/2020 | 4/2/2020 | 4/3/2020 | 4/4/2020 | 4/5/2020 | 4/6/2020 | 4/7/2020 | 4/8/2020 | 4/9/2020 | 4/10/2020 | 4/11/2020 | 4/12/2020 | 4/13/2020 |
|--------------------------------|----------|----------|----------|----------|----------|----------|----------|----------|----------|-----------|-----------|-----------|-----------|
| Cells Housing One Inmate       | 479      | 479      | 481      | 482      | 479      | 479      | 479      | 479      | 479      | 479       | 479       | 479       | 479       |
| Cells Housing Two Inmates      | 120      | 117      | 116      | 117      | 116      | 116      | 116      | 116      | 116      | 116       | 116       | 116       | 116       |
| Total Population               | 600      | 596      | 597      | 599      | 595      | 595      | 595      | 595      | 595      | 595       | 595       | 595       | 595       |
| Percentage Inmate Single Cells | 80%      | 80%      | 80%      | 80%      | 80%      | 80%      | 80%      | 80%      | 80%      | 80%       | 80%       | 80%       | 80%       |
| Percentage Inmate Double Cells | 20%      | 20%      | 20%      | 20%      | 20%      | 20%      | 20%      | 20%      | 20%      | 20%       | 20%       | 20%       | 20%       |

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

Ex. 2

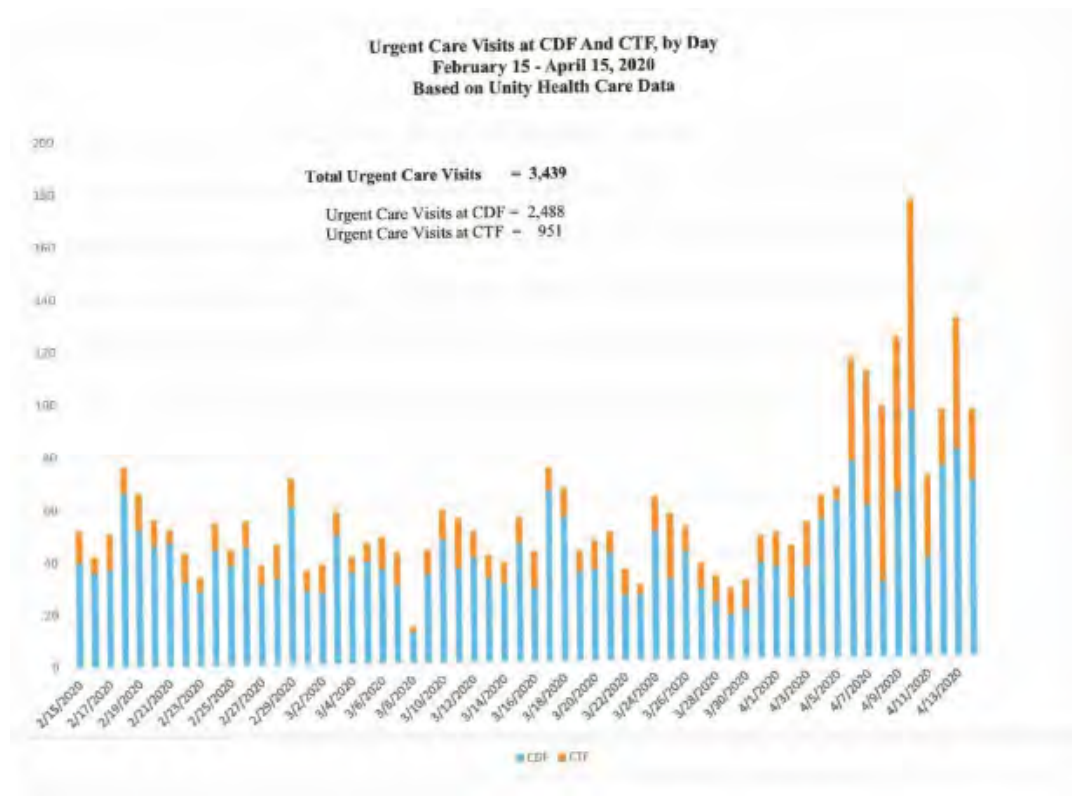
Number of Calls Handling One Incident and Two Incidents at the Correctional Treatment Facility  
 March 12 - April 15, 2020  
 Based on Department of Corrections Data

|                                   | 3/12/2020 | 3/16/2020 | 3/17/2020 | 3/19/2020 | 3/19/2020 | 3/19/2020 | 3/21/2020 | 3/22/2020 | 3/23/2020 | 3/24/2020 | 3/25/2020 | 3/26/2020 | 3/27/2020 | 3/28/2020 | 3/29/2020 | 3/31/2020 |
|-----------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Calls Handling One Incident       | 208       | 146       | 161       | 181       | 169       | 164       | 165       | 150       | 149       | 172       | 172       | 152       | 148       | 146       | 144       | 142       |
| Calls Handling Two Incidents      | 12        | 11        | 14        | 25        | 21        | 12        | 66        | 88        | 87        | 72        | 72        | 78        | 71        | 72        | 68        | 68        |
| Total Population                  | 373       | 167       | 167       | 141       | 159       | 128       | 525       | 527       | 511       | 116       | 116       | 118       | 107       | 107       | 102       | 107       |
| Percentage Incident Single-Called | 69%       | 75%       | 77%       | 12%       | 75%       | 72%       | 74%       | 74%       | 74%       | 72%       | 72%       | 69%       | 71%       | 71%       | 71%       | 71%       |
| Percentage Incident Double-Called | 31%       | 25%       | 23%       | 88%       | 25%       | 27%       | 26%       | 26%       | 26%       | 28%       | 28%       | 31%       | 29%       | 29%       | 29%       | 29%       |

|                                   | 4/1/2020 | 4/2/2020 | 4/3/2020 | 4/6/2020 | 4/7/2020 | 4/8/2020 | 4/9/2020 | 4/10/2020 | 4/11/2020 | 4/12/2020 | 4/13/2020 | 4/14/2020 |
|-----------------------------------|----------|----------|----------|----------|----------|----------|----------|-----------|-----------|-----------|-----------|-----------|
| Calls Handling One Incident       | 144      | 158      | 142      | 130      | 153      | 153      | 191      | 164       | 115       | 101       | 171       | 178       |
| Calls Handling Two Incidents      | 22       | 16       | 18       | 17       | 48       | 41       | 54       | 52        | 47        | 37        | 12        | 11        |
| Total Population                  | 173      | 174      | 160      | 147      | 201      | 194      | 245      | 216       | 162       | 138       | 183       | 189       |
| Percentage Incident Single-Called | 74%      | 75%      | 76%      | 78%      | 76%      | 79%      | 74%      | 74%       | 77%       | 73%       | 87%       | 89%       |
| Percentage Incident Double-Called | 26%      | 25%      | 24%      | 22%      | 24%      | 21%      | 26%      | 26%       | 23%       | 27%       | 13%       | 11%       |

Ex. 3

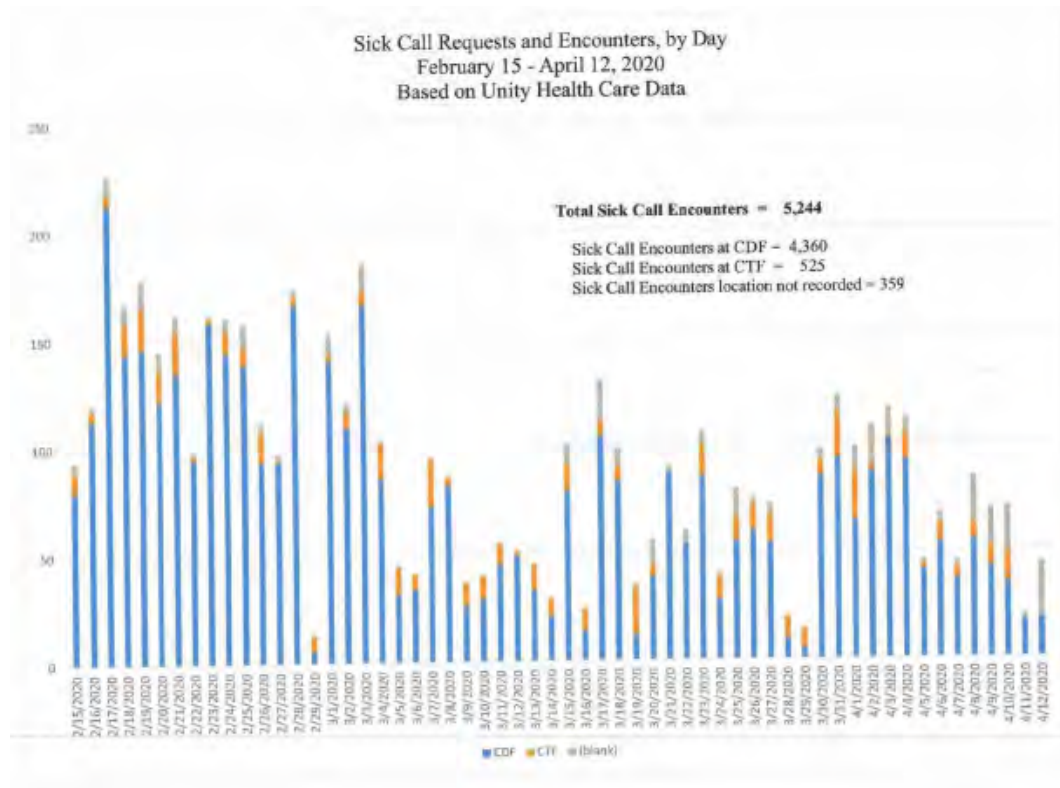


Ex. 4



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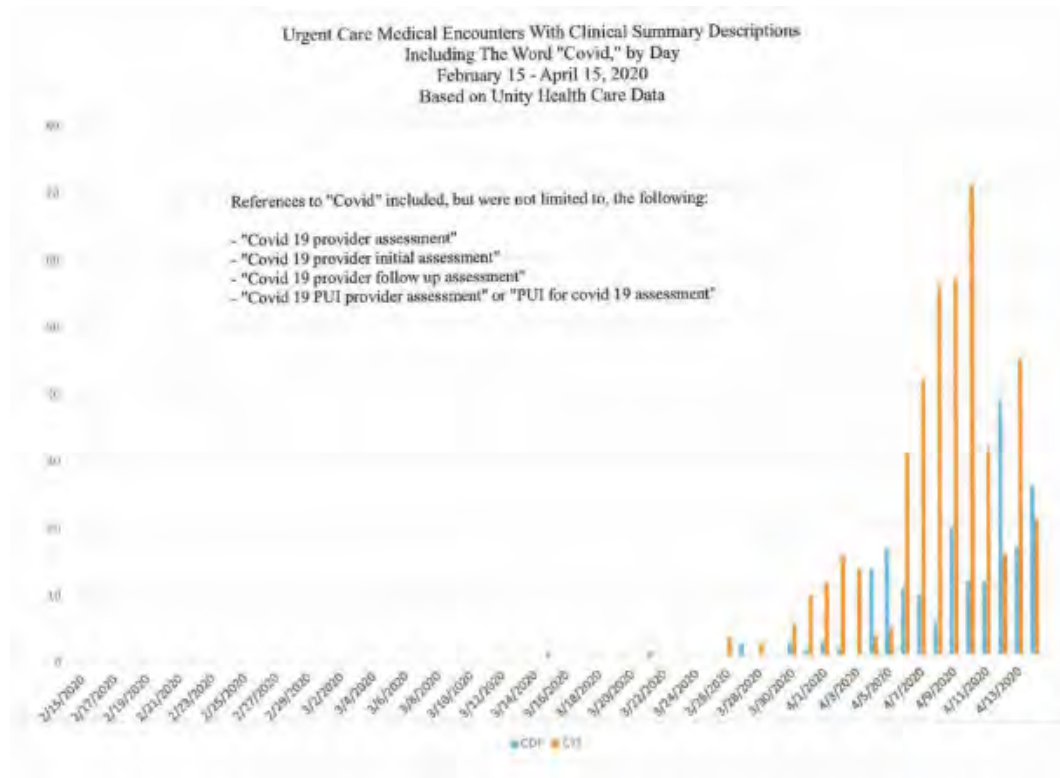
2020 WL 1914896



**Ex. 5**

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2020 WL 1914896



**Ex. 6**



Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

Johnson, Leonard (DOC)

From: Blackmon, Kenya (DOC)  
 Sent: Friday, April 03, 2020 9:28 PM  
 To: DOC CDF Mailing List; DOC HQ Mailing List  
 Subject: EFFECTIVE SATURDAY, APRIL 4, 2020: Medical Stay-In-Place



Medical Stay-In-Place

Saturday, April 4, 2020 – Your health and safety is extremely important to us. Together, everyone needs to play their part in helping to flatten the curve. To mitigate the possible spread of coronavirus (COVID-19) through DC Department of Corrections (DC DOC) facilities, the Department will implement a medical stay-in-place, effective immediately, which will further limit movement of residents and help “flatten the curve”, as we anticipate the pandemic’s peak in the next several weeks.

During the medical stay in place, the following activities will occur:

- Residents will largely be restricted to their cells with the exception of a modified recreation schedule, where groups no larger than five are out at any one time, and practice social distancing of six feet to the fullest extent possible;
- All non-urgent medical visits will be re-scheduled to minimize movement. To the extent possible, medical care will be provided on the unit;
- Commissary will continue once a week as scheduled;
- Laundry will continue once a week as scheduled;
- Out of cell time of 30 minutes each day for phone calls, showers, and get wise down;
- Parole Commission and Video Court Hearings would continue;
- Medical escorts will continue for matters that cannot be handled on the unit;
- Disciplinary hearings will continue as scheduled;
- Culinary and Environmental details will continue as scheduled;
- Mail services will continue as scheduled.

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- Stop all group activities and minimize the number of residents participating in recreation on site (no more than 10 at a time);
- Cease all movement between facilities unless in an emergency situation;
- Cease all video visitation; and
- Cease all visits with attorneys unless actively in trial for the same reason listed above.

These changes are for the health and safety of our workforce, residents, and contractors.

Please continue to utilize health and safety precautions to help keep our DOC facilities, staff, and residents safe and healthy. Follow the guidance below on how to reduce your risk of infection and slow its spread.

- Thoroughly wash your hands for at least 20 seconds.
- Avoid close contact with people who are sick.
- Avoid touching your eyes, nose, and mouth.
- Sanitize your equipment.
- Follow the safety protocols in place at each of the DOC facilities.
- If you are sick, contact your healthcare provider and request sick leave through your supervisor.

Thank you for your continued commitment to serving our city and our neighbors.

For the latest information on the District Government's response to COVID-19 (Coronavirus), please visit [coronavirusdc.gov](http://coronavirusdc.gov).

**Ex. 7**

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

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

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

The US Centers for Disease Control and Prevention (CDC) will update this guidance as needed and as additional information becomes available. Please check the following CDC website periodically for updated interim guidance: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>.

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

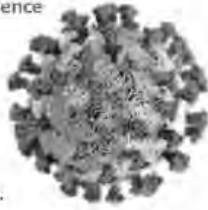
### In this guidance

- Who is the intended audience for this guidance?
- Why is this guidance being issued?
- What topics does this guidance include?
- Definitions of Commonly Used Terms
- Facilities with Limited Onsite Healthcare Services
- COVID-19 Guidance for Correctional Facilities
- Operational Preparedness
- Prevention
- Management
- Infection Control
- Clinical Care of COVID-19 Cases
- Recommended PPE and PPE Training for Staff and Incarcerated/Detained Persons
- Verbal Screening and Temperature Check Protocols for Incarcerated/Detained Persons, Staff, and Visitors

### Who is the intended audience for this guidance?

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

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



[cdc.gov/coronavirus](https://cdc.gov/coronavirus)

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

**Why is this guidance being issued?**

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

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

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

## Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

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

### What topics does this guidance include?

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

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

### Definitions of Commonly Used Terms

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

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

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



## Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

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

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

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

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

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

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

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

### Facilities with Limited Onsite Healthcare Services

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

## Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

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

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

### COVID-19 Guidance for Correctional Facilities

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

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

### Operational Preparedness

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

#### Communication & Coordination

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

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

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

✓ **Review existing pandemic flu, all-hazards, and disaster plans, and revise for COVID-19.**

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

✓ **Coordinate with local law enforcement and court officials.**

- o Identify lawful alternatives to in-person court appearances, such as virtual court, as a social distancing measure to reduce the risk of COVID-19 transmission.
- o Explore strategies to prevent over-crowding of correctional and detention facilities during a community outbreak.

✓ **Post signage throughout the facility communicating the following:**

- o **For all:** symptoms of COVID-19 and hand hygiene instructions
- o **For incarcerated/detained persons:** report symptoms to staff
- o **For staff:** stay at home when sick; if symptoms develop while on duty, leave the facility as soon as possible and follow CDC-recommended steps for persons who are ill with COVID-19 symptoms including self-isolating at home, contacting their healthcare provider as soon as possible to determine whether they need to be evaluated and tested, and contacting their supervisor.
- o Ensure that signage is understandable for non-English speaking persons and those with low literacy, and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or low-vision.

**Personnel Practices**

✓ **Review the sick leave policies of each employer that operates in the facility.**

- o Review policies to ensure that they actively encourage staff to stay home when sick.
- o If these policies do not encourage staff to stay home when sick, discuss with the contract company.
- o Determine which officials will have the authority to send symptomatic staff home.



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- ✓ **Identify staff whose duties would allow them to work from home. Where possible, allowing staff to work from home can be an effective social distancing strategy to reduce the risk of COVID-19 transmission.**
  - Discuss work from home options with these staff and determine whether they have the supplies and technological equipment required to do so.
  - Put systems in place to implement work from home programs (e.g., time tracking, etc.).
- ✓ **Plan for staff absences.** Staff should stay home when they are sick, or they may need to stay home to care for a sick household member or care for children in the event of school and childcare dismissals.
  - Allow staff to work from home when possible, within the scope of their duties.
  - Identify critical job functions and plan for alternative coverage by cross-training staff where possible.
  - Determine minimum levels of staff in all categories required for the facility to function safely. If possible, develop a plan to secure additional staff if absenteeism due to COVID-19 threatens to bring staffing to minimum levels.
  - Consider increasing keep on person (KOP) medication orders to cover 30 days in case of healthcare staff shortages.
- ✓ **Consider offering revised duties to staff who are at higher risk of severe illness with COVID-19.** Persons at higher risk may include older adults and persons of any age with serious underlying medical conditions including lung disease, heart disease, and diabetes. See CDC's website for a complete list, and check regularly for updates as more data become available to inform this issue.
  - Facility administrators should consult with their occupational health providers to determine whether it would be allowable to reassign duties for specific staff members to reduce their likelihood of exposure to COVID-19.
- ✓ **Offer the seasonal influenza vaccine to all incarcerated/detained persons (existing population and new intakes) and staff throughout the influenza season.** Symptoms of COVID-19 are similar to those of influenza. Preventing influenza cases in a facility can speed the detection of COVID-19 cases and reduce pressure on healthcare resources.
- ✓ **Reference the Occupational Safety and Health Administration website for recommendations regarding worker health.**
- ✓ **Review CDC's guidance for businesses and employers to identify any additional strategies the facility can use within its role as an employer.**

**Operations & Supplies**

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

## Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

- Recommended PPE (facemasks, N95 respirators, eye protection, disposable medical gloves, and disposable gowns/one-piece coveralls). See PPE section and Table 1 for more detailed information, including recommendations for extending the life of all PPE categories in the event of shortages, and when face masks are acceptable alternatives to N95s.
- Sterile viral transport media and sterile swabs to collect nasopharyngeal specimens if COVID-19 testing is indicated.
- ✓ **Make contingency plans for the probable event of PPE shortages during the COVID-19 pandemic, particularly for non-healthcare workers.**
  - See CDC guidance optimizing PPE supplies.
- ✓ **Consider relaxing restrictions on allowing alcohol-based hand sanitizer in the secure setting where security concerns allow.** If soap and water are not available, CDC recommends cleaning hands with an alcohol-based hand sanitizer that contains at least 60% alcohol. Consider allowing staff to carry individual-sized bottles for their personal hand hygiene while on duty.
- ✓ **Provide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing.** (See Hygiene section below for additional detail regarding recommended frequency and protocol for hand washing.)
  - Provide liquid soap where possible. If bar soap must be used, ensure that it does not irritate the skin and thereby discourage frequent hand washing.
- ✓ **If not already in place, employers operating within the facility should establish a respiratory protection program as appropriate, to ensure that staff and incarcerated/detained persons are fit tested for any respiratory protection they will need within the scope of their responsibilities.**
- ✓ **Ensure that staff and incarcerated/detained persons are trained to correctly don, doff, and dispose of PPE that they will need to use within the scope of their responsibilities.** See Table 1 for recommended PPE for incarcerated/detained persons and staff with varying levels of contact with COVID-19 cases or their close contacts.

### Prevention

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

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

### Operations

- ✓ **Stay in communication with partners about your facility's current situation.**
  - State, local, territorial, and/or tribal health departments
  - Other correctional facilities
- ✓ **Communicate with the public about any changes to facility operations, including visitation programs.**

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- ✓ **Restrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.**
  - o Strongly consider postponing non-urgent outside medical visits.
  - o If a transfer is absolutely necessary, perform verbal screening and a temperature check as outlined in the Screening section below, before the individual leaves the facility. If an individual does not clear the screening process, delay the transfer and follow the protocol for a suspected COVID-19 case—including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing. If the transfer must still occur, ensure that the receiving facility has capacity to properly isolate the individual upon arrival. Ensure that staff transporting the individual wear recommended PPE (see Table 1) and that the transport vehicle is cleaned thoroughly after transport.
- ✓ **Implement lawful alternatives to in-person court appearances where permissible.**
- ✓ **Where relevant, consider suspending co-pays for incarcerated/detained persons seeking medical evaluation for respiratory symptoms.**
- ✓ **Limit the number of operational entrances and exits to the facility.**

**Cleaning and Disinfecting Practices**

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

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

**Hygiene**

- ✓ **Reinforce healthy hygiene practices, and provide and continually restock hygiene supplies throughout the facility, including in bathrooms, food preparation and dining areas, intake areas, visitor entries and exits, visitation rooms and waiting rooms, common areas, medical, and staff-restricted areas (e.g., break rooms).**
- ✓ **Encourage all persons in the facility to take the following actions to protect themselves and others from COVID-19. Post signage throughout the facility, and communicate this information verbally on a regular basis. Sample signage and other communications materials are available on the CDC website.** Ensure that materials can be understood by non-English speakers and those with low literacy, and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or low-vision.
  - **Practice good cough etiquette:** Cover your mouth and nose with your elbow (or ideally with a tissue) rather than with your hand when you cough or sneeze, and throw all tissues in the trash immediately after use.
  - **Practice good hand hygiene:** Regularly wash your hands with soap and water for at least 20 seconds, especially after coughing, sneezing, or blowing your nose; after using the bathroom; before eating or preparing food; before taking medication; and after touching garbage.
  - **Avoid touching your eyes, nose, or mouth without cleaning your hands first.**
  - **Avoid sharing eating utensils, dishes, and cups.**
  - **Avoid non-essential physical contact.**
- ✓ **Provide incarcerated/detained persons and staff no-cost access to:**
  - **Soap**—Provide liquid soap where possible. If bar soap must be used, ensure that it does not irritate the skin, as this would discourage frequent hand washing.
  - **Running water, and hand drying machines or disposable paper towels for hand washing**
  - **Tissues and no-touch trash receptacles for disposal**
- ✓ **Provide alcohol-based hand sanitizer with at least 60% alcohol where permissible based on security restrictions.** Consider allowing staff to carry individual-sized bottles to maintain hand hygiene.
- ✓ **Communicate that sharing drugs and drug preparation equipment can spread COVID-19 due to potential contamination of shared items and close contact between individuals.**

**Prevention Practices for Incarcerated/Detained Persons**

- ✓ **Perform pre-intake screening and temperature checks for all new entrants. Screening should take place in the sallyport, before beginning the intake process, in order to identify and immediately place individuals with symptoms under medical isolation. See Screening section below for the wording of screening questions and a recommended procedure to safely perform a temperature check. Staff performing temperature checks should wear recommended PPE (see PPE section below).**
  - **If an individual has symptoms of COVID-19 (fever, cough, shortness of breath):**
    - \* Require the individual to wear a face mask.
    - \* Ensure that staff who have direct contact with the symptomatic individual wear recommended PPE
    - \* Place the individual under medical isolation (ideally in a room near the screening location, rather than transporting the ill individual through the facility), and refer to healthcare staff for further evaluation. (See Infection Control and Clinical Care sections below.)
    - \* Facilities without onsite healthcare staff should contact their state, local, tribal, and/or territorial health department to coordinate effective medical isolation and necessary medical care.

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- o **If an individual is a close contact of a known COVID-19 case (but has no COVID-19 symptoms):**
  - \* Quarantine this individual and monitor for symptoms two times per day for 14 days. (See Quarantine section below.)
  - \* Facilities without on-site healthcare staff should contact their state, local, tribal, and/or territorial health department to coordinate effective quarantine and necessary medical care.
- o **Implement social distancing strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of the presence of symptoms).** Strategies will need to be tailored to the individual space in the facility and the needs of the population and staff. Not all strategies will be feasible in all facilities. Example strategies with varying levels of intensity include:
  - o **Common areas:**
    - \* Enforce increased space between individuals in holding cells, as well as in lines and waiting areas such as intake (e.g., remove every other chair in a waiting area).
  - o **Recreation:**
    - \* Choose recreation spaces where individuals can spread out.
    - \* Stagger time in recreation spaces.
    - \* Restrict recreation space usage to a single housing unit per space (where feasible).
  - o **Meals:**
    - \* Stagger meals.
    - \* Rearrange seating in the dining hall so that there is more space between individuals (e.g., remove every other chair and use only one side of the table).
    - \* Provide meals inside housing units or cells.
  - o **Group activities:**
    - \* Limit the size of group activities.
    - \* Increase space between individuals during group activities.
    - \* Suspend group programs where participants are likely to be in closer contact than they are in their housing environments.
    - \* Consider alternatives to existing group activities, in outdoor areas or other areas where individuals can spread out.
  - o **Housing:**
    - \* If space allows, reassign bunks to provide more space between individuals, ideally 6 feet or more in all directions. (Ensure that bunks are cleaned thoroughly if assigned to a new occupant.)
    - \* Arrange bunks so that individuals sleep head to foot to increase the distance between them.
    - \* Rearrange scheduled movements to minimize mixing of individuals from different housing areas.
  - o **Medical:**
    - \* If possible, designate a room near each housing unit to evaluate individuals with COVID-19 symptoms, rather than having them walk through the facility to be evaluated in the medical unit. If this is not feasible, consider staggering sick call.
    - \* Designate a room near the intake area to evaluate new entrants who are flagged by the intake screening process for COVID-19 symptoms or case contact, before they move to other parts of the facility.



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- ✓ **Communicate clearly and frequently with incarcerated/detained persons about changes to their daily routine and how they can contribute to risk reduction.**
- ✓ **Note that if group activities are discontinued, it will be important to identify alternative forms of activity to support the mental health of incarcerated/detained persons.**
- ✓ **Consider suspending work release programs and other programs that involve movement of incarcerated/detained individuals in and out of the facility.**
- ✓ **Provide up-to-date information about COVID-19 to incarcerated/detained persons on a regular basis, including:**
  - Symptoms of COVID-19 and its health risks
  - Reminders to report COVID-19 symptoms to staff at the first sign of illness
- ✓ **Consider having healthcare staff perform rounds on a regular basis to answer questions about COVID-19.**

**Prevention Practices for Staff**

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

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- ✓ **When feasible and consistent with security priorities, encourage staff to maintain a distance of 6 feet or more from an individual with respiratory symptoms while interviewing, escorting, or interacting in other ways.**
- ✓ **Ask staff to keep interactions with individuals with respiratory symptoms as brief as possible.**

**Prevention Practices for Visitors**

- ✓ **If possible, communicate with potential visitors to discourage contact visits in the interest of their own health and the health of their family members and friends inside the facility.**
- ✓ **Perform verbal screening (for COVID-19 symptoms and close contact with cases) and temperature checks for all visitors and volunteers on entry.** See Screening section below for wording of screening questions and a recommended procedure to safely perform temperature checks.
  - Staff performing temperature checks should wear recommended PPE.
  - Exclude visitors and volunteers who do not clear the screening process or who decline screening.
- ✓ **Provide alcohol-based hand sanitizer with at least 60% alcohol in visitor entrances, exits, and waiting areas.**
- ✓ **Provide visitors and volunteers with information to prepare them for screening.**
  - Instruct visitors to postpone their visit if they have symptoms of respiratory illness.
  - If possible, inform potential visitors and volunteers before they travel to the facility that they should expect to be screened for COVID-19 (including a temperature check), and will be unable to enter the facility if they do not clear the screening process or if they decline screening.
  - Display signage outside visiting areas explaining the COVID-19 screening and temperature check process. Ensure that materials are understandable for non-English speakers and those with low literacy.
- ✓ **Promote non-contact visits:**
  - Encourage incarcerated/detained persons to limit contact visits in the interest of their own health and the health of their visitors.
  - Consider reducing or temporarily eliminating the cost of phone calls for incarcerated/detained persons.
  - Consider increasing incarcerated/detained persons' telephone privileges to promote mental health and reduce exposure from direct contact with community visitors.
- ✓ **Consider suspending or modifying visitation programs, if legally permissible. For example, provide access to virtual visitation options where available.**
  - If moving to virtual visitation, clean electronic surfaces regularly. (See Cleaning guidance below for instructions on cleaning electronic surfaces.)
  - Inform potential visitors of changes to, or suspension of, visitation programs.
  - Clearly communicate any visitation program changes to incarcerated/detained persons, along with the reasons for them (including protecting their health and their family and community members' health).
  - If suspending contact visits, provide alternate means (e.g., phone or video visitation) for incarcerated/detained individuals to engage with legal representatives, clergy, and other individuals with whom they have legal right to consult.

NOTE: Suspending visitation would be done in the interest of incarcerated/detained persons' physical health and the health of the general public. However, visitation is important to maintain mental health.

## Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

If visitation is suspended, facilities should explore alternative ways for incarcerated/detained persons to communicate with their families, friends, and other visitors in a way that is not financially burdensome for them. See above suggestions for promoting non-contact visits.

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

### Management

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

### Operations

- ✓ **Implement alternate work arrangements deemed feasible in the Operational Preparedness section.**
- ✓ **Suspend all transfers of incarcerated/detained persons to and from other jurisdictions and facilities (including work release where relevant), unless necessary for medical evaluation, medical isolation/quarantine, care, extenuating security concerns, or to prevent overcrowding.**
  - If a transfer is absolutely necessary, perform verbal screening and a temperature check as outlined in the Screening section below, before the individual leaves the facility. If an individual does not clear the screening process, delay the transfer and follow the protocol for a suspected COVID-19 case—including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing. If the transfer must still occur, ensure that the receiving facility has capacity to appropriately isolate the individual upon arrival. Ensure that staff transporting the individual wear recommended PPE (see Table 1) and that the transport vehicle is cleaned thoroughly after transport.
- ✓ **If possible, consider quarantining all new intakes for 14 days before they enter the facility's general population (SEPARATELY from other individuals who are quarantined due to contact with a COVID-19 case).** Subsequently in this document, this practice is referred to as **routine intake quarantine**.
- ✓ **When possible, arrange lawful alternatives to in-person court appearances.**
- ✓ **Incorporate screening for COVID-19 symptoms and a temperature check into release planning.**
  - Screen all releasing individuals for COVID-19 symptoms and perform a temperature check (See Screening section below)
    - \* If an individual does not clear the screening process, follow the protocol for a suspected COVID-19 case—including putting a face mask on the individual, immediately placing them under medical isolation, and evaluating them for possible COVID-19 testing.
    - \* If the individual is released before the recommended medical isolation period is complete, discuss release of the individual with state, local, tribal, and/or territorial health departments to ensure safe medical transport and continued shelter and medical care, as part of release planning. Make direct linkages to community resources to ensure proper medical isolation and access to medical care.
    - \* Before releasing an incarcerated/detained individual with COVID-19 symptoms to a community-based facility, such as a homeless shelter, contact the facility's staff to ensure adequate time for them to prepare to continue medical isolation, or contact local public health to explore alternate housing options.



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- ✓ **Coordinate with state, local, tribal, and/or territorial health departments.**
  - When a COVID-19 case is suspected, work with public health to determine action. See *Medical Isolation* section below.
  - When a COVID-19 case is suspected or confirmed, work with public health to identify close contacts who should be placed under quarantine. See *Quarantine* section below.
  - Facilities with limited onsite medical isolation, quarantine, and/or healthcare services should coordinate closely with state, local, tribal, and/or territorial health departments when they encounter a confirmed or suspected case, in order to ensure effective medical isolation or quarantine, necessary medical evaluation and care, and medical transfer if needed. See *Facilities with Limited Onsite Healthcare Services* section.

**Hygiene**

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

**Cleaning and Disinfecting Practices**

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

**Medical Isolation of Confirmed or Suspected COVID-19 Cases**

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

- ✓ **As soon as an individual develops symptoms of COVID-19, they should wear a face mask (if it does not restrict breathing) and should be immediately placed under medical isolation in a separate environment from other individuals.**
- ✓ **Keep the individual's movement outside the medical isolation space to an absolute minimum.**
  - Provide medical care to cases inside the medical isolation space. See *Infection Control and Clinical Care* sections for additional details.
  - Serve meals to cases inside the medical isolation space.
  - Exclude the individual from all group activities.
  - Assign the isolated individual a dedicated bathroom when possible.
- ✓ **Ensure that the individual is wearing a face mask at all times when outside of the medical isolation space, and whenever another individual enters.** Provide clean masks as needed. Masks should be changed at least daily, and when visibly soiled or wet.
- ✓ **Facilities should make every possible effort to place suspected and confirmed COVID-19 cases under medical isolation individually. Each isolated individual should be assigned their own housing space and bathroom where possible.** Cohorting should only be practiced if there are no other available options.

## Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

- o If cohorting is necessary:
  - **Only individuals who are laboratory confirmed COVID-19 cases should be placed under medical isolation as a cohort. Do not cohort confirmed cases with suspected cases or case contacts.**
  - Unless no other options exist, do not house COVID-19 cases with individuals who have an undiagnosed respiratory infection.
  - Ensure that cohorted cases wear face masks at all times.
- ✓ **In order of preference, individuals under medical isolation should be housed:**
  - o Separately, in single cells with solid walls (i.e., not bars) and solid doors that close fully
  - o Separately, in single cells with solid walls but without solid doors
  - o As a cohort, in a large, well-ventilated cell with solid walls and a solid door that closes fully. Employ social distancing strategies related to housing in the Prevention section above.
  - o As a cohort, in a large, well-ventilated cell with solid walls but without a solid door. Employ social distancing strategies related to housing in the Prevention section above.
  - o As a cohort, in single cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. (Although individuals are in single cells in this scenario, the airflow between cells essentially makes it a cohort arrangement in the context of COVID-19.)
  - o As a cohort, in multi-person cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. Employ social distancing strategies related to housing in the Prevention section above.
  - o Safely transfer individual(s) to another facility with available medical isolation capacity in one of the above arrangements  
 (NOTE—Transfer should be avoided due to the potential to introduce infection to another facility; proceed only if no other options are available.)
- If the ideal choice does not exist in a facility, use the next best alternative.
- ✓ **If the number of confirmed cases exceeds the number of individual medical isolation spaces available in the facility, be especially mindful of cases who are at higher risk of severe illness from COVID-19.** Ideally, they should not be cohorted with other infected individuals. If cohorting is unavoidable, make all possible accommodations to prevent transmission of other infectious diseases to the higher-risk individual. (For example, allocate more space for a higher-risk individual within a shared medical isolation space.)
  - o Persons at higher risk may include older adults and persons of any age with serious underlying medical conditions such as lung disease, heart disease, and diabetes. See CDC's website for a complete list, and check regularly for updates as more data become available to inform this issue.
  - o Note that incarcerated/detained populations have higher prevalence of infectious and chronic diseases and are in poorer health than the general population, even at younger ages.
- ✓ **Custody staff should be designated to monitor these individuals exclusively where possible.** These staff should wear recommended PPE as appropriate for their level of contact with the individual under medical isolation (see PPE section below) and should limit their own movement between different parts of the facility to the extent possible.
- ✓ **Minimize transfer of COVID-19 cases between spaces within the healthcare unit.**

## Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

- ✓ **Provide individuals under medical isolation with tissues and, if permissible, a lined no-touch trash receptacle.** Instruct them to:
  - **Cover** their mouth and nose with a tissue when they cough or sneeze
  - **Dispose** of used tissues immediately in the lined trash receptacle
  - **Wash hands** immediately with soap and water for at least 20 seconds. If soap and water are not available, clean hands with an alcohol-based hand sanitizer that contains at least 60% alcohol (where security concerns permit). Ensure that hand washing supplies are continually restocked.
- ✓ **Maintain medical isolation until all the following criteria have been met. Monitor the CDC website for updates to these criteria.**

For individuals who will be tested to determine if they are still contagious:

  - The individual has been free from fever for at least 72 hours without the use of fever-reducing medications **AND**
  - The individual's other symptoms have improved (e.g., cough, shortness of breath) **AND**
  - The individual has tested negative in at least two consecutive respiratory specimens collected at least 24 hours apart

For individuals who will NOT be tested to determine if they are still contagious:

  - The individual has been free from fever for at least 72 hours without the use of fever-reducing medications **AND**
  - The individual's other symptoms have improved (e.g., cough, shortness of breath) **AND**
  - At least 7 days have passed since the first symptoms appeared

For individuals who had a confirmed positive COVID-19 test but never showed symptoms:

  - At least 7 days have passed since the date of the individual's first positive COVID-19 test **AND**
  - The individual has had no subsequent illness
- ✓ **Restrict cases from leaving the facility while under medical isolation precautions, unless released from custody or if a transfer is necessary for medical care, infection control, lack of medical isolation space, or extenuating security concerns.**
  - If an incarcerated/detained individual who is a COVID-19 case is released from custody during their medical isolation period, contact public health to arrange for safe transport and continuation of necessary medical care and medical isolation as part of release planning.

### Cleaning Spaces where COVID-19 Cases Spent Time

**Thoroughly clean and disinfect all areas where the confirmed or suspected COVID-19 case spent time. Note—these protocols apply to suspected cases as well as confirmed cases, to ensure adequate disinfection in the event that the suspected case does, in fact, have COVID-19. Refer to the Definitions section for the distinction between confirmed and suspected cases.**

- Close off areas used by the infected individual. If possible, open outside doors and windows to increase air circulation in the area. Wait as long as practical, up to 24 hours under the poorest air exchange conditions (consult CDC Guidelines for Environmental Infection Control in Health-Care Facilities for wait time based on different ventilation conditions), before beginning to clean and disinfect, to minimize potential for exposure to respiratory droplets.
- Clean and disinfect all areas (e.g., cells, bathrooms, and common areas) used by the infected individual, focusing especially on frequently touched surfaces (see list above in Prevention section).

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- ✓ **Hard (non-porous) surface cleaning and disinfection**
    - If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
    - For disinfection, most common EPA-registered household disinfectants should be effective. Choose cleaning products based on security requirements within the facility.
      - Consult a list of products that are EPA-approved for use against the virus that causes COVID-19. Follow the manufacturer's instructions for all cleaning and disinfection products (e.g., concentration, application method and contact time, etc.).
      - Diluted household bleach solutions can be used if appropriate for the surface. Follow the manufacturer's instructions for application and proper ventilation, and check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted. Prepare a bleach solution by mixing:
        - 5 tablespoons (1/3rd cup) bleach per gallon of water or
        - 4 teaspoons bleach per quart of water
  - ✓ **Soft (porous) surface cleaning and disinfection**
    - For soft (porous) surfaces such as carpeted floors and rugs, remove visible contamination if present and clean with appropriate cleaners indicated for use on these surfaces. After cleaning:
      - If the items can be laundered, launder items in accordance with the manufacturer's instructions using the warmest appropriate water setting for the items and then dry items completely.
      - Otherwise, use products that are EPA approved for use against the virus that causes COVID-19 and are suitable for porous surfaces.
  - ✓ **Electronics cleaning and disinfection**
    - For electronics such as tablets, touch screens, keyboards, and remote controls, remove visible contamination if present.
      - Follow the manufacturer's instructions for all cleaning and disinfection products.
      - Consider use of wipeable covers for electronics.
      - If no manufacturer guidance is available, consider the use of alcohol-based wipes or spray containing at least 70% alcohol to disinfect touch screens. Dry surfaces thoroughly to avoid pooling of liquids.
- Additional information on cleaning and disinfection of communal facilities such can be found on CDC's website.
- ✓ **Ensure that staff and incarcerated/detained persons performing cleaning wear recommended PPE.** (See PPE section below.)
  - ✓ **Food service items.** Cases under medical isolation should throw disposable food service items in the trash in their medical isolation room. Non-disposable food service items should be handled with gloves and washed with hot water or in a dishwasher. Individuals handling used food service items should clean their hands after removing gloves.
  - ✓ **Laundry from a COVID-19 cases can be washed with other individuals' laundry.**
    - Individuals handling laundry from COVID-19 cases should wear disposable gloves, discard after each use, and clean their hands after.
    - Do not shake dirty laundry. This will minimize the possibility of dispersing virus through the air.
    - Launder items as appropriate in accordance with the manufacturer's instructions. If possible, launder items using the warmest appropriate water setting for the items and dry items completely.



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- o Clean and disinfect clothes hampers according to guidance above for surfaces. If permissible, consider using a bag liner that is either disposable or can be laundered.

✓ **Consult cleaning recommendations above to ensure that transport vehicles are thoroughly cleaned after carrying a confirmed or suspected COVID-19 case.**

**Quarantining Close Contacts of COVID-19 Cases**

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

✓ **Incarcerated/detained persons who are close contacts of a confirmed or suspected COVID-19 case (whether the case is another incarcerated/detained person, staff member, or visitor) should be placed under quarantine for 14 days (see CDC guidelines).**

- o If an individual is quarantined due to contact with a suspected case who is subsequently tested for COVID-19 and receives a negative result, the quarantined individual should be released from quarantine restrictions.

✓ **In the context of COVID-19, an individual (incarcerated/detained person or staff) is considered a close contact if they:**

- o Have been within approximately 6 feet of a COVID-19 case for a prolonged period of time OR
- o Have had direct contact with infectious secretions of a COVID-19 case (e.g., have been coughed on)

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

✓ **Keep a quarantined individual's movement outside the quarantine space to an absolute minimum.**

- o Provide medical evaluation and care inside or near the quarantine space when possible.
- o Serve meals inside the quarantine space.
- o Exclude the quarantined individual from all group activities.
- o Assign the quarantined individual a dedicated bathroom when possible.

✓ **Facilities should make every possible effort to quarantine close contacts of COVID-19 cases individually.** Cohorting multiple quarantined close contacts of a COVID-19 case could transmit COVID-19 from those who are infected to those who are uninfected. Cohorting should only be practiced if there are no other available options.

- o If cohorting of close contacts under quarantine is absolutely necessary, symptoms of all individuals should be monitored closely, and individuals with symptoms of COVID-19 should be placed under medical isolation immediately.
- o If an entire housing unit is under quarantine due to contact with a case from the same housing unit, the entire housing unit may need to be treated as a cohort and quarantine in place.
- o Some facilities may choose to quarantine all new intakes for 14 days before moving them to the facility's general population as a general rule (not because they were exposed to a COVID-19 case). Under this scenario, avoid mixing individuals quarantined due to exposure to a COVID-19 case with individuals undergoing routine intake quarantine.

# Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

- o If at all possible, do not add more individuals to an existing quarantine cohort after the 14-day quarantine clock has started.
- ✓ **If the number of quarantined individuals exceeds the number of individual quarantine spaces available in the facility, be especially mindful of those who are at higher risk of severe illness from COVID-19.** Ideally, they should not be cohorted with other quarantined individuals. If cohorting is unavoidable, make all possible accommodations to reduce exposure risk for the higher-risk individuals. (For example, intensify social distancing strategies for higher-risk individuals.)
- ✓ **In order of preference, multiple quarantined individuals should be housed:**
  - o Separately, in single cells with solid walls (i.e., not bars) and solid doors that close fully
  - o Separately, in single cells with solid walls but without solid doors
  - o As a cohort, in a large, well-ventilated cell with solid walls, a solid door that closes fully, and at least 6 feet of personal space assigned to each individual in all directions
  - o As a cohort, in a large, well-ventilated cell with solid walls and at least 6 feet of personal space assigned to each individual in all directions, but without a solid door
  - o As a cohort, in single cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells creating at least 6 feet of space between individuals. (Although individuals are in single cells in this scenario, the airflow between cells essentially makes it a cohort arrangement in the context of COVID-19.)
  - o As a cohort, in multi-person cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. Employ social distancing strategies related to housing in the Prevention section to maintain at least 6 feet of space between individuals housed in the same cell.
  - o As a cohort, in individuals' regularly assigned housing unit but with no movement outside the unit (if an entire housing unit has been exposed). Employ social distancing strategies related to housing in the Prevention section above to maintain at least 6 feet of space between individuals.
  - o Safely transfer to another facility with capacity to quarantine in one of the above arrangements(NOTE—Transfer should be avoided due to the potential to introduce infection to another facility; proceed only if no other options are available.)
- ✓ **Quarantined individuals should wear face masks if feasible based on local supply, as source control, under the following circumstances** (see PPE section and Table 1):
  - o If cohorted, quarantined individuals should wear face masks at all times (to prevent transmission from infected to uninfected individuals).
  - o If quarantined separately, individuals should wear face masks whenever a non-quarantined individual enters the quarantine space.
  - o All quarantined individuals should wear a face mask if they must leave the quarantine space for any reason.
  - o Asymptomatic individuals under routine intake quarantine (with no known exposure to a COVID-19 case) do not need to wear face masks.
- ✓ **Staff who have close contact with quarantined individuals should wear recommended PPE if feasible based on local supply, feasibility, and safety within the scope of their duties** (see PPE section and Table 1).
  - o Staff supervising asymptomatic incarcerated/detained persons under routine intake quarantine (with no known exposure to a COVID-19 case) do not need to wear PPE.

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

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

**Management of Incarcerated/Detained Persons with COVID-19 Symptoms**

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

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

## Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

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

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

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

### Management Strategies for Staff

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

### Infection Control

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

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



**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- o Implement the above guidance as fully as possible within the correctional/detention context. Some of the specific language may not apply directly to healthcare settings within correctional facilities and detention centers, or to facilities without onsite healthcare capacity, and may need to be adapted to reflect facility operations and custody needs.
- o Note that these recommendations apply to staff as well as to incarcerated/detained individuals who may come in contact with contaminated materials during the course of their work placement in the facility (e.g., cleaning).

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

**Clinical Care of COVID-19 Cases**

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

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

- ✓ **Ensure that all staff (healthcare and non-healthcare) and incarcerated/detained persons who will have contact with infectious materials in their work placements have been trained to correctly don, doff, and dispose of PPE relevant to the level of contact they will have with confirmed and suspected COVID-19 cases.**

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- o Ensure that staff and incarcerated/detained persons who require respiratory protection (e.g., N95s) for their work responsibilities have been medically cleared, trained, and fit-tested in the context of an employer's respiratory protection program.
- o For PPE training materials and posters, please visit the CDC website on Protecting Healthcare Personnel.
- ✓ **Ensure that all staff are trained to perform hand hygiene after removing PPE.**
- ✓ **If administrators anticipate that incarcerated/detained persons will request unnecessary PPE, consider providing training on the different types of PPE that are needed for differing degrees of contact with COVID-19 cases and contacts, and the reasons for those differences (see Table 1). Monitor linked CDC guidelines in Table 1 for updates to recommended PPE.**
- ✓ **Keep recommended PPE near the spaces in the facility where it could be needed, to facilitate quick access in an emergency.**
- ✓ **Recommended PPE for incarcerated/detained individuals and staff in a correctional facility will vary based on the type of contact they have with COVID-19 cases and their contacts (see Table 1). Each type of recommended PPE is defined below. As above, note that PPE shortages are anticipated in every category during the COVID-19 response.**
  - o **N95 respirator**

See below for guidance on when face masks are acceptable alternatives for N95s. N95 respirators should be prioritized when staff anticipate contact with infectious aerosols from a COVID-19 case.

  - o **Face mask**
  - o **Eye protection**—goggles or disposable face shield that fully covers the front and sides of the face
  - o **A single pair of disposable patient examination gloves**

Gloves should be changed if they become torn or heavily contaminated.

  - o **Disposable medical isolation gown or single-use/disposable coveralls, when feasible**
    - \* If custody staff are unable to wear a disposable gown or coveralls because it limits access to their duty belt and gear, ensure that duty belt and gear are disinfected after close contact with the individual. Clean and disinfect duty belt and gear prior to reuse using a household cleaning spray or wipe, according to the product label.
    - \* If there are shortages of gowns, they should be prioritized for aerosol-generating procedures, care activities where splashes and sprays are anticipated, and high-contact patient care activities that provide opportunities for transfer of pathogens to the hands and clothing of staff.
- ✓ **Note that shortages of all PPE categories are anticipated during the COVID-19 response, particularly for non-healthcare workers. Guidance for optimizing the supply of each category can be found on CDC's website:**
  - o **Guidance in the event of a shortage of N95 respirators**
    - \* Based on local and regional situational analysis of PPE supplies, **face masks are an acceptable alternative when the supply chain of respirators cannot meet the demand.** During this time, available respirators should be prioritized for staff engaging in activities that would expose them to respiratory aerosols, which pose the highest exposure risk.
  - o **Guidance in the event of a shortage of face masks**
  - o **Guidance in the event of a shortage of eye protection**
  - o **Guidance in the event of a shortage of gowns/coveralls**

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

Table 1. Recommended Personal Protective Equipment (PPE) for Incarcerated/Detained Persons and Staff in a Correctional Facility during the COVID-19 Response

| Classification of Individual Wearing PPE                                                                                                                                                             | N95 respirator                                                                                          | Face mask                                                                        | Eye Protection | Gloves | Gown/ Coveralls |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|----------------|--------|-----------------|
| <b>Incarcerated/Detained Persons</b>                                                                                                                                                                 |                                                                                                         |                                                                                  |                |        |                 |
| Asymptomatic incarcerated/detained persons (under quarantine as close contacts of a COVID-19 case*)                                                                                                  | Apply face masks for source control as feasible based on local supply, especially if housed as a cohort |                                                                                  |                |        |                 |
| Incarcerated/detained persons who are confirmed or suspected COVID-19 cases, or showing symptoms of COVID-19                                                                                         | -                                                                                                       | ✓                                                                                | -              | -      | -               |
| Incarcerated/detained persons in a work placement handling laundry or used food service items from a COVID-19 case or case contact                                                                   | -                                                                                                       | -                                                                                | -              | ✓      | ✓               |
| Incarcerated/detained persons in a work placement cleaning areas where a COVID-19 case has spent time                                                                                                | Additional PPE may be needed based on the product label. See CDC guidelines for more details.           |                                                                                  |                | ✓      | ✓               |
| <b>Staff</b>                                                                                                                                                                                         |                                                                                                         |                                                                                  |                |        |                 |
| Staff having direct contact with asymptomatic incarcerated/detained persons under quarantine as close contacts of a COVID-19 case* (but not performing temperature checks or providing medical care) | -                                                                                                       | Face mask, eye protection, and gloves as local supply and scope of duties allow. |                |        | -               |
| Staff performing temperature checks on any group of people (staff, visitors, or incarcerated/detained persons), or providing medical care to asymptomatic quarantined persons                        | -                                                                                                       | ✓                                                                                | ✓              | ✓      | ✓               |
| Staff having direct contact with (including transport) or offering medical care to confirmed or suspected COVID-19 cases (see CDC infection control guidelines)                                      | ✓**                                                                                                     |                                                                                  | ✓              | ✓      | ✓               |
| Staff present during a procedure on a confirmed or suspected COVID-19 case that may generate respiratory aerosols (see CDC infection control guidelines)                                             | ✓                                                                                                       | -                                                                                | ✓              | ✓      | ✓               |
| Staff handling laundry or used food service items from a COVID-19 case or case contact                                                                                                               | -                                                                                                       | -                                                                                | -              | ✓      | ✓               |
| Staff cleaning an area where a COVID-19 case has spent time                                                                                                                                          | Additional PPE may be needed based on the product label. See CDC guidelines for more details.           |                                                                                  |                | ✓      | ✓               |

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

\*\* A NIOSH-approved N95 is preferred. However, based on local and regional situational analysis of PPE supplies, face masks are an acceptable alternative when the supply chain of respirators cannot meet the demand. During this time, available respirators should be prioritized for procedures that are likely to generate respiratory aerosols, which would pose the highest exposure risk to staff.

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

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

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

**Verbal screening for symptoms of COVID-19 and contact with COVID-19 cases should include the following questions:**

- 1. During only the past 24 hours, have you had any of the following symptoms?
  - Fever (100.4 or higher), or hot spots?
  - Cough?
  - Difficulty breathing?
- 2. In the past 14 days, have you had contact with a person known to be infected with the novel coronavirus (COVID-19)?

**The following is a protocol to safely check an individual's temperature:**

- 1. Perform hand hygiene.
- 2. Put on a face mask, eye protection (goggles or disposable face shield that fully covers the front and sides of the face), gown/gloves, and a single pair of disposable gloves.
- 3. Check individual's temperature.
- 4. If performing a temperature check on multiple individuals, ensure that a clean pair of gloves is used for each individual and that the thermometer has been thoroughly cleaned in between each check. If disposable or non-contact thermometers are used and the screener did not have physical contact with an individual, gloves do not need to be changed before the next check. If non-contact thermometers are used, they should be cleaned according to recommendations by CDC for disinfection.
- 5. Remove and discard PPE.
- 6. Perform hand hygiene.

**Ex. 8**

Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

| Dates and Quantities of Cleaning Supplies and Soap Delivered to the CDF and CTF, by Date<br>December 31, 2019 - April 13, 2020 |                            |                                           |                                                    |                                              |                                                 |                                         |                                                   |             |
|--------------------------------------------------------------------------------------------------------------------------------|----------------------------|-------------------------------------------|----------------------------------------------------|----------------------------------------------|-------------------------------------------------|-----------------------------------------|---------------------------------------------------|-------------|
| Summary                                                                                                                        | Product                    |                                           |                                                    |                                              |                                                 |                                         |                                                   |             |
| Date of Delivery                                                                                                               | Bar Soap Soz<br>(100 bars) | Ecolab AB Foam<br>Hand Soap<br>(6, 25 oz) | Ecolab<br>Disinfectant<br>Cleaner<br>(2.5 gallons) | Ecolab E Foam<br>Hand Sanitizer<br>(6,25 oz) | Ecolab Multi-Quat<br>Sanitizer<br>(2.5 gallons) | Ecolab Orange<br>Force<br>(2.5 gallons) | Ecolab Peroxide<br>Multi Surface<br>(2.0 gallons) | Grand Total |
| 12/31/2019                                                                                                                     | 31                         |                                           |                                                    |                                              |                                                 |                                         |                                                   | 31          |
| 1/7/2020                                                                                                                       |                            |                                           | 2                                                  |                                              |                                                 |                                         |                                                   | 2           |
| 1/8/2020                                                                                                                       |                            | 3                                         | 3                                                  |                                              |                                                 | 3                                       |                                                   | 9           |
| 1/10/2020                                                                                                                      | 20                         |                                           |                                                    |                                              |                                                 |                                         |                                                   | 20          |
| 1/14/2020                                                                                                                      | 7                          |                                           |                                                    |                                              |                                                 |                                         |                                                   | 7           |
| 1/16/2020                                                                                                                      |                            | 8                                         | 10                                                 | 5                                            | 5                                               | 8                                       |                                                   | 36          |
| 1/21/2020                                                                                                                      | 20                         | 1                                         |                                                    |                                              |                                                 |                                         |                                                   | 21          |
| 1/22/2020                                                                                                                      |                            | 3                                         | 4                                                  |                                              |                                                 |                                         |                                                   | 7           |
| 1/31/2020                                                                                                                      |                            | 4                                         | 5                                                  | 4                                            | 3                                               | 3                                       |                                                   | 19          |
| 2/6/2020                                                                                                                       | 25                         | 10                                        | 15                                                 |                                              |                                                 |                                         |                                                   | 50          |
| 2/10/2020                                                                                                                      |                            |                                           | 1                                                  |                                              |                                                 |                                         |                                                   | 1           |
| 2/12/2020                                                                                                                      | 7                          | 4                                         | 4                                                  |                                              |                                                 | 4                                       |                                                   | 19          |
| 2/19/2020                                                                                                                      |                            | 3                                         | 5                                                  |                                              |                                                 |                                         |                                                   | 8           |
| 2/26/2020                                                                                                                      | 20                         |                                           | 6                                                  | 3                                            | 3                                               |                                         |                                                   | 32          |
| 2/27/2020                                                                                                                      |                            |                                           | 1                                                  |                                              | 1                                               | 1                                       |                                                   | 3           |
| 3/4/2020                                                                                                                       | 7                          | 6                                         | 5                                                  |                                              | 3                                               | 3                                       |                                                   | 24          |
| 3/6/2020                                                                                                                       |                            |                                           | 31                                                 | 30                                           | 4                                               | 3                                       |                                                   | 68          |
| 3/9/2020                                                                                                                       |                            |                                           |                                                    | 8                                            |                                                 |                                         |                                                   | 8           |
| 3/10/2020                                                                                                                      |                            | 14                                        | 16                                                 | 8                                            | 8                                               | 8                                       |                                                   | 54          |
| 3/12/2020                                                                                                                      |                            | 11                                        | 10                                                 | 3                                            | 6                                               | 6                                       | 7                                                 | 43          |
| 3/13/2020                                                                                                                      | 20                         |                                           |                                                    |                                              |                                                 |                                         |                                                   | 20          |
| 3/17/2020                                                                                                                      | 13                         |                                           |                                                    |                                              |                                                 |                                         |                                                   | 13          |
| 3/18/2020                                                                                                                      | 6                          | 10                                        | 7                                                  | 12                                           | 6                                               | 6                                       | 9                                                 | 56          |
| 3/19/2020                                                                                                                      |                            |                                           |                                                    | 1                                            |                                                 |                                         |                                                   | 1           |
| 3/23/2020                                                                                                                      | 0                          |                                           |                                                    |                                              |                                                 |                                         |                                                   | 0           |
| 3/24/2020                                                                                                                      | 2                          | 8                                         | 5                                                  | 11                                           | 4                                               | 5                                       | 6                                                 | 41          |
| 3/25/2020                                                                                                                      |                            |                                           |                                                    | 4                                            |                                                 |                                         |                                                   | 4           |
| 3/28/2020                                                                                                                      |                            |                                           |                                                    | 1                                            |                                                 |                                         |                                                   | 1           |
| 3/31/2020                                                                                                                      | 12                         | 8                                         | 5                                                  | 10                                           | 4                                               | 4                                       | 6                                                 | 49          |
| 4/3/2020                                                                                                                       |                            |                                           |                                                    | 3                                            |                                                 |                                         |                                                   | 3           |
| 4/7/2020                                                                                                                       | 12                         | 2                                         |                                                    | 2                                            |                                                 |                                         |                                                   | 16          |
| 4/8/2020                                                                                                                       | 5                          | 8                                         | 2                                                  | 13                                           | 2                                               | 2                                       | 3                                                 | 35          |
| 4/13/2020                                                                                                                      |                            | 5                                         | 2                                                  | 9                                            |                                                 | 2                                       | 3                                                 | 21          |
| Grand Total                                                                                                                    | 207                        | 108                                       | 139                                                | 127                                          | 49                                              | 58                                      | 34                                                | 722         |

Ex. 9



Banks v. Booth, Slip Copy (2020)

2020 WL 1914896



**Ex. 10**

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896



**Ex. 11**



Banks v. Booth, Slip Copy (2020)

2020 WL 1914896

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
DEPARTMENT OF CORRECTIONS



Office of the Director

MEMORANDUM

**TO:** All DOC employees and contractors  
**FROM:** Quincy L. Booth, Director  
**DATE:** April 17, 2020  
**SUBJECT:** Reminders and Updated COVID-19 Policies and Procedures

This memorandum serves as a reminder to all District of Columbia Department of Corrections (DOC) staff and contractors of the agency's COVID-19 policies and procedures. Informed by some new guidance from Mayor's Order 2020-06, dated April 15, 2020, it is imperative that the following policies and procedures are followed and maintained:

1. Social Distancing Measures

- a. Correctional officers must enforce social distancing in DOC's correctional facilities at all times.
- b. There shall be multiple daily announcements over the agency's public address (PA) system reminding staff and residents of social distancing. Specifically, the PA announcement shall remind residents to stay at least six feet apart from each other and not to gather in groups.
- c. Strict limits on the number of persons out of their cells at one time will help with social distancing. In general, only six residents from a unit will be out at one time for out of cell time, plus an occasional two to three cleaning detailees.

2000 14<sup>th</sup> St, NW 7<sup>th</sup> Floor | Washington, DC 20009 Telephone: 202-671-3041 Fax: 202-671-3516

**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

d. Group activities, such as classes, shall continue to be suspended for the duration of the emergency period.

**2. Resident out of cell time**

- a. All DOC residents, except those on isolation units, shall be allowed one hour of out of cell time each day.
- b. PA announcements shall be made daily to remind DOC staff and residents that out of cell time is one hour per day.

**3. Personal Protective Equipment (PPE), COVID-19 and Sick Call Education Training**

- a. DOC shall conduct PPE refresher courses for its staff during roll call of each shift, until otherwise directed. These courses are and shall continue to be documented by DOC.
- b. DOC's medical staff and sick call staff shall visit DOC's housing units to refresh staff and residents on PPE use, COVID-19 prevention and how to submit sick call slips for medical visits, until otherwise directed. These visits shall be documented by DOC.
- c. All DOC staff shall wear PPE in compliance with Centers for Disease Control guidelines while working in DOC's correctional facilities.

**4. Isolation Units**

- a. All residents housed in isolation units shall be allowed to shower each day.
- b. All residents housed in isolation units shall be allowed, each day, free 30-minute legal calls to their attorney of record on an un-secure and non-monitored telephone line. Notably, a "rolling phone" will be transporting to the residents' cells for legal calls.
- c. DOC shall provide tablets with entertainment and education content pre-programmed and activity packets (pamphlets with education materials) to residents housed on isolation units who feel well enough to use them.

**5. Unit Common Area and Cell Cleaning**

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**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- a. At the beginning of each shift, correctional officers working in DOC housing units shall document the amount of cleaning product and equipment available in the housing unit. Any shortages of cleaning product and equipment shall be documented by the correctional officer on duty and he/she shall notify his/her supervisor of any shortages so that additional cleaning product and the equipment may be ordered for the housing unit.
- b. During a resident's out of cell time, correctional officers shall spray towels with cleaning product and provide the resident with the cleaning product sprayed paper towels and dry paper towels to clean his/her cell.
- c. During each shift, correctional officers working in housing units shall verify and document that the housing unit's common areas are cleaned in accordance with DOC's cleaning schedules.
- d. DOC shall post listings of all cleaning products and equipment available to residents in each housing unit.
- e. Cleaning product are diluted appropriately by DOC's environmental team before being provided to the units; there is no need for further dilution.

**6. Linen and Laundry Exchanges**

- a. Each week, DOC shall provide its residents with fresh clothing and undergarments (laundry) and towels and sheets (linens) and collect the residents' used items as part of the agency's laundry and linen exchanges.
- b. If a resident refuses to participate in either exchange, he/she will still be provided with fresh laundry and linen, if supplies are available.

**7. Contractor and Staff Screening and Hygiene**

- a. All staff and contractors who enter DOC's facilities (except emergency personnel responding to an emergency) shall continue to undergo a COVID-19 screening, including a temperature check with a contactless infrared thermometer, and answering of brief questions designed to spot early signs of COVID-19 infection.

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**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- b. All entrants who fail the COVID-19 screening shall be denied entry to DOC's facilities.
- c. All staff responsible for COVID-19 screenings shall be re-trained on the use of contactless infrared thermometers.
- d. Non-essential visitors shall continue to be excluded for the duration of the emergency.
- e. Following the screening and before starting their tour of duty, entrants shall wash their hands with soap and water for at least twenty seconds to prevent the spread of disease.
- f. Staff who have been determined to have recently been in sustained, close contact with another staffer or inmate who tests positive for COVID-19 will be informed, consistent with privacy protections, and directed according to protocol.

**8. Access to Legal Calls**

- a. All residents shall be allowed, each day, three 30-minute legal calls to their attorney of record on a non-secure and un-monitored telephone line.
- b. DOC staff shall cooperate to facilitate residents' receipt of incoming calls from their attorney. Specifically, DOC's Case Management team has and will continue to coordinate legal calls between DOC's residents and their attorney.

**9. Medical Care**

- a. DOC staff who observe a resident exhibiting symptoms of COVID-19 shall direct the resident to medical care, and medical staff will determine appropriate next steps for the inmate's health and the health of those nearby.

**10. Tablets**

- a. Inmates may have the tablets in their cells at least for the duration of the Public Health Emergency.

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**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

- b. To facilitate the sharing of the tablets by residents, all tablets shall be sanitized between use by different residents

**ALSO, PLEASE BE ADVISED:**

1. **Single Cells:** DOC is balancing the competing needs to protect residents' mental health and prevent anxiety, self-harm, and suicide with the goal of providing single cells where possible to reduce the spread of COVID-19. Cooperate as directed in facilitating resident moves to make better use of our space as our population decreases.
2. **Medical Reserve Corps Assistance:** You may see new staffers on the units, as DOC is requesting staff augmentation through the Medical Reserve Corps (Corps). Corps members (thirty are being requested) may perform such tasks as assisting with temperature checks for incoming staff and contractors; checking residents' temperatures daily; helping in the medical unit and isolation units; and performing such other duties as may be required. Their valued service will be of great assistance as needs are higher during this challenging time.
3. **Provision of Tablets** Presently, DOC does not have a tablet for every resident. Thus, we are requesting additional tablets to eliminate the need to share, and to enable residents to communicate with their attorneys through the tablets, as well as to enjoy the entertainment, inspirational, and educational offerings that are pre-loaded. Activity packets shall also be provided to residents upon request.
4. **Quarantine of new arrivals.** Be advised that new intakes to the facility are placed in an "enhanced monitoring" for 14 days and should be presumed not to have COVID-19. However, if the new intake develops COVID-19 symptoms during the "enhanced monitoring" period, they will be tested for COVID-19 and moved to a quarantine housing in until the agency receives their test results. If they test positive, they will be housed in an isolation unit for treatment. If they test negative, they will remain in a quarantine unit until they are no longer symptomatic.

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**Banks v. Booth, Slip Copy (2020)**

2020 WL 1914896

5. Mobile testing: As mobile testing becomes available, DDC will request its deployment to its facilities to screen staff and residents, per CDC and DOH guidelines.

THIS MEMO SHALL BE READ DURING ROLL CALL DURING THE NEXT SEVEN CONSECUTIVE DAYS AND POSTED ON ALL APPROPRIATE BULLETIN BOARDS.

2020 | 4<sup>th</sup> Ed. 374 - 7<sup>th</sup> Print | Washington, DC 20036 | Telephone: 202-671-2000 | Fax: 202-671-2514

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Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882



KeyCite Blue Flag – Appeal Notification

Appeal Filed by CRAIG WILSON, ET AL v. MARK WILLIAMS, ET AL, 6th Cir., April 27, 2020

2020 WL 1940882

Only the Westlaw citation is currently available.  
United States District Court, N.D. Ohio.

Craig WILSON, et al., Petitioners,  
v.  
Mark WILLIAMS, et al., Respondents.

CASE NO. 4:20-cv-00794

|  
Signed 04/22/2020

## Synopsis

**Background:** Inmates at federal correctional institution filed emergency habeas corpus petition as putative class action, alleging that prison officials' failure to create safe conditions for inmates with especially vulnerable health in midst of COVID-19 pandemic violated those inmates' Eighth Amendment rights. Inmates moved for class certification and for preliminary injunction requiring release of medically vulnerable inmates and for officials to ensure social distancing to prevent spread of COVID-19.

**Holdings:** The District Court, [James S. Gwin](#), J., held that:

- [1] commonality requirement for class certification was satisfied;
- [2] typicality requirement for class certification was satisfied;
- [3] prison officials acted on grounds generally applicable to all proposed class members, as required to certify class seeking declaratory and injunctive relief;
- [4] inmates demonstrated likelihood of success on merits;
- [5] inmates demonstrated risk of irreparable harm;
- [6] harm to others did not weigh against preliminary injunction; and



Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

[7] public interest supported granting preliminary injunction.

Motion granted in part and denied in part.

**Procedural Posture(s):** Petition for Writ of Habeas Corpus; Motion to Certify Class; Motion for Preliminary Injunction.

West Headnotes (14)

[1] **Habeas Corpus** 🔑

District courts have inherent authority to grant enlargement to a defendant pending a ruling on the merits of that defendant's habeas petition. 🇺🇸 28 U.S.C.A. § 2241.

[2] **Federal Civil Procedure** 🔑

Commonality requirement for class certification requires plaintiffs to demonstrate that the class members have suffered the same injury. 🇺🇸 Fed. R. Civ. P. 23(a).

[3] **Federal Civil Procedure** 🔑

To satisfy commonality requirement for class certification, plaintiffs' claims must depend upon a common contention of such a nature that it is capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke; this inquiry focuses on whether a class action will generate common answers that are likely to drive resolution of the lawsuit. 🇺🇸 Fed. R. Civ. P. 23(a).

[4] **Federal Civil Procedure** 🔑

Common question of whether prison officials' failure to create safe conditions for inmates with especially vulnerable health in midst of COVID-19 pandemic violated those inmates' Eighth Amendment rights was sufficient to satisfy commonality requirement for class certification, in habeas action seeking release from prison due to spread of COVID-19

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

within the prison, even though there was variation of inmates' crimes, sentences, medical histories, proximities to infected inmates, and dangers to the community. U.S. Const. Amend. 8; 28 U.S.C.A. § 2241; Fed. R. Civ. P. 23(a)(2).

**[5] Federal Civil Procedure** 🔑

Typicality requirement for certification of medically-vulnerable class of inmates in inmates' habeas action seeking release from prison due to spread of COVID-19 within the prison, where three of the named plaintiffs had documented medical issues that were commiserate with those suffered by the class, and nothing suggested that their claims were distinct from the class. 28 U.S.C.A. § 2241; Fed. R. Civ. P. 23(a)(3).

**[6] Federal Civil Procedure** 🔑

Typicality requirement for class certification is met if the class members' claims are fairly encompassed by the named plaintiffs' claims. Fed. R. Civ. P. 23(a).

**[7] Federal Civil Procedure** 🔑

Prison officials acted on grounds generally applicable to all proposed class members, as required to certify class of medically vulnerable inmates seeking declaratory and injunctive relief, in inmates' habeas action alleging that prison officials' failure to create safe conditions for inmates with especially vulnerable health in midst of COVID-19 pandemic violated those inmates' Eighth Amendment rights, since officials' failure to protect inmates from the spreading virus applied to entirety of the class generally, and injunctive relief was appropriate as to the class. U.S. Const. Amend. 8; 28 U.S.C.A. § 2241; Fed. R. Civ. P. 23(b)(2).

**[8] Injunction** 🔑

Four factors guide a district court's decision to issue a preliminary injunction: whether the plaintiffs will likely win down the road, whether an injunction would prevent the plaintiffs from being irreparably harmed, whether an injunction would harm others, and how the injunction would impact the public interest.

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

**[9] Sentencing and Punishment** 🔑

Objective component of the test for deliberate indifference to serious medical needs in violation of the Eighth Amendment requires the existence of a sufficiently serious medical need. [U.S. Const. Amend. 8](#).

**[10] Sentencing and Punishment** 🔑

Subjective component of the test for deliberate indifference to serious medical needs in violation of the Eighth Amendment requires that defendants have acted with “deliberate indifference,” a degree of culpability greater than mere negligence, but less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. [U.S. Const. Amend. 8](#).

**[11] Injunction** 🔑

Inmates demonstrated likelihood of success on merits of claim that prison officials were deliberately indifferent to their serious medical needs in violation of the Eighth Amendment, as required to obtain preliminary injunction requiring release of medically-vulnerable inmates and ensure social distancing of remaining inmates to prevent spread of COVID-19 coronavirus; virus was spreading among prison population and staff, and for infected inmates, it could lead to pneumonia and death, for which medically vulnerable inmates were at greater risk, and prison officials had failed to separate inmates at least six feet apart, despite clear Centers for Disease Control and Prevention (CDC) guidance that such measures were necessary to stop virus' spread and save lives. [U.S. Const. Amend. 8](#).

**[12] Injunction** 🔑

Inmates demonstrated a risk of irreparable harm from prison officials' alleged deliberate indifference to their serious medical needs in violation of the Eighth Amendment, as required to obtain preliminary injunction requiring release of medically-vulnerable inmates and ensure social distancing of remaining inmates to prevent spread of COVID-19 coronavirus, where prison was hotspot for the virus and more dangerous than other facilities, and it was more than speculative that virus would continue to spread and pose

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

a danger to inmates if officials did not increase efforts to stop the spread. [U.S. Const. Amend. 8.](#)

### [13] Injunction 🔑

Harm to others did not weigh against issuance of preliminary injunction requiring prison officials to release medically-vulnerable inmates and ensure social distancing of remaining inmates to prevent spread of COVID-19 coronavirus, in inmates' action alleging that officials were deliberately indifferent to their serious medical needs in violation of the Eighth Amendment; inmates only sought release to move vulnerable inmates to various other types of confinement so that they were no longer at risk of dying from the virus, and quarantining inmates 14 days before being transferring them out reduced harm to public, while there was continued risk of harm to others, including prison staff, if inmates remained in prison and virus continued to thrive among dense inmate population. [U.S. Const. Amend. 8.](#)

### [14] Injunction 🔑

Public interest supported granting inmates a preliminary injunction requiring release of medically-vulnerable inmates and ensuring social distancing in prison to prevent spread of COVID-19 coronavirus, in inmates' action alleging that prison officials' failure to create safe conditions for inmates with especially vulnerable health in midst of COVID-19 pandemic violated those inmates' Eighth Amendment rights; although no guarantees existed that inmates would not recidivate, they were older and suffered serious medical conditions, six inmates had already died from the virus, keeping a high population of inmates would likely multiply prison's costs to test each inmate and guard, and it was always in public interest to prevent violation of party's constitutional rights. [U.S. Const. Amend. 8.](#)

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Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

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## ORDER

[Resolving Doc. 1]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

\*1 On April 13, 2020, Petitioners, inmates at Elkton Federal Correctional Institution, brought this emergency habeas action seeking release from Elkton due to the spread of COVID-19 within the prison.<sup>1</sup> Petitioners claim to represent both a class of all Elkton inmates as well as a subclass of medically vulnerable inmates.<sup>2</sup> Respondents opposed.<sup>3</sup>

<sup>1</sup> Doc. 1.

<sup>2</sup> *Id.*

<sup>3</sup> Doc. 10.

On April 17, 2020 the Court held a hearing on the matter. On April 18, 2020, both parties filed additional materials in response to the Court's hearing inquiries.<sup>4</sup>

<sup>4</sup> Docs. 18, 19.

For the foregoing reasons, the Petitioners' motion for relief is GRANTED IN PART and DENIED IN PART.

### I. COVID-19 at Elkton

State government and the media have well documented the spread of COVID-19 and the efforts to contain the virus and limit its impact. The virus's highly-infectious nature and the risks it poses, especially to medically vulnerable populations, has led to the implementation of unprecedented measures throughout the country and the world.

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

While research concerning the virus is ongoing, for some time health officials have known and reported that asymptomatic persons spread the virus.<sup>5</sup> A large percentage of coronavirus-infected citizens are asymptomatic.<sup>6</sup> These asymptomatic persons show no, or limited, symptoms. Yet, they spread the virus.

<sup>5</sup> CDC, Coronavirus Disease 2019: Recommendations for Cloth Face Covers, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html> (last visited Apr. 20, 2020) (citing Yan Bai, Lingsheng Yao, and Tao Wei, et al., *Presumed Asymptomatic Carrier Transmission of COVID-19*, JAMA (Feb. 21, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2762028>).

<sup>6</sup> Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>.

Due to this threat from infected but asymptomatic individuals, testing, tracing and treatment became the first mitigation responsibilities. As the virus has become more widespread, state government has directed citizens to reduce the spread not only through careful hygiene practices, but also through social distancing and isolation.

For inmates in our country's prisons the virus is no less a threat, but distancing measures are only minimally available.

Defendants Elkton officials have implemented measures to lessen the COVID-19 threat. Elkton segregates new inmates for fourteen days.<sup>7</sup> Elkton officials evaluate existing inmates with virus symptoms to determine whether isolation or testing is appropriate.<sup>8</sup> They check inmate and staff temperatures.<sup>9</sup> Elkton officials segregate inmates for fourteen days before allowing the inmates to leave Elkton.<sup>10</sup>

<sup>7</sup> Doc. 10 at 8.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 9-10.

<sup>10</sup> *Id.* at 27.

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

But despite their efforts, the Elkton officials fight a losing battle. A losing battle for staff. A losing battle for inmates.

The parties to the present action dispute some of the factual details of the current conditions within Elkton. Even in light of these disputes, the prison's "dorm-style" design guarantees that inmates remain in close proximity to one another.<sup>11</sup> With the shockingly limited available testing and the inability to distance inmates, COVID-19 is going to continue to spread, not only among the inmate population, but also among the staff.

<sup>11</sup> Doc. 10 at 7.

\*2 According to Respondents, Elkton has had 59 confirmed cases of COVID-19 among inmates.<sup>12</sup> The number of infected staff members, 46, is almost as high.<sup>13</sup> The number has risen even in the days since the initiation of this lawsuit and will continue to do so absent intervention.

<sup>12</sup> Doc. 19 at 2.

<sup>13</sup> The official numbers on the Bureau of Prison's website conflict with the numbers reported by Respondents. The BOP's website reports 52 confirmed cases among inmates, 46 cases among staff. Contrarily, Respondents report 59 cases among inmates and 34 among staff. *Compare* Federal Bureau of Prisons, *COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last visited April 22, 2020), with Docs. 10 at 10, 19 at 2.

Notably, it is unlikely that these figures represent the actual number of cases at the institution, given the paltry number of tests the federal government has made available for the testing of Elkton's inmates.

To date, Elkton has received only 50 COVID-19 swab tests and one Abbott Rapid testing machine with 25 rapid tests.<sup>14</sup> Most swab tests have already been used. Because the Department of Justice has given BOP so few tests, Elkton medical staff has needed to triage test usage.

<sup>14</sup> Doc. 19 at 1-2.

Respondents represent that "test swabs are back-ordered until July or August," but they "believe that they will receive an additional 25 rapid test[s]" each week.<sup>15</sup> These additional tests are all but useless considering Elkton's 2,400 inmates.



Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

<sup>15</sup> *Id.*

Recent experience at another Ohio correctional facility, Marion Correctional Institution, run by the Ohio Department of Rehabilitation and Corrections, shows how quickly and insidiously the virus spreads among a tightly quartered prison population.

Both Elkton and Marion are low security prisons and house approximately 2,500 inmates.<sup>16</sup>

<sup>16</sup> Ohio Department of Rehabilitation & Correction, *Marion Correctional Institution*, <https://drc.ohio.gov/mci> (last visited Apr. 22, 2020).

The State of Ohio has tested its prisoners en masse for COVID-19. At Marion 1,950 inmates tested positive for COVID-19.<sup>17</sup> This number includes large numbers of inmates who were asymptomatic and would otherwise not have been tested.<sup>18</sup>

<sup>17</sup> Ohio Department of Rehabilitation & Correction, *COVID-19 Inmate Testing Updated 4/20/2020*, <https://drc.ohio.gov/Portals/0/DRC%20COVID-19%20Information%2004-20-2020%20%201304.pdf> (last visited Apr. 20, 2020).

<sup>18</sup> *Id.*

Everything suggests that if BOP tested as ODRC commendably has, results would show that the virus has become equally widespread within Elkton. However, without testing there is no way to know how many Elkton inmates have the virus.

The Ohio prisons virus response undercuts BOP's ability to argue that testing is either unavailable or is impossible. Why has the Justice Department allocated Elkton an entirely insignificant number of tests while Ohio has been able to pull off mass testing across not only Marion, but at multiple institutions?

While the COVID-19 tests inadequacy is one area of grave concern, testing is only one part of the multi-faceted approach institutions like Elkton must take to reduce the virus's spread.

Respondents report that the prison, in accordance with BOP guidance, has changed its operations to try to limit the virus's spread.<sup>19</sup> For instance, the prison has implemented health screening measures for various groups of inmates, staff, and civilians.<sup>20</sup> These are all good efforts.

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

<sup>19</sup> Doc. 10 at 7-11.

<sup>20</sup> *Id.* at 8-9.

\*<sup>3</sup> However, once the virus is inside the prison, as it already is at Elkton, screening measures can only be so effective. And screening will only help to identify individuals with active symptoms, not those asymptomatic individuals who can nevertheless spread the virus undetected.

Respondents have also implemented “modified operations” to somewhat reduce inmate contact with each other. Elkton allows inmate housing units of 150 to pick up pre-packaged meals, receive dispensed medications, and visit the commissary with only a single housing unit moving around the institution at one time.<sup>21</sup> Better practices, but not enough.

<sup>21</sup> Doc. 10 at 21.

Respondents attempt to liken each housing unit to a “family unit.” They say that each unit is akin to unincarcerated community members who live with roommates or family.<sup>22</sup> They say that each housing unit is separate from other units, visitors, and sick inmates.<sup>23</sup>

<sup>22</sup> *Id.* at 21-22.

<sup>23</sup> *Id.*

But each single housing unit includes about 150 people.<sup>24</sup> Respondents ignore that some unit inmates nonetheless circulate throughout the prison as “essential” workers. Because some untested inmates circulate throughout Elkton, the housing units are not truly isolated. And with 150 “family members,” there are significant opportunities to increase the risk of spread. Within each housing unit there seems to be little chance of obstructing the spread of the virus.

<sup>24</sup> *Id.*

Respondents say that soap and disinfectant are readily available, a fact that Petitioners dispute.<sup>25</sup> However, these supplies can only be so useful in an environment where the inmates are constantly in close proximity to one another. Likewise, the education about hygiene and social distancing Respondents tout is only effective if the inmates have the supplies and physical space to put such knowledge into practice.<sup>26</sup>

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

<sup>25</sup> Compare Doc. 10 at 27, with Doc. 1 at 17.

<sup>26</sup> Doc. 10 at 11-12.

Furthermore, while the deteriorating health conditions at Elkton pose a danger for each of the 2,400 men who are incarcerated at Elkton, the institution's inability to stop the spread of the virus among the inmates in its care poses an even greater risk for inmates whose medical conditions put them at higher risk of death if they contract the virus.<sup>27</sup>

<sup>27</sup> See generally Briefs for Disability Rights Ohio and Public Health and Human Rights Experts as Amici Curiae Supporting Petitioners, Docs. 8-1 and 14-1.

Plus, while this litigation concerns Elkton's conditions for its inmates, the same conditions endanger prison staff, who must continue to go to work despite the virus's spread throughout the facility. And the Elkton spread endangers the staff's families who come into contact with Elkton's undoubtedly exposed staff.

In light of these realities, Petitioners, inmates at Elkton, bring the present action. They sue on behalf of themselves and on behalf a class of all current and future Elkton inmates.<sup>28</sup>

<sup>28</sup> Doc. 1 at 29.

They bring additional claims on behalf of the “Medically-Vulnerable Subclass,” defined as:

[A]ll current and future persons incarcerated at Elkton over the age of 50, as well as all current and future persons incarcerated at Elkton of any age who experience: chronic lung disease or moderate to severe asthma; serious heart conditions; conditions that can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS or prolonged use of corticosteroids and other immune weakening medications; severe obesity (defined as a body mass index of 40 or higher); diabetes; chronic kidney disease or undergoing dialysis; or liver disease.<sup>29</sup>

<sup>29</sup> Id.

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

\*4 Petitioners seek certification of the classes. In addition, they request:

a temporary restraining order, preliminary injunction, permanent injunction, and/or writ of habeas corpus requiring Respondents to identify within six (6) hours of the Court's order, and submit to the Court a list of, all Medically-Vulnerable Subclass Members, and release all such persons within twenty-four (24) hours, with such release to include supports to ensure social distancing and other expert-recommended measures to prevent the spread of coronavirus.<sup>30</sup>

<sup>30</sup> Doc. 1 at 36.

Petitioners define release as “discharge of incarcerated persons from the physical confines of Elkton, not necessarily release from custody.”<sup>31</sup> Petitioners suggest that “[r]elease options may include, but are not limited to: release to parole or community supervision; transfer furlough (as to another facility, hospital, or halfway house); or non-transfer furlough, which could entail a release person's eventual return to Elkton once the pandemic is over and the viral health threat abated.”<sup>32</sup>

<sup>31</sup> *Id.* at 2 n. 2.

<sup>32</sup> *Id.* at 2.

In other words, Petitioners seek an “enlargement.” Enlargement is not release, although some courts refer to it using the terms release or bail.<sup>33</sup> When a court exercises its power to “enlarge” the custody of a defendant pending the outcome of a habeas action, the BOP maintains custody over the defendant, but the place of custody is altered by the court.<sup>34</sup>

<sup>33</sup> See Declaration of Professor Judith Resnik Regarding Provisional Remedies for Detained Individuals at 8, *Money et al. v. Jeffreys*, No. 1:20-cv-02094 (N.D. Ill. April 4, 2020), ECF No. 24-3.

<sup>34</sup> *Id.*

After the release of the subclass, Petitioners request “a plan, to be immediately submitted to the Court and overseen by a qualified public health expert” that provides for mitigation efforts in line with CDC guidelines and a housing and/or public support plan for released inmates.<sup>35</sup> They also

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

seek the release of Class Members so that the remaining inmates can follow CDC guidance to maintain six feet of space between them while in the prison.<sup>36</sup>

<sup>35</sup> Doc. 1 at 36-37.

<sup>36</sup> *Id.* at 37.

Respondents respond that Petitioners cannot challenge the conditions inside the prison through a habeas corpus action and that this Court and the BOP do not have the authority to grant early release.<sup>37</sup>

<sup>37</sup> Doc. 10 at 15-19.

## II. Discussion

[1] District courts have inherent authority to grant enlargement to a defendant pending a ruling on the merits of that defendant's habeas petition.<sup>38</sup> The Court finds that the exceptional circumstances at Elkton and the Petitioners' substantial claims, that are likely to succeed at the merits stage, necessitate the exercise of that authority and that such relief is proper for members of the subclass defined *infra*.<sup>39</sup>

<sup>38</sup> See, e.g.,  *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001); *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990).

<sup>39</sup> *Dotson*, 900 F.2d at 79.

However, given the nature of the present litigation as class action habeas proceeding, the Court is unable to determine the specific type of enlargement most suitable for each subclass member. In light of this difficulty, the Court will grant a preliminary injunction, in aid of its authority to grant enlargements, ordering Respondents to determine the appropriate means of transferring medically vulnerable subclass members out of Elkton. Pursuant to the below analysis, the Court finds that Petitioners have met the standard for a preliminary injunction.

### A. Jurisdiction

\*5 Petitioners argue that Elkton's inability, even if it tried, to adequately protect the inmates from the risks posed by coronavirus subjects the prisoners to substantial risk of harm in violation of their Eighth Amendment rights. Petitioners say that their claim is cognizable under  28 U.S.C. § 2241

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

as a habeas action because they are challenging the execution of their sentences, rather than the validity of the convictions themselves.<sup>40</sup> Petitioners argue that they are not seeking to challenge a specific aspect of their confinement, but the confinement itself.<sup>41</sup>

<sup>40</sup> Doc. 1 at 34-35.

<sup>41</sup> Doc. 18 at 8-9.

Respondents argue that habeas relief is not the proper vehicle to challenge conditions of confinement.<sup>42</sup>

<sup>42</sup> Doc. 10 at 15-16.

Courts have attempted to clarify the types of claims appropriate for habeas relief and distinguish those claims from civil rights claims more appropriately resolved under § 1983. The general result has been that challenges to the fact or duration of confinement that seek release sound in habeas whereas actions challenging the conditions of confinement raise concerns properly addressed under § 1983.<sup>43</sup>

<sup>43</sup> See  *Muhammad v. Close*, 540 U.S. 749, 750, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004) (“Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus...requests for relief turning on circumstances of confinement may be presented in a § 1983 action.”);  *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994);  *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).

But, these seemingly bright line rules are difficult to apply in practice. The near impossibility in some cases of drawing such distinctions has become even more obvious with COVID-19. Whereas many medical needs claims might appropriately be addressed through § 1983 litigation, claims concerning COVID-19 are not so easily classified as § 1983 claims.

Inmates challenging BOP's COVID-19 response challenge the dangerous conditions within the prison created by the virus. However, the only truly effective remedy to stop the spread is to separate individuals—a measure that in our nation's densely populated prisons is typically impossible without the release of a portion of the population. So, such actions ultimately seek to challenge the fact or duration of confinement as well.<sup>44</sup>

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

<sup>44</sup> *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at \*6 (N.D. Ill. Apr. 9, 2020). Two federal district courts have noted without deciding that claims such as those brought by Petitioners might be cognizable as habeas claims because the relief sought would affect the duration of confinement or because the conditions complained of could not be eliminated without releasing the inmates from detention. See *A.S.M. v. Donahue*, No. 7:20-CV-62, 2020 WL 1847158, at \*1 (M.D. Ga. Apr. 10, 2020); *Mays*, 2020 WL 1812381 at \*6.

In this case, the Petitioners frame their action as a  § 2241 habeas claim.<sup>45</sup> The Sixth Circuit, echoing the distinctions recognized by other courts, has found that “ § 2241 is not the proper vehicle for a prisoner to challenge conditions of confinement.”<sup>46</sup> However, the Sixth Circuit has also held “ § 2241 is appropriate for claims challenging the execution or manner in which the sentence is served.”<sup>47</sup>

<sup>45</sup> Whereas other petitioners bringing COVID-19-related challenges have pleaded both habeas and § 1983 claims in the alternative, Petitioners do not do so here.

<sup>46</sup> *Luedtke v. Berkebile*, 704 F.3d 465, 465-66 (6th Cir. 2013) (citing two additional Sixth Circuit cases that found the same).

<sup>47</sup>  *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001).

\*6 Petitioners' action evades easy classification. Part of the difficulty rests in Petitioners' differing relief requests for the class and subclass. For the significantly vulnerable subclass the Petitioners seek immediate release, arguing that for the medically vulnerable inmates continued imprisonment at Elkton is unconstitutional given the COVID-19 outbreak.

Notably, these Petitioners do not seek a commutation of their sentences, but rather to serve their sentences in home confinement, parole, or in half-way houses at least until the risk of the virus has abated. This claim is closer to a challenge to the manner in which the sentence is served and is therefore cognizable under  28 U.S.C. § 2241.

For the remainder of the less-obviously-vulnerable class the challenges sound more as a confinement conditions claim. Petitioners seek the oversight of a public health expert to mitigate the risk COVID-19 poses to class members that remain incarcerated at Elkton. Because the not medically vulnerable Elkton inmates seek an alteration to the confinement conditions, the claims are more like § 1983 claims.



Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

Because Petitioners have brought their claims as a habeas petition, the Court may only properly address those claims suitable for habeas relief. The remainder of this order addresses the habeas claims of the vulnerable subclass alone.

## B. Class Certification

Given the emergency nature of this proceeding, a class certification determination has not yet taken place. That does not, however, preclude Petitioners from obtaining class-wide interim relief at this stage. “[T]here is nothing improper about a preliminary injunction preceding a ruling on class certification.”<sup>48</sup> This Court may grant preliminary injunctive relief to a conditional class.

<sup>48</sup>  *Gooch v. Life Investors Ins. Co. of America*, 672 F.3d 402, 433 (6th Cir. 2012).

As a preliminary matter, the Court finds that the Petitioners' subclass definition is likely too broad. Although the risk of complications from COVID-19 is serious for all inmates, the Court limits the subclass to those identified by the CDC as being at higher risk.<sup>49</sup> This includes all Elkton inmates 65 years or older and those with documented, pre-existing medical conditions, including heart, lung, kidney, and liver conditions, [diabetes](#), conditions causing a person to be immunocompromised (including, but not limited to [cancer](#) treatment, transplants, HIV or AIDS, or the use of immune weakening medications), and severe [obesity](#) (body mass index of 40 or higher).<sup>50</sup> The subclass definition excludes those whose only risk factor is a history of smoking, given the difficulty of documenting such occurrence and identifying those individuals through BOP records alone.

<sup>49</sup> The Court has “broad discretion to modify class definitions.” *Ball v. Kasich*, 307 F. Supp.3d 701, 718 (S.D. Ohio 2018).

<sup>50</sup> CDC, *Coronavirus Disease 2019: People Who Are At Higher Risk*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited April 20, 2020).

Under  [Federal Rule of Civil Procedure 23\(a\)](#), a class must meet the requirements of numerosity, commonality, typicality, and adequate representation. Additionally, one of  [Rule 23\(b\)](#)'s requirements must also be satisfied.

Petitioners have made a sufficient showing at this stage to satisfy the  [Rule 23\(a\)](#) factors for the above-defined subclass.

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

**\*7 Numerosity:** The subclass consists of hundreds of Elkton inmates.<sup>51</sup>

<sup>51</sup> In accordance with the Court's order, dated April 17, 2020, Respondents submitted for *in camera* review, lists of Elkton inmates with certain medical conditions. Although the Court cannot say with certainty the exact number of inmates who comprise the subclass, it is satisfied that the number is in the hundreds.

[2] [3] **Commonality:** “Commonality requires [Petitioners] to demonstrate that the class members have suffered the same injury.”<sup>52</sup> “Their claims must depend upon a common contention...of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”<sup>53</sup> This inquiry focuses on whether a class action will generate common answers that are likely to drive resolution of the lawsuit.<sup>54</sup>

<sup>52</sup> *Ball*, 307 F. Supp.3d at 719 (quoting  *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)).

<sup>53</sup>  *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 852-53 (6th Cir. 2013) (citing  *Dukes*, 564 U.S. at 350, 131 S.Ct. 2541).

<sup>54</sup>  *Id.*

[4] In this case, all subclass members have been subjected to dangerous conditions in which they run a high risk of exposure to the deadly COVID-19 virus. The inquiry driving the litigation is whether the BOP's failure to create safe conditions for inmates with especially vulnerable health has violated those inmates' rights. Answering this question will determine whether the inmates are entitled to movement from Elkton.

Respondents argue that the subclass lacks commonality given the class's combination of “inmates that have different crimes, sentences, outdates, disciplinary histories, ages, medical histories, proximities to infected inmates, availability of a home landing spot, likelihoods of transmitting the virus to someone at home detention, likelihoods of violation or recidivism, and dangers to the community.”<sup>55</sup>

<sup>55</sup> Doc. 10 at 36-37.

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

However, the Petitioners seek varied relief that allows the BOP to make individualized determination as to where each subclass member should be placed. Petitioners do not seek to open the prison gates to allow its inmates to run free. In fact, Petitioners concede that “release” might look different for different inmates. The Petitioners acknowledge that while some inmates might be placed in home confinement others should be furloughed and that in all instances such “release” could be temporary.<sup>56</sup>

<sup>56</sup> Doc. 1 at 2 n. 2.

The motivating question in the litigation is whether the subclass members' rights are being violated by the deteriorating conditions at Elkton. As such, the subclass can satisfy commonality.

[5] [6] **Typicality:** “Typicality is met if the class members' claims are ‘fairly encompassed by the named plaintiffs' claims.’ ”<sup>57</sup> Three of the named Petitioners have documented medical issues that are commiserate with those suffered by the subclass. The fourth named Petitioner, Maximino Nieves, could represent that class, but not the subclass, as he attests that he doesn't have a serious medical history.<sup>58</sup> Excepting Nieves, nothing suggests that the remaining three Petitioners' claims are distinct from those of the remainder of the subclass. Typicality is satisfied.<sup>59</sup>

<sup>57</sup>  *In re Whirlpool*, 722 F.3d at 852 (citation omitted).

<sup>58</sup> Doc. 1-8 at 2.

<sup>59</sup> Respondents argue that the named Petitioners defy typicality because they are all ineligible for home confinement. This contention ignores the fact that other means of removal from Elkton might be available to the named Petitioners other than home confinement, such as transfer to another facility.

**\*8 Adequate Representation:** The Court is satisfied that counsel is competent to represent the class. Additionally, the interests of the named Petitioners do not conflict with those of the other subclass members.

[7] Having satisfied the  **Rule 23(a)** requirements, the subclass must also demonstrate that it meets one of the  **Rule 23(b)** requirements. Petitioners argue that “Respondents have acted on grounds generally applicable to all proposed Class members, and this action seeks declaratory and injunctive relief.”<sup>60</sup> Indeed, Respondents' failure to protect the inmates from the spreading

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

virus applies to the entirety of the subclass generally and injunctive relief is appropriate as to the subclass.  [Rule 23\(b\)\(2\)](#) is therefore satisfied.

<sup>60</sup> Doc. 1 at 31.

For the purposes of the preliminary injunction inquiry, the Court finds that the subclass as defined in this order likely meets the requirements for class certification.

### C. Injunctive Relief

[8] “Four factors guide a district court's decision to issue a preliminary injunction: whether the plaintiffs will likely win down the road, whether an injunction would prevent the plaintiffs from being irreparably harmed, whether an injunction would harm others, and how the injunction would impact the public interest.”<sup>61</sup> The Court considers each in turn.

<sup>61</sup> [McNeil v. Community Prob. Servs., LLC](#), 945 F.3d 991, 994 (6th Cir. 2019).

#### 1. Likely Success

Petitioners' claims are predicated on a violation of their Eighth Amendment rights which protects them from “cruel and unusual punishments.” In order to succeed on an Eighth Amendment claim, Petitioners must satisfy both an objective and subjective component.<sup>62</sup>

<sup>62</sup>  [Miller v. Calhoun Cty.](#), 408 F.3d 803, 812 (6th Cir. 2005).

[9] “The objective component of the test requires the existence of a ‘sufficiently serious’ medical need.”<sup>63</sup> Petitioners obviously satisfy this component. At this moment a deadly virus is spreading amongst Elkton's population and staff. For infected inmates, the virus can lead to [pneumonia](#). In the worse [pneumonia](#) cases, COVID-19 victims suffer diminishing oxygen absorption, with resulting organ failure leading to death. Victims choke to death. While not every inmate who contracts the virus will die, the subclass members are at a much greater risk of doing so. They have a very serious medical need to be protected from the virus.

<sup>63</sup>  *Id.* (citing  [Blackmore v. Kalamazoo County](#), 390 F.3d 890, 895 (6th Cir. 2004)).

[10] The subjective component requires that Respondents have acted with deliberate indifference, “a degree of culpability greater than mere negligence, but less than ‘acts or omissions for the very

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

purpose of causing harm or with knowledge that harm will result.’ ”<sup>64</sup> Petitioners satisfy this standard.

<sup>64</sup>  *Id.* at 813 (quoting  *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

While Respondents offer certain prison-practice changes to show they know COVID-19 risks and have sought to reduce those risks, the Court still finds that, at this preliminary stage of the litigation, the Petitioners have sufficiently met the threshold for showing that Respondents have been deliberately indifferent.

One only need look at Elkton's testing debacle for one example of this deliberate indifference. Additionally, Elkton has altogether failed to separate its inmates at least six feet apart, despite clear CDC guidance for some time that such measures are necessary to stop the spread and save lives.

**\*9 [11]** Having met both prongs of the Eighth Amendment analysis, Petitioners have demonstrated a likelihood of success on the merits.

## 2. Irreparable Harm

Respondents argue that Petitioners have not shown that release will reduce the risk of exposure to COVID-19. But the district court cases Respondents use that have found that release would not lessen the risk to a defendant's health did not deal specifically with Elkton confinement.<sup>65</sup> Of the reported inmate deaths in nation-wide BOP custody, 6 out of 23, more than 1 in 4, has occurred at Elkton, making it a hotspot for the virus and certainly more dangerous than other facilities.<sup>66</sup>

<sup>65</sup> *United States v. Taylor*, No. 5:19-CR-192-KKC-MAS, 2020 WL 1501997, at \*5 (E.D. Ky. Mar. 26, 2020) (noting that the Court believed that the practices at “any facility” were sufficient to protect from COVID-19); *United States v. Steward*, 2020 WL 1468005, at \*1 (S.D.N.Y. Mar. 26, 2020) (denying release from Metropolitan Correctional Center).

<sup>66</sup> Federal Bureau of Prisons, *COVID-19 Cases*, <https://www.bop.gov/coronavirus/> (last visited April 22, 2020).

**[12]** Respondents also argue that the Petitioners' harm is speculative. It is true that some subclass members may not die if they contract the virus. However, it is more than mere speculation that the

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

virus will continue to spread and pose a danger to inmates if BOP does not increase its efforts to stop the spread.<sup>67</sup> Petitioners have therefore shown a risk for irreparable harm.

<sup>67</sup> See Doc. 14-1 at 5-10 (describing the inadequacy of the Elkton measures and the risk of spread within the prison environment).

### 3. Harm to Others

Respondents argue that the release of inmates from Elkton “would cause substantial damage to others” because there is no assurance that the inmates can care for themselves upon release.<sup>68</sup> They argue the inmates might be left without access to food, shelter, or medical care.<sup>69</sup>

<sup>68</sup> Doc. 10 at 3.

<sup>69</sup> *Id.* at 3, 33-34.

[13] As stated previously, Petitioners do not ask this Court to throw open the gates to the prison and leave the inmates that are released to fend for themselves. Instead, Petitioners seek “release” that consists of moving vulnerable inmates to various other types of confinement so that they are no longer at risk of dying from the virus. And as Respondents acknowledge, it is BOP's current policy to quarantine all inmates that are transferred from Elkton for 14 days before transfer.<sup>70</sup> The continued implementation of this policy reduces the risk that an inmate with COVID-19 will carry the virus with him outside of the prison.

<sup>70</sup> Doc. 10-2 at 7.

Furthermore, there is a continued risk of harm to others, including prison staff, if inmates remain in the prison and the virus continues to thrive among the dense inmate population.

### 4. Public Interest

Respondents argue that the public faces a grave danger if inmates are to be released *en masse* onto the streets. They say:

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

Our over-burdened police and safety services should not be forced to deal with the indiscriminate release of thousands of prisoners on the streets without any verification that those prisoners will follow the laws when they are released, that they will have a safe place to go where they will not be mingling with their former criminal associates, and that they will not return to their former ways as soon as they walk through the prison gates.<sup>71</sup>

<sup>71</sup> Doc. 10 at 41-42.

\***10** First, Respondents might as well be arguing against the release of any inmate, at any time, for any reason, because even in the best of circumstances the country's criminal justice system has no way, short of life imprisonment, of ensuring former prisoners do not recidivate. The COVID-19 pandemic has not suddenly raised this issue.

Third, the danger of recidivism reduces with age, especially after age 40.<sup>72</sup> The subclass inmates are older and by definition, the vulnerable sub-class inmates suffer serious medical conditions.

<sup>72</sup> See generally United States Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders*, (Dec. 2017), <https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders>.

Second, it bears repeating that the Petitioners are not asking the Court to dump inmates out into the streets. No one's interest would be served in doing so. The Court is confident that the transfer of prisoners from Elkton to other means of confinement could accomplish the goal of protecting Elkton's vulnerable population while also protecting public safety.

Third, six Elkton inmates have already died. Likely, they died after agonizing days under intensive care, most probably with ventilators. The BOP absorbs the high cost of this treatment—costs that are likely multiples of what it would have cost to test each Elkton inmate and guard.

[14] Finally, “it is always in the public interest to prevent the violation of a party's constitutional rights.”<sup>73</sup>



Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

73

  *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

#### D. The Prison Litigation Reform Act

Respondents argue that the Prison Litigation Reform Act (“PLRA”), 18 U.S.C. § 3626, bars this Court from granting the inmates' release.<sup>74</sup> This is not so. The PLRA does not extend to “habeas corpus proceedings challenging the fact or duration of confinement in prison.”<sup>75</sup> Because the Court has determined that the subclass's claims are properly before the Court as a habeas action, this prohibition does not apply.<sup>76</sup>

74

Doc. 10 at 16.

75

18 U.S.C. § 3626(g)(2).

76

See   *Colton v. Ashcroft*, 299 F. Supp. 2d 681 (E.D. Ky. 2004) (“ 28 U.S.C. §§ 2241,  2254, and 2255 filings have been deemed not covered by the PLRA.”).

Additionally, Respondents argue that a release order may only be entered by a three-judge court and that the court must find that “crowding is the primary cause of the violation of a Federal right” and “no other relief will remedy the violation.”<sup>77</sup> As stated previously the PLRA does not bar this habeas proceeding. However, even if it did, the Court is not ordering the release of the prisoners. Instead, the inmates will remain in BOP custody, but the conditions of their confinement will be enlarged.

77

18 U.S.C. § 3626(a)(3)(E).

#### III. Conclusion

The Court **GRANTS IN PART** and **DENIES IN PART** Petitioners' motion for relief.

The Court orders the Respondents to identify, within one (1) day all members of the subclass as defined in this Order. Respondents must identify in the list each subclass member's sentencing court and the case number of their underlying criminal conviction.

Following identification, the Court orders Respondents to evaluate each subclass member's eligibility for transfer out of Elkton through any means, including but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two (2) weeks.

Wilson v. Williams, --- F.Supp.3d ---- (2020)

2020 WL 1940882

**\*11** In undertaking this evaluation, Respondents will prioritize the review by the medical threat level. For example, older inmates with heart, pulmonary, diabetes or immunity risks should receive review priority over subclass members who are younger.

Subclass members who are ineligible for compassionate release, home release, or parole or community supervision must be transferred to another BOP facility where appropriate measures, such as testing and single-cell placement, or social distancing, may be accomplished. In transferring subclass members, Respondents must continue to comply with BOP policy of quarantining inmates for 14 days prior to transfer out of Elkton.

Any subclass members transferred out of Elkton may not be returned to the facility until the threat of the virus is abated or until a vaccine is available and Elkton obtains sufficient vaccine supplies to vaccinate its population, whichever occurs first.

IT IS SO ORDERED.

## All Citations

--- F.Supp.3d ----, 2020 WL 1940882

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Mays v. Dart, --- F.Supp.3d ---- (2020)

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United States District Court, N.D. Illinois, Eastern Division.

[Anthony MAYS](#), individually and on behalf of a class of similarly situated persons; and [Judia Jackson](#), as next friend of Kenneth Foster, individually and on behalf of a class of similarly situated persons, Plaintiffs-Petitioners,

v.

[Thomas DART](#), Defendant-Respondent.

Case No. 20 C 2134

|

04/27/2020

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#### MEMORANDUM OPINION AND ORDER

[MATTHEW F. KENNELLY](#), District Judge: <sup>1</sup>

<sup>1</sup> Judge Kennelly is addressing this matter as emergency judge pursuant to paragraph 5 of Second Amended General Order 20-0012.

\*1 Anthony Mays and Kenneth Foster, both of whom are detained at Cook County Jail while awaiting trial on criminal charges, have sued Cook County Sheriff Thomas Dart, who operates the Jail, on behalf of a class of similarly situated persons. Mays and Foster allege the Sheriff has violated the constitutional rights of persons detained at the jail by failing to provide them with reasonably safe living conditions in the face of the current coronavirus pandemic. They assert claims under  42 U.S.C. § 1983 and for writs of habeas corpus under  28 U.S.C. § 2241.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

On April 9, 2020, the Court granted the plaintiffs' motion for a temporary restraining order in part. The Court directed the Sheriff to: (1) establish and implement, within two days' time, a policy requiring prompt coronavirus testing of detained persons with symptoms consistent with coronavirus disease; (2) within two days' time, eliminate the use of “bullpens” to hold groups of new detainees during the intake process; (3) begin to provide inmates and staff, within one day, soap and/or hand sanitizer sufficient to enable them to frequently clean their hands, and sanitation supplies sufficient to enable them to regularly sanitize surfaces in areas used in common; (4) establish and carry out, within two days' time, a policy requiring sanitation of all such surfaces between each use; and (5) within three days' time, distribute facemasks to all detained persons quarantined due to their exposure to a person exhibiting symptoms consistent with coronavirus disease. The Court overruled the plaintiffs' request for additional temporary relief, including a mandate for implementation of “social distancing” throughout the Jail and to provide facemasks to every detained person. The Court also concluded that the plaintiffs seeking habeas corpus relief had failed to exhaust available state court remedies.

The plaintiffs have now moved for entry of a preliminary injunction and other relief. They again seek writs of habeas corpus, based on newly discovered facts that they contend provide a basis to excuse their failure to exhaust state court remedies. They also seek conversion of the temporary restraining order to a preliminary injunction, and they again request an order requiring implementation of social distancing throughout the Jail, as well as transfer of detained persons from the Jail to other locations within the Sheriff's control, including electronic home monitoring. The plaintiffs also request the convening of a three-judge court under the Prison Litigation Reform Act to consider entering a “prisoner release order” within the meaning of that statute.

For the reasons stated below, the Court converts the terms of the temporary restraining order to a preliminary injunction and enters further preliminary injunctive relief regarding social distancing but denies the plaintiffs' other requests for relief.

### **Factual Background**

**\*2** The following discussion of relevant facts concerning coronavirus, the Cook County Jail facilities, and the parties' claims and defenses is taken from undisputed facts, the affidavits and documentary evidence submitted by the parties, and the testimony and exhibits offered at the evidentiary hearing held on April 23, 2020.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

### A. The coronavirus pandemic

The rapid global spread of the novel coronavirus has led to a pandemic of extraordinary scale. The Court's decision on the plaintiffs' motion for a temporary restraining order includes a discussion of the gravity of the public health threat associated with this virus. *Mays v. Dart*, No. 20 C 2134, — F.Supp.3d —, —, 2020 WL 1812381, at \*2 (N.D. Ill. Apr. 9, 2020).

Symptoms of the disease caused by the novel coronavirus—what has come to be known as COVID-19, which the Court will refer to as coronavirus disease—include fever, cough, and shortness of breath, and the health effects can be very severe, including serious damage to the lungs and other internal organs, and death. People who are sixty-five years of age or older and those with certain pre-existing health conditions, including chronic lung disease, moderate to severe asthma, serious heart conditions, diabetes, chronic kidney disease, liver disease, a body mass index of forty or higher, and other conditions have a heightened vulnerability to severe illness if they contract the coronavirus.

The rapid transmission of coronavirus has been attributed to several characteristics. Respiratory droplets containing the virus emitted by an infected person, though coughing or sneezing for example, can travel several feet and may persist in the air for several hours. In addition, because the virus can persist on some surfaces for up to three days, transmission can occur even without physical proximity to an infected person. Moreover, those who contract the virus may be asymptomatic for days or even for the entire duration of the infection but can still transmit the virus to others, making it more challenging to readily identify infected individuals and respond with necessary precautions.

There is currently no known effective treatment for coronavirus disease and no vaccine to prevent people from contracting it. Medical professionals and public health experts agree—and the evidence in this case demonstrates beyond peradventure—that the only way to curb the spread of the virus is through a multi-faceted strategy that includes testing to identify those who have been infected; isolation of those who test positive or develop symptoms consistent with the disease; quarantining those who may have come into contact with the virus; frequent sanitation of surfaces; frequent handwashing; and use of personal protective equipment (PPE) such as facemasks. And a key tactic recommended by public health experts to curb the spread of coronavirus disease has been to keep people apart from each other—what has come to be known as “social distancing.” The Centers for Disease Control's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (“CDC Guidelines”),<sup>2</sup> defines social distancing as “the practice of increasing the space between individuals and decreasing the

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

frequency of contact to reduce the risk of spreading a disease (ideally to maintain at least 6 feet between all individuals, even those who are asymptomatic).” *Id.* at 4.

2 The Guidelines were issued on March 23, 2020 and are available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

\*3 Social distancing has effectively been mandated by most state governments as a critical strategy in combatting the pandemic. Here in Illinois, the state has been under a statewide stay-at-home order first imposed by Governor J.B. Pritzker effective March 20, 2020, the goal of which is to limit person-to-person contacts to curb transmission of the virus. Activities not deemed “essential” have been shut down. People have been strongly urged, and in many situations directed (by governments, employers, commercial establishments, and so on) to maintain space between themselves and others. In addition, the wearing of PPE, primarily facemasks, has been strongly advised and now required in some situations, particularly when people may come into contact with others.

The effect of the stay-at-home orders imposed in Illinois and most other states, along with advice by national officials to limit contacts and group activities, has been dramatic: schools have been closed; commercial establishments and workplaces have ceased operations, resulting in massive job losses; public events have largely been cancelled; and access to public spaces has been limited or barred entirely. Entire sectors of the national economy have slowed to a snail's pace. Society has paid a very high price to curb the spread of this highly contagious virus.

## B. Operation of the Cook County Jail

The Sheriff runs the Cook County Jail. As the Court stated in its written decision on the plaintiffs' motion for a temporary restraining order (TRO), the Jail is “a very large physical facility—actually a campus of separate physical facilities—whose population, if one considers including both detainees and staff, is the size of a small (but not all that small) town.” *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*1. Managing the Jail is extraordinarily challenging because of the size of its population and physical facilities, the diverse needs of the detainees, the Sheriff's public safety obligations, and his obligations to the criminal justice system. The Sheriff's public safety obligations require him to consider the appropriate custodial conditions for each detained person. As the Court has noted, the Jail's population “runs the gamut from persons with lengthy criminal records who are accused of committing violent crimes to non-violent offenders in custody for the first time who, perhaps, remain in custody only because they and their families were unable to post bond money.” *Id.* And the Sheriff's obligations to the people in his custody, most of whom are detained awaiting trial on crimes for which they are therefore entitled to a presumption of innocence, require him to provide care sufficient to account for each individual's physical and



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

mental health conditions. This is no small task, particularly given that populations in custody are statistically more likely to have adverse health conditions, both physical and mental.

Adding an infectious disease outbreak to these conditions further complicates the difficult challenge of managing the Jail. The very nature of the Jail's setup and day-to-day operations facilitates rapid transmission of communicable diseases like the one caused by the coronavirus. First, the Jail's physical facilities are designed to accommodate large populations, all densely housed, and many in congregate settings. In particular, the Jail has many so-called “dormitory” units, which in normal times may house as many as hundreds of detained persons in a single room with closely-spaced bunk beds.

Second, the Jail is a closed environment with many spaces used in common. Persons detained there—even those housed in single-occupancy cells—do not have individual bathing facilities; toilets are typically used in common; they eat in groups under normal circumstances; and they come into contact with each other and with correctional officers in other common areas. And even when confined, detainees are in close proximity, in adjoining cells and in tiers that use a common ventilation system.

\*4 Third, the routine operations of the Jail require high levels of movement of people. Detained persons must be escorted from their cells to common areas like shower and bathroom facilities. In normal times they are escorted to court hearings and recreational areas (all or nearly all of which have come to a stop). Finally, large numbers of staff personnel, as well as vendors, move in and out of the Jail and its various areas on a daily basis. In doing so, these individuals have contact with other members of the community at large, who themselves may have contracted coronavirus. Thus staff members and contractors potentially can carry the virus both into and out of the Jail.

Limiting exposure to the coronavirus in the Jail is therefore a significant challenge. Infection rate data reflects that it has been challenging to effectively curb transmission of the highly infectious coronavirus in the setting of the Jail. As of April 6, 2020, the infection rate within the Jail was an order of magnitude higher than the rate of infection in Cook County. *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*8. And on April 8, 2020, the New York Times reported that, at that time, the Jail was the largest-known source of [coronavirus infections](#) in the United States. See Timothy Williams and Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars* (April 8, 2020), N.Y. Times, <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html> (last updated April 23, 2020).



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

## Procedural History

### A. Plaintiffs' suit and motion for a temporary restraining order

The plaintiffs, Anthony Mays and Kenneth Foster, are detained at the Cook County Jail and have been housed on tiers in which at least one person had been infected with the coronavirus. On April 3, 2020, they sued the Sheriff on behalf of themselves and others similarly situated, with allegations stemming from the risks the coronavirus poses to their health. The plaintiffs seek to represent a class and two putative subclasses. The class consists of “all people who are currently or who will in the future be housed in the Cook County Jail for the duration of the COVID-19 pandemic.” Compl. (dkt. no. 1) ¶ 60. “Subclass A consists of all people who, because of age or previous medical conditions, are at particularly grave risk of harm from COVID-19.” *Id.* ¶ 61. “Subclass B consists of all people who are currently housed on a tier where someone already tested positive for the coronavirus.” *Id.* ¶ 62. Mays and Foster both have medical conditions that heighten their risk of serious health consequences from an infection by the coronavirus.

In their complaint, the plaintiffs alleged that because the Sheriff was not implementing measures to control the spread of the coronavirus at the Jail, especially those recommended in the CDC Guidelines, the conditions in the Jail facilitated rapid transmission, putting the health of detained persons at great risk. In support of this contention, the plaintiffs attached several affidavits to their complaint from individuals who had spoken to persons detained at the jail. These affidavits reported the following conditions at the Jail in late March and early April:

- detained persons were not receiving soap, hand sanitizer, or facemasks;
- facemasks that they made for themselves out of cloth were being confiscated;
- detainees were being housed in bunks or beds that were between two and four feet apart from each other;
- many detained persons were living in dormitory-style housing, where dozens of individuals shared a single room;
- detained persons were being held at intake in so-called bullpens, where numerous detainees were held together for extended periods in a crowded cell; and
- \*5 • the Jail's staff was not regularly sanitizing common surfaces or providing detainees with cleaning supplies to do this themselves.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

The day they filed suit, the plaintiffs moved for the issuance of writs of habeas corpus for the members of subclass A and for a TRO or preliminary injunction on behalf of the class as a whole, requiring the Sheriff to take action to control the rapid spread of the coronavirus at the Jail. The plaintiffs also moved to certify their proposed class and subclasses.

After an extended hearing on the motion for a temporary restraining order, the Court issued a written decision on April 9, 2020 denying the request for writs of habeas corpus and partially, but not entirely, granting the motion for a TRO. *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*6, 14–16. In ruling on this motion, the Court considered the affidavits from medical experts, individuals who had spoken to detainees, and those from Jail officials and employees. The Sheriff had raised a hearsay objection to the Court's consideration of the affidavits from individuals who had spoken to detainees, but hearsay may be considered in ruling on a motion for a TRO or for a preliminary injunction. See *SEC v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991).<sup>3</sup> The TRO directed the Sheriff to take the following actions: (1) establish and implement a policy requiring prompt testing of symptomatic detainees, and—if medically appropriate and feasible based on the availability of testing materials—detainees who may have been exposed to the virus; (2) implement social distancing during intake and suspend the use of bullpens to hold detained persons awaiting intake; (3) provide all detained persons with adequate soap or sanitizer for hand hygiene; (4) provide staff personnel and detained persons with adequate cleaning supplies to regularly sanitize surfaces and objects, including in high-traffic areas such as shower facilities; (5) establish a policy requiring frequent sanitation of these areas; and (6) provide facemasks to all detained persons in quarantine. *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*14–15.

<sup>3</sup> “Given its temporary nature, ‘a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.’” *FTC v. Lifewatch Inc.*, 176 F. Supp. 3d 757, 761 (N.D. Ill. 2016) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)). The same, of course, is true of a TRO.

The Court denied several of the plaintiffs' requests for relief. They sought an order mandating social distancing throughout the facility, not just at intake, arguing that this was one of the critical outbreak control measures outlined in the CDC Guidelines. *Id.* at —, at \*10. The Court declined to mandate social distancing beyond intake, reasoning that there are space constraints at the Jail and the Guidelines expressly recognized that social distancing may not be feasible in a correctional facility. *Id.* The Court also declined the plaintiffs' request for direct screening of medically vulnerable detainees before they show symptoms of infection, also because the CDC Guidelines did not mandate this. *Id.* In addition, the Court denied the plaintiffs' request to require the Sheriff issue facemasks to every detained person, as the CDC Guidelines recommended this

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

only for those who had come into contact with a symptomatic individual. *Id.* at —, at \*12, 15. Finally, the Court declined the plaintiffs' request to transfer the members of subclass B to a safe facility or other forms of custody, because the plaintiffs had failed to show that the other protective measures that the Court had ordered would be inadequate to protect detained persons from the health risks associated with the coronavirus outbreak. *Id.* at —, at \*15. The Court also declined subclass A's request for emergency writs of habeas corpus, concluding that they had failed to exhaust available state court remedies. *Id.* at —, at \*6.

## **B. The Sheriff's response and current conditions at the Jail**

### **1. April 13 status report**

\*6 On April 13, pursuant to the Court's direction, the Sheriff filed a status report regarding compliance with the TRO. First, with respect to the directive to test symptomatic detainees, the Sheriff reported that Cermak Health Services, an arm of Cook County that provides healthcare to persons detained at the Jail, maintains the supplies for medical testing and actually administers such tests.<sup>4</sup> According to the Sheriff, Cermak had determined that it would not be medically appropriate to test all detained persons in quarantine. The Sheriff therefore instructed his personnel to isolate and refer symptomatic detainees to Cermak for further evaluation and testing.

<sup>4</sup> From a chain-of-command standpoint, Cermak is under the control of Cook County, not the Sheriff.

As to the order to maintain social distancing during the Jail's intake process, the Sheriff implemented a modified procedure that maintains six feet of distance between all detained persons awaiting intake and provides them with facemasks. Use of the bullpens was discontinued.

Regarding the order to distribute facemasks, the Sheriff stated that he had acquired and on hand sufficient surgical masks to distribute to all quarantined detainees and employees and that he was continuing his efforts to obtain additional masks. Additionally, the Sheriff was in the process of procuring cloth masks that would be available to any detained person who requested one.

The Sheriff further reported that on April 9, he delivered approximately 28 gallons of hand sanitizer and 980 bars of soap for distribution in the Jail. He also ordered distribution of soap and sanitizer twice per week going forward. The Sheriff noted concern that some detained persons may use the soap or hand sanitizer as a weapon and that some might try to consume hand sanitizer. These considerations required the Sheriff to determine on a detainee-by-detainee basis whether to distribute hand sanitizer or soap.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

With respect to the sanitation-related directives in the TRO, the Sheriff reported that he had distributed cleaning supplies to staff and detained persons on April 10. He also issued a sanitation policy to ensure that frequently touched areas such as doorknobs and phones are sanitized between uses. He issued another a policy requiring each living unit officer to ensure that surfaces are routinely cleaned and sanitized during the officer's shift. Additionally, the Sheriff stated that he was planning to hire an independent contractor to professionally clean the Jail.

## **2. April 17 updates from the Sheriff**

On April 17, three days after the Sheriff submitted his status report, officials from the Chicago Department of Public Health (CDPH), including one designated as a CDC epidemic intelligence service officer, inspected the Jail. These officials had toured the Jail roughly a month prior, on March 20, and issued recommendations for controlling COVID-19 at the Jail. A report from this inspection, dated March 27, was introduced in connection with the preliminary injunction hearing held on April 23. The March 27 recommendations from the CDPH included screening and classifying inmates based on their level of risk associated with coronavirus disease and “considering mass release of inmates to decompress the jail for urgent public health reasons.” Levin Dec. (dkt. no. 70) at 10.

A report from the more recent April 17 had not yet been received by the Sheriff as of the April 23 hearing. The Sheriff therefore submitted statements and testimony from two Jail officials who participated in the April site visit: Rebecca Levin, a senior public health advisor to the Sheriff, and Michael Miller, the Executive Director of the Cook County Department of Corrections. Levin stated that during the April 17 inspection, the officials commended the Jail's efforts to reduce density in housing units. Miller testified that the officials visited two of the dormitory units—Dorm 4, the largest dormitory unit, and Dorm 2—and commented positively about the organization and cleanliness of these spaces.

\*7 In a declaration dated April 17, Miller also provided an update to the Sheriff's April 14 status report on efforts to control the coronavirus outbreak at the Jail. He reported that each person detained in a quarantine tier was receiving a new surgical-type facemask each day. Miller anticipated that at its current rate of consumption of masks, the Sheriff would exhaust his supplies on June 7, 2020. He added that, “as supplies permit,” the Sheriff planned to distribute masks to detainees who are not on quarantine tiers. Miller Dec., Def.'s Resp. to Renewed Mot. for Prelim. Inj., Ex. E (dkt. no. 62-5) ¶ 24.

Although the TRO did not require the Sheriff to implement social distancing beyond modifying his intake procedures, Miller reported in his April 17 affidavit that the Sheriff had engaged in a

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

significant effort to increase social distancing at the Jail. Specifically, he reported the following measures: opening previously closed divisions to better distribute detainees across available space; converting housing on 175 tiers to single-occupancy cells only; limiting dormitory units to fifty percent of capacity, with the exception of detainees in medical or “restricted housing,” *id.* ¶ 12; and limiting the number of detained persons released into dayroom common areas to half the number assigned to that area. He reported that beds in dormitory units have been spaced so that they are at least six feet apart, and if beds are bolted to the floor, then detained persons are distributed so that there is six feet of distance between occupied beds.

Attached to Miller's declaration was a spreadsheet with the occupancy rates as of April 17 on each tier of the Jail, including units in Cermak and Division 8, the Residential Treatment Unit (RTU). Miller later explained that the RTU provides twenty-four-hour access to medical care and houses people who have medical needs (though the level of need was not described). This spreadsheet showed, apparently contrary to the statement in Miller's declaration, that some dormitory units were still occupied above fifty percent capacity. For example, Tier D of Dorm 1 in Division 2, which was not then under quarantine, was occupied at eighty-one percent capacity. In addition, many dormitory units in the RTU, Division 8, were occupied at nearly full capacity. For example, Tier 2F was occupied at ninety-seven percent capacity, and Tier 2G was occupied at one hundred percent capacity. (Also, Tiers 2Q and 2R in Division 6 were occupied at sixty percent and sixty-three percent capacity, respectively. They are not labeled as dormitory units in the spreadsheet, but they each have a forty-person capacity.)

The Sheriff submitted additional evidence reflecting that his ability to implement social distancing had increased by virtue of, among other things, a significant expansion of the electronic home monitoring program. He offered a chart showing a steady decline in the Jail's daily population over the previous month, including a reduction of roughly 230 detainees between April 9, when the Court issued the TRO, and April 17. Another chart showed a steady increase in the jail's electronic home monitoring population over the previous month, with an increase of approximately 300 detainees on electronic home monitoring between April 9 and April 17. The Sheriff also offered evidence, however, that utilization of this program had been extended to its outside limits, or nearly so, in light of the apparent exhaustion of program vendor's supply of monitoring equipment.

### **3. Plaintiffs' reports regarding conditions at the Jail**

In anticipation of the preliminary injunction hearing, the plaintiffs submitted a number of affidavits identifying problems or deficiencies in the Sheriff's compliance with the directives in the TRO. These affidavits were from individuals who had spoken to detained persons between April 14 and April 18, and they described these persons' current experiences at the Jail. According to these



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

affidavits, symptomatic individuals are not being tested. Additionally, although facemasks are now being distributed, detainees reported, it is not happening regularly.

\*8 The detained persons discussed in the affidavits also reported inadequacies in cleaning and sanitation practices at the Jail. Several stated that detained persons lack cleaning supplies for their individual cells and that some common spaces lack cleaning supplies as well. And even where cleaning solution is available, they reported, cloths or wipes have not been provided to enable use of the solution. A number of detainees also reported that commonly used objects, such as telephones, are not being sanitized between uses. In addition, they stated, the Jail's staff has not been cleaning cells, and some common areas are cleaned only every other day, meaning they stand uncleaned despite multiple uses and repeated touching by numerous detained persons and potentially staff personnel.

The detainees also reported an inability or great difficulty in practicing social distancing. In common areas where detained persons eat, several stated, it has been impossible to practice social distancing due to the arrangement of picnic-style benches. Tape or paint markings have been placed on the floor in some dayrooms to designate appropriate space for social distancing, but, they reported, some correctional officers have mocked the practice of social distancing, and many have failed to enforce it. By way of example, detained persons have been using, at the same time, telephones that are spaced only two feet apart.

### C. The renewed preliminary injunction motion

In their renewed motion for a preliminary injunction, filed on April 14, 2020, the plaintiffs contend that the Sheriff's efforts in response to the TRO "have not worked and cannot work to abate the spread of the disease" caused by the coronavirus. Pls.' Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 4. The plaintiffs focus primarily on two inadequacies of the Sheriff's efforts to date: failure to identify and transfer medically vulnerable detainees out of the Jail, and insufficient social distancing, which, the plaintiffs contend, "is the *only* way to prevent intolerable risk to [their] health and lives." *Id.* at 2.

The plaintiffs request the following in their renewed motion for a preliminary injunction. First, they ask for a preliminary injunction ordering the Sheriff to mandate social distancing throughout the Jail. In support of this request, the plaintiffs have submitted the declaration of Dr. Gregg Gonsalves, an epidemiologist at the Yale School of Medicine and School of Public Health, who opined that social distancing is "the only way to prevent further, essentially uncontrolled, spread of the virus" in the Jail. *Id.*, Ex. G (dkt. no. 55-7) ¶ 29. In the alternative, the plaintiffs argue that if the Court concludes that additional social distancing is not possible, an order should be entered requiring the

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

Sheriff to transfer detained persons to another safe facility, or the Court should request convening a three-judge panel with the authority to order the release of detainees, as required under the Prison Litigation Reform Act. *See* 18 U.S.C. § 3626(a)(3)(B). In addition, subclass A has renewed its request for issuance of emergency writs of habeas corpus.<sup>5</sup>

<sup>5</sup> The plaintiffs also sought expedited discovery, but that largely became a moot point in light of later developments, so the Court does not discuss the request here.

In response, the Sheriff argues that he has sufficiently addressed the risks to the health of persons in his custody, in accordance with constitutional requirements, through the protective measures he has already implemented; his efforts were consistent with the recommendations in the CDC Guidelines; and he has taken substantial steps to implement social distancing. The Sheriff also appears to contend that further implementation of social distancing was not realistically possible in the Jail at this time. In response to the plaintiff's contention that the Sheriff has not adequately abated the risk of infection to medically vulnerable detainees, he argues that he cannot screen such individuals, because he does not have access to detained persons' health information. Furthermore, the Sheriff has explained, he already refers all medical complaints and issues to Cermak, and nothing more on his part is required to satisfy the requirements of the Fourteenth Amendment.

\*9 In their reply brief, the plaintiffs acknowledge that the Sheriff has taken “dramatic steps” to increase social distancing in the Jail. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 6. They contend, however, that these efforts have been insufficient to remedy the constitutional violation. They reaffirm their request to immediately convene a three-judge court to determine whether to release detained persons. They also reaffirm their request for a preliminary injunction mandating social distancing throughout the Jail as well as transfer of detained persons to “some other safe location,” *id.* at 2, and they ask the Court to issue such an order contemporaneously with a request to convene a three-judge panel. Additionally, the plaintiffs ask the Court to convert the TRO to a preliminary injunction.

### **1. Hearing on motion for preliminary injunction**

The Court held an evidentiary hearing on the preliminary injunction motion by videoconference on April 23, 2020. In light of the unusually compressed time schedule necessitated by the development of the coronavirus pandemic and increases in confirmed [coronavirus infections](#) at the Jail, the Court determined that it would consider the parties' affidavits (giving due consideration to issues regarding weight) and would permit each side to call one live witness. Executive Director Miller testified as the Sheriff's witness; he offered, among other things, updates to his April 17 affidavit regarding the Sheriff's efforts to manage the coronavirus outbreak.



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

With respect to screening medically vulnerable detainees, Miller testified that the Jail was doing what it could based on the limited medical information that it has available. Miller explained that Cermak conducts a medical evaluation of every detained person at intake, and based on this, it transmits information called “alerts” to the Jail to inform housing decisions based on medical needs. These alerts do not contain any diagnostic information; rather, they simply specify the accommodations necessary to address a medical need. For example, an alert from Cermak may inform the Jail that a detained person should be housed on a bottom bunk, but it will not state the medical reason for this determination. Miller testified that Cermak has not “yet” created an alert for those who have heightened risk of severe health consequences from a [coronavirus infection](#). Without such an alert, Miller explained that the Jail is conducting coronavirus screening based on any medical information about a detained person that it already has, including existing alerts.

Miller also reported that the Jail had made additional efforts to implement social distancing. To encourage persons housed in dormitory units to stay at their beds rather than congregating in common spaces, the Jail has been providing them with free books, writing pads, and puzzle books. In addition, Miller stated, detainees throughout the Jail are now released to use shared shower facilities one at a time. In common areas, six-foot intervals have been demarcated with spray paint markings. Correctional officers, Miller said, have been trained to enforce social distancing by first communicating to detained persons the importance of maintaining the distance, and if that fails, using disincentives such as loss of microwave privileges. Miller acknowledged that despite this, detainees have not always been practicing social distancing and that they continue to congregate in common spaces such as eating areas.

Miller reported that the Jail's staff has worked diligently to increase the Jail's ability to reduce the density of the population in its housing units. Over the past month, he stated, the Jail has opened up several hundred additional housing units. Between April 17 and April 23, the Jail doubled the number of detainees housed in single-occupancy cells, and this effort included moving 260 detainees out of double-occupancy cells. Miller stated that there are currently no detainees housed in double-occupancy cells without a medical or security reason. Most of those who are still in double-occupancy cells, he said, are either housed by Cermak or are designated by Cermak as requiring placement in a double-occupancy cell due to a health condition or possible suicide risk. Miller did not explain why a health condition might require placement in a double-occupancy cell. Some of those in double-occupancy cells have been placed there, he said, due to disorderly conduct—though, again, he did not explain how double-celling serves a security purpose in such situations. Miller acknowledged on cross examination that social distancing is impossible for persons housed in double-occupancy cells.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

\*10 Miller also reported that roughly 1,000 detainees are still being housed in dormitory units. He stated that approximately seventy percent of that population must remain in those units due to a medical need, though he did not explain this. As for the remainder, Miller cited one possible non-medical reason that some detainees must remain in dorm units: they are housed there in accordance with requirements of the Prison Rape Elimination Act. He explained that it would be “very challenging to try to separate those individuals and keep them protected as we need to under the PREA Act so that those individuals are not vulnerable in other areas while they're incarcerated.” April 23, 2020 Tr. at 46–47. Again, however, Miller did not explain this.

Miller supplemented his testimony with an updated spreadsheet showing the occupancy of the Jail's housing units as of April 23. This spreadsheet showed that the capacity of almost every tier that was not in Cermak, the RTU, or under quarantine was fifty percent or below. However, in Division 2, Tier D1-D was at eighty-one percent capacity, and Tier D4-R was at fifty-nine percent (Tier D3-B was right at fifty percent). A number of Cermak and RTU tiers had occupancy rates as high as ninety-seven or one hundred percent.

On cross examination, the plaintiffs' counsel asked Miller about the high occupancy levels in certain Cermak and RTU tiers reported in the April 17 and April 22 spreadsheets. Miller explained that Cermak needed to house those individuals together to be able to provide them with access to care at all hours of the day or night. Miller acknowledged that social distancing was not possible for those housed in the Cermak and RTU tiers.

Plaintiffs' counsel also asked Miller about a high occupancy rate listed in the April 17 spreadsheet for a tier (referenced above) that was not in Cermak, the RTU, or under quarantine: Tier D of Dorm 1 in Division 2, which was then at eighty-one percent capacity. The April 22 spreadsheet showed that the dorm was still at the same capacity. Miller stated: “There's another security level and/or issue with having this many people on this tier that we've had to abide by.” *Id.* at 31. He did not clarify the nature of the security issue. Miller acknowledged that social distancing was not possible for detainees on that tier.

When the Court asked Miller if there was still room at the Jail to move more detainees out of dorms and into cells, Miller responded, “I do have a plan in my back pocket.” *Id.* at 57. He explained that he was working on moving people out of Dorms 1, 2, and 3. He added that the Jail is considering reconfiguring housing arrangements on tiers for detainees who are women to see if there is a way to create more capacity, presumably to disperse the much larger population of detainees who are men.

As for cleaning and sanitation of common areas, Miller reported that detainees have been given the supplies they need to do sanitation; he attributed shortfalls in sanitation to their own behavior. For

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

example, he stated, at each microwave stations and shared showers and toilets, detained persons have been provided cleaning solution so that they can sanitize the facility prior to use.

Finally, Miller stated, to ensure implementation of its response measures, such as sanitation of common areas or use of PPE, the Sheriff has deployed “audit teams” that oversee these efforts. For example, the Jail has a PPE audit team that patrols PPE use and educates staff members and detained persons who are not using PPE properly.

Plaintiffs called as their hearing witness Dr. Homer Venters, a medical doctor with over a decade of experience in correctional health. Dr. Venters is the former Deputy Medical Director of the New York City Jail Correctional Health Service, a position in which he oversaw care of detainees and medical policies governing care in New York City's twelve jails. He had previously submitted a declaration along with plaintiffs' preliminary injunction reply brief. At the hearing, he testified that, in his view, the Jail's coronavirus response efforts have three key deficiencies: (1) lack of a cohesive coronavirus response plan; (2) failure to screen for individuals at higher risk of experiencing severe health consequences from a [coronavirus infection](#); and (3) insufficient social distancing.

**\*11** First, Dr. Venters explained that having a cohesive plan, rather than a collection of policy documents that address different aspects of emergency response, is a critical first step to addressing an outbreak of a communicable disease in a jail facility. He stated that because jails are such complex systems, employing and housing several thousand people, it is not possible to respond to a large outbreak without a single, coordinate plan that coordinates response measures implemented by security, health, and administrative staff.

Second, Dr. Venters testified that screening medically vulnerable individuals is critical so that they can immediately receive heightened surveillance of possible symptoms of a [coronavirus infection](#). This heightened surveillance would entail daily checks on those individuals for symptoms such as elevated temperature, shortness of breath, and fatigue.

Third, Dr. Venters emphasized the importance of social distancing in combatting the spread of coronavirus. In his declaration, Dr. Venters stated that medical literature on the coronavirus confirms that social distancing is an essential strategy in controlling an outbreak. During the hearing, he explained that because the coronavirus spreads so easily through respiratory droplets emitted from an infected person, transmission “is greatly impeded by physical distance that we establish through social distancing.” *Id.* at 67.

During his testimony, Dr. Venters emphasized that practicing social distancing only in some specific areas of a congregate setting like the Jail is insufficient to curb virus transmission rates.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

Because people are densely packed in many contexts during routine operations of a detention facility—e.g., sleeping areas, dayrooms, shower facilities, and areas where medication is dispensed—it is critical to implement social distancing throughout the entire facility. Dr. Venters explained that a “lack of a full commitment or complete commitment to social distancing” in the Jail would promote faster transmission of the coronavirus, and more detainees and staff would become “seriously ill.” *Id.* at 74. In his declaration, Dr. Venters had observed that the concern about severe health effects is heightened when considering detainees, because they are statistically more likely than the general public to have pre-existing health problems such as [cardiovascular disease](#) and [cancer](#).

Dr. Venters also discussed the importance of communication with detainees and staff as a means to ensure that they practice social distancing in an appropriate way. Specifically, he said, to ensure widespread observance of this practice, individuals must understand what social distancing means and why it is important.

On cross examination, Dr. Venters acknowledged that outbreak management in a correctional setting imposes “unique challenges,” *id.* at 79, and that the CDC Guidelines are “now the most important set of principles” on response, *id.* at 81. He also acknowledged that the CDC Guidelines provide that social distancing might not always be feasible in a correctional setting.

Dr. Venters testified that although use of single-occupancy cells facilitates social distancing, doing so poses a risk of increasing detainees' psychological distress from social isolation. He also testified that the Jail's practice of housing detainees with mental health conditions in double-occupancy cells is inappropriate, because they cannot practice social distancing at all. Though these two concerns point in opposite directions, Dr. Venters reconciled them by clarifying that, in the current pandemic environment, housing detainees in single-occupancy cells is preferable to double-occupancy because social distancing is critical. To address the psychological toll of isolation in single-occupancy cells, Dr. Venters testified, the Jail should provide opportunities for detained persons to come out of their cells and benefit from engagement with others in common areas while practicing social distancing.

**\*12** Dr. Venters's testimony largely buttressed the points made by several other medical doctors and epidemiologists in affidavits and declarations that the plaintiffs had attached to their complaint and briefing of this motion. The plaintiffs' medical, public health, and correctional health experts have analogized the conditions in the Jail to those on cruise ships, which have experienced some of the largest concentrated outbreaks of the coronavirus. Specifically, these experts observe, a jail, like a cruise ship, is an environmentally enclosed, congregate-living setting with high levels of movement of people. Mohareb Dec., Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj., Ex. B

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

(dkt. no. 64-3) at 5; Gonsalves Dec., Pls.' Renewed Mot. for Prelim. Inj., Ex. G (dkt. no. 55-7) ¶¶ 17, 27; Med. Profs.' Dec., Compl., Ex. B (dkt. no. 1-2) ¶¶ 24, 25, 26.

In particular, Dr. Amir Mohareb, a medical doctor who is a biothreat response expert and an instructor at Harvard Medical School, used the example of the Diamond Princess cruise ship to highlight the importance of social distancing. The Diamond Princess sailed from Japan to Hong Kong in January of this year. After one of its passengers tested positive for the coronavirus in the last week of January, “strict precautions of hand hygiene and cabin isolation were implemented for all crew and passengers.” Mohareb Dec. (dkt. no. 64-3) at 5. Despite these efforts, 700 of the people who had been on the ship tested positive for the virus over the course of the following month. This example, Dr. Mohareb, said, reflects that in the context of a congregate living arrangement like a cruise ship, hand hygiene and cabin cell isolation are insufficient to control the transmission of the coronavirus. He stated that a jail, which is similarly a congregate environment, “constitutes an equal or greater risk setting to that of a cruise ship.” *Id.*

Dr. Mohareb explained that because respiratory droplets emitted by an infected person can travel up to six feet and be inhaled by another, social distancing is “a necessary intervention to prevent the spread of [infection](#)” from the coronavirus. *Id.* at 3, 6. He emphasized that social distancing is particularly important because an infected person may be mildly symptomatic or not symptomatic at all. Dr. Mohareb also noted that numerous authoritative bodies, including the CDC, the World Health Organization, and the Infectious Diseases Society of America, have recommended social distancing to control the transmission of coronavirus. He added that mathematical modeling supports a conclusion that social distancing is “the primary means by which individuals can be safely protected from the threat of COVID-19.” *Id.* at 5.

All of the plaintiffs' expert affidavits emphasized the critical need to implement social distancing in order to meaningfully control the spread of the virus. Gonsalves Dec. ¶ 29 (social distancing is the “only way” to control outbreak); *see also* Rasmussen-Torvik Dec., Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj., Ex. C (dkt. no. 64-4) ¶ 9. They reiterated Dr. Venters's point that the very design of a correctional facilities promotes transmission of the coronavirus because it densely packs large groups of people together. Dr. Gonsalves stated that although correctional facilities are like cruise ships in that they are enclosed environments, they present an even higher risk of rapid transmission of the coronavirus because of “conditions of crowding, the proportion of vulnerable people detained, and often scant medical care resources.” Gonsalves Dec. ¶ 17. In a joint declaration, five medical doctors with experience working in a correctional setting—including three doctors who had worked at the Jail—similarly observed that the “crowded congregate housing arrangements” of jails and prisons promote the transmission of respiratory illnesses like the coronavirus disease. Med. Profs.' Dec. (dkt. no. 1-2) ¶ 24



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

\*13 Beyond providing additional support for the points in Dr. Venters's testimony, the plaintiffs' other medical and public health experts added that the risks of severe health consequences from a [coronavirus infection](#) are not limited only to those who have preexisting medical conditions or are over the age of sixty-five. According to Dr. Gonsalves, "young and healthy individuals may be more susceptible than originally thought." Gonsalves Dec. ¶ 5. He reported that in March, the CDC reported that one-fifth of infected people between the ages of twenty to forty-four had been hospitalized. Dr. Mohareb also stated that "a fraction of patients with COVID-19 in all groups go on to develop severe respiratory disease." Mohareb Dec. at 1.

At the conclusion of the April 23 preliminary injunction hearing, the Court extended the TRO, which was set to expire that day, pending its ruling on the motion for a preliminary injunction.

### Discussion

"A preliminary injunction is an extraordinary remedy." [Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.](#), 858 F.3d 1034, 1044 (7th Cir. 2017). A court's determination of whether to issue a preliminary injunction or temporary restraining order involves a two-step inquiry, with a threshold phase and a balancing phase. [Id.](#) First, the party seeking the preliminary injunction has to make a threshold showing, which has three elements: (1) reasonable likelihood of success on the merits of the claim; (2) irreparable harm to the movant absent preliminary injunctive relief; (3) lack of adequate remedies at law. [Id.](#) If the movant makes the threshold showing, the court proceeds to the balancing step, in which it determines "whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." [Id.](#)

Because they request relief that changes the status quo or requires the Sheriff to take affirmative action, the plaintiffs are requesting what is sometimes referred to as "mandatory" preliminary injunctive relief. See [Graham v. Med. Mut. of Ohio](#), 130 F.3d 293, 295 (7th Cir. 1997); [O'Malley v. Chrysler Corp.](#), 160 F.2d 35, 37 (7th Cir. 1947); cf. [Schrier v. Univ. Of Co.](#), 427 F.3d 1253, 1260 (10th Cir. 2005) ("[D]etermining whether an injunction is mandatory as opposed to prohibitory can be vexing."). Mandatory preliminary injunctions typically are "cautiously viewed and sparingly issued." [Graham](#), 130 F.3d at 295 (quoting [Jordan v. Wolke](#), 593 F.2d 772, 774 (7th Cir. 1978)); see also [Knox v. Shearing](#), 637 F. App'x 226, 228 (7th Cir. 2016). But "there may be situations justifying a mandatory temporary injunction compelling the defendant to take

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

affirmative action” based on the circumstances, *Jordan*, 593 F.2d at 774, and “the clearest [of] equitable grounds,” *W. A. Mack, Inc. v. Gen. Motors Corp.*, 260 F.2d 886, 890 (7th Cir. 1958). At least two courts have recognized the unusual nature of mandatory preliminary injunctions and yet issued them after finding violations of the rights of people in custody during the coronavirus pandemic. See *Barbecho v. Decker*, No. 20-CV-2821 (AJN), 2020 WL 1876328, at \*2, 8–9 (S.D.N.Y. Apr. 15, 2020); *Jones v. Wolf*, No. 20-CV-361, 2020 WL 1643857, at \*2, 14–15 (W.D.N.Y. Apr. 2, 2020).

In assessing each claim, the Court will address the first threshold requirement for a preliminary injunction: likelihood of success on the merits, which requires showing only a “better than negligible” chance of success. *Whitaker*, 858 F.3d at 1046 (quoting *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999)). Generally speaking, “[t]his is a low threshold,” *id.*, but the Court gives the matter greater scrutiny here in light of the fact that plaintiffs are seeking affirmative conduct by the Sheriff.

## A. Habeas corpus claim

\*14 Plaintiffs and subclass A have petitioned for a writ of habeas corpus under 28 U.S.C. § 2241. The Court first addresses the issue of exhaustion of remedies and then considers subclass A's ability to satisfy the criteria for a representative action.

### 1. Exhaustion

As the Court concluded in its TRO decision, a petition for a writ of habeas corpus under 28 U.S.C. § 2241 is the appropriate mechanism for a state pretrial detainee to challenge his or her detention. *Jackson v. Clements*, 796 F.3d 841, 843 (7th Cir. 2015). “Because a pre-trial detainee is not yet in custody pursuant to the judgment of a State court, relief under 28 U.S.C. § 2254 is not available.” *Id.* (internal quotation marks omitted).

Section 2241 has no express exhaustion requirement, but courts apply a common-law exhaustion rule. *Richmond v. Scibana*, 387 F.3d 602, 604 (7th Cir. 2004). A pretrial detainee must “exhaust all avenues of state relief” before seeking a writ of habeas corpus through a section 2241 action. See *United States v. Castor*, 937 F.2d 293, 296–97 (7th Cir. 1991). Although there are exceptions, “the hurdle is high.” *Richmond*, 387 F.3d at 604. In deciding whether an exception applies, courts “must balance the individual and institutional interests involved, taking into account ‘the nature of the claim presented and the characteristics of the particular administrative procedure



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

provided.’ ” [Gonzalez v. O'Connell](#), 355 F.3d 1010, 1016 (7th Cir. 2004) (quoting [McCarthy v. Madigan](#), 503 U.S. 140, 146, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), *superseded by statute on other grounds as recognized in* [Porter v. Nussle](#), 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)). A court may excuse exhaustion where:

(1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite timeframe for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where substantial constitutional questions are raised.

[Id.](#)

It is undisputed that a state court has the authority to release a pretrial detainee. A person who is detained in Illinois may challenge his or her detention by seeking judicial review of his or her bond.

[725 Ill. Comp. Stat. Ann. 5/110-6](#). On March 23, 2020, in response to an emergency petition filed by the Cook County Public Defender, the Presiding Judge of the Cook County Circuit Court's Criminal Division issued an order setting out an expedited bond hearing process that applied to seven designated classes of detained persons. Def.'s Resp. to Mot. for TRO, Ex. E (dkt. no. 31-1) at 1–2. The seven classes included those at an elevated risk of contracting coronavirus due to their ages or underlying medical conditions—that is, the putative members of subclass A. *Id.* The expedited hearings took place from March 24 through March 27. *Id.* at 3–5. Although the expedited hearings do not appear to be currently ongoing, Cook County's courts are still available for emergency matters, and judges are hearing motions to review or reduce bail daily at all locations where court is held. Def.'s Supp. Resp. to Mot. for TRO, Ex. A (dkt. no. 41-1) at 1.

In the TRO decision, the Court concluded that the plaintiffs—who both were named as representatives of subclass A—could not show that they exhausted available state remedies before petitioning for habeas corpus because they did not “contend that they sought expedited bond hearings or initiated any sort of state proceedings challenging their bonds.” *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*6. The Court declined to excuse exhaustion because it found that the state's existing bond reduction process is “anything but futile”; the plaintiffs did not show that the process is “unduly time-consuming in a way that undermines their claimed constitutional rights”;

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

and they did not show that state courts cannot remedy the type of constitutional violations they raise. *Id.*

\*15 After the Court issued its decision, the plaintiffs' counsel learned that Foster had sought release in the Circuit Court of Cook County through an expedited bond hearing. (The plaintiffs do not contend that Mays separately sought release in state court prior to the filing of this lawsuit.) Foster is charged with domestic battery, robbery, and unlawful restraint. Pls.' Renewed Mot. for Prelim. Inj., Ex. F (dkt. no. 55-6) at ECF p. 3 of 17. His bail was set at \$50,000, requiring him to post \$5,000 to be released, which he is unable to afford. *Id.* In his motion to reduce bond, he described his serious medical conditions and explained that they place him at a heightened risk of becoming critically ill if he contracts coronavirus. *Id.* at ECF p. 4–5 of 17. He also argued that it would violate his constitutional rights to keep him in custody during the coronavirus pandemic. *Id.* at ECF p. 13 of 17. On April 2, 2020, a state trial judge heard and denied Foster's motion. *See id.* at ECF p. 16 of 17.

The plaintiffs argue that Foster has sufficiently presented his request to the state courts and should not be required to do more. They acknowledge that he has not exhausted all avenues of state relief: he could appeal the state court's denial of his motion to reduce his bond, but plaintiffs do not contend that he done so. They argue, however, that the Court should excuse exhaustion based on the futility of an appeal or the Court's equitable authority to excuse exhaustion. They contend that an appeal would take weeks to pursue, making appellate remedies practically unavailable to him in light of the urgency of the coronavirus pandemic and causing an unreasonable delay that would force him to continue to suffer the alleged harm. In support of this contention, they offer an affidavit from Lester Finkle, the Chief of Staff to the Cook County Public Defender, who explains the procedure for interlocutory appeals of denials to modify bail. Pls.' Renewed Mot. for Prelim. Inj., Ex. C (dkt. no. 55-3). Under [Illinois Supreme Court Rule 604\(c\)](#), before a defendant can file such an appeal, he must file a verified motion in the trial court providing certain information about himself. *Id.* ¶ 2. Only after the trial court denies the verified motion can the defendant file an appeal. *Id.* The affidavit submitted by the plaintiffs reflects that this process typically takes two to four weeks. *Id.* ¶ 5. After that, if the appellate court denies the defendant's appeal, he can seek discretionary review in the Illinois Supreme Court. *Id.* ¶ 3. Based on this information, the plaintiffs argue that their state-court remedies are futile or practically unavailable and that requiring them to pursue these remedies would unfairly prejudice them.

The plaintiffs' contentions are not persuasive. Their only evidence, Finkle's affidavit, describes how long such an appeal would take under ordinary circumstances. But here we are not dealing with not ordinary circumstances. The affidavit does not adequately show how the state appellate process would be expected to work for a medically vulnerable detainee claiming that due to a

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

global pandemic that has infiltrated the Jail, he faces immediate risk of serious health consequences unless his bail is reduced. We know the state courts are capable of dealing with emergency requests of this type promptly and efficiently; Cook County trial court judges dealt quickly and efficiently with hundreds of such requests in late March, and they continue to do so now. There is no reason to believe that the Illinois Appellate Court would treat such an appeal as an ordinary, run-of-the-mill bail issue and would refuse to deal with it promptly. Although a court may excuse exhaustion in the unusual case where a state process would cause an unreasonable delay, *see, e.g.*, [Gonzalez, 355 F.3d at 1016](#), the plaintiffs have not established that this is so in the present situation.

The plaintiffs also contend that the existing bond review processes provide no effective remedy for the claims that the class members advance in this case. Specifically, they contend that the Illinois statute governing bail, [725 Ill. Comp. Stat. Ann. 5/110-5](#), does not require state courts to consider a detained person's medical health in deciding whether to set or reduce the amount of bail and that state judges making those decisions would not be expected to consider the medical risks at the Jail. But they point to no evidence that state courts are not *permitted* to consider detained persons' medical conditions, let alone that state courts reviewing bonds are not actively considering detained persons' medical conditions in light of the coronavirus pandemic. To the contrary, the evidence in the record suggests that state courts *are* considering the medical dangers the coronavirus presents to detained persons. As the Court indicated in its TRO decision, between early March and early April 2020, the Jail's population decreased by over 1,175 detainees, [Mays, — F.Supp.3d at —, 2020 WL 1812381, at \\*6](#); since then, the population has decreased by at least 300 more detainees, *see* Def.'s Resp. to Renewed Mot. for Prelim. Inj., Ex. A (dkt. no. 62-1) at 1. An affidavit submitted by the plaintiffs reflects that this reduction in the Jail's population has occurred, at least in part, because state court judges have granted bond reductions. *See* Pls.' Renewed Mot. for Prelim. Inj., Ex. B (dkt. no. 55-2) ¶ 3 (state courts released 719 detainees through an expedited process for bond reconsiderations in light of the coronavirus pandemic). In short, the contention that state courts cannot or will not consider detained persons' medical conditions in bond review proceedings is unsupported. Accordingly, the Court concludes that the plaintiffs have not shown that the state courts do not provide an effective remedy for detained persons with medical conditions that place them at a high risk of severe illness or death if they contract coronavirus.

**\*16** The plaintiffs also appear to argue that the state courts cannot provide an adequate remedy because, they contend, unlike the federal habeas claims in this case, state courts can consider factors other than medical need. That contention is based on an erroneous premise, which the Court will discuss momentarily, that a district court addressing a habeas corpus petition challenging jail conditions under [section 2241](#) cannot or would not consider other factors such as whether a detainee poses a threat to public safety. The bottom line is that the plaintiffs have not shown that the bond reduction remedy offered by the state courts is any less effective than a federal remedy.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

For these reasons, the Court concludes—as it did in its TRO decision—that the plaintiffs have no likelihood of success on the habeas corpus claim advanced by them on behalf the representatives of subclass A due to their failure to exhaust available state court remedies.

## 2. Representative action

Even if the plaintiffs could establish some likelihood of success on their contention that the failure to exhaust state remedies should be excused, they would be unable to satisfy the criteria for a representative action. Although the Court need not actually certify a representative action at this point, before issuing a preliminary injunction it would need to find that the requirements for such an action conditionally would be met. *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*3 (collecting cases). Because the plaintiffs cannot satisfy those requirements, the representative class has no likelihood of success on the merits.

In the Seventh Circuit, the Federal Rule of Civil Procedure that governs class actions, Rule 23, does not apply to habeas corpus proceedings. *Bijeol v. Benson*, 513 F.2d 965, 967–68 (7th Cir. 1975); cf. *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010). But representative actions—which are analogous to class actions—on rare occasions can be brought in habeas corpus proceedings. *Bijeol*, 513 F.2d at 967–68; see also *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 220–21 (7th Cir. 1976); *Kazarov v. Achim*, No. 02 C 5097, 2003 WL 22956006, at \*8 (N.D. Ill. Dec. 12, 2003); *United States ex rel. Green v. Peters*, 153 F.R.D. 615, 619 (N.D. Ill. 1994); *Faheem-El v. Klincar*, 600 F. Supp. 1029, 1033 (N.D. Ill. 1984). The Seventh Circuit has not “set down a strict formula which must be mechanically followed” before people in custody can bring a representative habeas corpus action. *Morgan*, 546 F.2d at 221. Instead, it has suggested that courts can look to the provisions of Rule 23 in determining whether a representative action is appropriate, though courts need not “precisely” comply with Rule 23. *Id.* n.5. The Court thus finds that Rule 23 is instructive in analyzing whether plaintiffs can bring a representative action. The parties seem to agree; they discuss the issue within the framework of Rule 23.

To bring a class action, and by analogy a representative action, a plaintiff must show that the proposed class meets the four requirements of Rule 23(a): “numerosity, commonality, typicality, and adequate representation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). In addition, “the proposed class must satisfy at least one of the three requirements listed in Rule 23(b).” *Id.* at 345, 131 S.Ct. 2541. The plaintiffs here rely on, or analogize to, Rule 23(b)(2), which applies when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” *Fed. R. Civ. P. 23(b)(2)*.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

The parties dispute whether subclass A satisfies each requirement of [Rule 23](#), as applied to representative actions, apart from numerosity. The Court discusses each disputed requirement in turn.

### a. Commonality

\*17 To establish that they are likely to satisfy the commonality requirement, the plaintiffs must show that there likely “are questions of law or fact common to” the members of subclass A. [Fed. R. Civ. P. 23\(a\)\(2\)](#). “That language is easy to misread.” [Wal-Mart](#), 564 U.S. at 349, 131 S.Ct. 2541. “Commonality requires the plaintiff[s] to demonstrate that the class members have suffered the same injury.” [Id.](#) at 349–50, 131 S.Ct. 2541 (internal quotation marks omitted). In addition, “[t]heir claims must depend upon a common contention” for which the “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” [Id.](#) at 350, 131 S.Ct. 2541. Thus “what matters...is not the raising of common ‘questions’ ...but rather, the capacity of a [representative] proceeding to generate common answers apt to drive the resolution of the litigation.” [Id.](#) at 350, 131 S.Ct. 2541 (emphasis omitted). “Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.” [Suchanek v. Sturm Foods, Inc.](#), 764 F.3d 750, 756 (7th Cir. 2014).

Subclass A conditionally satisfies the commonality requirement because the plaintiffs likely can show that its members “suffered the same injury.” See [Wal-Mart](#), 564 U.S. at 349–50, 131 S.Ct. 2541. Specifically, the members of subclass A can show that the Sheriff’s response to the coronavirus pandemic gave rise to their habeas claim. In addition, the plaintiffs point to several questions the determination of which, they contend, will resolve issues that are central to the validity of their habeas claim. For purposes of commonality, the Court need consider only one: whether coronavirus presents so severe a risk of harm to some people in the Sheriff’s custody such it is unconstitutional to confine them in in the Jail.<sup>6</sup> In a representative proceeding, a common answer to that question likely would drive the resolution of the litigation by resolving a core issue underlying subclass A’s request for a writ of habeas corpus.

<sup>6</sup> The Court notes that the plaintiffs posed different questions in their motion for class certification than in their reply brief in support of their motion for a preliminary injunction.



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

*Compare* Pls.' Mot. to Cert. Class (dkt. no. 6) at 7–8 *with* Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 21–22. Which particular question the Court identifies as conditionally satisfying the commonality requirement makes no difference for the purpose of this opinion. Regardless, at least one question the plaintiffs pose in their reply brief would also satisfy the commonality requirement: whether detainees in the Jail, as a matter of due process, are entitled to practice social distancing consistent with people in the community at large.

The Sheriff contends that subclass A cannot satisfy the commonality requirement because its members seek habeas corpus relief that would require individual proceedings or determinations. But issues pertaining to the individualized nature of the desired injunctive relief go to the requirements of [Rule 23\(b\)](#), not commonality. *See id.* at 360–62, 131 S.Ct. 2541; [Bell v. PNC Bank, Nat. Ass'n](#), 800 F.3d 360, 379–80 (7th Cir. 2015). In other words, the commonality requirement of [Rule 23\(a\)](#) does not demand that the relief ultimately awarded to each plaintiff be the same. *See id.*; [Suchanek](#), 764 F.3d at 756 (commonality of relief is not essential); [In re IKO Roofing Shingle Prod. Liab. Litig.](#), 757 F.3d 599, 602 (7th Cir. 2014) (“[The commonality requirement as discussed in] [Wal-Mart](#) has nothing to do with commonality of damages.”). Nor is this a case in which the commonality requirement is not satisfied because individual plaintiffs experienced the harm in meaningfully different ways. *Cf.* [Jamie S. v. Milwaukee Pub. Sch.](#), 668 F.3d 481, 497–98 (7th Cir. 2012) (class of disabled students did not meet commonality requirement where its members likely experienced alleged violations of federal and state law in different ways). The putative members of subclass A all experienced the alleged harm from the Sheriff's response to coronavirus in the same or similar ways, specifically their allegedly increased risk of exposure to the virus. In addition, all of them raise the same kind of claim, and their claims all involve a common question that would resolve a central issue of that claim.

**\*18** The Court acknowledges that, in a case raising claims similar to the habeas corpus claims asserted in this one, another judge in this district recently took a different approach with regard to commonality. A putative representative class of convicted prisoners in [Money v. Pritzker](#), No. 20-CV-2093, — F.Supp.3d —, 2020 WL 1820660 (N.D. Ill. Apr. 10, 2020), also sought habeas corpus relief and medical furloughs or home detentions under [section 1983](#) based on an allegedly inadequate response to the coronavirus pandemic by the director of the Illinois Department of Corrections. *Id.* at —, at \*1–2. For the [section 1983](#) claim, the court found the only common question “apt to drive the resolution of the litigation,” *id.* at —, at \*15 (quoting [Wal-Mart](#), 564 U.S. at 350, 131 S.Ct. 2541), was “which class members should actually be given a furlough,” *id.* That question did not satisfy the commonality requirement, the court found, because “individualized determinations” would be necessary to answer it. *Id.* The court

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

also indicated that the habeas claim would not be “suitable for representative or class treatment” because “release determinations must be made on an individual basis regardless of the vehicle for considering and effectuating them.” *Id.* at —, at \*21 n.15. The court did not clarify whether it based its finding that the habeas claim would be unsuitable for representative or class treatment on the commonality requirement or another  Rule 23 consideration. *See id.*

This Court respects the court's decision in *Money*, which it cites as persuasive authority elsewhere in this opinion. But to the extent that the court in *Money* found that the putative classes failed to satisfy the commonality requirement because their requested relief would entail individualized determinations, this Court departs from the analysis in *Money*. As indicated, the commonality requirement does not mean that the relief ultimately awarded to each plaintiff must be the same. Thus whether the release determinations would need to be made on an individual basis does not factor into the  Rule 23(a) commonality analysis.

The Court concludes, for the reasons stated above, that the putative class satisfies  Rule 23(a)'s commonality requirement.

### b. Typicality

The Sheriff contends that the putative subclass does not meet  Rule 23(a)'s typicality requirement. He does not explain why, and he is incorrect. The named plaintiffs' habeas corpus “claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other [subclass] members and is based on the same legal theory.”  *Lacy v. Cook County*, 897 F.3d 847, 866 (7th Cir. 2018) (alteration omitted). “This requirement is meant to ensure that the named representative's claims have the same essential characteristics as the claims of the class at large.”  *Id.* (internal quotation marks omitted). Typicality is satisfied for subclass A because the named plaintiffs have alleged the same injurious conduct stemming from the Sheriff's response to the coronavirus pandemic as the other members of the subclass and have advanced the same legal theory as the subclass at large.

### c. Rule 23(b)(2)

 Rule 23(b)(2) is the sticking point for the habeas corpus plaintiffs' attempt to bring a representative action on behalf of subclass A. As indicated,  Rule 23(b)(2) allows for class



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

certification where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief...is appropriate respecting the class as a whole.”

 [Fed. R. Civ. P. 23\(b\)\(2\)](#). It “applies only when a single injunction or declaratory judgment would provide relief to each member of the class,” not “when each individual class member would be entitled to a *different* injunction.”  [Wal-Mart, 564 U.S. at 360, 131 S.Ct. 2541](#).

The Sheriff contends that the putative subclass A does not satisfy  [Rule 23\(b\)\(2\)](#) because the plaintiffs seek individualized relief. He suggests that any habeas corpus proceeding would need to account for each subclass member's individual circumstances, including, for example, the danger each detainee would pose to the public if released. The plaintiffs expressly concede that the relief would need to be at least partly individualized. They contend, however, that this could be achieved through “brief, individual proceedings” without defeating class certification. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 23; *see also* Pls.' Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 16.

**\*19** In actions where plaintiffs seek an injunction that “would merely initiate a process through which highly individualized determinations of liability and remedy are made,”  [Rule 23\(b\)\(2\)](#) is not satisfied.  [Jamie S., 668 F.3d at 499 \(7th Cir. 2012\)](#) (injunction that established a system for identifying disabled children and implementing individualized education plans and remedies did not satisfy  [Rule 23\(b\)\(2\)](#) because it “merely establishe[d] a system for eventually providing individualized relief”). Compare  *id.* and  [Kartman v. State Farm Mut. Auto. Ins. Co., 634 F.3d 883, 893 \(7th Cir. 2011\)](#) (in case challenging insurer's performance of hail storm damage appraisals, injunction requiring class-wide roof reinspection did not satisfy  [Rule 23\(b\)\(2\)](#) where it “would only initiate thousands of individualized proceedings to determine breach and damages”) with  [Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chi., 797 F.3d 426, 441–42 \(7th Cir. 2015\)](#) (proposed class was maintainable under  [Rule 23\(b\)\(2\)](#) where plaintiffs asked the court for a declaration that a school board's policies violated Title VII and prospective relief including a moratorium on a challenged practice and the appointment of a monitor).

The plaintiffs concede that issuing writs of habeas corpus in this case would entail individualized proceedings but not that  [Rule 23\(b\)\(2\)](#) precludes them from proceeding on a representative basis. They suggest that the type of supposedly brief, individualized proceedings they seek “have long been commonplace in class litigation.” Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 23. But the cases they cite to support that proposition are distinguishable from this one. Both  [Barnes v. District of Columbia, 278 F.R.D. 14 \(D.D.C. 2011\)](#), and  [Dunn v. City of Chicago, 231 F.R.D. 367 \(N.D. Ill. 2005\)](#), *amended on reconsideration*, No. 04 C 6804, 2005

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

WL 3299391 (N.D. Ill. Nov. 30, 2005), involved individualized proceedings on damages under  Rule 23(b)(3), not individualized proceedings for injunctive relief under  Rule 23(b)(2). See  Barnes, 278 F.R.D. at 19–23;  Dunn, 231 F.R.D. 367, at 375–78.  Dunn also involved class members who had variations in how they *experienced* the constitutional violations—an issue the court properly discussed as part of the commonality analysis, not the  Rule 23(b)(2) analysis. See  *id.* at 372.

Even if the plaintiffs did not concede it, individualized proceedings would be required for writs of habeas corpus that the plaintiffs seek because the Prisoner Litigation Reform Act (PLRA) applies to their habeas corpus claims. Under the PLRA, in tailoring any prospective or preliminary injunctive relief “in any civil action with respect to prison conditions,” a court must “give substantial weight to any adverse impact on public safety,” among other considerations. 18 U.S.C. § 3626(a)(1)(A), (a)(2). The PLRA defines “civil action with respect to prison conditions” as “any civil proceeding 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 does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.” *Id.* § 3626(g)(2). Thus if the plaintiffs' habeas claims constitute civil actions as defined by the PLRA, the Court would need to give substantial weight to the public safety of granting writs, which would require consideration of, among other things, any danger each individual member of subclass A poses to the public.

As the Court indicated in its TRO decision, the question of whether detained persons can even use a  section 2241 petition to challenge the conditions of their confinement has divided courts. *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*6 (comparing, e.g.,  *Aamer v. Obama*, 742 F.3d 1023, 1032 (D.C. Cir. 2014) (a prisoner may challenge the conditions of his confinement in a federal habeas corpus petition) and  *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (same) with *Spencer v. Haynes*, 774 F.3d 467, 469–70 (8th Cir. 2014) ( section 2241 petitions may not challenge conditions)). The Seventh Circuit has expressed a “long-standing view that habeas corpus is not a permissible route for challenging prison conditions,” at least when a prisoner's claim does not have “even an indirect effect on the duration of punishment.” *Robinson v. Sherrod*, 631 F.3d 839, 840–41 (7th Cir. 2011). But the Seventh Circuit has also noted that “the Supreme Court [has] left the door open a crack for prisoners to use habeas corpus to challenge a condition of confinement.” *Id.* at 840 (quoting *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005)) (citing  *Nelson v. Campbell*, 541 U.S. 637, 644–46, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004);  *Bell v. Wolfish*, 441 U.S. 520, 526 n.6, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979);  *Preiser v. Rodriguez*, 411 U.S. 475, 499–500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973)).

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

\*20 In the TRO decision, the Court said that it did not need to decide the question of whether the plaintiffs could challenge conditions of confinement in a habeas corpus proceeding definitively at the time but stated that were it “required to address this point, [the Court] would not consider it to be an absolute bar to plaintiffs' motion for a temporary restraining order.” *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*6. The Court stated that “[t]he plaintiffs' claims, as they have framed them, *do* bear on the duration of their confinement (they contend, ultimately, that they cannot be held in the Jail consistent with the Constitution's requirements), and they are not the sort of claims that are, or can be, appropriately addressed via a claim for damages.” *Id.*

But the plaintiffs' claims also bear on the conditions of their confinement: they challenge the constitutionality of the conditions in the Jail during the coronavirus pandemic, and they contend that the conditions are so deficient that it is unconstitutional for subclass A to be confined at the Jail. The Seventh Circuit has not expressly addressed whether the PLRA applies to habeas corpus petitions that involve conditions of confinement, but it has not foreclosed the application of the PLRA to such petitions. Cf. *Walker v. O'Brien*, 216 F.3d 626, 634 (7th Cir. 2000) (stating that actions “brought under section 2241...as habeas corpus petitions are not subject to the PLRA”—but not addressing such petitions that challenge the conditions of confinement); *see also Thomas v. Zatecky*, 712 F.3d 1004, 1005 (7th Cir. 2013) (*Walker* holds, among other things, “that a collateral attack under § 2241 or § 2254 is not a ‘civil action’ for the purpose” of the PLRA (emphasis added)). By specifying that a “civil action with respect to prison conditions...does not include habeas corpus proceedings challenging the fact or duration of confinement in prison,” the language of the PLRA appears suggests that it may cover other types of habeas corpus proceedings, including, potentially, those challenging the conditions of confinement. *See Advocate Health Care Network v. Stapleton*, — U.S. —, 137 S. Ct. 1652, 1659, 198 L.Ed.2d 96 (2017) (courts should interpret a statute in a way that would “give effect, if possible, to every clause and word”). And at least some courts addressing the issue have suggested that the PLRA applies to habeas corpus petitions involving the conditions of confinement. *See Jones v. Smith*, 720 F.3d 142, 145, 145 n.3 (2d Cir. 2013) (the PLRA does not apply to “habeas petition[s] seeking to overturn a criminal conviction or sentence” but presumably would apply to conditions-of-confinement habeas claims brought under section 2241); *Blair-Bey v. Quick*, 151 F.3d 1036, 1042 (D.C. Cir.) (habeas corpus petitions challenging conditions of confinement “would have to be subject to the PLRA's...rules, as they are precisely the sort of actions that the PLRA sought to address”), *on reh'g*, 159 F.3d 591 (D.C. Cir. 1998).

Accordingly, the Court concludes that the PLRA applies to the plaintiffs' habeas corpus claim. The PLRA's mandate that a court “give substantial weight to any adverse impact on public safety”

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

before issuing preliminary injunctive or prospective relief thus would apply to the habeas corpus claim. *See* 18 U.S.C. § 3626(a)(1)(A), (a)(2). To do so, the Court would need to consider the circumstances of the detained persons and any threat they pose to public safety, which plainly would vary from one person to another. This is a process that would render the claim unsuitable to certification under  Rule 23(b)(2) or its analogy for representative actions.

The plaintiffs also state, in two sentences found at the very end of a small-type, twenty-four-line footnote, that a release order would not require a court to resolve individualized questions regarding safety because such an order would give the Sheriff discretion on which detained persons to release. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 21 n.16. The plaintiffs make this point with respect to commonality for their  section 1983 claim, not on the question of whether the habeas corpus claim may be handled on a representative basis. They nowhere attempt to explain how the Court could condition the issuance of writs of habeas corpus on detainee-specific decisions made by the Sheriff. As this Court stated in its TRO decision, “[t]he issuance of [a] writ of habeas corpus through a  section 2241 petition is a federal remedy (in other words, it does not depend on state law).” *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*7. Nor could the issuance of a writ depend on subsequent decisions by a detained person's custodian. The habeas corpus claim proceeds *against* the custodian based on the fundamental, long-standing rule that a person in custody “may be liberated if no sufficient reason is shown to the contrary.”  *Rumsfeld v. Padilla*, 542 U.S. 426, 435, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004) (quoting  *Wales v. Whitney*, 114 U.S. 564, 574, 5 S.Ct. 1050, 29 L.Ed. 277 (1885)). The only remedy available for a habeas corpus claim is liberation of the person in custody. *See*  *id.* It is difficult to imagine a writ of habeas corpus that would tell a jailer to release the petitioner—unless he decides it would not be a good idea to do so. Plaintiffs offer no authority supporting the proposition that a writ of habeas corpus could appropriately be issued in this way.

\*21 In sum, though representative habeas corpus actions do not need to comply “precisely” with  Rule 23, *Morgan*, 546 F.2d at 221 n.5, the plaintiffs cannot meet the requirements for representative treatment.<sup>7</sup>

7

The Court acknowledges that this is different from the conclusion it reached in the TRO decision, in which it conditionally certified subclass A. *See Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*4. But that was, of course, a provisional decision. And even for a non-conditionally certified class, a court may alter or amend an order granting class certification at any point before final judgment.  Fed. R. Civ. P. 23(c)(1)(C);  *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (class certification

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

order is “inherently tentative,” and a district court “remains free to modify it in the light of subsequent developments in the litigation”).

Because the plaintiffs' habeas corpus claims founder on the exhaustion requirement, and because they have not established that the claims may be pursued on a representative basis, their representative action on behalf of subclass A has no likelihood of success on the merits. Accordingly, the plaintiffs' request for the Court to release medically vulnerable members of subclass A on unsecured or non-monetary bail conditions pending review of their habeas corpus claims is moot.

## B. Section 1983 claim

The Court next addresses the question of likelihood of success on the plaintiffs'  section 1983 claim, dealing with conditional class certification first, followed by the merits. The Court then addresses certain provisions of the PLRA as applied to the  section 1983 claim.

### 1. Conditional class certification

For their  section 1983 claim, the plaintiffs seek class-wide relief in the form of a preliminary injunction. But because the plaintiffs only recently filed the lawsuit, there has not yet been a class certification ruling. As the Court indicated in its TRO opinion, “[t]his does not foreclose the possibility of relief for the plaintiffs at this stage, because a district court has general equity powers allowing it to grant temporary or preliminary injunctive relief to a conditional class.” *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*3 (citing *Lee v. Orr*, No. 13 C 8719, 2013 WL 6490577, at \*2 (N.D. Ill. Dec. 10, 2013); *Al Otro Lado v. Wolf*, 952 F.3d 999, 1005 n.4 (9th Cir. 2020);  *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012);  *Howe v. Varity Corp.*, 896 F.2d 1107, 1112 (8th Cir. 1990)). “Furthermore,  Federal Rule of Civil Procedure 23(b)(2) ‘does not restrict class certification to instances when final injunctive relief issues’ and permits certification of a conditional class for the purpose of granting preliminary injunctive relief.” *Id.* (quoting  *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012)).

As indicated, to bring a class action a plaintiff must show that the proposed class meets the four requirements of  Rule 23(a): “numerosity, commonality, typicality, and adequate representation.”  *Wal-Mart*, 564 U.S. at 349, 131 S.Ct. 2541. In addition, “the proposed class must satisfy at least one of the three requirements listed in  Rule 23(b).”  *Wal-Mart*, 564 U.S. at 345, 131 S.Ct. 2541. The plaintiffs rely on  Rule 23(b)(2).



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

\*22 As an initial matter, the Court must clarify the scope of the class or subclasses for which the plaintiffs have sought certification. They assert count 1 under [section 1983](#) on behalf of all putative members of a class consisting of “all people who are currently or who will in the future be housed in the Cook County Jail for the duration of the COVID-19 pandemic.” Compl. (dkt. no. 1) ¶ 60. In their reply brief in support of their motion for a preliminary injunction, however, the plaintiffs indicate that they also request injunctive relief for claims under [section 1983](#) specifically for the putative members of proposed subclass B, which consists of “all people who are currently housed on a tier where someone has already tested positive for the coronavirus,” *id.* ¶ 62. *See, e.g.*, Pls.’ Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 29 (requesting the transfer of members of putative subclass B). Accordingly, the Court takes this as meaning that, with respect the [section 1983](#) claim, the plaintiffs seek injunctive relief on behalf of both the overall class and subclass B.

The parties dispute whether the class and subclass B satisfy each requirement of [Rule 23](#), except for numerosity. The Court’s analysis earlier in this opinion finding that subclass A (the subclass seeking habeas relief) satisfies the typicality and commonality requirements apply to the overall class and subclass B as well. Specifically, the class and subclass B satisfy the commonality requirement because their members “have suffered the same injury” and their claims “depend upon a common contention” for which class action proceedings will “generate common answers apt to drive the resolution of the litigation.” [Wal-Mart](#), 564 U.S. at 350, 131 S.Ct. 2541 (emphasis omitted). As with subclass A, the claims members of the class and subclass B raise at least one common question that satisfies [Rule 23\(a\)](#)’s commonality requirement: whether coronavirus presents so severe a risk of harm to those in the Sheriff’s custody that their conditions of confinement are unconstitutional. For the reasons previously discussed, [Rule 23\(a\)](#)’s commonality requirement does not involve whether each member of the class would be entitled to identical relief.

The Class and subclass B also satisfy [Rule 23\(a\)](#)’s typicality requirement. Each member’s [section 1983](#) claim arises from the Sheriff’s response to the coronavirus pandemic—“the same event or practice or course of conduct”—and “is based on the same legal theory.” *See* [Lacy](#), 897 F.3d at 866 (alteration omitted).

The Court’s analysis under [Rule 23\(b\)\(2\)](#), however, differs from its analysis regarding the habeas corpus claim. Again, [Rule 23\(b\)\(2\)](#) allows for class certification where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

relief...is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). It “applies only when a single injunction or declaratory judgment would provide relief to each member of the class,” not “when each individual class member would be entitled to a different injunction.” *Wal-Mart*, 564 U.S. at 360, 131 S.Ct. 2541.

A good deal of the injunctive relief that the plaintiffs seek would provide relief to the entire class via a single order. Specifically, on behalf of the overall class, the plaintiffs request a single order mandating social distancing and/or extending the TRO or converting it to a preliminary injunction, which would provide the same relief to each class member. Accordingly, the class satisfies the requirements of Rule 23(b) to the extent the plaintiffs request relief under section 1983 mandating social distancing and/or extending the TRO or converting it into a preliminary injunction.

The plaintiffs' requests for prisoner transfers and/or releases on behalf of subclass B, however, likely would entail individual determinations to some degree. The parties do not dispute that the PLRA applies to the plaintiffs' section 1983 claim or that the 1983 claim involves prison conditions. As discussed earlier with regard to the habeas corpus claim, before granting prospective or preliminary injunctive relief on the section 1983 claim, the PLRA requires the Court to “give substantial weight to any adverse impact on public safety,” in addition to making other findings. 18 U.S.C. § 3626(a)(1)(A), (a)(2). As indicated, the Sheriff contends that these individual determinations prevent certification under 23(b)(2). As the Court has discussed, the plaintiffs contend (albeit only in a footnote) that a court would not be required to make those individual determinations because a court could grant a single injunction while delegating those questions to the Sheriff. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 21 n.16; *see also* *Brown*, 563 U.S. at 537–38, 131 S.Ct. 1910 (three-judge court adequately considered “public safety by leaving” decision “of how best to comply with its population limit to state prison officials”). The Court recognizes that analysis of whether the Sheriff may exercise discretion in carrying out a transfer or release order may be different for the section 1983 claim. Among other differences, a petition for habeas corpus contemplates a singular form of relief with regard to habeas—release from custody—whereas a court has a broader spectrum of possible relief under section 1983. *See* *Rumsfeld*, 542 U.S. at 435, 124 S.Ct. 2711; *Preiser*, 411 U.S. at 484–86, 489, 93 S.Ct. 1827. The range of injunctive relief available under section 1983 may allow courts to “leave details of implementation to [a] State's discretion by leaving sensitive policy decisions to responsible and competent policy state officials.” *See, e.g.,* *Brown*, 563 U.S. at 538, 131 S.Ct. 1910. The Court need not decide that issue now, however, because, as it will explain later in this



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

opinion, at this point it concludes that the predicate under the PLRA for convening a three-judge court or ordering prisoner transfers has not been established.

\*23 In sum, the Court conditionally certifies the class to the extent the plaintiffs request relief under [section 1983](#) requiring social distancing and/or extending the TRO or converting it to a preliminary injunction. The Court declines to decide whether subclass B satisfies the requirements of [Rule 23\(b\)](#) because it is not necessary to do so at this time.

## 2. Likelihood of success on the merits

The injunctive relief requests remaining for determination are the class's requests to require social distancing throughout the Jail and (it appears) advance identification and further screening of detained persons with conditions that make them more vulnerable to severe health consequences from coronavirus disease, as well as their request to convert the TRO to a preliminary injunction. (The Court addresses in later sections the plaintiffs' request to require the Sheriff to transfer detainees out of the Jail and to convene a three-judge panel.)

The claims of the class arise under the Due Process Clause of the Fourteenth Amendment. “When a state actor [ ] deprives a person of his ability to care for himself by...detaining him..., it assumes an obligation to provide some minimum level of well-being and safety.” [Johnson v. Rimmer](#), 936 F.3d 695, 706 (7th Cir. 2019) (quoting [Collignon v. Milwaukee County](#), 163 F.3d 982, 987 (7th Cir. 1998)). The Due Process Clause requires a jailer to provide a pretrial detainee with food, shelter, and basic necessities, including reasonably adequate sanitation, ventilation, bedding, hygienic materials, and utilities, [Hardeman v. Curran](#), 933 F.3d 816, 820 (7th Cir. 2019), and to “meet[ ] the person's medical needs while he is in custody,” [Johnson](#), 936 F.3d at 706. More broadly, the Due Process Clause protects pretrial detainees, who “have not been convicted of anything,” [Miranda v. County of Lake](#), 900 F.3d 335, 350 (7th Cir. 2018), from conditions that “amount[ ] to punishment.” [Kingsley v. Hendrickson](#), 576 U.S. 389, 135 S. Ct. 2466, 2467, 192 L.Ed.2d 416 (2015) (quoting [Graham v. Connor](#), 490 U.S. 386, 395 n.10, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)); [Hardeman](#), 933 F.3d at 823.

Here there is no question that the plaintiffs' claims involve conditions that are sufficiently serious to invoke the Fourteenth Amendment; the Sheriff does not argue otherwise. A pretrial detainee may establish a Fourteenth Amendment violation based on a condition, or combination of conditions, posing an “unreasonable risk of serious damage to [his] future health.” [Henderson v. Sheahan](#), 196 F.3d 839, 847 (7th Cir. 1999) (decided under Eighth Amendment “deliberate indifference”

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

standard). See [Helling v. McKinney](#), 509 U.S. 25, 33, 35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (Eighth Amendment case; “exposure of inmates to a serious, communicable disease” that poses a risk of future harm is a deprivation sufficiently serious to invoke constitutional protections). This is precisely where persons detained in the Jail find themselves. The coronavirus is indisputably present in the Jail. And the persons detained there are housed in settings that facilitate its transmission. This is true throughout the Jail, given the close proximity in which even single-celled detained persons are housed and the fact that they occupy common areas like bathrooms, showers, and dayrooms where other inmates congregate or have been present. And it is particularly true for detained persons who are doubled celled and those who are still housed in the dormitory units, where dozens (or more) spend twenty-four hours per day, or close to it, in the same room. It is equally undisputed that persons are detained in these settings with the knowledge of the Sheriff and his personnel, who have assigned them to live in these quarters while aware of the risks of virus transmission. All of this, taken together, is sufficient for the plaintiffs to have well more than a “better than negligible chance,” see [Whitaker](#), 858 F.3d at 1046, of establishing the threshold requirement of their due process claim—conduct that the Sheriff knows puts detainees at a significant risk of serious harm from coronavirus. See [Kingsley](#), 135 S. Ct. at 2472; [Miranda](#), 900 F.3d at 353. Meeting this threshold requirement of the due process standard does not require an intent to cause harm; it requires only knowledge of “the physical consequences” of one's conduct. [Kingsley](#), 135 S. Ct. at 2472.

**\*24** The primary dispute before the Court, and the point on which the Sheriff focuses his defense, involves the second requirement of a due process claim. To succeed on their claim, the plaintiffs must show that the Sheriff's conduct in addressing the risks posed by exposure to coronavirus is objectively unreasonable in one or more respects. See, e.g., [McCann v. Ogle County](#), 909 F.3d 881, 886 (7th Cir. 2018). At the preliminary injunction stage, however, the plaintiffs are not required to prove this definitively; they are required only to establish a reasonable likelihood that they will ultimately succeed in proving it.

The plaintiffs concede that the Sheriff and others have taken significant steps to reduce the Jail's population and to decrease the number of persons housed in groups or double celled. They argue, however, that the Sheriff's actions do not go far enough and that detained persons continue to be unreasonably exposed to a risk of serious harm. The plaintiffs contend that social distancing is not being enforced even in units where detained persons are single celled, given joint usage of showers, toilet facilities, and dayrooms. And, they say, social distancing is not even a possibility for the hundreds who are double celled or remain in dormitory units. The plaintiffs also contend that despite policies promulgated by the Sheriff, proper sanitation—in particular, frequent cleaning of surfaces and facilities used in common, distribution of cleaning materials to detainees, and so on—

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

is not actually being carried out on the ground. Finally, the plaintiffs contend—and it is undisputed—that nothing has been done by the Sheriff to enable him to identify, in advance, detained persons with medical or other conditions that make them particularly vulnerable to serious illness should they contract the coronavirus.

The Sheriff argues that he and others have taken significant steps to reduce the risk to detained persons from coronavirus. One critical aspect of this is a very significant reduction in the overall population of the Jail, accomplished by bond reductions issued by judges and by expansion, to its limits, of the Sheriff's electronic home monitoring program. In addition, in recent weeks, there have been far fewer new detainees admitted on a daily basis than has been the case historically, presumably due to fewer arrests. At the same time, the Sheriff has taken steps to increase capacity, including by reopening previously shuttered buildings and parts of buildings within the Jail complex. Together, these actions have enabled the Sheriff to take further steps to separate persons who remain detained in the Jail. Specifically, a far greater percentage of detainees are now in cells by themselves. And far fewer are housed in the dormitory units than before, with many having been transferred to single-cell units. In addition, at the Sheriff's direction, detainees have been provided guidance regarding social distancing. The Sheriff has also instituted policies to enhance sanitation practices and to carry out these policies. He has also implemented the distribution of facemasks to certain detained persons—in particular, those who are in quarantine—consistent with the availability of supplies, and he has undertaken efforts to acquire more. (Some of this has taken place as a result of the TRO entered on April 9.)

It cannot reasonably be disputed that the Sheriff has undertaken a significant, and impressive, effort to safeguard detained persons in his custody from infection by coronavirus. And based on the record, including the testimony of Executive Director Miller at the April 23 hearing, the Court is satisfied that the Sheriff and his staff have acted in good faith, with the goal of protecting the people placed in his custody, consistent with his obligation to maintain security.

**\*25** Were this an Eighth Amendment case involving convicted prisoners, the efforts the Court has just described likely would be the end of the story. To prevail in a case involving a convicted prisoner, a plaintiff is required to show that the prison official was *deliberately indifferent* to the risk of harm to the plaintiff—in other words, the official knew about but disregarded that risk. *See, e.g., Orr v. Shicker*, 953 F.3d 490, 499 (7th Cir. 2020); *Garcia v. Armor Corr. Health Serv., Inc.*, 788 F. App'x 393, 395 (7th Cir. 2019). Were the plaintiffs in this case required to make that showing, they would be unable to prevail; the Sheriff has been anything but deliberately indifferent to the risk of harm to pretrial detainees from coronavirus.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

But because this is a case involving persons detained prior to an adjudication of their guilt or innocence, the Sheriff's good intentions are not dispositive of the plaintiffs' claims. There is a critical difference between a claim regarding conditions of confinement brought by pretrial detainees like the plaintiffs and one brought by a convicted prisoner under the Eighth Amendment, who unlike a pretrial detainee can constitutionally be subjected to punishment. *See Hardeman*, 933 F.3d at 824 (Eighth Amendment standard is “more demanding”). The standard by which a court evaluates a claim by a pretrial detainee like the plaintiffs “is solely an objective one.” *Kingsley*, 135 S. Ct. at 2473. The plaintiffs are not required to show that the Sheriff had an intent to punish or to harm them, *id.*; indeed, they need not show any sort of malicious or bad intent at all. Rather, what they are required to show—actually, on a preliminary injunction, simply establish a reasonable likelihood of showing—is that the Sheriff's conduct with respect to the particular condition has been objectively unreasonable in one or more respects. *See McCann*, 909 F.3d at 886. In applying this standard, a court “focus[es] on the totality of facts and circumstances” the defendant faced “to gauge objectively—without regard to any subjective belief held by the [defendant]—whether the response [to the conditions] was reasonable.” *Id.*

The plaintiffs contend that the Sheriff's response to the coronavirus outbreak at the Jail has not been objectively reasonable or sufficiently protective of the people in his custody, at least with respect to the issues currently before the Court—social distancing, sanitation, and identification and monitoring of highly vulnerable detainees. In evaluating the plaintiffs' contentions, the Court assesses objective reasonableness “from the perspective of ‘a reasonable [official] on the scene,’ based on what the [official] knew at the time.” *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*9 (quoting *Kingsley*, 135 S. Ct. at 2473). The question, in the present context, is whether the Sheriff “acted reasonably to mitigate the risks to [the] health and safety of detainees.” *Id.* (citing *Hardeman*, 933 F.3d at 825; *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017)). And in determining the reasonableness of the Sheriff's actions, the Court “must account for his legitimate interest in managing the Jail facilities,” and it must “defer to policies and practices that ‘are needed to preserve internal order and discipline and to maintain institutional security.’ ” *Id.* (quoting *Kingsley*, 135 S. Ct. at 2473); *see Bell*, 441 U.S. at 547, 99 S.Ct. 1861.

The fact of the matter is that the Sheriff's actions have not eliminated the risk to detained persons; far from it. But this, too, is not dispositive. Although a jailer must make a reasonable effort to abate conditions that pose an excessive risk to the health or safety of the people in his custody, the fact that he fails to prevent actual harm does not mean that his response was unreasonable. *See Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008) (applying Eighth Amendment deliberate indifference standard). More specifically, the Constitution does not require a detention facility to provide “foolproof protection from infection” by a communicable disease. *Forbes v. Edgar*,

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

112 F.3d 262, 266 (7th Cir. 1997) (applying Eighth Amendment standard); *see also* [Smith v. Sangamon Cty. Sheriff's Dep't](#), 715 F.3d 188, 191 (7th Cir. 2013) (applying Eighth Amendment standard; “Prison and jail officials are not required to guarantee [a] detainee's safety.” (internal quotation marks omitted)). That said, the ongoing risk to detained persons at the Jail, confirmed by increases in the number who have tested positive for coronavirus and the death of six detained persons from coronavirus disease as of April 23, is the backdrop against which the Court must view the Sheriff's conduct.

**\*26** The Court begins with the question of social distancing. As the plaintiffs see it, a policy that fails to fully implement social distancing throughout the Jail—which indisputably has not happened—cannot possibly be considered an objectively reasonable response to the coronavirus outbreak there. At least until full social distancing is enforced, the plaintiffs contend, detained persons face an unacceptably high risk of death or serious harm to their health.

The Sheriff's position is likewise simple and straightforward. His implementation of a coronavirus response plan at the Jail complies, he says, with the CDC Guidelines, and for this reason his actions have been objectively reasonable. The Guidelines, he points out, do not require social distancing in correctional facilities where it is not feasible given physical space, population, and staffing.<sup>8</sup> The plaintiffs respond that the CDC Guidelines are not a surrogate for constitutional due process requirements.

<sup>8</sup> Largely based on this aspect of the CDC Guidelines, the Court, in deciding the TRO motion, declined to require the Sheriff to enforce social distancing other than during the intake process, one very obvious point at which social distancing was not taking place. The TRO ruling, however, is neither final nor binding. The Court has reassessed the matter with the benefit of more thorough briefing and a more complete record.

To support his position that compliance with the CDC Guidelines should effectively be dispositive, the Sheriff cites [Carroll v. DeTella](#), 255 F.3d 470 (7th Cir. 2001). There the Seventh Circuit held that a convicted prisoner could not show that prison officials had been deliberately indifferent to his lack of access to safe drinking water, because radium concentrations in the prison's drinking water were at a level that the U.S. Environmental Protection Agency deemed at the time to be safe. *Id.* at 472–73. The court noted that because prisoners are not entitled to better quality of air, water, or environment than the general public, prisons do not have “a duty to take remedial measures against pollution or other contamination that the agencies responsible for the control of these hazards do not think require remedial measures.” *Id.*



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

The Sheriff's reliance on [Carroll](#) is unavailing. First of all, the plaintiffs do not suggest any entitlement on the part of pretrial detainees to conditions that exceed health and safety standards applicable to the general public. But that aside, the CDC Guidelines, unlike the EPA standards relied upon in [Carroll](#), do not say or suggest that compliance makes detained people safe. This is particularly so in view of the fact that the Guidelines include feasibility qualifiers, particularly in relation to social distancing. *See* CDC Guidelines at 1, 3, 4, 11. Given this limitation, the Guidelines are not the same as a safety standard set by a regulatory agency.

For their part, the plaintiffs suggest that the CDC Guidelines “shed no light” on whether the Sheriff's conduct has been objectively reasonable, in conformity with constitutional requirements. Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 10 (quoting [Thompson v. City of Chicago](#), 472 F.3d 444, 454 (7th Cir. 1996)). The Court disagrees with this as well. The plaintiffs rely to a significant extent on [Thompson](#). There the court, considering a claim of excessive force against a police officer—a claim also determined by a standard of objective reasonableness—stated that a policy on the use of force established by the police department was “completely immaterial [on] the question of whether a violation of the federal constitution has been established.” *Id.* at 454. But later, in [United States v. Brown](#), 871 F.3d 532 (7th Cir. 2017), the Seventh Circuit clarified that [Thompson](#) simply means that a police department's own policies do not establish the standard of what is reasonable for purposes of the Constitution. *See id.* at 537 (“Despite its strong language, [Thompson](#) should not be understood as establishing a rule that evidence of police policy or procedure will *never* be relevant to the objective-reasonableness inquiry.”). The court explained in [Brown](#) that, in the fact-intensive objective reasonableness analysis, evidence of national or widely used police policies could be relevant to helping a factfinder understand how a reasonable officer might have behaved under the circumstances that faced the defendant. *Id.* at 538. The court noted that the relevance of such policy evidence may turn on the “factual complexity” of the circumstances facing the defendant, and it may be less relevant in circumstances in which a factfinder can rely on common sense to determine the reasonableness of conduct. *See id.*

\*27 Here—unlike, perhaps, a relatively simple excessive force claim against an arresting officer—the circumstances facing the Sheriff in operating the Jail are quite complex. In these circumstances, guidance from an expert body like the CDC is beneficial in assessing the objective reasonableness of the Sheriff's conduct in the face of an ongoing outbreak. Indeed, in [Forbes](#), the Seventh Circuit concluded that a prison's response to a case of active tuberculosis in its facility had

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

been objectively reasonable in part because it had implemented and effected the recommendations of the CDC.  *Forbes*, 112 F.3d at 267.

In sum, the CDC Guidelines are an important piece of evidence to consider in assessing the Sheriff's conduct, but they cannot be appropriately viewed as dispositive standing alone. Indeed, the CDC's recommendations on tuberculosis were not dispositive in  *Forbes*; the court also considered other facts—noting, for example, that the prison had only one case of active tuberculosis, “a far cry” from an outbreak.  *Id.* As the Court has indicated, one reason why the CDC Guidelines are not appropriately viewed as dispositive of the plaintiffs' due process claims is the way in which they account for feasibility. Although feasibility may be a consideration in determining objective reasonableness, see  *Gayton v. McCoy*, 593 F.3d 610, 622 (7th Cir. 2010) (decided under deliberate indifference standard), no case of which the Court is aware sets it as a dispositive factor. That, however, is exactly what the CDC Guidelines do, at least if read as the Sheriff suggests: they set a feasibility or practicality limitation on social distancing practices that they also call “a cornerstone of reducing transmission of respiratory diseases such as COVID-19.” CDC Guidelines at 4. One can certainly understand why the CDC, a public health body, has acknowledged these sorts of limits upon its ability to prescribe guidelines for managing jails. But from a constitutional-law standpoint, it is difficult to believe that “do what you can, but if you can't, so be it”<sup>9</sup> satisfies a jailer's constitutional obligation to take objectively reasonable steps to mitigate known risks to the life and health of people in his custody who are detained awaiting determination of their guilt or innocence.

<sup>9</sup> The Court does not intend by this to suggest that this is the attitude of the Sheriff, the Executive Director, or their staff. Here the Court is characterizing a legal argument, not any person's behavior.

Currently the Sheriff is housing hundreds of detained persons under conditions that make social distancing completely impossible or nearly so, or at least very difficult. Those for whom it is completely impossible are the detainees who are double celled. Those for whom it is at least very difficult and likely impossible are detainees who are housed in dormitory units that are not operating at a greatly reduced capacity. Specifically, a significant number of the existing dormitory units are operating at or greater than fifty percent capacity. Based on the record before the Court, social distancing is practically impossible in such units, and this cannot be completely attributed to detainee conduct or misconduct: if people are kept in groups in relatively close quarters, it is entirely predictable that they will have difficulty maintaining separation.



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

At the current stage of the pandemic, group housing and double celling subject detainees to a heightened, and potentially unreasonable and therefore constitutionally unacceptable, risk of contracting and transmitting the coronavirus. Such arrangements make it impossible or unduly difficult to maintain social distancing, a “cornerstone” of the reduction of coronavirus transmission among detainees. The Court, however, must account for and give deference to the Sheriff’s interest in managing the Jail facilities and to practices that are needed to preserve order and discipline and maintain security. *See* [Kingsley](#), 135 S. Ct. at 2473; [Bell](#), 441 U.S. at 547, 99 S.Ct. 1861. These include documented considerations that make group or double celling appropriate or necessary. Feasibility limitations imposed by existing or otherwise available physical facilities are also taken into account, though this is not and cannot be a controlling factor. In this regard, it is worth noting that despite general statements by both sides to the contrary, it does not appear, based on the evidence, that the Sheriff has yet hit the feasibility limit on getting detainees out of group housing, even if one considers only the Jail complex itself. *See* Apr. 23, 2020 Hearing Tr. at 57:2–19 (testimony by Executive Director Miller referencing the possibility of further moves of detained persons out of dormitories).

**\*28** Based on the evidence submitted, the Court finds that the plaintiffs are reasonably likely to succeed on their contention that group housing or double celling of detained persons is objectively unreasonable given the immediate and significant risk to their life and health from transmission of coronavirus, except in the following situations:

- Persons detained in tiers or dormitories currently under quarantine following a positive test for the coronavirus within the tier or dormitory, as this makes it inadvisable to transfer them to other housing arrangements until the quarantine period has expired (what the Sheriff refers to as “quarantine tiers”).
- Detained persons who have tested positive for the coronavirus and are under medical observation (what the Sheriff refers to as “isolation tiers”), a housing arrangement that the CDC Guidelines specifically authorize.
- Detained persons who have tested positive for coronavirus and are recovering (what the Sheriff refers to as “convalescent tiers”), which the CDC Guidelines likewise authorize.
- Double-celled or dormitory-housed detainees for whom there is a documented determination by a medical or mental health professional that single-celling poses a risk of suicide or self-harm.
- Persons detained housed in a dormitory unit that is at less than fifty percent capacity, which the record reflects will permit adequate social distancing.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

- Detained persons committed, at the documented direction of a medical or mental health professional, to a group housing unit that is equipped for medical or mental health treatment, if but only if there is not available space in an appropriate housing or medical unit that permits full social distancing.

Detained persons housed in any of the listed “acceptable” arrangements will, however, need facemasks that are replaced at appropriate intervals and must be provided with instruction on how to use a facemask and the reasons for its use. They also must be instructed, at regular intervals, on the importance of social distancing.

The Court has omitted from the list above two categories of detained persons referenced in Executive Director Miller's affidavits and testimony: persons put into group housing or double celled because of conduct issues (including those who Miller referred to during his testimony as “our disorderly...population,” Apr. 23, 2020 Tr. at 52:6) or for reasons associated with the PREA. On the record as it currently stands, the plaintiffs have a reasonable likelihood of succeeding on a contention that it is objectively unreasonable to effectively preclude social distancing for such persons. With regard to PREA detainees, the proposition that they cannot be single celled is counterintuitive, to say the least.<sup>10</sup> And with regard to individuals with conduct issues, without more the Court cannot say that there is an objectively reasonable basis to hold them in a setting that does not permit adequate social distancing. With regard to detained persons in these categories, the Court is willing to entertain a properly-supported request by the Sheriff to include them in the category of persons who may be appropriately detained in group housing, perhaps with appropriate distancing.

<sup>10</sup> This is so whether these persons are alleged perpetrators or likely victims, which is not clear from the record.

Beyond what the Court has described, the plaintiffs have not established a reasonable likelihood of success on their due process claims. Specifically, the Court is not prepared to say that it is constitutionally inappropriate, in light of the coronavirus pandemic, to detain persons in the Jail in any form of group housing or to detain them in single cells given the likelihood of multiple uses of common facilities and areas. This would be tantamount to saying that, in the present circumstances, the Constitution prohibits detaining people in jails. The plaintiffs have not established, and are not likely to be able to establish, that this is so.

**\*29** Next, the Court addresses the plaintiffs' contentions regarding advance identification of detained persons who are especially vulnerable to severe illness or death if they contract the coronavirus. The Court remains unpersuaded that the plaintiffs have a reasonable likelihood

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

of showing that this is objectively unreasonable and thus violative of those class members' constitutional rights. The plaintiffs' experts opined that screening is important so that vulnerable individuals can be monitored for symptoms. Miller explained, however, that any person with symptoms consistent with coronavirus disease is already provided immediate screening and treatment, and medical professionals treating such a person will have immediate access to his or her medical records (which include an inventory of medical conditions reported by the detained person upon intake or thereafter). Though, as the Court stated in its TRO decision, advance identification of persons with heightened vulnerability would appear to be a good practice and perhaps a best practice, the plaintiffs have not shown that failing to do so is, under the circumstances, objectively unreasonable.

Finally, the Court addresses the plaintiffs' request for extension of the TRO. The TRO required the Sheriff to establish and implement a policy regarding coronavirus testing; provide cleaning supplies to detainees and staff and soap and/or hand sanitizer to detained persons; establish and implement a policy regarding sanitization of frequently touched surfaces; and provide facemasks to all detained persons who are quarantined. *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*14–15. The plaintiffs ask the Court to convert these requirements into a preliminary injunction. The Sheriff argues that the Court need not extend or convert the TRO because he has complied with it and continues to do so.

A court “retains the power to grant injunctive relief” even after the defendant ceases the allegedly unlawful conduct.  *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 748 (7th Cir. 1999); *see also*  *United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 563 F.3d 257, 275 (7th Cir. 2009). The moving party must show that such relief still is required.  *Milwaukee Police Ass'n*, 192 F.3d at 748. “The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.”  *Id.* (quoting  *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)); *see also*  *United Air Lines, Inc.*, 563 F.3d at 275 (“The court may consider how easily former practices might be resumed at any time in determining the appropriateness of injunctive relief.”). Where the cessation of an allegedly wrongful activity occurred “only after a lawsuit has been filed,” a district court is “within its discretion” to find that the cessation was “not voluntary, and that even a voluntary cessation is not determinative.”  *Id.*

Although the Sheriff appears to have complied with the TRO, the Court cannot say that the constitutional violations the Court sought to address will not recur absent an extension of the TRO's requirements. The Sheriff's actions to develop policies on sanitation and coronavirus testing, distribute soap and cleaning supplies, and distribute facemasks to detained persons who are

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

quarantined—at least those done after the April 9 TRO—cannot be said to have been undertaken entirely voluntarily. Rather, they were done in response to the TRO, and there is at least some evidence of problems in carrying out the TRO's directives. In addition, without a court order, there is at least a possibility that these important measures could slip to the wayside, despite the Sheriff's best intentions, as he works to manage the complexities of the Jail during this public health crisis. For these reasons, the Court concludes that it is appropriate to convert the TRO to a preliminary injunction.

### 3. Transfer

The plaintiffs next request the transfer of members of subclass B out of the Jail “to another safe location in the Sheriff's custody.” Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 2. Until recently, they primarily suggested that such a location could include “home confinement or electronic home monitoring.” Pls.' Resp. to April 3, 2020 Ord. (dkt. no. 26-1) at 17; *see also* Pls.' Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 16–17 (requesting transfer without specifying the location to which detained people should be transferred). But in their most recent reply brief, they suggest that this also could include transfer to “another correctional space, a hospital or medical facility, a clinic, [or] administrative furlough.” Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 29. The Sheriff contends that, under the PLRA, only a three-judge court may order such transfers and that, regardless, he lacks the authority to transfer detainees to electronic home monitoring. The Court starts with the threshold issue: whether this Court may, on its own, order the transfer of detained persons as proposed by the plaintiffs.

**\*30** As indicated, under the PLRA, “[i]n any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court.” [18 U.S.C. § 3626\(a\)\(3\)\(B\)](#). The PLRA defines “prisoner release order” as “any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison.” [18 U.S.C. § 3626\(g\)\(4\)](#). It defines “prison” as “any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.” *Id.* [§ 3626\(g\)\(5\)](#). This definition plainly includes the Jail.

The plaintiffs contend that the transfer of detained persons that they seek would not be a prisoner release order because it would simply involve moving them from one place under the Sheriff's control to another place under his control. That misses the mark. Transfers to home confinement, administrative furlough, or electronic home monitoring in particular—which, at least up until they filed their reply brief, are the primary forms of transfer the plaintiffs have requested—would

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

constitute prisoner release orders because they would have “the purpose or effect of reducing [the] population” of the Jail. *Id.* § 3626(g)(4); *Money*, — F.Supp.3d at —, 2020 WL 1820660, at \*12 (transfers of prisoners to temporary medical furlough or home detention within the state's custody would constitute prisoner release orders because “the PLRA does not focus on custodial status under state law, nor does it say anything about whether the reduction of population is temporary or permanent.”). Population reduction is the “whole point” of the transfers the plaintiffs seek—they propose to prevent or curb the spread of coronavirus to detained persons, and in particular those who are vulnerable, by reducing the Jail's population. See *id.* at —, at \*13.

The transfers sought by the plaintiffs would constitute prisoner release orders for an additional reason: they would direct the release of detained persons out of the Jail. See 18 U.S.C. § 3626(g)(4). The plaintiffs contend that, for people confined at home at the direction of a state authority, a home may amount to a prison within the meaning of the PLRA. To be sure, the list of institutions that qualify as prisons under the PLRA is not limited to those specified in the statute.  *Witzke v. Femal*, 376 F.3d 744, 753 (7th Cir. 2004) (confinement in a drug rehabilitation halfway house qualified as confinement in a correctional facility under the PLRA). But, as defined by the PLRA, a prison is a facility. *Id.* § 3626(g)(5). The common definition of a facility is “a building or establishment that [provides a service or feature of a specified kind].”<sup>11</sup> That does not appear to cover a person's home; a home, even one in which a person is residing subject to a court or law enforcement authority's order, is not a place that provides specified services or features.<sup>12</sup> It is hard to see the PLRA's definition of “prison” stretching that far. In addition, even if home confinement and/or electronic home monitoring constitutes imprisonment under state law (an issue the Court need not decide), an order mandating the transfer of prisoners out of the Jail to confinement in their homes likely would constitute a prisoner release order because it would “direct[ ] the release [of prisoners] from...a prison” to another place of confinement, 18 U.S.C. § 3626(g)(4).

<sup>11</sup> *Facility*, Oxford English Dictionary Online, <https://www.oed.com/view/Entry/67465?redirectedFrom=facility&> (last visited April 26, 2020).

<sup>12</sup> *Home*, Oxford English Dictionary Online, <https://www.oed.com/view/Entry/87869?rskey=8yYRsS&result=1&isAdvanced=false> (last visited April 26, 2020).

\*31 The plaintiffs, however, appear to take the position even if prisoner transfers have the effect of reducing the prison population, a single-judge court may order them where the basis for the order is not crowding or overcrowding. They may be correct. One of the PLRA's requirements for the entry of a prisoner release order by a three-judge panel is that “crowding is the primary cause of the violation of a Federal right.” 18 U.S.C. § 3626(a)(3)(E)(i). Some courts have concluded that single-judge courts can order the transfers of prisoners, at least to other facilities, where the purpose



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

of the transfer involves the prisoners' medical needs or vulnerabilities. See *Plata v. Brown*, No. C01-1351 TEH, — F.Supp.3d —, 2013 WL 12436093, at \*9–10, 15 (N.D. Cal. June 24, 2013) (ordering the transfer to other institutions of certain medically high-risk categories of prisoners out of two prisons where they were at risk of contracting Valley Fever, a disease not spread through human-to-human contact); *Reaves v. Dep't of Correction*, 404 F. Supp. 3d 520, 523–24 (D. Mass. 2019) (denying a stay pending appeal and explaining why the PLRA permitted the court to order the transfer of a quadriplegic prisoner to a medical facility equipped to care for him in *Reaves v. Dep't of Correction*, 392 F. Supp. 3d 195 (D. Mass. 2019), appeal docketed, No. 19-2089 (1st Cir. Nov. 4, 2019)); see also *Money*, 2— F.Supp.3d at —, 020 WL 1820660, at \*12 n.11 (suggesting that a single-judge courts can order prisoner transfers for reasons other than crowding). This conclusion seems correct: because three-judge courts can order prisoner releases only where crowding is the primary cause of the violation of a federal right, 18 U.S.C. § 3626(a)(3)(E)(i), to ensure the vindication of people in custody's constitutional rights, the PLRA must be read to permit courts to order transfers where some other condition causes the violation of a constitutional right. See *Plata*, — F.Supp.3d at —, 2013 WL 12436093, at \*9–10.

But a single judge's ability to order a prisoner transfer for reasons other than crowding makes no difference in this case: the primary basis for the transfers the plaintiffs request is to reduce crowding in the Jail. See *Money*, — F.Supp.3d at —, 2020 WL 1820660, at \*13 (plaintiffs' suggestion that they did not seek a remedy for overcrowding “contradict[ed] the allegations of their complaint and their entire theory of the case”). To put it in simple terms, one of plaintiffs' core contentions is that their constitutional rights are being violated because social distancing, which they contend is crucial to protect their health, has not been or cannot be accomplished at the Jail. Social distancing is essentially the converse of overcrowding. Thus it is apparent that the plaintiffs' request for prisoner transfers or releases *is* based on overcrowding.

To be more specific, one of the central allegations in the complaint is that the crowded conditions in the Jail “ensure the continued[,] rapid, uncontrolled spread of COVID-19 within the Jail and beyond—because the Jail is not and cannot be isolated from the larger community” and “because the Jail is a crowded, congregate environment.” Compl. (dkt. no. 1) ¶ 2; see also, e.g., *id.* at ¶¶ 20, 25–26, 30–35, 37–41, 46, 51. The plaintiffs hinge their legal arguments on the contention that “without a reduction of the Jail's population, the lives and safety of the persons confined there cannot be reasonably protected” because “social distancing is not possible with the current jail population.” Pls.' Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 1; see also, e.g., Pls.' Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 1 (“The virus is spreading rapidly in the jail..., and that is not surprising: People are sleeping within three feet of each other, eating and using showers in close proximity to each other, and touching the same surfaces.”). They contend that the imperative of social distancing is an undisputed “medical necessity” and that “[a]ll of the evidence

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

in this record supports that proposition.” Pls.’ Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 3. As indicated, they cite evidence from a range of sources—including the CDC, the governor of Illinois, the City of Chicago, and medical and epidemiological experts—reflecting that social distancing is among the most effective and important interventions to reduce the spread of coronavirus and protect public health right now. *Id.* at 3–5; *see also, e.g.*, Pls.’ Renewed Mot. for Prelim. Inj. (dkt. no. 55) at 4–8. And, crucially, they contend that social distancing at the jail is impossible *because of its current population levels*. *Id.* at 10 (“[I]f the current population of a jail unavoidably creates intolerable risk to life and health then the current population must change.”); *see also id.* at 10–13; Pls.’ Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 6–8. In short, the plaintiffs are requesting transfers because social distancing is impossible; with that in mind, it is incongruous to contend that crowding is not the basis or primary basis for seeking compelled transfers. *See Money*, — F.Supp.3d at —, 2020 WL 1820660, at \*13.

\*32 Citing *United States v. Cook County*, 761 F. Supp. 2d 794 (N.D. Ill. 2000), the plaintiffs contend that the PLRA applies only to prisoner release orders that are “explicitly related to population caps,” not to all such orders stemming primarily from crowding. Pls.’ Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 32 (citing *id.* at 796–97). That interpretation stretches the statute’s language too far. Even if “[s]ponsors of the PLRA were especially concerned with courts setting ‘population caps,’ ” *Plata*, — F.Supp.3d at —, 2013 WL 12436093, at \*10 (quoting  *Gilmore v. California*, 220 F.3d 987, 998 n. 14 (9th Cir. 2000)), the PLRA’s text does not limit prisoner release orders issued by three-judge courts to only orders that set population caps, *see* 18 U.S.C. § 3626(a)(3)(E). *United States v. Cook County* does not suggest otherwise. The three-judge court in that case found “that overcrowding [was] a primary cause of unconstitutional conditions at the jail” because it caused, among other things, “excessive force by guards, grossly unsanitary and unhealthy conditions, and grossly inadequate medical (including mental-health) care.” *Cook County*, 761 F. Supp. 2d at 797. Although these conditions might have existed even without overcrowding, overcrowding made them worse. *Id.* at 797–98. Thus the purpose of the prisoner release order in *Cook County* was not merely to set prison caps but, rather, to address constitutional violations caused primarily by overcrowding. *See id.* The same is true in this case: the severe medical risks posed by coronavirus would exist even if the Jail was not crowded, but the plaintiffs contend the crowding at the Jail significantly enhances those risks and makes the outbreak more challenging to control. The purpose of a transfer order would be to address alleged constitutional violations stemming from coronavirus due to crowding in the Jail, and that is the type of order than only a three-judge court may issue.

#### 4. Three-judge court



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

The plaintiffs also have asked the Court to convene a three-judge court “to consider whether and to what extent to enter a prisoner release order.” Pls.’ Reply in Supp. of Renewed Mot. for Prelim. Inj. (dkt. no. 64) at 2. Under the PLRA, “[i]n any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court.” 18 U.S.C. § 3626(a)(3)(B). The Sheriff contends that the requirements for convening a three-judge court have not been met.

The PLRA provides that no court may enter a prisoner release order unless two requirements are met. 18 U.S.C. § 3636(a)(3)(A). First, a court must have “previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order.” *Id.* § 3636(a)(3)(A)(i) (the “previous order requirement”). In addition, the defendant must have “had a reasonable amount of time to comply with the previous court orders.” *Id.* § 3636(a)(3)(A)(ii) (the “reasonable time requirement”).

Together, these requirements ensure that a three-judge court's prisoner release order is a “last resort remedy.”  *Brown*, 563 U.S. at 514, 131 S.Ct. 1910. A party requesting a prisoner release order and the convening of a three-judge court must file “materials sufficient to demonstrate” that both requirements have been met. *Id.* § 3636(a)(3)(C). A federal judge can also request *sua sponte* the convening of a three-judge court if both requirements are met. *Id.* § 3636(a)(3)(D). The judge need not consider the likelihood of whether a three-judge court would issue a prisoner release order. *See Plata v. Schwarzenegger*, No. C01-1351-TEH, 2007 WL 2122657, at \*1 (N.D. Cal. July 23, 2007).

#### a. Previous order requirement

The Court starts with the previous order requirement. It previously entered an order for less intrusive relief by issuing the TRO. *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*14–16. The Sheriff contends that the TRO does not satisfy the PLRA's previous order requirement because it did not include an order requiring social distancing. In the TRO decision, the Court found that the plaintiffs had failed “to show a reasonable likelihood of success on their contention that the Sheriff is acting in an objectively unreasonable manner by failing to mandate full social distancing.” *Id.* at —, at \*10. The Court declined to order relief with respect to social distancing throughout the Jail but required the Sheriff to enforce social distancing in connection with the new detainee intake process. *Id.* at —, at \*14.

The previous order requirement is “satisfied if the court has entered one order [that] ‘failed to remedy’ the constitutional violation.”  *Brown v. Plata*, 563 U.S. at 514, 131 S.Ct. 1910. Neither

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

the statute nor the relevant case law suggests that a court must attempt all possible steps short of release before requesting the convening of a three-judge court. *See* 18 U.S.C. § 3636; [Brown](#), 563 at 514–16, 131 S.Ct. 1910. And the PLRA does not require a previous order involving a particular type of remedy; instead, it simply requires a previous order that attempted but failed to remedy the constitutional deprivation itself. *See* *id.* In [Brown](#), the Supreme Court affirmed an order of a three-judge court mandating a population limit for California's prison system as a remedy for constitutional violations in two class actions, one involving a class of prisoners with serious mental disorders and the other involving prisoners with serious medical conditions. *Id.* at 499, 502, 131 S.Ct. 1910. The Court found that district courts “acted reasonably when they convened a three-judge court,” despite recent, ongoing plans to address the at-issue constitutional violations, because they “had a solid basis to doubt” that the “additional efforts...would achieve a remedy.” *Id.* at 516, 131 S.Ct. 1910.

\*33 In the TRO, the Court ordered relief less intrusive than a prisoner release order. Specifically, it required the Sheriff to establish and implement policies regarding coronavirus testing and sanitation in the Jail, implement social distancing during the new detainee intake process, provide adequate soap and/or hand sanitizer and sanitation supplies, and provide facemasks to all detained persons who are quarantined. *Mays*, — F.Supp.3d at —, 2020 WL 1812381, at \*14–15. Because the TRO has not remedied the overall claimed constitutional violation—deficient conditions in the Jail during a pandemic—it satisfied the PLRA's previous order requirement.

### **b. Reasonable time requirement**

Additionally, before a three-judge court is convened under the PLRA, the defendant must have “had a reasonable amount of time to comply with the previous court orders,” as indicated. *Id.* § 3636(a)(3)(A)(ii). This provision “requires that the defendant have been given a reasonable time to comply with *all* of the court's orders.” [Brown](#), 563 U.S. at 514, 131 S.Ct. 1910 (emphasis added). In some situations, a court may need “to issue multiple orders directing and adjusting ongoing remedial efforts” while it “attempts to remedy an entrenched constitutional violation through reform of a complex institution.” *Id.* at 516, 131 S.Ct. 1910. “Each new order must be given a reasonable time to succeed, [and] reasonableness must be assessed in light of the entire history of the court's remedial efforts.” *Id.* But a court may request the convening of a three-judge court even while its remedial efforts are ongoing; otherwise, a court unreasonably would have “to impose a moratorium on new remedial orders” before a three-judge court considers the issuance of a prisoner release. *Id.*

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

In  *Brown*, the Supreme Court found that defendants in the two consolidated cases had reasonable time to comply with court orders where one court had “engaged in remedial efforts” for five years and the other court had done so for twelve years.  *Id.* Remedial efforts were ongoing when the district courts requested three-judge courts, but those ongoing efforts merely attempted “to solve the crisis” through the same “basic plan[s]” as earlier efforts.  *Id.* at 515, 131 S.Ct. 1910. In one case, a special master the district court appointed to oversee remedial matters had issued over seventy remedial orders.  *Id.* The courts had no “assurance[s] that further, substantially similar efforts would yield success absent a population reduction.”  *Id.* Indeed, advances that had been made in one case were “ ‘slip-sliding away’ as a result of overcrowding.”  *Id.* (quoting court-appointed special master).

The plaintiffs contend that the Sheriff has had a reasonable time to comply with the Court's previous order. They have requested a preliminary injunction ordering social distancing, but, in light of the urgency of the situation, they also have requested the convening of a three-judge court to consider the question of prisoner release. The plaintiffs appear to contend that if an injunction directing social distancing does not remedy the alleged constitutional violations, then only the immediate release of prisoners by a three-judge court will achieve a remedy, so a three-judge court needs to be ready to issue a ruling as soon as that time comes. The Sheriff contends that he has not reasonably had time to comply with any such order because the Court has not directed him to implement social distancing throughout the Jail.

The Court recognizes that determination of what amounts to a “reasonable time” to comply with a court's previous orders may depend on the circumstances, and here the circumstances are extraordinary, involving an infectious virus that can be transmitted quickly from person to person. So here, perhaps, a “reasonable time” may amount to days or a small number of weeks, not years as may be the case in other situations. Undue delays in responding to the coronavirus pandemic may place detained persons' health and lives in imminent danger.

\*34 Unlike in  *Brown*, however, the ongoing remedial efforts in this case might remedy the ongoing constitutional violation—which, to be clear, involves the objective reasonableness of the Sheriff's response to the coronavirus outbreak, not existence of coronavirus itself—if given adequate time. The Sheriff has offered evidence that may be understood to suggest that he is making a substantial effort to comply with the Court's order and attempt to improve the conditions of confinement at the Jail in response to the coronavirus pandemic. As detailed earlier in this opinion, he has complied with the TRO by implementing social distancing at intake; developing and implementing a plan to distribute soap, sanitizer, and cleaning supplies more frequently; and

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

providing facemasks to detained persons housed on tiers under quarantine. In addition, he has made efforts to spread out detainees within the Jail, even though the TRO did not mandate it. As detailed earlier, he has opened up previously closed units, doubled the number of persons housed in single-occupancy cells, attempted to ensure that detained persons are assigned beds in dorm units that are spaced more than six feet apart, and adopted various practices to encourage detained persons to practice social distancing in dorms and in common areas. As the Court has explained, it believes that the narrowly tailored relief it is ordering via this opinion appropriately addressed the claimed constitutional violations on which the plaintiffs have shown a likelihood of success. Unlike in [Brown](#), the additional relief ordered in this decision is not based on the same “basic plan” as earlier efforts but rather takes a different and focused approach. [Brown](#), 563 U.S. at 515, 131 S.Ct. 1910. In short, it will require preventative public health measures that the Court has not previously ordered and that the Sheriff has not shown he has implemented.

Further, although the PLRA's previous order requirement refers to a single order, its reasonable time requirement uses the plural “orders.” Compare 18 U.S.C. § 3626(a)(3)(A)(i) with *id.* § 3626(a)(3)(A)(ii); see also [Brown](#), 563 U.S. at 514, 131 S.Ct. 1910. Nothing in the statute or the relevant case law indicates that a court must convene a three-judge panel after issuing only one order. Rather, the case law reflects that a court can, and perhaps in some circumstances should, make additional efforts beyond a single TRO before convening a three-judge court to consider ordering the release of imprisoned or detained persons. See *id.* (releasing prisoners is a “last resort remedy”). This seems particularly true where, as here, a Court has a basis on which to issue an additional order that is not “substantially similar” to its previous order and thus can attempt a new approach to remedying the constitutional violation that might “yield success.” Cf. [Brown](#), 563 U.S. at 515, 131 S.Ct. 1910.

For these reasons, the Court is not persuaded that it has given its less-intrusive orders “a reasonable time to succeed,” [Brown](#), 563 U.S. at 516, 131 S.Ct. 1910; that the Sheriff has “reasonable amount of time to comply” with those orders, 18 U.S.C. § 3636(a)(3)(A)(ii); or that the Sheriff could have reasonable time to comply in light of the further efforts the Court is taking in this order to remedy the claimed constitutional violations. The Court concludes that the PLRA's reasonable time prerequisite for the convening of a three-judge court has not yet been satisfied.

For these reasons, the Court declines to request the convening of a three-judge court.<sup>13</sup>

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

13

As the Court has previously advised the parties, however, immediately after the issuance of the TRO, the Court advised the chief circuit judge of the pendency of the case and the potential need, at some point, to convene a three-judge court.

## 5. Irreparable harm

In addition to showing a likelihood of success on the merits, the plaintiffs must show that they will likely suffer irreparable harm without a preliminary injunction.  *Whitaker*, 858 F.3d at 1044. Irreparable harm is “harm that cannot be repaired and for which money compensation is inadequate.” *Orr v. Shicker*, 953 F.3d 490, 502 (7th Cir. 2020) (internal quotation marks omitted). The plaintiffs must show more than a “mere possibility” of harm but not that harm has already occurred or is certain to occur.  *Whitaker*, 858 F.3d at 1045. “[A] remedy for unsafe conditions need not await a tragic event.”  *Helling v. McKinney*, 509 U.S. 25, 33, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993).

The plaintiffs have satisfied this requirement. They have shown a likelihood that, without additional measures to expand and enforce social distancing and the continuation of measures aimed at enhancing sanitation of surfaces within the Jail and otherwise curbing the spread of coronavirus among detained persons, some of the class members will contract the virus. If they contract coronavirus, class members—particularly those over the age of sixty-five or with certain preexisting health conditions—risk severe health consequences, including death. These grave risks to health are not an insignificant possibility for the class members, all of whom are live in the Jail's congregate environment, where the coronavirus has been spreading for weeks and where detained persons—even those who sleep their own cells—share spaces like common areas and showers. Therefore, the plaintiffs have adequately shown a likelihood that they will suffer irreparable harm without a preliminary injunction.

## 6. No adequate remedy at law

\*35 The plaintiffs also must show that they have no adequate remedy at law should the preliminary injunction not issue.  *Whitaker*, 858 F.3d at 1046. They are not required to show that a remedy is “wholly ineffectual” but rather “that any award would be seriously deficient as compared to the harm suffered.”  *Id.* Where harm cannot be practicably remedied by monetary damages, there is no adequate legal remedy. See  *id.*;  *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003); see also  *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1126–27 (N.D. Ill. 2018) (no adequate remedy of law to address harm from prolonging child's separation from parent). The plaintiffs have clearly shown that the risk of harm to their health and possibly their lives cannot



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

be fully remedied through damages, and therefore they have shown that they have no adequate remedy at law.

## 7. Balancing of harms

“Once a moving party has met its burden of establishing the threshold requirements for a preliminary injunction, the court must balance the harms faced by both parties and the public as a whole.”  [Whitaker](#), 858 F.3d at 1054. The nature of the balancing analysis depends on the moving party's likelihood of success: the higher the likelihood, the more the balance tips in favor of granting injunctive relief.  *Id.* Before issuing an injunction ordering a defendant to perform an affirmative act, which can impose “significant burdens on the defendant,” a court must give “careful consideration [to] the intrusiveness of the ordered act, as well as the difficulties that may be encountered in supervising the enjoined party's compliance with the court's order.”  [Kartman](#), 634 F.3d at 892 (discussing certification of a class seeking mandatory injunctive relief).

The Sheriff argues that the balance of harms weighs against issuing a preliminary injunction because he is doing the best he can to contain the spread of coronavirus at the Jail, including, he contends, following the CDC Guidelines to the greatest extent possible. He argues that an order requiring him to implement more health and protective measures would be disruptive to his ongoing and persistent efforts to protect detainees from coronavirus. He also argues that the Court should defer to his expertise and judgment regarding the best policies and practices to implement at the Jail, particularly in light of the fundamental need for him to maintain internal security and order. *See*  [Bell](#), 441 U.S. at 547–48, 99 S.Ct. 1861. The plaintiffs contend that the risk of severe health consequences or death to the class members is so grave that it tips the balance of harms in favor of granting a preliminary injunction. Additionally, the plaintiffs argue the public's interest in containing outbreaks of coronavirus favors granting injunctive relief.

The Court concludes that the balance favors granting preliminary injunctive relief to the plaintiffs to the limited extent contemplated by this order. First, as detailed above, the plaintiffs have presented ample evidence of conditions that pose an unreasonable risk of serious harm to the class members' health and, despite the laudable strides the Sheriff has made since the Court issued the TRO, at least some shortcomings in the Sheriff's mitigation of that risk. This evidence tips the balance in favor of injunctive relief because, as the Court has explained, the plaintiffs have far surpassed their burden of demonstrating a “better than negligible” likelihood of success on the merits.  [Whitaker](#), 858 F.3d at 1046 (quoting  [Cooper v. Salazar](#), 196 F.3d 809, 813 (7th Cir. 1999)). The interest of the public in containing the spread of coronavirus further tips the balance in favor of injunctive relief.

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

As it did in issuing the TRO, the Court acknowledges the deference owed to the Sheriff in the operation of the Jail and in his development of internal procedures to maintain safety, order, and security and to response to this severe crisis. The Court recognizes the immense amount of time and work that the Sheriff and his staff have spent trying to respond to this crisis. The Court further recognizes that compliance with judicial orders impose burdens on the Sheriff and his staff, in no small part by requiring them to devote some of their limited time and resources to following a court's directives.

**\*36** The Court has taken these considerations into account in ordering the limited relief described in this order. It has ensured that the relief is narrowly drawn, extends no further than necessary, and is the least intrusive means necessary to address the shortcomings discussed earlier in this opinion. The Court has tailored the relief to account for deference to the Jail's ongoing planning and efforts to address the risks associated with the coronavirus outbreak. The Court also has, as indicated earlier, taken into account the enhanced requirements for issuing what it has referred to as a “mandatory injunction.” And the Court has concluded that it will not encounter significant obstacles in supervising the order despite its mandatory nature. Despite these considerations, the risk to the health and safety of detainees and others is sufficient to permit and require preliminary injunctive relief.

### **C. Preliminary injunctive relief**

For the reasons stated above, the plaintiffs have met the criteria for a preliminary restraining order with regard to at least parts of Count 1 of their complaint. The Court orders as follows and will also include this in a separate preliminary injunction order issued under [Federal Rule of Civil Procedure 65\(d\)](#).

- The Sheriff shall maintain and carry out a policy requiring prompt coronavirus testing of: (1) detained persons who exhibit symptoms consistent with coronavirus disease, and (2) at medically appropriate times, detained persons who have been exposed to others who have exhibited those symptoms or have tested positive for coronavirus. With regard to the category (2), the Sheriff must acquire and maintain sufficient testing materials so that determination of the appropriateness of testing such persons is made pursuant to medical and public health considerations and not the availability of testing materials.
- The Sheriff shall enforce social distancing during the new detainee intake process, including continued suspension of the use of bullpens and other multiple-person cells or enclosures to hold new detainees awaiting intake.



Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

- The Sheriff shall provide soap and/or hand sanitizer to all detainees in quantities sufficient to permit them to frequently clean their hands.
- The Sheriff shall provide sanitation supplies sufficient and adequate to enable all staff and detainees to regularly sanitize surfaces and objects on which the virus could be present, including in all areas occupied or frequented by more than one person (such as two-person cells, as well as bathrooms, showers, and other surfaces in common areas). The Sheriff shall also maintain and carry out a policy requiring sanitization between all uses of frequently touched surfaces and objects as well as monitoring and supervision to ensure that such sanitization takes place regularly.
- The Sheriff shall provide facemasks to all detained persons who are quarantined—i.e., those who have been exposed to a detained person who is symptomatic (even if not coronavirus-positive). The facemasks must be replaced at medically appropriate intervals, and the Sheriff must provide the users with instruction on how to use a facemask and the reasons for its use.
- The Sheriff shall establish by no later than April 29, 2020 and shall put into effect by no later than May 1, 2020 a policy precluding group housing or double celling of detained persons, except in the following situations:
  - Persons detained in tiers or dormitories currently under quarantine following a positive test for the coronavirus within the tier or dormitory (“quarantine tiers”);
  - Detained persons who have tested positive for the coronavirus and are under medical observation (“isolation tiers”);
  - Detained persons who have tested positive for coronavirus and are recovering (“convalescent tiers”);
  - Double-celled or dormitory-housed detainees for whom there is a documented determination by a medical or mental health professional that single-celling poses a risk of suicide or self-harm;
  - \*37 • Persons detained housed in a dormitory unit that is at less than fifty percent capacity; and
  - Detained persons committed, at the documented direction of a medical or mental health professional, to a group housing unit that is equipped for medical or mental health

Mays v. Dart, --- F.Supp.3d ---- (2020)

2020 WL 1987007

treatment, if but only if there is not available space in an appropriate housing or medical unit that permits full social distancing.

- Detained persons housed in any of the listed “acceptable” arrangements must be provided with facemasks that are replaced at medically appropriate intervals. The detained persons must be provided with instruction on how to use a facemask and the reasons for its use. They also must be instructed, at regular intervals, on the importance of social distancing.
- On May 1, 2020, the Sheriff shall file a report regarding his compliance with the terms of the preliminary injunction.

Finally, the Court will entertain submissions by the parties regarding the duration of the preliminary injunction, in particular the social distancing provisions. Typically, a preliminary injunction lasts until the trial on the merits, but the order the Court is entering is predicated on an underlying condition—the ongoing pandemic—that, one can hope, will not last indefinitely. Under ordinary circumstances, there is nothing constitutionally inappropriate about housing detained persons in groups and allowing them to come into contact with each other. Currently we are not living in ordinary circumstances—hence the preliminary injunction—but once matters return to something approaching normal, it may be appropriate to loosen the requirements of the injunction. The Court (either the emergency judge or the assigned judge) will address this with the parties at a future date.

## Conclusion

The Court grants the plaintiffs' motion for preliminary injunction in part and denies it in part as set out in this Memorandum Opinion and Order [dkt. no. 55].

## All Citations

--- F.Supp.3d ----, 2020 WL 1987007

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Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

2020 WL 2405350

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United States District Court, D. Connecticut.

Dianthe MARTINEZ-BROOKS et al., Plaintiffs,

v.

D. EASTER & Michael Carvajal, Defendants.

No. 3:20-cv-00569 (MPS)

|

Signed 05/12/2020

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### **RULING ON MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION TO DISMISS**

Michael P. Shea, U.S.D.J.

### **I. INTRODUCTION**

\*1 On March 27, 2020, Congress gave federal prison officials an extraordinary tool to confront the extraordinary threat posed by the novel coronavirus within prison walls: the authority to transfer any federal inmate from prison to confinement in his or her home. A week later, the Attorney General of the United States urged the Director of the Bureau of Prisons (“BOP”) to “maximize” the use of that tool as soon as possible, stating in an April 3 memorandum that “[g]iven the speed with which this disease has spread through the general public,” and the Bureau’s “profound obligation to protect the health and safety of all inmates,” “it is clear that time is of the essence.” ECF No. 24-2 at 48-49. The Attorney General’s memo was triggered by an outbreak of COVID-19, the disease caused by the novel coronavirus, at the Danbury Federal Correctional Institution (“FCI Danbury”), a low security prison in Danbury, Connecticut, and two other federal prisons; the memo directed the BOP to “immediately review all inmates who have COVID-19 risk factors” for potential placement in home confinement, “starting with inmates incarcerated at ... FCI Danbury” and the other two facilities. *Id.* at 49. This case – brought by four inmates at FCI Danbury – involves

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

an apparent failure of the Warden and staff at FCI Danbury to take these exhortations seriously. The four inmates, all of whom have COVID-19 risk factors, have made a preliminary showing that officials at FCI Danbury are making only limited use of their home confinement authority, as well as other tools at their disposal to protect inmates during the outbreak, and that these failures amount to deliberate indifference to a substantial risk of serious harm to inmates in violation of the Eighth Amendment. Accordingly, I grant in part the inmates' motion for a temporary restraining order and issue an order that requires the Warden at FCI Danbury to adopt a process for evaluating inmates with COVID-19 risk factors for home confinement and other forms of release that is both far more accelerated and more clearly focused on the critical issues of inmate and public safety than the current process. Factual disputes as to other issues the inmates raise preclude me from granting further relief at this time, but I also order an expedited period of discovery and schedule a hearing for June 11, 2020, to adjudicate the inmates' motion for preliminary injunction.

## II. PROCEDURAL HISTORY

On April 27, the inmates (the "Petitioners") filed a petition for writ of habeas corpus under  [28 U.S.C. § 2241](#) against the Warden of FCI Danbury and the Director of the Bureau of Prisons (the "Respondents"). They sought to represent a class consisting of all inmates in the men's prison and the two women's prisons making up FCI Danbury, as well as a "medically vulnerable" subclass consisting of those inmates with COVID-19 risk factors. They alleged that "[t]he only effective way to minimize the potential devastation from COVID-19 in BOP facilities generally and FCI Danbury in particular is to downsize immediately the incarcerated population and, for the prisoners who remain at the institution, to undertake aggressively the detection, prevention, and treatment measures that public health and medical experts have recommended, including effective social distancing." ECF No. 1 at 34. They further alleged that Respondents were violating the Eighth Amendment by "fail[ing] to use the BOP's available statutory authority to reduce the population of FCI Danbury to mitigate the severe risk posed by COVID-19," ECF No. 1 at 41, and by failing to take adequate safety measures—including distancing, hygiene, testing, and medical treatment—to protect inmates during the outbreak.

**\*2** The Petition seeks a wide range of relief, including an order "requiring Respondents to release from custody or to home confinement members of the [medically vulnerable] Subclass and requiring Respondents to provide medically adequate social distancing and health care and sanitation for members of the Class who remain." ECF No. 1 at 66.

On April 30, the Petitioners filed an "emergency motion for temporary restraining order and preliminary injunction," seeking an order requiring Respondents to "enlarge [*i.e.*, transfer] to home confinement all women currently housed in the satellite camp at FCI Danbury," "enlarge to home

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

confinement all members of the medically vulnerable Subclass,”<sup>1</sup> and “implement appropriate measures to maximize social distancing and improve hygiene” for the remaining inmates or transfer them to safer BOP facilities. ECF No. 14 at 1. Together with their Petition and motion, Petitioners filed declarations from inmates housed at each of the three prisons within FCI Danbury, as well as declarations from experts and other evidence.

<sup>1</sup> During oral argument on the motion for temporary restraining order and preliminary injunction, Petitioners’ counsel stated that, by asking for an order of “enlarge[ment],” Petitioners were *not* seeking the immediate, indiscriminate release of inmates, but instead asking for a process by which inmates would be evaluated promptly for transfer to home confinement, with the urgency reflected in the Attorney General’s April 3 memo. The order I issue today requires the implementation of such a process.

On May 5, the Respondents filed a joint motion to dismiss the habeas petition under [Fed. R. Civ. P. 12\(b\)\(1\) and 12\(b\)\(6\)](#) and an opposition to the motion for temporary restraining order and preliminary injunction. The Respondents argued that the Court lacked jurisdiction over the habeas petition, that it failed state a claim, and that the Petitioners’ motion should be denied. With regard to jurisdiction, the Respondents argued, among other things, that the Court was prohibited from entertaining the Petitioners’ requests for “enlargement”, because doing so would exceed the limited authority of district courts to modify sentences once they are imposed; that the Prison Litigation Reform Act, [18 U.S.C. § 3626](#), foreclosed such relief; and that the Petitioners had failed to exhaust administrative remedies. The Respondents also submitted a lengthy declaration by the Warden and defended her efforts to combat the COVID-19 crisis on the merits, detailing safety measures the Warden had imposed at FCI Danbury, including enhanced sanitation, quarantine of inmates, isolation of groups of inmates, the provision of masks and other protective equipment to inmates and staff, and delivery of food and programming directly to the living units. Finally, the Respondents argued that this habeas petition cannot be maintained as a class action.

I held oral argument on May 6, 2020, and now issue this ruling.

### III. FACTUAL BACKGROUND

The factual background is taken from the Petition, the declarations submitted by Petitioners, and the Warden’s declaration.

#### A. The Petitioners

Petitioners are four inmates currently serving terms of imprisonment at FCI Danbury. Petitioners suffer from medical conditions that place them at higher risk for serious illness or death from the

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

disease caused by the SARS-CoV-2 virus (“COVID-19”). They bring this habeas petition on behalf of themselves and a putative class of all inmates currently in custody at FCI Danbury, or who will be in custody at FCI Danbury during the course of the COVID-19 pandemic (“the Class”), as well as a subclass consisting of all such individuals who are also at heightened risk for serious illness or death from COVID-19 (“the Medically Vulnerable Subclass”).

\*3 Petitioner Dianthe Martinez-Brooks is a 50-year-old woman currently housed in FCI Danbury’s women’s minimum-security camp. ECF No. 1 (“Petition”) ¶ 1. Ms. Martinez-Brooks suffers from systematic [lupus erythematosus](#), an inflammatory [autoimmune disease of the connective tissue](#), for which she takes corticosteroids. *Id.* The prolonged use of corticosteroids can cause a person to be immunocompromised.<sup>2</sup> Ms. Martinez-Brooks also suffers from [asthma](#) and [hypertension](#). *Id.* She is serving a 48-month sentence for wire fraud, and her projected release date is June 25, 2022. ECF No. 1-3 at 2.

<sup>2</sup> *People Who Are at Higher Risk for Severe Illness*, CDC (Apr. 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

Petitioner Kenneth Cassidy is a 54-year-old man currently housed at FCI Danbury’s men’s prison, a low-security facility. ECF No. 1-4 at 2. He has had three [heart attacks](#), has had [pneumonia](#) in his right lung more than 20 times, and suffers from multiple chronic medical conditions, including [asthma](#), [coronary artery disease](#), and [hypertension](#). *Id.* He is morbidly obese. *Id.* at 3. Mr. Cassidy is serving a 5 year sentence for conspiracy to commit wire fraud and willful failure to file an income tax return. *Id.* His projected release date is March 31, 2021 and his projected home confinement release date is October 1, 2020. *Id.*

Petitioner Rejeanne Collier is a 64-year-old woman currently housed in the Women’s Camp. Petition ¶ 2. She suffers from [lupus](#), [hypertension](#), and [hepatitis C](#) and has been treated for [cancer](#) while in custody. *Id.* She is serving a 15 ½ year term of imprisonment for conspiracy to possess with intent to distribute and to distribute one kilogram or more of heroin. ECF No. 24-2 at 38-39.

Petitioner Jackie Madore is a 50-year-old woman currently housed in the low security satellite prison. Petition ¶ 3. She suffers from [hypertension](#), [hypothyroidism](#), and [hepatitis C](#). *Id.*

## B. The COVID-19 Pandemic

The COVID-19 pandemic is an ongoing, once-in-a-century public health crisis to which no reader will need much introduction. As of May 11, 2020, there have been a whopping 1.3 million confirmed cases and roughly 80,000 deaths from COVID-19 in the United States alone. *Cases in*



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

the U.S., CDC.gov (last updated May 11, 2020).<sup>3</sup> Shops, restaurants, and offices remain shuttered in many states, and unemployment has reached levels unseen since the Great Depression.

<sup>3</sup> URL: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

Not all Americans, however, are equally at risk. It is well established that the elderly and those suffering from certain preexisting medical conditions are at significantly higher risk of serious illness or death from COVID-19. According to the Centers for Disease Control and Prevention (“CDC”), those at high risk for severe illness from COVID-19 include people who are 65 years and older, have [chronic lung disease](#) or moderate to severe [asthma](#), have serious heart conditions, are immunocompromised, are severely obese, have [diabetes](#), have [chronic kidney disease](#) and are undergoing dialysis, or have liver disease.<sup>4</sup> High-risk individuals face significantly higher mortality rates should they contract COVID-19 than the general population. According to one report, for example, the mortality rate from COVID-19 is 8.4% for individuals with [hypertension](#), 8.0% for individuals with chronic respiratory disease, 7.6% for individuals with [cancer](#), and 13.2% for individuals with [cardiovascular disease](#). ECF No. 1 at 9-11 (citing Report of WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), World Health Organization (Feb. 28, 2020), at 12, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (last visited May 7, 2020)).

<sup>4</sup> *People Who Are at Higher Risk for Severe Illness*, CDC (Apr. 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

\*4 Petitioners’ medical conditions place them in this high-risk group. And Petitioners face an additional risk that even most of those in the high-risk group do not: They are incarcerated. According to Petitioners’ expert, “[t]he risk posed by infectious diseases in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” ECF No. 1-1 at 3. And it is not difficult to imagine why. The vast majority of the inmates at FCI Danbury live in large dormitory halls lined with bunk beds, each housing roughly 50 or more inmates, with shared bathrooms and common spaces. This arrangement makes effective social distancing virtually impossible.

Thus, not surprisingly, numerous federal and state prisons are contending with significant COVID-19 outbreaks, and FCI Danbury is no exception. Since the pandemic began, sixty-nine inmates at FCI Danbury have tested positive, out of an inmate population of approximately 1,000. ECF No. 24-2 at 25. But this figure may well understate the true number of COVID-19 cases at FCI Danbury, in light of the limited testing that has been conducted. One inmate has died since the crisis began. In fact, FCI Danbury was one of only three federal prisons specifically identified



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

by Attorney General William Barr in an April 3, 2020 memo to the Director of the Bureau Prisons ordering immediate action to place vulnerable inmates on home confinement. ECF No. 24-2 at 48. In the memo, Attorney General Barr noted the “significant levels of infection” at FCI Danbury, along with FCI Oakdale and FCI Elkton. *Id.*

### C. The Warden’s Efforts To Contain the Outbreak

The extent to which the Warden has implemented adequate measures to control the COVID-19 outbreak at FCI Danbury and protect inmates is hotly disputed in this case. The Warden’s efforts and the Petitioners’ allegations regarding their insufficiency are described in the sections that follow.

#### 1. Social Distancing

According to the CDC, social distancing is “the best way to reduce the spread of coronavirus disease 2019 (COVID-19).” *Social Distancing*, CDC (May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>. Practicing social distancing requires individuals to stay at least 6 feet from other people, to avoid gathering in large groups, and to stay out of crowded places and avoid mass gatherings. *Id.* These measures are virtually impossible to observe in a prison setting, particularly at facilities like FCI Danbury. FCI Danbury consists of three facilities—a low-security men’s prison, a minimum-security women’s camp, and a low-security women’s satellite prison. ECF No. 24-2 at 4-5.

In the men’s prison, there are seven units of open, dorm-style housing, two smaller rooms that can house ten to twelve inmates each, and three units of individual cells. ECF No. 24-2 at 4. Thus, the majority of the inmates at the men’s prison live in large, open dormitories, with shared common spaces and bathrooms. For example, Petitioner Kenneth Cassidy sleeps in a room with 65 other prisoners. ECF No. 1-4 at 9. He sleeps within one foot of the prisoner on the bunk above him, and within three to four feet of the four prisoners in the two bunks on either side of him. *Id.* There are no barriers between the beds. *Id.* As of May 4, 2020, the men’s prison housed 719 inmates. ECF No. 24-2 at 4.

In the women’s satellite prison, all of the women are housed in a single dormitory-style room that accommodates approximately 160-170 beds. Petition ¶ 36. The room is divided into cubicles, each containing two bunk beds, separated by approximately four feet. *Id.* Beds in each cubicle are immediately adjacent to the cubicle wall, which does not reach to the ceiling. *Id.* In some instances the wall does not even reach the top of the bunk bed, and the woman on the top bunk sleeps right next to the woman on the top bunk in the adjacent cubicle. *Id.* The women in the satellite prison

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

share three bathrooms, each of which includes between 4-8 toilets, sinks, and showers. *Id.* As of May 4, 2020, the women’s satellite prison housed 131 inmates. ECF No. 24-2 at 5.

\*5 The women’s prison camp is a large building divided into four dormitories, each consisting of cubicles and bunk beds. *Id.* at 4. The cubicles have no doors and their dividing walls do not extend to the ceilings. Petition ¶ 37. The bunk beds are less than six feet apart. *Id.* Each of the four dormitories has a common shower and bathroom area. *Id.* Three of the dorms house 47 women each, and the fourth houses 7. *Id.* As of May 4, 2020, the women’s camp housed 134 inmates. ECF No. 24-2 at 4.<sup>5</sup>

<sup>5</sup> As these two sentences show, the figures estimated by Petitioners differ somewhat, but not materially, from those estimated by Respondents; these differences may be a function of the different times at which they filed their submissions.

The Petitioners complain that social distancing—arguably the most effective measure for preventing the spread of COVID-19—is impossible at FCI Danbury. Most of the inmates at FCI Danbury live in large, open dormitories with 50 or more other inmates, where they sleep within 3 to 4 feet of between 3 and 5 other prisoners. Petition ¶ 149. Prisoners use the same bathrooms and share a limited number of toilets, sinks, and showers, as well as a limited number of telephones and computers, which are located close together in common areas. *Id.* Moreover, according to Petitioners, prisoners are unnecessarily made to line up in close proximity to one another to receive their meals and medications. *Id.* ¶ 150.

The Warden contends that she has taken substantial steps toward implementing social distancing. In general, smaller inmate groups at FCI Danbury have been formed by separating inmates by housing unit so they can “shelter in place” with the fewest number of fellow inmates. ECF No. 24-2 at 9. These groups are rotated through the recreation facility by themselves, and the facility is disinfected between groups. *Id.* Programs, including “Education, Psychology, and Religious Services” are delivered in each unit, and meals are delivered directly to the units by staff (rather than inmate food service workers) in order to maintain the integrity of the inmate group quarantine. *Id.* While the Respondents compare this arrangement to “family units in the general population,” and note that an inability to full socially distance is typical of many, if not all, correctional institutions, ECF No. 24-1 at 73, the fact remains that true social distancing appears to be unachievable at FCI Danbury, creating an environment where the risk of transmission is significantly heightened.

## 2. Screening and Testing

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

Petitioners contend that the Warden has failed to adequately screen inmates for COVID-19 symptoms and test and isolate inmates exhibiting symptoms. According to Petitioners, inmates who complain to staff of symptoms consistent with COVID-19—including coughing, congestion, and shortness of breath—are routinely unable to obtain immediate medical examination, are not tested for COVID-19, and are returned to the general population until their symptoms worsen. Petition ¶ 131. For example, Kimberly Hoisington, an inmate at the satellite prison, indicates that on March 26, she reported being ill to staff on two separate occasions, but was told to lie down. ECF No. 1-7 at 2. By early morning on March 27, she developed severe chest pain and was eventually taken to the hospital, where she tested positive for COVID-19. *Id.* Similarly, Christina Korbe, an inmate at the satellite prison, submitted testimony indicating that, in early April, she began experiencing symptoms consistent with COVID-19, including a severe headache, body aches, fever, shortness of breath, and “a terrible cough”—the “worst cough I have ever had.” ECF No. 1-5 at 2. She spoke to the medical department multiple times about her symptoms but was never offered a test for COVID-19. *Id.* Despite her symptoms, she was not quarantined but was instead kept with the general population. *Id.* She further claims that she has personally observed many other prisoners with symptoms similar to hers, but that the majority of these women were not placed into quarantine. *Id.* at 3. Petitioner Cassidy, an inmate at the men’s prison, indicates that “[a]pproximately 80% of prisoners in my unit show flu-like symptoms, including fever, coughing, body aches, shortness of breath, chest pressure, and headaches.” ECF No. 1-4 at 3.

\*6 Inmate Christina Korbe also relates that, on April 24, a woman at the satellite prison became extremely sick, vomiting and struggling for air. ECF No. 1-5 at 3. Other inmates were around her, trying to help her, without wearing any gloves or masks. *Id.* She was sick for hours and throughout the night, and the inmates did not understand why the staff did not take her to the hospital. *Id.* In response to concern among the inmates, a correctional officer (a lieutenant) came into the dormitory and announced that anyone who used the phone to contact people on the outside about the incident would get a disciplinary violation, and that the inmates needed to “stay in [their] lane” because they “are not doctors.” *Id.* The sick woman was eventually taken to the hospital early on April 25. *Id.* At oral argument, the Respondents indicated that she was taken to the hospital because she was aspirating—choking on her own vomit—and that she was intubated for this reason, although she also tested positive for COVID-19. The Respondents further indicated that she was taken off the ventilator the very next day and sent back to FCI Danbury after only two nights in the hospital. According to Christina Korbe, many of the women who had been in contact with the woman who was taken to the hospital were tested for COVID-19, and at least ten of them tested positive. These women have been quarantined, but were first allowed to come back to the dormitory to get their personal belongings and take showers. *Id.* at 3-4.

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

The Warden contends that inmates are screened daily for COVID-19 symptoms. For example, beginning on April 9, 2020, the Lieutenants at FCI Danbury began visiting each housing unit daily to take the temperature of all inmates assigned to that unit. ECF No. 24-2 at 24. Any inmate found to have a temperature of 99 degrees or higher is sent to Health Services for a follow-up assessment by a licensed health care provider. *Id.* Petitioners contend, however, that these readings are sometimes manipulated to avoid appropriate follow-up by requiring prisoners to drink a glass of cold water, attributing high readings to equipment error, or holding the temperature wand too far from inmates' foreheads. Petition ¶ 134. According to inmate Kimberly Hoisington, for example, when she was taken to the hospital, her temperature was 102 degrees upon arrival, while an hour earlier, FCI Danbury staff had told her that her temperature was 97 degrees. ECF No. 1-7 at 2.

In general, the Warden claims that any inmate at FCI Danbury presenting with symptoms consistent with COVID-19 is immediately evaluated by a medical provider to determine whether testing and/or isolation is appropriate, whether contact tracing might be necessary, and whether inmates with whom the symptomatic inmate had contact might need to be quarantined. ECF No. 24-2 at 24. The decision whether to test an inmate for COVID-19 is made by BOP medical providers based on a number of criteria, including but not limited to: (1) the nature and severity of the symptoms; (2) the inmate's potential exposure to COVID-19; and (3) whether the inmate is considered "high-risk." *Id.* On April 14, 2020, FCI Danbury received an Abbott "ID NOW" machine that can deliver test results within approximately 15 minutes. *Id.* at 24-25. As of May 4, 2020, FCI Danbury had 150 COVID-19 testing kits in stock, and the facility has the ability to order and quickly receive additional kits from a designated vendor if needed. *Id.* at 25. Since the advent of the emergency, 205 inmates have been tested for COVID-19; sixty-nine inmates and fifty-six staff have tested positive. *Id.* This includes testing of every woman at the satellite prison, performed at the behest of U.S. Senator Christopher Murphy between May 2nd and 3rd, during which 20 of 143 women tested positive. *Id.*

### 3. Isolation and Quarantine

The Petitioners claim that the Warden has further failed to adequately isolate individuals testing positive for COVID-19 and to quarantine individuals who have had contact with inmates infected with COVID-19. According to the CDC's "Interim Guidance on Management of [COVID-19] in Correction and Detention Facilities," "as soon as an individual develops symptoms of COVID-19, ... they ... should be immediately placed under medical isolation in a separate environment from other individuals," and "persons who are close contacts of a confirmed or suspected COVID-19 case ... should be placed under quarantine for 14 days." CDC (May 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [hereinafter CDC, Interim Guidance]. For medically isolated

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

individuals, the CDC provides the following criteria for how long an individual testing positive must be isolated:

**\*7 • For individuals who will be tested to determine if they are still contagious:**

- The individual has been free from fever for at least 72 hours without the use of fever-reducing medications **AND**
- The individual's other symptoms have improved (e.g., cough, shortness of breath) **AND**
- The individual has tested negative in at least two consecutive respiratory specimens collected at least 24 hours apart

**• For individuals who will NOT be tested to determine if they are still contagious:**

- The individual has been free from fever for at least 72 hours without the use of fever-reducing medications **AND**
- The individual's other symptoms have improved (e.g., cough, shortness of breath) **AND**
- At least 10 days have passed since the first symptoms appeared

**• For individuals who had a confirmed positive COVID-19 test but never showed symptoms:**

- At least 10 days have passed since the date of the individual's first positive COVID-19 test **AND**
- The individual has had no subsequent illness

*Id.*

According to Petitioners, in spite of this guidance, prisoners who test positive for COVID-19 are returned to the general population far earlier than appropriate. Petition ¶ 140. For example, Tamika Somerville, an inmate at the satellite prison, indicates that a woman in her unit, who sleeps in the adjacent cubicle, was removed from the unit because she had a fever, tested positive for COVID-19 on a Tuesday, and was returned to the unit that same Friday. ECF No. 1-9 at 3. The Petitioners also indicate that staff members who test positive for COVID-19 return to work while still symptomatic. For example, inmate Marius Mason indicates that one officer told her she still felt ill and did not want to be at work, but was nonetheless told to return. ECF No. 1-6 at 3.



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

The Warden, on the other hand, indicates that separate housing spaces have been established for “isolation” (for inmates demonstrating symptoms) and “quarantine” (for asymptomatic inmates) in each of the three facilities, and each facility has the ability to create additional isolation/quarantine space should the need arise. ECF No. 24-2 at 10-11. She indicates that all inmates who present with COVID-19 symptoms are isolated and tested the same day, “provided testing supplies are available.” *Id.* at 26. According to the warden, under no circumstance are inmates who have been placed in isolation released to the general population prior to meeting the CDC’s symptom-based criteria.<sup>6</sup> *Id.* at 27. Staff are subjected to screening, including having their temperature taken, prior to the start of every shift. *Id.* at 16. If a staff member reports symptoms consistent with COVID-19, he or she is sent home. *Id.* at 17. If a staff member tests positive, his or her suitability for returning to work is evaluated under the CDC’s symptom-based criteria (as described in footnote 4). *Id.*

<sup>6</sup> The Warden describes these criteria as follows: “(1) being fever-free for greater or equal to 72 hours without the use of fever-reducing medication, and (2) respiratory symptoms have improved, and (3) at least 7 days have passed since the first symptoms appeared.” ECF No. 24-2 at 27.

#### 4. Sanitation and Hygiene

\*8 Petitioners claim that they do not have adequate cleaning supplies to clean their personal areas, and that shared living spaces throughout the facility are not regularly or properly disinfected to prevent the spread of COVID-19. Petition ¶ 159. Telephones, computers and video calling equipment, and televisions shared by hundreds of prisoners are not cleaned or disinfected between uses, and the common areas in which the equipment is located is not regularly or properly disinfected. *Id.* ¶ 161. CDC Guidance further recommends thoroughly cleaning and disinfecting all areas where confirmed or suspected COVID-19 cases spent time. CDC, Interim Guidance. According to Petitioners, however, units where prisoners who test positive were housed are not being subjected to any heightened cleaning. Petition ¶ 162. Petitioners also indicate that prisoners have no access to hand sanitizer, which has been out of stock at the commissary for the duration of the present crisis, and that liquid soap dispensers were only recently installed in the men’s prison but are not regularly restocked. *Id.* ¶ 163. According to the Petitioners, soap is unavailable to indigent prisoners. *Id.* ¶ 165.

The Warden, by contrast, indicates that cleaning supplies are distributed throughout the facility on a daily basis, including a broad-spectrum disinfectant (“Virex II/256”), which was added specifically to address the coronavirus threat. ECF No. 24-2 at 12-13. Once in the housing units, cleaning supplies are maintained in small caddies or bins kept in staff offices or closes, which inmates can then ask to bring back to their living areas. *Id.* at 13. Large area disinfection is being performed

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

at both the satellite prison and the men's prison through the use of backpack cleaning chemical sprayers. *Id.* While the Warden indicates that recreational areas are disinfected between uses, she does not indicate whether items such as phones and computers are disinfected between uses. As for soap and other personal hygiene products, the Warden maintains that inmates at FCI Danbury are provided with basic soap and personal hygiene products by the institution, and that "there is never a reason an inmate should not have access to soap at FCI Danbury." *Id.* at 14. In addition, prisoners can purchase up to 13 different kinds of soap, as well as other personal hygiene products, from the commissary. *Id.* The Warden does not indicate whether inmates have access to hand sanitizer.

## 5. Personal Protective Equipment

According to the Warden, staff at FCI Danbury have, and will continue to have, access to appropriate personal protective equipment ("PPE"). ECF No. 24-2 at 15. Upon reporting to work each day, staff at FCI Danbury are provided with new surgical masks, which they are required to wear throughout their shift. *Id.* Additional PPE, including gowns, gloves, N-95 particulate respirators, and face shields, are available for staff working in Health Services, Receiving & Discharge, and isolation housing units. *Id.* Staff are instructed as to the proper use of PPE. *Id.* Inmates at FCI Danbury were initially provided with two of the same surgical masks provided to staff. *Id.* at 16. Once FCI Danbury was able to procure cloth masks, two of these masks were issued to every inmate. *Id.* Upon request, inmates are still provided with the same surgical masks provided to staff. *Id.* Inmates are required to wear these masks at all times, except when they are eating or sleeping, and failure to do so can result in disciplinary action. *Id.*

Petitioners contend that the usage of PPE is inconsistent, and correctional staff do not enforce mask usage against prisoners who refuse to cover their faces, nor do correctional staff consistently wear masks or gloves when they are in the units. Petition ¶ 182. Prisoners—including prisoners on cleaning duty—are not provided with gloves to protect their hands from exposed surfaces. *Id.* ¶ 180. And in many parts of the facility, FCI Danbury only provides one mask per prisoner and, therefore, prisoners have no protection when their masks are being washed. *Id.* ¶ 179.

## 6. Medical Treatment for Other Conditions

Petitioners allege that, since the onset of the COVID-19 crisis, non-virus medical needs have sometimes gone unattended. Petition ¶ 188. Prisoners who do not present with a fever during sick call cannot gain access to a physician, and sick call requests unrelated to the virus go unanswered for prolonged periods of time. *Id.* Petitioners indicate that medical triage in the men's prison is conducted by a social worker without medical training, who is openly contemptuous of the men's needs. Petition ¶ 129. Petitioner Cassidy represents, for example, that the social worker told the men in his unit, "You are all fucking children with nothing more than a flu so stop your shit you're



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

not going home early.” ECF No. 1-4 at 5-6. She has also told the men, “I don’t need medical training to tell you you’re not sick so go lay the fuck down.” *Id.*

\*9 Petitioners further indicate the prison pharmacy has been closed, and medications must be shipped from another facility, resulting in delays in their delivery and disruption of medication regimens. *Id.* ¶ 189. Petitioner Cassidy, for example, indicates that he did not receive the correct dose of his medication for two weeks in April, ECF No. 1-4 at 3, and Petitioner Martinez-Brooks indicates that her blood pressure medicine ran out on April 2 and additional medicine did not reach her until April 10. ECF No. 1-3 at 4. Similarly, inmates with special medical diets or allergies have received meals containing ingredients harmful to their health. Prisoners with [peanut allergies](#) have received meals containing peanut products, and Petitioner Cassidy, who suffers from [diverticulosis](#), has received meals containing rice and beans. Petition ¶ 190. Petitioners further indicate that, as a result of staff shortages, officers and staff are sometimes not available to respond to medical emergencies. *Id.* ¶ 187.

The Warden, while acknowledging that several medical staff are on leave, for reasons both related and unrelated to COVID-19, indicates that a BOP Medical Asset Support Team, including an Associate Warden, two physician assistants, and one pharmacist, has been dispatched to FCI Danbury to assist with its COVID-19 response. ECF No. 24-2 at 25-26. The Warden maintains that inmates continue to have access to Health Services, but that, in order to maintain the integrity of the group quarantines, Health Services staff (including the social worker and the dental hygienist) go to the individual housing units to pass out and collect “sick call forms,” which are written requests to Health Services. *Id.* at 26. These staff do not perform any assessments at that time. *Id.* The “sick call” forms are then triaged by a registered nurse or a physician assistant for appropriate action. *Id.* If it is determined that inmates need to be seen in the clinic, they are set for an appointment at a time they can move to the clinic with other members of their quarantine group or unit. *Id.* For emergent medical needs, an inmate can always be specifically called up to the clinic outside the scheduled time for his or her unit. *Id.* The Warden also indicates that the pharmacy at FCI Danbury has remained functioning throughout the course of the current crisis, and that there are two scheduled times per day when inmates can, with their quarantine group, proceed to the clinic for “pill line” or for staff-assisted medication administration. *Id.* at 27.

#### **D. Home Confinement and Compassionate Release**

By contrast to the abundant factual disputes regarding the Warden’s implementation of safety measures, the facts regarding the Warden’s use of home confinement and compassionate release are largely undisputed.

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

## 1. Home Confinement

The Bureau of Prisons has statutory authority to transfer prisoners to home confinement under 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541. ECF No. 24-2 at 18. Under 18 U.S.C. § 3624(c)(2), the Bureau of Prisons may “place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months.” Under 34 U.S.C. § 60541, the BOP may release some or all eligible elderly offenders<sup>7</sup> and eligible terminally ill offenders<sup>8</sup> from BOP facilities to home detention, upon written request from either BOP staff or an eligible offender.

<sup>7</sup> The statute defines “eligible elderly offender” to mean an offender in the custody of the Bureau of Prisons (i) “who is not less than 60 years of age”; (ii) “who is serving a term of imprisonment that is not life imprisonment based on conviction for an offense or offense that do not include any crime of violence ..., sex offense ..., or offense under chapter 37 of title 18, and has served 2/3 of the term of imprisonment to which the offender was sentenced”; (iii) “who has not been convicted in the past of any Federal or State crime of violence, sex offense, or other offense described in clause (ii)”; (iv) “who has not been determined by the Bureau of Prisons, on the basis of information the Bureau uses to make custody classifications, and in the sole discretion of the Bureau, to have a history of violence, or of engaging in conduct constituting a sex offense or other offense described in clause”; (v) “who has not escaped or attempted to escape”; (vi) whose release “will result in a substantial net reduction of costs to the Federal Government”; and (vii) “who has been determined by the Bureau of Prisons to be at no substantial risk of engaging in criminal conduct or of endangering any person or the public if released to home detention.” 34 U.S.C. § 60541(g)(5)(A).

<sup>8</sup> The statute defines “eligible terminally ill offender” to mean an offender who (i) “is serving a term of imprisonment based on a conviction for an offense or offenses that do not include any crime of violence ..., sex offense ..., offense described in section 2332b(g)(5)(B) of title 18, or offense under chapter 37 of title 18”; (ii) “satisfied the criteria specified in clauses (ii) through (vii) of subparagraph (A) [defining eligible elderly offender]”; and (iii) “has been determined by a medical doctor approved by the Bureau of Prisons to be ... (I) in need of care at a nursing home, intermediate care facility, or assisted living facility ... or ... (II) diagnosed with a terminal illness.” 34 U.S.C. § 60541(g)(5)(D).

\*<sup>10</sup> On March 26, 2020, Attorney General Barr issued a memorandum to the Director of the Bureau of Prisons, titled “Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic.” ECF No. 24-2 at 45. In the memo, Attorney General Barr stated that “there are some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

might be safer serving their sentences in home confinement rather than in BOP Facilities.” *Id.* He directed the Bureau to “prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic.” *Id.* The memo provides a non-exhaustive list of discretionary factors for evaluating inmates for confinement. First and foremost among these is the “age and vulnerability of the inmate to COVID-19, in accordance with the Centers for Disease Control and Prevention (CDC) guidelines.” *Id.* The other factors in the memo include:

- The security level of the facility currently holding the inmate, with priority given to inmates residing in low and minimum security facilities;
- The inmate’s conduct in prison, with inmates who have engaged in violent or gang-related activity in prison or who have incurred a BOP violation within the last year not receiving priority treatment under this Memorandum;
- The inmate’s score under PATTERN, with inmates who have anything above a minimum score not receiving priority treatment under this Memorandum;
- Whether the inmate has a demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety, including verification that the conditions under which the inmate would be confined upon release would present a lower risk of contracting COVID-19 than the inmate would face in his or her BOP facility;
- The inmate’s crime of conviction, and assessment of the danger posed by the inmate to the community. Some offenses, such as sex offenses, will render an inmate ineligible for home detention. Other serious offenses should weigh more heavily against consideration for home detention.

*Id.* at 46.

On March 27, 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), which authorized the Director of the Bureau of Prisons to lengthen the amount of time prisoners can be placed on home confinement under  [Section 3624\(c\)\(2\)](#)—previously capped at the shorter of 10% of their sentence or 6 months—provided that the Attorney General makes a finding that “emergency conditions will materially affect the functioning of the Bureau.”<sup>9</sup> CARES Act, [Pub. L. No. 116-136](#), § 12003(b)(2) (2020).

<sup>9</sup> Section 12003(b)(2) provides that “[d]uring the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau,

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of [section 3624\(c\)\(2\) of title 18, United States Code](#), as the Director determines appropriate.” CARES Act, [Pub. L. No. 116-136](#), § 12003(b)(2) (2020).

Attorney General Barr made quick use of his authority under the CARES Act, issuing a memo on April 3, 2020, in which he made the requisite finding that “emergency conditions are materially affecting the functioning of the Bureau.” ECF No. 24-1 at 48. The memo indicated that the Bureau of Prisons was “experiencing significant levels of infection at several of our facilities, including FCI Oakdale, FCI Danbury, and FCI Elkton.” *Id.* Noting the Bureau’s “profound obligation to protect the health and safety of all inmates,” Attorney General Barr directed the Bureau to “move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of these institutions.” *Id.*

Reflecting the urgency of the situation, Attorney General Barr’s memo directed immediate action. He directed the Bureau to “immediately review all inmates who have COVID-19 risk factors, as established by the CDC,” to “immediately maximize appropriate transfers,” and to “begin implementing this directive immediately.” *Id.* at 49. He noted that, “[g]iven the speed with which this disease has spread through the general public, it is clear that time is of the essence,” and directed the Bureau to “implement this Memorandum as quickly as possible....” *Id.*

**\*11** Attorney General Barr’s memorandum specifically named FCI Danbury—out of over one hundred BOP facilities—as one of three experiencing significant outbreaks and with respect to which the Bureau was to move “as quickly as possible.” *Id.* 48-49. Moreover, the Attorney General made clear that the Bureau’s review was to include “all at-risk inmates—not only those who were previously eligible for transfer” and “starting with the inmates incarcerated FCI Oakdale, FCI Danbury, FCI Elkton, and similarly situated facilities where [the Director] determine[s] that COVID-19 is materially affecting operations.” *Id.* at 49. The Attorney General went further, stating that although the BOP has limited resources to monitor inmates on home confinement, he was authorizing it to transfer inmates to home confinement “even if electronic monitoring is not available, so long as BOP determines in every such instance that doing so is appropriate and consistent with our obligation to protect public safety.” *Id.* Noting, however, the Bureau’s responsibility to protect the public, Attorney General Barr directed the Bureau to continue to make “individualized determinations” and cautioned against the “indiscriminate” release of prisoners. *Id.* at 50.

Despite the explicit statutory authority under the CARES Act to place any inmate on home confinement, and despite Attorney General Barr’s urgent memorandum calling out FCI Danbury and directing immediate action, the Warden’s use of her home confinement authority has been

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

limited. Since March 26, the Warden indicates that of the nearly 1,000 inmates at FCI Danbury, only 159 inmates have been reviewed for home confinement, and only 21 of these have been released to home confinement. ECF No. 24-2 at 23.<sup>10</sup>

<sup>10</sup> The Warden indicates that another 2 inmates have been released on furlough until the beginning of a previously established home confinement date. ECF No. 24-2 at 23-24.

In her description of the Bureau's—and FCI Danbury's—implementation of Attorney General Barr's memoranda and the Bureau's expanded home confinement authority under the CARES Act, the Warden indicates that BOP Case Management staff are reviewing inmates for suitability for home confinement, and that inmates do not need to apply to be considered, although any inmate who believes he or she is eligible may submit a request. *Id.* at 22. The Warden indicates that BOP is currently assessing “a number of factors to ensure an inmate is suitable for home confinement including, but not limited to, reviewing the inmate's institutional disciplinary history for the last twelve months; ensuring the inmate has a verifiable release plan; verifying the inmate's primary offense is not violent, a sex offense, or terrorism related; and confirming the inmate does not have a current detainer.” *Id.* at 23. In addition, the Warden indicates that, at this time, BOP is “prioritizing for consideration those inmates who either (1) have served 50% or more of their sentence, or (2) have 18 months or less remaining in their sentence and have served 25% or more of their sentence.” *Id.* The Warden does not provide any indication regarding the extent to which inmates' COVID-19 risk factors—such as their age and preexisting medical conditions—are weighed in evaluating inmates for home confinement.

A Danbury Inmate Bulletin from the Warden dated April 16, 2020 and titled “Criteria for Home Confinement based on COVID-19 Guidelines,” apparently distributed to inmates, indicates that the criteria for home confinement include: “No incident reports in the past 12 months (regardless of severity level)”; “U.S. Citizen”; “PATTERN risk score is MINIMUM”; and “Mental Health Care Level is less than CARE-MH 4.” ECF No. 15-7 at 2. The April 16 Bulletin further indicates that “Other considerations” include age, projected release date, percentage of time served, medical care level, issues related to victims, date of arrival to FCI Danbury, gang-related activity, health concerns of residents in the proposed release plan, and medical needs/concerns in the community. *Id.* A more recent Danbury Inmate Bulletin, dated April 21, 2020 and titled “Updated criteria for Home Confinement based on COVID-19 guidelines,” lists eight criteria that “must” be met to be eligible for home confinement:

\***12** 1. Primary Offense is not violent;

2. Primary Offense is not sex offense;



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

3. Primary Offense is not terrorism;
4. No detainer;
5. Mental Health Care Level is less than IV;
6. PATTERN risk score is MIN;
7. No Incident Reports in the past 12 months;
- 8. Inmate must have served at least 50% of their sentence** [bolded in original]

ECF No. 15-8 at 1. The April 21 Bulletin gives no indication whether and how inmates' COVID-19 risk factors are factored into the analysis.

## 2. Compassionate Release

Under  18 U.S.C. § 3582(c)(1)(A), a sentencing court may, upon motion of the Director of the Bureau of Prisons or upon motion of the defendant, reduce a defendant's term of imprisonment if it finds that "extraordinary and compelling reasons warrant such a reduction."<sup>11</sup> This authority is often referred to as "compassionate release." Importantly, if the Bureau of Prisons does not bring a motion for compassionate release on behalf of a defendant, the defendant may only bring a motion on his or her own behalf after either "fully exhaust[ing] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf" or "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A).

<sup>11</sup> The statute further requires the sentencing court to consider the factors set forth in Section 3553(a) to the extent that they are applicable.  18 U.S.C. § 3582(c)(1)(A).

Since the COVID-19 crisis began, it does not appear that the BOP has issued any updated internal guidance as to the standards to be used in assessing whether there are "extraordinary and compelling reasons" warranting a reduction in a defendant's term of imprisonment. Respondents' brief points to a BOP program statement that was last updated in January 2019. ECF No. 24-1 at 31 (citing Program Statement 5050.50, available at [http://www.bop.gov/policy/progstat/5050\\_050\\_EN.pdf](http://www.bop.gov/policy/progstat/5050_050_EN.pdf)). That document, of course, makes no mention of the current pandemic; nor does it mention the risk of infection inside prisons in general. Instead, it identifies a few extreme situations that might make "compassionate release" appropriate. These extreme cases

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

include: “inmates who have been diagnosed with a terminal, incurable disease” or “an incurable, progressive illness” or “debilitating injury” that has left them “completely disabled” or “capable of only limited self care and ... confined to a bed or chair more than 50% of waking hours”; inmates who are 65 or older, suffer from “chronic or serious medical conditions related to the aging process,” experience “deteriorating mental or physical health that substantially diminishes their ability to function in a correctional facility,” have no prospect of “substantial improvement” in their condition from “conventional treatment,” and have served at least half their sentence; inmates age 65 or older who have served the greater of 10 years or 75% of their sentence; and inmates whose minor children “are suddenly without a family member caregiver due to that caregiver’s death or incapacitation.” *Id.* Even in these cases, “compassionate release” is far from guaranteed. Instead, the inmate must satisfy a host of criteria, some of which are focused on public safety but others of which include the age at which the inmate committed the offense, whether the inmate lived with the caregiver (in cases of deceased caregivers), and whether the inmate received public funding or had a job prior to incarceration. *Id.*

**\*13** For the Bureau of Prisons to bring a motion for compassionate release on behalf of a defendant, a lengthy, multi-tiered administrative process must first play out. First, the Warden must determine that the request warrants approval. Requests do not reach the Warden’s desk, however, until “various staff” at the prison have reviewed the request first. ECF No. 24-2 at 27. Next, even if the Warden approves the request, BOP regulations provide that the Director will make a motion under  [Section 3582\(c\)](#) only after further review by both the General Counsel and either the Medical Director or the Assistant Director, Correctional Programs Division. [28 C.F.R. § 571.62](#). Since the beginning of the COVID-19 crisis, however, the Warden has not approved a single request for compassionate release for referral to the General Counsel, and consequently no inmate at FCI Danbury has reached the latter stages of the Bureau’s administrative process. *See* ECF No. 24-2 at 27 (indicating that, from the beginning of the COVID-19 crisis through May 4, 2020, prison officials have received 241 requests for compassionate release and that, of these, 136 have been processed and denied, 18 have been returned to the inmate seeking further information, 70 are being reviewed by “various staff who need to review the application,” and 17 are awaiting the Warden’s review).

In the event that the Warden denies a request, a defendant may bring a motion on his or her own behalf only after either “fully exhaust[ing] all administrative rights to appeal,” including appeals to the appropriate Regional Director and then to the General Counsel, or else waiting for the 30-day statutory period to expire. [28 C.F.R. § 571.63](#); [28 C.F.R. § 542.15](#).

Where inmates from across the country have managed to bring COVID-19 related motions for compassionate release on their own behalf, they have enjoyed significant success before courts in



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

this District. *See* ECF No. 24-2 at 52-54 (indicating that approximately 25 out of 48 COVID-19 related motions for compassionate release have been granted in this District alone since the crisis began).

## IV. DISCUSSION

As noted, Respondents have filed both a motion to dismiss under [Fed. R. Civ. P. 12\(b\)\(1\) and 12\(b\)\(6\)](#) and a response to the Petitioners motion for a temporary restraining order and preliminary injunction. In the discussion below, I deny the [Rule 12\(b\)\(1\)](#) motion because I find that the Warden's jurisdictional challenges lack merit; I grant in part and deny in part the motion for temporary restraining order and order expedited discovery and an evidentiary hearing to adjudicate the motion for preliminary injunction; and I deny the [Rule 12\(b\)\(6\)](#) motion because I find that the Petition states a claim under [28 U.S.C. § 2241](#).

### A. The Warden's Jurisdictional Arguments

#### 1. [Rule 12\(b\)\(1\)](#) Standard

"In resolving a motion to dismiss under [Rule 12\(b\)\(1\)](#), the district court must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." [Tandon v. Captain's Cove Marina of Bridgeport, Inc.](#), 752 F.3d 239, 243 (2d Cir. 2014) (citations and internal quotation marks omitted). "[W]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits. In that case, the party asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.* (citations, quotation marks, and alterations omitted). "A case is properly dismissed for lack of subject matter jurisdiction under [Fed. R. Civ. P. 12\(b\)\(1\)](#) when the district court lacks the statutory or constitutional power to adjudicate it." [Gonzalez v. Option One Mortgage Corp.](#), 2014 WL 2475893, at \*2 (D. Conn. June 3, 2014).

#### 2. Sentencing Finality, the Court's Authority under [Section 2241](#), and the BOP's Statutory Discretion

Respondents argue that "[t]his Court lacks authority to divest the BOP and sentencing courts of their jurisdiction to place inmates in home confinement or the sentencing judge's authority to amend a term of imprisonment." ECF No. 24-1. This argument is not an obstacle to the temporary restraining order I issue today, because the order does not divest the BOP of any authority or infringe on the sentencing judge's authority to amend a term of imprisonment. It merely directs

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

the Respondents to exercise the authority already conferred on them to place inmates in home confinement and consider requests for compassionate release in a manner that does not violate the Eighth Amendment.

\*14 First, Respondents point to well-established law regarding the finality of sentences and the limited, statutory authority of sentencing courts to modify them after they are imposed. *See, e.g.,* [Dillon v. United States](#), 560 U.S. 817, 824 (2010) (“A judgment of conviction that includes a sentence of imprisonment constitutes a final judgment and may not be modified by a district court except in limited circumstances.” (internal quotation marks and alterations omitted)); [18 U.S.C. § 3582\(c\)](#) (“The court may not modify a term of imprisonment once it has been imposed except that ... [listing specific exceptions for “compassionate release” and subsequent lowering of applicable Guideline ranges]”). But it is clear from context that these restrictions apply to *sentencing courts*. *See* [18 U.S.C. 3582\(a\)](#) (referring to the factors that “[t]he court” must consider “in determining whether to impose a term of imprisonment”); [id. 3582\(c\)](#) (again referring to the “the court” when stating “[t]he court may not modify a term of imprisonment”); [id. 3582\(c\)\(1\)\(B\)](#) (allowing “the court” to modify a term of imprisonment to the extent allowed by statute or by Rule 35); Fed. R. Civ. Crim. P. 35(a) (“Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.”). It is less clear whether they apply to a judge presiding over a 2241 petition who did not sentence the petitioner—a common situation, because 2241 petitions must be filed in the jurisdiction of the place of confinement rather than the jurisdiction of the sentencing court. [Rumsfeld v. Padilla](#), 542 U.S. 426, 443 (2004) (“[T]he general rule [is] that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement.”)

I need not decide whether I have authority to modify the Petitioners’ sentences, however, because the order I impose today does not modify any sentences. What it does do is ensure that inmates who face an imminent risk of serious illness or death from the rapid spread of the coronavirus within the facility receive prompt review of either a request for compassionate release or consideration for home confinement, both of which are within the statutory authority of the BOP.

Respondents also argue that “release” is not an available remedy to a [Section 2241](#) petitioner who challenges the conditions of his or her confinement, citing cases from courts outside the Second Circuit that have so held. *See, e.g., Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005) (“Glaus’s [2241] habeas corpus petition would be proper if release were among the possible remedies for an Eighth Amendment deliberate indifference claim. Unfortunately for Glaus, it is not. If an inmate established that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

from custody is not an option.”). But in their motion for a temporary restraining order, Petitioners do not seek “release from custody.” Instead, they seek (among other relief) “enlarge[ment] to home confinement,” ECF No. 14 at 1<sup>12</sup>; in home confinement, they would remain within the “custody” of the BOP. See 18 U.S.C. 3624(c)(2) (authorizing the BOP to make home confinement placements under a subsection entitled “[p]release custody”); see also *United States v. Hope*, 2018 WL 358490, at \*4 (D. Mont. Jan. 10, 2018) (“When a defendant is transferred pursuant to Section 3624(c), he remains under BOP custody until his prescribed term of imprisonment expires.”). In any event, Respondents cite no Supreme Court or Second Circuit decision suggesting that release is categorically unavailable to a Section 2241 petitioner asserting an Eighth Amendment claim. To the contrary, the Second Circuit affords habeas petitioners bail, albeit “in unusual cases, or when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective.” *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001).

<sup>12</sup> It is true that one of the forms of relief sought in the habeas petition itself is “release from custody.” ECF No. 1 at 66 (praying for the issuance of a writ of habeas corpus or injunctive relief “requiring Respondents to release from custody or to home confinement members of the [medically vulnerable] Subclass....”).

Although *Mapp* does not mention Section 2241, it involved a habeas petition brought on behalf of immigration detainees, who commonly rely on Section 2241. See, e.g., *Basank v. Decker*, 2020 WL 1953847 (S.D.N.Y. Apr. 23, 2020) (2241 petition filed by ICE detainees seeking release because of the public health crisis posed by COVID-19); *Ferreya v. Decker*, 2020 WL 1989417 (S.D.N.Y. Apr. 27, 2020) (same). Further, the *Mapp* court’s statement of its holding makes clear that a federal court’s bail authority sweeps broadly across the habeas spectrum: “We hold that the federal courts have the same inherent authority to admit habeas petitioners to bail in the immigration context as they do in criminal habeas cases.” *Mapp*, 241 F.3d at 223. During the ongoing pandemic, district courts within the Circuit have relied on the authority of *Mapp* to issue bail or temporary release orders to 2241 petitioners who have argued that their conditions of confinement and medical histories make them especially vulnerable to serious illness from COVID-19. See, e.g., *Basank*, 2020 WL 1953847, at \*13 (“Even if [ICE detainees petitioning under Section 2241] had not met the requirements for a preliminary injunction, the Court would release them on bail pending final resolution of their habeas claims under the Second Circuit’s decision in *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001).”); *Ferreya*, 2020 WL 1989417, at \*12 (same); *Coronel v. Decker*, 2020 WL 1487274, at \*8-9 (S.D.N.Y. March 27, 2020) (finding that “Petitioners have raised substantial claims” and that “[r]elease is ... necessary to make the

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

habeas remedy effective” because “[i]f Petitioners were to remain detained, they would face a significant risk that they would contract COVID-19—the very outcome they seek to avoid.”).

\*15 Respondents also argue that “Petitioners ... are seeking to divest the BOP of its statutory and regulatory discretion as to which inmates should be placed on home confinement.” ECF No. 24-1 at 47. Here, Respondents invoke the language of Section 3621(b), which states, in part, that “[n]otwithstanding any other provision of law, a designation of a place of imprisonment under this subsection is not reviewable by any court.” 18 U.S.C. § 3621(b). But this provision is not an obstacle to the order I impose today either, for several reasons. First, Petitioners’ argument that Respondents are not adequately exercising their authority under Section 3624, as expanded by the CARES Act and the Attorney General’s memo, does not require the Court to “review[ ]” “a designation of a place of imprisonment under this subsection,” *i.e.*, under subsection 3621(b). Petitioners are not challenging their designation to FCI Danbury. Rather, they are challenging Respondents’ failure adequately to exercise their separate, recently expanded statutory authority under subsection 3624(c)(2) to place inmates on home confinement. While subsection 3621(b) gives the BOP broad, general authority over designations of and transfers to “places of imprisonment,” a term that some courts have construed to cover halfway houses as well as prisons, *see, e.g.*, *Goldings v. Winn*, 383 F.3d 17, 26 (1st Cir. 2004), subsection 3624(c)(2) provides specific, independent authority to place inmates in home confinement.<sup>13</sup> So in finding preliminarily that Respondents are not exercising their authority under subsection 3624(c)(2) in a constitutionally adequate manner, I am not “review[ing]” the BOP’s “designation of a place of imprisonment” under subsection 3621(b).<sup>14</sup> Second, to the extent there is any ambiguity about whether Section 3621(b) or any other statute bars judicial review of the Respondents’ failures to exercise their authority under Section 3624, I would construe it not to do so to avoid the constitutional question that would arise from a wholesale bar on judicial review in the circumstances of this case. *Triestman v. United States*, 124 F.3d 361, 378 (2d Cir. 1997) (“[W]e must construe a federal statute to avoid constitutional questions where such a construction is reasonably possible. By construing the habeas-preserving paragraph of Section 2255 to provide that habeas corpus remains available to federal prisoners when Section 2255 is not available and when the failure to allow for some form of collateral review would raise serious constitutional questions, we do just that.”); *see also Webster v. Doe*, 486 U.S. 592, 603 (1988) (“[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.... We require this heightened showing in part to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.” (internal citations and quotation marks omitted)).<sup>15</sup>

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

- 13 To be sure, the two are not unrelated, and the Second Circuit has suggested, in dicta, that, while the broad authority in subsection 3621(b) is discretionary, the “prerelease” provisions of [Section 3624](#), which includes the home confinement authority of subsection 3624(c)(2), “impose[ ] an affirmative, discretion less obligation on the BOP, where practicable, to send an offender to a less-restrictive facility during a transitional period prior to final release.” [Levine v. Apker](#), 455 F.3d 71, 75 (2d Cir. 2006) (citing cases, including [Goldings v. Winn](#), 383 F.3d 17 (1st Cir. 2004) (noting the “shall” language in [Section 3624\(c\)\(1\)](#))).
- 14 18 U.S.C. § 3625, which makes the provisions of the Administrative Procedure Act inapplicable to designation, transfer, and placement decisions by the BOP, also is not a bar to Petitioners’ challenge, which is brought under the habeas statute, [28 U.S.C. § 2241](#), not the Administrative Procedure Act.
- 15 During oral argument, Respondents also cited two decisions by another judge on this court, [Fournier v. Zickefoose](#), 620 F. Supp.2d 313 (D. Conn. 2009) and [United States v. Ford](#), 2009 WL 3059129 (D. Conn. Sept. 21, 2009). But neither decision suggests that the Court is foreclosed from reviewing whether Respondents are exercising their authority under [Sections 3624\(c\)\(2\)](#) or [3582\(c\)\(1\)\(A\)](#) in conformity with the Eighth Amendment. In *Fournier*, the Court reviewed the petitioner’s [Section 2241](#) claim regarding the BOP’s refusal to allow her to serve the remainder of her sentence in a halfway house or home confinement but found that it failed on the merits. *Fournier*, 620 F. Supp. 2d at 317-18 (noting that “[t]he general rule is that the Fifth Amendment’s Due Process Clause does not confer any right upon an inmate to any particular custody or security classification,” that the BOP had acted “within its authority to place Fournier” in a halfway house for a shorter period than she desired, and that her Eighth Amendment claim failed because she “neither claims that she has been deprived of the minimal civilized measure of life’s necessities” nor asserts that the Warden acted with a sufficiently culpable state of mind). Similarly, in *Ford*, the court found that the defendant’s challenge to his designation to FCI Fairton failed on the merits, concluding that “the BOP [ ] act[ed] well within its authority under [section 3621](#)” in making the designation. 2009 WL 3059129, at \* 1.

### 3. The Prison Litigation Reform Act and Res Judicata

Respondents also raise objections based on the Prison Litigation Reform Act, [18 U.S.C. § 3626](#) (the “PLRA”), and res judicata, or claim preclusion. ECF No. 24-1 at 54-58. For the reasons set forth below, I find that neither objection precludes the order I enter today.



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

**a. The PLRA**

\*16 The provisions of the PLRA set forth in 18 U.S.C. § 3626 impose restrictions on the types of relief federal courts can award in “any civil action with respect to prison conditions.” 18 U.S.C. § 3626(a). Among other things, the statute requires that prospective relief—the type Petitioners seek in this case—be “narrowly drawn, extend[ ] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right.” 18 U.S.C. § 3626(a). In addition, the statute imposes strict prerequisites before a federal court may issue a “prisoner release order,” which is broadly defined as “any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison.” 18 U.S.C. § 3626(g)(4). Those prerequisites include the failure of some other, earlier-imposed remedy to address the deprivation of the federal right and the convening of a three-judge court. *Id.* § 3626(a)(3). None of these provisions apply, however, unless the proceeding is a “civil action with respect to prison conditions,” a term that “means any civil proceeding 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 does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.*” *Id.* § 3626(g)(2) (emphasis added). Whether the requirements of Section 3626 apply here turns on whether the italicized language in the preceding sentence describes this case. For the reasons set forth below, I find that it does, and thus that Section 3626 is inapplicable.

The Petitioners in this case are challenging the conditions of their confinement but they are also challenging the “fact ... of confinement in prison.” Specifically, they contend that their medical histories and the outbreak at FCI Danbury combine to place them in grave danger from COVID-19; that at current facility population levels, they and other FCI Danbury inmates cannot comply with CDC guidelines for physical distancing; and that “[a]s long as prisoners are unable to practice physical distancing, any other mitigating steps will fail to decrease meaningfully the risk of COVID-19 infections at FCI Danbury.” ECF No. 1 at 21. The Petition seeks an order either releasing them from custody altogether or releasing them to home confinement, *id.* at 66, because, “[a]bsent significant de-densifying, people who are confined in prisons, jails, and detention centers, as well as staff, will find it impossible to engage in the necessary social distancing and hygiene required to mitigate the risk of transmission.” *Id.* at 26; *see also id.* at 34 (“The only effective way to minimize the potential devastation from COVID-19 in BOP facilities generally and at FCI Danbury in particular is to downsize immediately the incarcerated population....”). In short, Petitioners contend that the fact of their confinement in prison itself amounts to an Eighth Amendment violation under these circumstances, and nothing short of an order ending their confinement at FCI Danbury will alleviate that violation.<sup>16</sup>

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

16 This contention distinguishes this case from the situation in *Alvarez v. Larose*, 20cv782-DMS(AHG) (S.D. Cal. May 9, 2020) (attached to Respondents' Notice of Additional Authority, ECF No. 29 at 16), where the court recently reached a different conclusion about the applicability of Section 3626 based in part on the fact that "Plaintiffs fail to argue there are no set of conditions of confinement that would be constitutionally sufficient." ECF No. 29 at 16. Here, Petitioners are making precisely that argument as to the medically vulnerable subclass.

These allegations show that, under the plain language of the definition quoted above, this is a habeas proceeding challenging "the fact ... of confinement in prison." A "fact," when used with "the", refers to, among other things, the "actual occurrence of an event" or the "real existence of a situation or state of affairs." Oxford English Dictionary (3d ed., Sept. 2014), <https://www.oed.com/view/Entry/67478> (emphasis original); see also Webster's Third New International Dictionary (defining a "fact" as, among other things, "something that has actual existence," "an occurrence, quality, or relation the reality of which is manifest in experience or may be inferred with certainty," and "an actual happening in time and space."). "Confinement" in turn, is defined as "the act or state of being confined," i.e., "imprison[ed]," Webster's Third New International Dictionary,—a status that plainly applies to each of the Petitioners and those they seek to represent in this case. "[T]he fact ... of confinement," then, refers generally to the existence of the state of being imprisoned. Because Petitioners contend that the Eighth Amendment violation inheres in their incarceration at Danbury FCI and cannot be remedied unless they are removed from that setting, Petitioners are challenging the fact—or "existence"—of their confinement. See also *Wilson v. Williams*, 2020 WL 1940882, at \*5, 10 (N.D. Ohio Apr. 22, 2020) (concluding that a similar habeas petition brought by inmates at FCI Elkton "ultimately seek[s] to challenge the fact or duration of confinement," as well as the conditions of confinement, and that the petition is not subject to the PLRA, 18 U.S.C. § 3626); *Wilson v. Williams*, 20-3447, ECF No. 23-1 (6th Cir. May 4, 2020) (denying the Government's motion to stay, holding that, "[w]here a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of the confinement," and concluding that the PLRA does not apply.).

\*17 The above construction of the statutory language accords meaning to all parts of the definition of "civil action with respect to prison conditions"—following a well-established canon of statutory construction. See, e.g., *U.S. v. Bernier*, 954 F.2d 818, 819-20 (2d Cir. 1992) ("[C]ourts must give effect to every word of a statute where possible.... The sole exception to this rule of construction applies where the statute groups words together in a list, in which case the words should be given a related meaning.... No 'list' appears in section 924(c), which contains only two words. Accordingly, each word should be given separate effect according to its plain meaning."). Because



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

the first part of the definition already limits its scope to proceedings “with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison,” habeas petitions unrelated to conditions of confinement—such as challenges to the validity of a conviction or the length of the sentence imposed by the court—are already excluded from the scope of the PLRA. Thus, to interpret the habeas clause of the definition to refer only to these types of petitions would make the clause superfluous. By contrast, interpreting the clause to refer to a subset of habeas petitions “with respect to the conditions of confinement ...”—namely, those that challenge the “fact or duration of confinement” by claiming, for example, that no constitutional conditions of confinement are possible under the circumstances—gives effect to all parts of the definition. Put differently, read as a whole, *see U.S. v. Lockhart*, 749 F.3d 148, 154 (“[I]t is well established that statutory phrase should not be construed in isolation; we read statutes as a whole.”) (internal quotation marks and citations omitted), the definition in subsection (g)(2) strongly suggests that there are habeas proceedings that challenge both the conditions of confinement *and* the “fact or duration of confinement,” and that such petitions are exempt from the statute. The present case presents just such a petition.<sup>17</sup>

<sup>17</sup> To the extent that its meaning is unclear, there is little law that further illuminates the phrase “but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.” 18 U.S.C. § 3626(g)(2). I could find no legislative history that shed real light on the phrase, nor any case law within the Second Circuit that explicates it. As Respondents note, the Second Circuit has suggested, in dicta, that the PLRA applies to at least some habeas petitions challenging conditions of confinement. *Jones v. Smith*, 720 F.3d 142, 145 n.3 (2d Cir. 2013) (after noting that an earlier decision had held that a habeas petition was not a “civil action” for purposes of the fee requirements of the PLRA, stating as follows: “We recognize that [the earlier decision] spoke in general terms to the effect that ‘habeas corpus petitions’ are not civil actions covered by the PLRA. We nonetheless assume without deciding that, in so saying, the court meant habeas corpus petitions that challenge criminal convictions and sentences, and not petitions, sometimes brought under 28 U.S.C. § 2241, that complain of conditions of confinement, which are analogous to suits under 42 U.S.C. § 1983 complaining of conditions of confinement. The logic of our [earlier decision] was to distinguish between civil actions covered by the PLRA and others based on the type of relief sought, rather than the statute under which relief was sought.”). But, for one, neither *Jones* nor the earlier decision it cites interpreted Section 3626(g)(2), as Section 3626 was not at issue in those cases, and it is unclear whether its definition of “civil action with respect to prison conditions” applies to other provisions of the PLRA. Moreover, given the state of the law in the Second Circuit, the *Jones* dicta does not clearly address whether the PLRA applies to habeas petitions that challenge *both* conditions

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

of confinement *and* the fact or duration of confinement. Before and after *Jones*, district courts within the Second Circuit have entertained cases that challenged conditions but did not seek release from confinement. *See, e.g., Ilina v. Zickefoose*, 591 F. Supp.2d 145, 150 (D. Conn. 2008) (denying motion to dismiss 2241 petition challenging conditions of confinement where prisoner sought “restoration of needed medical care at FCI Danbury”); *Anderson v. Williams*, 2016 WL 7217588, at \*2 (evaluating on the merits Section 2241 petition challenging conditions of confinement and motion for preliminary injunction to ensure that petitioner received certain medical tests and treatment). The *Jones* dicta is best read to suggest that it is these types of petitions that fall within the ambit of the PLRA (though not necessarily Section 3626). To the extent that Respondents read *Jones* to equate “habeas corpus petitions that challenge criminal convictions and sentences” with the term “habeas corpus proceedings challenging the fact or duration of confinement in prison” in subsection (g)(2)—a statutory provision that, again, the *Jones* court did not address—such a reading is inconsistent with the plain language of subsection (g)(2) for the reasons set forth above.

#### b. Res Judicata

\*18 Respondents’ res judicata argument points out that two of the petitioners have filed motions for “compassionate release” under 18 U.S.C. § 3582(c)(1)(A), and that one of those motions—filed by Petitioner Cassidy—was denied without prejudice by the sentencing judge. (The motion has since been renewed, reportedly following Mr. Cassidy’s efforts to exhaust his administrative remedies under Section 3582(c)(1)(A), and is pending before that judge.) Respondents assert that “Petitioner Cassidy does not simply get a ‘do-over’ in the District of Connecticut after his same claim was rejected by” his sentencing judge. ECF No. 24-1 at 54-55. During oral argument, Petitioners’ counsel argued that Section 3582(c)(1)(A) and the Eighth Amendment consist of different elements and apply different legal standards, and so there would be no preclusive effect on this case from a ruling by a sentencing judge denying a Section 3582 motion.

This argument raises novel issues—including whether an inmate could raise an Eighth Amendment claim in a motion brought under Section 3582(c)(1)(A) and whether a ruling on the merits of such a motion (as opposed to a mere denial without prejudice) should be treated as a judgment having claim preclusive effect. *See Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 366 (2d Cir. 1995) (“The doctrine of res judicata, or claim preclusion, holds that following entry of a valid final judgment, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.” (internal quotation marks omitted)). For the moment, however, I need not decide these issues, because

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

Respondents have not suggested that there are inmates falling in the medically vulnerable subclass whose  [Section 3582](#) motions have been denied *on the merits* by their sentencing judges. Should there be, the Respondents may file a motion asking that those persons be excluded from the group being prioritized for home confinement review under the order I issue today, in which case I will likely need to decide the issues set forth above. Any such motion should attach a copy of the judge's ruling denying the  [Section 3582\(c\)\(1\)\(A\)](#) motion.

#### 4. Exhaustion<sup>18</sup>

18

It is debatable whether the exhaustion requirement for a  [Section 2241](#) habeas petition should be treated as a “jurisdictional” issue rather than as an affirmative defense. As discussed below, the requirement is judge-made, rather than statutory, and is subject to various exceptions. Nonetheless, because Respondents classify it as a “jurisdictional” flaw and because some district courts within the Second Circuit have as well, *see e.g., United States v. Grajales*, 2019 WL 2617027, at \*2 (E.D.N.Y. June 26, 2019); *but see Oliva v. INS*, 1999 WL 61918, at \*3 (S.D.N.Y. Feb. 10, 1999), I treat it under the heading of jurisdictional issues.

Respondents argue that the Petitioners have failed to exhaust administrative remedies. ECF No. 24-1 at 42-43, 58-65. They make this argument with respect to both Petitioners' requests for release to home confinement and their requests for “additional ‘safety’ measures.” *Id.* at 43. Here, I address the exhaustion issue only with respect to the Petitioners' requests for release to home confinement, as I grant the TRO only so that the medically vulnerable class can be properly considered for that type of relief and for compassionate release.

Exhaustion in the context of  [Section 2241](#) habeas petitions is a judge-made rule subject to judge-made exceptions. *U.S. ex rel. Scranton v. State of New York*, 532 F.2d 292, 294 (2d Cir. 1976) (“While 28 U.S.C. [ ]  [Section 2241](#) does not by its own terms require the exhaustion of state remedies as a prerequisite to the grant of federal habeas relief, decisional law has superimposed such a requirement in order to accommodate principles of federalism.”); *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 634 (2d Cir. 2001) (“[O]ur decision today [applying the cause and prejudice standard for a  [Section 2241](#) habeas petitioner who had defaulted on his administrative remedies] rests solely on the requirement of administrative exhaustion *as spelled out in our decisional law*....” (emphasis added)); *McPherson v. Lamont*, 2020 WL 2198279, at \*6 (D. Conn. May 6, 2020) (“Because  [Sec. 2241](#)'s exhaustion requirement is a judicial invention, it is amenable to judge-made exceptions.”).<sup>19</sup> Those exceptions include futility (“exhaustion may be

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

unnecessary where it would be futile, either because agency decisionmakers are biased or because the agency has already determined the issue”); incapability (“exhaustion may be unnecessary where the administrative process would be incapable of granting adequate relief”); and undue prejudice (“an unreasonable or indefinite timeframe for administrative action may sufficiently prejudice [petitioners] to justify a federal court in taking a case prior to the complete exhaustion of administrative remedies”). [Washington v. Barr](#), 925 F.3d 109, 118-19 (2d Cir. 2019); *see also* [Gonzalez v. Perrill](#), 919 F.2d 1, 2 (1990) (In [Section 2241](#) case, noting that “[t]he controlling standard is unambiguous: an appellant must exhaust his administrative remedies before seeking federal review of his conviction unless administrative procedures are unavailable or are incompetent to provide adequate redress.”).

19 At one point, Respondents assert that the exhaustion requirement of the Prison Litigation Reform Act—[42 U.S.C. § 1997e](#)—applies to habeas proceedings. ECF No. 24-1 at 62. This is an inaccurate statement of the law in the Second Circuit. [Carmona](#), 243 F.3d at 634 (noting Second Circuit’s earlier holding that [Section 1997e](#) does not apply to habeas proceedings brought under [28 U.S.C. § 2254](#) and stating that, “[d]oubtless the same rule should obtain in [Section 2241](#) cases as in [Section 2254](#) petitions,” and that “[a] number of other circuits—relying primarily on the ground that habeas proceedings are not civil actions—have ruled the [Prison] Litigation Reform Act inapplicable to habeas actions brought by federal prisoners under [Section 2241](#).”); *United States v. McGriff*, 468 F. Supp.2d 445, 447 (E.D.N.Y. 2007) (“A habeas petition [brought under [Section 2241](#)] is not subject to the administrative exhaustion requirement of the Prison Litigation Reform Act of 1995 (“PLRA”), [42 U.S.C. § 1997e\(a\)](#); instead it is subject to the judicially-created requirement that federal prisoners must exhaust their administrative remedies prior to filing a petition for habeas relief.” (internal quotation marks and citations omitted)).

\*19 The Petitioners have set forth sufficient facts to support a finding that at least the final exception—undue prejudice from delay—applies here. As noted above, the Warden has considered only 159 inmates for home confinement<sup>20</sup> to date and has not yet even addressed 44% of the compassionate release requests. Further, even after the Warden makes a decision, the BOP’s administrative remedy process involves two additional layers of review (by the Regional Director and General Counsel), and each layer involves a new form and a new mailing. *See* [28 C.F.R. § 542.15](#). Given the rapid spread of COVID-19 at FCI Danbury, as evidenced by the number of positive tests among inmates and staff to date, Petitioners have shown that that they would likely suffer irreparable harm if they were required to exhaust the administrative remedy process before

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

seeking relief in court. Accordingly, I find that the Petitioners are excused from exhaustion with respect to their claims seeking release to home confinement.<sup>21</sup>

<sup>20</sup> In her declaration, the Warden states that “[i]nmates do not need to apply to be considered for home confinement,” although they may do so. ECF No. 24-2 at 22.

<sup>21</sup> Respondents also assert that “[a]s release from custody or placement in home confinement is not a remedy available under a  28 U.S.C. § 2241 conditions of confinement habeas, an exhaustion analysis is not essential with respect to those claims.” ECF No. 24-1 at 43. They cite no authority for the notion that “release from custody or placement in home confinement is not a remedy” for  Section 2241 claims challenging conditions of confinement, however, and, as discussed above, several district courts within the Second Circuit have released  Section 2241 petitioners challenging their conditions of confinement in light of COVID-19, relying on the broad authority to grant bail in habeas cases set forth in  *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001).

## **B. The Petitioners’ Request for a Temporary Restraining Order<sup>22</sup>**

<sup>22</sup> The rules governing habeas proceedings allow for application of the Federal Rules of Civil Procedure, including Rule 65 governing temporary restraining orders and preliminary injunctions, “to the extent that they are not inconsistent with any statutory provisions or these rules.” Rule 12 of the Rules Governing  Section 2254 Cases in the United States District Court; *see also* Rule 1(b) (“The district court may apply any or all of these rules to a habeas corpus petition not covered by [ 28 U.S.C. § 2254].”).

### **1. Legal Standard**

“It is well established that in this Circuit the standard for an entry of a TRO is the same as for a preliminary injunction.” *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008) (collecting cases). In general, a party seeking a preliminary injunction or temporary restraining order “must ... show a likelihood of success on the merits, a likelihood of irreparable harm in the absence of preliminary relief, that the balance of equities tips in the party’s favor, and that an injunction is in the public interest.”  *American Civil Liberties Union v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015) (citing  *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). “A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.”  *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citation omitted). The burden on the moving party is higher where, as here, that party seeks



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

a mandatory injunction—that is, an injunction commanding a positive act, as opposed to one that merely maintains the status quo. The Second Circuit has instructed that a mandatory injunction “should issue ‘only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.’ ”  *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995) (quoting  *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

**\*20** The Petitioners seek a temporary restraining order to vindicate two somewhat distinct constitutional claims. As to the subclass of medically vulnerable inmates at high risk of serious illness or death from COVID-19, the Petitioners’ chief complaint is the Warden’s failure to make prompt, meaningful use of her authority to place inmates on home confinement and to grant compassionate release—the only measures they contend are capable of offering such inmates adequate protection from COVID-19. With respect to the broader class consisting of all inmates at FCI Danbury, the Petitioners claim that the Warden has failed to implement adequate safety measures to contain the spread of the virus and mitigate the risks of infection, including adequate screening, testing, isolation, quarantine, sanitation, hygiene, and personal protective equipment. I address each of these claims in turn.

## **2. The Medically Vulnerable Subclass and the Warden’s Home Confinement and Compassionate Release Authority**

### **a. Likelihood of Success on the Merits – Eighth Amendment**

Under the Eighth Amendment, prison officials must “ensure that inmates receive adequate food, clothing shelter, and medical care, and must take reasonable measure to guarantee the safety of the inmates.”  *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Prisoners have a right, in other words, to “humane conditions of confinement.” *Id.* “[H]aving stripped [incarcerated persons] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.”  *Id.* at 833.

Prison officials violate a prisoner’s Eighth Amendment right to humane conditions of confinement when two conditions are met. First, under the “objective” component of the analysis, “the alleged deprivation must be, ‘objectively,’ sufficiently serious.”  *Id.* at 834. Second, under the “subjective” component, prison officials must have acted with a “sufficiently culpable state of mind,” namely, “ ‘deliberate indifference’ to inmate health or safety.” *Id.*

### **i. Objective Component**

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

To satisfy the objective component, “the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.” *Id.* Here, this requirement is easily satisfied. Courts have long recognized that prison officials have an Eighth Amendment duty to protect inmates from exposure to communicable disease. *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect inmates from infectious disease.”); *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (“[F]ailure to adequately screen newly arrived inmates for communicable disease” represents an “(omission) sufficiently harmful to evidence deliberate indifference to serious medical needs” (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))); *id.* (“[I]t is unnecessary to require evidence that an infectious disease has actually spread in an overcrowded jail before issuing a remedy.”).

It is undisputed that there is an active and serious outbreak of COVID-19 at FCI Danbury. Attorney General Barr’s April 3rd memorandum specifically identifies FCI Danbury as one of three federal prisons experiencing “significant levels of infection.” ECF No. 24-2 at 48. A recent test of the inmates at the satellite prison—conducted following the intervention of Senator Chris Murphy—revealed that 20 of the 143 women at the facility had active infections. ECF No. 24-2 at 25. In addition, 62 other inmates have been tested for COVID-19, and 49 of these have tested positive, for a total of 69 positive tests. ECF No. 24-2 at 25. The high rate of positive tests outside of the satellite prison, and significant questions raised by the Petitioners as to the adequacy of testing, suggest this number may underrepresent the true number of COVID-19 infections at FCI Danbury. But even if that were not the case, the undisputed evidence leaves no doubt that FCI Danbury is experiencing an active outbreak of COVID-19.

**\*21** Further, the structure of the three facilities at FCI Danbury—even assuming that all reasonable precautions and safety measures are being fastidiously observed (which the Petitioners dispute)—heightens the risk of transmission. The cornerstone of the public health response to COVID-19 is to practice “social distancing.” In the State of Connecticut, for example, social gatherings of more than 5 people continue to be prohibited, and members of the public are directed to wear face coverings wherever a six-foot distance cannot be maintained. *Coronavirus Disease 2019 (COVID-19)*, CT.gov, <https://portal.ct.gov/Coronavirus> (last visited May 7, 2020); *see also Social Distancing*, Centers for Disease Control and Prevention (April 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (“Limiting face-to-face contact with others is the best way to reduce the spread of [COVID-19],” including staying at least 6 feet from other people and avoiding group gatherings.). In the meantime, the vast majority of the 140 inmates at the satellite prison live and sleep in a perpetual large gathering—a single dormitory hall with bunk beds separated by four feet or less, with shared common spaces such as bathrooms and showers. *See* ECF No. 1 at 12-13. The inmates at the camp and the men’s prison fare little better in terms of social distancing. Most of the



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

inmates at the camp and the men's prison live in dorms that house roughly 50 people each. ECF No. 1 at 14. Put differently, at a time when public health officials are counseling strict adherence to social distancing practice, most inmates at FCI Danbury live in close contact with between 50 and 140 other inmates, in a facility with a serious, active COVID-19 outbreak.

It is also undisputed—and, indeed, by now common knowledge—that COVID-19 is a highly dangerous disease that poses a significant risk of severe illness and death, particularly for members of the Medically Vulnerable Subclass. *See* ECF No. 1-1 at 6 (“Serious illness and death is most common among people with underlying chronic health conditions, like heart disease, lung disease, liver disease, and diabetes, and older age.”); *see also* [Wilson v. Williams](#), 2020 WL 1940882, at \*8 (N.D. Ohio Apr. 22, 2020) (“For infected inmates, the virus can lead to pneumonia. In the wors[t] pneumonia cases, COVID-19 victims suffer diminishing oxygen absorption, with resulting organ failure leading to death.”). According to one report, the mortality rate from COVID-19 is 8.4% for individuals with hypertension, 8.0% for individuals with chronic respiratory disease, 7.6% for individuals with cancer, and 13.2% for individuals with cardiovascular disease. ECF No. 1 at 9-11 (citing Report of WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19), World Health Organization at 12 (Feb. 28, 2020), <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (last visited May 7, 2020)).

In short, with respect to Petitioners and other members of the Medically Vulnerable Subclass, Petitioners have demonstrated a likelihood of success on the merits on their claim that they are “incarcerated under conditions posing a substantial risk of serious harm.”

## ii. Subjective Component

Under the subjective prong, a prison official may be held liable for inhumane conditions of confinement “only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” [Farmer](#), 511 U.S. at 847; *see also* [Brock v. Wright](#), 315 F.3d 158, 164 (2d Cir. 2003) (“In order to prove deliberate indifference in a challenge to [a] prison inmate’s conditions of confinement, the prisoner must show that a particular defendant ‘knows of and disregards an excessive risk to inmate health or safety.’ ” (quoting [Farmer](#), 511 U.S. at 837)). In the context of threats to an inmate’s health, a plaintiff must show that the defendant “acted with deliberate indifference to [the plaintiff’s] medical needs.” [Brock](#), 315 F.3d at 162 (citing [Estelle](#), 429 U.S. at 104). In other words, the Petitioners must show that “the prison official knew of and disregarded the plaintiff’s serious medical needs.” [Harrison v. Barkley](#), 219 F.3d 132, 137 (2d Cir. 2000) (quoting [Chance v. Armstrong](#), 143 F.3d 698, 703 (2d Cir. 1998)). “Deliberate indifference requires more than negligence, but less than conduct

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

undertaken for the very purpose of causing harm.”  *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994).

Here, it cannot be disputed that the Respondent Warden knew of the substantial risk of serious harm posed by the COVID-19 outbreak at FCI Danbury. On April 3—more than one month ago—Attorney General Barr issued an urgent memo to the Bureau of Prisons regarding COVID-19, noting the “significant levels of infection at several of our facilities, including ... FCI Danbury.” ECF No. 24-2 at 48. The Warden and her staff at FCI Danbury understood the threat posed by COVID-19 at least as early as March 19, 2020, when they began modifying the operations at all three FCI Danbury facilities in response. ECF No. 24-2 at 9-11. Further, given the pervasive daily media coverage of the pandemic, the seriousness of the threat posed by COVID-19—and the particular vulnerability of elderly individuals as well as those with certain preexisting medical conditions—are so well known that it would be implausible to suggest that prison officials are unaware of this risk. See  *Farmer*, 511 U.S. at 842 (“[A] fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”).

**\*22** The parties vigorously dispute, however, whether prison officials have acted with deliberate indifference to the risk posed by COVID-19. The Petitioners contend that the Warden’s failure to transfer medically vulnerable prisoners from FCI Danbury to home confinement “in any meaningful numbers” constitutes deliberate indifference. ECF No. 15 at 39. I find that they have shown a likelihood of success on the merits with respect to this contention. I also find that Warden’s handling of “compassionate release” requests under  [Section 3582\(c\)\(1\)\(A\)](#) bolsters the finding of deliberate indifference.

### Home Confinement

As discussed above, the CARES Act has given the Bureau of Prisons explicit authority to place *any* inmate on home confinement, and the Attorney General has made the emergency findings triggering that authority. He has also directed the Bureau of Prisons in urgent terms to “immediately review *all* inmates who have COVID-19 risk factors, as established by the CDC, starting with the inmates incarcerated at FCI Oakdale, *FCI Danbury*, FCI Elkton, and similarly situated facilities....” ECF No. 24-2 at 48-49 (emphases added). His April 3, 2020 memorandum could not have conveyed a greater sense of urgency, instructing the Bureau to “begin implementing this directive immediately at the facilities I have specifically identified,” noting that “time is of the essence,” and asking for implementation “as quickly as possible.” *Id.* at 49.

In spite of the explicit statutory authorization in the CARES Act to make widespread use of home confinement in response to the threat posed by COVID-19, and the exhortations of the

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

head of the government department in which the Bureau of Prison sits, the implementation of this directive at FCI Danbury has been slow and inflexible. The Warden indicates that only 159 inmates have been reviewed since March 26, and a mere 21 inmates have actually been placed on home confinement, out of a population of roughly 1,000. ECF No. 23-24. Moreover, the criteria apparently being used by the Respondents to evaluate inmates for home confinement evidence a disregard for the seriousness of the health risk faced by vulnerable inmates. Indeed, the most recent inmate bulletin regarding home confinement criteria does not even expressly mention health risks or how they will be evaluated. ECF No. 15-8 (noting “updated criteria for Home Confinement based on COVID-19 guidelines” but not specifying any guidelines and listing only non-health-related criteria). And the Warden’s description of the home confinement review process suggests that, rather than prioritizing review based on age, medical history, and COVID-19 risk factors, FCI Danbury is focusing on those who have served the larger portions of their sentences. ECF No. 24-2 at 23.) In fact, the inmate bulletins make clear that those who have not served a specified percentage of their sentences are categorically disqualified: any inmate who has not served at least 50% of his or her sentence is deemed ineligible for home confinement, irrespective of vulnerability to COVID-19. ECF Nos. 15-7, 15-8.<sup>23</sup> Other criteria in the inmate bulletins are similarly unrelated to medical vulnerability and, at best, only tangentially related to public safety. For example, any inmate with an incident report in the past 12 months—no matter the seriousness—is deemed ineligible for home confinement, regardless of any health condition he or she might have. ECF Nos. 15-7, 15-8. At oral argument, the Government suggested that such an inmate could seek compassionate release as an alternative. But that is a dead end at FCI Danbury: Of the 241 requests for compassionate release filed since the COVID-19 crisis began, the Warden has signed off on exactly 0.<sup>24</sup> ECF No. 24-2 at 28.

<sup>23</sup> The Warden’s declaration puts it slightly differently: “BOP is at this time prioritizing for consideration those inmates who either (1) have served 50% or more of their sentence, or (2) have 18 months or less remaining in their sentence and have served 25% or more of their sentence.” ECF No. 24-2 at 23.

<sup>24</sup> This is particularly troubling in light of the fact that numerous judges, including the undersigned, have denied motions for compassionate release because the inmate has not first waded through the statutorily mandated administrative process for requesting compassionate release from the Warden—a process that now appears to be the definition of futile.

**\*23** Especially in light of the Barr memos, it is unimaginable that the Respondents would not be taking COVID-19 medical risk factors—some of which, by some estimates, give an inmate a better than 10% chance of dying should the inmate contract COVID-19—into consideration in reviewing inmates for home confinement. But, at the very least, the lack of any express mention of

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

such factors in both the inmate bulletins and the Warden's declaration suggests that prison officials are not giving these risk factors the weight they plainly deserve.

The Warden argues that the measures taken at FCI Danbury to protect inmates from COVID-19, including screening, testing, quarantining, isolation of COVID-19 positive inmates, enhanced sanitation, and widespread use of personal protective equipment, show that she has not disregarded, or acted with deliberate indifference toward, the threat posed by COVID-19. But even accepting the Warden's account of the scope, consistency, and effectiveness of these measures—an account the Petitioners vigorously dispute—Petitioners have shown a likelihood of success on the merits of their claim that the Warden's inadequate implementation of the home confinement authority in the CARES Act constitutes "deliberate indifference" under the Eighth Amendment. The Warden does not dispute the impossibility of instituting effective social distancing measures in facilities, like FCI Danbury, where the vast majority of the population lives and sleeps in large dormitory halls lined with bunk beds, sharing bathroom and shower facilities. *See* ECF No. 24-1 at 73. But without social distancing measures, reliable containment of a highly contagious disease is nearly impossible. This makes transfer to home confinement (or compassionate release, discussed below) the only viable measure by which the safety of highly vulnerable inmates can be reasonably assured. While the Warden is free to exercise discretion in choosing among equally effective measures to protect inmates from serious risks, choosing inevitably inadequate measures to the exclusion of a plainly superior one constitutes deliberate indifference. *See, e.g., Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) ("[M]ere disagreement over the proper treatment ... does not create a constitutional claim ... [s]o long as the treatment given is adequate."); *id.* ("In certain instances, a physician may be deliberately indifferent if he or she consciously chooses an easier and less efficacious treatment plan." (internal quotation marks and citations omitted)); *see also Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (reasonable jury could find that putting prisoner into protective custody but failing to protect her from a risk that persisted even in protective custody was unconstitutional).

Put somewhat differently, even with the measures that the Warden has put in place, due to the impossibility of adequate social distancing, confinement at FCI Danbury—due to the very structure of the facility—continues to pose a grave risk to vulnerable inmates' health. For this reason, Congress has provided statutory authority for, and the Attorney General has directed the warden to "immediately" implement, the broad use of home confinement for vulnerable inmates. Under the circumstances of the present crisis, the Warden's failure to make prompter, broader use of this authority to protect the lives of vulnerable inmates is likely to constitute deliberate indifference.

In short, by failing to make meaningful use of her home confinement authority, the Warden has failed to implement what appears to be the sole measure capable of adequately

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

protecting vulnerable inmates—a measure the Attorney General directed the BOP to implement “immediately” and with “dispatch”—in favor of measures that, even if they were fully and painstakingly implemented, would still leave vulnerable inmates subject to a grave risk to their health. Petitioners have thus shown a likelihood of success on the merits on their claim that, with respect to the Medically Vulnerable Subclass, the Warden has disregarded a “substantial risk of serious harm” by “failing to take reasonable measures to abate it.” *Farmer*, 511 U.S. at 847.<sup>25</sup>

<sup>25</sup> Respondents do not argue that the Warden’s hands were tied by BOP policy set by the BOP Director in setting the criteria for home confinement at FCI Danbury—an argument that would easily have been available in this case given that Petitioners have named both the Warden and the Director as Respondents. In any event, such an argument would not be dispositive, as a prison official does not comply with the Eighth Amendment when he or she knows of a serious risk to inmate safety but fails to address it due to mechanical reliance on prison policy. See *Johnson v. Wright*, 412 F.3d 398, 404 (2d Cir. 2005) (reasonable jury could find that “the defendants here acted with a sufficiently culpable state of mind in mechanically following [hepatitis C Guideline regarding substance abuse] and refusing to prescribe him [hepatitis C drug]”; “[t]he operative question in this case is not whether the Guideline’s substance abuse policy is generally justifiable, but whether a jury could find that the application of the policy in plaintiff’s case could have amounted to deliberate indifference to plaintiff’s medical needs”; “there is no evidence suggesting that the defendants took any step whatsoever to investigate—let alone verify—whether it would be medically appropriate to ignore the unanimous advice of [plaintiff’s] treating physicians ... and apply the Guideline’s substance abuse policy in [plaintiff’s] case.”).

### Compassionate Release under Section 3582(c)(1)(A)

\*24 The Warden has another source of authority she may use to remove medically vulnerable inmates from the dangerous environment at FCI Danbury, and at the same time reduce the density within the prison for all inmates. Unfortunately, the record in this case makes clear she is not making adequate use of that authority either. Specifically, neither the Warden nor the BOP as a whole is implementing Section 3582(c)(1)(A) in the way Congress intended when it adopted the First Step Act, and neither has made any noticeable effort to update the process for evaluating “compassionate release” requests to take account of the COVID-19 pandemic. For the medically vulnerable inmates at FCI Danbury, this failure bolsters my conclusion that Petitioners have shown a likelihood of success on the merits on their claim that the Respondents are displaying deliberate indifference in violation of the Eighth Amendment.



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

First, some history is in order. Before the First Step Act was enacted in 2018, only the Director of the Bureau of Prisons could file a motion with the sentencing court seeking “compassionate release” under  [Section 3582\(c\)\(1\)\(A\)](#). “The BOP rarely did so.... From 1984 to 2013, an average of only 24 inmates were released each year through BOP-filed motions.” *United States v. Rodriguez*, 2020 WL 1627331, at \*2 (E.D. Pa. April 1, 2020). According to a 2013 report of the Department of Justice’s Inspector General, these low numbers stemmed in part from poor management, a lack of clear standards, and inconsistent implementation of the compassionate release program. *Id.* “In an effort to improve and increase the use of the compassionate-release process, the First Step Act amended § 3852(c)(1)(A) to allow prisoners to directly petition courts for compassionate release, removing the BOP’s exclusive ‘gatekeeper’ role.” *Id.* The current version of the statute allows defendants to bring motions for release themselves at the earlier of two occurrences: (1) the defendant’s “fully exhaust[ing] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or [2] the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility.”  [18 U.S.C. § 3582\(c\)\(1\)\(A\)](#).

The First Step Act left the BOP an important role in the process, as the defendant must still exhaust his administrative remedies with the BOP before filing a motion in court.<sup>26</sup> And given the statute’s specification of the timing for exhaustion—either the time needed for full exhaustion or the lapse of 30 days from receipt of the request by the warden, whichever is earlier—it appears that Congress assumed that sometimes the BOP would act on the request within 30 days of the Warden’s receipt of the request, and sometimes it would not. Further, one might assume that, after the 2013 Inspector General’s report and Congress’s reaction to it, the BOP would have built a better system for processing compassionate release requests administratively. Finally, one might assume that the BOP would have modified its internal “compassionate release” guidance to take account of the serious risk of severe illness or death faced by medically vulnerable inmates housed in prisons with COVID-19 outbreaks. Unfortunately, the record in this case belies all of these assumptions. According to the Warden’s declaration, “since this emergency began” through May 4, 2020—a period that spans more than 6 weeks since the Warden placed the prison on “modified operations” on March 19, ECF No. 24-2 at 10—the Reduction in Sentence Coordinator at FCI Danbury has received 241 requests for compassionate release; of these, 136 have been processed and denied, 18 have been returned to the inmate seeking further information, 70 are being reviewed by staff, and 17 “are awaiting” the Warden’s review. ECF No. 24-2 at 27.

<sup>26</sup> There is a split among district courts within the Second Circuit as to whether the statute’s exhaustion requirement is mandatory, or whether it can be “waived” or excused by the district judge for reasons such as futility, irreparable harm, and similar equitable doctrines.

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

Compare  *United States v. Roberts*, 2020 WL 1700032, at \*2 (S.D.N.Y. April 8, 2020) (“[T]he Court must abide by Congress’s choice, given  Section 3582(c)’s clear command that the Court “may not” grant compassionate release except under the conditions Congress prescribed.”) with  *United States v. Colvin*, 2020 WL 1613943, at \*2 (D. Conn. April 2, 2020) (“[I]n light of the urgency of Defendant’s request, the likelihood that she cannot exhaust her administrative appeals during her remaining eleven days of imprisonment, and the potential for serious health consequences, the Court waives the exhaustion requirement of  Section 3582(c)(1)(A).”). I have adopted the former position, finding that a defendant may not file a motion with the sentencing court until either he or she has exhausted the available administrative remedies or 30 days have lapsed from receipt of the request by the warden. *United States v. Nathaniel Smith*, 2020 WL 1903160 (D. Conn. April 17, 2020).

**\*25** These figures are striking for two reasons. First, the figures make clear that the FCI Danbury staff has, to date, not granted a single request for compassionate release—a batting average that is dramatically less favorable to inmates than the frequency with which courts in this District are granting  Section 3582 motions. ECF No. 24-2 at 52-54 (Government’s listing of rulings by District of Connecticut judges on COVID-based  Section 3582(c)(1)(A) motions showing that approximately 25 out of 48 have been granted, some with the Government’s consent).<sup>27</sup> This suggests that the Warden is setting an impossible high bar for these requests.<sup>28</sup> Alternatively, it suggest that the Warden has not set a new standard for compassionate release in light of the pandemic, but is applying an obsolete one that takes no account of the risk of illness or death to medically vulnerable inmates from COVID-19: As discussed above, the BOP’s January 2019 policy statement makes no mention of COVID-19 or the risk posed by infectious diseases inside prisons in general, and restricts use of “compassionate release” authority to a few, extreme situations that have little to do with susceptibility to COVID-19. Respondents have not suggested they have made any attempt to adjust the January 2019 standards for compassionate release to account for new “extraordinary and compelling” circumstances presented by COVID-19 in the prison setting.

<sup>27</sup> Out of the 48, 7 involved inmates at Wyatt, which is a detention facility, albeit one that also houses sentenced prisoners immediately after sentencing. Only two of the Wyatt detainees were released, according to the Government’s spreadsheet. ECF 24-2 at 52-54. The Bail Reform Act, rather than  Section 3582(c)(1)(A), governs release as to detainees.

<sup>28</sup> Apparently, she is not the only one. Information Petitioners filed on the docket concerning the handling of  Section 3582 requests at BOP Elkton—which is under a court injunction



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

in light of a COVID-19 outbreak there, *see* [Wilson v. Williams](#), 2020 WL 1940882 (N.D. Ohio April 22, 2020)—only confirms what appears to be the near-impossible standard the BOP is applying to these requests. According to a filing by the Government in the *Wilson* case, of 243 medically vulnerable inmates who have submitted a request for compassionate release to the warden at FCI Elkton, “[o]nly one inmate ... met the criteria for compassionate release.” ECF No. 26-4 at 4.

Second, the figures suggest that the Warden is processing request for compassionate release based on COVID-19 at a pace that disregards the seriousness of the risk faced by medically vulnerable inmates. The figures show that over more than six weeks, FCI Danbury has not made even an *initial* response to some 44% of compassionate release requests, justifying the Petitioners’ assertion that the staff at the facility are “failing to timely respond to requests for emergency compassionate relief.” Petition ¶ 119. Further, an initial response from the Warden—when it arrives—is only the first step in a multi-tiered administrative remedy process the inmate must follow to “fully exhaust[ ]” administrative remedies. That process requires each inmate to appeal the denial by the Warden to a BOP Regional Director, followed by an appeal to the BOP General Counsel. 28 C.F.R. § 571.63; 28 C.F.R. § 542.15. For each level of appeal, the inmate must use a different form and mail it to a different reviewing official. *Id.* Even if the inmate’s request to the Warden is approved—something that has not happened at Danbury since the outset of the pandemic—that approval must go through at least three more layers of review involving the BOP General Counsel, the Medical Director or an Assistant Director, and, finally, the Director. 28 C.F.R. § 571.62. It does not appear that the BOP has updated these regulations since the First Step Act was passed, let alone made any attempt to suspend them or otherwise accelerate the process during the pandemic.

From all this it should be obvious that the BOP, from the Warden at FCI Danbury up through the Director, is not allowing—and, indeed, under its current regulations cannot allow—a defendant to “fully exhaust[ ] all administrative rights to appeal a failure of the Bureau of Prisons” to bring a motion for compassionate release before the expiration of the 30 days specified in the statute.

18 U.S.C. § 3582(c)(1)(A). So, as far as the record at FCI Danbury shows, it is practically impossible for a defendant to “fully exhaust” a compassionate release request within the BOP before expiration of the 30-day period, despite Congress’s apparent intent. Further, it is, at least during the COVID-19 crisis at FCI Danbury, impossible to find any success within the existing administrative remedy process; the applicable standards appear to make no allowance for the grave risks posed by COVID-19, even for members of the Medically Vulnerable Subclass, and the Warden indicates she has not approved for referral a single request. The 30-day period under the statute is simply dead time during which there is no prospect the BOP will come to the defendant’s aid.

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

\*26 All of these circumstances support the order I issue today, which requires the Warden to process  [Section 3582](#) requests more promptly and requires her to explain why, apparently, no consideration is being given in this process to the serious risk of illness or death posed to the medically vulnerable subclass.

While these circumstances might also support broader relief against the Director, the Director is not a proper party in this case because he is not the immediate custodian of the Petitioners.  [Rumsfeld, 542 U.S. at 434-35](#) (“The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is ‘the person who has custody over [the petitioner].’ [28 U.S.C. § 2242](#).... The 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.... In accord with the statutory language ..., longstanding practice confirms that in habeas challenges to present physical confinement—‘core challenges’—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.” (alteration in original)). Thus, unless the Petitioners can provide a reason not to do so within 7 days of this order, I will dismiss the 2241 Petition against the Director.

\* \* \*

To be clear, I am not suggesting that the Eighth Amendment requires the Warden to place on home confinement or recommend for compassionate release every inmate who has a COVID-19 risk factor. In *Farmer*, the Supreme Court held that “a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm *and disregards that risk by failing to take reasonable measures to abate it.*”  [511 U.S. at 847](#) (emphasis added). Whether it is a “reasonable measure” to place an inmate on home confinement or grant compassionate release in a particular case will depend on the severity of the risk faced by the inmate from COVID-19 in light of his or her age and medical history, the danger the inmate presents to the residents of the home environment under consideration, and the danger to the public at large. The determination must be individualized, as the Petitioners acknowledged at oral argument, ECF No. 28 at 9, and, in some cases, such as where the inmate has a recent record of violence, may properly result in denying home confinement or compassionate release even to inmates whose age or medical histories place them at risk of serious injury or death from COVID-19. But difficult as this determination may be, Petitioners have made a preliminary showing that, in these circumstances, the Eighth Amendment requires that it be made promptly and that it focus on the critical issues of inmate and public safety.

## b. Irreparable Harm

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

“A showing of irreparable harm is the single most important prerequisite” for the issuance of a temporary restraining order.  *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citations omitted). To satisfy the irreparable harm requirement, the Petitioners must demonstrate that, absent a temporary restraining order, “they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.” *Id.* (internal quotation marks and citations omitted).

\*27 A substantial risk of serious illness or death has often been found to constitute irreparable harm. *See, e.g.*,  *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 43-44 (2d Cir. 1997) (finding irreparable harm where the closure of a treatment program would pose serious risk of harm to plaintiffs, including “death, illness or disability”);  *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332-33 (2d Cir. 1995) (upholding District Court’s irreparable harm finding based on the “risk of injury, infection, and humiliation”).

More specifically, Courts across the country have concluded that the risk of contracting COVID-19 as a result of unsafe conditions of confinement constitutes irreparable harm. *See, e.g.*,  *Wilson v. Williams*, 2020 WL 1940882, at \*9 (N.D. Ohio Apr. 22, 2020) (finding that the risk of exposure to COVID-19 at FCI Elkton—one of two other facilities that, like FCI Danbury, were specifically identified by Attorney General Barr’s April 3 memo as experiencing significant outbreaks—constituted irreparable harm); *Mays v. Dart*, 2020 WL 1812381, at \*13 (N.D. Ill. Apr. 9, 2020) (The risk of “severe health consequences, including death, if they contract coronavirus disease” constituted “irreparable harm.”);  *Basank v. Decker*, 2020 WL 1481503, at \*4 (S.D.N.Y. Mar. 26, 2020) (“The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO.”).

FCI Danbury is experiencing an active COVID-19 outbreak—one of the worst in the federal prison system. One inmate at the prison has already died as a result of contracting the virus, and it is undisputed that members of the vulnerable subclass face a serious risk of meeting the same fate should they contract the virus. In light of the impossibility of instituting effective social distancing in the setting of a prison, like FCI Danbury, where inmates live and sleep in large dormitories lined with bunk beds, the grave risk to Petitioners persists despite the measures prison officials have taken to combat the virus.

In addition to the imminent prospect of serious physical harm, medically vulnerable inmates have alleged a violation of an important constitutional right—the right to be free from cruel and unusual punishment. “In the Second Circuit, it is well-settled that an alleged constitutional

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

violation constitutes irreparable harm.”  *Basank v. Decker*, 2020 WL 1481503, at \*4 (citing cases); *Connecticut Dep't of Env'tl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (“[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.” (internal quotation marks and citations omitted));  *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (“[T]he *alleged* violation of a constitutional right ... triggers a finding of irreparable harm.” (emphasis original)). Thus, the alleged violation of subclass members’ constitutional right to be free from cruel and unusual punishment itself constitutes “irreparable harm.”

In short, Subclass Members easily satisfy the irreparable harm prerequisite for issuing a temporary restraining order.

### c. Balance of the Equities and the Public Interest

“Where the Government is the opposing party, the final two factors in the temporary restraining order analysis—the balance of the equities and the public interest—merge.”  *Coronel v. Decker*, 2020 WL 1487274, at \*7 (S.D.N.Y. Mar. 27, 2020) (citing  *Planned Parenthood of New York City, Inc. v. U.S. Dep't of Health & Human Servs.*, 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018)).

**\*28** As an initial matter, “the public interest is best served by ensuring the constitutional rights of persons within the United States are upheld.”  *Coronel*, 2020 WL 1487274, at \*7 (quoting   *Sajous v. Decker*, 2018 WL 2357266, at \*13 (S.D.N.Y. 2018)); *see also*  *Doe v. University of Connecticut*, 2020 WL 406356, at \*6 (D. Conn. Jan. 23, 2020) (noting the “public interest in avoiding violations of constitutional rights”); *Barbecho v. Decker*, 2020 WL 1876328, at \*7 (S.D.N.Y. Apr. 15, 2020);   *G & V Lounge, Inc. v. Michigan Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.”).

Moreover, the Petitioners’ interest in avoiding serious illness or death must weigh heavily on the scales. While I am not unmindful of the unprecedented challenges faced by the Warden in combatting the COVID-19 pandemic, not to mention the challenges of operating a prison—including maintaining order and discipline, maintaining health and safety, and achieving the prison’s penological and rehabilitative objectives—under even the best of circumstances, and while I approach imposing additional duties on her at this time with great hesitation, the burdens faced by the Warden must yield to medically vulnerable inmates’ interest in avoiding serious illness or death, as well as the public’s interest in seeing those inmates’ constitutional rights vindicated.

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

Respondents argue that an assessment of the public interest also requires individualized consideration of an inmate's suitability for release, taking into account the safety of the inmate, his or her family, and the public. I agree, and the order I issue today mandates such individualized consideration, albeit on a basis more accelerated and more focused on the critical factors of inmate and public safety than the current home confinement review process at FCI Danbury.

### 3. Safety Measures

With respect to the broader putative class, the Petitioners argue that the Warden has failed to institute the measures necessary to prevent the continued spread of COVID-19 at FCI Danbury and to protect inmates from infection. Aside from the Warden's use of home confinement and compassionate release to protect medically vulnerable patients and reduce the population at FCI Danbury, which is addressed above, the Petitioners argue that the Warden has further failed to (1) adequately screen inmates for COVID-19 symptoms, (2) test symptomatic inmates, (3) isolate infected patients, (4) quarantine patients thought to have been exposed, (5) implement adequate social distancing, (6) observe proper sanitation measures, (7) provide staff and inmates with adequate personal protective equipment, soap, and sanitizers, and (8) provide adequate medical care to inmates with COVID-19 as well as other medical conditions. But while the salient facts regarding the Warden's use of her home confinement and compassionate release authority are generally undisputed, factual disputes abound with respect to the Petitioners' other allegations. For example, while Petitioners contend that prison officials "willfully refused to take temperatures or test for fever in order to avoid identifying cases of possible COVID infection," ECF No. 1 ¶ 132, the Warden claims that "[t]his could not be further from the truth," and that, since April 9, 2020, FCI Danbury has conducted daily temperature checks for all inmates. ECF No. 24-2 at 24. Similarly, while Petitioners contend that symptomatic patients are not being tested appropriately, the Warden maintains that "[a]ny inmate at FCI Danbury presenting with symptoms consistent with COVID-19 is immediately evaluated by a medical provider to determine whether testing and/or isolation is appropriate." ECF No. 24-2 at 2. And while Petitioners claim that the use of personal protective equipment such as masks has been inconsistent and is not enforced, the Warden indicates that both staff and inmates are required to wear face masks and are provided with personal protective equipment as appropriate. *Id.* at 15.

**\*29** These factual disputes preclude me from concluding at this stage that the Warden's implementation of measures to protect against the spread of COVID-19 exhibits deliberate indifference to the serious risks posed by the virus, and thus that the Petitioners are likely to succeed on the merits of this portion of their claim. It is well established that "[t]he existence of factual disputes necessitates an evidentiary hearing ... before a motion for preliminary injunction may be decided."  *Kern v. Clark*, 331 F.3d 9, 12 (2d Cir. 2003) (internal quotation marks and citations



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

omitted). Perhaps recognizing the conflicting factual record on mitigation and safety measures, the Petitioners submitted a proposed order following oral argument, ECF No. 26-1, that does not include an order directing the Warden to implement the various measures at issue (again, most of which the Warden contends she is already implementing). I thus deny the Petitioner's request for a temporary restraining order to the extent that it asks the Court to direct the Warden to implement safety measures and report to the Court on the status of those measures.

### C. The Propriety of Multi-Party Treatment

Although the Second Circuit has “conclude[d] that the class action device should not be imported into collateral actions, at least in its full vigor as contemplated by Rule 23,” it has recognized “the power of the judiciary ... to fashion for habeas actions appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage.”  *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974). In *Preiser*, the court allowed “a multi-party proceeding similar to the class action” on behalf of young adults serving misdemeanor sentences, largely because the petitioners’ claims were “applicable on behalf of the entire class” and “uncluttered by subsidiary issues.”  *Id.* at 1126. The Court noted several other “persuasive justifications” for affording class action treatment, including that “many of those serving reformatory sentences are likely to be illiterate or poorly educated,” “most would not have the benefit of counsel to prepare habeas corpus petitions,” and “considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue is thereby avoided.” *Id.* Noting that “the precise provisions of Rule 23 are not applicable to these proceedings,” the Court nonetheless found that consideration of the four Rule 23(a) prerequisites further bolstered its conclusion that class treatment was appropriate. *Id.* The approach laid out by the *Preiser* court is, in short, both flexible and sensitive to the particular circumstances of a given case.

In any event, I need not make a formal determination as to class certification—or, more precisely, as to whether a multi-party proceeding analogous to a class action is appropriate. “It is well established that ‘[c]ertain circumstances give rise to the need for prompt injunctive relief for a named plaintiff or on behalf of a class’ and that the ‘court may conditionally certify the class or otherwise award a broad preliminary injunction, without a formal class ruling, under its general equity powers.’ ”  *Strouchler v. Shah*, 891 F. Supp. 2d 504, 517 (S.D.N.Y. 2012) (quoting *Alba Conte & Herbert Newberg, Newberg on Class Actions* § 9:45 (4th Ed.2002)). Thus, in *Strouchler*, the court “[p]reliminarily examin[ed] plaintiffs’ entitlement to class status,” concluded that “it is likely that plaintiffs will be able to meet the Rule 23 prerequisites of numerosity, commonality, typicality, and adequacy” as well as the requirements of Rule 23(b)(2), and granted in part plaintiffs’ motion for preliminary injunction.  *Id.* at 518-19; see also *LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 58 (2d Cir. 2004) (finding that the District Court did not

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

abuse its discretion in issuing a preliminary injunction prior to class certification and in reliance on representative evidence of irreparable harm). By analogy to this established practice in the class action context, I need only determine at this stage whether multi-party treatment is *likely* to be appropriate.

**\*30** Moreover, the scope of my inquiry as to multi-party treatment need not extend beyond the scope of the claim addressed by this ruling and the temporary restraining order I issue. I have concluded above that the Petitioners, as medically vulnerable inmates, have shown that they are likely to succeed on the merits of their claim that the Warden’s implementation of her home confinement and compassionate release authority violates their constitutional rights. I have further found that they face irreparable harm should preliminary relief not be granted, and that issuing a temporary restraining order is in the public interest. The injunction I issue below directs the Warden to make prompt, meaningful use of her home confinement and compassionate release authority; expeditiously to consider all medically vulnerable inmates for home confinement and compassionate release; and to discontinue the use of unduly burdensome eligibility criteria that are divorced from the interests of vulnerable inmates as well as the public and that preclude otherwise eligible inmates from consideration. At this stage, I need only consider, on a provisional basis, whether multi-party treatment is likely appropriate as to this claim and the associated relief.<sup>29</sup>

<sup>29</sup> Should I later find that other claims, issues, or forms of relief the Petitioners are pursuing are inappropriate for multi-party, representative treatment, I see no reason why, for example, I could not employ an analogue to issue certification under Rule 23(c)(4). Thus, I need not determine whether all claims, issues, and forms of relief in this case are appropriate for multi-party treatment in this ruling.

I find that, as in *Preiser*, the claim as to which I now grant preliminary relief—that the Warden’s implementation of her home confinement and compassionate release authority violates the constitutional rights of medically vulnerable inmates—is plainly “applicable on behalf of the entire [subclass]” and “uncluttered by subsidiary issues.” *Id.* It is the Warden’s existing process as applied to medically vulnerable inmates that amounts to deliberate indifference—a process that applies to the entire subclass, as evidenced, for example, by the single set of home confinement criteria published by the Warden. *See* ECF Nos. 15-7, 15-8. I do not rule on the propriety of the Warden’s determination as to any particular inmate; thus, the fact that these determinations will likely require at least some degree of individualized inquiry does not destroy the common questions inherent in the claims under consideration.

Other considerations also counsel in favor of a multi-party proceeding at this stage. As in *Preiser*, the majority of the vulnerable inmates would be unlikely to have the benefit of counsel in pursuing



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

individual habeas petitions absent a multi-party proceeding. Similarly, multi-party treatment avoids the “considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue,” [Preiser](#), 506 F.2d at 1126. Furthermore, because the present ruling addresses the constitutionality of the processes employed by the Warden—processes that, in the interest of fairness, efficiency, and accuracy, must be uniform—individual adjudication, and the conflicting directives it would likely generate, would unduly burden the Warden and interfere with the fair and efficient operation of the home confinement and compassionate release programs, thus undermining the very constitutional interests Petitioners seek to vindicate.

Consideration of the Rule 23(a) prerequisites further bolsters my conclusion that multi-party treatment is likely appropriate. According to the Government, there are 984 inmates at FCI Danbury. ECF No. 2401 at 14. At FCI Elkton, a facility with 2,368 inmates,<sup>30</sup> Petitioners indicate that the BOP identified 837 medically vulnerable prisoners. ECF No. 26 at 3. If a similar proportion of inmates at FCI Danbury are medically vulnerable, that would mean the putative Medically Vulnerable Subclass consists of roughly 350 inmates. This would easily satisfy Rule 23’s numerosity requirement.<sup>31</sup> I also find that, even applying the “more stringent standards” alluded to by the [Preiser court](#), 506 F.2d at 1127, commonality is likewise satisfied. Facts regarding the process employed by the Warden in considering inmates for home confinement and compassionate release are common to the entire putative subclass, as are the legal questions regarding whether the Warden’s handling of those processes in these circumstances is constitutional. And while members of the putative class may vary in terms of the severity of their COVID-19 risk factors, all are recognized as falling in the high-risk group as to which heightened precautions are justified.<sup>32</sup> Typicality is similarly satisfied; because the process at issue is applicable to all inmates, “each member’s claim arises from the same course of events,”—the establishment and operation of this process—“and each class member makes similar legal arguments to prove the defendant’s liability.” [In re Flag Telecom Holdings, Ltd. Securities Litigation](#), 574 F.3d 29, 35 (2d Cir. 2009) (internal quotation marks and citations omitted); *see also* [Robidoux v. Celani](#), 987 F.2d 931, 937 (2d Cir. 1993) (“Evidence indicating the employer discriminated *in the same general fashion* against the class representatives and against other members of the class was held sufficient to satisfy the typicality requirement.” (citing [Rossini v. Ogilvy & Mather, Inc.](#), 798 F.2d 590, 596-98 (2d Cir. 1986))). Finally, Petitioners are represented by experienced and qualified counsel, and there is no reason to think that the named petitioners are inadequate representatives of the class, thus satisfying the adequacy requirement.

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

30 *FCI Elkton*, BOP.gov, <https://www.bop.gov/locations/institutions/elk> (last visited May 10, 2020).

31 See *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (holding that “numerosity is presumed at a level of 40 members”) and *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (courts do not require “evidence of exact class size or identity of class members to satisfy the numerosity requirement”).

32 Petitioners and Respondents jointly propose that the Medically Vulnerable Subclass be defined as follows:

All individuals in custody at FCI Danbury, while the threat of COVID-19 at the facility remains, who are aged 65 or over and/or who have any of the following conditions specifically identified by the United States Centers for Disease Control as putting them at higher risk for severe illness from COVID-19: (a) chronic lung disease including moderate to severe asthma, COPD, emphysema, chronic bronchitis, idiopathic pulmonary fibrosis and/or cystic fibrosis; (b) immunocompromised status, including status as a transplant recipient, on chemotherapy, HIV positive, prolonged use of corticosteroids, using immunosuppressive medication, and/or having an immune deficiency; (c) severe obesity (BMI of 40 or higher); (d) diabetes mellitus Type I or Type II, (e) gestational diabetes mellitus; (f) chronic kidney disease on dialysis; (g) chronic liver diseases, cirrhosis; and/or serious heart conditions, including congestive heart failure, coronary artery disease, congenital heart disease, cardiomyopathy, and/or pulmonary hypertension.

ECF No. 26 at 2.

\*31 In short, I conclude that the Petitioners are likely to show that proceeding on a multi-party basis with respect to the claim at issue is appropriate, and thus that injunctive relief as to the medically vulnerable subclass is appropriate at this stage.

#### D. The Government’s Rule 12(b)(6) Motion

In deciding a motion to dismiss under Rule 12(b)(6), the Court must determine whether the plaintiff has alleged “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the pleaded content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted). In considering such a motion, the court must construe the complaint liberally, “accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff’s favor.” *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

To survive a motion to dismiss, “[a]fter the court strips away conclusory allegations, there must remain sufficient well-pleaded factual allegations to nudge plaintiff’s claims across the line from conceivable to plausible.” *In re Fosamax Products Liab. Litig.*, 2010 WL 1654156, at \*1 (S.D.N.Y. Apr. 9, 2010). “When a complaint is based solely on wholly conclusory allegations and provides no factual support for such claims, it is appropriate to grant defendants[’] motion to dismiss.” *Scott v. Town of Monroe*, 306 F. Supp. 2d 191, 198 (D. Conn. 2004).

With respect to the Petitioners’ claim that the Warden’s failure to make prompt, meaningful use of her home confinement and compassionate release authority constitutes deliberate indifference under the Eighth Amendment, I have found that the Petitioners’ claim is not only plausible, but is likely to succeed on the merits.

The Petitioners have also plausibly alleged that the Warden has failed to implement adequate measures to prevent the continued spread of COVID-19 at the prison, in violation of the Petitioners’ Eighth Amendment rights. The Petitioners have plausibly alleged that they face a grave risk of serious illness or death due to COVID-19, *see, e.g.*, Petition ¶¶ 25-34 (listing Petitioners’ medical conditions rendering them particularly vulnerable to COVID-19), ¶¶ 56-76 (describing why prisons are particularly susceptible to outbreaks of COVID-19), and thus that they are “incarcerated under conditions posing a substantial risk of serious harm,” *Farmer*, 511 U.S. at 834, satisfying the objective component of the deliberate indifference analysis. The prisoners have further plausibly alleged that prison officials “kn[ew] of and disregard[ed] an excessive risk to inmate health or safety,” *Brock*, 315 F.3d at 164. Petitioners have alleged, for example, that instead of screening inmates for COVID-19 in good faith, so that symptomatic patients can be tested and, if necessary, isolated, prison officials have “falsely discounted the readings of elevated temperatures in order to avoid taking appropriate follow-up action.” Petition ¶ 132. While the Warden contests this account, I must accept the Petitioners’ allegations as true for the purposes of this motion. Similarly, Petitioners allege that on April 24, a woman at the satellite prison exhibiting serious symptoms was ignored by correctional staff and left among the general population for hours, despite the urgings of the other prisoners, before finally being taken to the hospital where she tested positive for COVID-19. Petition ¶ 54. The Petitioners further allege that prison officials threatened retaliation against any inmate who told anyone on the outside about this incident. *Id.* These and other allegations—which I must accept as true for the purposes of this motion—satisfy the subjective component of the deliberate indifference standard.

\*32 For the above reasons, the Government’s Rule 12(b)(6) motion to dismiss is DENIED.

## V. RELIEF

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

For the reasons discussed above, I grant in part and deny in part Petitioners' motion for temporary restraining order and issue the orders set forth below. The temporary restraining order that follows is aimed at accelerating the process for evaluating inmates for home confinement and compassionate release, and focusing that process on achieving a "reasonable" balance between the risks to inmate safety and the risks to public safety. See  *Farmer*, 511 U.S. at 847.

### TEMPORARY RESTRAINING ORDER

1. Within **3 days** of this order, Respondent Warden (the "Respondent") shall file on the docket, under seal, a list of "medically vulnerable inmates at Danbury FCI," consisting, more specifically, of the following:

All individuals in custody at FCI Danbury who are aged 65 or over and/or who have any of the following conditions specifically identified by the United States Centers for Disease Control as putting them at higher risk for severe illness from COVID-19: (a) **chronic lung disease** including moderate to severe **asthma**, COPD, **emphysema**, chronic **bronchitis**, **idiopathic pulmonary fibrosis** and/or **cystic fibrosis**; (b) immunocompromised status, including status as a transplant recipient, on chemotherapy, HIV positive, prolonged use of corticosteroids, using immunosuppressive medication, and/or having an immune deficiency; (c) severe **obesity** (BMI of 40 or higher); (d) **diabetes mellitus Type I** or **Type II**, (e) **gestational diabetes mellitus**; (f) **chronic kidney disease** on dialysis; (g) **chronic liver diseases**, **cirrhosis**; and/or (g) serious heart conditions, including **congestive heart failure**, **coronary artery disease**, **congenital heart disease**, **cardiomyopathy**, and/or **pulmonary hypertension**.

- a. Within 1 day of this order, counsel for petitioners and respondents shall confer with each other (to the extent they have not already done so) about how to identify promptly the inmates who fit the criteria listed above, including, if feasible, through the use of ICD codes, as discussed during the recent teleconference;
- b. The list referred to in paragraph 1 shall include the identity of the inmate, the inmate's sentencing court, and the case number of the inmate's underlying criminal conviction but shall not include information about the specific medical condition suffered by each inmate;
- c. The list referred to in paragraph 1 shall be organized by facility within Danbury FCI (*i.e.*, one list for the men's facility, one list for the women's satellite prison, and one list for the women's camp)

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

- d. The list shall indicate, as to each inmate, whether that inmate (a) has submitted a request for compassionate release under  18 U.S.C. § 3582(c)(1)(A), and  (b) has been reviewed for home confinement since March 26, 2020, and if so, whether the inmate has been designated for home confinement.
- e. If compiling the information described in paragraph 1d. will significantly delay the creation and filing of a list setting forth just the information described in paragraphs 1, 1b., and 1c., then the Respondents may initially, within 3 days of this order, file a list including only the information set forth in paragraphs 1, 1b., and 1c., and then, within 7 days of this order, file a second version of the list including all of the information described in paragraphs 1 and 1b.-1d.
- \*33 f. Respondent shall provide the list to Petitioners' counsel, and the list shall be marked "Confidential-Attorneys' Eyes Only" and be treated accordingly under the Protective Order entered in this case, ECF No. 9.
- g. Respondent shall file on the docket with the list a declaration setting forth the process used to identify those persons described in paragraph 1, including a description of the databases searched.

2. Within **3 days** of this order, Respondent shall:

- a. Finalize and implement a process that makes full and speedy use of the home confinement authority under  18 U.S.C. § 3624(b) and the CARES Act and, as directed by the Attorney General's April 3, 2020 Memorandum, "immediately maximize[s] appropriate transfers to home confinement [for] all appropriate inmates held at ... FCI Danbury," in particular, by (a) prioritizing for review for home confinement all inmates identified on the list described in paragraph 1, (b) assigning substantial weight in that review to the inmate's risk factors for COVID-19 based on CDC guidance, (c) eliminating all requirements that the inmate have served some portion of his or her sentence to be eligible for placement on home confinement, (d) eliminating the requirement that a "primary or prior offense" not be a violent offense; (e) eliminating the requirement that the inmate be "without incident reports in the past 12 months (regardless of severity level)"; (f) modifying any requirement that a person approved for home confinement be quarantined at the facility for 14 days to allow for immediate release to home confinement for those inmates as to whom Respondent verifies, after reasonable inquiry, that the inmate is not showing symptoms and is able to self-isolate for the same period in the home confinement setting.<sup>33</sup>



Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

- b. File a statement on the docket explaining why the Court should not also require the review process described in paragraph 2a. to eliminate or modify the requirements that the PATTERN risk score be “MIN” and that the Mental Health Care Level be less than IV, ECF No. 15-8 at 2.
- c. Publish to inmates the factors to be considered in the revised home confinement review process developed by the Warden in accordance with this order.

33 By “eliminating” particular “requirements,” I do not mean to suggest that these considerations are irrelevant to the Warden’s assessment of the appropriateness of home confinement for a particular inmate. To the contrary, a particular inmate’s violent history, for example, is obviously relevant to the assessment of the danger his or her release might pose to the public and thus should be accorded weight in the determination. The purpose of eliminating these and other categorical exclusions is to make the process more individualized and more amenable to a proper and reasonable balancing of inmate safety and public safety.

3. Within **7 days** of this order, Respondent shall:

- a. Provide written notice of either (a) a referral of the matter in writing with recommendation of approval of the request, [28 C.F.R. § 571.62](#), or (b) a denial of the request, together with the appropriate appeal form, [28 C.F.R. §§ 571.63, 542.15](#), to each inmate described in paragraph 1 (or, if that is not administratively feasible, to each inmate) who has made a written request for compassionate release based on COVID-19 under [18 U.S.C. § 3582\(c\)\(1\)\(A\)](#) but has not yet received a decision.
- b. Finalize and implement a process whereby each inmate described in paragraph 1 (or, if that is not administratively feasible, each inmate) who makes a written request for compassionate release based on COVID-19 receives notice of either the referral of their request, with a recommendation of approval, or its denial, with the appropriate appeal form, within 7 days of the date the request is received by a member of the Danbury FCI staff.
- c. File a statement on the docket explaining whether and how the criteria in the BOP’s Program Statement governing compassionate release have been updated to take account of the COVID-19 crisis and, if they have not been, showing cause why the Court should not require the Warden to promulgate revised compassionate release criteria for use at FCI Danbury that take full and appropriate account of the threat posed by COVID-19 to medically vulnerable inmates.

Martinez-Brooks v. Easter, Slip Copy (2020)

2020 WL 2405350

**\*34** 4. Within **13 days** of this order, as to each person described in paragraph 1, the Respondent Warden shall complete the home confinement review process described in paragraph 2a. and shall either (a) approve such person for home confinement and (i) place him or her on home confinement or (ii) place him or her in quarantine within the facility for 14 days before placing him or her on home confinement, or (b) deny such person home confinement.

5. Within **13 days** of this order, the Respondent Warden shall provide to the Court (under seal) an individualized explanation for each denial of home confinement as to an inmate described in paragraph 1, including at least a brief description of the factual basis for any factors deemed to outweigh the danger to the inmate from COVID-19, and shall show cause why each such inmate should not be transferred to another facility within the BOP where adequate social distancing is possible.

6. Within **13 days** of this order, Respondent shall file a status report describing her efforts to comply with this order.

7. On **May 26, 2020, at 1:00 p.m.**, the parties shall participate in a telephonic status conference with the Court to determine whether this order should be extended. *See* [Fed. R. Civ. P. 65\(b\)\(2\)](#).

#### HEARING ON MOTION FOR PRELIMINARY INJUNCTION

The Court will hold a hearing on the motion for preliminary injunction on **June 11, 2020 at 9:00 a.m.** Before the hearing, the parties shall participate in expedited discovery. The parties shall meet and confer within one day of this order to discuss the scope and timing of that discovery. By **May 14, 2020 at noon**, they shall file a joint proposal regarding that scope and timing, and shall indicate any disagreements. The Court will hold a telephonic status conference to discuss the proposal on **May 14, 2020 at 3:00 p.m.**

IT IS SO ORDERED.

#### **All Citations**

Slip Copy, 2020 WL 2405350



Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

2017 WL 7050280

Only the Westlaw citation is currently available.

United States Court of Appeals, Sixth Circuit.

Edison Alexander PEOPLES, Plaintiff–Appellant,

v.

Catherine S. BAUMAN, et al., Defendants–Appellees.

No. 16–2096

|

FILED September 05, 2017

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN  
DISTRICT OF MICHIGAN

**Attorneys and Law Firms**

Edison Alexander Peoples, Marquette, MI, pro se.

[John L. Thurber](#), Office of the Attorney General, Lansing, MI, for Defendants–Appellees.

Before: [SILER](#) and [BATCHELDER](#), Circuit Judges; BERTELSMAN, District Judge.\*

\* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

ORDER

\*1 Edison Alexander Peoples, a pro se Michigan prisoner, appeals the district court's dismissal of all claims raised in his civil rights action filed under  42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See [Fed. R. App. P. 34\(a\)](#).

In 2014, Peoples sued thirty-three employees of Alger Correctional Facility (LMF) for their alleged involvement in three incidents occurring during his incarceration there. In an amended complaint, Peoples stated that the first incident began on June 13, 2011, when various defendants ordered

Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

him to lie in sewage from a flooded cell in order to shackle him. Peoples reluctantly complied, “saturating his pants, underwear[,] and shirt in sewage” in the process. Peoples was placed in handcuffs and leg [irons](#), which were connected to a belly chain, securing him “in a permanent crouch[ing] position” that caused him extreme pain. He “remained in this state for approximately thirty and one half hours.”

The second incident occurred on June 21, 2011. Peoples alleged that he received a prison disciplinary hearing before Defendant Hursh for misusing or destroying his mattress. Peoples claimed that he asked Hursh to call witnesses but that Hursh failed to do so. Peoples was found guilty, and Hursh imposed a 30-day loss-of-privileges sanction and ordered him to pay \$48.33 in restitution.

The third incident began on August 8, 2011. After Peoples barricaded himself in his cell, he was sprayed with mace in his face, chest, and body, leaving all of his clothing saturated. He “surrendered” shortly afterwards and was shackled in the same crouching position as in the June 13 incident. Peoples claimed that the restraints severely decreased his mobility and caused him extreme pain, as did the intense burning from the mace. He was so restrained that “he was unable to pull his pants down to reli[e]ve his bowels or urinate.” The restraints were not removed until August 11, and he was not permitted to wash the mace from his body until August 18.

Seeking an injunction and declaratory and monetary relief, Peoples asserted multiple causes of actions stemming from these incidents, mostly Eighth Amendment violations or state law torts. As to Hursh, Peoples asserted violations of his Fourteenth Amendment due process rights.

The district court disposed of Peoples's claims in three separate orders. On October 24, 2014, the district court, pursuant to [28 U.S.C. §§ 1915\(e\)\(2\) and 1915A](#) and [42 U.S.C. § 1997e\(c\)](#), dismissed sua sponte defendants Bauman, Sprader, Lesatz, Hood, Taskila, Smith, Immel, O'Dell, Lee, Johnson, and Branus. The court determined that Peoples's claims against these defendants were impermissibly based upon only a theory of respondeat superior or a “failure to act.” Additionally, the district court determined that Hursh was a hearing officer, and as such, was entitled to absolute judicial immunity from damages. Finally, the court determined that John Doe defendants one through eleven, as unnamed defendants, could not be served and thus were “not properly parties to [the] action.” However, the district court ordered service of Peoples's amended complaint against the remaining defendants Lindenmuth, Rankin, Rondeau, Curtis, Kienitz, Sadak, Tennyson, Wickstrom, Scott, and McDonald.

**\*2** On August 3, 2015, in ruling on a motion for summary judgment filed by the defendants, the district court dismissed defendants Lindenmuth, Rankin, Rondeau, Curtis, and Scott, concluding

Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

that Peoples failed to exhaust his administrative remedies against them. However, the district court determined that Peoples had properly exhausted his claims as to the August 8, 2011 incident against defendants Kienitz, Sadak, Tennyson, Wickstrom, and McDonald.

On May 20, 2016, the district court granted the remaining defendants' motion for summary judgment asserting qualified immunity and dismissed Peoples's remaining claims. Specifically, the district court concluded that the remaining defendants were entitled to qualified immunity from Peoples's Eighth Amendment claims. And after determining that Peoples had no federal claims remaining, the district court declined to exercise supplemental jurisdiction over his state law claims and dismissed them without prejudice. Peoples now appeals the district court's dismissal of all his claims.

#### *October 24, 2014 Order*

Peoples challenges the district court's October 24, 2014 order that sua sponte dismissed defendants Bauman, Sprader, Lesatz, Hood, Taskila, Smith, Immel, O'Dell, Lee, Johnson, Branus, and Hursh. However, Peoples fails to challenge the district court's determination that John Does one through eleven were “not properly parties to this action.” Accordingly, he has waived any appellate argument as to these defendants. See [Geboy v. Brigano](#), 489 F.3d 752, 767 (6th Cir. 2007).

We review de novo a district court's dismissal of a prisoner's complaint under [28 U.S.C. §§ 1915\(e\)\(2\) and 1915A](#) and [42 U.S.C. § 1997e\(c\)](#). [Flanory v. Bonn](#), 604 F.3d 249, 252 (6th Cir. 2010). Each of these statutes allows a court to dismiss a complaint that fails to state a claim for relief. [28 U.S.C. §§ 1915\(e\)\(2\)\(B\)\(ii\), 1915A\(b\)\(1\)](#); [42 U.S.C. § 1997e\(c\)\(2\)](#). “[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” [Hill v. Lappin](#), 630 F.3d 468, 471 (6th Cir. 2010) (quoting [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009)). “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” [Iqbal](#), 556 U.S. at 679.

First, Peoples challenges the district court's determination that his claims against Bauman, Sprader, Lesatz, Hood, Taskila, Smith, Immel, O'Dell, Lee, Johnson, and Branus merely amounted to allegations of respondeat superior or the failure to act. See [Miller v. Calhoun Cty.](#), 408 F.3d 803, 817 n.3 (6th Cir. 2005) (“Because [§ 1983](#) liability cannot be imposed under a theory of respondeat superior, proof of personal involvement is required for a supervisor to incur personal liability.”); [Shehee v. Luttrell](#), 199 F.3d 295, 300 (6th Cir. 1999) (noting that [§ 1983](#) liability must be based upon “active unconstitutional behavior” and not just a defendant's failure to act).

Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

He argues that his complaint alleged that: (1) each defendant was involved in the constitutional violations he experienced; and (2) he sufficiently alleged supervisory liability.

In his amended complaint, Peoples alleged that defendants Hood, Taskila, Smith, Immel, O'Dell, Lee, Johnson, and Branus each visited his cell in the days after the August 8, 2011 incident began and he told each of them that he was currently experiencing pain and suffering from having been maced and placed in restraints. (Peoples did not include Bauman, Sprader, and Lesatz in this allegation; his separate allegations against those defendants will be addressed later.) This claim implicates defendants as being liable for denying him humane conditions of confinement. *See*  [\*Farmer v. Brennan\*, 511 U.S. 825, 837 \(1994\)](#) (noting that liability in such cases attaches where “the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”).

\*3 Similarly, Peoples's allegations amounted to more than a mere “failure to act.” *See*  [\*Shehee\*, 199 F.3d at 300](#). It can be said that those supervisory defendants, by personally witnessing the alleged abuse committed by other prison employees and taking no action in response, “at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.”  [\*Bellamy v. Bradley\*, 729 F.2d 416, 421 \(6th Cir. 1984\)](#); *see*  [\*Peatross v. City of Memphis\*, 818 F.3d 233, 242 \(6th Cir. 2016\)](#) (noting that while active unconstitutional behavior by a supervisory official is required to impose supervisory liability, “active” behavior does not require the supervisor to actually “put his hands on the injured party or *even [be] physically ... present at the time of the constitutional violation*”) (emphasis added). Accordingly, we vacate the district court's dismissal of defendants Hood, Taskila, Smith, Immel, O'Dell, Lee, Johnson, and Branus, and remand so that the district court can further consider Peoples's claims against them.

Peoples also argues that his amended complaint alleged sufficient factual content to show that defendants Bauman, Lesatz, and Sprader were liable for constitutional violations against him. Peoples argues that these defendants denied him a mattress and other bedding during times when his cell was very cold. The district court did not appear to consider these allegations; we vacate and remand with instructions to do so. *See* [\*Francis v. Altieri\*, 491 Fed.Appx. 539, 541 \(6th Cir. 2012\)](#).

Additionally, the district court apparently did not consider Peoples's claim alleging that Lesatz, Sprader, and Bauman were aware, through various prison documents, of a history at LMF of using restraints and mace as a means to inflict punishment upon prisoners. In certain circumstances, a supervisor's failure to train and supervise offending officers in light of such information can

Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

support a showing of knowing acquiescence in unconstitutional conduct. See [Peatross](#), 818 F.3d at 242–43. Accordingly, we vacate the dismissal of Lesatz, Sprader, and Bauman, and remand so that the district court can consider this allegation.

Lastly, Peoples challenges the district court's dismissal of Defendant Hursh. First, Peoples points out that he alleged in his amended complaint that he directly told Hursh about his pain and suffering following the August 8, 2011 incident. Accordingly, for the reasons given as to the other defendants connected to this incident, the district court erred in dismissing Hursh without addressing this claim. However, the district court correctly determined that to the extent that Hursh was acting as a hearing officer, Hursh was entitled to absolute judicial immunity. See [Shelly v. Johnson](#), 849 F.2d 228, 230 (6th Cir. 1988). Accordingly, we vacate the district court's October 24, 2014 order in part and affirm in part, and remand for further proceedings.

#### *August 3, 2015 Order*

Peoples next challenges the district court's August 3, 2015 order that dismissed defendants Lindenmuth, Rankin, Rondeau, Curtis, and Scott for failure to exhaust his administrative remedies against them. The district court also determined that Peoples had not exhausted his claims as to the June 13, 2011 incident.

“Dismissal of a prisoner's civil rights claim for failure to exhaust administrative remedies is reviewed de novo.” [Risher v. Lappin](#), 639 F.3d 236, 239 (6th Cir. 2011). The Prison Litigation Reform Act (PLRA) requires prisoners to properly exhaust their available administrative remedies before bringing suit in federal court. See 42 U.S.C. § 1997e(a); [Woodford v. Ngo](#), 548 U.S. 81, 93 (2006). Proper exhaustion demands that a prisoner “complete the administrative review process in accordance with the applicable procedural rules.” [Woodford](#), 548 U.S. at 88. “[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion.” [Jones v. Bock](#), 549 U.S. 199, 218 (2007). “[A] prisoner cannot satisfy the ... exhaustion requirement by filing an untimely or otherwise procedurally defective administrative grievance.” [Scott v. Ambani](#), 577 F.3d 642, 647 (6th Cir. 2009).

\*4 Peoples complained about the June 13, 2011 incident in a grievance identified as LMF–11–07–1403–27b. The district court summarily rejected this grievance as not having exhausted any claims because “it was rejected as a policy issue per P.D. 03.02.130 ¶ F.1.” Michigan Department of Corrections Policy Directive 03.02.130 ¶ F.1. states: “A grievant may not grieve the content of policy or procedure except as it was specifically applied to the grievant.” This policy led the Michigan Department of Corrections (MDOC) to conclude that Peoples's grievance was “non-



Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

grievable.” We have held, in an unpublished opinion, that an inmate “cannot be required to exhaust administrative remedies regarding non-grievable issues.”  [Figel v. Bouchard](#), 89 Fed.Appx. 970, 971 (6th Cir. 2004). Accordingly, Peoples's claims in this grievance were not subject to dismissal for failure to exhaust administrative remedies. *See id.*

Peoples complained about the August 8, 2011 incident in a grievance identified as LMF–11–08–1817–17a. Because Peoples identified defendants Kienitz, Sadak, Tennyson, Wickstrom, and McDonald in this grievance, the district court determined that his claims against them were properly exhausted. However, the district court concluded that Lindenmuth, Rankin, Rondeau, Curtis, and Scott were not mentioned and that the claims against them had not been exhausted. The district court was correct as to all defendants except Scott.

According to the applicable policy directive, a grievant must provide the facts underlying the issue being grieved and include “[d]ates, times, places, and *names* of all those involved.” MDOC Policy Directive 03.02.130 ¶ R (emphasis added). Because Peoples failed to name Lindenmuth, Rankin, Rondeau, and Curtis in this grievance, he failed to exhaust his claims against them as to this incident. *See*  [Sullivan v. Kasajaru](#), 316 Fed.Appx. 469, 470 (6th Cir. 2009). However, Peoples specifically identified defendant Scott, a registered nurse, in this grievance. He stated that though Scott provided him with eye medication after he was maced, he was not given the opportunity to wash the mace from his body. Further, Peoples stated that all persons mentioned in the grievance were “defendants because of their deliberate failure to ensure [his] physical well-being.” In his amended complaint, Peoples claimed that Scott failed to ensure that he could wash the mace from his “person and clothing.”

The standard for preserving a claim through a grievance is relaxed. A prisoner need only provide “prison officials [with] fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim made against a defendant in a prisoner's complaint.”   [Bell v. Konteh](#), 450 F.3d 651, 654 (6th Cir. 2006) (quoting  [Burton v. Jones](#), 321 F.3d 569, 575 (6th Cir. 2003) ). Here, by identifying Scott by name and generally claiming that Scott prevented him from washing the mace from his body, Peoples gave fair notice of his alleged mistreatment by Scott. Accordingly, the district court erred in dismissing Scott for failure to exhaust his administrative remedies. We vacate the district court's August 3, 2015 order in part and affirm in part, and remand for further proceedings.

*May 20, 2016 Order*

Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

Peoples next challenges the district court's May 20, 2016 order granting defendants Kienitz, Sadak, Tennyson, Wickstrom, and McDonald's motion for summary judgment on qualified immunity grounds for their involvement in the August 8, 2011 incident.

We review de novo the district court's grant of summary judgment on the grounds of qualified immunity. See  *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 565 (6th Cir. 2013). Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “In reviewing a summary judgment motion, we view all facts and draw all reasonable inferences in the light most favorable to the nonmoving party.”  *Stoudemire*, 705 F.3d at 565.

**\*5** Qualified immunity shields government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”  *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). “To determine whether an officer is entitled to qualified immunity, a court evaluates two independent prongs: whether the officer's conduct violated a constitutional right, and whether that right was clearly established at the time of the incident.” *Richko v. Wayne Cty.*, 819 F.3d 907, 914–15 (6th Cir.) (citing  *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ), *petition for cert. filed* (U.S. Oct. 20, 2016) (No. 16–538).

Peoples's complaint implicates various Eighth Amendment claims relating to the August 8, 2011 incident, including the use of excessive force, inhumane conditions of confinement, and deliberate indifference to his serious medical needs. As an initial matter, Peoples argues that the district court failed to fully address all his claims. We agree.

Though Peoples's allegations implicated multiple Eighth Amendment claims, the district court evaluated his restraints claim under only an excessive-force standard and his mace claim under only a deliberate-indifference-to-his-serious-medical-needs standard. And the district court addressed Peoples's restraint and mace claims in isolation, thus failing to consider the combined negative impact of the two. See *Francis*, 491 Fed.Appx. at 543. And lastly, the district court never considered People's claims relating to his “inhumane” and “hazardous living conditions”—challenges to his conditions of confinement—and this court thus has no ruling to review. Accordingly, we conclude that the district court prematurely dismissed Peoples's excessive-force and conditions-of-confinement claims.

### *Excessive Force*



Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

“The Eighth Amendment proscribes the unnecessary and wanton infliction of pain against prisoners.”  [Williams v. Curtin](#), 631 F.3d 380, 383 (6th Cir. 2011). An Eighth Amendment claim consists of both subjective and objective components.  [Cordell v. McKinney](#), 759 F.3d 573, 580 (6th Cir. 2014). In the excessive-force context, the subjective component turns on “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”  [Hudson v. McMillian](#), 503 U.S. 1, 7 (1992). “The objective component requires the pain inflicted to be ‘sufficiently serious.’ ”  [Williams](#), 631 F.3d at 383 (quoting  [Wilson v. Seiter](#), 501 U.S. 294, 298 (1991) ).

Peoples alleged that he was confined in a painful crouching position from the restraints for about three days. Also, he claimed the “complete denial of bedding [and] shoes and socks” during this time period in an allegedly cold cell. And he alleged that he experienced intense burning from the mace, and was not permitted to wash it from his body for about ten days. Under circumstances similar to this case, courts have determined that the continued use of restraints and the failure to permit a prisoner to wash off mace can support a showing of excessive use of force. *See*  [Danley v. Allen](#), 540 F.3d 1298, 1308 (11th Cir. 2008) (“Although less common than the direct application of force, subjecting a prisoner to special confinement that causes him to suffer increased effects of environmental conditions—here, the pepper spray lingering in the air and on him—can constitute excessive force.”);   [Williams v. Benjamin](#), 77 F.3d 756, 765 (4th Cir. 1996) (prisoner was shackled and was not permitted to wash off mace for eight hours); *Harris v. Jones*, No. 10–1580 (6th Cir. Dec. 9, 2010) (unpublished). We make no ultimate determination whether Peoples's allegations here constitute excessive force. However, we remand so that the district court may do so, considering the combined negative impact of all of Peoples's allegations.

### *Conditions of Confinement*

\*6 The Eighth Amendment requires prison officials to provide humane conditions of confinement.  [Farmer](#), 511 U.S. at 832. “[P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care.” *Id.* A conditions-of-confinement claim has two elements: (1) the deprivation alleged must be sufficiently serious under an objective standard of review; and (2) the prison official's “state of mind [must be] one of ‘deliberate indifference’ to inmate health or safety.”  *Id.* at 834. “To move beyond the pleading stage ... an inmate must allege that he has been deprived ‘of the minimal civilized measure of life's necessities.’ ”  [Harden–Bey v. Rutter](#), 524 F.3d 789, 795 (6th Cir. 2008) (quoting  [Rhodes v. Chapman](#), 452 U.S. 337, 347 (1981) ).

Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

Parsing out what type of Eighth Amendment framework each of the many factual allegations in this case falls under is undoubtedly a laborious undertaking. See  [Villegas v. Metro. Gov't of Nashville](#), 709 F.3d 563, 569–70 (6th Cir. 2013). There may be some overlap between Peoples's excessive-force and conditions-of-confinement claims. Here though, Peoples's allegations, including the denial of bedding, shoes, socks, uncontaminated clothing, and the ability to use a toilet for days, warrant such an analysis by the district court on remand. The district court is best suited for this task, rather than this court for the first time on appeal. Accordingly, we remand with instructions for the district court to consider all of Peoples's allegations connected with the August 8, 2011 incident in light of the appropriate constitutional framework, including whether he sufficiently alleged a conditions-of-confinement claim. However, the district court need not review Peoples's medical-needs claim on remand because, as discussed below, we conclude that the district court correctly dismissed it.

#### *Deliberate Indifference to Medical Needs*

The Eighth Amendment forbids prison officials from “unnecessarily and wantonly inflicting pain” on a prisoner by acting with “deliberate indifference” to a prisoner's serious medical needs.  [Blackmore v. Kalamazoo Cty.](#), 390 F.3d 890, 895 (6th Cir. 2004) (quoting  [Estelle v. Gamble](#), 429 U.S. 97, 104 (1976) ). As such, a viable Eighth Amendment claim has objective and subjective components. *Id.* The objective component requires that the medical need be sufficiently serious. *Id.* A serious medical need is one that is “so obvious that even a lay person would easily recognize the necessity for a doctor's attention.”  [Harrison v. Ash](#), 539 F.3d 510, 518 (6th Cir. 2008). The subjective component requires a showing that the defendant knew of, and acted with deliberate indifference to, a threat to an inmate's health or safety.  [Blackmore](#), 390 F.3d at 895–96.

Viewing all facts and reasonable inferences in favor of Peoples, the district court did not err in granting summary judgment on his medical-needs claim. Regarding the objective component, the district court determined that Peoples “failed to show that his medical need was sufficiently serious.” We agree that there is no evidence in the record that Peoples had been diagnosed with a serious medical need, or had one that would be obvious even to a lay person. See  [Villegas](#), 709 F.3d at 570. Accordingly, the district court properly dismissed this claim. We further add that Peoples's allegations do not fit within the framework of a “typical medical-needs claim [which] deals with a deprivation of medical care” or “involves the interference with a prescribed treatment plan.”  *Id.* at 569–70. Rather, Peoples's allegations were “premised on the notion” that the defendants' alleged actions increased his risk of medical complications. *Id.* In these particular circumstances, these allegations do not implicate a medical-needs claim. Accordingly, the district court properly dismissed this claim.

Peoples v. Bauman, Not Reported in Fed. Rptr. (2017)

2017 WL 7050280

### *Collateral Matters*

\*7 Besides challenging the district court's three orders disposing of his claims, Peoples challenges other collateral matters. First, Peoples argues that a magistrate judge erred in denying his first and second motions to compel discovery. Although Peoples asserts various discovery violations on appeal, he concentrates mostly on the defendants' failure to provide him with: (1) a personal copy of a cell extraction video (he admits that he viewed the video once); and (2) "exempt policy directives." Next, Peoples claims that the district erred in failing to rule on objections he filed to the magistrate judge's denial of his motions to compel, and on a motion for the U.S. Marshals Service to serve a subpoena. This latter issue is dispositive of the first.

Peoples filed two motions under [Federal Rule of Civil Procedure 72\(a\)](#), one objecting to the magistrate judge's order denying his motions to compel discovery and the other objecting to the magistrate judge's order denying his motion to serve a subpoena. [Rule 72\(a\)](#) states that a district judge "must consider timely objections" to a magistrate judge's order. [Fed. R. Civ. P. 72\(a\)](#); see [Bell v. Int'l Bhd. of Teamsters](#), No. 96–3219, 1997 WL 103320, at \*4 (6th Cir. Mar. 6, 1997) (table) (discussing a prior version of the rule). The district court never ruled on Peoples's objections. On remand, the district court will be able to do so.

Lastly, Peoples argues that the district court failed to rule on his motion filed under [Federal Rule of Civil Procedure 56\(d\)](#). In that motion, Peoples essentially asked the district court to allow him more time to respond to the defendants' motion for summary judgment asserting qualified immunity because he first wanted to obtain additional discovery. However, this issue is now moot because: (1) this court vacates most of the district court's August 3, 2015 order granting summary judgment on qualified immunity grounds; and (2) Peoples's only dismissed claim resulting from this order, his medical-needs claim, is meritless for the reasons given above.

Accordingly, for the above reasons, we **AFFIRM** the district court's orders in part, and **VACATE** and **REMAND** in part for further proceedings consistent with this opinion.

### **All Citations**

Not Reported in Fed. Rptr., 2017 WL 7050280

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Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

2020 WL 2306565

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Santo Valenzuela ARIAS, Edson Louis, Job Velasquez Estrada, Petitioners,

v.

Thomas DECKER, in his official capacity as Director of the New York Field Office of U.S. Immigrations & Customs Enforcement; and Chad Wolf, in his official capacity as Acting Secretary, U.S. Department of Homeland Security, Respondents.

20 Civ. 2802 (AT)

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Signed 05/08/2020

#### Attorneys and Law Firms

Brooke Menschel, [Sonia Marquez](#), Brooklyn Defender Services, Brooklyn, NY, for Petitioners.

Samuel Hilliard Dolinger, U.S. Attorney's Office, New York, NY, for Respondents.

### OPINION AND ORDER

[ANALISA TORRES](#), District Judge:

\*1 Petitioners, Santo Valenzuela Alias and Edson Louis, were detained by Immigration and Customs Enforcement (“ICE”) in the Essex County Correctional Facility (“Essex Comity Jail”) in New Jersey, where cases of COVID-19 have been identified. <sup>1</sup> Petition ¶ 2, ECF No. 1. Petitioners filed a petition for a writ of habeas corpus under [28 U.S.C. § 2241](#), requesting release from ICE custody because of the public health crisis posed by COVID-19. *See* Petition. Petitioners also submitted an application for a temporary restraining order (“TRO”) and preliminary injunction pursuant to [Rule 65 of the Federal Rules of Civil Procedure](#), seeking an order (1) releasing them on their own recognizance, subject to reasonable and appropriate conditions, and (2) restraining Respondents, Thomas Decker, as Director of the New York Field Office of ICE, and Chad Wolf, as Acting Secretary of the U.S. Department of Homeland Security, from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings. TRO Mem. at 1, ECF No. 3.

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

<sup>1</sup> The Petition included a third Petitioner, Job Velasquez Estrada. *See* Petition ¶ 8. Respondents released Velasquez Estrada on April 7, 2020, prior to the issuance of the TRO. *See* TRO at 1. Accordingly, in this order, “Petitioners” refers only to Valenzuela Arias and Louis.

The Court granted the TRO, and directed Respondents to show cause why it should not be converted into a preliminary injunction. *Valenzuela Arias v. Decker*, No. 20 Civ. 2802, 2020 WL 1847986, at \*9–10 (S.D.N.Y. Apr. 10, 2020). For the reasons stated below, Petitioners’ request for a preliminary injunction is GRANTED as follows: (1) Petitioners shall remain released, subject to the conditions set by the Court, *see* ECF Nos. 20, 21, and (2) Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes unless Respondents first obtain the Court’s permission.

## BACKGROUND

Petitioners were detained by ICE in connection with removal proceedings pending at the Varick Street Immigration Court. Petition ¶¶ 6, 7. They were housed in the Essex County Jail, where as of May 4, 2020, at least three detainees, 83 correction officers, and three civilian staff members have been diagnosed with COVID-19. Ortiz Decl. ¶ 31, ECF No. 33-1.

Each Petitioner suffers from chronic medical conditions, and faces an imminent risk of serious injury or death if exposed to COVID-19. As a result of rib and chest wall injuries, Louis, age 37, suffers from breathlessness and chronic pain. Petition ¶ 6. Shortly before his release, after feeling ill and fainting, he was hospitalized and then returned to the Essex County Jail. *Id.* Louis also suffers from *post-traumatic stress disorder*, depression, and anxiety. *Id.* Valenzuela Arias, age 27, has a lump on the left side of his chest, which requires surgical removal. *Id.* ¶ 7. Petitioners represent that the lump is caused by *gynecomastia*, which results from a hormone imbalance that can be associated with *testicular tumors*, liver disease, and *hyperthyroidism*, among other conditions. Pet. Reply at 10, ECF No. 31.

\*2 Petitioners moved for a TRO on April 8, 2020. ECF No. 3. The Court held a telephonic hearing on April 9, 2020, *see* April 9, 2020 minute entry, and on April 10, 2020, entered a TRO ordering *Petitioners’ release*, *Valenzuela Arias*, 2020 WL 1847986, at \*9–10. The Court extended the TRO for good cause for an additional fourteen days in order to consider the parties’ submissions on the question of whether the TRO should be converted to a preliminary injunction. ECF No. 32.<sup>2</sup> The Court now addresses, in turn, Respondents’ argument that the action should be severed into three individual proceedings, the question of venue, and the merits of Petitioners’ request for a preliminary injunction.



Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

2 The Court concludes that the record is sufficient to resolve the matter without an evidentiary hearing. See  *Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998) (“An evidentiary hearing is not required when the relevant facts either are not in dispute ... or when the disputed facts are amenable to complete resolution on a paper record.” (citations omitted)).

## DISCUSSION

### I. Severance

Consistent with its decision at the TRO stage, the Court remains unpersuaded by Respondents’ argument that the petition should be severed into separate habeas actions. *Valenzuela Arias*, 2020 WL 1847986, at \*2–3; Resp. Opp. at 13–14, ECF No. 28.

The Court denied Respondents’ request to sever Petitioners’ claims for two reasons. First, the Court concluded that severance is inappropriate on the grounds of judicial economy and fairness. *Id.* at \*2. Courts in this district have relied on this principle to deny the Government’s request to sever a number of multi-party habeas petitions similar to this one. See  *Coronel v. Decker*, 20 Civ. 2472, 2020 WL 1487274, at \*2 (S.D.N.Y. Mar. 27, 2020) (severance denied because “the [c]ourt has already read and digested the record and heard lengthy oral argument on this motion—and the urgent need to timely decide [p]etitioners’ motion for a temporary restraining order in light of the immediate risk to the health of the [p]etitioners counsel against severance at this juncture.”); *Basank v. Decker*, No. 20 Civ. 2518, 2020 WL 1953847, at \*3 (S.D.N.Y. Apr. 23, 2020) (denying respondents’ request to sever a similar action brought by petitioner-detainees); *Coronel*, 20 Civ. 2472, ECF No. 35 at 3 (S.D.N.Y. Apr. 1, 2020) (denying without prejudice respondents’ motion to sever the joint petition after receiving further briefing). The amount of effort expended by this Court has only increased since the TRO stage, and splitting Petitioners’ claims now would create even greater inequity.

Second, the Court concluded that a single habeas action is merited because this matter is “uncluttered by subsidiary issues.”  *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125–26 (2d Cir. 1974); TRO at 4–5. In *Sero*, the Second Circuit considered a proposed habeas corpus class action brought by young adult misdemeanants (ages 16 to 21), on behalf of themselves and all others similarly situated, who were serving a reformatory sentence in excess of the adult penalty for the same misdemeanor.  *Id.* at 1119. The court of appeals held that a “multi-party proceeding similar to the class action authorized by [ Rule 23 of the Federal Rules] of Civil Procedure” was

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

permissible, because the judiciary has the inherent authority under the All Writs Act, 28 U.S.C. § 1651, to fashion “expeditious methods of procedure in a specific case.” *Id.* at 1125 (citing *Harris v. Nelson*, 394 U.S. 286, 294 (1969)); *see also* *Bertrand v. Sava*, 684 F.2d 204, 219 (2d Cir. 1982) (finding no error in the district court’s decision to “certify a [habeas] class of ‘all Haitian aliens transferred from [an Immigration and Naturalization Service facility] ..., who have requested political asylum and parole, but have remained in respondent’s custody’ ” (citation omitted)). Respondents contest the applicability of *Sero*, arguing that unlike in that case, each Petitioner here relies on different medical conditions, and may have had different levels of exposure to individuals infected with COVID-19. Resp. Opp. at 13–14. This argument misapprehends Petitioners’ claims. Although they have different underlying illnesses, Plaintiffs share an increased risk of serious complications if they contract the virus. And this case does not turn on the degree to which each Petitioner may have been exposed to infected individuals; it turns on the alleged risk created by the conditions in the Essex County Jail, which is common to all Petitioners.

\*3 The Court remains convinced, therefore, that a procedure such as this multi-party habeas action is appropriate where Petitioners “shar[e] certain complaints about the legality” of their confinement. *Bertrand v. Sava*, 535 F. Supp. 1020, 1024 (S.D.N.Y. 1982) (citations omitted), *rev’d on other grounds*, 684 F.2d 204 (2d Cir. 1982); *see also* *id.* at 1024–25 (“Such initiative and flexibility are essential to modern use of the writ [of habeas corpus] in order to cut through barriers of form and insure that miscarriages of justice are corrected.”).

Accordingly, Respondents’ request to sever the action into three individual habeas petitions is DENIED.

## II. Venue

Respondents argue that they are not properly named in the petition, because although Petitioners are detained at the command and under the authority of Respondents, Respondents have contracted with a state facility to hold Petitioners. Resp. Opp. at 12. 28 U.S.C. § 2242 provides that an application for a writ of habeas corpus should be directed to “the person who has custody over [the applicant].” *See also* 28 U.S.C. § 2243 (“The writ, or order to show cause shall be directed to the person having custody of the person detained.”). The Supreme Court has held that in challenges to detention, therefore, the proper respondent is the “person who has the *immediate custody* of the party detained, with the power to produce the body of [petitioner] before the court or judge.” *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (internal quotation marks and citation omitted). Respondents contend that Petitioners’ immediate custodian is the warden of the Essex County Jail, the facility that housed them. Resp. Opp. at 12. And, because the Petitioners were detained in a



Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

New Jersey facility, Respondents argue that the Southern District of New York is not the proper venue for their claims. *Id.*; see  [Padilla](#), 542 U.S. at 451 (Kennedy, J., concurring) (“[W]hen an action is brought in the district court, it must be filed in the district court whose territorial jurisdiction includes the place where the custodian is located.”).

The Court disagrees. Though it remains an unsettled question, “courts in this [d]istrict have repeatedly recognized, in cases where a petitioner is detained in a non-federal facility pursuant to the power and authority of the federal government and under a contract with the federal government, the proper respondent is the federal official with the most immediate control over that facility.” [Cruz v. Decker](#), No. 18 Civ. 9948, 2019 WL 4038555, at \*3 (S.D.N.Y. Aug. 27, 2019) (internal quotation marks and citation omitted) (collecting cases), *aff’d*, No. 18 Civ. 9948, 2019 WL 6318627 (S.D.N.Y. Nov. 26, 2019). Petitioners are held in a county jail under contract with ICE, but they are “in custody pursuant only to the power and authority of the federal government,” and, therefore, the person with the power to produce their bodies and effect their release is “the *federal* official most directly responsible for overseeing the contract facility.”  [Rodriguez Sanchez v. Decker](#), No. 18 Civ. 8798, 2019 WL 3840977, at \*2 (S.D.N.Y. Aug. 15, 2019) (emphasis added) (internal quotation marks, citation, and alterations omitted); see also  [You v. Nielsen](#), 321 F. Supp. 3d 451, 461 (S.D.N.Y. 2018) (“Petitioner’s immediate custodian is not the warden of the Bergen County Jail, but, in fact, ICE officials located in this district.”); [Matias Madera v. Decker](#), No. 18 Civ. 7314, 2018 WL 10602037, at \*3 (S.D.N.Y. Sept. 28, 2018) (“[T]he ICE District Director represents the first and most immediate federal official who is able [to] respond to the petition and, if indicated, deliver the relief sought.”).

\*4 In this case, “Field Office Director Decker [is] the federal official with the most immediate control over the non-federal facility in which Petitioner[s] [are] being detained,” and is the proper respondent.  [Rodriguez Sanchez](#), 2019 WL 3840977, at \*4; see also, e.g., [Garcia v. Decker](#), No. 20 Civ. 1345, 2020 WL 1435007, at \*2 (S.D.N.Y. Mar. 24, 2020) (“Respondent Decker is located within this [d]istrict and, as Director of the ICE NY Field Office, has control over [p]etitioner’s detention.”); [Matias Madera](#), 2018 WL 10602037, at \*4 (“Respondent Decker is thus [the] proper respondent in these proceedings, because he can order the release of [p]etitioner.”). And Decker’s office is located within the territorial jurisdiction of this Court. See Petition ¶ 9.

Accordingly, Respondents’ motion to dismiss Decker and to transfer Petitioners’ claims to the District of New Jersey is DENIED.

However, “there is generally only one proper respondent to a given prisoner’s habeas petition.”  [Padilla](#), 542 U.S. at 434. Unlike Decker, Wolf is the acting Secretary of Homeland Security, a

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

“remote supervisory official” who does not have “immediate custody” of Petitioners.  *Id.* at 435 (internal quotation marks and citation omitted); see Petition ¶ 10. Because he is “only connected to Petitioner[s] as Decker’s supervisor,” he is “not a proper party to this case.” *Matias Madera*, 2018 WL 10602037, at \*4.

Accordingly, Wolf is DISMISSED from this action.

### III. Preliminary Injunction

#### A. Legal Standard

A preliminary injunction sought against government action taken pursuant to a statute or regulatory scheme requires that “the moving party ... demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction.”  *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 143 (2d Cir. 2016). “A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.”  *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotation marks and citation omitted).

#### B. Analysis

##### 1. Irreparable Harm

To establish irreparable harm, Petitioners “must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.” *Id.* (internal quotation marks and citation omitted). Petitioners have shown irreparable harm by establishing the risk of injury to their health and constitutional rights. See *Barbecho v. Decker*, No. 20 Civ. 2821, 2020 WL 1876328, at \*6 (S.D.N.Y. Apr. 15, 2020) (“[I]rreparable harm exists where, as here, petitioners face imminent risk to their health, safety, and lives.” (internal quotation marks and citation omitted)). The Court addresses each injury in turn.

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

a. Risk of Serious Illness or Death

Based on the record before it, the Court concludes that Petitioners would face a risk of serious illness or death if returned to civil immigration detention at the Essex County Jail.

i. Essex County Jail

As of the date of this opinion, there are more than 3.8 million confirmed cases of COVID-19 worldwide and over 1.25 million cases in the United States. Center for Systems Science and Engineering at Johns Hopkins University, *Coronavirus COVID-19 Global Cases*, Coronavirus Resource Center (May 7, 2020), <https://coronavirus.jhu.edu/map.html>. Some 267,996 people have died from the disease worldwide; at least 26,130 have died in New York. *Id.* New Jersey also has a devastating outbreak of the virus, with 1,381 deaths in Essex County. New Jersey Dep't of Health, *New Jersey COVID-19 Dashboard*, Official Site of the State of New Jersey (May 7, 2020), [https://www.nj.gov/health/cd/topics/covid2019\\_dashboard.shtml](https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml) (noting 133,635 confirmed cases and 8,801 deaths statewide).

**\*5** The nature of detention facilities makes exposure and spread of the virus particularly harmful. Gregg S. Gonsalves, Ph.D., an epidemiologist at the Yale School of Medicine and School of Public Health, submitted a declaration in this matter, discussing the conditions at the Essex County Jail, among others, after reviewing Centers for Disease Control and Prevention (“CDC”) guidance, ICE guidance, and the declaration filed by the jail’s director. Gonsalves Decl. ¶¶ 3, 43, ECF No. 34-1. It is Gonsalves’ “professional judgment that individuals placed in these jails are at a significantly higher risk of infection with COVID-19 as compared to the population in the community and that they are at a significantly higher risk of harm if they do become infected.” *Id.* ¶ 63. Jaimie Meyer, M.D., M.S., who has worked extensively on infectious disease treatment and prevention in the context of jails and prisons, agrees; she submitted a declaration in another action in this district noting that the risk of COVID-19 to people held in New York-area detention centers “is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” Meyer Decl. ¶ 7, *Velesaca v. Wolf*, 20 Civ. 1803 (S.D.N.Y. Feb. 28, 2020), ECF No. 42.

This Court also recently concluded that vulnerable detainees at the Essex County Jail are at risk of serious illness or death, notwithstanding the additional measures taken at the facility. *Basank v. Decker*, No. 20 Civ. 2518, 2020 WL 1953847, at \*6 (S.D.N.Y. Apr. 23, 2020). A number of other courts in this district have also recognized the threat that COVID-19 poses to detained

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

individuals, including the Essex County Jail. *See, e.g.*, [Coronel](#), 2020 WL 1487274, at \*3 (“[B]eing in immigration detention places [p]etitioners at significantly higher risk of contracting COVID-19. Individuals in carceral settings are at a ‘significantly higher’ risk of spreading infectious diseases.” (citation omitted)); [United States v. Stephens](#), No. 15 Cr. 95, 2020 WL 1295155, at \*2 (S.D.N.Y. Mar. 19, 2020) (“[I]nmates may be at a heightened risk of contracting COVID-19 should an outbreak develop.”) (collecting authorities); *see also In the Matter of the Request to Commute or Suspend County Jail Sentences*, Case No. 84230 (N.J. Mar. 22, 2020) (holding that “reduction of county jail populations, under appropriate conditions, is in the public interest to mitigate risks imposed by COVID-19” in light of “the profound risk posed to people in correctional facilities arising from the spread of COVID-19”).

## ii. Petitioners’ Medical Conditions

Courts have recognized the health risk posed by COVID-19 to be particularly acute for detainees who have underlying illnesses. *See* [Jones v. Wolf](#), No. 20 Civ. 361, 2020 WL 1643857, at \*13 (W.D.N.Y. Apr. 2, 2020) (“[P]etitioners with the CDC-identified vulnerabilities face a grave, irreparable risk to their health and safety if they remain confined under current conditions” in a facility where COVID-19 is spreading); [United States v. Martin](#), No. 19 Cr. 140-13, 2020 WL 1274857, at \*2 (D. Md. Mar. 17, 2020) (“[T]he Due Process Clauses of the Fifth or Fourteenth Amendments, for federal and state pretrial detainees, respectively, may well be implicated if defendants awaiting trial can demonstrate that they are being subjected to conditions of confinement that would subject them to exposure to serious (potentially fatal, if the detainee is elderly and with underlying medical complications) illness.”).

The Court takes judicial notice that COVID-19 causes severe medical complications and has increased lethality among people with underlying health problems. *People Who Are at Higher Risk for Severe Illness*, Centers for Disease Control and Prevention (Apr. 15, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (“[P]eople of any age who have serious underlying medical conditions might be at higher risk for severe illness from COVID-19.”); *see* [Fed. R. Evid. 201\(b\)](#) (“The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.”); [Basank](#), 2020 WL 1953847, at \*7 (taking judicial notice of medical conditions recognized by the CDC as resulting in increased risks of contracting COVID-19 or developing serious, and potentially fatal, complications from the virus).

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

\*6 Petitioners are at particular risk for severe illness or death, because their preexisting medical conditions make them more likely to develop serious complications due to COVID-19. Respondents do not dispute that Louis’ breathing restrictions and chest injuries put him in the high-risk category, and that a doctor who examined him concluded that he faces grave consequences should he contract the virus. Petition ¶ 6; *see* Resp. Opp. at 20–21. Valenzuela Arias has a lump in his chest that requires surgery, which could render him significantly more vulnerable to COVID-19. *See, e.g., S. Lei, et al., Clinical Characteristics and Outcomes of Patients Undergoing Surgeries During the Incubation Period of COVID-19 Infection*, EClinicalMedicine at 5 (2020), <https://doi.org/10.1016/j.eclinm.2020.100331> (“The data in this study suggest that surgery may accelerate and exacerbate disease progression of COVID-19.”). Moreover, there is a real possibility that his [gynecomastia](#) is a symptom of another serious illness that would increase his risk from the virus. Pet. Reply at 10. The Court rejects Respondents’ assertion that Valenzuela Arias is not at heightened risk of COVID-19 complications because his condition is not listed on the CDC website. Resp. Opp. at 21.

The risk that Petitioners will face a severe, and quite possibly fatal, infection in immigration detention constitutes irreparable harm warranting a preliminary injunction. *See Barbecho*, 2020 WL 1876328, at \*6 (concluding that detainees who “face a risk of severe, irreparable harm—including death—if they contract COVID-19” met burden of showing irreparable harm);  *Coronel*, 2020 WL 1487274, at \*3 (“Due to their serious underlying medical conditions, all [p]etitioners [at Essex County Jail, among others,] face a risk of severe, irreparable harm if they contract COVID-19.... [B]eing in immigration detention places [p]etitioners at significantly higher risk of contracting COVID-19. Individuals in carceral settings are at a ‘significantly higher’ risk of spreading infectious diseases.” (citation omitted)); *Basank*, 2020 WL 1953847, at \*7 (holding that immigration detainees at the Essex County Jail faced irreparable harm because of the threat of COVID-19); *Velesaca v. Decker*, No. 20 Civ. 2643, Order, ECF No. 29 (S.D.N.Y. Apr. 16, 2020) (granting immediate release of petitioner in light of the COVID-19 pandemic); *Nikolic v. Decker*, No. 20 Civ. 2500, ECF No. 19 at 1 (S.D.N.Y. Apr. 3, 2020) (ordering release of medically vulnerable individual in light of COVID-19).

## b. Constitutional Violations

Second, Petitioners have also shown irreparable injury because they allege a violation of their constitutional rights. In the Second Circuit, it is well settled that an alleged constitutional violation constitutes irreparable harm. *See, e.g., Connecticut Dep’t of Envtl. Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (“[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.” (internal quotation marks and citation omitted)); *Statharos v. New*



Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

*York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999) (“Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.”); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (clarifying that “it is the alleged violation of a constitutional right that triggers a finding of irreparable harm” and a substantial likelihood of success on the merits of a constitutional violation is not necessary); *Sajous v. Decker*, No. 18 Civ. 2447, 2018 WL 2357266, at \*12 (S.D.N.Y. May 23, 2018) (finding that immigration detainee established irreparable injury by alleging that prolonged immigration detention violated his constitutional due process rights).

The Court finds, therefore, that Petitioners have established the threat of irreparable harm absent the preliminary injunction.

## 2. Likelihood of Success on the Merits

Petitioners argue that a return to confinement in the Essex County Jail would violate their due process rights. Pet. Reply at 10–15. The Court agrees. Notwithstanding the steps that have been taken at the facility since the Court issued its TRO, Petitioners have met their burden of showing a likelihood of success on the merits.

### a. Legal Standard

\*7 The Due Process Clause of the Fifth Amendment to the United States Constitution forbids the government from depriving a person of life, liberty, or property without due process of law. The protection applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). An application for habeas corpus under 28 U.S.C. § 2241 is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing. See *Roba v. United States*, 604 F.2d 215, 218–19 (2d Cir. 1979) (allowing a § 2241 application to challenge an inmate’s “transfer while seriously ill” where that transfer posed a risk of fatal heart failure).

Immigration detainees can establish a substantive due process violation for unmet medical needs by showing that a government official “knew, or should have known” of a condition that “posed an excessive risk to health,” and failed to take appropriate action. *Darnell v. Pineiro*, 849 F.3d 17,

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

35 (2d Cir. 2017). “Deliberate indifference” to serious medical needs “can be established by either a subjective or objective standard: A plaintiff can prove deliberate indifference by showing that the defendant official recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, *or should have known*, that the condition posed an excessive risk to the plaintiff’s health or safety.”  *Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) (internal quotation marks, citation, and alterations omitted).

Additionally, the Supreme Court has recognized that government authorities may be deemed “deliberately indifferent to an inmate’s current health problems” where they “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” including “exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.”  *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Petitioners need not demonstrate that “they actually suffered from serious injuries” to show a due process violation.  *Darnell*, 849 F.3d at 31; *see*  *Helling*, 509 U.S. at 33. Instead, showing that the conditions of confinement “pose an unreasonable risk of serious damage to their future health” is sufficient.  *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting  *Helling*, 509 U.S. at 35 (alteration omitted)).

## b. Analysis

Respondents argue that ICE has set in motion various steps to improve health and sanitation at the Essex County Jail, and have submitted the declaration of the facility’s warden attesting to the actions taken. *See* Ortiz Decl. They point out that the Essex County Jail has implemented health and temperature checks for all detainees who enter the facility, provided additional on-site medical staff, obtained testing kits, obtained protective equipment and supplies, educated staff, inmates, and detainees on best practices, put into place new food service protocols (including no longer permitting detainees or inmates to work in the kitchens), increased cleaning, suspended classes and religious services led by volunteers, and limited attorney visits to window visits only. Resp. Opp. at 8–10; *see also* Ortiz Decl. ¶¶ 8–9, 15–21. Respondents contend that these measures undercut Petitioners’ deliberate indifference claim. Resp. Opp. at 15–20.

The standard for deliberate indifference, however, is not one of malice. Rather, Petitioners may establish deliberate indifference through intentional denial of care (the subjective standard), *or* by showing that Respondents “recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the [Respondents] knew, or should have known, that the condition posed an excessive risk to [the Petitioners’] health or safety” (the



Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

objective standard).  *Charles*, 925 F.3d at 87.<sup>3</sup> Based on the record before it, the Court concludes that the inadequate measures implemented by Respondents amount to a reckless failure to act with reasonable care to protect Petitioners as high-risk individuals.<sup>4</sup>

<sup>3</sup> Respondents imply that in *Charles*, the Second Circuit held that the Court may find deliberate indifference only if, in addition to finding that Respondents have objectively failed to act with reasonable care, the Court separately finds that their actions “shock[ ] the contemporary conscience.” Resp. Opp. at 16 (internal quotation marks omitted). That is not the law. Instead, the Second Circuit has explicitly stated that, with respect to a claim of unmet medical needs by detainees, once deliberate indifference is shown, a “court need not ... conduct a separate analysis, over and above the deliberate indifference analysis, of whether the state’s conduct ‘shocks the conscience.’ ”  *Charles*, 925 F.3d at 86; see *id.* n.11 (clarifying that the court of appeals has applied “separate ‘shocks the conscience’ analysis in cases that do not involve the medical needs of those the state has taken into custody”). In other words, the failure to take objectively necessary measures to protect vulnerable inmates from a deadly pandemic is *per se* conscience-shocking. See  *id.* at 86 (“The Supreme Court has held that the point of conscience shocking is reached when government actors are deliberately indifferent to the medical needs of pretrial detainees.”).

<sup>4</sup> The Court concludes that Petitioners have established a likelihood of success on the merits on their substantive due process claim, both articulated as a conditions of confinement claim, see  *Helling*, 509 U.S. at 33 (discussing a conditions of confinement claim and raising “exposure of inmates to a serious, communicable disease” as an example), as well as an unmet medical needs claim, see  *Charles*, 925 F.3d at 87 (discussing deliberate indifference to medical needs). Indeed, where, as here, a communicable disease renders the general conditions of confinement dangerous to Petitioners’ health, and meeting Petitioners’ medical needs requires that Respondents take specific measures to prevent their infection, the conditions of confinement and unmet medical needs claims essentially merge.

\*8 First, the Court finds that Respondents have not put into place adequate measures to identify, protect, and treat detainees who are at a heightened risk of contracting or suffering grave complications from COVID-19. Respondents indicate that vulnerable detainees “are being housed separately,” and that staff working with them wear personal protective gear. Ortiz Decl. ¶ 33. But detainees are designated as high-risk only if, in the facility’s judgment, they have “chronic conditions that place them at higher risk for COVID-19” and “those conditions are not well-controlled.” Ortiz Supp. Decl. ¶ 18, ECF No. 33-2. It is not clear how the facility determines which underlying illnesses are “well-controlled,” nor is there any evidence in the record that

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

demonstrates that an inmate with a “well-controlled” chronic condition is not still at increased risk of experiencing complications from a COVID-19 infection.

Moreover, Respondents cannot provide assurances that COVID-19 is not already present among the separately housed vulnerable population. Although Respondents assert that they engage in “daily monitoring” of high-risk detainees, Ortiz Decl. ¶ 15(f), and “increased monitoring” of the detainee population as a whole, *id.* ¶ 15(g), there is evidence that the facility’s procedures are not thorough. For example, detainees recently released from the Essex County Jail report that individuals with apparent COVID-19 symptoms remained among the general population. *See* Khan Decl. ¶ 15, ECF No. 34-3 (reporting that after reporting that he was “feeling generalized pain, muscle aches, and had lost [his] sense of taste and smell ... [n]obody took [his] temperature or gave [him] a blood test”); *id.* ¶¶ 12, 14 (describing other sick detainees who were untreated and kept in the general population); Perez Decl. ¶ 12, ECF No. 34-4 (“While I was [in the Essex County Jail], I can think of about eight people who were sick with headaches and fevers, which I understand are symptoms of coronavirus. It would take four or five days for these men to go to medical and while they waited, they were still in the dorms around other people.”). In any event, when it comes to vulnerable detainees like Petitioners, monitoring them for signs of infection is too little, too late. *See also* Gonsalves Decl. ¶ 52 n.71 (noting that the facilities fail to explain “who conducts that monitoring, how, when, or where it is conducted, or what steps are taken if a person exhibits symptoms of COVID-19 infection”). The best, and perhaps only, way to protect them is to prevent infection in the first place. Respondents have not taken meaningful steps to do so.

Second, with respect to general conditions of confinement, the evidence submitted by Respondents does not indicate that social distancing is being practiced in various daily situations inside the Essex County Jail. *See How to Protect Yourself & Others*, Centers for Disease Control and Prevention (Apr. 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (recommending maintaining at least six feet of distance from other persons at all times and noting that “[k]eeping distance from others is especially important for people who are at higher risk of getting very sick”). Detainees sleep in either a cell with a bunk bed, or in a dorm, which includes “bunks around the perimeter of the dorm” with “a seating area and recreation yard” in the center of the dorm. Ortiz Decl. ¶ 6. The facility’s director concedes that the top and bottom bunks of each bed are separated by less than six feet, and that the beds, which are bolted to the ground, are also less than six feet apart from each other. Ortiz Supp. Decl. ¶ 7; *see* Picasso Decl. ¶ 6, ECF No. 3-3 (noting that detainees in Essex County Jail sleep “very close together—two people in a small room with bunk beds”); Khan Decl. ¶ 7 (“The dorm is one big hall and there are about 48 people in our dorm.... I was always within six feet from other people no matter where I went in the dorm.”); Perez Decl. ¶ 4 (“The cells were small and I was very close to my cellmate – I could not stay six feet away from him in the cell.”). Moreover, even in the common areas, it does not appear that

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

detainees can consistently practice social distancing. Perez Decl. ¶ 6 (“When we were out of our cells, the group of 30 people would use the phones, the bathrooms and the microwave.... We were always very close to one another and always within six feet of one another.”); Picasso Decl. ¶¶ 4–5 (attesting that it was “impossible to maintain six feet of distance” in the common space); Pena Decl. ¶¶ 4–5, ECF No. 3-2 (averring that even after the facility reduced the number of inmates who could be out of their cell at any given time, “the dorms weren't big enough for us to stay away from people and we would still come into contact with them—people would group in lines waiting for the phone and the bathrooms. It was impossible to stay away from people even if I wanted to because the room just wasn't big enough.”). Gonsalves opines that “[g]enerally social distancing is impossible to obtain in a jail or prison setting, and none of the ICE declarations provide any evidence to alter my view.” Gonsalves Decl. ¶ 56. Attempts to practice social distancing are also for naught when detainees are forced to come into contact with surfaces that may have been touched by symptomatic individuals or items that belong to symptomatic individuals. *See* Khan Decl. ¶ 12 (attesting that when a symptomatic individual was removed from the general population and placed in quarantine, staff at the facility asked the detainees to pick up the symptomatic individual’s belongings, without any protective equipment); *see also* Gonsalves Decl. ¶ 55 (“[W]hile efforts to increase cleaning are admirable, in my opinion the frequencies for cleaning outlines are still inadequate. Rather than cleaning surfaces a handful of times each day, surfaces should be wiped down with disinfecting chemicals on a continual basis each time they are touched to prevent the spread of the virus.”).

\*9 Third, the Essex County Jail uses “cohorting” to separate possibly infected detainees. But instead of isolating each individual, the facility groups them together. *See* Ortiz Decl. ¶ 21. This practice risks spreading the virus to otherwise healthy inmates. *See* Gonsalves Decl. ¶ 47. Respondents complain that in granting the TRO, the Court “misinterpret[ed] [the Essex County Jail’s] practices and CDC guidance as pertains to the ‘cohorting’ of detainees,” *Resp. Opp.* at 17, because the Court found that the Essex County Jail’s practice of cohorting individuals with potential exposure to the virus was not in line with the CDC’s admonition that “[o]nly individuals who are laboratory confirmed COVID-19 cases should be placed under medical isolation as a cohort.” *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control and Prevention (Apr. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>; *see Valenzuela Arias*, 2020 WL 1847986, at \*4. Respondents argue that the CDC also indicates that correctional facilities may cohort exposed individuals as a last resort, so long as they are not cohorted with confirmed cases. *Resp. Opp.* at 17–18; *see Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*. There is no evidence in the record that individually quarantining exposed detainees would be impossible. But more to the point, if vulnerable detainees

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

with underlying illnesses face the possibility of being cohorted with others who may or may not be infected with COVID-19, then the vulnerable detainees face an increased risk of infection with the virus.<sup>5</sup> The cohorting practice described, therefore, does not adequately protect Petitioners.

<sup>5</sup> Indeed, a court in this district recently described a similar cohorting practice as a “Kafkaesque approach” that “will inevitably permit the virus to spread.”  *United States v. Scparta*, No. 18 Cr. 578, 2020 WL 1910481, at \*1 (S.D.N.Y. Apr. 20, 2020).

Fourth, Respondents’ assurance that the Essex County Jail is “testing its entire population using rapid antibody screening,” Ortiz Decl. ¶ 32, provides no solace. The facility’s medical director explains that population-wide testing is underway using “[a]ntibody blood tests, which are also called serology tests,” Anicette Decl. ¶ 8, as a “screening tool to determine appropriate housing conditions,” *id.* ¶ 11. The Essex County Jail first tested all new admissions, then detainees deemed to be high-risk, and is now in the process of testing the remainder of the population. *Id.* ¶ 13. The facility quarantines for 14 days any individual who tests positive for certain antibodies associated with COVID-19. *Id.* ¶ 15. This procedure is deeply flawed, as Meyer explains in her supplemental declaration. *See* Meyer Supp. Decl., ECF No. 34-2. Meyer attests that it can take more than a week after infection for a person to develop the relevant antibodies, and even then, a number of confounding factors might lead to the non-development of those antibodies. *Id.* ¶ 18. As a result, “when it comes to assessing whether or not a person currently has COVID-19, a negative test result tells us nothing more than if we had not done a test in the first place. One cannot be reassured by a negative test. At most, it would be evidence that the individual did not have COVID-19 or was not exposed to it approximately 2 weeks ago.” *Id.* ¶ 19. Further, “an antibody test still cannot tell us whether or not someone actually has the virus or is contagious to others,” because “[t]here is evidence that people can be contagious for weeks before they develop symptoms and for weeks after they have recovered from COVID-19.” *Id.* ¶ 23. For this reason, Meyer opines that the Essex County Jail “is currently misinterpreting and misusing the results of these antibody tests in a way that puts detained persons and staff at significantly greater risk of harm related to COVID-19,” because it is likely to result in contagious individuals being housed with healthy ones, and insufficient measures being taken to protect detainees wrongly classified as immune. *Id.* ¶ 30; *see id.* ¶¶ 31–42 (describing in detail the diagnostic errors in the Essex County Jail’s testing plan).<sup>6</sup> Indeed, in her expert opinion, the Essex County Jail’s “testing protocol would significantly increase the risk of COVID-19 in the facility *more so than if there was no testing at all.*” *Id.* ¶ 48 (emphasis added).

<sup>6</sup> Gonsalves corroborates Meyer’s assessment:

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

It is also particularly concerning that Essex County Jail plans to use serologic, or so-called antibody, testing of detainees to make critical decisions about how to house and isolate its population. Although Essex County Jail touts this plan as a sign of its commitment to comprehensive testing, antibody testing should not be used to diagnose active infection (PCR-based [antigen tests](#) are used for that) nor as a way to ascertain if someone has been exposed to or recovered from or is immune from SARS-COV-2. The CDC, the Food and Drug Administration (“FDA”), and the World Health Organization (“WHO”) all warn against using antibody tests to determine whether an individual is infected or was previously infected with COVID-19. The New York City Department of Health and Mental Hygiene recently warned healthcare providers that “[serologic tests](#) should not be used to diagnose acute or priors SARS-CoV-2 infection, nor should they be used to determine immune status to SARS-CoV-2. Due to the prevalence of false results (e.g. false positive and false negatives), the uncertainty, in fact, lack of evidence to support even a true positive results’ association with immune protection, relying on [serologic tests](#) in this way may in fact increase exposure to COVID-19 among detainees at Essex County Jail.

Gonsalves Decl. ¶ 50 (internal quotation marks and citations omitted).

**\*10** Finally, the Court is not persuaded that it should draw an inference in Respondents’ favor based on what Respondents characterize as swift action by ICE to identify and release vulnerable detainees. Resp. Opp. at 18. For one, this Court is not alone in finding that the pace of ICE’s response demonstrates deliberate indifference to the needs of those in its custody. *See Fraihat v. U.S. Immigration & Customs Enft*, No. 19 Civ. 1546, 2020 WL 1932570, at \*22 (C.D. Cal. Apr. 20, 2020) (“[ICE] made an intentional decision to promulgate only non-binding guidance for the first month of the pandemic, despite some knowledge of the risk posed by COVID-19. The March 6, March 27, and April 4, 2020 ICE guidance documents illustrate [ICE’s] awareness of a grave risk, but their failure to mandate a facility-wide response.”). But more importantly, ICE did not release the Petitioners before the Court. The question presented is whether the conditions in which Respondents seek to hold *these Petitioners* exhibit a reckless disregard for *their* health, taking into account their preexisting medical conditions. That ICE has released other individuals is not relevant.

A number of courts in this district and beyond have held that habeas petitioners have demonstrated a likelihood of success under similar conditions. In *Basank v. Decker*, this Court ordered immediate release of ten individuals detained in ICE custody at county jails in New Jersey, including the Bergen and Essex County Jails. No. 20 Civ. 2518, [2020 WL 1481503](#), at \*4 (S.D.N.Y. Mar. 26, 2020); *see also Basank*, 2020 WL 1953847, at \*13 (converting TRO into preliminary injunction on supplemented record). In *Coronel*, another court in this district released seven ICE detainees, including detainees at the Essex County Jail, due to their underlying medical conditions, which include [obesity](#), [hypertension](#), and gastrointestinal problems, in light of ICE’s insufficient steps



Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

to protect high-risk detainees. [2020 WL 1487274](#), at \*1, \*10. The same critical deficiencies have led other courts in this district to find a likelihood of success on the merits of a deliberate indifference claim brought by ICE detainees. *See Velesaca v. Decker*, No. 20 Civ. 2643, TRO Hr'g Tr. at 23:10–15, ECF No. 30 (S.D.N.Y. Apr. 13, 2020) (“[A]lthough the record reflects the respondents have taken general proactive steps to prevent the spread of COVID-19 in the Orange County Correctional Center, consistent with other courts in this district, I find such measures are unresponsive to [petitioner’s] needs as a high-risk individual”); [Barbecho](#), [2020 WL 1876328](#), at \*4 (ordering release of detainees because “beyond [a] custody re-assessment, [r]espondents have failed to offer any evidence of measures designed to address the needs of those high-risk detainees who ICE has re-assessed and determined should remain in ICE custody”); [Avendaño Hernandez v. Decker](#) No. 20 Civ. 1589, [2020 WL 1547459](#), at \*2–3 (S.D.N.Y. Mar. 31, 2020) (holding that an immigration detainee had established a “substantial claim for deliberate indifference” where ICE and the county jail in which he was held had “not taken any action to address the particular risks that COVID-19 poses to high-risk individuals,” but rather had taken “only generalized proactive measures to prevent detainees within [their] care from contracting and spreading the virus”).<sup>7</sup>

7

Courts in other districts have also found that ICE detainees have shown a likelihood of success on their claims that continued confinement, without adequate protection for their health, violates their due process rights. In *Hope v. Doll*, a court granted the immediate release of 22 immigration detainees held at facilities with reported COVID-19 cases, finding that “the protective measures in place ... are not working.” No. 20 Civ. 562, ECF. No. 11 at 13 (M.D. Pa. Apr. 7, 2020). As the court explained, “[i]t now seems that our worst fears have been realized—COVID-19 is spreading, and not nearly enough is being done to combat it. We cannot allow the [p]etitioners before us, all at heightened risk for severe complications from COVID-19, to bear the consequences of ICE’s inaction.” *Id.* at 19. A court in that same district released 13 individuals from ICE detention, who suffered from medical conditions such as [high blood pressure](#), [diabetes](#), [asthma](#), and trouble breathing. [Thakker v. Doll](#), No. 20 Civ. 480, [2020 WL 1671563](#), at \*1, \*10 (M.D. Pa. Mar. 31, 2020). In finding that the petitioners had shown a likelihood of success on the merits, the court noted that the petitioners had demonstrated that, “despite their best efforts, they cannot practice these effective preventative measures in [detention] [f]acilities.” *Id.* at \*8. “Considering ... the grave consequences that will result from an outbreak of COVID-19, particularly to the high-risk [p]etitioners in this case,” the court determined that it “cannot countenance physical detention in such tightly-confined, unhygienic spaces.” *Id.* In *Malam v. Adducci*, the court released an ICE detainee, notwithstanding the precautionary measures taken by the facility, because the petitioner was “not ensured anything close to reasonable safety.” No. 20 Civ. 10829, [2020 WL 1672662](#), at \*12 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020)

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

(internal quotation marks and citation omitted). The court found that “the only reasonable response by [r]espondents is the release of [p]etitioner; any other response demonstrates a disregard of the specific, severe, and life-threatening risk to [p]etitioner from COVID-19.” *Id.*

**\*11** To be clear, the Court does not hold that the CDC’s guidelines amount to strict rules of constitutional law that Respondents must follow in every circumstance. *Contra* Resp. Opp. at 15–16. The Court does, however, take the numerous ways in which the Essex County Jail has failed to implement protective measures for high-risk individuals to be an overwhelming indication that the conditions of confinement are dangerous to detainees like Petitioners, and that their specific medical needs as vulnerable individuals would go unmet in custody. Thus, as the Court previously concluded, “Respondents know, or should know, that [the steps taken so far] are not enough to protect vulnerable detainees like Petitioners from an unreasonable risk of serious damage to their health.” *Valenzuela Arias*, 2020 WL 1847986, at \*8.

The Court holds, therefore, that Petitioners are likely to succeed on the merits of their due process claim that Respondents knew or should have known that Petitioners’ conditions of confinement pose excessive risks to their health and that their specific medical needs were unmet.<sup>8</sup>

<sup>8</sup> The Court does not reach Petitioners’ additional argument that they are likely to succeed on the merits of the claim that their due process rights were violated because the facilities’ conditions are punitive. Pet. Reply at 13–14.

### 3. Balance of Equities and Public Interest

The equities and public interest weigh heavily in Petitioners’ favor. Petitioners face irreparable injury—to their constitutional rights and to their health.

The potential harm to Respondents is limited. Respondents have not identified a specific danger to the public or risk of flight that necessitates returning Petitioners to confinement in an ICE detention facility. *See generally* Resp. Opp. In any event, the Court has imposed strict conditions of release that fully address any such concerns. *See* ECF Nos. 20, 21. Respondents note that Valenzuela Arias was mandatorily detained pursuant to 18 U.S.C. § 1226(c). Resp. Opp. at 4–5. However, courts have the authority to order those detained in violation of their due process rights released, notwithstanding § 1226(c). *See*  *Cabral v. Decker*, 331 F. Supp. 3d 255, 259 (S.D.N.Y. 2018) (collecting cases). As such, Respondents have failed to justify Petitioners’ detention in unsafe conditions.



Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

Finally, the public interest favors Petitioners' release. Petitioners were confined for civil violations of the immigration laws. In the current crisis, public health and safety are best served by rapidly decreasing the number of individuals held in confined, unsafe conditions. As another court in this district has observed, "[d]ecreasing the [ICE detention] population will ... 'mitigate the damage' to both the [j]ail and the surrounding community and thereby 'reduce the death toll.'" *Barbecho*, 2020 WL 1876328, at \*7 (quoting *United States v. Nkanga Nkanga*, No. 18 Cr. 713, 2020 WL 1529535, at \*1 (S.D.N.Y. Mar. 31, 2020)). "Indeed, reducing the size of the population in jails and prisons reduces the level of risk both for those within those facilities and for the community at large." *Id.* (internal quotation marks, citation, and alterations omitted).

Respondents argue that the public interest is disserved by "constitutionalizing" the Government's response to a public health crisis. Resp. Opp. at 22. Suffice it to say that the constitutional requirement that the Government eliminate "a condition of confinement that is sure or very likely to cause serious illness and needless suffering" for those it has chosen to imprison is not a novel one. *Helling*, 509 U.S. at 33. When that fundamental obligation is violated, there is no public interest in turning a blind eye. Rather, "the public interest lies with the enforcement of the Constitution." *Ligon v. City of New York*, 925 F. Supp. 2d 478, 541 (S.D.N.Y. 2013).

\*12 Accordingly, the Court holds that Petitioners have established their entitlement to a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure.<sup>9</sup>

<sup>9</sup> Respondents argue that granting a preliminary injunction would improperly give Petitioners "the ultimate relief [they] seek[ ]." Resp. Opp. at 23 (quoting *WarnerVision Entm't Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996) (internal quotation marks omitted)). But the purpose of a preliminary injunction is to "prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *WarnerVision*, 101 F.3d at 261 (internal quotation marks and citation omitted). The Court has determined that the only way to prevent irreparable harm to Petitioners pending final adjudication of this action is to release them from an unsafe detention facility.

#### IV. *Mapp v. Reno*

Even if Petitioners had not met the requirements for a preliminary injunction, the Court would release them on bail pending final resolution of their habeas claims under the Second Circuit's decision in *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). In *Mapp*, the Second Circuit held "that the federal courts have inherent authority to admit to bail individuals properly within

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

their jurisdiction” including immigration detainees petitioning for habeas relief. *Id.* A habeas petitioner’s “fitness for bail” depends on “whether the habeas petition raises substantial claims and whether extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective.”  *Id.* at 230 (internal quotation marks, citation and alteration omitted).

For the reasons already stated, Petitioners’ habeas claims are plainly substantial. Indeed, as the Court has already held, they are likely to succeed on the merits. And releasing Petitioners from confinement pending final adjudication of their petition is necessary to “make the habeas remedy effective.” *Id.* “Severe health issues have been the prototypical but rare case of extraordinary circumstances that justify release pending adjudication of habeas.”  *Coronel*, 2020 WL 1487274, at \*9 (collecting cases); see, e.g., *Barbecho*, 2020 WL 1876328, at \*8 (“If these Petitioners—whose medical conditions place them at a higher risk of severe illness, or death, from COVID-19—were to remain detained, they would face a significant risk that they would contract COVID-19—the very outcome they seek to avoid. Release is therefore necessary to make the habeas remedy effective.” (internal quotation marks and citation omitted)); *United States v. Nkanga*, No. 18 Cr. 713, 2020 WL 1695417, at \*3 (S.D.N.Y. Apr. 7, 2020) (granting bail pending resolution of a habeas claim under 28 U.S.C. § 2255 given “the defendant’s age; his multiple health issues; the nature of the defendant’s offense; [and] the precise timing of the sentencing proceeding (which occurred on March 12, 2020) in relation to the emerging COVID-19 pandemic” (internal quotation marks and citation omitted)). Detention of Petitioners pending final adjudication of this action could cause severe illness or death—precisely the harm their petition seeks to avert. The effectiveness of the habeas remedy can only be preserved, therefore, by Petitioners’ remaining released for the duration of this matter.

**\*13** Accordingly, the Court holds, in the alternative to granting Petitioners’ motion for a preliminary injunction, that bail is imposed pending final resolution of their petition for habeas corpus. Their bail conditions shall be the same as the conditions set in the TRO, and extended by the preliminary injunction.

## CONCLUSION

For the reasons stated in this opinion, it is hereby ORDERED that:

1. Petitioners’ request for a preliminary injunction is GRANTED as follows:

a. Petitioners shall remain released, subject to the conditions already set by the Court, and

Arias v. Decker, Slip Copy (2020)

2020 WL 2306565

b. Respondents are RESTRAINED from arresting Petitioners for civil immigration detention purposes unless Respondents first obtain the Court's permission;<sup>10</sup>

2. Wolf is DISMISSED from this action; and

3. The preliminary injunction shall remain in effect until further order of the Court.

<sup>10</sup> Respondents argue that the preliminary injunction should not prohibit Respondents from rearresting Petitioners if they determine that the public health crisis is over, or if Petitioners violate the terms of their release. Resp. Opp. at 22–25. Perhaps those occurrences would warrant an application to the Court for a modification of this order. But the Court shall not pass on the hypothetical circumstances that might allow redetention.

SO ORDERED.

## All Citations

Slip Copy, 2020 WL 2306565

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**DECLARATION OF PAUL DRAUS, PhD**

I, Paul Draus, PhD, declare as follows:

1. I am a Professor of Sociology at the University of Michigan-Dearborn. I have taught courses in Medical Sociology, Health Policy and numerous other areas here since 2005. My complete CV is attached. (Background and Qualifications – include CV or resume)
2. **Knowledge re: public health, epidemiology, and correction:** I earned my PhD in Sociology from Loyola University Chicago in 2001. My dissertation was focused on tuberculosis contact tracing and treatment that I engaged in directly as a Public Health Advisor in New York City from 1992-1993 and as a Community Epidemiologist at Cook County Hospital in Chicago from 1993-2000. I have also been an volunteer classroom instructor inside the Michigan Department of Corrections since 2008. My statement is based on this set of experiences. I have worked cooperatively with MDOC for years and I am well aware of the challenges that they face in dealing daily operations even when not faced with a pandemic. I give them full credit for trying to work within a set of difficult circumstances that they did not create and cannot control. This statement is based on my professional judgment of the current situation, as I understand it, and is not intended to disparage the work of correctional professionals.
3. **Lectures, published articles, books, etc. (See attached CV).**
4. **Based on my training and experience in infectious disease epidemiology**, the only way to properly contain an epidemic is through **breaking the cycle of infection**. This requires several things: **accurate identification** of active cases of disease, **adequate medical isolation** of all potentially infectious cases, and **widespread testing of all potentially exposed persons, both symptomatic and asymptomatic**. Contact investigations should properly proceed using a **concentric circle model**, identifying

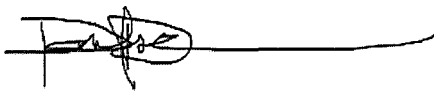
those individuals in **close contact** with every **confirmed case** first, and moving outward to identify others who may be **infected** but not yet symptomatic, though still potentially contagious. However, because of the prison setting and the number of people who are confined in close proximity, the highly infectious nature of the coronavirus, and the inability to implement effective social distancing to prevent early transmission, it may not be possible to take these steps.

5. **For this reason, widespread testing among prisoners is necessary:** Based on my experience and professional judgment, the current practice of testing only **symptomatic** individuals or **suspected cases** is insufficient because every symptomatic **confirmed case** revealed by such testing merely represents the end point of a trail of infection. This means that you are already well behind the virus from an infection control standpoint. Use of Personal Protective Equipment (PPEs) and deep cleaning of surfaces, especially in shared environments, may limit spread of contagion going forward but does nothing about transmission that has already occurred. At the very least extensive testing should be conducted within all housing units where cases have emerged, in order to understand the extent of spread. Physical separation or **quarantine** of those infected from those uninfected should be implemented for a fourteen-day period. As the CDC guidelines indicate, best practice would be to quarantine all individuals *exposed* to *either* a confirmed or a suspected case.
6. **Testing everyone goes beyond current CDC recommendations, but that is necessary given the prison environment.** Given the fixed structure and congregate nature of the prison, widespread community transmission is likely to have occurred prior to detection of any single case. In such a situation, where preventive social distancing and effective

quarantine of exposed persons is impossible, the only way to keep the incarcerated population and frontline staff safe is to implement universal testing inside the facilities so that effective contact tracing and separation (i.e. **cohorting**) of the infected, exposed and uninfected can occur. This is also in the best long-term interest of the facilities as it will limit the number of new cases needing medical attention.

7. **Widespread testing among prison staff is necessary.** The fact is that prisons, with their concentrations of aging and vulnerable populations, are *de facto* health care institutions even without a pandemic. Under the current circumstances, prisons are effectively coronavirus tinderboxes which may pose risk to incarcerated people, correctional staff and the broader community if they flare into full outbreaks. Every correctional officer is by default a frontline health care worker and similar care should be taken to protect them as are taken in hospitals and nursing homes where COVID-19 cases have been diagnosed.

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

A handwritten signature in black ink, appearing to read 'Paul Draus', followed by a long horizontal line extending to the right.

---

Paul Draus, PhD

Dated: May 18, 2020

**Paul J. Draus**

**CURRICULUM VITAE**

work phone: 313.583.6628 e-mail: [draus@umich.edu](mailto:draus@umich.edu) cell phone: 313.319.2651

**Education**

PhD, Sociology. Loyola University, Chicago, IL January 2001

Dissertation: "*Consumed in the City: Observing Tuberculosis in the 1990s*"

Chair: Dr. Anne Figert

MA, American Studies, *summa cum laude*. University of Wyoming, Laramie, WY May 1992

BA, English, Honors Program, *magna cum laude*. Loyola University, Chicago, IL May 1990

**Employment History**

Professor of Sociology

Department of Behavioral Sciences

The University of Michigan-Dearborn, Dearborn, MI

Fall 2016-present

Director, Master of Criminal Justice and Criminology Program

The University of Michigan-Dearborn, Dearborn, MI

Winter 2020-Winter 2023

Associate Professor of Sociology and Health Policy Studies

Department of Behavioral Sciences

The University of Michigan-Dearborn, Dearborn, MI

Fall 2010-Summer 2016

Director, Master of Public Administration and Master of Public Policy Programs

The University of Michigan-Dearborn, Dearborn, MI

Fall 2010-Summer 2013; July 2014-July 2016

Assistant Professor of Sociology and Health Policy Studies

Department of Behavioral Sciences

The University of Michigan-Dearborn, Dearborn, MI,

Fall 2005-Summer 2010

Research Scientist and Ethnographer

Center for Interventions, Treatment and Addictions Research

Wright State University School of Medicine, Dayton, OH

June 2002-July 2005



Regional Epidemiologist, Ohio Substance Abuse Monitoring Network (OSAM)  
Columbus, OH  
January 2004-July 2005

Visiting Assistant Professor, Departments of Sociology and American Studies  
Grinnell College, Grinnell, IA  
Fall 2000–Spring 2002

Contract Ethnographer  
U.S. Census Bureau, Washington, DC  
2000 – 2001

Lecturer, Department of Sociology and Anthropology  
Loyola University Chicago, Chicago, IL  
Fall 1999 – Spring 2000

Lecturer, Department of Sociology and Anthropology  
Indiana University Northwest, Gary, IN  
Spring 1997

Epidemiologist I & II, Tuberculosis Control Program  
Hektoen Institute for Medical Research at Cook County Hospital  
Chicago, IL 1993 – 2000

Public Health Advisor  
New York City Department of Health  
Bureau of Tuberculosis Control  
New York, NY 1992-1993

### **Honors and Awards**

2014 Michigan Campus Compact Community Service-Learning Award  
2019-2020 Provost Faculty Fellow

### **Scientific and Professional Societies Memberships**

Member, American Sociological Association  
Member, North Central Sociological Association  
Member, Society for the Study of Social Problems  
Member, Society for Urban Ecology

### **Curriculum Development**

Urban Sociology (SOC 435) developed as Academic Service Learning course, Winter 2008.

Inside-Out Prison Exchange (SOC 476) developed as a specialized upper level course entitled "Ghettos and Prisons," Fall 2008.

Health Policy Studies Senior Seminar (HPS 402) developed as a participatory service-learning seminar, Winter 2012-Winter 2018.

Interdisciplinary Foundations course, "Weeds, Wastelands and the Salvation of the World" developed as part of initial cohort of first-year seminars to be offered Fall 2020.

Sociological Theory (SOC 308) developed as an online, active-learning course, to be offered Fall 2020.

### **Graduate/Undergraduate Student Supervision**

#### ***PhD Students***

Palmer, I. PhD candidate at Wayne State University, Department of Sociology. Serving on Committee.

McDuffie, A. Currently preparing for preliminary examinations at Wayne State University, Department of Sociology. Serving on Committee.

#### ***MPP Students***

Zadoff, J., "Government Intervention in Promoting Recycling of Lithium-Ion Batteries: A Policy Analysis." Master of Public Policy Program, April 2015. Director of Committee.

Manley, M., and Roddy, A. "Building Restorative Networks with the Michigan Department of Corrections." Graduate students in Public Policy and Applied Mathematics and Statistics. Summer 2014 research project, presented at North Central Sociological Association Annual Meetings in Cleveland, OH, April 2015.

#### ***Undergraduate Research Projects***

Liang, David and Ganesh, P. Low Altitude Wind Turbines. Undergraduate Research in Sustainable Energy (U-RISE) Program. May-August 2019.

Freeman, Paris. Green Redevelopment and the Role of Ethnography: Using Qualitative Methods to Engage a Detroit Neighborhood about Greening Infrastructure. Office of Research and Sponsored Programs (ORSP) Summer Research Program, May-August 2018.

Oldham, Leah. The Life Narratives of Female Athletes at the University of Michigan-Dearborn. Meeting of Minds XXVI, the University of Michigan-Dearborn, May 11<sup>th</sup> 2018.

Gates, Omitra. Community Advocacy through Photography: an ethnographic excursion of Detroit. Meeting of Minds XXVI, the University of Michigan-Dearborn, May 11<sup>th</sup> 2018.

Freeman, P., Makled, T., and **Draus, P.** (2016). Greening and the Grassroots: The Importance of Engagement with Detroit Residents Concerning Green Infrastructure. Conference paper based on community-based research in Detroit, published online at:

[https://www.umflint.edu/sites/default/files/groups/Research\\_and\\_Sponsored\\_Programs/MOM/p.freeman.pdf](https://www.umflint.edu/sites/default/files/groups/Research_and_Sponsored_Programs/MOM/p.freeman.pdf)

Freeman, P. The Greening of West Grand Boulevard. Summer Fall Service Learning project in Urban Sociology, presented at Michigan Sociological Association Annual Meetings in Flint, MI, in October 2015.

Makled, T. Using Service Learning to Study Neighborhood Land Use Strategies. Fall Service Learning project in Urban Sociology, presented at North Central Sociological Association Annual Meetings in Cleveland, OH, April 2015.

### **Other Teaching Experiences**

Designed and taught three-hour workshop on "The Policing Experience and the Sanctity of Life" to ten cohorts of Dearborn Police Officers as component of [Alternatives to Violent Force \(AVE\)](#) series, UM-Dearborn 2017-2019.

Designed and taught weeklong Seminar Series in Applied Social Science Research Methodology, Vytautas Magnus University, Kaunas, Lithuania, September 2014. Funded by Lithuanian Council of Science.

Designed and taught eight-week workshop on Qualitative Research Methods at Macomb Correctional Facility, 2013-2014.

Designed and taught four week workshop on Storytelling and Society through Americorps Program at Wind River Tribal College, Ethete, WY, summer 2000.

### **Publications**

#### ***a) Books***

**Draus, Paul.** (2004). *Consumed in the City: Observing Tuberculosis at Century's End.* Philadelphia: Temple University Press.

**Draus, Paul.** *Wreckage and Restoration: The Collision of Trauma, Ecology and Design in Contemporary Detroit.* Under contract, the University of Pittsburgh Press.

**Draus, Paul.** *Wind in the Weeds: One Man's Fight for the Future of Detroit*. In discussion with Wayne State University Press.

***b) Papers Published or Accepted for Publication in Refereed Journals***

**Draus, P.,** Haase, D., Napieralski, J., Roddy, J., and Qureshi, S. (2019). Wounds, Ghosts and Gardens: Historical Trauma and Green Reparations in Berlin and Detroit. *Cities* 93: 153-163. <https://doi.org/10.1016/j.cities.2019.05.002>

**Draus, P.,** and Roddy, J. (2018). Weeds, Pheasants and Wild Dogs: Resituating the Ecological Paradigm in Postindustrial Detroit. *International Journal of Urban and Regional Research* 42(5): 807-827. <https://doi.org/10.1111/1468-2427.12627>

**Draus, P.,** Lovall, S., Formby, T., Baldwin, L., and Lowe-Anderson, W. (2018). A Green Space Vision in Southeast Michigan's Most Heavily Industrialized Area. *Urban Ecosystems*. Published online May 11. DOI 10.1007/s11252-018-0765-7

**Draus, P.,** Roddy, J., and McDuffie, A. (2018). "It's Like Half and Half": Austerity, Possibility and Daily Life Inside a Depopulated Detroit Neighborhood. *City, Culture and Society*. Published online February 17. <https://doi.org/10.1016/j.ccs.2018.01.001>

**Draus, P.,** Roddy, J., and Asabigi, K. (2016). Parallel Paradoxes and Useful Uselessness: Notes on the Confluence of Ethnography, Mindfulness and Recovery. *SAGE Open*. Published online December 1. DOI: 10.1177/2158244016679684

Roddy, J., **Draus, P.,** and Asabigi, K. (2016). The Cost of Recovery: Shifts in Income and Expenses During a Three-Phased Transition from Sex Work and Addiction to Drug Treatment and Independent Living. *Journal of Applied Social Science*, Vol. 10(2): 132-146.

**Draus, P.,** and Roddy, J. (2016). Ghosts, Devils and the Undead City: Detroit and the Narrative of Monstrosity. *Space and Culture*, Vol. 19 (1): 67-79.

**Draus, P.,** Roddy, J., and Asabigi, K. (2015). Streets, Strolls and Spots: Sex Work, Drug Use and Social Space in Detroit. *The International Journal of Drug Policy*, Vol. 26 (5): 453-460.

**Draus, P.,** Roddy, J., and Asabigi, K. (2014). Making Sense of the Transition to Drug Treatment from the Detroit Streets. *Qualitative Health Research*, Vol. 25 (2): 228-240.

**Draus, P.,** and Roddy, J. (2014). Paintings, Pensions and Pain. *Contexts*, Vol. 13(2): 58-60.

**Draus, P.,** Roddy, J., and McDuffie, A. (2013). We Don't Have No Neighborhood: Advanced Marginality and Urban Agriculture in Detroit. *Urban Studies*, Vol. 51(12): 2523-2538.

**Draus, P.**, and Lempert, L. (2013). Growing Pains: Reflection and Action in the Ryan Correctional Theory Group, Detroit, MI. *The Prison Journal*, Vol. 93 (2): 138 - 161.

Roddy, J., **Draus, P.**, White, E. and Asabigi, K. (2013). Moving Parts and Balancing Acts: Building and Maintaining a Collaborative Partnership in Detroit. *Advances in Applied Sociology*, Vol. 3 (1): 26-36.

**Draus, P.**; Roddy, J.; and Greenwald, M. (2012). Heroin Mismatch in the Motor City: Addiction, Segregation and the Geography of Opportunity. *Journal of Ethnicity in Substance Abuse*, Vol. 11(2): 149-73.

**Draus, P.**; Roddy, J.; and Greenwald, M. (2010). I always kept a job: Income generation, heroin use and economic uncertainty in 21st century Detroit. *The Journal of Drug Issues*, Vol. 40(3): 841-870.

**Draus, P.**; Roddy, J.; and Greenwald, M. (2010). A Hell of a Life: Addiction and Marginality in Post-Industrial Detroit. *Social & Cultural Geography*, Vol. 7(11): 663-680.

**Draus, P.** (2009). Substance Abuse and Slow-Motion Disasters: The Case of Detroit. *The Sociological Quarterly*, Vol. 50: 360-382.

**Draus, P.**, Carlson, R. (2009). The Game Turns on You: Crack, Sex, Gender and Power in Small Town Ohio. *The Journal of Contemporary Ethnography*, Vol. 38 (3): 384-408.

**Draus, P.**, Carlson, R. (2008). Down on Main Street: Drugs and the Small-Town Vortex. *Health & Place*, Vol. 15: 247-254.

**Draus, P.**, Carlson, R. (2007). Change in the Scenery: an ethnographic exploration of crack cocaine use in rural Ohio. *Journal of Ethnicity in Substance Abuse*, Vol. 6(1): 81-107.

**Draus, P.**, Carlson, R. (2006). Needles in the haystacks: The social context of initiation to heroin injection in rural Ohio. *Substance Use and Misuse*, Vol. 41(8): 1111-1124.

Siegal, H., **Draus, P.**, Carlson, R., Falck, R., Wang, J. (2006). Perspectives on Health Among Adult Users of Illicit Stimulant Drugs in Rural Ohio. *Journal of Rural Health*, Vol. 22(2): 169-173.

Falck, R., Siegal, H., Wang, J., Carlson, R., **Draus, P.** (2005). Non-medical drug use among adults in small towns in Ohio. *Journal of Substance Abuse Treatment*, Vol. 28(4):341-9.

**Draus, P.**, Siegal, H., Carlson, R., Falck, R., Wang, J. (2005). Cracking the cornfields: Recruiting illicit stimulant drug users in rural Ohio. *Sociological Quarterly*, Vol. 46:165-189.

**Draus, P.** (2001). A Tale of Treatment: Tuberculosis Control in a Low-Income Neighborhood in the United States. *Current Sociology*, Vol. 49:189-206.

***Papers Submitted or in Process for Publication in Refereed Journals***

**Draus, P.**, Haase, D., Napieralski, J., Qureshi, S., and Roddy, J. Lurking in the Bushes: Informality, Illicit Activity and Transitional Green Space in Berlin and Detroit. Revise and resubmit, *cultural geographies*.

**Draus, P.**, Haase, D., Napieralski, J., Sparks, A., Qureshi, S., and Roddy, J. Wastelands, Greenways and Gentrification: Introducing a Comparative Framework with a Focus on Detroit, USA. Under review, *Sustainability*.

**Draus, P.**, Roddy, J., and Franke, D. Restorative Reentry in Detroit: Implementing Family Conferencing Through a Therapeutic Community. Revise and resubmit, *Michigan Journal of Community and Service Learning*.

***Book Chapters in Edited Volumes***

**Draus, P.** Green Dreams, Open Wounds: Sustainability and Inclusive Design in Detroit, USA. 2020. Chapter accepted for inclusion in edited volume on *Sustainable Responses of UNESCO Cities of Design*, edited by Karl Stocker and Sigrid Bürstmayr. In press.

Price, C., **Draus, P.**, Wellman, R., Gleicher, S., Alazzawi, H., Pepin, K., Norwood, D., and Sampson, N. The Healthy Dearborn Coalition: An Interdisciplinary, Continuing Collaboration between University, Health, Government and Community in Southeast Michigan. Chapter submitted to *International Handbook on Public Sociology*, edited by Leslie Hossfeld. In press.

**Draus, P.** *Qualitative Methods in Substance Abuse Research*. 2017. Pp. 129-145 in *Research Methods in the Study of Substance Abuse*. Jonathan VanGeest, Timothy P. Johnson, and Sonia Alemagno, editors. New York: Springer International.

**Draus, P.**, and Roddy, J. Sex Work. 2016. Pp. 177-194 in *Understanding the HIV/AIDS Epidemic in the United States: The Role of Syndemics in Shaping the Public's Health*. Wright, Eric R., and Carnes, Neal (editors). New York: Springer International.

**Draus, P.**, and Roddy, J. 2015. Drugs and Public Health and Safety in Geographic and Economic Context. Pp. 335-368 in *The Wiley Handbook on Drugs and Society*, Henry Brownstein, editor. Hoboken, NJ: Wiley-Blackwell.

**Draus, P.** 1999. With Cornelius Howard. Spying on an Eyesore: Space, Place and Urban Decay. Pp. 59-79 in *Constructions of Urban Space: Research in Urban Sociology, Vol. 5*. Hutchison, R. (editor). Bingley, UK: Emerald Group Publishing.



## Blog Posts

**Draus, P.** 2018. Buried scars, green dreams: historical trauma and environmental healing in contemporary Detroit. Posted on [Post-Industrial Stories](https://postindustrialstories.org/index.php/workshop2018/presentation-by-paul-draus-prof/), an outgrowth of Scars of History and Healing Spaces workshop, The European Solidarity Centre, Gdańsk, October 2018.  
<https://postindustrialstories.org/index.php/workshop2018/presentation-by-paul-draus-prof/>

**Draus, P.,** and Roddy, J. Scraping Black Bottom: Linking Memory, Identity and Community in Detroit. October 2, 2016 guest post on *Understanding Society* blog maintained by Daniel Little.  
<http://understandingsociety.blogspot.com/2016/10/guest-post-by-paul-draus-and-juliette.html>

**Draus, P.** Thoughts on "Culture of Health." January 4, 2016 on Authority Health website.  
<http://www.authorityhealth.org/-/population-health-blog/uncategorized/thoughts-on-culture-of-health>

**Draus, P.,** and Roddy, J. Ghosts and Monsters in the Motor City: challenging the trope of Detroit's decline. December 24, 2015 on *London School of Economics American Politics & Policy Blog*. <http://blogs.lse.ac.uk/usappblog/2015/12/24/ghosts-and-monsters-in-the-motor-city-challenging-the-trope-of-detroits-decline/>

**Draus, P.** Paul Draus, PhD, on Detroit and Other Depopulated Cities. December 15, 2014 on Vytautas Magnus University website. <http://www.vdu.lt/en/paul-draus-phd-on-detroit-and-other-depopulated-cities/>

**Draus, P.** Teaching Points: Paul Draus comments on "Ghettos & Prisons." September 5, 2012. *Points: The Blog of the Alcohol & Drugs History Society*.  
<https://pointsadhsblog.wordpress.com/2012/09/05/teaching-points-paul-draus-commentary-on-the-class/>

## Reports

**Draus, P.,** and Roddy, J. November 2019. Rejoining Detroit: Justice System Impacts and Employment Opportunities in the Motor City. Commissioned by the Detroit Regional Workforce Fund, United Way of SE Michigan.

**Draus, P.,** and Roddy, J. May 2019. Evaluation Report: Chance For Life Organization.

**Draus, P.,** and Roddy, J. 2013. Building a Healthy Community in Detroit: Tracking the Impact of the Hope Village Initiative Area. Institute Integrated Assessment Report Series Volume III Report 2. University of Michigan, Graham Institute for Environmental Sustainability. Accessed 6/16/2016 at [http://graham.umich.edu/media/files/HOPEVillageIA\\_Baseline.pdf](http://graham.umich.edu/media/files/HOPEVillageIA_Baseline.pdf)



### **Invited Talks**

The Detroit Windmill Project: A Model Platform for Upcycling and Green Energy. Jornada Showcase, Detroit, Michigan, December 7<sup>th</sup>, 2019. With Carlos Nielbock.

Weeds & Drugs. TEDx Dearborn, October 19<sup>th</sup> 2019, under theme of "Unexpected Connections."

Buried Scars, Green Dreams: Socio-spatial Trauma and Redevelopment in Detroit, Michigan. Presented at interdisciplinary workshop entitled "Scars of History and Healing Spaces" at International Workshop European Center for Solidarity, Gdańsk, Poland, October 11<sup>th</sup> 2018.

Design as a Solution to Exclusion: Case Studies from Detroit, USA. Presented at Vytautas Magnus University, Kaunas, Lithuania, October 4<sup>th</sup> 2018.

Design & Protest in Detroit: Tracing Scars and Healing Spaces. Presented at FH JOANNEUM Institute for Design and Communication 2018 Lecture Series. Graz, Austria, May 8 2018. See <http://designmonat.at/en/events/fh-joanneum-lecture-by-paul-draus/>

Building the FRoG Vision: Nature, Community, Labor and Industry in Detroit's Backyard. Presented to University of Michigan-Dearborn Metropolitan Research Group, October 5, 2016.

Pheasants, Farms and Trees of Heaven: Re-examining the Ecological Paradigm in Postindustrial Detroit. With Juliette Roddy. Presented as part of the Detroit School Series, the University of Michigan, Ann Arbor MI, December 4, 2015.

Disaster and Resilience in Detroit: A Sociological Journey. Presented at Henry Ford Centennial Library, Armchair Academy Series, Dearborn MI, January 14, 2015.

Sex Work, Drug Use and the Problem of Agency. Presented at 4<sup>th</sup> Annual Sujal Symposium for Health and Social Justice, the University of Michigan-Ann Arbor, October 18<sup>th</sup>, 2014.

Challenges to Sustainable Urban Development in the USA: the Case of Detroit. Presented at Vytautas Magnus University, Kaunas, Lithuania, September 29, 2014.

A Swiftly Shifting City: Landscape and Social Change in Detroit. Presented at Tulane University, City Culture and Community Program, January 31, 2014.

Illicit Circulations: Sex, Drugs and Money in Detroit. Presented at Grand Valley State University, Department of Sociology, November 15, 2012.

Horror and Hope in the Motor City: an Ethno-Geographic journey. Presented at the University of Wyoming American Studies Program, Laramie, WY, November 8, 2011.

Fresh Off the Streets: Social Networks and Economic Lives of Former Sex Workers in Detroit. Presented at the Center for Urban Research and Learning (CURL), Loyola University Chicago, October 8, 2010.

Heroin and Spatial Mismatch: 'White' and 'Black' patterns of heroin use and acquisition in 21<sup>st</sup> Century Detroit. Presented at the University College of London, Department of Geography, January 20<sup>th</sup> 2010

Digging Detroit: Drugs, Work and Worth in the Aftermath of Abandonment. Presented at Cambridge University, August 27-28, 2007, Cambridge, England.

Hidden Populations, Vulnerable Populations: Addressing HIV-Related Stigma in Rural Communities. Keynote address delivered at Midwest AIDS Training and Education Center (MATEC) conference on HIV/AIDS in Rural Communities, Sault Ste. Marie, June 2007.

Notes from the Hidden Country: Exploring Illicit Substance Use in the Rural Midwest. Plenary address delivered at the national conference of the Rural Center for AIDS/STD Prevention (RCAP) and the National Rural Health Association (NRHA), Bloomington, Indiana, April 2007.

White Lines, Black Crack: Myths of Race, Drugs and Small Town America. Presentation given at 4<sup>th</sup> and 5<sup>th</sup> Annual Conference on White Privilege, Pella, IA April 2003 and May 2004.

Lessons from Poor Historians: Ethnography and the Social Context of Tuberculosis. Presented at quarterly meeting of the Metropolitan Chicago Tuberculosis Coalition, September 26, 2001, Chicago, IL.

### **Presentations at Professional Meetings**

Victims and Veterans of the War on Drugs Find Their Voice: An Aspirational Agenda for the Post-Trump Era. With Juliette Roddy, the University of Michigan-Dearborn. Society for the Study of Social Problems (SSSP) Annual Meetings. New York, NY, August 2019.

Design as a Solution to Exclusion: Case Studies from Detroit, USA. Society for the Study of Social Problems (SSSP) Annual Meetings. New York, NY, August 2019.

Prisoner Representation, Prisoner Studies and the IRB. With Juliette Roddy, the University of Michigan-Dearborn, Society for the Study of Social Problems (SSSP) Annual Meetings, New York, NY, August 2019.

Trauma, Reparations and Redevelopment in Detroit: Ethnographic Snapshots of Environmental Justice Struggles. American Sociological Association (ASA) Annual Meetings, New York, NY, August 2019.

Green Reparations in Berlin and Detroit: Sociospatial Trauma and the Role of Urban Nature. Presented at Spaces and Flows International Ninth International Conference on Urban and ExtraUrban Spaces, Heidelberg, Germany, October 26<sup>th</sup> 2018.

Place and Process-Based Approaches to Population Health in Dearborn, Detroit, and Ypsilanti. Presented at Coalition of Urban and Metropolitan Universities (CUMU) 24<sup>th</sup> Annual Conference. Chicago, IL, October 24<sup>th</sup> 2018.

Condemning the System while Towing the Line: Compromises, Conflicts and Contradictions of the Inside-out Prison Exchange Program. Society for the Study of Social Problems (SSSP) Annual Meetings. Philadelphia, PA, August 2018.

Lurking in the Bushes: Substance Use, Sex Work and Urban Nature in Berlin and Detroit. American Sociological Association (ASA) Annual Meetings. Philadelphia, PA, August 2018. Restorative Justice in Prison and Community Settings in Detroit. With Juliette Roddy. Society for the Study of Social Problems (SSSP) Annual Meetings. Philadelphia, PA, August 2018.

Green Fingers, Green Walls, Green Scars: Sociospatial Trauma and the Role of Urban Nature in Berlin and Detroit. With Juliette Roddy, the University of Michigan-Dearborn. Society for the Study of Social Problems (SSSP) Annual Meetings. Philadelphia, PA, August 2018.

Hatred, Division and Healing in Berlin and Detroit: Sociospatial Trauma and the Role of Urban Green Space. Association of American Geographers (AAG) Annual Meeting. New Orleans, LA April 14, 2018. With Dagmar Haase and Salman Qureshi, Humboldt University Berlin; Jacob Napieralski, Juliette Roddy, Nichole Bowman, and Alec Sparks (student), The University of Michigan-Dearborn.

From Red Lines to Green Scars: Analyzing the Relationship between Socio-spatial trauma and Urban Green Space in Detroit, Michigan (Poster). Association of American Geographers (AAG) Annual Meeting. New Orleans, LA. April 12, 2018. With Alec Sparks (student), Jacob Napieralski, Nichole Bowman (student), University of Michigan- Dearborn.

Crossing the Thin Blue Line: Teaching and Talking about/to/with the Police. Presentation and panel discussion at North Central Sociological Association Annual Meetings, Pittsburgh, PA, April 7, 2018. With Juliette Roddy, the University of Michigan-Dearborn, Waverly Duck, the University of Pittsburgh, and Tony Gaskew, the University of Pittsburgh-Bradford.

A Sociologist on the Brownfield Board: Insights from an Outsider. Presented at the EPA National Brownfields Training Conference, Pittsburgh, PA December 2017.

Restorative Practices and Violence Prevention: Local Efforts in Southeast Michigan Focused on Repairing and Avoiding Harm. With Juliette Roddy, University of Michigan Dearborn, and Derrick Franke, MA, Academic Specialist, Michigan State University. Michigan's Premier Public Health Conference (MPPHC). Mackinac Island, MI. October 4, 2018.

Active Absences: Moving Narratives of Memory, Loss, Identity and Community in Detroit. With Juliette Roddy, University of Michigan-Dearborn. Society for the Study of Social Problems (SSSP), Montreal, CA. August 12, 2017.

Training Police: Alternatives to Violent Force. With Juliette Roddy, Paul Draus and Donald Shelton, University of Michigan-Dearborn. Society for the Study of Social Problems (SSSP), Montreal, CA. August 11, 2017.

A Greenspace Vision in Southeast Michigan's Most Heavily Industrialized Area. With Sam Lovall and Treva Formby. Presented at the International Association for Great Lakes Research (IAGLR) Annual Meeting, May 2017, Detroit, MI.

Scraping Black Bottom: Linking Memory, Identity and Community in Detroit. Presented at the Midwest Historical Archaeology Annual Meetings, Detroit, MI, September 2016.

Between the Man and the Monster: Negotiating Collaborative Relationships with Oppressive and Exploitive Organizations. Presented at the Society for the Study of Social Problems Annual Meetings, Seattle, WA, August 2016.

Weeds, Rats and Crackheads: Re-examining the Ecological Paradigm in Post-Industrial Detroit. With Juliette Roddy. Presented at the Society for the Study of Social Problems Annual Meetings, Chicago, IL, August 2015.

Green Light, Shifting Shadows: Snapshots of Race and Marijuana in Michigan. With Juliette Roddy. Presented at the Society for the Study of Social Problems Annual Meetings, Chicago, IL, August 2015.

Adapting to Disaster: Narrative Accounts of Detroit's Ongoing Deconstruction. With Anthony McDuffie and Juliette Roddy. Presented at the Society for the Study of Symbolic Interaction Annual Meeting, Chicago, IL, August 2015.

We Are Garbage People: Austerity, Possibility and the Daily Routines of Detroit's Submerged Workers. With Juliette Roddy and Anthony McDuffie. American Sociological Association Annual Meeting, Chicago, IL, August 2015.

Adapting to Disaster: Narrative Accounts of Detroit's Ongoing Deconstruction. With Anthony McDuffie and Juliette Roddy. Presented at the North Central Sociological Association Annual Meeting, Cleveland, OH, April 2015.

Mapping Stories: Linking Ethnography and Geography through Narrative in Detroit. Presented at Couch-Stone Symposium, Society for the Study of Social Interaction, St. Petersburg, FL, March 2015.

Given the Greenlight in Detroit: Photographic illustrations of themes developed during medical marijuana research. With Juliette Roddy. Presented at the American Public Health Association 142nd Annual Meetings, New Orleans, LA, November 2014.

We Are Garbage People: Daily Routines of Detroit's Submerged Workers. With Juliette Roddy and Anthony McDuffie. Society for Cultural Anthropology Biennial Meetings, Detroit, MI, May 2014.

A Swiftly Shifting City: Dynamics of Linked Landscape and Social Change in Detroit. With Juliette Roddy and Jacob Napieralski. Poster presented at Conference on Complex Systems, Health Disparities & Population Health. National Institutes of Health, Bethesda MD, February 2014.

A Swiftly Shifting City: Linked Landscape and Social Change in Detroit. With Juliette Roddy. Presented at the Spaces and Flows Conference, Amsterdam, Netherlands, November 2013.

Streets, Strolls and Sanctuaries: Gender, mobility and safety in Detroit's drug and prostitution zones. With Juliette Roddy. Presented at the American Sociological Association Annual Meetings, New York, NY, August 2013.

The Loudest of the Loud: Impacts of the Michigan Medical Marijuana Legislation on Urban and Suburban Patterns of Use, Procurement and Association. With Juliette Roddy. Presented at the Society for the Study of Social Problems Annual Meetings, New York, NY, August 2013.

Digging Detroit: A Multilayered Excavation of Landscape and Social Change in a Postindustrial City. With Juliette Roddy. Innovation Briefing Delivered at *The Engaged Campus: Driving Innovation through Partnerships* Conference, Dearborn, MI May 2013.

The Cost of Recovery: Economic Profiles of Former Street Sex Workers in Detroit. With Juliette Roddy. Presented at the American Public Health Association 140<sup>th</sup> Annual Meetings, San Francisco, CA October 2012.

Illicit Circulations: Sex, Drugs, and Money in Detroit. With Juliette Roddy. Presented at the Spaces and Flows Conference, Detroit, MI, October 2012.

We Don't Have No Neighborhood: Advanced Marginality and the Utopian Future of Postindustrial Detroit. With Juliette Roddy and Anthony McDuffie. Presented at the American Sociological Association Annual Meetings. Denver, CO, August 2012.

Green Recovery in Detroit: Comparing Two Promising Efforts in the Early Stages. Presented at the American Public Health Association 139<sup>th</sup> Annual Meeting, Washington, D.C., October 31, 2011.

The Street, the Stroll and the Spot: Negotiations of social and semipublic space in Detroit's drug and prostitution zones. With Juliette Roddy. Presented at The Pub, the Street, and the Medicine Cabinet: The 6th International Conference on the History of Alcohol and Drugs, Buffalo, NY, June 25<sup>th</sup>, 2011.

Fresh Off the Streets: Social Networks and Economic Lives of Detroit Sex Workers. With Juliette Roddy. Poster presented at AcademyHealth Annual Research Meetings, Seattle, WA, June 13<sup>th</sup>, 2011.

Redundant Situations: Making the transition to treatment from the Detroit streets. With Juliette Roddy. Presented at the North Central Sociological Association Annual Meetings, Cleveland, OH, April 2011.

Ghosts, Devils, and the Undead City: Crisis and Survival in Detroit. Presented at the Canadian American Studies Association Annual Meetings, Windsor ON, October 2010.

Webs and Circuits: Describing the Social Networks of Detroit Heroin Users. Presented at the Midwest Sociological Society Annual Meetings, Chicago, April 2010.

Heroin and Spatial Mismatch: "White" and "Black" patterns of income generation, heroin use and acquisition in 21<sup>st</sup> Century Detroit. With Juliette Roddy. Presented at the Society for the Study of Social Problems Annual Meetings, San Francisco, August 2009.

Teaching in Correctional Settings: Experiences from the Inside-Out Program. Roundtable presentation at The Midwest Sociological Society Annual Meetings, Des Moines, April 2009.

Sorting Out the Bad Apples: Public Schools and the Code of the Street on Season 4 of *The Wire*. With Bryan Granger, Shavon Holcomb and Lynn McMeal, presented at "Heart of the City: Black Urban Life on *The Wire*," Ann Arbor, February 2009.

Heroin and Bare Life: drugs, work and worth in the post-industrial city. With Juliette Roddy. Paper presented at the American Sociological Association Annual Meeting, Boston, August 2008.

'I always kept a job': Work patterns, social networks and heroin use in 21<sup>st</sup> century Detroit. With Juliette Roddy. Presented at the Society for the Study of Social Problems Annual Meeting, New York City, August 2007.

Substance Ab(use) and Slow Motion Disasters: The Need for a Critical Counter-Narrative. Paper presented at the Society for the Study of Social Problems Annual Meetings, Montreal, Canada, August 2006.

Who's Using Who?: Gender, Power, Sex and Crack Cocaine in Small Town Ohio. Paper presented at Qualitative Health Research Annual Conference, Edmonton, Canada, April 2006.

Crack Cocaine Use and Health Risk Behavior in Rural Ohio: An Ethnographic Exploration. Paper presented at Society for Applied Anthropology, Annual Meeting, Santa Fe, NM, April 2005.

Down on Main Street: Drugs and the Small Town Vortex. Paper presented at Midwest Sociological Society Annual Meetings, Kansas City MO, April 2004.



Needles in the Haystacks: Pathways to illegal drug injection in small-town Ohio. Paper presented at American Public Health Association Annual Meetings, San Francisco CA, November 16-19, 2003.

Cracking the Cornfields: Recruiting active stimulant users in small-town Ohio. Paper presented at Society for Applied Anthropology, Annual Meeting, Portland, OR, March 2003.

Difficult Negotiations: Coercion, Care and Compliance in Tuberculosis Therapy. Paper presented at Society for the Study of Social Problems, Annual Meetings, Chicago, IL, August 2002.

Race in Your Face: John Brown in Iowa. Presentation given at Third Annual Conference on White Privilege, Pella, IA, April 2002.

Darkness on the Edge of Town: Race, Drugs, Disease and Other American Demons. Presented at Charles University, Prague, Czech Republic, March 2002.

Tuberculosis Control, Ethnography and Foucault: Notes on Theory and Methodology. Presented at American Sociological Association, Annual Meetings, Anaheim, CA, August 2001.

Hard Case Histories: Narratives of Homelessness, Illness and Addiction. Presented at American Sociological Association, Annual Meetings, Anaheim, CA, August 2001.

Attitudes Towards Community and Institutional Distrust: From Café to Crime Zone. Presentation given at the U.S. Census Bureau, Washington, DC, February 2001.

From Xela to Chicago: Cross-Cultural Comparison of Public Hospital Spaces in Guatemala and the United States. Paper presented at Qualitative Health Research Conference, sponsored by International Institute for Qualitative Research, Banff, Alberta, Canada, April 2000.

Tuberculosis Transmission in an Inner-City Car Wash. Poster co-authored with Chris Caudill and James McAuley of the Centers for Disease Control and William Paul of the Chicago Department of Health. Presented at the Annual Conference of the American Lung Association, San Diego, CA 1999.

Spying on an Eyesore: Space, Place and Urban Decay. With Cornelius Howard. Presented at the American Sociological Association, Annual Meeting, Chicago, IL 1999.

Inside the Myopticon: Medical Surveillance, Foucault, and Subjectivity. Presented at the American Sociological Association, Annual Meeting, Chicago, IL 1999.

Tales of Treatment: Tuberculosis Control in the Street. Presented at the American Sociological Association Annual Meetings, San Francisco, CA 1998.



Subsistence Labor, Marginal Economics, and the Urban Homeless. With Talmadge Wright. Presented at the Society for the Study of Social Problems Annual Meetings, New York, NY, August 1996.

### Research Grants

Tangle—Overridden Urban Space. (Co-Investigator, with Tzveta Kassabova and Holly Hughes, UM-Ann Arbor). University of Michigan Mcubed. **FUNDED:** \$15,000 over one year.

Place-Based Projects as Catalysts for Resilience: A Social-Ecological-Design Approach. Draus, Paul. Office of Research and Sponsored Programs (ORSP) UM-Dearborn Scholars Grant. **FUNDED:** \$15,000 over one year, May 2018-June 2019.

A Green Energy Village in Detroit's Eastern Market: Establishing a Strategy for Scalability and Integrated Assessment. Draus, Paul (PI). With Juliette Roddy, Kevin Bai (UM-Dearborn), Joshua Newell (UM-Ann Arbor), Carlos Nielbock, Janai Gilmore (CAN Art Handworks), Lydia Levinson, Dan Carmody (Eastern Market Corporation). Graham Sustainability Center Catalyst Grant. **FUNDED:** \$10,000 over one year, May 2018-September 2019.

Violence Prevention as Community Health Work: Street Outreach Programs in Two Michigan Cities (PI). The University of Michigan-Dearborn Community-Based Research Seed Grant. Co-Investigator, Dr. Juliette Roddy. **FUNDED:** \$4,000 over two years, June 2017-June 2019.

Green Space, Health and Quality of Life in Detroit and Berlin (PI). University of Michigan Humboldt-Universität zu Berlin Collaboration on Applications of Cooperative Research in the Social Sciences. **FUNDED:** \$100,000 over 2 years, January 2017-January 2019.

Restorative Reentry in Detroit: Implementing Family Conferencing Through a Therapeutic Community (PI). Submitted to Michigan Institute for Clinical & Health Research (MICHR). **FUNDED:** \$30,000 over one year, September 2015-August 2016.

Supporting Restorative Reentry in Detroit: A Proposal to the Skillman Foundation (PI). Small Project Grant, the Technical Assistance Center, the University of Michigan-Ann Arbor. **FUNDED:** \$7,500 over 3 months. June-August 2015.

Green Infrastructure and Social Equity: Examining Community Engagement & Risk Communication Strategies Related to Environmental Remediation in Southwest Detroit (PI). The Spivack Program in Applied Social Research and Social Policy, the American Sociological Association (ASA). **FUNDED:** \$2,975 over two years, May 2015-May 2016.

Restorative Reentry in Detroit: An Interdisciplinary Collaborative Approach. The University of Michigan-Dearborn Community-Based Research Seed Grant. Co-Investigator, Dr. Juliette Roddy. **FUNDED:** \$4,000 over two years, June 2014-June 2016.

Digging Detroit: Multilayered Mapping of Landscape and Social Change in Detroit. **(PI)**. The University of Michigan-Dearborn Step 2 Grant for Faculty Research. **FUNDED:** \$15,000 over two years, April 2013-April 2015.

Building a Healthy Community in Detroit: Tracking the Impact of the Hope Village Initiative. University of Michigan, Graham Institute for Environmental Sustainability. Co-Investigator, with Dr. Juliette Roddy. **FUNDED:** \$28,000 over two years, May 2012-May 2014.

The Depopulation of Oakwood Heights: An Exploratory, Community-Based Study. **(PI)**. The University of Michigan-Dearborn Community-Based Research Seed Grant. **FUNDED:** \$8,000 over two years, June 2012-June 2014.

Black, White and Shades of Gray: Racial and Spatial Impacts of Michigan's Medical Marijuana Policy on the Users. Co-Investigator, Dr. Juliette Roddy. The University of Michigan-Dearborn Rackham (Replacement) Grant/Pilot Study. **FUNDED:** \$6,000 over two years, April 2011-June 2013.

Tracing Changes in the Urban Landscape: An ethno-geographic study of the RecoveryPark Project. **(PI)**. The University of Michigan-Dearborn, Office of Research and Sponsored Programs, Faculty Summer Research Grants. **FUNDED:** \$6,000 over two years, April 2011-June 2013.

An Ethnographic and Economic Investigation of the Fresh Start Prostitution Reform Program. Co-Investigator, Dr. Juliette Roddy. (NIDA 1 R21 DA027145-01). Community Influences on Health Behavior (CIHB) Group. **FUNDED:** \$275,000 over two years, beginning October 10, 2009.

Social Networks and Contexts of Health Risk Behavior Among Active Heroin Users in Detroit: An Exploratory Ethnographic Study. **(PI)**. University of Michigan-Dearborn, Office of Research and Sponsored Programs, Faculty Summer Research Grants. **FUNDED:** \$6,000 over two years, July 2006-February 2008.

## **Service Activities**

### **a) University Service**

#### **Campus-wide Committees**

Experiential Education Work Group, Summer 2010

Health Programs Committee, Summer 2011-2012

Transition Committee for Office of Research and Sponsored Programs, Winter 2014

Engagement Day Planning Committee, Fall 2014

Office of Metropolitan Impact (OMI) Advisory Committee, 2013-present

CASL Restructuring Task Force, January 2018-2019

### **College (CASL, CECS, COE, SOM) Committees**

Dean's Task Force on Integrated Bands (2017-2018)  
CASL Climate Committee (2015-2018), Faculty Co-Chair 2017-2018.  
CASL Strategic Planning Committee (2014-2016)  
CASL Grants Committee (2008-2010)

### **Departmental Committees**

Department Executive Committee, Sociology Discipline Coordinator, Fall 2015-Fall 2018  
Faculty Search Committees for Sociology (2009), Public Administration (Chair, 2012), Health Policy Studies (2013), Criminal Justice Studies (2013), Public Health (2014), Anthropology (2016)

### **b) Professional Activities**

Guest Editor, *Michigan Journal of Community Service Learning*, special issue on Detroit, Fall 2016.

Editorial Review Board, *Journal of Prison Education and Reentry*, 2015-present.

Frequent reviewer, *Journal of Contemporary Ethnography*; *Health & Place*; *Urban Studies*; *International Journal of Drug Policy*; *International Journal of Urban and Regional Research*; *Qualitative Health Research*; *American Journal of Public Health*.

Co-Chair, Health, Health Policy and Health Services Division, Society for the Study of Social Problems 2015-2017.

Council Member At-Large, North Central Sociological Association (NCSA). Elected fall 2017 for two-year term (2018-2020).

American Association of Humanist Sociologists (AHS), November 2018, Detroit, MI. Crossing the Thin Blue Line: Teaching and Talking About/To/With the Police. Organized workshop.

North Central Sociological Association (NCSA), April 2018, Pittsburgh, PA. Crossing the Thin Blue Line: Teaching and Talking About/To/With the Police. Organized panel discussion.

Restorative Justice=Results Mini-Conference at the University of Michigan-Dearborn, December 1 2017. Organized four-hour conference and presented research results.

Michigan's Premier Public Health Conference (MPPHC), Mackinac Island, MI. October 2017. Restorative Practices and Violence Prevention: Local Efforts in Southeast Michigan Focused on Repairing and Avoiding Harm. Co-organized session with Juliette Roddy.

Society for the Study of Social Problems (SSSP), August 2017, Montreal, Canada. Organized roundtable paper session for Health, Health Policy, and Health Services Division. Twenty-five papers were included and presiders assigned for each table of five presenters.

Mini-Symposium on Socio-Design and its Applications in Europe and Detroit, June 2017, Detroit MI. Organized four-hour event involving local artists, architects and designers in discussion with visiting designers from Austria, focused on social dimensions of design. Justice Studies Association (JSA), June 2017, Detroit, MI. Co-organized session with Juliette Roddy and Derrick Franke entitled "Localized Efforts at Justice Reform in Michigan."

International Association for Great Lakes Research (IAGLR) Annual Meeting, May 2017, Detroit, MI. Organized panel discussion entitled "What Good Does It Do Me?: Engaging Community Stakeholders in the Implementation and Valuation of Green Infrastructure."

North Central Sociological Association (NCSA), April 2017, Indianapolis, IN. Co-organized session with Juliette Roddy and Derrick Franke entitled "Moving Outside the Academy: Localized Efforts at Crime Prevention & Criminal Justice Reform in Michigan."

Michigan Association for Local Public Health (MALPH), October 2016, Kalamazoo, MI. With Juliette Roddy, co-organized session on "Drugs, Justice, the Environment and Health in Detroit," featuring presentations by both students and faculty from UM-Dearborn based on collaborative research conducted with community partners in Detroit.

American Sociological Association (ASA), August 2016, Seattle, WA. With Jason Schnittker, co-organized session entitled "Health and the Carceral State", for the Medical Sociology section.

Society for the Study of Social Problems (SSSP), August 2016, Seattle, WA. Organized sessions on "Environment and Health" and "Defining and Debating the Culture of Health."

North Central Sociological Association (NCSA), April 2016, Chicago, IL. Organized session entitled "Drugs, Justice, Health and Recovery in Detroit", featuring presentations by both students and faculty from UM-Dearborn.

North Central Sociological Association (NCSA), April 2015, Cleveland, OH. Organized and chaired session entitled "Land, Law, Leaf and Quality of Life in Detroit", featuring presentations by both students and faculty from UM-Dearborn.

Society for the Study of Social Problems (SSSP), August 2014, San Francisco, CA. Organized and chaired two linked sessions on "People, Places and Things: Applying Actor-Network Theory to Substance Use Behaviors."

#### **Book Reviews**

The Pastoral Clinic: Addiction and Dispossession Along the Rio Grande. (2011). Book reviewed for *Social Forces*, Vol. 90(1): 328-330.

Race, Space and Riots. (2008). Book reviewed for *City & Community*, Vol. 7(2): 183-185.

Suffering in the Land of Sunshine. (2007). Book reviewed for *Health: An Interdisciplinary Journal for the Social Study of Health, Illness and Medicine*, Vol. 11(3): 419-428.

### **Community Service**

Board Member, Self Help Addiction Rehabilitation (SHAR) Inc.

Board Member, Downriver Delta Community Development Corporation.

Board Member, Friends of the Rouge River,

Community Representative, Downriver Community Conference Brownfield Consortium.

Member, City of Dearborn Brownfield Redevelopment Committee.

Member, Health Dearborn Coalition.

Presenter, UM-Dearborn Digital Education Day, 2017 and 2018. Invited to share practices incorporating digital media into my teaching pedagogy.

Expanding Inside-Out Prison Exchange in the State of Michigan. **(PI)**. Ford Foundation subaward from Temple University, Philadelphia, PA. Grant awarded September 2015 for work to be completed by the end of the calendar year. FUNDED: \$10,000 over 4 months.

Tour narration, 2019 Rouge Cruise, August 6. Provided commentary for three hour boat cruise on the Detroit and Rouge Rivers.

Facilitator, Fort-Rouge Gateway (**FRoG**) Partnership, dedicated to enhancing access to green space in Lower Rouge River watershed, and involving a number of community organizations as well as government and corporate entities, including Michigan Department of Transportation (MDOT), Greening of Detroit, Southwest Detroit Business Association, Sierra Club, Motor Cities National Heritage Area, UAW Local 600, and the Marathon Petroleum Company. Major project of the Fort Street Bridge Park was funded for approximately \$1M after four years of effort and construction slated to begin October 2019.

Facilitator, Michigan Theory Group at Macomb Correctional Facility, focused on promoting meaningful dialogue and expanding educational opportunities inside the prison system, as well as outreach to larger community, promoting Restorative Justice and initiating program and research design with Michigan Department of Corrections (MDOC) and community partners

such as Self Help Addiction Rehabilitation (SHAR). Group has facilitated ten trainings of faculty Inside-Out Prison Exchange and organized three Restorative Justice Summits and two conferences on education in prison, Confined Minds I (2009) and Confined Minds II (2019).

## REFERENCES

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