UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARIA ALEJANDRA CELIMEN SAVINO and JULIO CESAR MEDEIROS NEVES,	)	
Petitioners-Plaintiffs,	)	**20-cv-10617 WGY**
v.	)	
THOMAS HODGSON, et al.,	)	
Respondents-Defendants.	)	

OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

In this litigation, Plaintiffs sought, and obtained, certification of a class of all civil immigration detainees housed at the Bristol County House of Corrections ("BCHOC"). Plaintiffs claim that their Fifth Amendment rights have been violated by the conditions at BCHOC, and, particularly, the threat of infection with the coronavirus commonly called COVID-19. Plaintiffs have made it clear that the only form of relief acceptable to them is release from detention.

At issue presently is Plaintiffs' motion for a preliminary injunction. Because an injunction would potentially grant the full relief sought, the Court has indicated that the present motion will address the merits of the case. At its core, this case is about whether BCHOC has been deliberately indifferent to the risk of infection such that Plaintiffs' Fifth Amendment rights have been violated. While Plaintiffs seek to litigate as if the sole question is whether they are at risk for a COVID-19 infection if they remain detained, that alone is an insufficient basis for a preliminary injunction under their Fifth Amendment claim. This is manifestly *not* a case about

how best to manage the daily affairs at BCHOC. This case must start from, and be determined in accordance with, the cause of action pleaded by Plaintiffs, which is the Fifth Amendment.[1] Plaintiffs cannot meet their burden for a preliminary injunction.[2]

II. PROCEDURAL HISTORY

In approximately six weeks, over 150 docket entries have been received in this case. The Court is familiar with the twists and turns of the case, but is referred to the summary of the procedural history of the case attached as an exhibit hereto. The Court has certified a class, admitted a number of detainees to bond under conditions, and now takes up the temporary restraining order/preliminary injunction motion which, as the Court and parties agree, will effectively be a decision on the full merits (apart from the Rehabilitation Act claim, which remains undeveloped).

III. FACTS

A. Current Situation at BCHOC

Despite the dire predictions by Plaintiffs that they were under imminent threat of widespread infection and likely death, for five weeks since the petition and motions were filed there was not a single case of coronavirus confirmed among the inmate or detainee population at BCHOC. The first positive test was received on Monday, May 4, 2020. *See* Letter to Court, submitted in camera, May 5, 2020. While Plaintiffs will portray that as the sky is falling, it is actually a remarkable achievement by the BCHOC staff given the number of coronavirus cases

[1] As the Court has recognized, Plaintiffs' Rehabilitation Act claim is not a basis they rely on in the motion for a temporary restraining order (which has been converted by the Court to a preliminary injunction motion). *See* Opinion and Order, dkt. # 64.

[2] In addition to this Memorandum, the Defendants also rely on, and ask the Court to consider as if incorporated herein, docket entries 26, 35, 41 and 83, along with the exhibits thereto.

in Massachusetts and their rise during the same time period.[3] During the month of April, Massachusetts went from 8,966 cases of confirmed coronavirus (representing .13 % of the Commonwealth's population) to 69,087 (1% of the 6,893,000 residents), an almost eight-fold increase.[4] During the same period, BCHOC remained at zero confirmed cases. Even with the one positive test on May 4, 2020, that is still around one-tenth of one percent of the detainee population at BCHOC. In other words, the frequency of coronavirus in the population of the Commonwealth at large is approximately ten times as great as in BCHOC.[5]

B. BCHOC Has Taken Extensive Measures

The extensive precautions taken at BCHOC to prevent the introduction of COVID-19 into BCHOC, and to limit its spread if introduced, were largely set out in prior briefing. *See* Defendants' Opposition to Motion for a Temporary Restraining Order and Supplemental Brief, docket ## 26 & 41. Since those briefs were submitted at the beginning of April, some important additional steps have been taken.

First, all persons entering BCHOC are screened for elevated temperature prior to entering the facility. Anyone with an elevated temperature is turned away. Those conducting the

[3] In the immediate aftermath of the one positive test, BCHOC sought to test all remaining detainees from the same unit, Unit B. 19 additional detainees agreed to be tested and their results came back negative. *See* Declaration of Steven Souza, attached hereto as Exhibit 1. Six of the detainees have refused to be tested. *Id.*

[4] Massachusetts state government website at https://www.mass.gov/info-details/covid-19-response-reporting (information through May 4, 2020, last accessed May 5, 2020). April 2, 2020 data taken from the same website but accessed on April 2, 2020.

[5] While it is true that these numbers only represent *confirmed* cases, and that widespread testing has not been made available, this is as equally applicable outside the institution as inside. Thus, the comparison remains relevant to the comparative risk of BCHOC versus the wider community. *See* section IV. A. *infra.*

screening are in personal protective equipment. *See* Declaration (attached as exhibit 2 to dkt. # 83) and deposition of Nelly Floriano.

Second, all BCHOC staff inside the facility are required to wear masks at all times while in the facility. *Id.*

Third, all detainees have been provided with face masks and are required to wear them at all times unless they are eating or lying in their beds. *Id.*; *see also* deposition of Steven Souza, May 1, 2020.

Fourth, meals are distributed directly to the detainees in covered, sanitized containers. Detainees are no longer gathering for meals. *Id.*

As stated in the previously submitted affidavits and declarations (Sheriff Thomas Hodgson, Dr. Nicholas Rencricca, Medical Director, Director of Clinical Services Debra Jezard, ICE Nursing Supervisor Nelly Floriano and Superintendent Steven Souza (multiple declarations), extensive precautions were already in place to minimize the risk to detainees at BCHOC. *See* dkt. # 26, Exhibit 1; dkt. #35; dkt. # 83, Exhibits 1 & 2. BCHOC, through its medical services contractor Correctional Psychiatric Services, Inc. ("CPS"), developed Medical Guidance for dealing with the coronavirus threat; *see* docket # 35 and 83 and exhibits thereto. The Medical Guidance was informed by, and comports with, the national guidance from the Centers for Disease Control ("CDC") as well as the Massachusetts Department of Public Health ("DPH"). *See* affidavits of Dr. Rencricca and Debra Jezard, dkt. # 35.

Moreover, despite the inflammatory and inaccurate claims of Plaintiffs and their experts, BCHOC ICE detainees do not come from all over the country, nor are there frequent transfers into or out of BCHOC ICE units.[6] Any transferee who is not coming from BCHOC criminal

[6] "Furthermore, the routine practice of transferring immigrant detainees from one

incarceration is screened prior to housing within the ICE units. If there are any signs or symptoms of illness, or if any of the standard questions provoke concern, the transferee is quarantined for fourteen days in accordance with CDC protocol.[7]

In addition to the physical separation of ICE detainees from the general inmate population, BCHOC has taken numerous other steps to limit the risk of contamination from the outside. Screening of all staff prior to entry is required. All staff are required to wear masks when in the facility. Any staff member who feels ill must not enter the facility and must be medically cleared before returning to work. Thus, while several staff members have tested positive, up until May the virus was apparently kept out of BCHOC. Moreover, the higher incidence of BCHOC positive tests for coronavirus among staff members than among detainees underscores that the risk of contracting the COVID-19 virus is greater outside BCHOC than inside.

C. <u>A Sufficient Population Reduction Has Occurred</u>

At the outset of this litigation, there were 148 ICE detainees at BCHOC. There are presently 82.[8] That represents a 45% reduction. In some of the units, the reduction has been even higher, as a percentage.[9] Plaintiffs maintain that there is no safe level of population at

---

facility to another, throughout the nationwide immigration detention network, makes the likelihood of COVID-19 spread and infection even more likely." Complaint, ¶ 81. This does not happen, at least, not into or out of BCHOC. *See* Notices of Transfer to the Court.

[7] A transferee from within BCHOC is similarly screened if symptomatic. *See* Exhibits to dkt. # 26 & 35.

[8] The Court has ordered the release of two additional individuals, so there will be 80 detainees. Dkt. # 147.

[9] As the Court is aware, because ICE B was rendered uninhabitable by the ICE detainees, the 26 have been relocated. 20 of the 26 are now housed in single cells and 6 are housed in double cells. *See* Declaration of Steven Souza, Ex. 1 hereto.

BCHOC. They steadfastly refuse to even consider what a safe level of detainees might be or any alternatives to release.

But the Court may not disregard the safety of the community into which the detainees will be released. It is unavoidably confronted with the question of what is the level at which social distancing is sufficiently practicable, such that the risk to the remaining detainees is balanced against the risk to the community of releasing violent individuals. Put another way, this is not simply a case of bail review for 148 individuals. Under the law, Plaintiffs must demonstrate that additional releases are required *such that* the Plaintiffs would prevail on their claim that ICE is deliberately indifferent to the risk of infection if no other steps are taken. *See* section III A *infra*.

Plaintiffs have suggested in their opposition to Defendants' Motion to Stay Further Releases that social distancing cannot occur because the aisles between the bunk beds is only four feet wide.[10] However, the CDC guidance for correctional facilities (as opposed to the general public guidance) recognizes that a six foot distance may not be practically achievable at all times, and thus additional precautions such as the use of masks is recommended. *See* Centers for Disease Control Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, attached hereto as Exhibit 2. The question is not whether the detainees will be guaranteed to be six feet away from all other humans at every moment. The question is can the practice of social distancing, tailored to existing constraints, be reasonably achieved assuming the detainees choose to be compliant and if additional steps, such

[10] Plaintiffs appear to be suggesting that there are two detainees within a single bed; *see* ECF 91-6, Declaration of Jen Shin and Accompanying Exhibits. There are not; at most, there is one detainee on a top bunk and another on a bottom bunk, but with their heads at opposite ends.

as masks and disinfecting, can augment social distancing. Thus, for example, Plaintiffs' experts opine (without having ever seen the inside of BCHOC) that detainees would be within six feet of each other in the bathroom. It is true that this is possible, just as it is equally true that a released detainee could be within six feet of a person who is infected while at home. It is not true that the detainees *must* be within six feet of each other in the bathroom. *See* First Declaration of Steven Souza, Exhibit 1 to dkt. # 83.

As further grounds, Defendants urge the Court to review their Motion to Stay, docket # 82 and the exhibits thereto. That motion goes into the physical setting of the detention areas in great detail.[11] The Court is also directed to the videos previously submitted via email to the Courtroom Clerk, Ms. Gaudet.

D. <u>Many of the Detainees Are Dangerous</u>

The Court has been presented with the criminal history and flight concerns regarding all 148 original detainees plus several transferees.[12] There is a range of degree of dangerousness

---

[11] On April 7, 2020, the Court entered an order which stated in part "The Court inquires whether given the number of cells and the common areas in the detention facility there is some number of detainees who might occupy the facility and yet be adequately spaced?" Docket # 55. In response to the Court's inquiry regarding whether there was a level of population reduction which would render the conditions relatively safe for the remaining detainees, Defendants submitted two declarations on Thursday, April 9, 2020. One was from Superintendent Steven Souza of BCHOC. That declaration went through the areas where detainees are held at BCHOC in painstaking detail, providing both dimensions and the current number of detainees housed in each. The second declaration was from Nelly Floriano, the Nursing Supervisor for ICE detainees at BCHOC. Ms. Floriano reviewed the prevention and treatment practices at the facility and stated that she was confident that the detainee population is sufficiently low so as to allow adequate social distancing (separation of six feet or more) to be practiced in all of the detainee units. Declaration of Nelly Floriano, ¶¶ 7 & 9. Unlike Plaintiffs' experts, most of whom have *never* been inside BCHOC, and those that have did not have access to all the detainee areas, Ms. Floriano is in the units on a regular basis, although she has not been inside the bathrooms in the male units.

[12] *See* dkts. 50, 52, 56, 58, 65, 67, 74, 75, 78, 79, 80, 81, 84, 85, 88, 89, 92, 94, 100, 102, 104, 105, 110, 111, 115, 116, 130, and 131.

among the detainees that can be determined from their records. One detainee was convicted of rape in Brazil; many others have been convicted of spousal abuse. Even more have pending charges involving violence.

Within days of the lawsuit being filed, the detainees in ICE B, which is a higher risk group than ICE A, barricaded themselves in the Unit and refused to let Bristol staff enter. This is the group that made numerous false representations regarding the conditions at Bristol to the press that led to the lawsuit being filed. The same group, last Friday, May 1, 2020, engaged in what amounted to a totally lawless riot. During the course of the riot, detainees ripped sinks off the walls and smashed them. They broke windows. They barricaded doors and refused to admit prison personnel. They smashed holes in the walls and broke toilets. They rendered Unit B uninhabitable. *See* Souza declaration, Ex. 1, *passim.*

This supposedly arose because one of the detainees reported flu-like symptoms and was told he would be taken to the medical unit for testing and then placed in isolation, in accordance with the facility's COVID-19 medical guidance. *Id.* An additional group of detainees claimed symptoms and were told they, too, would be taken out of the unit for testing and isolation. *Id.* They refused. *Id.* When Sheriff Hodgson entered the unit to try to talk the detainees down from their confrontational stance, one of the detainees threw a chair at the Sheriff and injured him. *Id.* BCHOC staff eventually regained control of the Unit with the involvement of the Special Operations Unit of Bristol County Sheriff's Office. *Id.*

One of the detainees claimed his shoulder was hurt during the riot. *Id.* He had been observed during the riot with a metal bar or pipe, possibly an assistance grab rail from the bathroom, concealed up his sleeve.[13]

In response to the news, received yesterday, that this detainee tested positive for COVID-19, Plaintiffs have urged the Court to immediately release more detainees. This is a puzzling response insofar as Plaintiffs have assumed all along that one of the detainees would test positive at some point and argued for a population reduction to minimize the risk of transfer. Defendants believe that sufficient reduction has already taken place, as ordered by the Court based on its acceptance of Plaintiffs' premise that the virus would eventually find its way into the detainee population. Because the Court has already reduced the detainee population in anticipation of a positive case of COVID-19, the fact that a single case has been confirmed does not mean that the Court should take additional drastic steps – particularly since almost one-third of the current detainees have confirmed their violent and lawless propensity in last Friday's disturbance.[14]

IV. THE APPLICABLE LAW

A. <u>The Standard on Preliminary Injunctions</u>

1. Preliminary injunctions generally: Courts disfavor preliminary injunctions that "exhibit any of three characteristics: (1) it mandates action (rather than prohibiting it), (2) it

---

[13] This detainee, and two others who did not suffer physical injuries but who complained of anxiety and chest pain, were separately taken to the hospital. One of the detainees (the detainee who complained about his shoulder) had a temperature of 99 and was tested for COVID-19, which was positive.

[14] Plaintiffs took umbrage with Defendants informing the Court of the facts of the Unit B riot after Defendants successfully argued that the riot should not be a topic in Sheriff Hodgson's deposition. The relevance of the riot to Defendants' position that detainees who are violent should not be released is clear. The relevance of the violent behavior of detainees, and the response thereto by BCSO, is highly attenuated to Plaintiffs' claim that the detainees are at risk of coronavirus infection.

changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win." *Mrs. Fields Franchising, LLC v. MFGPC,* 941 F.3d 1221, 1232 (10th Cir. 2019). All three characteristics apply here.

"It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (internal quotations omitted); *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 22 (2008); *Peoples Federal Savings Bank v. People's United Bank,* 672 F. 2d 1, 8-9 (1st Cir. 2012)(preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right).

The burden on Plaintiffs is not merely to show that there is a risk of infection if they remain detained. Their burden is to prove to the Court that they meet *all* the elements of the standard four-part test, and that includes a likelihood of winning on the merits of their legal claims. This cannot be overemphasized—it is not enough to show that continued detention carries a risk of infection. Plaintiffs must show that the risk of infection and Defendants' actions or inaction regarding that risk ***amounts to deliberate indifference*** to their medical needs. Nothing less will satisfy their burden of showing a likelihood of success on the merits of their Fifth Amendment claim.[15]

---

[15] Because Plaintiffs are not likely to win on the merits of their Fifth Amendment claim, the Court's determination of bail for individual class members does not meet the requirements of *Woodcock v. Donnelly,* 470 F.2d 93, 94 (1st Cir. 1972) (per curiam). While this Court suggested that this requirement was not absolute, Defendants believe the *Woodcock* approach to be sound. Moreover, unlike the present case, there was no issue in *Mapp v. Reno* (also relied upon by this Court), 241 F.3d 221, 228–29 (2d Cir. 2001), as to whether Congress had expressly limited federal judicial power to grant bail to aliens because ICE [then "INS"] had withdrawn its claim that mandatory detention applied. The Defendants in this case maintain that mandatory detention *does* apply to many of the class members. Therefore, under *Mapp's* reasoning, bail is **not** available for all class members and the Court may wish to reconsider its interpretation of *Mapp* accordingly.

In moving for a temporary restraining order or a preliminary injunction plaintiffs "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Id.* (setting out the standard four-part test); *Equal Employment Opportunity Comm'n, v. Astra USA, Inc.*, 94 F.3d 738, 742 (1st Cir. 1996)(burden of proof in a temporary restraining order or preliminary injunction motion is on the moving party). Thus, the Plaintiffs must meet all four requirements of the traditional test.

Courts generally do not issue mandatory preliminary injunctions unless the facts and law are clearly in favor of the moving party. *See Northeastern University v. BAE Systems Information and Electronic Systems Integration, Inc.*, Civil Action No. 13-12497-NMG, 2013 WL 6210646 at *7 (D. Mass. Nov. 27, 2017) *citing L.L. Bean v. Bank of America*, 630 F. Supp. 2d 83, 89 (D. Me. 2009). The likelihood of success on merits is the *sine qua non* of such motions. *Jean v. Massachusetts State Police*, 492 F. 3d 24, 26 (1st Cir. 2007).

In a situation where a movant seeks to require action of the nonmoving party, in alteration of the status quo, rather than maintenance of it, courts have held the moving party to a more rigorous standard. *See Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 151 (1st Cir. 1998). A mandatory preliminary injunction "disturbs rather than preserves the status quo" by affirmatively mandating action by the non-moving party. *See Lewis v. General Electric Co*., 37 F. Supp. 2d 55, 62 (D. Mass. 1999).

2. Irreparable harm cannot be assumed: On the facts of this case, Plaintiffs have not shown that there is irreparable harm to class members if they remain detained. It is not enough to speculate that continued detention will lead to widespread infection. The fact that the

coronavirus is spreading rapidly in Massachusetts does not mean that it will do so within BCHOC. The fact that there have been no confirmed cases of COVID-19 until this month underscores this point. 20 of 26 detainees in ICE B have now been tested; only the original test taken at the hospital has been positive. *See* Declaration of Steven Souza, attached hereto as Exhibit 1, at ¶ 9. The other nineteen tests came back negative today. *Id.* Every step that can be taken to reduce the risk to the ICE B detainees has already been taken. They were quarantined and medically monitored. All but six are in single-person cells, while the six are in two-person cells.[16] None of the 26 are in a general detainee population. *Id.*

Irreparable harm cannot be assumed from the fact of the pandemic alone. It must also be shown that the risk of infection is, essentially, unavoidable in detention and almost certainly avoidable in home confinement. The failure to fully evaluate these two situations with anything approaching an equal degree of rigor is addressed more fully below.

3. Plaintiffs are unlikely to succeed on the merits: Likelihood of success on the merits is a threshold issue. *See United States v. Weikert*, 504 F.3d 1, 5 (1st Cir.2007) ("[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.") (quoting *New Comm Wireless Servs., Inc. v. SprintCom, Inc*., 287 F.3d 1, 9 (1st Cir.2002)). Plaintiffs' constitutional and statutory claims are unlikely to succeed on the merits.

This prong of the four-part test for preliminary injunctive relief is often assumed away by the courts. It should not be. As is argued below in detail, Plaintiffs do not have evidence that

[16] It is worth noting that the inability of BCHOC to house all of the former ICE B detainees in single person cells is a direct consequence of their destroying Unit B.

ICE or BCHOC are deliberately indifferent to their medical needs. A difference in opinion about the risk of infection does not come close to meeting the applicable precedents on this point.

4. The balance of the equities favors Defendants: It is well-settled that the public interest in enforcement of United States immigration laws is significant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant."); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) ("There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permit[s] and prolong[s] a continuing violation of United States law." (internal marks omitted)).

Plaintiffs appear to assume that the risk of contracting COVID-19 outweighs all other considerations. The Court, in particular, has opined as to the unprecedented nature of the pandemic. *See* dkt. ## 64 & 86. But what must be weighed is the actual risk to detainees of detention **at BCHOC** (as opposed to some theoretical amalgamation of facilities imagined by Plaintiffs' experts) in light of the extensive steps taken versus the risk of harm to the community of releasing persons with a known propensity for violence, drunk driving, and the like along with risk of flight and of not allowing ICE to conduct its business without undue interference. That is what must be balanced here. Defendants maintain that the balance favors no further releases of detainees.[17]

[17] Even if the balance of the equities favors Plaintiffs, which Defendants deny, that alone is not sufficient for the Court to grant a preliminary injunction. Plaintiffs must still establish a likelihood of success on the legal merits of their Fifth Amendment claim, which they cannot do.

5. The public will be adversely impacted by excessive releases of individuals:

This point has been adequately argued, in both the prior briefs and through the submissions to the Court for the daily lists of detainees being considered for bail. *See* note 9, *supra*. It is essentially the same challenge the Court faces any time it is considering detention. How bad the person is, and what the risk is that they will misbehave, possibly violently, if released is an important consideration. Clearly, the criminal history presented to the Court for many of the as-yet unreleased detainees as well as the recent riot and assault on Sheriff Hodgson establish that there are real risks to the community of further releases. Moreover, the public has an interest in ICE being allowed to do its job without undue interference in the manner, and in accordance with the statutes, proscribed by Congress -- which includes mandatory detention for many of the detainees pre-removal. As stated in *Barco v. Price*:

> The public interest in enforcement of immigration laws is significant and so is the public interest in being protected from those who present a risk of danger. Releasing Plaintiffs would be contrary to public interest. Accordingly, the Court finds that Plaintiffs have failed to show that the injunction would not adversely affect the public interest.

Barco v. Price, -- F. Supp. 3d --, 2020 WL 2099890 (D.N.M. May 1, 2020)(involving an immigration detainee's claim for release owing to COVID-19), copy attached hereto as Exhibit 4.[18]

[18] "There can be no doubt that, with respect to immigration and deportation, federal judicial power is singularly constrained. See U.S. Const. art. I, § 8, cl. 4; *see also, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."),*" Mapp v. Reno*, 241 F.3d 221, 227 (2d Cir. 2001).

B. The Fifth Amendment Has Not Been Violated

To evaluate the constitutionality of a pretrial detention condition under the Fifth Amendment, a district court must determine whether those conditions "amount to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Kingsley v. Hendrickson*, ––– U.S. ––––, 135 S. Ct. 2466, 2473-74 (2015). Punishment may be shown through express intent or a restriction or condition that is not "reasonably related to a legitimate governmental objective." *Bell*, 441 U.S. at 539.

First, Plaintiffs do not present allegations or evidence to show Defendants have an "express intent" to punish Plaintiffs. Second, preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective. See *Jennings v. Rodriguez*, ––– U.S. ––––, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). So is protecting the community and complying with congressional directives. Third, Plaintiffs' current confinement does not appear excessive in relation to those objectives.

Plaintiffs' cited authority addresses the exposure of inmates or detainees to *existing* conditions within the facility at issue. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 682-83 (1978) (mingling of inmates with infectious diseases with others); *Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974) (same); *Helling v. McKinney*, 509 U.S. 25 at 33, 35, (1993) (placement of inmate with emphysema in a cell with a cellmate who smoked often). As set forth in the exhibits to Defendants' prior filings, (dkt. #26 Exhibit 1; #35 Exhibits 1 & 2; # 83 Exhibits 1 & 2), BCHOC is not mingling inmates who are known to have infectious disease with uninfected individuals; in fact, they are taking steps to try to prevent that.

The analysis of a Fifth Amendment claim for civil detainees often borrows on the more extensive canon of Eighth Amendment prisoner cases. *See, e.g., Swain v. Junior*, __ F.3d ___ (11th Cir. May 5, 2020, case # 20-11622)(copy attached). In the *Swain* case, the Eleventh Circuit stayed the district court's preliminary injunction in an immigration detainee case very similar to the present case. The Eleventh Circuit stated:

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

Swain, at 10-11 (copy attached hereto as Exhibit 3). Defendants submit that taking the same path as the district court did in the Southern District of Florida, which the Eleventh Circuit found problematic, would be a mistake. *See* the Court's Memorandum and Order, dkt. # 54.

First Circuit precedent is in accord with the Eleventh Circuit's opinion in *Swain.* "[P]rison officials ... cannot be deliberately indifferent if they responded reasonably to the risk, even if the harm ultimately was not avoided," *Leavitt v. Corr. Med. Servs., Inc*., 645 F.3d 484, 503-04 (1st

Cir. 2011); *Burrell v. Hampshire Cty*., 307 F.3d 1, 8 (1st Cir. 2002)(*citing Farmer*, 511 U.S. at 844). If under the totality of the circumstances as understood by prison officials at the time, the defendants took reasonable measures to avert potential harm, then they cannot be found to have been deliberately indifferent. *Id.* Such is the case here: BCHOC has taken extensive precautions to minimize the risk of a coronavirus outbreak. As stated in *Sacal-Michal*:

> The Court recognizes that the COVID-19 pandemic presents an extraordinary and unique public-health risk to society, as evidenced by the unprecedented protective measures that local, state, and national governmental authorities have implemented to stem the spread of the virus. And it is possible that despite ICE's best efforts, Sacal may be exposed and contract the virus. Moreover, Sacal's age and medical condition render him particularly vulnerable to serious complications from the virus. But the fact that ICE may be unable to implement the measures that would be required to fully guarantee Sacal's safety does not amount to a violation of his constitutional rights and does not warrant his release. Sacal has not demonstrated his likelihood of proving that ICE has failed to take reasonable measures to guarantee his safety.

Sacal-Michal v. Longoria, (S.D. Tx. March 27, 2020)(copy previously submitted).

Plaintiffs cite *Helling v. McKinney*, 509 U.S. 25, 36 (1993), for the proposition that involuntary exposure of a prison inmate to a hazard (in that case environmental tobacco smoke or "ETS") can form the basis of a claim for relief under the Eighth Amendment), but that case required deliberate indifference to the health risk, which has not remotely been shown here. As the Supreme Court said in *McKinney*:

> [S]uch claims require proof of a subjective component, and that where the claim alleges inhumane conditions of confinement or failure to attend to a prisoner's medical needs, the standard for that state of mind is the "deliberate indifference" standard of *Estelle v. Gamble*, 429 U.S. 97 (1976).
>
> On remand, the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct, which may have changed considerably since the judgment of the Court of Appeals.

Id.[19] At bottom, Plaintiffs in this case cannot establish the subjective factor of deliberate indifference regardless of how the Court weighs the objective factors. Deliberate indifference "defines a narrow band of conduct in this setting." *Feeney v. Corr. Med. Servs., Inc.*, 464 F.3d 158, 162 (1st Cir. 2006)(affirming this session's grant of summary judgment to defendants). The medical care provided must have been "so inadequate as to shock the conscience." *Id.* (quoting *Torraco v. Maloney*, 923 F.2d 231, 235 (1st Cir. 1991)).[20] *See also Whitley v. Albers*, 475 U.S. 312, 319 (1986) ("It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause."); *Battista v. Clarke*, 645 F.3d 449, 454 (1st Cir.2011) ("[S]o long as the balancing judgments are within the realm of reason and made in good faith, the officials' actions are not 'deliberate indifference.'").[21]

---

[19] Even if Plaintiffs could show a Fifth or Eighth Amendment violation, Plaintiffs provide no authority under which such a violation would justify immediate release, as opposed to injunctive relief that would leave Plaintiffs detained while ameliorating any alleged violative conditions within the facility. *See, e.g., Seifert v. Spaulding*, No. 18-11600-MGM, 2018 WL 7285967, at *2 (D. Mass. Sept. 11, 2018), report and recommendation adopted, No. CV 18-11600-MGM, 2019 WL 538253 (D. Mass. Feb. 11, 2019); *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005); *Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990).

[20] "Immigration detainees' constitutional claims status is akin to that of pretrial detainees. Pretrial detainees are protected under the Due Process Clause rather than the Eighth Amendment; however, the standard to be applied is the same as that used in Eight Amendment cases." Under the Eighth Amendment standard, a detainee must prove that defendants' withholding of essential health care amounted to 'deliberate indifference to a serious medical need.' Mere substandard care, malpractice, negligence, inadvertent failure to provide care, and disagreement as to the appropriate course of treatment is insufficient to prove a constitutional violation." *Doan v. Bergeron*, No. 15-CV-11725-IT, 2016 WL 5346935, at *4 (D. Mass. Sept. 23, 2016) *citing Burrell v. Hampshire Ctv.*, 307 F.3d 1, 7 (1st Cir. 2002) and *Ruiz-Rosa v. Rullan*, 485 F.3d 150, 156 (1st Cir. 2007)) (other citations and quotation marks omitted).

[21] In language that is applicable to this case, the court in *Sacal-Michal* stated that Plaintiff was unlikely to prove that ICE acted with deliberate indifference with respect to Sacal's health. "In other words, Sacal has not demonstrated that the conditions in which ICE maintains him in

C. Habeas Corpus Relief Is Extraordinary and Circumscribed

1. Conditions of confinement are not cognizable in a habeas petition:

Plaintiffs are seeking to address *conditions* of their confinement, not just the fact of or duration thereof: "Plaintiffs and members of the proposed class seek a writ of habeas corpus to remedy their unconstitutional detention in life-threatening *conditions* at Bristol County Immigration Detention Facilities." Complaint, ¶ 93 (emphasis supplied).

In a thoughtful opinion, Magistrate Judge Page Kelley reviewed this issue:

> Jenkins appears to be challenging the conditions of his confinement. This claim should be brought through a civil rights action pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that an individual aggrieved by a federal official's violation of his constitutional rights can bring an action for monetary relief). *See Kane v. Winn*, 319 F. Supp. 2d 162, 213 (D. Mass. 2004) ("Although a habeas corpus petition is the appropriate means to challenge the fact or duration of incarceration, actions challenging the conditions of confinement reside more in the heartland of civil actions under 42 U.S.C. § 1983 (for state prisoners), *Bivens*, 403 U.S. 388, 91 S. Ct. 1999 (for federal prisoners), or some other non-habeas doctrine or statute."). … Here, petitioner's complaints about the dangers he is facing do not challenge the length of his confinement.

Jenkins v. Spaulding, 2019 WL 1228093 (D. Mass. Feb. 22, 2020), Civil Action No. 19-10078-MPK.[22]

---

custody arise to the level of a constitutional violation. In addition, Sacal has not demonstrated a substantial likelihood of success on his fundamental argument—i.e., that the detention facility is incapable of protecting him from contracting COVID-19 or providing appropriate medical attention should he be infected. For these propositions, Sacal offers only conclusory arguments based on general articles regarding the highly-contagious nature of COVID-19 and its impact on the elderly and individuals with certain underlying medical conditions."

[22] The First Circuit has said that where a prisoner seeks relief from conditions of confinement that would result in a reduction of his sentence, he should bring a habeas claim, and

And, as this Court has stated in *Kane v. Winn*, 319 F. Supp. 2d 162, 213-15 (D. Mass. 2004):

> Although a habeas corpus petition is the appropriate means to challenge the "fact or duration" of incarceration, actions challenging the conditions of confinement reside more in the heartland of civil actions under 42 U.S.C. § 1983 (for state prisoners), *Bivens*, 403 U.S. 388, 91 S.Ct. 1999 (for federal prisoners), or some other non-habeas doctrine or statute. *See Heck v. Humphrey*, 512 U.S. 477, 481–83, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488–90, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973)). Various courts in this Circuit and elsewhere have dismissed habeas petitions (or individual claims contained therein) that challenged conditions of confinement rather than the fact or duration of confinement. *See, e.g., Melham v. Farquharson*, Civ. A. No. 03–10721–DPW, 2003 WL 21397987, at *1 n. 1 (D. Mass. June 17, 2003) (Woodlock, J.) (declining to address a habeas petitioner's claims insofar as they related to conditions of confinement); *Do Vale v. I.N.S.*, Nos. 01–216–ML, 01–507–ML, 2002 WL 1455347, at *9 (D.R.I. June 25, 2002) (dismissing such claims); *Barnes v. I.N.S.*, Civ. No. 01–48–PC, 2001 WL 1006077, at *7 (D.Me. Aug.30, 2001) (recommending a similar disposition); *Kamara v. Farquharson*, 2 F.Supp.2d 81, 89 (D.Mass.1998) (Saris, J.) (dismissing such claims).
>
> For most conditions of confinement claims, however, and particularly for those involving inadequate medical treatment, courts usually hold that habeas relief is not available. *See, e.g., Lee v. Winston*, 717 F.2d 888, 893 (4th Cir.1983); *United States v. Sisneros*, 599 F.2d 946, 947 (10th Cir.1979); *Crawford v. Bell*, 599 F.2d 890, 891–92 (9th Cir.1979). *But cf. Albers v. Ralston*, 665 F.2d 812, 815 (8th Cir.1981) (noting that a habeas action will lie to challenge conditions of confinement where substantial constitutional violations were alleged).

Id.

---

where he seeks relief from conditions of confinement that would not reduce his sentence, he should bring a civil rights claim. *See Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873-74 (1st Cir. 2010).

To similar effect is a decision handed down last Friday, *Barco v. Price*, _ F. Supp. 3d __ 2020 WL 2099890 (D.N.M. May 1, 2020)(Exhibit 4 hereto). In *Barco*, plaintiffs made the same challenges to their immigration confinement based on the threat of COVID-19 as have been made in this case. The district court determined that plaintiffs were unlikely to prevail on the merits of their preliminary injunction motion because "the Court finds that Plaintiffs are challenging the conditions of their detention, as opposed to its fact or duration, which is not appropriate under 28 U.S.C. § 2241." *Id.* Moreover, the court found that plaintiffs had not demonstrated that they had conditions that put them at a higher risk or that the conditions of confinement were not rationally related to the legitimate purpose of preventing aliens from absconding and ensuring that they appear for removal proceedings, citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 520-22 (2003); and *Zadvydas*, 533 U.S. at 690–91.

Regarding the irreparable harm prong of the preliminary injunction test, the district court stated:

> In essence, Plaintiffs are asking the Court to order their immediate release from Otero based on the possibility that they may suffer irreparable harm from COVID-19 should they contract it while detained there. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Accordingly, the Court finds that Plaintiffs have not shown that they will suffer irreparable harm unless the injunction is issued.
>
> Even if the Court were to order Plaintiffs' immediate release, the Court cannot make the finding that they would not face the risk of contracting COVID-19 outside of Otero, when comparing the United States 1,031,659 COVID-19 cases to Otero County's 5 COVID-19 cases.

Id.

In *Sacal-Michal v. Longoria*, (S.D. Tx. March 27, 2020)(copy previously submitted), the court rejected a civil immigration detainee's request to be released in light of his health issues and COVID-19. The court noted that a habeas petition can address the fact or duration of detention, but that "allegations that challenge rules, customs, and procedures affecting conditions of confinement are properly brought in civil rights actions." *Id., citing Schipke v. Van Buren*, 239 F. App'x 85, 85–86 (5th Cir. 2007). The court concluded that plaintiff was challenging the conditions of his confinement.[23]

> Sacal alleges that Respondents cannot prevent the COVID-19 virus from infecting the detention center where he is detained. … He contends that he will be exposed to COVID-19 via the medical staff or other detainees. And he alleges that because of his failing health, "[c]ontinued detention . . . presents a clear and present danger to his fundamental right to life." Sacal effectively alleges that ICE's inability to isolate him successfully, the movement of individuals within the detention facility, and the absence of adequate testing to identify carriers of the virus, all render it a certainty that he will contract the illness if maintained in custody. Those factors focus on the conditions of his confinement. A detention facility's protocols for isolating individuals, controlling the movement of its staff and detainees, and providing medical care are part and parcel of the conditions in which the facility maintains custody over detainees.

Id. A detainee can establish a constitutional violation based on inadequate conditions of his confinement. But to do so, he must demonstrate that the officials acted with deliberate indifference to his medical needs or his safety. *See* section B above.

---

[23] *Accord Muhammad v. Close*, 540 U.S. 749, 750 (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," *cited in Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016).

Presently, there is no legal basis to justify an alien's release based solely on COVID-19. *See Dawson v. Asher*, 2020 WL 1304557 (W.D. Wash. March 19, 2020). The *Dawson* court ruled that appropriate relief would be to order the agency to ameliorate any alleged violative conditions within the facility.

Outside of the immigration arena, courts have found that the threat of COVID-19 is not sufficient to justify release. For example, the court in *U.S. v. Jones* found that health risks are not the sole determinant of whether detention is appropriate, and every decision must include an individualized assessment of the existing standards for release eligibility. *See U.S. v. Jones*, 2020 WL 1323109, (D. Md. March 20, 2020).[24]

In *United States v. Martin*, United States District Court, D. Maryland, Southern Division, March 17, 2020 (2020 WL 1274857), the court stated:

> Finally, while the record confirms that Martin has disclosed that he suffers from asthma, high blood pressure, and diabetes, this alone is insufficient to rebut the proffer by the Government that the correctional and medical staff at CDC are implementing precautionary and monitoring practices sufficient to protect detainees from exposure to the COVID-19 virus. For all the above reasons, I reach the same conclusion as Chief Magistrate Judge Gesner. Martin has failed to rebut the presumption of detention, and the Government has established by clear and convincing evidence that he must continue to be detained for the protection of the community. Therefore, his appeal is DENIED.

In *United States of America v. Teon Jefferson*, United States District Court, D. Md. March 23, 2020 (2020 WL 1332011), the court rejected the plaintiff's contention that his asthma

[24] However, a separate court ruled that COVID-19 could establish changed circumstance to permit a redetermination of a defendant's bail based on new flight risk factors arising out of COVID-19. *See U.S. v. Stephens*, 2020 --- F. Supp.3d.---, 2020 WL 1295155 (S.D.N.Y. March 19, 2020). This is, of course, very different than court-ordered release.

constituted an unacceptable health risk that should result in release to home confinement with location monitoring. The court noted that no third-party custodian had been identified and that location monitoring is a particularly scarce. resource under the current conditions. *Id.*

In another COVID-19 release case, *United States v. Hamilton*, (E.D.N.Y. March 20, 2020), 2020 WL 1323036, the court rejected the plaintiff's argument that in light of his advanced age and medical conditions, the ongoing COVID-19 pandemic constitutes "another compelling reason" to permit his temporary release under 18 U.S.C. 3142(i)(4). According to the court:

> While the court is mindful of Mr. Hamilton's concerns, it does not believe that the COVID-19 outbreak—at this point in time—constitutes a sufficiently compelling reason to justify release under the circumstances of this case. Mr. Hamilton does appear to fall within a higher-risk cohort should he contract COVID-19; however, he does not suffer from any pre-existing respiratory issues and his medical conditions appear to have been well managed over the course of the past fourteen months of incarceration. Further, and perhaps most importantly, as of this writing, there have been no reported incidents of COVID-19 within MDC, and the Bureau of Prisons is taking system-wide precautions to mitigate the possibility of infection within its facilities. As such, given the risks that Mr. Hamilton's release would pose, the court concludes that the possibility of an outbreak at MDC is not a "compelling circumstance" justifying his release.

Id.

United States v. Gileno, (D. Conn. March 19, 2020), 2020 WL 1307108, is to similar effect: "The Court takes judicial notice of the fact that public health recommendations are rapidly changing. But at this time the Court cannot assume that the Bureau of Prisons will be unable to manage the outbreak or adequately treat Mr. Gileno should it emerge at his correctional facility while he is still incarcerated." *Id. Accord Nikolic v. Decker*, (S.D.N.Y. March 19, 2020),

2020 WL 1304398 (in a case not subject to the restrictions of 8 U.S.C. § 1252(f), court noted that a federal court should grant bail to a habeas petitioner only in unusual cases).

2. Class-wide relief remains inappropriate: Although the Court has certified the class of all immigration detainees who were held at BCHOC at the outset of the litigation, the Defendants believe that the Court should reconsider its decision now that it has experienced in detail just how varied the situation is for every detainee. There is a lack of commonality among the class members such that the Court has had to make individual determinations. Most importantly, there is no class-wide relief available unless the Court is willing to order release of all detainees – which it should not do in light of the violent, criminal propensity of many class members.

In addition to the obvious differences in the criminal records of the detainees, the individuals also vary greatly on a number of other factors. For example, risk of flight, medical conditions, situations for home release, and many other potentially relevant variables. Thus, there is no commonality of the purported class members which is *required* for class certification. *Walker v. Osterman Propane LLC*, 411 F. Supp. 3d 100, 108 (D. Mass. 2019).

Although the Court has decided otherwise for purposes of class certification, Defendants maintain that the Court lacks jurisdiction to enjoin the normal operation of 8 U.S.C. § 1226(c).[25] The Supreme Court has instructed that the provision is a bar on "classwide injunctive relief against the operation of §§ 1221-1231" with a carve out that applies to "individual cases." *Reno*

[25] Defendants recognize that district courts have authority to issue a writ of habeas corpus to address constitutional wrongs in individual cases. That is not what the Court has proposed, and, more importantly, it is not what Plaintiffs have sought. It is not for the Court to recast Plaintiffs' theory of recovery (i.e., the broadest class possible) nor the legal basis upon which it stands.

v. Am. Arab Anti-Discrimination Comm., 525 U.S. 471, 481-82 (1999) (emphasis added).[26] While this Court labels this as dicta, *see* dkt. # 64 at 15-16, in *Jennings v. Rodriguez*, the Court indicated that section 1252(f)(1) would apply to constitutional claims like those raised by Plaintiffs because they seek to enjoin the ordinary application of section 1226(c) as unconstitutional. *See* No. 15-1204, --- U.S. ---, 138 S. Ct. 830, 852 (recognizing that the Ninth Circuit had found that section 1252(f)(1) did not bar its jurisdiction over the statutory claims but concluding that "[t]his reasoning does not seem to apply to an order granting relief on constitutional grounds"). This provision is entitled "limit on injunctive relief," and it unquestionably prohibits class-based injunctions while preserving individual access to a habeas writ and all forms of equitable relief.[27] The Sixth Circuit recently echoed this sentiment, stating that, while "[i]t is true that 'declaratory relief will not always be the functional equivalent of injunctive relief,' … in this case, it is the functional equivalent." *Hamama v. Adducci*, 912 F.3d 869, 880 n.8 (6th Cir. 2018) (citing *Alli v. Decker*, 650 F.3d 1007, 1014 (3d Cir. 2011)). "The practical effect of a grant of declaratory relief as to Petitioners' detention would be a class-wide injunction against the detention provisions, which is barred by § 1252(f)(1)." *Id*.

The Sixth Circuit also stated, "[n]evertheless, we find that 8 U.S.C. § 1252(f)(1) bars the district court from entering class-wide injunctive relief for the detention-based claims. In our

---

[26] In *Hamama*, the Sixth Circuit rejected petitioners' argument that this exception means that § 1252(f)(1) did not apply to class members in immigration proceedings. *Hamama*, 912 F.3d 869, 877-78 (6th Cir. 2018).

[27] Notably, Plaintiffs' motion seeks injunctive relief, not declaratory relief, so even assuming § 1252(f)(1) would not bar the declaratory relief they seek in their complaint, it still bars the relief at issue presently before this Court. See TRO Mot. dkt. # 11 (requesting "release of plaintiffs and similarly situated detainees," "implementation" of guidance and protocols, "ceasing placing new detainees" in the facilities).

view, *Reno* [525 U.S. 471] unambiguously strips federal courts of jurisdiction to enter class-wide injunctive relief for the detention-based claims." *Id.* The Sixth Circuit continued:

> Second, the claim that "the district court was not enjoining or restraining the statutes" is implausible on its face. The district court, among other things, ordered release of detainees held "for six months or more, unless a bond hearing for any such detainee is conducted"; created out of thin air a requirement for bond hearings that does not exist in the statute; and adopted new standards that the government must meet at the bond hearings ("shall release ... unless the immigration judge finds, by clear and convincing evidence, that the detainee is either a flight risk or a public safety risk"). If these limitations on what the government can and cannot do under the removal and detention provisions are not "restraints," it is not at all clear what would qualify as a restraint. The district court did not have jurisdiction to enter class-wide injunctive relief on Petitioners' detention-based claims.

Id., at 879-880.

3. Plaintiffs Lack Article III Standing

Although the Court has previously rejected Defendants' argument on standing in the context of class certification, Defendants believe it should be revisited in the preliminary injunction context. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The "irreducible constitutional minimum of standing" contains three requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. Second, the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the Court." *Id*. Third,

it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." *Id*. at 560-61 (internal citations omitted). Plaintiffs do not raise a cognizable injury, the claimed injury is not caused by Defendants nor is the alleged injury redressable by this Court. Put another way, the risk of infection is not a result of what Defendants have done, are doing or have failed to do. The risk is a consequence of a world-wide pandemic. In addition, whether Plaintiffs will contract COVID-19 is entirely conjectural. As noted, there has been only one confirmed case at BCHOC in the last six weeks. Bristol County has expended extensive resources and efforts to address the very issues that Plaintiffs have identified.

IV. Plaintiffs' False Dichotomy

A. <u>Release of All Detainees Is Not Required</u>

Plaintiffs have steadfastly refused to suggest any level of detainee reduction that would be safe. Nor have they offered suggestions as to what further steps ought to be taken at BCHOC to reduce their risk of infection. Indeed, although they are highly critical of what steps have been taken, see Memorandum in Support of Preliminary Injunction motion at pp. 14-16, the only suggestions they make is (i) release all detainees; and (ii) (implied) conduct more testing. *Id.* Finally, they have opposed transfers of BCHOC detainees to other facilities. This reinforces that their goal all along has been to secure release without regard to any other considerations such as the safety of the community. Even now, with most or all of Unit B having engaged in wanton destruction of the facility as well as violence against Sheriff Hodgson, Plaintiffs continue to seek immediate release of detainees without any consideration of what unit the detainees are held in, what the living arrangements are and what the current detainee population is.[28]

[28] As just one of a multitude of examples of Plaintiffs' approach that complete release is the only solution, their expert Keller assumes, *without ever having visited BCHOC*, that there is nothing other than release that could reduce the risk of infection. This Court has indicated that

It is important to review what we are trying to achieve. What the parties, the Court and the Defendants are seeking is to minimize is the risk of the detainees (and, presumably, BCHOC staff and detainees' family) getting infected with COVID-19. There are a number of ways in which that can be done. None of the possible steps is exclusive. There is no single right way to do this and there is no way to achieve absolute protection from the virus. The CDC Guidance for correctional institutions does not suggest that release, or even a six-foot social distancing, is the only option to increase facility safety. *See* Ex. 2, *passim.*

Plaintiffs have painted an unrealistic, black and white picture in which the *only* effective means of protection is the release of all detainees.[29] This is flawed in both logic and pragmatics. First, there is no guarantee that the detainees will not encounter COVID-19 upon release. *See* section 3 *infra*. Second, the risk of contracting COVID-19 if class members remain detained is also not certain. In the six weeks since this case was filed, only one case of coronavirus has been confirmed in the detainee or inmate population. That stands in stark contrast to the doomsday predictions of Plaintiffs and their experts, and to the spread of the virus in the community at large.

BCHOC is not like the world at large. This is because BCHOC is able to control who comes into its facility, where they go, and what steps are taken to screen such individuals. Social

---

population reduction may be achieved by means other than release: "Nor does it matter how the density of Detainees is reduced. Transfer to less crowded facility, deportation, release on bond, or simply declining to contest lawful residence -- any of these methods would effectively minimize the concentration of people in the facility. This affords the government greater flexibility and minimizes the differences among the various Detainees." Opinion, dkt. # 64 at p. 23.

[29] "The only way to effectively inhibit the spread of COVID-19 and to protect Plaintiffs and others is to immediately release Plaintiffs." Complaint, ¶ 30.

interaction, the primary focus of the social distancing recommendations, is much more limited at BCHOC than in the outside world. Perhaps more importantly, there is virtually no information available regarding the conditions where the detainees who have been released are living, or where the others would live. Thus, it is far too simple to contrast the exaggerated danger of BCHOC with the equally exaggerated safety of release. So it is by no means clear that release is a panacea.[30]

B. Plaintiffs Exaggerate Conditions in BCHOC

Plaintiffs have overstated the risk of COVID-19 infection within BCHOC. In the Complaint at ¶ 3, they claimed "that the dangerous conditions in the Bristol County Immigration Detention Facilities where Plaintiffs are confined will imminently result in the uncontrolled spread of COVID-19 and the likely death of many detainees including Plaintiffs." This claim was made on March 27, 2020, almost six weeks ago. And there is a single confirmed case as of now. That is hardly an imminent spread as a consequence of "confinement conditions [that] are a tinderbox, that once sparked will engulf the facility." *Id.*, ¶ 29.

Moreover, Plaintiffs have made numerous claims that are simply untrue. This is not just a "he said/she said" situation. There are real facts, and the Court must determine them. For example, the claims that the detainees are "without adequate soap, toilet paper, and other daily necessities" (Complaint, ¶ 3; ¶ 70); and that BCHOC "admit[s] new detainees without COVID-

[30] Plaintiffs say "Most people who develop serious illness will need advanced support. This level of supportive care requires highly specialized equipment that is in limited supply, even in non-detention settings, and an entire team of dedicated medical care providers." Complaint, ¶ 56. There is no evidence that any detainee has access to such care outside BCHOC, and, indeed there is good reason to think it is not as the immigrant population is generally uninsured. A detainee requiring advanced care would be transported from BCHOC and ICE would pay for his or her care; *see generally* affidavit of Sheriff Hodgson submitted with the Opposition to the TRO Motion, dkt. # 26, Ex. 1.

19 testing or screening [and] den[ies] access to testing and medical care for Plaintiffs and other detainees" (*id.*), are absolutely wrong. Throughout the litigation, and before, there was always adequate soap and toilet paper. Medical care and testing, including screening, has been continuously available. *See, e.g.*, Declarations of Dr. Nicholas Rencricca and Debra Jezard, dkt. #35.

There have also been cleaning supplies on hand including disinfectant; *see* Complaint, ¶ 21. Defendants are not "introducing daily new detainees in with the general population without any mandatory quarantine period." Complaint, ¶ 26; *see, e.g.* dkts. 87 & 109. And the assertion that "Plaintiffs are unaware of any meaningful safety measures enacted by Defendants since the inception of this crisis," Complaint, ¶ 28, is clearly a statement of how unfamiliar Plaintiffs are with the actual management of BCHOC.

Two additional claims made in the Complaint are worth noting:

> The [ICE] protocols also do not address: imminent shortages of medical supplies and staffing or education of detained people and staff about the virus, amongst other critical issues.
>
> Further, there is substantial evidence that ICE's COVID-19 protocols are not being followed in detention centers throughout the country, including Bristol County Immigration Detention Facilities.

Complaint, ¶¶ 76 & 77. There has been no evidence developed in the case to date that there is a shortage of medical supplies at BCHOC or that the staff and detainees have not been educated about the risks of the virus. The opposite has been shown in Defendants' filings, including the declarations and exhibits thereto. Nor is there any evidence that BCHOC has not been following ICE's COVID-19 guidance. Moreover, much of expert opinion offered by Plaintiffs is by persons who have either never been to BCHOC or who only had limited entry to BCHOC, and

who therefore make generalized statements about correctional facilities in the abstract and not in particular about BCHOC. *See, e.g.,* Declarations of Dr. Keller and Gartland.

C. Plaintiffs Understate the Risk Outside of BCHOC

"No one and no place is immune from COVID-19 infection, illness, and death," Complaint, ¶ 14. This applies equally to the locations to which detainees have been, or will be, released—about which we know virtually nothing. An article cited by Plaintiffs' expert Keller (dkt. 94-1) states:

> In addition, **our findings suggest that home isolation of persons with suspected COVID-19 might not be a good control strategy.** Family members usually do not have personal protective equipment and lack professional training, which easily leads to familial cluster infections. During the outbreak, the government of China strove to the fullest extent possible to isolate all patients with suspected COVID-19 by actions such as constructing mobile cabin hospitals in Wuhan, which ensured that all patients with suspected disease were cared for by professional medical staff and that virus transmission was effectively cut off. As of the end of March, the SARS-COV-2 epidemic in China had been well controlled.[31]

Here is what Plaintiffs have argued is relevant to a decision regarding the risk of continued detention:

1. Who is coming into the ICE detention facility;
2. What screening has been done of these people:
3. What are the dimensions of all the spaces in which the detainees are housed;
4. How many people live in the facility;
5. What cleaning supplies are available;
6. How often is the facility cleaned and with what substances;

[31] Zhen-Dong Guo, et al. "Aerosol and Surface Distribution of Severe Acute Respiratory Syndrome Coronavirus 2 in Hospital Wards, Wuhan, China, 2020" (https://wwwnc.cdc.gov/eid/article/26/7/20-0885_article, last accessed 5/4/20)(emphasis supplied)(citing Rui Huang, et al., A family cluster of SARS-CoV-2 infection involving 11 patients in Nanjing, China, published in The Lancet Infectious Diseases, vol.20, issue 5,May 2020, Pages 534-535 (available at https://www.sciencedirect. com/science/article/pii/S147330992030147X?via%3Dihub, last accessed 5/4/20).

> 7. Who is preparing meals and what steps are taken to ensure there is no contamination of the food, from when it is brought into the facility to when it is served;
> 8. What is the sleeping arrangement for each person;
> 9. How wide are the halls and spaces through which residents must pass;
> 10. What testing has been done of the residents for the virus;
> 11. What are the protocols for preventing the virus's spread;
> 12. Has anyone living there tested positive for the virus;
> 13. Has anyone that any of the residents been in contact with tested positive; and
> 14 What was done if anyone tested positive?

The list could be much longer based on the arguments made by Plaintiffs, the discovery they have promulgated, the questions emailed to defense counsel, and the topics raised at the three depositions. Yet, when Defendants asked essentially the same questions of Plaintiffs, they refused to answer.[32] In response to interrogatories seeking information regarding the conditions outside of BCHOC, plaintiffs said:

> This litigation concerns whether the practices and conditions of confinement at the Bristol County House of Correction and Facilities (BCHOC) violate Petitioners' constitutional and statutory rights. The information requested in Respondent's Interrogatory No. 1 exclusively pertains to details about the lives and livelihoods of class members who are no longer in custody at BCHOC and their co-habitants. The requested information bears no relationship to whether the practices or conditions at BCHOC violate Plaintiff class members' constitutional or statutory rights nor any applicable defense to those allegations.

In response to an interrogatory seeking information as to whether any released detainee has experienced flu-like symptoms or been tested for COVID-19 after release, Plaintiffs refused to answer. When asked if any family member living with the released detainee had experienced

[32] Defendants are filing a motion to compel compliance with their discovery requests. In the motion, Defendants will explain how lead counsel for Plaintiffs assured defense counsel that responses were coming, then waited until just before midnight on Monday, May 4, 2020 to serve responses that contained **no** responsive information whatsoever to the interrogatories and only documents that had been previously filed with the Court in response to the document requests. This made it effectively impossible for defense counsel to file a motion to compel and get responses on a timely basis for the May 7, 2020 hearing.

symptoms or been tested, Plaintiffs stonewalled. When asked if anyone in a household in which Plaintiffs proposed an inmate be released to had tested positive or exhibited symptoms, Plaintiffs again objected and provided no information. If the risk of infection is worth considering at BCHOC, then the relative risk of infection upon release must also be considered. Absent information regarding the conditions in the locations where the released detainees are to live, Plaintiffs are asking the Court to *assume* that the conditions are safer. That is insufficient to meet *their* burden of proof to show that the benefits of the relief sought outweigh the harm (not to mention that it does not establish deliberate indifference as required).

For example, the Court has no idea whether one person or twenty people live at any proposed or existing release location. The Court does not know how many people there go out and work everyday. The Court has no idea about what anyone living there is doing to prevent infection. The Court is in the dark as to whether anyone living there has tested positive for COVID-19 or exhibited symptoms. As Plaintiffs have repeatedly asserted, someone can be infected and be asymptomatic, so the protocols for maintaining social distance and hygiene are essential. But we know absolutely nothing about that for any of the released detainees or the remaining detainees for whom release is sought. And that is just a partial list of the facts that Plaintiffs assert are key for the Court's determination of the safety of detention but which they claim are wholly irrelevant to a release decision.

It is true that home quarantined individuals have the *potential* to exercise greater control over who they come into contact with *if* they choose to comply with Governor Baker's recommendation that they stay at home. This is not, at least not yet, a mandatory order. And the Court's order that the released detainees must stay at home only applies to the detainees and not to anyone else living in the residence. Even families that chose to comply typically have

someone going out to buy food, and many households have one or more people that are working outside the home still. In addition, it is likely that some families of released detainees will have fewer resources and diminished access to social services as a consequence of the pandemic. This puts additional economic pressure on them to continue working outside the home.

As stated above, Massachusetts has experienced an almost eight-fold increase in cases. The Court and the government have very little means of knowing, much less controlling, the extent to which the detainees *and their families* practice appropriate precautions against the virus. While the Court has ordered house arrest, the Court neither has authority over, nor insight into, the behavior of those around the detainees. Thus, the risk of the detainees contracting COVID-19 upon release is far from zero.

CONCLUSION

While the current pandemic may be unprecedented in our lifetimes, courts have dealt with challenges to the conditions of detention before, and there is a well-established legal path. That path requires Plaintiffs to prove, among other things, a likelihood of establishing that Defendants have been deliberately indifferent to the risk of infection and detainees' medical needs. They have not, and cannot, meet their burden. This Court must not let bad facts lead it to bad law. The Court has reduced the immigration detainee population density at the Bristol County House of Corrections through individualized bond determinations. No further relief is necessary nor warranted under the law.

Respectfully submitted,

ANDREW E. LELLING,
United States Attorney

By: */s/ Thomas E. Kanwit*
Thomas E. Kanwit
Michael Sady
Assistant U.S. Attorneys
U.S. Attorney's Office
John J. Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3100
thomas.kanwit@usdoj.gov
michael.sady@usdoj.gov

May 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Thomas E. Kanwit

Dated: May 6, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARIA ALEJANDRA CELIMEN SAVINO; JULIO CESAR MEDEIROS NEVES; and ALL THOSE SIMILARLY SITUATED,	)	
Petitioners,	)	C.A. No. 20-10617-WGY
v.	)	
STEVEN J. SOUZA,	)	
Respondent.	)	

THIRD DECLARATION OF STEVEN SOUZA

I, Steven Souza, do hereby depose under oath and with personal knowledge, and from information provided to me by individuals with personal knowledge, the following:

1. As this Court is aware, there was a disturbance in Unit B of the ICE immigration detainee building at the Bristol County House of Corrections ("BCHOC") on Friday, May 1, 2020. Although the investigation of this incident is ongoing, what occurred amounted to a prison riot. During the course of the riot, detainees ripped sinks off the walls and smashed them. They broke windows. They barricaded doors and refused to admit prison personnel. They smashed holes in the walls. They rendered Unit B uninhabitable.

2. This incident purportedly arose when one of the detainees reported flu-like symptoms and was told he would be taken to the medical unit on the Main Campus for testing and then placed in isolation, in accordance with the facility's COVID-19 medical guidance. An additional group of detainees, nine in total, also claimed symptoms and they were also told that they would be taken out of the unit for testing and isolation. They refused.

3. Staff contacted Sheriff Hodgson to inform him of the situation. Sheriff Hodgson

entered Unit B to try to talk the detainees down from their confrontational stance, and one of the detainees threw a chair at the Sheriff striking his arm and injuring him. BCHOC staff eventually regained control of the Unit with the involvement of the Special Operations Unit of Bristol County Sheriff's Office.

4. One of the detainees (who had complained of flu-like symptoms prior to the incident) claimed his shoulder was hurt during the riot. This person, and two other detainees, were separately taken to a local hospital. Neither of the other two had physical injuries and all three were released from medical care after observation for several hours. The detainee that had complained of flu-like symptoms (the one who complained of his shoulder) while at BCHOC before the riot had his temperature taken at the hospital. It was 99 degrees, so he was given a test for coronavirus. The test came back positive yesterday.

5. Prior to receiving this information, all of Unit B was placed in isolation, one detainee per cell, as a consequence of the riot, the uninhabitable condition of Unit B, and as a precaution since 10 of the 26 Unit B members claimed two COVID-like symptoms. The individual who tested positive had been in Unit B since late November. 20 (out of 26 total) detainees who were in Unit B have now been tested (including the one tested at the hospital), and six detainees have refused to be tested. Of those who were tested, 19 tested negative and one has tested positive (the one tested at the hospital).

6. In addition, ICE has been asked whether there have been releases from Unit B in the last two weeks or so and, if so, where those people are located and who they are. The detainee who tested positive is back at BCHOC but in a cell by himself .

7. Because of the extensive damage to Unit B, the detainees who had been housed there will not be able to be returned to that unit for some time. Of these 26 detainees, 16 are

housed in Unit EE; 4 in Unit ED; and 6 in Unit EC. All are in single cells, with their own toilets and sinks. They were all in quarantine as a result of our COVID-19 protocol to isolate individuals who are complaining of COVID-19 symptoms and those who may have been exposed to them; while the nineteen for whom the test was negative do not need to be quarantined for COVID-19, they will continue to be separated from the general detainee population for security reasons.

8. In another troubling incident, on May 5, 2020, detainees in Unit 2 East spread human feces on the walls in the unit, and intentionally clogged the toilets with toilet paper causing them to overflow and pour toilet water on the bathroom floor. It appears that these incidents are a result of the on-going litigation as BCHOC has not had any incidents with detainees before the litigation. This may cause some limited additional cell re-assignments.

9. Including the 26 detainees mentioned above, BCHOC has 82 detainees at its facility. Of the remaining 56 non-Unit B detainees, 12 are housed in Unit A, 38 are housed in 2 East, 5 are in Unit EB, and 1 is housed in Unit EA.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS SIXTH_____ DAY OF MAY, 2020.

/s/ Steven Souza
STEVEN SOUZA,
Superintendent Bristol County
House of Corrections

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**.

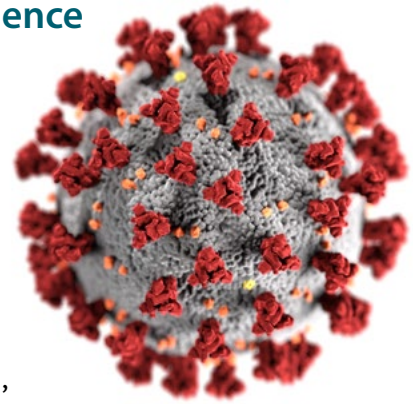
The US Centers for Disease Control and Prevention (CDC) will update this guidance as needed and as additional information becomes available. Please check the following CDC website periodically for updated interim guidance: https://www.cdc.gov/coronavirus/2019-ncov/index.html.

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.

Why is this guidance being issued?

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

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

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

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

What topics does this guidance include?

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

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

Definitions of Commonly Used Terms

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

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

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

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

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

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

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

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

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

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

Facilities with Limited Onsite Healthcare Services

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

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

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

COVID-19 Guidance for Correctional Facilities

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

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

Operational Preparedness

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

Communication & Coordination

√ **Develop information-sharing systems with partners.**

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

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

√ **Review existing pandemic flu, all-hazards, and disaster plans, and revise for COVID-19.**

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

√ **Coordinate with local law enforcement and court officials.**

- Identify lawful alternatives to in-person court appearances, such as virtual court, as a social distancing measure to reduce the risk of COVID-19 transmission.
- Explore strategies to prevent over-crowding of correctional and detention facilities during a community outbreak.

√ **Post signage throughout the facility communicating the following:**

- **For all:** symptoms of COVID-19 and hand hygiene instructions
- **For incarcerated/detained persons:** report symptoms to staff
- **For staff:** stay at home when sick; if symptoms develop while on duty, leave the facility as soon as possible and follow CDC-recommended steps for persons who are ill with COVID-19 symptoms including self-isolating at home, contacting their healthcare provider as soon as possible to determine whether they need to be evaluated and tested, and contacting their supervisor.
- Ensure that signage is understandable for non-English speaking persons and those with low literacy, and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or low-vision.

Personnel Practices

√ **Review the sick leave policies of each employer that operates in the facility.**

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

- √ **Identify staff whose duties would allow them to work from home. Where possible, allowing staff to work from home can be an effective social distancing strategy to reduce the risk of COVID-19 transmission.**
  - o Discuss work from home options with these staff and determine whether they have the supplies and technological equipment required to do so.
  - o 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.
  - o Allow staff to work from home when possible, within the scope of their duties.
  - o Identify critical job functions and plan for alternative coverage by cross-training staff where possible.
  - o 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.
  - o 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.
  - o 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.**
  - o Standard medical supplies for daily clinic needs
  - o Tissues
  - o Liquid soap when possible. If bar soap must be used, ensure that it does not irritate the skin and thereby discourage frequent hand washing.
  - o Hand drying supplies
  - o Alcohol-based hand sanitizer containing at least 60% alcohol (where permissible based on security restrictions)
  - o Cleaning supplies, including EPA-registered disinfectants effective against the virus that causes COVID-19

- Recommended PPE (facemasks, N95 respirators, eye protection, disposable medical gloves, and disposable gowns/one-piece coveralls). See PPE section and Table 1 for more detailed information, including recommendations for extending the life of all PPE categories in the event of shortages, and when face masks are acceptable alternatives to N95s.
- Sterile viral transport media and sterile swabs to collect nasopharyngeal specimens if COVID-19 testing is indicated

√ **Make contingency plans for the probable event of PPE shortages during the COVID-19 pandemic, particularly for non-healthcare workers.**

- See CDC guidance optimizing PPE supplies.

√ **Consider relaxing restrictions on allowing alcohol-based hand sanitizer in the secure setting where security concerns allow.** If soap and water are not available, CDC recommends cleaning hands with an alcohol-based hand sanitizer that contains at least 60% alcohol. Consider allowing staff to carry individual-sized bottles for their personal hand hygiene while on duty.

√ **Provide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing.** (See Hygiene section below for additional detail regarding recommended frequency and protocol for hand washing.)

- Provide liquid soap where possible. If bar soap must be used, ensure that it does not irritate the skin and thereby discourage frequent hand washing.

√ **If not already in place, employers operating within the facility should establish a respiratory protection program as appropriate, to ensure that staff and incarcerated/detained persons are fit tested for any respiratory protection they will need within the scope of their responsibilities.**

√ **Ensure that staff and incarcerated/detained persons are trained to correctly don, doff, and dispose of PPE that they will need to use within the scope of their responsibilities.** See Table 1 for recommended PPE for incarcerated/detained persons and staff with varying levels of contact with COVID-19 cases or their close contacts.

Prevention

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

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

Operations

√ **Stay in communication with partners about your facility's current situation.**

- State, local, territorial, and/or tribal health departments
- Other correctional facilities

√ **Communicate with the public about any changes to facility operations, including visitation programs.**

- √ **Restrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.**
  - 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.**

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.
  - o **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.
  - o **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.
  - o **Avoid touching your eyes, nose, or mouth without cleaning your hands first.**
  - o **Avoid sharing eating utensils, dishes, and cups.**
  - o **Avoid non-essential physical contact.**
- √ **Provide incarcerated/detained persons and staff no-cost access to:**
  - o **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.
  - o **Running water, and hand drying machines or disposable paper towels for hand washing**
  - o **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).
  - o **If an individual has symptoms of COVID-19** (fever, cough, shortness of breath):
    - Require the individual to wear a face mask.
    - Ensure that staff who have direct contact with the symptomatic individual wear recommended PPE.
    - Place the individual under medical isolation (ideally in a room near the screening location, rather than transporting the ill individual through the facility), and refer to healthcare staff for further evaluation. (See Infection Control and Clinical Care sections below.)
    - Facilities without onsite healthcare staff should contact their state, local, tribal, and/or territorial health department to coordinate effective medical isolation and necessary medical care.

- **If an individual is a close contact of a known COVID-19 case (but has no COVID-19 symptoms):**
  - Quarantine the individual and monitor for symptoms two times per day for 14 days. (See Quarantine section below.)
  - Facilities without onsite healthcare staff should contact their state, local, tribal, and/or territorial health department to coordinate effective quarantine and necessary medical care.

√ **Implement social distancing strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of the presence of symptoms).** Strategies will need to be tailored to the individual space in the facility and the needs of the population and staff. Not all strategies will be feasible in all facilities. Example strategies with varying levels of intensity include:

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

- √ **Communicate clearly and frequently with incarcerated/detained persons about changes to their daily routine and how they can contribute to risk reduction.**
- √ **Note that if group activities are discontinued, it will be important to identify alternative forms of activity to support the mental health of incarcerated/detained persons.**
- √ **Consider suspending work release programs and other programs that involve movement of incarcerated/detained individuals in and out of the facility.**
- √ **Provide** up-to-date information about COVID-19 **to incarcerated/detained persons on a regular basis, including:**
  - o Symptoms of COVID-19 and its health risks
  - o 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.
  - o In very small facilities with only a few staff, consider self-monitoring or virtual monitoring (e.g., reporting to a central authority via phone).
  - o 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:**
  - o Symptoms of COVID-19 and its health risks
  - o Employers' sick leave policy
  - o **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.
  - o **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.
  - o **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.**
  - o Employees who are close contacts of the case should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).

√ **When feasible and consistent with security priorities, encourage staff to maintain a distance of 6 feet or more from an individual with respiratory symptoms while interviewing, escorting, or interacting in other ways.**

√ **Ask staff to keep interactions with individuals with respiratory symptoms as brief as possible.**

Prevention Practices for Visitors

√ **If possible, communicate with potential visitors to discourage contact visits in the interest of their own health and the health of their family members and friends inside the facility.**

√ **Perform verbal screening (for COVID-19 symptoms and close contact with cases) and temperature checks for all visitors and volunteers on entry.** See Screening section below for wording of screening questions and a recommended procedure to safely perform temperature checks.

- Staff performing temperature checks should wear recommended PPE.
- Exclude visitors and volunteers who do not clear the screening process or who decline screening.

√ **Provide alcohol-based hand sanitizer with at least 60% alcohol in visitor entrances, exits, and waiting areas.**

√ **Provide visitors and volunteers with information to prepare them for screening.**

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

√ **Promote non-contact visits:**

- Encourage incarcerated/detained persons to limit contact visits in the interest of their own health and the health of their visitors.
- Consider reducing or temporarily eliminating the cost of phone calls for incarcerated/detained persons.
- Consider increasing incarcerated/detained persons' telephone privileges to promote mental health and reduce exposure from direct contact with community visitors.

√ **Consider suspending or modifying visitation programs, if legally permissible. For example, provide access to virtual visitation options where available.**

- If moving to virtual visitation, clean electronic surfaces regularly. (See Cleaning guidance below for instructions on cleaning electronic surfaces.)
- Inform potential visitors of changes to, or suspension of, visitation programs.
- Clearly communicate any visitation program changes to incarcerated/detained persons, along with the reasons for them (including protecting their health and their family and community members' health).
- If suspending contact visits, provide alternate means (e.g., phone or video visitation) for incarcerated/detained individuals to engage with legal representatives, clergy, and other individuals with whom they have legal right to consult.

NOTE: Suspending visitation would be done in the interest of incarcerated/detained persons' physical health and the health of the general public. However, visitation is important to maintain mental health.

If visitation is suspended, facilities should explore alternative ways for incarcerated/detained persons to communicate with their families, friends, and other visitors in a way that is not financially burdensome for them. See above suggestions for promoting non-contact visits.

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

Management

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

Operations

√ **Implement alternate work arrangements deemed feasible in the** Operational Preparedness **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.

√ **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.

- If cohorting is necessary:
  - **Only individuals who are laboratory confirmed COVID-19 cases should be placed under medical isolation as a cohort. Do not cohort confirmed cases with suspected cases or case contacts.**
  - Unless no other options exist, do not house COVID-19 cases with individuals who have an undiagnosed respiratory infection.
  - Ensure that cohorted cases wear face masks at all times.

√ **In order of preference, individuals under medical isolation should be housed:**

- Separately, in single cells with solid walls (i.e., not bars) and solid doors that close fully
- Separately, in single cells with solid walls but without solid doors
- As a cohort, in a large, well-ventilated cell with solid walls and a solid door that closes fully. Employ social distancing strategies related to housing in the Prevention section above.
- As a cohort, in a large, well-ventilated cell with solid walls but without a solid door. Employ social distancing strategies related to housing in the Prevention section above.
- As a cohort, in single cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. (Although individuals are in single cells in this scenario, the airflow between cells essentially makes it a cohort arrangement in the context of COVID-19.)
- As a cohort, in multi-person cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. Employ social distancing strategies related to housing in the Prevention section above.
- Safely transfer individual(s) to another facility with available medical isolation capacity in one of the above arrangements
  (NOTE—Transfer should be avoided due to the potential to introduce infection to another facility; proceed only if no other options are available.)

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

√ **If the number of confirmed cases exceeds the number of individual medical isolation spaces available in the facility, be especially mindful of cases who are at higher risk of severe illness from COVID-19.** Ideally, they should not be cohorted with other infected individuals. If cohorting is unavoidable, make all possible accommodations to prevent transmission of other infectious diseases to the higher-risk individual. (For example, allocate more space for a higher-risk individual within a shared medical isolation space.)

- Persons at higher risk may include older adults and persons of any age with serious underlying medical conditions such as lung disease, heart disease, and diabetes. See CDC's website for a complete list, and check regularly for updates as more data become available to inform this issue.
- Note that incarcerated/detained populations have higher prevalence of infectious and chronic diseases and are in poorer health than the general population, even at younger ages.

√ **Custody staff should be designated to monitor these individuals exclusively where possible.** These staff should wear recommended PPE as appropriate for their level of contact with the individual under medical isolation (see PPE section below) and should limit their own movement between different parts of the facility to the extent possible.

√ **Minimize transfer of COVID-19 cases between spaces within the healthcare unit.**

√ **Provide individuals under medical isolation with tissues and, if permissible, a lined no-touch trash receptacle.** Instruct them to:

- **Cover** their mouth and nose with a tissue when they cough or sneeze
- **Dispose** of used tissues immediately in the lined trash receptacle
- **Wash hands** immediately with soap and water for at least 20 seconds. If soap and water are not available, clean hands with an alcohol-based hand sanitizer that contains at least 60% alcohol (where security concerns permit). Ensure that hand washing supplies are continually restocked.

√ **Maintain medical isolation until all the following criteria have been met. Monitor the CDC website for updates to these criteria.**

For individuals who will be tested to determine if they are still contagious:

- The individual has been free from fever for at least 72 hours without the use of fever-reducing medications **AND**
- The individual's other symptoms have improved (e.g., cough, shortness of breath) **AND**
- The individual has tested negative in at least two consecutive respiratory specimens collected at least 24 hours apart

For individuals who will NOT be tested to determine if they are still contagious:

- The individual has been free from fever for at least 72 hours without the use of fever-reducing medications **AND**
- The individual's other symptoms have improved (e.g., cough, shortness of breath) **AND**
- At least 7 days have passed since the first symptoms appeared

For individuals who had a confirmed positive COVID-19 test but never showed symptoms:

- At least 7 days have passed since the date of the individual's first positive COVID-19 test **AND**
- The individual has had no subsequent illness

√ **Restrict cases from leaving the facility while under medical isolation precautions, unless released from custody or if a transfer is necessary for medical care, infection control, lack of medical isolation space, or extenuating security concerns.**

- If an incarcerated/detained individual who is a COVID-19 case is released from custody during their medical isolation period, contact public health to arrange for safe transport and continuation of necessary medical care and medical isolation as part of release planning.

Cleaning Spaces where COVID-19 Cases Spent Time

Thoroughly clean and disinfect all areas where the confirmed or suspected COVID-19 case spent time. Note—these protocols apply to suspected cases as well as confirmed cases, to ensure adequate disinfection in the event that the suspected case does, in fact, have COVID-19. Refer to the Definitions section for the distinction between confirmed and suspected cases.

- Close off areas used by the infected individual. If possible, open outside doors and windows to increase air circulation in the area. Wait as long as practical, up to 24 hours under the poorest air exchange conditions (consult CDC Guidelines for Environmental Infection Control in Health-Care Facilities for wait time based on different ventilation conditions), before beginning to clean and disinfect, to minimize potential for exposure to respiratory droplets.
- Clean and disinfect all areas (e.g., cells, bathrooms, and common areas) used by the infected individual, focusing especially on frequently touched surfaces (see list above in Prevention section).

- √ **Hard (non-porous) surface cleaning and disinfection**
  - o If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
  - o 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**
  - o 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**
  - o 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.**
  - o Individuals handling laundry from COVID-19 cases should wear disposable gloves, discard after each use, and clean their hands after.
  - o Do not shake dirty laundry. This will minimize the possibility of dispersing virus through the air.
  - o Launder items as appropriate in accordance with the manufacturer's instructions. If possible, launder items using the warmest appropriate water setting for the items and dry items completely.

- Clean and disinfect clothes hampers according to guidance above for surfaces. If permissible, consider using a bag liner that is either disposable or can be laundered.

√ **Consult cleaning recommendations above to ensure that transport vehicles are thoroughly cleaned after carrying a confirmed or suspected COVID-19 case.**

Quarantining Close Contacts of COVID-19 Cases

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

√ **Incarcerated/detained persons who are close contacts of a confirmed or suspected COVID-19 case (whether the case is another incarcerated/detained person, staff member, or visitor) should be placed under quarantine for 14 days (see CDC guidelines).**

- If an individual is quarantined due to contact with a suspected case who is subsequently tested for COVID-19 and receives a negative result, the quarantined individual should be released from quarantine restrictions.

√ **In the context of COVID-19, an individual (incarcerated/detained person or staff) is considered a close contact if they:**

- Have been within approximately 6 feet of a COVID-19 case for a prolonged period of time OR
- Have had direct contact with infectious secretions of a COVID-19 case (e.g., have been coughed on)

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

√ **Keep a quarantined individual's movement outside the quarantine space to an absolute minimum.**

- Provide medical evaluation and care inside or near the quarantine space when possible.
- Serve meals inside the quarantine space.
- Exclude the quarantined individual from all group activities.
- Assign the quarantined individual a dedicated bathroom when possible.

√ **Facilities should make every possible effort to quarantine close contacts of COVID-19 cases individually.** Cohorting multiple quarantined close contacts of a COVID-19 case could transmit COVID-19 from those who are infected to those who are uninfected. Cohorting should only be practiced if there are no other available options.

- If cohorting of close contacts under quarantine is absolutely necessary, symptoms of all individuals should be monitored closely, and individuals with symptoms of COVID-19 should be placed under medical isolation immediately.
- If an entire housing unit is under quarantine due to contact with a case from the same housing unit, the entire housing unit may need to be treated as a cohort and quarantine in place.
- Some facilities may choose to quarantine all new intakes for 14 days before moving them to the facility's general population as a general rule (not because they were exposed to a COVID-19 case). Under this scenario, avoid mixing individuals quarantined due to exposure to a COVID-19 case with individuals undergoing routine intake quarantine.

- If at all possible, do not add more individuals to an existing quarantine cohort after the 14-day quarantine clock has started.

√ **If the number of quarantined individuals exceeds the number of individual quarantine spaces available in the facility, be especially mindful of those who are at higher risk of severe illness from COVID-19.** Ideally, they should not be cohorted with other quarantined individuals. If cohorting is unavoidable, make all possible accommodations to reduce exposure risk for the higher-risk individuals. (For example, intensify social distancing strategies for higher-risk individuals.)

√ **In order of preference, multiple quarantined individuals should be housed:**

- Separately, in single cells with solid walls (i.e., not bars) and solid doors that close fully
- Separately, in single cells with solid walls but without solid doors
- As a cohort, in a large, well-ventilated cell with solid walls, a solid door that closes fully, and at least 6 feet of personal space assigned to each individual in all directions
- As a cohort, in a large, well-ventilated cell with solid walls and at least 6 feet of personal space assigned to each individual in all directions, but without a solid door
- As a cohort, in single cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells creating at least 6 feet of space between individuals. (Although individuals are in single cells in this scenario, the airflow between cells essentially makes it a cohort arrangement in the context of COVID-19.)
- As a cohort, in multi-person cells without solid walls or solid doors (i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. Employ social distancing strategies related to housing in the Prevention section to maintain at least 6 feet of space between individuals housed in the same cell.
- As a cohort, in individuals' regularly assigned housing unit but with no movement outside the unit (if an entire housing unit has been exposed). Employ social distancing strategies related to housing in the Prevention section above to maintain at least 6 feet of space between individuals.
- Safely transfer to another facility with capacity to quarantine in one of the above arrangements

(NOTE—Transfer should be avoided due to the potential to introduce infection to another facility; proceed only if no other options are available.)

√ **Quarantined individuals should wear face masks if feasible based on local supply, as source control, under the following circumstances** (see PPE section and Table 1):

- If cohorted, quarantined individuals should wear face masks at all times (to prevent transmission from infected to uninfected individuals).
- If quarantined separately, individuals should wear face masks whenever a non-quarantined individual enters the quarantine space.
- All quarantined individuals should wear a face mask if they must leave the quarantine space for any reason.
- Asymptomatic individuals under routine intake quarantine (with no known exposure to a COVID-19 case) do not need to wear face masks.

√ **Staff who have close contact with quarantined individuals should wear recommended PPE if feasible based on local supply, feasibility, and safety within the scope of their duties** (see PPE section and Table 1).

- Staff supervising asymptomatic incarcerated/detained persons under routine intake quarantine (with no known exposure to a COVID-19 case) do not need to wear PPE.

- √ **Quarantined individuals should be monitored for COVID-19 symptoms twice per day, including temperature checks.**
  - o If an individual develops symptoms, they should be moved to medical isolation immediately and further evaluated. (See Medical Isolation section above.)
  - o 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:**
  - o **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.
  - o **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.
  - o **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.**
  - o Individuals handling laundry from quarantined persons should wear disposable gloves, discard after each use, and clean their hands after.
  - o Do not shake dirty laundry. This will minimize the possibility of dispersing virus through the air.
  - o 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.
  - 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.

Management of Incarcerated/Detained Persons with COVID-19 Symptoms

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

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

√ **Medical staff should evaluate symptomatic individuals to determine whether COVID-19 testing is indicated.** Refer to CDC guidelines for information on evaluation and testing. See Infection Control and Clinical Care sections below as well.

√ **If testing is indicated (or if medical staff need clarification on when testing is indicated), contact the state, local, tribal, and/or territorial health department. Work with public health or private labs as available to access testing supplies or services.**

- If the COVID-19 test is positive, continue medical isolation. (See Medical Isolation section above.)
- If the COVID-19 test is negative, return the individual to their prior housing assignment unless they require further medical assessment or care.

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

√ **Provide clear information to incarcerated/detained persons about the presence of COVID-19 cases within the facility, and the need to increase social distancing and maintain hygiene precautions.**

- Consider having healthcare staff perform regular rounds to answer questions about COVID-19.
- Ensure that information is provided in a manner that can be understood by non-English speaking individuals and those with low literacy, and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or low-vision.

√ **Implement daily temperature checks in housing units where COVID-19 cases have been identified, especially if there is concern that incarcerated/detained individuals are not notifying staff of symptoms.** See Screening section for a procedure to safely perform a temperature check.

√ **Consider additional options to intensify** social distancing within the facility.

Management Strategies for Staff

√ **Provide clear information to staff about the presence of COVID-19 cases within the facility, and the need to enforce social distancing and encourage hygiene precautions.**

- Consider having healthcare staff perform regular rounds to answer questions about COVID-19 from staff.

√ **Staff identified as close contacts of a COVID-19 case should self-quarantine at home for 14 days and may return to work if symptoms do not develop.**

- See above for definition of a close contact.
- Refer to CDC guidelines for further recommendations regarding home quarantine for staff.

Infection Control

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

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

- Implement the above guidance as fully as possible within the correctional/detention context. Some of the specific language may not apply directly to healthcare settings within correctional facilities and detention centers, or to facilities without onsite healthcare capacity, and may need to be adapted to reflect facility operations and custody needs.
- Note that these recommendations apply to staff as well as to incarcerated/detained individuals who may come in contact with contaminated materials during the course of their work placement in the facility (e.g., cleaning).

√ **Staff should exercise caution when in contact with individuals showing symptoms of a respiratory infection.** Contact should be minimized to the extent possible until the infected individual is wearing a face mask. If COVID-19 is suspected, staff should wear recommended PPE (see PPE section).

√ **Refer to PPE section to determine recommended PPE for individuals persons in contact with confirmed COVID-19 cases, contacts, and potentially contaminated items.**

Clinical Care of COVID-19 Cases

√ **Facilities should ensure that incarcerated/detained individuals receive medical evaluation and treatment at the first signs of COVID-19 symptoms.**

- If a facility is not able to provide such evaluation and treatment, a plan should be in place to safely transfer the individual to another facility or local hospital.
- The initial medical evaluation should determine whether a symptomatic individual is at higher risk for severe illness from COVID-19. Persons at higher risk may include older adults and persons of any age with serious underlying medical conditions such as lung disease, heart disease, and diabetes. See CDC's website for a complete list, and check regularly for updates as more data become available to inform this issue.

√ **Staff evaluating and providing care for confirmed or suspected COVID-19 cases should follow the CDC Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19) and monitor the guidance website regularly for updates to these recommendations.**

√ **Healthcare staff should evaluate persons with respiratory symptoms or contact with a COVID-19 case in a separate room, with the door closed if possible, while wearing recommended PPE and ensuring that the suspected case is wearing a face mask.**

- If possible, designate a room near each housing unit to evaluate individuals with COVID-19 symptoms, rather than having them walk through the facility to be evaluated in the medical unit.

√ **Clinicians are strongly encouraged to test for other causes of respiratory illness (e.g., influenza).**

√ **The facility should have a plan in place to safely transfer persons with severe illness from COVID-19 to a local hospital if they require care beyond what the facility is able to provide.**

√ **When evaluating and treating persons with symptoms of COVID-19 who do not speak English, using a language line or provide a trained interpreter when possible.**

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

√ **Ensure that all staff (healthcare and non-healthcare) and incarcerated/detained persons who will have contact with infectious materials in their work placements have been trained to correctly don, doff, and dispose of PPE relevant to the level of contact they will have with confirmed and suspected COVID-19 cases.**

- Ensure that staff and incarcerated/detained persons who require respiratory protection (e.g., N95s) for their work responsibilities have been medically cleared, trained, and fit-tested in the context of an employer's respiratory protection program.
- For PPE training materials and posters, please visit the CDC website on Protecting Healthcare Personnel.

√ **Ensure that all staff are trained to perform hand hygiene after removing PPE.**

√ **If administrators anticipate that incarcerated/detained persons will request unnecessary PPE, consider providing training on the different types of PPE that are needed for differing degrees of contact with COVID-19 cases and contacts, and the reasons for those differences (**see Table 1). **Monitor linked CDC guidelines in Table 1 for updates to recommended PPE.**

√ **Keep recommended PPE near the spaces in the facility where it could be needed, to facilitate quick access in an emergency.**

√ **Recommended PPE for incarcerated/detained individuals and staff in a correctional facility** will vary based on the type of contact they have with COVID-19 cases and their contacts (see Table 1). Each type of recommended PPE is defined below. **As above, note that PPE shortages are anticipated in every category during the COVID-19 response.**

- **N95 respirator**

See below for guidance on when face masks are acceptable alternatives for N95s. N95 respirators should be prioritized when staff anticipate contact with infectious aerosols from a COVID-19 case.

- **Face mask**
- **Eye protection—**goggles or disposable face shield that fully covers the front and sides of the face
- **A single pair of disposable patient examination gloves**

Gloves should be changed if they become torn or heavily contaminated.

- **Disposable medical isolation gown or single-use/disposable coveralls, when feasible**
  - If custody staff are unable to wear a disposable gown or coveralls because it limits access to their duty belt and gear, ensure that duty belt and gear are disinfected after close contact with the individual. Clean and disinfect duty belt and gear prior to reuse using a household cleaning spray or wipe, according to the product label.
  - If there are shortages of gowns, they should be prioritized for aerosol-generating procedures, care activities where splashes and sprays are anticipated, and high-contact patient care activities that provide opportunities for transfer of pathogens to the hands and clothing of staff.

√ **Note that shortages of all PPE categories are anticipated during the COVID-19 response, particularly for non-healthcare workers. Guidance for optimizing the supply of each category can be found on CDC's website:**

- **Guidance in the event of a shortage of N95 respirators**
  - Based on local and regional situational analysis of PPE supplies, **face masks are an acceptable alternative when the supply chain of respirators cannot meet the demand.** During this time, available respirators should be prioritized for staff engaging in activities that would expose them to respiratory aerosols, which pose the highest exposure risk.
- **Guidance in the event of a shortage of face masks**
- **Guidance in the event of a shortage of eye protection**
- **Guidance in the event of a shortage of gowns/coveralls**

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
Incarcerated/Detained Persons					
Asymptomatic incarcerated/detained persons (under quarantine as close contacts of a COVID-19 case*)	Apply face masks for source control as feasible based on local supply, especially if housed as a cohort				
Incarcerated/detained persons who are confirmed or suspected COVID-19 cases, or showing symptoms of COVID-19	–	✓	–	–	–
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.			✓	✓
Staff					
Staff having direct contact with asymptomatic incarcerated/detained persons under quarantine as close contacts of a COVID-19 case* (but not performing temperature checks or providing medical care)	–	Face mask, eye protection, and gloves as local supply and scope of duties allow.			–
Staff performing temperature checks on any group of people (staff, visitors, or incarcerated/detained persons), or providing medical care to asymptomatic quarantined persons	–	✓	✓	✓	✓
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.

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

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

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

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11622-C

ANTHONY SWAIN, *et al.*

Plaintiffs - Appellees,

versus

DANIEL JUNIOR, in his official capacity as Director
of the Miami-Dade Corrections and Rehabilitation Department, and
MIAMI-DADE COUNTY, FLORIDA

Defendants - Appellants.

On Appeal from the United States
District Court for the Southern District of Florida

Before: WILSON, WILLIAM PRYOR and BRANCH, Circuit Judges.

BY THE COURT:

No part of our country has escaped the effects of COVID-19. It is thus not surprising that several inmates at the Metro West Detention Center ("Metro

West")—the largest direct-supervision jail facility in the State of Florida—have tested positive for the virus. This appeal concerns the adequacy of the measures implemented by Metro West to protect its prisoners from the spread of COVID-19.

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

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

I.

MDCR, a department of Miami-Dade County, operates Metro West. When the first case of COVID-19 in Miami-Dade County was reported in early March

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

On April 5, 2020, the plaintiffs filed a class action complaint on behalf of "all current and future persons detained at Metro West during the course of the

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

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

On April 29, following a telephonic evidentiary hearing, the district court entered a preliminary injunction against the defendants on the plaintiffs' § 1983

claim.[1] The preliminary injunction enjoins the defendants to:

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

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

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

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

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

---

[1] The district court did not make a finding as to whether the defendants had complied with the TRO. We do note, however, that a report commissioned by the district court and prepared by experts for each party following a review of the facility and of the TRO appears to indicate that the defendants were in compliance with the TRO.

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

III.

A court considering whether to issue a stay "considers four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776

(1987)). The first two factors are "the most critical." *Id.* at 434. We address each factor in turn and conclude that a stay is warranted.

A. Likelihood of Success on Appeal

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

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The 'cruel and unusual punishments' standard applies to the conditions of a prisoner's confinement." *Chandler v. Crosby*, 379

F.3d 1278, 1288 (11th Cir. 2004); *see also Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1306 (11th Cir. 2009) (explaining that a pre-trial detainee's "rights exist under the due process clause of the Fourteenth Amendment" but "are subject to the same scrutiny as if they had been brought as deliberate indifference claims under the Eighth Amendment"). An Eighth Amendment challenge to the conditions of confinement has two components: one objective and the other subjective. *See Farmer v. Brennan*, 511 U.S. 825, 846 (1994).

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

Second, to satisfy the "subjective component," the prisoner must show that the prison official acted with deliberate indifference. *Id.* A prison official acts with deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837; *see also Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004). A prison "official may escape liability for known risks 'if [he] responded reasonably to the risk, even if the harm ultimately

was not averted.'" *Chandler*, 379 F.3d at 1290 (quoting *Farmer*, 511 U.S. at 844). Deliberate indifference requires the defendant to have a subjective "state of mind more blameworthy than negligence," *Farmer*, 511 U.S. at 835, closer to criminal recklessness, *id.* at 839–40.

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

The defendants are also likely to succeed on appeal because the plaintiffs offered little evidence to suggest that the defendants were deliberately indifferent. Indeed, the evidence supports that the defendants are taking the risk of COVID-19 seriously. For example, the expert report commissioned by the district court concluded that the staff at Metro West "should be commended for their commitment to protect the staff and inmates in this facility during this COVID-19 pandemic. They are doing their best balancing social distancing and regulation applicable to the facility." According to the expert report, Metro West appears to have implemented many measures to curb the spread of the virus. While perhaps impossible for the defendants to implement social distancing measures effectively in all situations at Metro West's current population level, the district court cited no evidence to establish that the defendants subjectively believed the measures they were taking were inadequate. *See Valentine v. Collier*, No. No. 20-20207, 2020 WL 1934431, at *4 (5th Cir. Apr. 27, 2020) ("[T]reating inadequate measures as dispositive of the Defendants' mental state . . . resembles the standard for civil negligence, which *Farmer* explicitly rejected.").

The only other evidence the district court relied on to establish deliberate indifference is that Metro West's social-distancing policies are "not uniformly enforced." But the district court made no finding that the defendants are ignoring

or approving the alleged lapses in enforcement of social-distancing policies, so these lapses in enforcement do little to establish that the defendants were deliberately indifferent. *See Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 (11th Cir. 1995) (requiring plaintiffs establish a causal connection between the defendant's conduct and the constitutional violation to prevail on a deliberate-indifference claim). Accepting, as the district court did, that the defendants adopted extensive safety measures such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures, the defendants' actions likely do not amount to deliberate indifference. So the district court likely erred in this regard.

B. Irreparable Injury

The defendants have also shown that they will be irreparably injured absent a stay. *See Nken*, 556 U.S. at 434. Absent a stay, the defendants will lose the discretion vested in them under state law to allocate scarce resources among different county operations necessary to fight the pandemic. Through its injunction, the district court has taken charge of many administrative decisions typically left to MDCR officials. For example, the injunction requires that the defendants provide each Metro West inmate with an individual supply of soap and

disinfectant products. Under pain of contempt, therefore, MDCR must divert these high-demand supplies to Metro West, even though they may be more critical at another county facility. Similarly, the injunction requires that the defendants test all inmates with COVID-19 symptoms and everyone with whom they have been in contact. To avoid contempt, then, MDCR must allocate limited testing resources to Metro West at the expense of other county facilities. All the while, the district court has tasked itself with overseeing the steps the defendants are taking to "ensure additional social distancing safeguards," even though it acknowledges that social distancing is "impossible" at the current inmate population level. In short, the district court assumed the role of "super-warden" that our decisions repeatedly condemn. *See Pesci v. Budz*, 935 F.3d 1159, 1167 (11th Cir. 2019); *Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 965 (11th Cir. 2018).

As the Supreme Court has cautioned, "it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" *Woodford v. Ngo*, 548 U.S. 81, 94 (2006). In large measure, the injunction transfers the power to administer the Metro West facility in the midst of the pandemic from public officials to the district court. The injunction hamstrings

MDCR officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic. They cannot respond to the rapidly evolving circumstances on the ground without first seeking "a permission slip from the district court." *Valentine*, 2020 WL 1934431, at *5. Such a prohibition amounts to an irreparable harm.

C. Balance of Harms and Public Interest

The final two factors are the balance of harms and the public interest. *See Nken*, 556 U.S. at 426. Here, both those factors weigh in favor of a stay. The district court found that because the inmates "face immediate, irreparable harm from COVID-19," their risk of harm outweighs the harm imposed on the defendants from complying with the preliminary injunction. But the question is not whether COVID-19 presents a danger to the inmates—we do not dismiss the risk of harm that COVID-19 poses to everyone, including the inmates at Metro West. The question is instead whether the plaintiffs have shown that they will suffer irreparable injuries that they would not otherwise suffer in the absence of an injunction. *See id.*; *cf. Valentine*, 2020 WL 1934431, at *5. Nothing in the record indicates that the defendants will abandon the current safety measures absent a preliminary injunction, especially since the defendants implemented many

of those measures before the plaintiffs even filed the complaint. Nor do the plaintiffs contend that they will abandon those measures. For that reason, the balance of harms weighs in the defendants' favor.

Finally, where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest. *Nken*, 556 U.S. at 435. We therefore conclude that the defendants have satisfied all four requirements for a stay.

IV.

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

First, the district court likely erred in holding that the plaintiffs are not required to establish municipal liability under *Monell* at the preliminary injunction stage. A municipality may not be held liable under § 1983 unless a municipal

policy or custom caused the plaintiffs' injury. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). The policy or custom requirement of *Monell* applies to § 1983 claims for declaratory or injunctive relief no less than claims for damages. *Los Angeles Cty. v. Humphries*, 562 U.S. 29, 31 (2010). Because a district court cannot award prospective relief against a municipality unless the requirements of *Monell* are satisfied, *id.*, plaintiffs must establish that they are likely to satisfy the requirements of *Monell* to obtain a preliminary injunction against a municipality. *See Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994).

Contrary to *Church*, the district court ruled that the plaintiffs did not need to establish a likelihood of success under *Monell* to obtain a preliminary injunction, and it did not address whether they were likely to satisfy *Monell*. For that reason, Miami-Dade County is likely to succeed in arguing on appeal that the district court erred by enjoining it. And because the plaintiffs sued defendant Junior only in his official capacity, which "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent," *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell*, 436 U.S. at 690), they must also satisfy the requirements of *Monell* to obtain injunctive relief against him to the extent they challenge his conduct as an officer of Miami-Dade County. *See Barnett v.*

MacArthur, No. 18-12238, 2020 WL 1870445, at *3 (11th Cir. Apr. 15, 2020); *Familias Unidas v. Briscoe*, 619 F.2d 391, 403–04 (5th Cir. 1980). The district court did not address whether the plaintiffs were likely to satisfy *Monell* as to defendant Junior, so he is also likely to succeed in having the injunction against him vacated on appeal.

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

Just because failure to exhaust is an affirmative defense and not a pleading requirement, *see Jones v. Bock*, 549 U.S. 199, 216 (2007), does not render exhaustion irrelevant to determining whether the plaintiffs are entitled to a

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

V.

In conclusion, the defendants' motion for a stay pending appeal and motion to expedite the appeal are **GRANTED**. The plaintiffs' "Opposed Motion for Oral Argument on Appellants' Emergency Motion to Stay Injunction Pending Appeal" is **DENIED**.

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

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

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

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

United States District Court,
D. New Mexico.

RANDO BETANCOURT BARCO, MICHEL FUENTES LUIS, LUIS ALFONSO MEJIA VELASQUEZ, Plaintiffs/Petitioners,
v.
COREY PRICE, in his official capacity as Director of the El Paso ICE Field Office; DORA OROZCO, in her official capacity as Warden of Otero County Processing Center; 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, Defendants/Respondents.

No. 2:20-cv-350-WJ-CG
|
Filed 05/01/2020

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

WILLIAM P. JOHNSON CHIEF UNITED STATES DISTRICT JUDGE

***1 THIS MATTER** comes before the Court on Plaintiffs' Motion for a Temporary Restraining Order [Doc. 3], filed April 20, 2020. Plaintiffs are noncitizen detainees who are in the process of being removed from the United States. They are detained at the Otero County Processing Center ("Otero"). Plaintiffs request that the Court issue a temporary restraining order releasing them from Otero because they have medical conditions that make them vulnerable to serious illness or death should they contract Coronavirus Disease 2019 (COVID-19) and that there are no adequate measures that can ensure they avoid exposure to COVID-19 at Otero.

Plaintiffs are seeking relief under 28 U.S.C. § 2241 as a habeas corpus petition and 28 U.S.C. § 1331 as an independent cause of action for injunctive relief under the Fifth Amendment's Due Process Clause. The Court has reviewed the briefing, exhibits, and applicable law and finds that Plaintiffs have not met their heightened burden to demonstrate that the extraordinary remedy of a temporary restraining order is warranted. For the reasons explained in this Memorandum Opinion and Order, the Court denies Plaintiffs' motion.

PROCEDURAL HISTORY

On April 20, 2020, Plaintiffs filed their complaint [Doc. 1], a request that the case be assigned to United States District Judge Judith C. Herrera [Doc. 2], and the subject motion [Doc. 3]. Later that day, the United States entered its appearance on behalf of all Defendants [Doc. 11], and the case was

assigned to the undersigned Judge. On April 21, 2020, the Court ordered expedited briefing [Doc. 12]. As part of that Order, the Court instructed Defendants to include their position on whether the case should be assigned to Judge Herrera. On April 24, 2020, Defendants submitted their response [Doc. 20] opposing Plaintiffs' motion. In their response, Defendants alerted the Court that:

> As part of [the United States Immigration and Customs Enforcement's (ICE)] ongoing efforts at Otero to identify and release appropriate vulnerable detainees, Petitioner Betancourt was released from custody on April 21, 2020. Thus, his claim is now moot. Petitioners Fuentes and Mejia were likewise evaluated for potential release but were not granted parole because contrary to their allegations, they do not present documented [Centers for Disease Control and Prevention (CDC)] recognized vulnerabilities for COVID-19 and are flight risks due to their immigration and criminal histories.

Doc. 20 at 2–3 (citations omitted). Plaintiffs filed a notice [Doc. 21] later that same day notifying the Court that they no longer requested an order releasing Plaintiff Betancourt from Otero. Briefing on the motion was completed on April 27, 2020. Doc. 25 (Notice of Completion of Briefing). The court then reviewed the briefing, exhibits, and applicable law and determined that a hearing was not necessary to rule on Plaintiffs' motion.

REQUEST TO ASSIGN THE CASE TO JUDGE HERRERA

Prior to the undersigned Judge randomly being assigned this case, Plaintiffs requested that Judge Herrera be assigned the matter in their notice of a related case [Doc. 2]. Plaintiffs argued that assigning the case to Judge Herrera would conserve judicial resources because the case involves common questions of law and fact with a case that was previously assigned to her: *Soto v. Governor of New Mexico* (No. 1:20-cv-317-JCH-KK).

***2** "In the District of New Mexico, a judge will, at times, transfer a case to another judge if the other judge has conducted a large amount of work on the case or on a related case.... Familiarity with legal issues, however, is not a basis upon which the Court will transfer a case." *Stark-Romero v. Nat'l R.R. Passenger Co.*, 763 F. Supp. 2d 1231, 1274 (D.N.M. Jan. 12, 2011).

In *Soto*, the petitioners requested release from pretrial detention imposed by the State of New Mexico out of fear of contracting COVID-19 while detained. Judge Herrera found that the petition did not "present any federal constitutional or legal basis, fails to state any claim for [28 U.S.C.] § 2241 relief, and must be dismissed." 2020 WL 1853050, at *4 (D.N.M. Apr. 13, 2020). Compared to this case, *Soto* involves different parties, different detention facilities, and does not

meaningfully share any common questions of law. The only discernable similarity is that both cases concern requests for release from detention based on COVID-19, and that is not a sufficient reason to reassign this case to Judge Herrera. The Court also notes that the judgment in *Soto* was entered on April 20, 2020, so it cannot be consolidated with this case pursuant to Fed. R. Civ. P. 42. Finally, if Plaintiffs' argument that the instant case is related to the *Soto* case was the legal standard to determine whether one case is related to another case, then this would mean that every case filed in this Court seeking the release of someone because of COVID-19 should be assigned to Judge Herrera. That is not a viable option and is not going to happen in this case. Accordingly, Plaintiffs' request that the case be assigned to Judge Herrera is **DENIED**.

FACTUAL BACKGROUND

I. COVID-19

"COVID-19 is a serious disease, ranging from no symptoms or mild ones for people at low risk, to respiratory failure and death. There is no vaccine to prevent COVID-19. There is no known cure or anti-viral treatment for COVID-19 at this time." Doc. 1-3 (Declaration of Joseph J. Amon, Ph.D. MSPH ("Amon Decl.")) ¶ 6. The Centers for Disease Control and Prevention ("CDC") reports that, as of April 30, 2020, the United States has 1,031,659 COVID-19 cases and 60,057 deaths from it. CDC, Cases of COVID-19 in the United States, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited April 30, 2020). The New Mexico Department of Health ("NMDH") reports that, as of April 30, 2020, New Mexico has 3,411 COVID-19 cases and 123 deaths from it. NMDH, COVID-19 in New Mexico, https://cvprovider.nmhealth.org/public-dashboard.html (last visited April 30, 2020). Otero County, however, where the Otero County Processing Center is located and where Plaintiffs are detained, only has 5 COVID-19 cases and no deaths from it. *Id.*

II. Plaintiff Michel Fuentes Luis

Plaintiff Michel Fuentes Luis ("Fuentes") is a 33-year-old citizen of Cuba. Doc. 20-1 (Declaration of Deputy Field Officer Director Juan L. Acosta ("Acosta Decl.")) Fuentes ¶ 1. He illegally entered the United States on June 30, 2019. *Id.* ¶ 2. A few days later, United States Border Patrol issued him a notice to appear before an immigration judge and returned him to Mexico under the Migrant Protection Protocols (MPP).[1] *Id.* ¶ 4. On August 19, 2019, he appeared before an immigration judge in MPP removal proceedings. *Id.* On September 18, 2019, an immigration judge ordered him removed in absentia. *Id.* ¶ 6. He reentered the United States illegally on September 22, 2019. *Id.* ¶ 7. On September 25, 2019, he was convicted of illegal entry under 8 U.S.C. § 1325 in the United States District Court of the Western District of Texas and sentenced to time served. *Id.* ¶ 9. He was then transferred to Otero for removal proceedings. *Id.* ¶ 11. On March 5, 2020, an immigration judge declined to issue him a bond. *Id.* ¶ 14. His next removal proceeding is May 4, 2020. *Id.* ¶ 15.

[1] "The MPP directs the 'return' of

> asylum applicants who arrive from Mexico as a substitute to the traditional options of detention and parole. Under the MPP, these applicants are processed for standard removal proceedings, instead of expedited removal. They are then made to wait in Mexico until an immigration judge resolves their asylum claims." *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 506 (9th Cir. 2019).

***3** Plaintiff Fuentes alleges he was diagnosed with asthma at age three and has "used an inhaler ever since." Doc. 1-7 (Declaration of Plaintiff Fuentes ("Fuentes Decl.")) ¶ 5. This medical condition, he claims, makes him "especially vulnerable to severe health complications if [he] get[s] sick with COVID-19." *Id.* ¶ 2. He was recently evaluated for potential release from Otero:

> FUENTES has been evaluated for potential release, but he does not present a CDC recognized vulnerability for COVID-19. He had no documented history of asthma upon arrival and has not been diagnosed with asthma or respiratory difficulties. He did not have an inhaler in his possession when he was taken into [Enforcement and Removal Operations ("ERO")] custody on September 27, [2019]. He has not subsequently requested or been issued an inhaler. He presents a heightened risk of flight given his background.

Acosta Decl., Fuentes ¶ 16. The CDC maintains a webpage where they publish the medical conditions they are aware of that potentially put people at higher risk for severe illness from COVID-19. In terms of asthma, the CDC considers only those with moderate to severe asthma to be at a higher risk. *See* CDC, People Who Are at Higher Risk for Severe Illness, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited April 30, 2020) ("People with chronic lung disease or moderate to severe asthma").

III. Plaintiff Luis Alfonso Mejia Velasquez

Plaintiff Luis Alfonso Mejia Velasquez ("Mejia") is a 46-year-old citizen of Honduras. Acosta Decl., Mejia ¶ 1. He illegally entered the United States on November 4, 2003. *Id.* ¶ 2. A month later, an immigration judge ordered him to be removed. *Id.* ¶ 5. He was removed to Honduras on February 9, 2004. *Id.* ¶ 6. On an unknown date, he illegally reentered the United States. *Id.* ¶ 7. On February 14, 2012, he was convicted of resisting arrest with force or violence in the 22nd Judicial District Court of St. Tammany Parish in Covington, Louisiana. *Id.* ¶ 9. His prior removal order was then reinstated, and he was removed for a second time on March 30, 2012. *Id.* ¶¶ 11-13. On January 31, 2020, he illegally reentered the United States for a third time. *Id.* ¶ 14. On March 23, 2020, he was convicted of illegal reentry under 8 U.S.C. § 1326 in the United States District Court of the Western District of Texas and sentenced to time served. *Id.* ¶¶ 16-17. He was then transferred to Otero for removal proceedings.

Id. ¶ 19.

Plaintiff Mejia alleges he was diagnosed with hypertension and, as a result, experiences "dizziness, frequent headaches, and chest pain almost every night." Doc. 1-9 (Declaration of Plaintiff Mejia ("Mejia Decl.")) ¶¶ 5-7. This medical condition, he claims, makes him "especially vulnerable to severe health complications if [he] get[s] sick with COVID-19." *Id.* ¶ 2. He was recently evaluated for potential release from Otero:

> MEJIA has been evaluated for potential release, but he does not have a CDC-recognized vulnerability for COVID-19 because he is receiving medication for hypertension and his primary care provider has cleared him from daily blood pressure checks. MEJIA presents a risk of danger and a heightened risk of flight given his criminal and immigration backgrounds.

Acosta Decl., Mejia ¶ 21. On the webpage that the CDC uses to publish the known medical conditions that potentially put people at higher risk for severe illness from COVID-19, hypertension is not listed:

> ***4** Based on what [the CDC] know[s] now, those at high-risk for severe illness from COVID-19 are:
>
> ■ People 65 years and older
>
> ■ People who live in a nursing home or long-term care facility
>
> People of all ages with underlying medical conditions, particularly if not well controlled, including:
>
> ■ People with chronic lung disease or moderate to severe asthma
>
> ■ People who have serious heart conditions
>
> ■ People who are immunocompromised
>
> ○ Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications
>
> ■ People with severe obesity (body mass index [BMI] of 40 or higher)
>
> ■ People with diabetes
>
> ■ People with chronic kidney disease undergoing dialysis
>
> ■ People with liver disease

CDC, People Who Are at Higher Risk for Severe Illness, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited April 30, 2020).

IV. COVID-19 at the Otero County Processing Center

On April 8, 2020, one detainee at Otero tested positive for COVID-19. Acosta Decl. ¶ 28.

That detainee has since been removed from the United States. *Id.* As of April 23, 2020, there is one documented positive COVID-19 case at Otero. *Id.* ¶ 27. The 43 detainees who had known contact with that individual were separated from the general population and are monitored daily for fever and symptoms of respiratory illness. *Id.* ¶¶ 16 and 27.

Since the onset of COVID-19, "ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees." *Id.* ¶ 11. Otero's staff follows "ERO's COVID-19 Pandemic Response Requirements and the CDC's Interim Guidance on Management of [COVID-19] in Correctional and Detention Facilities." *Id.* ¶ 12.

As of April 20, 2020, Otero "is at 60% of its normal capacity." *Id.* ¶ 7. The population percentage at each housing unit is monitored daily to allow for as much social distancing as practicable. *Id.* Detainees are assigned to beds that are separated by six feet and, when detainees must be assigned to the same bunk bed, they sleep feet-to-head to increase their distance from each other. *Id.* Recreation, meals, and other scheduled activities have also been adjusted to allow for social distancing. *Id.* ¶ 23. To further mitigate the introduction of COVID-19 into Otero, in-person social visitation has been suspended. *Id.* ¶ 26.

Officials at Otero have posted CDC guidance with information on COVID-19 in dormitories and community areas. The posters include information about the symptoms, spread, and prevention of COVID-19. *Id.* ¶ 20. Detainees are provided with hygiene kits that include soap, shampoo, a toothbrush, and toothpaste, and the hygiene kits are replaced at no cost to the detainees. *Id.* ¶ 19. Hand sanitizer is available for the detainees to use, and additional soap dispensers have been placed in the housing units. *Id.* Cleaning crews, both contract staff and volunteer detainee workers, also clean and disinfect the housing units and common areas. *Id.*

***5** To ensure new detainees do not bring COVID-19 into Otero, each new detainee is medically screened and separated for a 14-day medical observation:

> During detention intake, a qualified health care provider assesses each detainee for fever and respiratory illness. Each detainee is asked, in a language they understand, to confirm if they have had close contact with a person with laboratory confirmed COVID-19 in the past 14 days. Each detainee is asked whether they have traveled from or through area(s) with sustained community transmission during the prior two weeks. All new detainee admissions are then assigned to a staggered housing location for 14-day medical observation.

Id. ¶ 14. Any asymptomatic detainee with known exposure to a person with confirmed COVID-19 is separated into a cohort with

other similarly exposed detainees for the duration of COVID-19's 14-day incubation period. *Id.* ¶ 16. They are monitored daily for fever and symptoms of respiratory illness and are referred to a medical provider for evaluation if they develop symptoms. *Id.* If a detainee tests positive for COVID-19, they are isolated and receive medical treatment. *Id.* ¶ 15. If needed, the detainee will be referred for local hospitalization. *Id.*

The staff at Otero have received guidance on how to detect symptoms of COVID-19 and help prevent its spread. *Id.* ¶ 22. When interacting with detainees, staff members use personal protective equipment, to include N95 respirators, eye protection, and latex gloves. *Id.* Staff members are also encouraged to stay home if they feel ill, and those who have had direct contact with a person testing positive for COVID-19 are asked to self-quarantine for 14 days. *Id.*

DISCUSSION

"[W]hen a temporary restraining order is sought on notice to the adverse party, it may be treated by the court as a motion for a preliminary injunction." 13 Moore's Federal Practice § 65.31 (2020); *see* Fed. R. Civ. P. 65. Defendants received notice of Plaintiffs' motion for a temporary restraining order and filed a response opposing it. Doc. 11 (Notice of Appearance by the United States on behalf of the Defendants); Doc. 20 (Defendants' Response). The Court, therefore, will treat Plaintiffs' request for a temporary restraining order as a request for a preliminary injunction.

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir. 2019) (quoting *Free the Nipple–Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 797 (10th Cir. 2019)). To obtain a preliminary injunction, Plaintiffs must establish: "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; *and* (4) that the injunction, if issued, will not adversely affect the public interest." *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (*emphasis* added) (quoting *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002)). "Because a preliminary injunction is an extraordinary remedy, the movant's right to relief must be clear and unequivocal." *Id.* (quoting *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1224 (10th Cir. 2008)).

***6** Courts disfavor preliminary injunctions that "exhibit any of three characteristics: (1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win." *Mrs. Fields Franchising, LLC*, 941 F.3d at 1232 (quoting *Free the Nipple-Fort Collins*, 916 F.3d at 797). Because Plaintiffs' request for immediate release from Otero meets all three disfavored categories, they face "a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors." *Id.*

I. Plaintiffs Fail to Establish a Substantial

Likelihood of Prevailing on the Merits

Plaintiffs are seeking relief under 28 U.S.C. § 2241 as a habeas corpus petition and 28 U.S.C. § 1331 as an independent cause of action for injunctive relief under the Fifth Amendment's Due Process Clause. They argue that the Court may order their immediate release under either.

The Court may grant a writ of habeas corpus to someone "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). "The fundamental purpose of a § 2241 habeas proceeding is ... 'an attack by a person in custody upon the legality of that custody, and ... the traditional function of the writ is to secure release from illegal custody.' " *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)). "It is well-settled law that prisoners who wish to challenge only the conditions of their confinement, as opposed to its fact or duration, must do so through civil rights lawsuits filed pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)—not through federal habeas proceedings." *Standifer v. Ledezma*, 653 F.3d 1276, 1280 (10th Cir. 2011).

Although Plaintiffs are requesting immediate release, they are not challenging the legality or duration of their detention. At the core of their argument, they contend that the conditions of their detention at Otero are inadequate to protect them from exposure to COVID-19. For example, Plaintiffs allege that they "are in close quarters on a near constant basis, making it virtually impossible to adhere to social distancing guidelines," "inadequate hygienic and sanitation practices have continued amidst the COVID-19 pandemic," "they are not provided with sufficient cleaning supplies or hand soap," and that the "guards do not wear masks or gloves." Doc. 1 (Complaint) at 8–10. Plaintiffs do not allege that the fact that they are detained for removal proceedings or that the length of their detention is illegal. Accordingly, the Court finds that Plaintiffs are challenging the conditions of their detention, as opposed to its fact or duration, which is not appropriate under 28 U.S.C. § 2241. *See Standifer*, 653 F.3d at 1280; *see also Sacal-Micha v. Longoria*, 2020 WL 1518861, at *4 (S.D. Tex. Mar. 27, 2020) (explaining that 28 U.S.C. § 2241 is used to challenge the fact or duration of confinement, not conditions of confinement, and that "at the core of his allegations [plaintiff] challenges the conditions of his confinement").

Federal immigration detention is a form of civil detention that must comply with the Fifth Amendment's Due Process Clause. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). To evaluate the constitutionality of pretrial detention under the Fifth Amendment, the Court must determine whether the conditions "amount to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). In the absence of an expressed intent to punish, Plaintiffs can prevail by showing that the conditions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the conditions "appear excessive in relation to that purpose." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (quoting *Bell*, 441 U.S. at 561).[2]

[2] The parties seem to treat Plaintiffs' claims, in part, as a denial of medical

> care. Even if Plaintiffs' claims were treated as a denial of medical care, the analysis and result would be the same. In *Colbruno v. Kessler*, a case Plaintiffs cited, the Tenth Circuit explained that "when a 'plaintiff finds himself in the criminal justice system somewhere between the two stools of an initial seizure and post-conviction punishment[,] we turn to the due process clauses of the Fifth or Fourteenth Amendment and their protection against arbitrary governmental action by federal or state authorities' to evaluate claims of mistreatment." 928 F.3d 1155, 1162 (10th Cir. 2019) (quoting *Porro v. Barnes*, 624 F.3d 1322, 1326 (10th Cir. 2010)).

***7** Plaintiffs do not allege that Defendants have an expressed intent to punish. Plaintiffs argue that "[k]eeping medically-vulnerable people detained in such close proximity to one another and without testing or screening or the sanitation or protective equipment necessary to combat the spread of [COVID-19] is 'not rationally related to a legitimate governmental objective' and thus constitutes illegitimate punishment in violation of Plaintiffs' due process rights." Doc. 3 at 18–19 (citation omitted). Plaintiffs' argument relies on two unproven factual premises: that they have medical conditions that put them at a higher risk of serious illness or death should they contract COVID-19 and that there are no adequate measures that can ensure they avoid exposure to COVID-19 while detained at Otero. Each is discussed in turn.

A. Plaintiffs' Alleged Medical Conditions

Plaintiffs have failed to show that Plaintiff Fuentes is medically vulnerable to COVID-19. Plaintiff Fuentes alleges he was diagnosed with asthma at age three and has "used an inhaler ever since." Fuentes Decl. ¶ 5. This medical condition, he claims, makes him "especially vulnerable to severe health complications if [he] get[s] sick with COVID-19." *Id.* ¶ 2. Plaintiff Fuentes, however, did not have an inhaler in his possession when taken into custody and has not required any treatment for asthma or experienced any respiratory difficulties in the seven months he has been detained. Acosta Decl., Fuentes ¶ 16. Plaintiff Fuentes was also recently evaluated for potential release and was found to "not present a CDC recognized vulnerability for COVID-19." *Id.* Under CDC guidelines, only people with moderate or severe asthma are identified as potentially at a higher risk for severe illness from COVID-19. *See* CDC, People Who Are at Higher Risk for Severe Illness, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited April 30, 2020).

The medical expert declarations Plaintiffs submitted concerning Plaintiff Fuentes' alleged asthma condition have minimal probative value because they appear to be based solely on the claims made by Plaintiff Fuentes in his declaration without any independent verification through medical documents or examination. *See* Amon Decl. ¶ 12 ("According to his declaration, [Plaintiff Fuentes] has asthma. This condition puts him at high risk for severe illness and death from COVID-19."); *see* Doc. 1-5 (Declaration of Norton Kalishman, MD ("Kalishman

Decl.")) ¶¶ 3 and 23 ("I have reviewed the declaration[ ] of ... Michel Fuentes Luis" and he "has been diagnosed with asthma that has required the use of an inhaler since he was three. This condition puts him at high risk of serious illness or death if he is infected with COVID-19."). Plaintiff Fuentes' exaggeration concerning his alleged asthma condition is not surprising when considering he also stated in his declaration, "I have no criminal convictions in the U.S.," when in fact he does: "On September 25, 2019, the U.S. District Court of the Western District of Texas in Pecos convicted FUENTES of illegal entry." Fuentes Decl. ¶ 8; Acosta Decl., Fuentes ¶ 9. The Court finds that Plaintiffs have failed to show that Plaintiff Fuentes is medically vulnerable to COVID-19.

Plaintiffs have also failed to show that Plaintiff Mejia is medically vulnerable to COVID-19. Plaintiff Mejia alleges he was diagnosed with hypertension and, as a result, experiences "dizziness, frequent headaches, and chest pain almost every night." Mejia Decl. ¶¶ 5–7. This medical condition, he claims, makes him "especially vulnerable to severe health complications if [he] get[s] sick with COVID-19." *Id.* ¶ 2. Plaintiff Mejia, however, is receiving medication for hypertension while detained at Otero and his primary care provider has cleared him from daily blood pressure checks. Acosta Decl., Mejia ¶ 21. Plaintiff Mejia was also recently evaluated for potential release and was found to "not have a CDC-recognized vulnerability for COVID-19." *Id.* The CDC does not list hypertension on the webpage they use to publish the medical conditions that potentially put people at higher risk for severe illness from COVID-19. *See* CDC, People Who Are at Higher Risk for Severe Illness, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited April 30, 2020).

***8** The medical expert declarations Plaintiffs submitted concerning Plaintiff Mejia's hypertension also have minimal probative value because they also appear to be based solely on the claims made by Plaintiff Mejia in his declaration without any independent verification through medical documents or examination. *See* Amon Decl. ¶ 13 ("According to his declaration, [Plaintiff Mejia] appears to have poorly controlled hypertension with recurring symptoms of chest pain, difficulty breathing, headaches and dizziness." Plaintiff Mejia's "condition and potentially related symptoms indicate he is likely at high risk for severe illness and death from COVID-19."); *see* Kalishman Decl. ¶¶ 3 and 23 ("I have reviewed the declaration[ ] of ... Louis Alfonzo Mejia Velasquez" and he "has been diagnosed with hypertension that has required the use of medication and left him hospitalized on three occasions. This condition puts him at high risk of serious illness or death if he is infected with COVID-19.").

Plaintiffs argue in their reply that other Courts have found hypertension to be a condition that puts people at a higher risk of serious illness or death should they contract COVID-19. Doc. 24 at 8–9. However, of the three cases Plaintiffs cite, each concern plaintiffs with multiple medical conditions and risk factors, not just hypertension. For example, in *Essien v. Barr*, 2020 WL 1974761 (D. Colo. Apr. 24, 2020), the Court explains that the plaintiff, in addition to

having hypertension, has six other medical conditions and risk factors for COVID-19. The cases Plaintiffs cite do no stand for the proposition that if someone has hypertension, that condition alone puts them at greater risk of serious illness or death should they contract COVID-19. The Court finds that Plaintiffs have failed to show that Plaintiff Mejia is medically vulnerable to COVID-19.

B. Otero County Processing Center's COVID-19 Measures

Plaintiffs have also failed to show that there are no adequate measures that can ensure they avoid exposure to COVID-19 while detained at Otero. As discussed in detail in the factual background section of this Memorandum Opinion and Order, Otero has taken numerous measures, following ERO's COVID-19 Pandemic Response Requirements and the CDC's Interim Guidance on Management of COVID-19 in Correctional and Detention Facilities, to prevent its detainees from exposure to COVID-19. Additionally, the allegations raised by Plaintiffs regarding the conditions at Otero are directly contrary to the evidence provided by Deputy Field Office Director Acosta. For example, Plaintiffs allege that detainees "lack sufficient cleaning supplies and hand soap." Fuentes Decl. ¶ 13; Mejia Decl. ¶ 12 ("I am very worried about the sanitation in this facility. We only have shampoo to wash our hands and bodies"). But the more credible evidence before the Court demonstrates that Plaintiffs' representations are not accurate:

> At each detention facility, upon admission, all detainees are provided a no-cost hygiene kit which includes soap and shampoo (can be an all-in-one product) a toothbrush and toothpaste. Hygiene kits are automatically refreshed at no cost or when a detainee requests one. Hand sanitizers are available for use for the [Otero County Processing Center] detained population. Additional soap dispensers have been placed in the [Otero County Processing Center] housing units to reinforce the proper hand washing protocols. Cleaning crews, both contract staff and volunteer detainee workers, are using the proper disinfection chemicals when performing housing unit and common area cleaning.

Acosta Decl. ¶ 19. Plaintiffs also allege crowded conditions, but Otero "is at 60% of its normal capacity," and officials monitor the housing unit populations daily to allow for social distancing as much practicable *Id.* ¶ 7. Recreation, meals, and other scheduled activities have also been adjusted to allow for social distancing. *Id.* ¶ 23. Detainees who present COVID-19 symptoms are referred to a medical provider for testing and separated from others. *Id.* ¶ 15. Confirmed COVID-19 cases are isolated and treated. *Id.* Asymptomatic detainees with known exposure to a confirmed case are placed in cohorts and monitored daily for 14 days. *Id.* ¶ 16. And new detainees are screened and separated from the general population for 14 days upon arrival. *Id.* ¶ 14.

***9** The expert declarations Plaintiffs submitted do not assist them in showing that there are no adequate measures that can ensure they avoid exposure to COVID-19 while detained at Otero. Dr. Amon and Dr. Kalishman's discussion on the conditions at Otero appear to be based solely on the descriptions provided in Plaintiffs' declarations without any independent verification. *See* Amon Decl. ¶ 36 ("Based upon the declarations I reviewed, I have identified the following vectors of COVID-19 infection at Otero County Processing Center."); *see* Kalishman Decl. ¶ 21 ("In the congregate setting, described in Petitioners' declarations, large numbers of people must share eating, hygiene, and sleeping facilities, leaving them vulnerable to transmission of this COVID-19."). Dr. Schriro's declaration provides only a generalized discussion of conditions at ICE facilities without providing any specific information addressing the current conditions at Otero. *See* Doc. 1-6 (Declaration of Dr. Dora Schriro). And Ms. Rucker's affidavit provides her observations from a visit to Otero on January 21, 2020, months before the COVID-19 outbreak had taken hold and Otero's prevention measures were put in place. *See* Doc. 1-10 (Affidavit of Nia Rucker). The Court finds that Plaintiffs have failed to show that there are no adequate measures to ensure they avoid exposure to COVID-19 while detained at Otero.

The Supreme Court has consistently held that detaining aliens to prevent them from absconding and ensuring that they appear for removal proceedings is a legitimate governmental purpose. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 520-22 (2003); *Zadvydas*, 533 U.S. at 690–91. Plaintiffs have not shown that their detention at Otero is not rationally related to that legitimate governmental purpose or is excessive in relation to that purpose because they have failed to demonstrate that they have medical conditions that put them at a higher risk of serious illness or death should they contract COVID-19 and that there are no adequate measures that can ensure they avoid exposure to COVID-19 while detained at Otero. *See Kingsley*, 135 S. Ct. at 2473 (2015) (quoting *Bell*, 441 U.S. at 561). Accordingly, the Court finds that Plaintiffs have not shown a substantial likelihood of prevailing on the merits.

II. Plaintiffs Fail to show Irreparable Harm Unless the Injunction is Issued

Plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Plaintiffs assert that they will suffer irreparable harm if they are not immediately released from Otero because they have medical conditions that put them at a higher risk of serious illness or death should they contract COVID-19, there are no adequate measures that can ensure they avoid exposure to COVID-19 at Otero, and Defendants have violated their constitutional rights by continuing to detain them despite being ill equipped to adequately protect them from COVID-19. Doc. 3 at 25–26. As discussed in detail in the previous section of this Memorandum Opinion and Order, these assertions are without merit. Plaintiffs have not shown that they have medical conditions that put them at a higher risk of serious illness or death should they contract COVID-19 or that the safeguards and precautions in place at Otero are

inadequate to prevent them from being exposed to COVID-19.

In essence, Plaintiffs are asking the Court to order their immediate release from Otero based on the possibility that they may suffer irreparable harm from COVID-19 should they contract it while detained there. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Accordingly, the Court finds that Plaintiffs have not shown that they will suffer irreparable harm unless the injunction is issued.

Even if the Court were to order Plaintiffs' immediate release, the Court cannot make the finding that they would not face the risk of contracting COVID-19 outside of Otero, when comparing the United States 1,031,659 COVID-19 cases to Otero County's 5 COVID-19 cases. *Compare* CDC, Cases of COVID-19 in the United States, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited April 30, 2020), *with* NMDH, COVID-19 in New Mexico, https://cvprovider.nmhealth.org/public-dashboard.html (last visited April 30, 2020).

III. Plaintiffs Fail to show that their Threatened Injury Outweighs the Harm that the Preliminary Injunction may cause the United States

***10** Plaintiffs argue that their threatened injury outweighs any harm the injunction would cause the United States because they will suffer irreparable harm from COVID-19 if not released from Otero and the harm to the United States is administrative because there are alternatives to detention such as release on conditions and bond. Doc. 3 at 27. Their argument is premised on having established that they will suffer irreparable harm from COVID-19 if not released. As explained in the previous section of this Memorandum Opinion and Order, Plaintiffs have not established irreparable harm. Accordingly, the Court finds that Plaintiffs have not shown that their threatened injury outweighs the harm that the injunction may cause the United States.

IV. Plaintiffs Fail to show that the Injunction, if issued, would Not Adversely Affect the Public Interest

Plaintiffs argue that the injunction would benefit the public interest because they claim that their release from Otero would decrease the likelihood that they will contract COVID-19 and take up valuable medical resources when being treated. *Id.* at 28. In making this argument, Plaintiffs incorrectly assume they are more vulnerable to COVID-19 at Otero and disregard their immigration histories and the fact that the "Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant." *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) (collecting cases).

Plaintiff Fuentes has illegally entered the United States two times. Acosta Decl., Fuentes ¶¶ 2 and 7. Plaintiff Mejia has illegally entered and reentered the United States three times. *Id.*, Mejia ¶¶ 2, 7 and 14.

Based on this prior conduct by Plaintiffs, they have demonstrated that they have no respect for the United States' immigration laws. Plaintiff Mejia also presents a risk of danger as he has a conviction for resisting arrest with force or violence. *Id.* ¶ 9. The public interest in enforcement of immigration laws is significant and so is the public interest in being protected from those who present a risk of danger. Releasing Plaintiffs would be contrary to public interest. Accordingly, the Court finds that Plaintiffs have failed to show that the injunction would not adversely affect the public interest.

CONCLUSION

A preliminary injunction of the type requested by Plaintiffs is an extraordinary remedy, and to obtain one Plaintiffs must show a substantial likelihood of prevailing on the merits; irreparable harm unless the injunction is issued; that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and that the injunction, if issued, will not adversely affect the public interest. Plaintiffs have not met their burden in establishing any of these factors. For the reasons explained in this Memorandum Opinion and Order, Plaintiffs' Motion for a Temporary Restraining Order [Doc. 3] is **DENIED**.

IT IS SO ORDERED.

2019 WL 1228093
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Sean JENKINS, Petitioner,
v.
Warden SPAULDING, Respondent.

Civil Action No. 19-10078-MPK
|
Signed 02/22/2019

Attorneys and Law Firms

Sean Jenkins, Ayer, MA, pro se.

ORDER FOR REASSIGNMENT AND REPORT AND RECOMMENDATION

M. PAGE KELLEY, United States Magistrate Judge

***1** Pro se petitioner Sean Jenkins is in custody at FMC Devens, Massachusetts. He filed this Petition for Writ of Habeas Corpus pursuant 28 U.S.C. § 2241 seeking transfer to Puerto Rico. For the reasons set forth below, this Court orders the Clerk's Office to reassign the case to a District Judge and recommends that the District Judge deny the petition and dismiss this action.

I. BACKGROUND

On January 10, 2019, petitioner filed this habeas action on a form he filled out, seeking habeas relief pursuant to 28 U.S.C. § 2241. (#1.) This action was assigned to this court, pursuant to the Court's Program for Random Assignment of Civil Cases to Magistrate Judges.

Petitioner is civilly committed to the custody of the United States Attorney General pursuant to 18 U.S.C. § 4246(d). *See United States v. Jenkins,* No. 5:16-hc-02229-BR (E.D.N.C. Feb. 28, 2017); *see also* #1 ¶ 4. Petitioner alleges that he is "in a hostile, abusive and racist environment" and seeks "return to Puerto Rico." *Id.* ¶¶ 5, 15. On February 20, 2019, he filed a letter concerning the payment of the filing fee. (#4.)

II. DISCUSSION

Although Jenkins brings this petition under 28 U.S.C. § 2241, the rules governing petitions brought pursuant to 28 U.S.C. § 2254 may be applied. *See* Rule 1(b) of the Rules Governing Habeas Corpus Cases Under Section 2254. Under Rule 4 of the Rules Governing Habeas Corpus Cases Under Section 2254, the court is required to examine a petition, and if it "plainly appears from the face of the petition ... that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition...." Thus, the court has a duty to screen and summarily dismiss a habeas petition prior to any answer or other pleading when the petition "appears legally insufficient on its face." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). In considering whether Jenkins' petition clears this hurdle, the Court liberally construes his petition because he is proceeding pro se. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

Habeas review under 28 U.S.C. § 2241 is appropriate if a person is "in custody in violation of the Constitution or laws ... of the United States." § 2241(c)(3). "A motion pursuant to § 2241 generally challenges the *execution* of a federal prisoner's sentence, including such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions." *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001) (emphasis in original).

Jenkins argues that he is in a "hostile, abusive and racist environment." (#1 at 2.) He says that he is being "constantly abused by the staff" and that this constitutes cruel and unusual punishment. *Id.* at 6. His petition contains no other details about his claims.

Jenkins appears to be challenging the conditions of his confinement. This claim should be brought through a civil rights action pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971) (holding that an individual aggrieved by a federal official's violation of his constitutional rights can bring an action for monetary relief). *See Kane v. Winn*, 319 F. Supp. 2d 162, 213 (D. Mass. 2004) ("Although a habeas corpus petition is the appropriate means to challenge the fact or duration of incarceration, actions challenging the conditions

of confinement reside more in the heartland of civil actions under 42 U.S.C. § 1983 (for state prisoners), *Bivens*, 403 U.S. 388, 91 S. Ct. 1999 (for federal prisoners), or some other non-habeas doctrine or statute.") (internal quotations omitted).[1] Jenkins presently has an action pending under *Bivens* in this court, *see Jenkins v. Spaulding, et al.,* C.A. No. 18-12359-MPK (filed Nov. 9, 2018), where he appears to complaint that his records have been tampered with, and as a result he has not been able to address issues with his treatment. *Id.*, #1 at 3. Today, February 22, 2019, the court has permitted Jenkins to amend his pleadings to include details about how his constitutional rights have been violated by officials at FMC Devens. *See* C.A. No. 18-12359-MPK, #7. Jenkins can include in that action any complaints regarding the constitutionality of his conditions of confinement.

III. ORDER FOR REASSIGNMENT

***2** For the foregoing reasons, this Court orders the Clerk's Office to reassign this action to a District Judge for further proceedings.

IV. RECOMMENDATION

For the foregoing reasons, this Court also recommends that the District Judge deny the Petition for Writ of Habeas Corpus pursuant 28 U.S.C. § 2241 and dismiss this action.

V. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72(b), any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See Fed. R. Civ. P. 72. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Fed. R. Civ. P. 72(b) will preclude further appellate review of the District Court's order based on this Report and Recommendation. See Phinney v. Wentworth Douglas Hosp., 199 F.3d 1 (1st Cir. 1999); Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997); Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993).

All Citations

Slip Copy, 2019 WL 1228093

Footnotes

1 The First Circuit has said that where a prisoner seeks relief from conditions of confinement that would result in a reduction of his sentence, he should bring a habeas claim, and where he seeks relief from conditions of confinement that would not reduce his sentence, he should bring a civil rights claim. *See Gonzalez-Fuentes v. Molina,* 607 F.3d 864, 873-74 (1st Cir. 2010) (citing *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991) (observing that if an inmate is seeking a "quantum change in the level of custody—[including] outright freedom ... then habeas corpus is his remedy. But if he is seeking a different program or location or environment, then he is challenging the conditions rather than the fact of his confinement," and his remedy is under civil rights law); *Wilkinson v. Dotson,* 544 U.S. 74, 85 (2005) (Scalia, J., concurring) (approving of "quantum change" framework)) (other citations omitted); *Brennan v. Cunningham*, 813 F.2d 1, 4-5 (1st Cir. 1987) (holding that habeas claim was proper where a prisoner was challenging his termination from a work release program that was "closely connected to [his] impending release"). For a thorough analysis of case law concerning when conditions of confinement claims are properly brought as habeas corpus versus civil rights claims, *see* 1 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 9.1 n. 34 (7th

ed. 2017). Here, petitioner's complaints about the dangers he is facing do not challenge the length of his confinement.

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

ICE A

TOTAL DOUBLE BUNKS	**33**
HEIGHT FROM BOTTOM BUNK TO TOP BUNK	**39”**
SPACE BETWEEN BUNKS (*VARIES)*	**36”- 44”**
SPACE BETWEEN BUNKS & WALL (*VARIES)*	**45”- 48”**
SPACE BETWEEN BUNKS & TABLES (MOVABLE*)*	**10’- 13’**
SPACE BETWEEN BUNKS & PHONES (*VARIES)*	**32”- 48”**
SPACE BETWEEN PHONES (*VARIES)*	**5’ - 6’**
ICE A LAUNDRY DIMENSIONS	**8’ 9” X 10’ 4”**
ICE MEDICAL DIMENSIONS	**14’ X 12’**
ICE A VISITS DIMENSIONS	**13’ X 10’**
ICE A BATHROOM DIMENSIONS	**18’ 7” X 35’ 4”**
ICE A CLASSROOM DIMENSIONS	**17’ 10” X 18’ 8”**
ICE A REC. PEN DIMENSIONS	**30’ X 54’**
ICE A SINKS	**8**
ICE A SHOWERS	**6 *(includes 1 HP)***
ICE A TOILETS	**6**
ICE A URINALS	**3**
ICE A DORM/DAYROOM DIMENSIONS	***approx.* 108’ x 48’**

MODS 2 EAST

2 EAST DORM ROOM DIMENSIONS	**30’ X 11’**
BOTTOM BUNK TO TOP BUNK VARIES FROM	**30”-36”**
DISTANCE IN BETWEEN BEDS VARIES FROM	**7”- 34”**
DISTANCE ACROSS ROOM TO BEDS OR DESKS	**78”-84”**

(It should be noted that although dorms are same size, layout varies from one side to other)

2 EAST BATHROOM DIMENSIONS	**21’ X 9’ *(EACH)***
TOILETS TOTAL	**7 (*includes 2 HP*)**
SINKS TOTAL	**13**
SHOWERS TOTAL	**10 (*includes 1 HP*)**
URINALS TOTAL	**3**
2 EAST HALLWAY DIMENSIONS	**30’ X 7’**
2 EAST DAYROOM DIMENSIONS	**59’ X 30’**
DISTANCE BETWEEN TABLES *(MOVABLE)*	**APPROX. 5’ X 6”**
2 EAST MEDICAL DIMENSIONS	**N/A**

(DETAINEES ARE TREATED AT HSU)

MODS REC YARD "L" SHAPED