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16 UNITED STATES DISTRICT COURT
17 EASTERN DISTRICT OF CALIFORNIA

18 Charles Criswell, et al.,
19 Plaintiffs,
20 vs.
21 Michael Boudreaux, in his official capacity as
Sheriff of Tulare County,
22 Defendant.

Case No. 1:20-cv-01048-DAD-SAB

**PLAINTIFFS' EX PARTE NOTICE OF
MOTION AND MOTION FOR
TEMPORARY RESTRAINING ORDER
AND OSC RE: PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES**

Filed concurrently with TRO Checklist;
[Proposed] Temporary Restraining Order and
Order to Show Cause re Preliminary Injunction

Judge: Hon. Dale A. Drozd
Date:
Time:
Crtrm.: 5

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that organizational Plaintiff California Attorneys for Criminal
3 Justice, and Plaintiffs Charles Criswell, Levi Johnson, Adam Ibarra, and Samuel Camposeco,
4 individually and on behalf of all others similarly situated, apply ex parte for a Temporary
5 Restraining Order requiring Defendant Michael Boudreaux to implement CDC-compliant policies
6 for effectuating social distancing and the immediate testing of incarcerated people in the Tulare
7 County Jails, and cessation of his interference in their rights to access counsel and this Court,
8 pursuant to Federal Rule of Civil Procedure 65 and Local Rule 231.

9 This Motion is based upon this Notice, the Memorandum of Points and Authorities, the
10 declarations and exhibits filed in support thereof, Plaintiffs' Complaint, the filings in this action,
11 the Proposed Order, which is being filed in accordance with Local Rule 231 and lodged in
12 accordance with Local Rule 137, and any and all evidence, argument, or other matters that may be
13 presented at the hearing.

14 On August 11, 2020, Sara McDermott, counsel for Plaintiffs, met and conferred with
15 counsel for Defendant Kathleen A. Taylor by telephone and gave notice of Plaintiffs' ex parte
16 application. *See* Ex. 1 (Declaration of Sara McDermott ("McDermott Decl.")) ¶¶ 4–7. As outlined
17 in the McDermott Declaration, counsel continue to meet and confer regarding Plaintiffs' request,
18 originally included in Plaintiffs' requested relief, that Defendant draft a CDC-compliant written
19 masking policy substantially reflecting the current practice within the Jails. *Id.* ¶ 7. As to
20 Plaintiffs' remaining requests, counsel have reached an impasse. *Id.* Plaintiffs' counsel advised
21 that Plaintiffs would be moving for a Temporary Restraining Order as to those requests. *Id.*

22 DATED: August 12, 2020

MUNGER, TOLLES & OLSON LLP

23
24
25 By: /s/ Sara A. McDermott
26 Sara A. McDermott
27 Attorneys for Plaintiffs
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1 **I. INTRODUCTION**

2 Plaintiffs bring this action to prevent avoidable illness and death from COVID-19 among
3 people incarcerated at Tulare County Jails. Plaintiffs challenge Defendant Sheriff Michael
4 Boudreaux’s callous indifference to their health and safety, and his callow attempts to prevent
5 them from challenging his unconstitutional practices in court. Plaintiffs, like all Americans in this
6 pandemic, have a right to be safe and to protect themselves as best they can from a novel and
7 frightening disease. But as long as Defendant continues to ignore the widely-known risks of
8 COVID-19 in Tulare County Jails,¹ the lives of Plaintiffs, and the class they seek to represent, will
9 remain imperiled.

10 Defendant’s indifference to Plaintiffs’ and the prospective class members’ health is
11 particularly notable in two regards:

12 *First*, contrary to the advice of the CDC, Defendant has actually worked to *increase*
13 overcrowding in the Jails. In just the past two weeks, Defendant has directed 148 incarcerated
14 people be transferred out of the Main Jail and into the other three active jails (*i.e.*, Bob Wiley, the
15 Pre-Trial Facility, and South County). These transfers have resulted in a marked increase in the
16 populations of Bob Wiley and the Pre-Trial Facility to nearly 80% of their rated capacity—despite
17 the fact that the Jails as a whole are at only 57% of rated capacity. What’s more, Defendant has
18 not tested the vast majority of the 148 incarcerated people that he transferred before initiating the
19 transfers. Far from providing for social distancing, Defendant, by initiating transfers without
20 testing, has actively encouraged the spread of the disease in the resultantly overcrowded dorms
21 and cell blocks.

22 *Second*, Defendant has administered an inadequate and dangerously low number of
23 COVID tests—about 150 tests in total since the pandemic began—and those tests have been
24 administered only in the Pre-Trial Facility. Incarcerated people in the remaining jails have been
25

26 ¹ The term “Tulare County Jails” refers to the five detention facilities managed by the Tulare
27 County Sheriff’s Office: Bob Wiley Detention Facility (Bob Wiley), Main Jail, Men’s
28 Tulare County Sheriff, Detentions,
<https://tularecounty.ca.gov/sheriff/index.cfm/divisions/detentions1/>.

1 denied tests despite exhibiting multiple symptoms of COVID-19. Instead they are flippantly told
2 —contrary to all evidence—that “incarcerated people [are] not likely to get sick from the
3 coronavirus” Ex. 16 (Declaration of Adam Ibarra (“Ibarra Decl.”)) ¶ 11.

4 At the same time Defendant has ensured conditions are ripe for an outbreak in his Jails, he
5 has also sought to deter incarcerated people from seeking redress in this Court. Incarcerated
6 people seeking to meet with their attorneys have faced armed interrogation, dangerous work
7 reassignments, and unwarranted and retaliatory reclassifications. When those didn’t work,
8 Defendant implemented a Kafkaesque visitation policy that continues to prevent counsel from
9 meeting with incarcerated people. The lack of access to counsel has made it extremely difficult for
10 Plaintiffs’ to pursue relief on behalf of themselves and the proposed class.

11 The spread of COVID-19 in Tulare County’s Jails threatens both incarcerated people in the
12 Jails and people in the surrounding community: Jails staff, volunteers, and others travel in and out
13 daily, potentially carrying COVID-19 beyond the prison walls. Immediate action is thus necessary
14 to prevent needless suffering and death inside and out of the Jails, and to allow incarcerated people
15 in the Tulare County Jails to exercise their constitutional right to access the courts. Defendant
16 must immediately reduce overcrowding by using the available space in the Jails to facilitate social
17 distancing; conduct universal testing to prevent the spread of COVID-19; and allow confidential
18 attorney visits to proceed immediately without intimidation or the threat of retaliation.

19 **II. FACTUAL BACKGROUND**

20 COVID-19 is terribly dangerous. The virus has already killed more than 165,000 people in
21 the United States, and it may cause long-term organ damage even in people who present with
22 minimal or no symptoms.² Congregate living facilities, like the Tulare County Jails, are at
23 particularly high risk. Ex. 2 (Declaration of Dr. Joe Goldenson (“Goldenson Decl.”)) ¶ 13.

24 _____
25 ² Centers for Disease Control and Prevention, *Cases in the U.S., Coronavirus Disease 2019*,
26 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>. A temporary
27 restraining order is customarily granted on the basis of evidence that is less complete than what is
28 presented at a trial on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The
Court may consider hearsay and otherwise inadmissible evidence when considering whether to
issue a preliminary injunction. *Rep. of the Phil. v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988).

1 Yet Defendant continues to operate the Jails as if it's 2019, refusing testing, and crowding
2 individuals into tight quarters despite the well-known and obvious risks. Without this Court's
3 immediate intervention, Plaintiffs and the members of the proposed class face the high likelihood
4 of needless suffering from the virus—and in some cases, even death.

5 **A. Defendant Continues to Transfer Incarcerated People to Two Overcrowded**
6 **Jails Despite Available Space Elsewhere**

7 Social distancing is a “cornerstone of reducing transmission of respiratory diseases such as
8 COVID-19.” Ex. 1 (McDermott Decl.) ¶ 8, Ex. C at 4. The CDC recommends that correctional
9 facilities reassign bunks to allow for six feet of space between individuals, and to the extent
10 possible, minimize the number of people housed in the same room. *Id.* at 10–11. The CDC
11 recommends ensuring that there is no mixing among housing units by staggering meals and
12 modifying work details. *Id.* Correctional institutions should modify group activities and the
13 delivery of medical services to increase opportunities for social distancing. *Id.* These and other
14 strategies can reduce the risk of transmission even in inherently dangerous settings like
15 correctional institutions. *Id.*

16 Right now, the population of the Tulare County Jails is only 57% of the Jails' total rated
17 capacity. Ex. 1 (McDermott Decl.) ¶ 13. Yet despite the available space, Defendant crams
18 incarcerated people in overcrowded housing units, including barracks-style dormitories and cells.
19 In these close quarters, it is impossible for incarcerated people to maintain at least six feet of
20 distance between themselves at any time. *See, e.g.*, Ex. 16 (Ibarra Decl.) ¶ 3 (reporting that nearly
21 all the cells in his unit are full); Ex. 22 (Declaration of Larry Robinson (“Robinson Decl.”)) ¶ 4;
22 Ex. 19 (Declaration of Martin Martinez (“Martinez Decl.”)) ¶ 3. So many people are locked
23 together that incarcerated people also cannot keep their distance on the yard or in other common
24 areas. Ex. 19 (Martinez Decl.) ¶¶ 7, 11. Plaintiff Camposeco reports that his “unit is very full and
25 deputies don't seem to care that we are all crowded together” despite incarcerated people's
26 complaints. Ex. 11 (Declaration of Samuel Camposeco (“Camposeco Decl.”)) ¶¶ 3, 13. Defendant

27 _____
28 The Court may also take judicial notice of publicly accessible websites. *See King v. Cnty. of L.A.*,
885 F.3d 548, 555 (9th Cir. 2018).

1 continues to book new people into the Jails and transfer them into the already-crowded units,
2 despite significant available space elsewhere in the Jails. Ex. 19 (Martinez Decl.) ¶ 12.

3 Nor does Defendant separate out medically vulnerable people—those with certain
4 preexisting conditions, and those over age 55—who are at particularly high risk from COVID-19.
5 Ex. 2 (Goldenson Decl.) ¶ 22. Defendant has not disclosed how many medically vulnerable people
6 are currently incarcerated in Tulare County, but the number may be in the hundreds.³ None are
7 afforded even basic CDC-recommended protections for their condition, and all continue to be
8 packed indiscriminately among the general population.

9 Indeed, Defendant appears to have begun intentionally *increasing* crowding in three of the
10 Jails, despite CDC’s recommendations for social distancing. From July 25 to August 1, 2020, the
11 total population of the Jails remained stable. Yet during that week, Defendant inexplicably moved
12 148 individuals from the Main Jail to Bob Wiley, the Pre-Trial Facility, and South County. Ex. 1
13 (McDermott Decl.) ¶ 13. As a result of the moves, Bob Wiley’s population increased from 72% of
14 rated capacity to 80% of rated capacity—and the population of the Pre-Trial Facility (where 22
15 people have tested positive for COVID-19) skyrocketed from 56% to 74% of rated capacity. *Id.*
16 Meanwhile, the population of the Main Jail plunged from 61% to only 6% of rated capacity. *Id.*
17 These transfers were accomplished *without* any prior testing of the transferees. *Id.*

18 Despite the clear and obvious danger, and despite the fact that the Jails are significantly
19 underpopulated, Defendant continues to crowd incarcerated people together in tight spaces,
20 significantly increasing the opportunities for transmission of COVID-19. Defendant’s
21 intentionally cruel transfer policy puts incarcerated people’s health at extreme risk.

22 **B. Defendant’s Testing Policy: If You Don’t Test, You Get No Positives**

23 Nearly six months into the pandemic, Defendant has tested a mere 153 people in his care—
24 out of a high-turnover jail population that hovers somewhere north of 1,000. *See* Ex. 1

25

26 ³ Defendant reports that the following incarcerated people have conditions that make them
27 medically vulnerable: 31 have chronic lung disease or moderate to severe asthma, 2 are
28 immunocompromised, 30 people have severe obesity, 46 people have diabetes, and 60 people have
liver disease. *See* Ex. 7 (Declaration of Dylan Verner-Crist (“Verner-Crist Decl.”) ¶ 19, Ex. F at 1.
Tulare County has not disclosed the number of incarcerated people over the age of 55.

1 (McDermott Decl.) ¶¶ 10–11, Ex. E at 1; *id.* Ex. F at 1. Defendant’s refusal to implement
2 widespread testing, including prior to initiating transfers, is both ineffective and dangerous. The
3 CDC recommends that facilities test anyone before transferring them to another facility—
4 especially if there is a risk that they are transferred to a facility with medically vulnerable people.
5 *See* Ex. 1 (McDermott Decl.) ¶ 9, Ex. D at 4; *see also* Ex. 3 (Declaration of Jaimie Meyer (“Meyer
6 Decl.”)) ¶ 19. The CDC also recommends testing before release. *See* Ex. 1 (McDermott Decl.) ¶ 9,
7 Ex. D at 4.

8 For individuals already incarcerated in the facility, the CDC recommends testing
9 symptomatic individuals and close contacts of anyone with a confirmed case of COVID-19. *Id.* at
10 2–3. Because correctional and detention facilities “have potential for rapid and widespread
11 transmission of SARS-CoV-2,” and contact tracing can be resource-intensive, the CDC
12 recommends “a broader testing strategy, beyond testing only close contacts within the facility to
13 reduce the chances of a large outbreak.” *Id.* at 3. Thus, “[b]aseline testing for all” incarcerated
14 people is recommended when there is a moderate to high level of community transmission, *id.* at
15 4—which Tulare County has.⁴ Baseline testing is particularly important because over a quarter of
16 those infected with COVID-19 may be asymptomatic but still transmit the virus. Ex. 2 (Goldenson
17 Decl.) ¶ 18. Thus, experts also recommend that correctional facilities conduct an initial test of all
18 people living and working in a correctional facility, and conduct regular follow-up testing, in order
19 to prevent the spread of the disease. Ex. 3 (Meyer Decl.) ¶ 19.

20 Defendant’s policies fall far short of these standards. Defendant has refused to conduct
21 even the initial testing that experts recommend—despite a letter from the Tulare County Superior
22 Court requesting that he do so. *See* Compl. Ex. 1 at 50, 52. As of July 7th, the stated policy of
23 Defendant’s medical provider, Wellpath, was to deny COVID-19 testing unless an incarcerated
24

25 _____
26 ⁴ Tulare County has a 16.7%, 7-day positivity rate for the period of July 19–July 25. Ex. 1
27 (McDermott Decl.) ¶ 17, Ex. K at 1. By contrast, the test positivity rate in California is less than
28 half that, with a 5.8% 7-day positivity rate. *See* California Department of Public Health, COVID-
19: Cases (last visited Aug. 10, 2020), [https://public.tableau.com/views/COVID-
19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=no](https://public.tableau.com/views/COVID-19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=no). Tulare County’s test
positivity rate is currently twice California’s target rate of 8% (or less).

1 person was actively symptomatic, as defined by Wellpath. *See* Ex. 7 (Declaration of Dylan
2 Verner-Crist (“Verner-Crist Decl.”)) ¶ 18, Ex. E at 41. To receive a test, incarcerated people must
3 present with specific symptoms: The patient must have a cough, shortness of breath, or difficulty
4 breathing, *or* at least two of the following symptoms: fever of 100 degrees Fahrenheit or greater,
5 repeated shaking with chills, congestion or runny nose, new loss of taste or smell, chills, sore
6 throat, nausea, headache, muscle pain, or diarrhea. *See id.*; *id.* ¶ 20, Ex. H at 107 (example of use
7 of screening form Assessment in practice). When there is no fever, Wellpath operators are to use
8 “clinical judgment” in determining whether to test for COVID-19. *Id.* Ex. E at 41 (small print).
9 This policy entirely ignores the possibility that COVID-19 may be transmitted asymptotically.

10 Worse, even those who *do* have symptoms consistent with COVID-19 are regularly
11 refused tests. On April 19, 2020, named Plaintiff Adam Ibarra sought medical attention for a
12 cough, chest pains, and headaches. Ex. 7 (Verner-Crist Decl.) ¶ 20, Ex. G at 105. An examination
13 determined that he had redness in the back of his throat and a dry cough, and concluded that his
14 symptoms “exceed findings for testing of COVID 19.” *Id.* Yet Ibarra was never given a test.
15 Instead, he was told to take Tylenol, Robitussin and an antihistamine, drink more water, and seek
16 medical help if his symptoms worsened. *Id.*

17 On May 20, 2020, named Plaintiff Samuel Camposeco began to experience flu-like
18 symptoms. Ex. 11 (Camposeco Decl.) ¶ 10. He requested a test, but TCSO staff refused to see
19 him. *Id.* It was not until nine days later that medical staff finally responded to his request. *Id.* ¶ 11.
20 Camposeco was handcuffed, then brought to see a nurse (despite never having been handcuffed
21 for a medical visit in the past). *Id.* Camposeco told the nurse that he “had body aches, a cough,
22 severe headaches, joint pain, chills, shortness of breath, and a sore throat, and that [he] was
23 worried that [he] had the coronavirus.” *Id.* The nurse responded by asking whether Camposeco—
24 who has been detained in the Jails since February 16, 2017—had traveled outside of the country
25 recently. *Id.* ¶¶ 2, 11. When Camposeco responded that he had not, the nurse “told [him he] could
26 not get a coronavirus test because [he] hadn’t traveled recently.” *Id.* ¶ 11. The nurse’s only advice:
27 “[D]rink more water.” *Id.*

28

1 Even more recently, on July 28, 2020, Luke Rodriguez—who was imminently due to be
 2 released to the home of his elderly, cancer-stricken mother—asked to be tested for COVID-19,
 3 consistent with CDC guidelines. Ex. 23 (Declaration of Luke Rodriguez (“Rodriguez Decl.”)) ¶ 3;
 4 *see also* Ex. 1 (McDermott Decl.) ¶ 9, Ex. D at 4 (Guidelines). But the nurse refused: “She told
 5 me that I could not get tested without a temperature of 104 degrees Fahrenheit or higher.” *Id.* ¶ 4.
 6 And in a disturbing coda to Camposeco’s previous request for testing, he was again denied a test
 7 as recently August 5, 2020—despite ostensibly meeting the Jail’s own criteria for testing of
 8 incarcerated people with symptoms. Ex. 12 (Suppl. Decl. of Samuel Camposeco) ¶ 6.

9 Defendant’s testing strategy has been ad hoc and limited, meaning that the results are
 10 essentially useless to determine whether COVID-19 is present in the Jail. On June 29, 2020—five
 11 months into the pandemic—Defendant announced he had (finally) conducted a first round of
 12 testing. Ex. 1 (McDermott Decl.) ¶ 14, Ex. H.⁵ He administered a grand total of 139 tests, of
 13 which 22 were positive for COVID-19. *Id.* ¶ 15, Ex. I. Those numbers evince an extremely high
 14 rate of infection: Dividing the number of positive tests by the total number of individuals tested
 15 yields a **15.8% positive test rate**. *Compare* Ex. 3 (Meyer Decl.) ¶ 41. By contrast, California’s
 16 target test positivity rate is less than 8%. Ex. 1 (McDermott Decl.) ¶ 17, Ex. K. Moreover,
 17 applying the 15.8% test positivity rate to the Jail’s population as a whole (1086 people as of
 18 August 1) suggests that at least 150 people went undiagnosed in the initial round of testing.
 19 *Compare* Ex. 3 (Meyer Decl.) ¶ 43. Yet despite the high likelihood that people are suffering
 20 without a diagnosis—or unintentionally passing the virus on to the medically vulnerable—
 21 Defendant has declared victory. Ex. 1 (McDermott Decl.) ¶ 15, Ex. I.

22 What’s more, statistics reported by the California Board of State and Community
 23 Corrections (“BSCC”) confirm that all of the tests were administered in the Pre-Trial Facility,
 24 meaning that Defendant has conducted *no* testing at all in Bob Wiley, South County, or the Main
 25 Jail—where the majority of incarcerated people are housed. *Id.* ¶¶ 10, Exs. E at 1. The experiences
 26 of incarcerated people confirm that this is not coincidence, but policy: When Mario Escobar
 27 _____

28 ⁵ Defendant inflated the total number of tests in his initial June Facebook announcement, claiming more than 200 given. In fact, Defendant has not administered 200 tests *since the pandemic began*.

1 sought testing on May 30, 2020, he was told that “Bob Wiley [does] not test incarcerated people.”
2 Ex. 14 (Declaration of Mario Escobar (“Escobar Decl.”)) ¶ 12.

3 Moreover, BSCC statistics indicate that between the week of July 25 and August 1,
4 Defendant transferred 148 people out of the Main Jail and into the other facilities. *See* Ex. 1
5 (McDermott Decl.) ¶¶ 10-13, Exs. E–F. Only 14 people were tested during that period, and all
6 were housed in the Pre-Trial Facility—meaning Defendant initiated the transfers *without* testing
7 the transferees. This is contrary to CDC guidelines, which recommend testing before transfers,
8 especially to a facility where medically vulnerable people are likely to be. Because Defendant
9 does not cohort medically vulnerable people, these transfers put them at especially high risk.

10 Defendant is aware of the possibility of asymptomatic transmission. Yet he refuses to
11 provide meaningful access to testing in the jail, even to those who show some symptoms—let
12 alone those who are not yet symptomatic. And he has transferred incarcerated people between
13 facilities without testing the vast majority of them. Defendant is willfully exposing incarcerated
14 individuals to the virus via unidentified, asymptomatic carriers, putting them at unreasonable risk
15 of contracting the disease themselves.

16 **C. Intentional Interference with Access to Courts and Counsel**

17 Incarcerated people have reported being harassed, interrogated, or retaliated against after
18 speaking to counsel about Tulare County Jail’s response to COVID-19. Defendant has also
19 interfered with incarcerated peoples’ rights indirectly, by attempting to prevent counsel from
20 contacting incarcerated people in the first place. Both civil and criminal defense attorneys have
21 had trouble meeting with retained and prospective clients, seeing multiple visits cancelled.
22 Through overt intimidation and interference, Defendant has created unacceptable, and
23 unconstitutional, barriers for incarcerated people who seek to vindicate their constitutional rights.

24 **1. Defendant’s Attorney Visitation Policy Was Designed to—and Had the**
25 **Effect of—Chilling Incarcerated People’s Access to Courts and Counsel**

26 In early May, the American Civil Liberties Union Foundation of Northern California
27 (“ACLU”) began contacting incarcerated people who had reached out to the ACLU to voice
28 concerns about the Jails’ response to the COVID-19 pandemic. *See* Ex. 7 (Verner-Crist Decl.)

1 ¶¶ 3–4. On May 28, the Jails abruptly canceled all of the ACLU’s confidential legal visits. Ex. 7
2 (Verner-Crist Decl.) ¶ 7. That day, Deputy County Counsel Diane Mendez, called Kathleen
3 Guneratne, a senior staff attorney with the ACLU, to ask about the visits. Ex. 5 (Declaration of
4 Kathleen Guneratne (“Guneratne Decl.”)) ¶ 3. The next day, on May 29, TCSO promulgated a
5 new policy that required attorneys to attest that they are an “attorney of record”—meaning,
6 attorneys would no longer be permitted to meet with prospective clients. *Id.* Ex. E. This significant
7 restriction on the right to an attorney was unprecedented. Prior to the COVID-19 pandemic, such
8 visits were routinely allowed. Ex. 8 (Declaration of Annie Davidian (“Davidian Decl.”)) ¶ 4.

9 Guneratne wrote to Mendez twice, demanding the ACLU’s confidential attorney visits be
10 reinstated immediately. Ex. 5 (Guneratne Decl.) ¶¶ 4–5, Exs. A–B. On June 4, Defendant modified
11 the policy to affirm that attorneys could no longer meet with prospective clients. *Id.* Ex. F.

12 Mendez responded to the ACLU’s letter on June 10. Ex. 5 (Guneratne Decl.) ¶ 5, Ex. C at
13 2. This response made clear that the Jail’s policy was no accident, but rather part of an active
14 attempt to deny the ACLU access to prospective clients. Although prospective clients are
15 privileged and a crucial part of the attorney-client relationship, *see* Ex. 4 (Declaration of Stephen
16 Bundy (“Bundy Decl.”)) ¶¶ 7–8, Mendez doubled down, claiming that visits with prospective
17 clients are not protected by the attorney-client privilege and must take place on recorded lines. Ex.
18 5 (Guneratne Decl.) Ex. C at 2. Despite attempts to further engage with TCSO, Ex. 5 (Guneratne
19 Decl.) Ex. D, the policy has remained in place.

20 The ACLU has, on numerous occasions, attempted to conduct confidential legal visits with
21 *retained* clients—with whom, according to the policy, they should be able to meet confidentially.
22 Ex. 5 (Guneratne Decl.) ¶ 8; Ex 6 (Declaration of Amy Gilbert (“Gilbert Decl.”)) ¶ 3. But those
23 visits have been repeatedly cancelled without explanation. Ex. 6 (Gilbert Decl.) ¶¶ 6-8. TCSO
24 delayed processing ACLU attorneys’ requests for confidential visits for weeks. *Id.* ¶¶ 6–16. And
25 Bob Wiley recently rescinded video visitation, meaning that attorneys wishing to speak with
26 clients in that facility must be willing to expose themselves to the possibility of contracting
27 COVID-19. Ex. 7 (Verner-Crist Decl.) ¶ 21. To this day, the ACLU has not been approved to visit
28 confidentially with named Plaintiff Charles Criswell.

1 Defendant's policy has prevented many incarcerated people from meeting confidentially
2 with the ACLU. *Id.* ¶¶ 15, 21. And the policy of denying access to counsel has not been limited to
3 civil counsel. Criminal defense attorneys have also reported being denied access to their clients.
4 Ex. 8 (Davidian Decl.) ¶¶ 9, 11. Because of TCSO's policy, some criminal defendants can meet
5 with their attorneys only *during* hearings. *Id.* ¶ 12.

6 **2. Defendant Has Intimidated, Interrogated, and Retaliated Against**
7 **Incarcerated People Seeking to Exercise Constitutional Rights**

8 May 28 was the day that TCSO cancelled all of the ACLU's future visits. The policies at
9 the Jails changed shortly after. Even as Defendant changed his policies to make it more difficult
10 for the ACLU to meet with incarcerated people, he worked to threaten, intimidate, and retaliate
11 against incarcerated people who reached out to ACLU attorneys.

12 ***Intimidation and Interrogation.*** Mario Escobar met with an ACLU investigator on May
13 27. Ex. 14 (Escobar ¶ 5). The next day, on May 28, TCSO deputies pulled Escobar out of his cell
14 and began interrogating him about his conversation. *Id.* ¶ 6. Adam Ibarra was also interrogated
15 after a May 28 visit with the ACLU. Ex. 16 (Ibarra Decl.) ¶¶ 5–6. Brandon Alford was also
16 scheduled to meet with an ACLU investigator in late May. Ex. 9 (Alford ¶ 4). But before the visit,
17 deputies interrogated Alford about the purpose of his meeting. Alford refused to talk to the
18 sergeant. In retaliation, the sergeant canceled Alford's visit with the ACLU. *Id.* ¶ 5.

19 Deputies also interrogated Jeffrey Nunes, who had met with an ACLU investigator. Ex. 20
20 (Declaration of Jeffrey Nunes ("Nunes Decl.,")) ¶ 7. Deputies told Nunes that they would cancel
21 all future legal visits. *Id.* ¶ 8. Later that night, Nunes was taken out of his cell and interrogated by a
22 supervising deputy—visibly armed, despite a no-firearm policy in the Jails—about his meetings
23 with the ACLU, whether he had future meetings scheduled with the ACLU, and whether he had
24 encouraged other incarcerated people to talk to the ACLU. *Id.*

25 ***Retaliation.*** Defendant and his staff also retaliated against incarcerated people who
26 attempted to reach out to the ACLU. In early June, Nunes, who had been employed at the farm in
27 the Pre-Trial Facility, Ex. 20 (Nunes Decl.) ¶¶ 9–10, was moved to a job cleaning cells in the
28 intake unit. *Id.* at 11. This job put Nunes at much higher risk of catching COVID-19. *Id.* ¶ 11–12.

1 After Brandon Alford spoke with the ACLU, Defendant transferred him, without warning
2 or reason, to a high-security unit populated with people facing far more serious charges than he
3 was. Ex. 9 (Alford Decl.) ¶ 6. While there, Alford was allowed only one hour of out-of-cell time
4 per day. *Id.* Although Alford has since been moved to another housing unit, he retains the same
5 high-security classification he received when he was moved to the high-security unit. *Id.* When
6 Alford attempted to grieve the reclassification, TCSO staff refused him a grievance form. *Id.*

7 Adam Ibarra and Mario Escobar were also the targets of retaliation: after speaking with the
8 ACLU, in mid-July, deputies conducted unauthorized searches of their cells, and both were given
9 disciplinary infractions for offenses that others were not written up for. *See* Ex. 16 (Ibarra ¶ 18).

10 One of the many reasons that incarcerated people must be afforded access to confidential
11 visits with attorneys is that it allows them to speak to attorneys without fear that the information
12 could get back to those with the power to harm them. *See* Ex. 4 (Bundy Decl.) ¶ 9. Defendant’s
13 actions are a case study of why privileged and confidential attorney visits are so important: By
14 denying incarcerated people the right to confidential visits and retaliating against them for
15 exercising their right to challenge the conditions of their confinement, Defendant has meaningfully
16 interfered with Plaintiffs’, and the proposed class members’, right to access the courts.

17 **III. ARGUMENT**

18 This Court should grant a temporary restraining order (“TRO”) to immediately protect
19 incarcerated people from Defendant’s callous refusal to protect their health and safety during the
20 COVID-19 pandemic. A TRO may issue upon a showing “that immediate and irreparable injury,
21 loss, or damage will result to the movant before the adverse party can be heard in opposition.”
22 Fed. R. Civ. P. 65(b)(1)(A). To obtain a TRO, a plaintiff must establish: (1) “that [the plaintiff] is
23 likely to succeed on the merits,” (2) “that [the plaintiff] is likely to suffer irreparable harm in the
24 absence of preliminary relief,” (3) “that the balance of equities tips in [the plaintiff]’s favor,” and
25 (4) “that an injunction is in the public interest.” *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7,
26 20 (2008). The Ninth Circuit employs a “sliding scale” approach to *Winter*’s four-element test. *All*
27 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). Under this approach, a
28 preliminary injunction or temporary restraining order may issue if the plaintiff raises at least

1 “serious questions going to the merits” and demonstrates that “the balance of hardships tips
2 sharply in the plaintiff’s favor” as long as the plaintiff also satisfies the other *Winter* factors. *Id.* A
3 stronger showing of one element may offset a weaker showing of another. *See id.*⁶

4 Here, Plaintiffs meet the standard for a TRO. Plaintiffs have gathered significant evidence
5 that Defendant has failed to take even the most basic and well-known measures to prevent the
6 spread of COVID-19 in the Tulare County Jails. Defendant’s shocking failure to abide by CDC
7 guidelines for testing incarcerated people, or to implement policies for social distancing in the
8 Jails despite available space, has created a substantial risk to the health of all people incarcerated
9 in Tulare County Jails, in violation of their constitutional rights. All the while, Defendant has
10 engaged in a concerted and targeted effort to stymie attempts by incarcerated people to protect
11 themselves in the courts. Not only do Defendant’s actions put Plaintiffs in danger of immediate,
12 irreparable harm; they also increase the likelihood of infection in the surrounding community,
13 contrary to the public interest in a County that is already struggling with high COVID-19 infection
14 rates. A TRO should immediately issue to protect incarcerated people and the public.

15 **A. Plaintiffs and the Proposed Class Are Likely to Succeed on the Merits**

16 “[W]hen the State takes a person into its custody and holds him there against his will, the
17 Constitution imposes upon it a corresponding duty to assume some responsibility for his safety
18 and general well-being.” *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 199–
19 200 (1989); *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (“[H]aving stripped [incarcerated
20 people] of virtually every means of self-protection and foreclosed their access to outside aid, the
21 government and its officials are not free to let the state of nature take its course.”). This principle
22 requires correctional officials to provide adequate medical care to incarcerated people and to
23 protect them from communicable disease. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993)
24 (holding officials may not be “deliberately indifferent to the exposure of inmates to a serious,
25

26 ⁶ The analysis for a TRO and a preliminary injunction are “substantially identical.” *See Stuhlbarg*
27 *Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001); *Frontline*
28 *Med. Assoc., Inc. v. Coventry Healthcare Workers Comp., Inc.*, 620 F.Supp.2d 1109, 1110 (C.D.
Cal. 2009) (“The standard for a temporary restraining order . . . and a preliminary injunction are
the same.”).

1 communicable disease”); *Hutto v. Finney*, 437 U.S. 678, 682 (1978) (finding constitutional
2 violation where incarcerated people were placed in conditions where infectious disease could
3 easily spread). An official’s “deliberate indifference” to a substantial risk of harm from infectious
4 disease violates the Constitution. *See Helling*, 509 U.S. at 33.

5 Plaintiffs need not wait until the risk of an outbreak has actually materialized in order to
6 meet this standard. Prison officials act with deliberate indifference when they “ignore a condition
7 of confinement that is sure or very likely to cause serious illness and needless suffering the next
8 week or month or year,” even when that risk has not yet materialized. *Id.* “It would be odd to deny
9 an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on
10 the ground that nothing yet had happened to them. . . . [A] remedy for unsafe conditions need not
11 await a tragic event.” *Id.*

12 Plaintiffs are likely to succeed on their constitutional claims because Defendant’s response
13 to the pandemic is deliberately indifferent to the substantial risk that his policies, wholly
14 uncompliant with CDC guidelines, will cause a COVID-19 outbreak to occur in Tulare County
15 Jails—if an outbreak has not begun already.

16 **1. Defendant Is Deliberately Indifferent to Plaintiffs’ Serious Medical**
17 **Needs, In Violation of the Fourteenth and Eighth Amendments**

18 Plaintiffs are likely to succeed on the merits of their claims because Defendant’s utter
19 failure to follow CDC guidelines is deliberately indifferent, whether evaluated objectively or
20 subjectively. For pre-trial detainees, whose claims are evaluated under the Fourteenth
21 Amendment, Plaintiffs need only prove objective deliberate indifference. *See Gordon v. Cnty. of*
22 *Orange*, 888 F.3d 1118, 1124–25 (9th Cir. 2018) *cert. denied sub nom. Cnty. of Orange, Cal. v.*
23 *Gordon*, 139 S. Ct. 794 (2019). The claims of post-conviction incarcerated people ordinarily
24 require proving subjective deliberate indifference. *Farmer*, 511 U.S. at 842.

1 Throughout the Jails, however, Defendant mixes pre-trial detainees together with
2 individuals held post-conviction.⁷ And “claims for violations of the right to adequate medical care
3 ‘brought by pretrial detainees against individual defendants under the Fourteenth Amendment’
4 must be evaluated under an objective deliberate indifference standard.” *Gordon*, 888 F.3d at 1124–
5 25. Thus, to prove a claim of deliberate indifference under the Fourteenth Amendment, Plaintiffs
6 held pretrial must show that:

- 7 (i) the defendant made an intentional decision with respect to the conditions under
8 which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial
9 risk of suffering serious harm; (iii) the defendant did not take reasonable available
10 measures to abate that risk, even though a reasonable official in the circumstances
11 would have appreciated the high degree of risk involved—making the
12 consequences of the defendant’s conduct obvious; and (iv) by not taking such
13 measures, the defendant caused the plaintiff’s injuries.

14 *Id.* at 1125. Here, however, it is impossible to order separate relief for pretrial and post-conviction
15 prisoners. Defendant’s policies on testing and social distancing apply equally to pretrial detainees
16 and post-conviction prisoners: Whether an individual is entitled to a test, for example, is
17 determined without reference to an individual’s conviction status. Because Defendant’s policies
18 apply equally to all incarcerated people in the Jails, the Court can consider these claims under the
19 more-protective Fourteenth Amendment. Yet even if the Eighth Amendment standard were to
20 apply, Defendant’s refusal to implement policies in the Jails responsive to the pandemic
21 demonstrates a knowing and callous disregard for the incarcerated people in his care.

22 Five months after Governor Newsom declared a state of emergency in California,⁸ it would
23 be impossible for any state or local official not to appreciate the significant and ongoing threat of
24

25 ⁷ For example, both pretrial detainee Brandon Alford and Mario Escobar, who has been sentenced
26 following a trial, are housed in Bob Wiley. *Compare* Ex. 9 (Alford Decl.) ¶ 2; *with* Ex. 14
(Escobar Decl.) ¶ 2.

27 ⁸ *Governor Newsom Declares State of Emergency to Help State Prepare for Broader Spread of*
28 *COVID-19*, Office of Governor Gavin Newsom (March 4, 2020),

1 COVID-19. As early as mid-March, cities and states around the country began to put drastic
2 measures into place, almost entirely halting normal economic and social activities, in an attempt to
3 protect citizens from the threat of COVID-19. It is well known that the disease is highly
4 contagious and spreads rapidly in congregate settings. Ex. 2 (Goldenson Decl.) ¶ 13. “[T]he
5 seriousness of the threat posed by COVID-19—and the particular vulnerability of elderly
6 individuals as well as those with certain preexisting medical conditions—are so well known that it
7 would be implausible to suggest that prison officials are unaware of this risk.” *Martinez-Brooks v.*
8 *Easter*, No. 3:20-cv-00569, 2020 WL 2405350, at *21 (D. Conn. May 12, 2020); *see also Farmer*,
9 511 U.S. at 842 (“[A] factfinder may conclude that a prison official knew of a substantial risk
10 from the very fact that the risk was obvious.”).

11 Defendant himself understands the risks presented by COVID-19. On July 1, 2020, the
12 Honorable Brett R. Alldredge, presiding judge of the Tulare County Superior Court, wrote a letter
13 warning that “[t]he pandemic has come to our collective doors[,]” respectfully requesting that the
14 County “immediately implement testing of all inmates in the county jail facilities and entry
15 temperature checks for all shared county courthouse buildings open to the public.” Compl. Ex. 1.
16 Yet despite actual notice that “[t]esting all inmates would identify those individuals who have the
17 potential to spread the virus,” *id.*, Defendant continues to withhold testing.

18 Courts across the country have concluded that COVID-19 presents a substantial risk of
19 serious harm to prisoners. *See, e.g., Torres v. Milusnic*, No. 20-cv-4450-CBM-PVC(x), 2020 WL
20 4197285, at *9 (C.D. Cal. July 14, 2020) (“Petitioners show they are at substantial risk of
21 exposure to COVID-19, which is inconsistent with contemporary standards of human decency.”);
22 *Cameron v. Bouchard*, No. 20-10949, 2020 WL 1929876, at *2 (E.D. Mich. Apr. 17, 2020), *as*
23 *modified on reconsideration*, 2020 WL 1952836 (E.D. Mich. Apr. 23, 2020) (“It cannot be
24 disputed that COVID-19 poses a serious health risk to Plaintiffs and the putative class [consisting
25 of current and future jail detainees.]”); *Martinez-Brooks*, 2020 WL 2405350, at *21. Yet despite
26 the widespread consensus that COVID-19 poses a substantial risk of serious harm to incarcerated

27 _____
28 <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>.

1 people, Defendant has made a conscious decision not to implement responsive policies. Despite a
2 lawsuit and jails operating at half-capacity, he continues to compress incarcerated people into
3 shared dorms, without any testing available even when they display symptoms. Although the CDC
4 has made clear recommendations for testing and social distancing in correctional facilities—and
5 although Defendant himself has cautioned the people of Tulare County about these measures’
6 importance, *see* Ex. 1 (McDermott Decl.), ¶ 16, Ex. J—Defendant has failed to propagate a clear
7 written policy implementing any of these commonsense precautions.

8 A reasonable official would have appreciated the extreme risk posed by a failure to act
9 under these circumstances. Defendant knows it. To succeed on their claims, Plaintiffs need show
10 only that Defendant acted with “more than negligence but less than subjective intent—something
11 akin to reckless disregard.” *Gordon*, 888 F.3d at 1125 (quoting *Castro v. Cnty. of L.A.*, 833 F.3d
12 1060, 1071 (9th Cir. 2016)); *see also Gantt v. City of L.A.*, 717 F.3d 702, 708 (9th Cir. 2013)
13 (explaining objective deliberate indifference “entails something more than negligence but is
14 satisfied by something less than acts or omissions for the very purpose of causing harm or with
15 knowledge that harm will result”); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 n.2 (9th
16 Cir. 2006) (explaining that a state actor acts with deliberate indifference by ignoring “a known or
17 obvious danger” to another created by the actor’s own conduct).

18 Here, Plaintiffs can show more: Although Defendant demonstrably understands the risks
19 posed by COVID-19, he has recklessly disregarded those risks by actively transferring people to
20 *more* crowded settings and by failing to implement clear and effective policies for the testing of
21 incarcerated people. Defendant’s deliberate indifference violates the Eighth Amendment, as well
22 as the Fourteenth. *See, e.g., Hernandez v. Cnty. of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal.
23 2015) (stating that “known noncompliance with generally accepted guidelines for inmate health
24 strongly indicates deliberate indifference to a substantial risk of serious harm”); *Cameron*, 2020
25 WL 1929876, at *2 (preliminarily finding deliberate indifference in violation of the Eighth
26 Amendment when jail “has not imposed even the most basic safety measures recommended by
27 health experts, the Centers for Disease Control and Prevention, and Michigan’s Governor to
28 reduce the spread of COVID-19 in detention facilities”).

1 **a. Defendant’s Decision to *Increase* Overcrowded Conditions**
2 **During the Pandemic Is Deliberate Indifference**

3 The evidence shows that Defendant continues to cluster individuals in just a fraction of the
4 housing available in the Jails—including *increasing* the population of the Adult Pretrial Detention
5 Facility from 56% to 74% of capacity over the course of just one week. Ex. 1 (McDermott Decl.) ¶
6 13. This flouts well-known CDC guidance for correctional facilities, which stresses that social
7 distancing of at least six feet “is a cornerstone of reducing transmission of respiratory illnesses.”
8 Ex. 2 (Goldenson Decl.) ¶ 13. Courts elsewhere agree: “[W]ithout social distancing measures,
9 reliable containment of a highly contagious disease is nearly impossible.” *Martinez-Brooks*, 2020
10 WL 2405350, at *23.

11 Defendant not only refused to implement even the most basic CDC guidelines to allow
12 incarcerated people to maintain some degree of distance from one another—he has actively made
13 the situation worse, transferring individuals between jails despite the lack of testing and despite
14 the lack of protections for medically vulnerable individuals. Defendant’s intentional actions are
15 deliberately indifferent to the serious risk of harm that such overcrowded conditions pose to
16 people incarcerated in his Jails. *See, e.g., Banks v. Booth*, No. CV 20-849 (CKK), 2020 WL
17 3303006, at *9 (D.D.C. June 18, 2020) (granting preliminary injunction where, “[d]espite
18 widespread understanding of the importance of social distancing, Defendants have taken
19 insufficient and delayed steps to ensure that social distancing is occurring consistently.”);
20 *Carranza v. Reams*, No. 20-CV-00977-PAB, 2020 WL 2320174, at *9 (D. Colo. May 11, 2020)
21 (granting preliminary injunction where jail refused to provide social distancing protections for
22 medically vulnerable incarcerated people); *Morales Feliciano v. Rosselló Gonzáles*, 13 F. Supp.
23 2d 151, 208–09 (D.P.R. 1998) (finding that the defendant’s “inability . . . to properly isolate cases
24 of active tuberculosis” constituted deliberate indifference).

25 **b. Defendant’s Refusal to Test the Vast Majority of Detainees is**
26 **Deliberately Indifferent**

27 Defendant’s failure to implement an appropriate testing policy—including refusing to test
28 *anyone* in three of the four facilities currently operating—also ignores the obvious risk of harm

1 that COVID-19 poses for incarcerated people. Infected individuals can spread COVID-19 even
2 when they are entirely asymptomatic. The complete lack of testing at intake, before transfer
3 between housing units, and prior to re-entry to the community means that Defendant is likely
4 allowing infected prisoners to interact with healthy populations and spread the virus. Without
5 testing, it is impossible for incarcerated people or TCSO staff to track the course of the disease
6 through the Jail. This risk is particularly acute for medically vulnerable people, who may be
7 unknowingly exposed to asymptomatic carriers of COVID-19.

8 It is well-established that exposing non-infected incarcerated people to contagious
9 individuals in itself constitutes deliberate indifference. *See, e.g., Duvall v. Dallas Cnty., Tex.*, 631
10 F.3d 203, 208 (5th Cir. 2011) (upholding a finding of unconstitutional conditions of confinement
11 where officials continued to house inmates in a facility despite the existence of an extensive
12 MRSA outbreak); *Laureau v. Manson*, 651 F.2d 96, 98–99 (2d Cir. 1981) (upholding finding of
13 unconstitutional conditions of confinement where healthy prisoners were housed with physically
14 ill cellmates). Without an effective testing plan, Defendant all but guarantees that incarcerated
15 people will continue to be exposed to a potentially-deadly disease, without knowledge or recourse.

16 Nor can Defendant escape liability by pointing to his supposed policies on testing. Any
17 policy that results in only a small fraction of the total population of the Jails—and only those
18 housed in a single facility—receiving COVID-19 testing is simply not compliant with CDC testing
19 guidelines. And even if Defendant were to provide evidence that, following the filing of this
20 action, he began testing more people in the Jails, that would not be sufficient to defeat Plaintiffs’
21 showing. “It is well settled that a defendant’s voluntary cessation of a challenged practice does not
22 deprive a federal court of its power to determine the legality of the practice. If it did, the courts
23 would be compelled to leave the defendant . . . free to return to his old ways.” *Friends of the*
24 *Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Given his months-long
25 history of ignoring incarcerated people’s serious medical needs, Defendant cannot meet “the
26 heavy burden of persuading” the Court that “the challenged conduct cannot reasonably be
27 expected to start up again” in the absence of judicial intervention. *Id.*; *see also Norton v. LVNV*
28 *Funding, LLC*, 396 F. Supp. 3d 901, 920 (N.D. Cal. 2019). Plaintiffs reasonably fear that absent

1 injunctive relief, Defendant will revert to his previous policy of denying testing to all but a select
2 few. Immediate injunctive relief is necessary to guarantee the protection of Plaintiffs' health and
3 constitutional rights.

4 In sum, Defendant's refusal to respond to the pandemic has been conscious, active, and
5 deliberate. He has chosen to put incarcerated people at great risk, disregarding the substantial risk
6 to the real possibility of unnecessary suffering and even death they face from COVID-19.

7 Plaintiffs are likely to succeed on the merits of their Eighth and Fourteenth Amendment claims.

8 **2. Defendant's Active Interference with Plaintiffs' Attempts to Meet with**
9 **Counsel Violates Their First, Sixth, and Fourteenth Amendment**
10 **Rights, and Also Runs Afoul of the Bane Act**

11 Plaintiffs and proposed class members, like all incarcerated people, have a constitutional
12 right of access to the courts under the First and Fourteenth Amendments. *See Bounds v. Smith*, 430
13 U.S. 817, 821 (1977). Under the First Amendment, an incarcerated person has both a right to
14 meaningful access to the courts and a broader right to petition the government for redress of
15 grievances. *See Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995) (*overruled on other grounds*
16 *in Shaw v. Murphy*, 532 U.S. 223, 230 n.2 (2001)). The Fourteenth Amendment's guarantee to
17 substantive and due process also protects incarcerated people's right to meaningful access to the
18 courts. *See Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990). And under the First and Fourteenth
19 Amendments, incarcerated people have a right to meaningful access to the courts "without *active*
20 *interference* by prison officials." *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011)
21 (*overruled on other grounds by Richey v. Dahne*, 807 F.3d 1202, 1209 n.6 (9th Cir. 2015)). "The
22 opportunity to communicate privately with an attorney is an important part of that meaningful
23 access." *Ching*, 895 F.2d at 609. Thus, prison officials may not arbitrarily enforce a policy that
24 prevents "effective attorney-client communication and unnecessarily abridges the prisoner's right
25 to meaningful access to the courts." *Id.* at 610; *see also Casey v. Lewis*, 4 F.3d 1516, 1523 (9th
26 Cir. 1993) (holding that infringement on right to meaningful access to the courts must be
27 reasonably related to legitimate penological interests).

28

1 The Bane Act allows an individual to bring a civil action for injunctive and other
2 appropriate relief “[i]f a person or persons, whether or not acting under color of law, interferes by
3 threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion with
4 the exercise or enjoyment by any individual or individuals of rights” secured by the constitutions
5 or laws of the United States or California. Cal. Civ. Code § 52.1(b). Additionally, California state
6 prisoners (including those sentenced to serve terms in county jails) have the statutory right “[t]o
7 initiate civil actions” as plaintiffs. Cal. Pen. Code § 2601(d). “This statute has been interpreted to
8 include within its scope the right to be afforded meaningful access to the courts to *prosecute* those
9 civil actions.” *Smith v. Ogbuehi*, 38 Cal. App. 5th 453, 465 (2019).

10 Here, Defendant has actively interfered with the rights of incarcerated people to access the
11 courts in two ways.

12 *First*, Defendant has imposed an arbitrary policy to frustrate Plaintiffs’ and prospective
13 class members’ efforts to meet confidentially with civil rights attorneys regarding the appalling
14 conditions in the Jails. *See Casey*, 4 F.3d at 1520 (holding that “the main concern” of the right of
15 meaningful access to the courts is “protecting the ability of an inmate to prepare a petition or
16 complaint”). And the policy is so overbroad as to infringe at least some class members’ right to
17 counsel in their criminal cases, Ex. 8 (Davidian Decl.) ¶ 11, in violation of the Sixth Amendment.
18 *See Texas v. Cobb*, 532 U.S. 162, 167 (2001) (“The Sixth Amendment provides that ‘[i]n all
19 criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for
20 his defence.’”); *Benjamin v. Fraser*, 264 F.3d 175, 188 (2d Cir. 2001) (restrictions on attorney
21 visits resulting in significant delays violated Sixth Amendment).

22 *Second*, Defendant has engaged in systematic intimidation and retaliation to discourage
23 incarcerated people from attempting to access the courts. On multiple occasions, Defendant’s
24 deputies have questioned, threatened, intimidated, and retaliated against incarcerated people who
25 have spoken or attempted to speak with ACLU investigators and counsel about conditions of
26 confinement in Tulare County Jails. *See, e.g.,* Ex. 16 (Ibarra Decl.) ¶¶ 5–7; Ex. 11 (Camposeco
27 Decl.) ¶ 6; Ex. 14 (Escobar Decl.) ¶ 8; Ex. 20 (Nunes Decl.) ¶ 10; Ex. 9 (Declaration of Brandon
28

1 Alford (“Alford Decl.”)) ¶¶ 5–6. The Constitution prohibits precisely this type of “active
2 interference by prison officials.” *See Silva*, 658 F.3d at 1103.

3 Defendant’s retaliation campaign also runs afoul of the Bane Act. A reasonable person,
4 standing in the shoes of Plaintiffs and class members, would have been intimidated. *See*
5 *Muhammad v. Garrett*, 66 F. Supp. 3d 1287, 1296 (E.D. Cal. 2014). Nor does a successful Bane
6 Act claim require a specific intent to violate a person’s rights. Instead, “reckless disregard of the
7 right at issue is all that is necessary.” *Cornell v. City & Cnty. of San Francisco*, 17 Cal. App. 5th
8 766, 804 (2017). By suffering this retaliation to continue, Defendant has recklessly disregarded
9 Plaintiffs’ and prospective class members’ well-established statutory and constitutional rights.

10 In short, Plaintiffs have presented compelling evidence that Defendant—through his
11 restrictive visitation policy and a systematic practice of intimidation and retaliation—has impeded
12 the ability of Plaintiffs and class members to pursue relief from unconstitutional conditions of
13 confinement. Plaintiffs are likely to succeed on their claims under the First, Sixth, and Fourteenth
14 Amendments, as well as their claims under the Bane Act.

15 3. Exhaustion Requirements Do Not Bar Relief

16 Named Plaintiffs Adam Ibarra and Samuel Camposeco both filed grievances challenging
17 Defendant’s COVID-19 response, and both were denied. Compl. Ex. 2 at 4; Ex. 3 at 2. Other
18 incarcerated people at Tulare County Jails have tried to file grievances, but these efforts have met
19 with no success. In some cases, TCSO staff refuse to provide incarcerated people with grievance
20 forms. *See, e.g.,* Ex. 22 (Robinson Decl.) ¶¶ 5–6; Ex. 9 (Alford Decl.) ¶¶ 8–9, 16. One individual
21 was told that if he grieved the Jails’ coronavirus response, “I would be put on a ‘Disciplinary
22 Infraction’ or have my classification level raised.” Ex. 22 (Robinson Decl.) ¶ 6. As a result of this
23 threat, he declined to file a grievance.

24 The Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e(a), does not require
25 exhaustion when circumstances render administrative remedies “effectively unavailable.” As the
26 Supreme Court has explained, an administrative remedy is unavailable “when (despite what
27 regulations or guidance may promise) it operates as a simple dead end—with officers unable or
28 consistently unwilling to provide any relief to aggrieved inmates” or “when prison administrators

1 thwart inmates from taking advantage of the grievance process.” *Ross v. Blake*, 136 S. Ct. 1850,
2 1859–60 (2016). Here, any grievance procedures that exist are simply incapable of addressing the
3 critical health and safety needs of incarcerated people in Tulare County Jails. Because Plaintiffs
4 have exhausted their administrative remedies and an administrative remedy is effectively
5 unavailable in any case, exhaustion is not a bar to Plaintiffs’ challenge to conditions of
6 confinement at Tulare County Jails.

7 **B. Plaintiffs and Proposed Class Members Will Suffer Irreparable Harm**

8 Plaintiffs and proposed class members are likely to suffer irreparable harm unless this
9 Court grants a temporary restraining order requiring Defendant to implement CDC-compliant
10 testing and social distancing policies, and to refrain from interfering with incarcerated people’s
11 immediate access to counsel.

12 “It is well established that the deprivation of constitutional rights ‘unquestionably
13 constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting
14 *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Here, as described above, not only Plaintiffs’ and
15 proposed class members’ Eighth and Fourteenth Amendment rights are at stake; so too are their
16 constitutional rights to counsel and access to the courts.

17 Moreover, as a direct consequence of the unconstitutional conditions, Plaintiffs and the
18 proposed class face a substantial and imminent risk of serious illness. The Constitution protects an
19 incarcerated person’s right to be free from the *risk*, not just the fact, of infection. Incarcerated
20 people need not wait for the risk to materialize before they challenge the practices causing the risk,
21 but have a right to prospectively remedy plainly unsafe conditions. *Helling*, 509 U.S. at 33;
22 *Fraihat v. U.S. Immigr. & Customs Enforcement*, No. 19-CV-1546 JGB (SHKx), 2020 WL
23 1932570, at *27 (C.D. Cal. Apr. 20, 2020); *see also Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir.
24 2004) (upholding preliminary injunction where plaintiffs would suffer “delayed and/or complete
25 lack of necessary treatment, and increased pain and medical complications”). People have already
26 fallen ill at Tulare County Jails—and the lack of testing means many more may be at risk than is
27 currently known. If Plaintiffs and class members succumb to the disease while this case remains
28

1 pending, no relief from this Court will remedy the resulting injury. The risk to Plaintiffs' health
2 undeniably rises to the level of irreparable harm.

3 Consistent with these principles, courts across the country have concluded that correctional
4 facilities' failure to ameliorate the risk of contracting COVID-19 constitutes irreparable harm. *See,*
5 *e.g., Castillo v. Barr*, 2020 WL 1502864, at *1 (C.D. Cal. Mar. 27, 2020) (granting TRO and
6 finding that the immigration detainee petitioners were likely to suffer irreparable harm from
7 COVID-19 when they were not kept six feet apart from other detainees); *see also, e.g., Banks v.*
8 *Booth*, No. CV 20-849 (CKK), 2020 WL 3303006, at *9 (D.D.C. June 18, 2020), *appeal docketed*,
9 No. 20-5216 (D.D.C. July 22, 2020); *Kaur v. U.S. Dep't of Homeland Sec.*, No. 2:20-cv-03172,
10 2020 WL 1939386, at *3 (C.D. Cal. April 22, 2020); *Doe v. Barr*, No. 20-cv-02141, 2020 WL
11 1820667, at *1, 9 (N.D. Cal. Apr. 12, 2020); *Bent v. Barr*, No. 19-cv-06123, 2020 WL 1812850,
12 at *1–2 (N.D. Cal. Apr. 9, 2020); *Thakker v. Doll*, No. 20-cv-0480, 2020 WL 1671563, at *9
13 (M.D. Pa. Mar. 31, 2020). As in those cases, Plaintiffs have presented ample evidence that
14 immediate relief is necessary to protect all incarcerated people in Tulare County Jails, especially
15 the Medically Vulnerable, from an imminent health risk.

16 **C. The Balance of Equities and Public Interest Both Favor Plaintiffs and the**
17 **Proposed Class**

18 The balance of equities tips in Plaintiffs' favor. Plaintiffs and the class face deprivations of
19 their constitutional rights to adequate medical care and humane conditions of confinement that far
20 outweigh any injury to Defendant. Defendant has no interest in maintaining unconstitutional
21 conditions at Tulare County Jails or in unlawfully interfering with Plaintiffs' right to access the
22 courts. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (noting that the government
23 "cannot suffer harm from an injunction that merely ends an unlawful practice"). While "[c]ourts
24 must be sensitive to the . . . need for deference to experienced and expert prison administrators,"
25 they "may not allow constitutional violations to continue simply because a remedy would involve
26 intrusion into the realm of prison administration." *Brown v. Plata*, 563 U. S. 493, 511 (2011).
27 Thus, any harm to Defendant pales in comparison to the imminent threat to Plaintiffs' health. *See*
28 *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009); *Mays v. Dart*, No. 20-C-

1 2134, 2020 WL 1812381, at *14 (N.D. Ill. Apr. 9, 2020) (holding in a suit challenging a jail’s
2 COVID-19 containment efforts that detainees’ interest in avoiding infection outweighs sheriff’s
3 interest in maintaining current practices).

4 The public interest also favors Plaintiffs for at least two reasons. First, Plaintiffs’ suit
5 highlights systemic constitutional deficiencies at Tulare County Jails, and “it is always in the
6 public interest to prevent the violation of a party’s constitutional rights.” *Melendres*, 695 F.3d at
7 1002. Second, public safety requires containing COVID-19 everywhere it exists, including within
8 Tulare County Jails. The Jails are not hermetically sealed: People enter and leave every day,
9 creating vectors to spread the virus from the Jails to the outlying community. In addition, because
10 the Jails lack resources to treat COVID-19 patients internally, an outbreak would burden local
11 healthcare facilities, straining a system that is already overtaxed by the pandemic.

12 The relief requested here—particularly widespread testing and effective policies for social
13 distancing—would protect the staff at Tulare County Jails as well as the community at large. The
14 requested actions, which will help prevent burdening hospitals and healthcare systems, and allow
15 our communities to safely reopen sooner, are undeniably in the public interest.

16 **D. Good Cause Exists to Grant Plaintiffs Early Discovery**

17 Plaintiffs additionally seek leave to serve early discovery. A court may allow early
18 discovery for the convenience of the witnesses and parties and in the interests of justice. Fed. R.
19 Civ. P. 26(d). Courts in this district allow discovery to commence prior to the conference required
20 by Rule 26(f) upon a showing of good cause. *See Malibu Media, LLC v. Doe*, 319 F.R.D. 299, 302
21 (E.D. Cal. 2016). There is good cause when the need for discovery, “in consideration of the
22 administration of justice, outweighs the prejudice to the responding party.” *Id.* (quoting *In re*
23 *Countrywide Fin. Corp. Derivative Litig.*, 542 F. Supp. 2d 1160, 1179 (C.D. Cal. 2008)).

24 Here, Plaintiffs’ need for discovery outweighs any prejudice to Defendant. Courts
25 routinely find that the good cause test is met when a plaintiff requires information in order to be
26 able to move for a preliminary injunction. *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-
27 LHK, 2011 WL 1938154, at *2 (N.D. Cal. May 18, 2011) (allowing expedited discovery where
28 discovery was “likely to be central to any motion for preliminary injunction”); *Interserve, Inc. v.*

1 *Fusion Garage PTE, Ltd.*, No. C 09-05812 JW (PVT), 2010 WL 143665, at *2 (N.D. Cal. Jan. 7,
2 2010) (same); *cf. Hall v. Mims*, No. 1:11-CV-02047-LJO-BAM, 2012 WL 1498893, at *4 (E.D.
3 Cal. Apr. 27, 2012) (denying expedited discovery in part where plaintiff failed to show
4 “emergency circumstances reasonably creating the need for a potential preliminary injunction”).

5 As described throughout the Application, the situation in Tulare County Jails is precarious,
6 and outbreaks of COVID-19 have already been reported in the Jails. What’s more, Defendant has
7 blocked Plaintiffs’ attempts to investigate the extent of the crisis at every turn, including through
8 interfering with their right to counsel and the courts. Plaintiffs require immediate discovery to
9 assess the situation in the Jails and determine whether to seek further remedial measures to protect
10 Plaintiffs and the proposed class members from the threat of COVID-19. *See United States v. Erie*
11 *Cnty., NY*, No. 09-CV-849S, 2010 WL 11578742, at *4 (W.D.N.Y. Mar. 6, 2010) (granting
12 expedited discovery in lawsuit alleging unconstitutional conditions of confinement to allow DOJ
13 “to determine whether it should seek a preliminary injunction to impose immediate remedial
14 measures to decrease the number of preventable suicides”). Plaintiffs also require immediate
15 discovery to determine whether Defendant has made additional changes in response to the
16 changing facts on the ground or any orders by this Court.

17 By contrast, the burden on Defendant is likely to be minimal. Plaintiffs seek leave to serve
18 early discovery that they would otherwise be entitled to within the course of the case. *See L’Oreal*
19 *USA Creative, Inc. v. Tsui*, No. 16-cv-8673 FMO (FFMx), 2016 WL 9275404, at *7 (C.D. Cal.
20 Dec. 22, 2016) (“The burden on defendants is de minimis, as the discovery plaintiffs [seek] is
21 what they would ordinarily seek in the course of the case.”); *Sas v. Sawabeh Info. Servs. Co.*, No.
22 11-cv-04147 GAF (MANx), 2011 WL 13130013, at *7 (C.D. Cal. May 17, 2011) (same). This
23 Court should grant Plaintiffs leave to serve early discovery.

24 **IV. CONCLUSION**

25 Plaintiffs have shown a high likelihood of success on the merits of their claims and an
26 imminent threat of irreparable injury. Moreover, the balance of harms and public interest weigh in
27 favor of immediate injunctive relief. Plaintiffs therefore respectfully request that the Court grant
28 the ex parte motion for a temporary restraining order.

1 DATED: August 12, 2020

MUNGER, TOLLES & OLSON LLP

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