**No. 20-11622**

# UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ANTHONY SWAIN, ALEN BLANCO, BAYARDO CRUZ, RONNIEL MARTINEZ-FLORES, WINFRED HILL, DEONDRE WILLIS, PETER BERNAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Plaintiffs-Appellees,*

*v.*

DANIEL JUNIOR, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MIAMI-DADE CORRECTIONS AND REHABILITATION DEPARTMENT, AND MIAMI-DADE COUNTY,

*Defendants-Appellants.*

On Appeal from the United States District Court
for the Southern District of Florida, No. 1:20-cv-21456 (Kathleen M. Williams, J.)

## APPELLEES' OPPOSITION TO EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL


LIDA RODRIGUEZ-TASEFF
DLA PIPER LLP (US) 200 SOUTH BISCAYNE BLVD., STE 2500
MIAMI, FLORIDA 33131
(305) 423.8525
LIDA.RODRIGUEZ-TASEFF@DLAPIPER.COM

ALEC KARAKATSANIS
(Counsel of record)
CIVIL RIGHTS CORPS
1601 Connecticut Ave. NW, Ste. 800
Washington, DC 20009
(202) 681-2409
alec@civilrightscorps.org


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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellees Anthony Swain, Alen Blanco, Bayardo Cruz, Ronniel Martinez-Flores, Winfred Hill, Deondre Willis, and Peter Bernal certify that the appellants' certificate of interested persons is complete.

/s/ Alec Karakatsanis
Alec Karakatsanis (Counsel of record)

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTORY PROVISIONS**



**OTHER AUTHORITIES**

## INTRODUCTION AND ABSENCE OF EMERGENCY TO STAY THE DISTRICT COURT'S ORDER

Plaintiffs, pre-trial detainees at the Metro West Detention Center in Miami, Florida, filed suit to require defendants to provide reasonable safeguards to protect their health and safety during the COVID-19 pandemic. The district court concluded that plaintiffs (1) are likely to succeed on their claim that defendants' failure to take adequate steps to prevent and minimize a COVID-19 outbreak inside the jail reflects deliberate indifference to their constitutional rights, and (2) will suffer irreparable harm absent a preliminary injunction. The court thus issued a preliminary injunction requiring defendants to implement basic measures that the Center for Disease Control (CDC) has recommended for correctional institutions—such as providing adequate soap and cleaning products—to reduce transmission of the virus as the court gives fuller consideration to the merits of plaintiffs' constitutional claims.

While asserting that they are already implementing nearly all of the measures the district court required (and that they would do so on their own accord), Motion 20; R.102 at 2, defendants seek an emergency stay pending appeal. But as this Court recently observed, "[a] litigant who agrees with the substance of an order faces a steep uphill battle in seeking to have that order stayed on appeal." *Robinson v. Attorney General*, 2020 WL 1952370, at *9 (11th Cir. Apr. 23, 2020). And not surprisingly given their claim of already being in compliance, defendants do not meaningfully explain how the provisions in the district court's order cause them

harm or create an emergency. By contrast, the harm from staying the injunction is substantial: Absent the minimal safeguards the district court ordered, COVID-19 will continue to spread throughout the jail at exponential rates, posing a serious risk of harm. Indeed, since the lawsuit was filed, the number of infected detainees has gone from 0 to 163. There is no sound basis to conclude that the district court abused its discretion in granting temporary relief to protect detainees' health and safety.

## BACKGROUND

On April 5, 2020, seven individuals detained at Metro West Detention Center filed this putative class action, alleging that defendants are violating the Fourteenth Amendment rights of pre-trial detainees in their custody. The named plaintiffs sought a TRO and preliminary injunction. In support, plaintiffs presented evidence that defendants' response to the threat of a COVID-19 outbreak at the jail is woefully inadequate and reflects deliberate indifference to the risk that COVID-19 poses, especially those who are medically vulnerable. Specifically, the evidence showed that detainees at Metro West are "packed" into dormitory-style cells housing over sixty people, and in which social distancing is impossible—indeed, the evidence showed that detainees sleep in bunks less than an arm's length from the next and are forced to closely congregate in shared areas to receive and eat meals and use the handful of shared toilets and showers. *E.g.*, R.3-6 ¶¶8, 15; R.3-7 ¶7; R.81-5 ¶¶15-19; R.81-4 ¶¶13-16. The evidence also showed the defendants have failed to:

- provide detainees sufficient access to soap, paper towels, toilet paper, cleaning products, and laundering facilities to enable detainees to practice good hygiene and disinfect high-touch surfaces between uses, R.81-1 (Ex. 37-11) ¶¶18-22; R.3-8 ¶¶7-8, 11; R.3-4 ¶¶14-15;

- provide detainees and staff with sufficient access to personal protective equipment (such as masks) to limit transmission, R.3-4 ¶¶3, 7, 15; R.3-8 ¶¶7-8, 13; R.3-10 ¶¶9-10;

- implement policies to screen and quarantine new detainees who may have been infected with COVID-19, R.3-6 ¶¶7-9; R.3-9 ¶5;

- separate individuals suspected of being infected with COVID-19 from those who were not, R.3-4 ¶¶5, 10; R.3-6 ¶¶5-7; and

- adequately respond to the medical needs of detainees, forcing those with symptoms to wait up to a week to be seen by medical staff, R.3-6 ¶¶5-7; R.3-9 ¶4; R.3-10 ¶¶7-8.

In short, the evidence showed that defendants had failed to implement even the most basic recommendations from the CDC and public-health experts on how to mitigate the COVID-19 infection in correctional facilities. R.3-14; R.11-1.

On April 6 and 7, 2020, the district court held telephonic hearings on plaintiffs' request for a TRO. The parties agreed on many of the TRO's terms and presented argument on disputed ones. On April 7, the district court issued a TRO, which included the agreed-upon terms and largely adopted defendants' less-restrictive language on disputed terms. R.25.

Despite the TRO, however, defendants have failed to effectively implement basic health measures, *see* R.100 at 17-19, even as the virus has spread rapidly within

the jail: By April 19, 15 detainees had tested positive. But by April 28, 163 had tested positive—a more than 10-fold increase in less than 10 days. R.100 at 4.

On April 27 and 28, the district court held a two-day preliminary injunction hearing. The court received declarations from over twenty detainees and four medical experts supporting plaintiffs' motion. The court also received an inspection report from two independent medical experts who toured Metro West. Over plaintiffs' strenuous objections, the tour was on a preset date and limited to a handful of predetermined cells at Metro West. Numerous declarations submitted to the district court, moreover, detailed steps that defendants hurriedly took shortly before the inspection to make those cells appear safe and sanitary during the inspection, including painting over mold, repairing broken showers, moving furniture, and moving a significant number of detainees out of only those cells. *See* R.81-1 (Ex. 37-17) ¶¶17-19. Even so, the experts concluded that Metro West was overcrowded and required an "urgent" significant population reduction in order to allow social distancing necessary to mitigate a serious risk of the infection spreading. R.70-1.

On April 29, the district court issued a preliminary injunction after finding that the record indicates defendants have shown "deliberate indifference to a serious risk of harm to Plaintiffs." R.100 at 37. The court noted, among other things, that plaintiffs' evidence suggests defendants have not taken adequate steps to slow or stop the spread of COVID-19, R.100 at 17-19, including adequate steps to ensure

detainees can "achieve meaningful social distancing," which "experts agree … is a critical step in preventing or flattening the rate of contagion," R.100 at 37. The court also questioned whether defendants would have implemented the measures required by the TRO in the absence of a TRO, as defendants claimed. R.100 at 40. The court's preliminary injunction—with few exceptions—merely extends the provisions of its TRO for 45 days. *Compare* R.25 *with* R.100 at 49-52. The court denied plaintiffs' request for habeas relief for a subclass of the most medically vulnerable detainees. R.100 at 1.

## STANDARD OF REVIEW

A stay pending appeal is an "'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009). The applicant must establish (1) "a strong showing that it is likely to succeed on the merits," (2) that it "will be irreparably injured absent a stay," (3) that a stay will not "substantially injure the other parties interested in the proceeding," and (4) that "the public interest lies" in its favor. *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019).

This Court reviews the grant of a preliminary injunction under the "deferential abuse of discretion standard." *Robinson*, 2020 WL 1952370, at *3. Accordingly,

"the narrow question" presented by the first stay factor is whether defendants have made "a strong showing that the district court abused its discretion." *Id.*

## ARGUMENT

### I. DEFENDANTS HAVE NOT MADE A "STRONG SHOWING" OF LIKELIHOOD OF SUCCESS ON THE MERITS

#### A. The District Court Correctly Concluded That Plaintiffs Are Likely To Prevail On Their Section 1983 Claim

##### 1. The district court correctly concluded that defendants have shown deliberate indifference to the serious and unreasonable risk of ongoing confinement in current conditions

The essence of plaintiffs' claims for relief in this lawsuit is that defendants have violated the Fourteenth Amendment rights of pretrial detainees in defendants' custody by showing deliberate indifference to detainees' health and safety. To establish deliberate indifference, a plaintiff must prove: (1) that the defendant "actually (subjectively) knew that an inmate face[s] a substantial risk of harm," and (2) that the defendant "disregarded that known risk by failing to respond to it in an (objectively) reasonable manner." *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1100 (11th Cir. 2014) (cleaned up).[1]

[1] There is a circuit split on when a presumptively innocent pretrial detainee must satisfy the subjective component. *Compare, e.g., Dang ex rel. Dang v. Sheriff, Seminole Cty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017), *with, e.g., Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). Although plaintiffs continue to believe that the Eleventh Circuit joined the wrong side of that split, that issue is irrelevant

Here, defendants do not dispute that the substantial risk of serious harm presented by COVID-19 satisfies the objective component of a deliberate-indifference claim. *See Helling v. McKinney*, 509 U.S. 25, 35 (1993) (Eighth Amendment protects against exposure to "an unreasonable risk of serious damage to … future health"). Defendants argue only that the district court erroneously held that they have displayed deliberate indifference. Their argument misunderstands the law and ignores the factual record supporting the court's order.

*First*, defendants' subjective knowledge of a risk of serious harm is indisputable. COVID-19 is a highly infectious, deadly disease. R.100 at 6-8; R.3-14 ¶¶22-24; R.11-1 ¶¶10-12. And defendants know that social distancing of at least six feet is an absolutely critical component of efforts to stop the spread of this virus. R.100 at 6-7 (describing "unrebutted testimony"); *see also* R.100 at 34; R.80-35 at ¶19 ("[F]rom an epidemiological perspective, ensuring that all detainees in Metro West Detention Center can socially distance from one another *is the only way* to prevent further, essentially uncontrolled, spread of the virus."). Defendants conceded this point, writing in a memorandum to jail staff: "Now more than ever, it is important that everyone practice strict social distancing even while wearing the protective mask." R.65-15 at 1. But social distancing will not be possible in the jail

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here because the evidence demonstrates Plaintiffs are likely to prevail under either standard.

unless the population is reduced. R.100 at 35. The joint report of independent infectious disease experts—one recommended by plaintiffs and one by defendants—concluded that social distancing is impossible given the current population, and it issued an "urgent" recommendation to immediately reduce the population to prevent further transmission of the disease. R.70-1.

*Second*, the district court correctly concluded that plaintiffs met their burden to show that defendants have been deliberately indifferent to the risk imposed on detainees by current jail conditions because (a) defendants know that the jail population remains too high to practice social distancing and (b) defendants have not implemented "other measure[s] to achieve meaningful social distancing." R.100 at 35. As to the former, defendants complain that the overcrowding is out of their control, while as to the latter, defendants complain that the district court did not identify "specific social distancing strategies that Metro West should have employed," Motion 13. The former point is legally wrong and the latter point is factually wrong.

Starting with the latter: The district court specifically found that defendants routinely fail to enforce feasible social distancing, including when inmates line up to receive food and eat together in their unit, when inmates line up to be counted, and when inmates line up outside the clinic to receive medication. *See* Dkt.100 at 37-38; *see also id.* at 14-15, 16 (citing record evidence). Defendants are not excused

from making adequate effort to achieve meaningful social distancing simply because full social distancing is not feasible with the current overcrowding.

As to the former point, defendants contend, as noted, that they cannot be deliberately indifferent because they do not have control over the jail's overcrowding. *See* Motion 13 ("[T]he County … is unable to release inmates without a court order, which must be obtained through state criminal court."); *see also* R.67 at 20; *id.* at 21 (complaining that "social distancing at Metro West is difficult to achieve for reasons largely beyond the County's control"). That is not the law. In *Brown v. Plata*, 563 U.S. 493 (2011), the Supreme Court held that if a prison population is such that reduction is the *only* way to cure a constitutional violation—i.e., if adequate care is "impossible" without a reduction—then an injunction may issue even if the defendant's affirmative conduct did not cause the overcrowding, *see id.* at 521, 526-529.

Under defendants' position, if defendants were told that a gas line at Metro West was likely to explode within a week and potentially kill those detained inside, the Constitution would offer the detainees no protection against defendants simply throwing up their hands and claiming they have no discretion to release them. In other words, federal courts would be powerless to protect confined individuals even against a threat of death so long as the jailer was not empowered under state law to

take steps to move or release the individuals. The Constitution does not sanction that cruel result.

As another district court observed in a similar proceeding during these unprecedented times: "Respondents' Facilities are plainly not equipped to protect Petitioners from a potentially fatal exposure to COVID-19. While this deficiency is neither intentional nor malicious, should we fail to afford relief to Petitioners we will be a party to an unconscionable and possibly barbaric result." *Thakker v. Doll*, 2020 WL 1671563, at *9 (M.D. Pa. Mar. 31, 2020); *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (holding subjective factor in a prospective relief case depends on "current attitudes and conduct" even if a defendant did not create the risk and learns of the ongoing risk after the litigation); *id.*at 846 n.9 (holding that "prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware" exhibit "deliberate indifference"); *Helling v. McKinney*, 509 U.S. 25, 36 (1993) (prohibiting prison conditions in which "the risk . . . is not one that today's society chooses to tolerate"). Here, of course, our society has shut down nearly entirely to accomplish social distancing because it deems the risk of COVID-19 infection to be intolerable. In a case seeking prospective relief, the ongoing enforcement of the confinement of individuals with the knowledge that they are unable to practice medically prescribed social distancing at current population levels and are therefore exposed to a risk that society has

deemed intolerable is "deliberately indifferent" under *Helling* and *Farmer*. *Id.* at 846 n.9.

Unfortunately, the Prison Litigation Reform Act does not allow the district court to enter (on plaintiffs' §1983 claim) the only remedy that could fully correct the constitutional violations—i.e., release of some detainees—unless less intrusive measures are attempted first and unless the court asks the chief judge of this Court to convene a three-judge tribunal. 18 U.S.C. §3626(a)(3). Given that, the district reasonably imposed a less intrusive remedy and set a briefing schedule on plaintiffs' motion to convene the three-judge tribunal. This less intrusive remedy was based not only on the district court's finding that defendants' ongoing confinement of plaintiffs under conditions that expose them to a serious risk of COVID-19 infection constituted deliberate indifference, but also on evidence of "problematic" compliance with the court's TRO. R.100 at 17. In particular, dozens of mutually corroborating sworn declarations from detainees (in many different housing units covering conditions for hundreds of prisoners) demonstrated that defendants are not providing the minimal protections required by the TRO and by their own policies. *See* R.100 at 12-19. Defendants' failure to comply with the TRO was also evinced by the 994% increase in inmate infections in Metro West between April 5 and April 29. *See* R.100 at 34.

In sum, the district court did not abuse its discretion in finding that plaintiffs are likely to succeed on their claim that defendants exhibit deliberate indifference to a known risk by continuing to confine them in conditions that prevent medically prescribed social distancing. Nor did the court err in entering a preliminary injunction that maintains the status quo pending further adjudication of plaintiffs' claim and that requires the less intrusive measures that are a necessary prerequisite to granting fuller relief if plaintiffs ultimately prove that such relief is warranted.

### 2. The district court did not abuse its discretion in ruling that plaintiffs need not prove municipal liability at this juncture

Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), local governments may be held liable for constitutional torts that result from official government policy or an unofficial custom or practice, *Grech v. Clayton Cty.*, 335 F.3d 1326, 1329 (11th Cir. 2003) (en banc). An unofficial custom or practice can be shown through "the actions of an official fairly deemed to represent government policy, or a custom or practice so pervasive and well-settled that it assumes the force of law." *Denno v. Sch. Bd. of Volusia Cty., Fla.*, 218 F.3d 1267, 1276 (11th Cir. 2000). The district court did not err in concluding that plaintiffs do not need to "prove" an unofficial custom or practice to receive preliminary relief. R.100 at 33. At this stage, plaintiffs need only demonstrate that they are likely to establish an unofficial custom or practice that gave rise to their injury. Plaintiffs have done so.

*First*, *Monell* is relevant only to plaintiffs' claims against Miami-Dade County. Plaintiffs have also sued defendant Daniel Junior in his official capacity. Usually, claims against a municipal official in an official capacity are treated as claims against the municipality. But there is an important exception: A municipal official is deemed to also act for the *state* when state law requires the official to take the relevant action. *Familias Unidas v. Briscoe*, 619 F.2d 391, 398-402, 404 (5th Cir. 1980). Regardless, it has been the law since *Ex parte Young*, 209 U.S. 123 (1908),[2] that the official can be enjoined from federal constitutional violations.[3] A classic example of this principle is a sheriff or jailor enforcing state court orders. *McNeil v. Community Probation Servs., Inc.*, 945 F.3d 991, 996 (6th Cir. 2019); *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018) (subsequent history omitted).

Here, defendant Junior argues that he had "no discretion" to refrain from enforcing state court orders that result in overcrowding. R.67 at 20; Motion 13. But

[2] When the local official is also the relevant final policymaker, the official's decision to follow state law can also subject the municipality to liability. *See, e.g.*, *Cooper v. Dillon*, 403 F.3d 1208, 1223 (11th Cir. 2005) ("While the unconstitutional statute authorized [the municipal official] to act, it was his deliberate decision to enforce the statute that ultimately deprived [the plaintiff] of constitutional rights and therefore triggered municipal liability.").

[3] *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. . . . It is a judge-made remedy . . . .").

it does not matter that defendants have no discretion under state law to release plaintiffs—if a prisoner release order is necessary to cure federal constitutional violations, a century of precedent empowers a federal tribunal to enjoin the official responsible for enforcing the constitutional violation and with the power to remedy it. *See Plata*, 563 U.S. at 500-501 (requiring prisoner release order against executive responsible for state prisons). *Monell* has nothing to say about that, and this alone is sufficient basis to reject defendants' argument.

Second, as to Miami-Dade County's liability directly, the county is responsible for the policies and practices of officials to whom relevant policymaking authority is delegated—such as Junior. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1292 (11th Cir. 2004). Defendants' evidence shows that the county's policymakers delegated final policymaking authority over day-to-day affairs of the jail to him. Defendants, for example, repeatedly cite directives and orders that he issued to change jail policies. *E.g.*, R.65-14; R.65-18; R.65-24; *see also Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 706 (11th Cir. 1985). This makes sense because the county issued an order delegating "[a]ll duties and functions which pertain to the … incarceration, … custody and release of prisoners [in the] County jail[s]" to Junior. *Delegation of Powers to the Department of Corrections and Rehabilitation*, Administrative Order No. 9-22 (July 23, 2002).

Defendants do not seriously contest this evidence. Indeed, they appear not to dispute that Junior's actions are "fairly deemed to represent government policy," *Denno*, 218 F.3d at 1276. They instead suggest, without citation, that the Mayor and the Board of County Commissions are the county's exclusive policymakers. Motion 15. However, because "final policymaking authority may be shared," *McMillian v. Johnson*, 88 F.3d 1573, 1578 (11th Cir. 1996), the fact that the Mayor and the board members are final policymakers does not preclude the possibility that Junior is as well. Defendants have shown no reason why plaintiffs will not prevail on the argument that the county is liable for Junior's deliberate indifference.

Plaintiffs are also likely to establish municipality liability based on the widespread failures to implement basic protections. As discussed, these failures are pervasive and have been ongoing for weeks. This consistent failure to follow purported policies strongly suggests deliberate indifference. *See Connick v. Thompson*, 563 U.S. 51, 62 (2011); *see also City of Canton v. Harris*, 489 U.S. 378, 394-395 (1989) ("policy of inaction" in light of notice that policy will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the constitution"). Defendants dismiss plaintiffs' evidence of the county's failure to follow its policies as "anecdotal," Motion 15, but that characterization is belied by the record.

### 3. Defendants' exhaustion argument fails

#### *a. The district court did not abuse its discretion in declining to address exhaustion at this stage*

In opposing plaintiffs' preliminary-injunction request, defendants "incorporated … by reference" their motion to dismiss argument that plaintiffs' failed to exhaust under the PLRA. R.67 at 12. Faced with an attempt to incorporate a new motion into an already over-length response brief raising numerous issues, the district court held that "Defendants have not properly raised the issues in the motion to dismiss with the Court by attempting to incorporate their entire motion in their Response." R.100 at 28 n.14. On this basis alone, the merits panel will not reach defendants' exhaustion arguments. *Porter v. Ogden*, 241 F.3d 1334, 1340 (11th Cir. 2001) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." (quotation marks omitted)). That argument thus provides no basis for a stay.

Even if defendants had properly raised exhaustion, the district court did not err in reserving judgment on that argument until briefing on defendants' motion to dismiss is completed on May 12. Disputing that, defendants argue that "exhaustion is a threshold matter that a court 'must address' before it may consider the merits." Motion 16. But "the very idea of a *preliminary* injunction is … the need for speedy … action to protect a plaintiff's rights before a case can be resolved on its merits." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016).

### *b. Exhaustion is not required*

Even if the district court was required to consider an (improperly raised) exhaustion argument before granting preliminary relief, defendants' argument that plaintiffs were required to exhaust grievance procedures lacks merit.

Under the PLRA, "a prisoner need exhaust only 'available' administrative remedies." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). An administrative procedure is unavailable where it "operates as a simple dead end" and does not "provide any relief to aggrieved inmates." *Id.* at 1859. That describes defendants' grievance procedures.

First, no grievance procedure is "available" for the urgent issues raised in this lawsuit. Defendants' manual provides a timeline for resolving "emergency" or "medically related" grievances that can take in excess of *two weeks*. Hence, where, as here, individuals face emergencies that must be met immediately to prevent serious harm, defendants' grievance procedures are not "available" to resolve those emergencies.

Defendants argued below that the timing of the jail's grievance procedures has *nothing* to do with the "availability" of a remedy. R.66 at 7. As they see it, even if the jail's procedures provide no practical ability for a person to obtain redress (say, for example, a grievance that a person had been starved of food or water for three days), the grievance procedure is still "available" so long as a person could obtain

food or water through a grievance heard a week or two in the future. This argument is both callous and nonsensical. As a sister circuit has said, "If it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no 'possibility of some relief' and so nothing for the prisoner to exhaust." *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1174 (7th Cir. 2010). Indeed, creating an "emergency" process that takes significant time is one of the main ways that jail officials could create a "dead end" that excuses exhaustion. *Ross*, 136 S. Ct at 1859.

The Supreme Court's decision in *Ross* rejects defendant's formalistic argument that the timing of an administrative process has nothing to do with its "availability." The Supreme Court explained that the term "available" in the text of PLRA "has real content." 136 S. Ct. at 1858. "[T]he ordinary meaning of … 'available,'" the Court elaborated, "is 'capable of use for the accomplishment of a purpose.'" *Id*. Here, if plaintiffs' goal was compliance with CDC guidelines so that they could disinfect their cells, wash their hands, and maintain medically required social distancing before becoming infected with a rapidly spreading serious disease, the two-week grievance procedure is not "capable of use for the accomplishment" of that purpose, *id.*, in any meaningful sense of those words. *See Fletcher*, 623 F.3d at 1173.

Defendants cite *Valentine v. Collier*, 2020 WL 1934431 (5th Cir. Apr. 22, 2020), which conflicts with *Fletcher*. *Fletcher* offers the more compelling

explanation of the meaning of "available." *Valentine* based its holding on the speculation that "[r]elief remains possible" so long as a grievance procedure does not *bar* prompt response to a grievance. *Valentine*, 2020 WL 1934431, at *7. But that distorts the meaning of "available" and ignores precedent that requires a person to *wait* for "available" remedies to *conclude*, meaning that even if it is theoretically possible for officials to respond to any grievance more quickly than they are required to do so, a prisoner would have no available remedy because they would not be permitted to sue until the allowed response period *actually did expire*.

Finally, even if defendants' procedures were capable of providing the relief plaintiffs sought, plaintiffs lacked access to the grievance forms that defendants require, which is a complete excuse to exhaustion. Defendants ran out of such forms in multiple housing units, and jail staff told plaintiffs—who repeatedly asked for more—that no more forms were available. *E.g.*, R.80-25 ¶18; R.80-27 ¶15; R.80-29 ¶14. The record was unrebutted on this point; the declaration that defendants filed to suggest that there had not been a shortage of forms in the named plaintiffs' housing unit was from an individual who had no basis to know the facts because the individual was out of the office on COVID-19 quarantine during the entire relevant time period. R.65-7 ¶9.

## II. DENIAL OF A STAY WOULD NOT CAUSE IRREPARABLE INJURY

"[F]ailure to show that the injunction would cause irreparable injury is an adequate and independent basis for denying the motion to stay pending appeal." *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1162, 1268 (11th Cir. 2019) (Pryor, J., concurring). Here, defendants' own admissions demonstrate they will not suffer any irreparable injury pending appeal. Defendants have fervently contended that they have already implemented and maintained virtually all of the measures in the district court's order. R.67 at 27; R.102 at 2 ("It is unrefuted in the record that Defendants will not cease any of the processes and protections put in place to protect inmates from COVID-19 in the absence of an injunction[.]"). If, as Defendants contend, they are already carrying out those measures and intend to continue doing so, the district court's injunction cannot have any "appreciable impact on them." R.100 at 43. Moreover, despite being subject to a TRO containing nearly all of the same provisions, defendants do not point to any harm that has resulted. To the extent defendants now express a new worry that these same protections will "prevent[] Defendants from shifting resources and undertaking new measures in response to a constantly evolving public health crisis," R.102 at 2, defendants are free to move the district court to modify the

terms of the preliminary injunction. There is no reason to think that the district court would deny defendants flexibility on a showing of need.[4]

## III. THE BALANCE OF HARMS AND PUBLIC INTEREST DO NOT FAVOR A STAY

The remaining stay factors weigh against a stay. As the district court found, the balance of harms is decidedly *not* in defendants' favor. R.100 at 42-43. While defendants have not shown why the provisions in the district court's order pose any non-speculative and tangible harm, plaintiffs have shown that COVID-19 is present in the jail, that the virus is rapidly spreading, and that if they contract the virus, they are at considerable risk of serious illness or death. R.11-1.

The public interest also weighs in plaintiffs' favor. Metro West is not cut off from the rest of the world; corrections staff enter and leave the jail every day. Efforts to minimize the spread of COVID-19 in the jail "advances the public interest by reducing the chance of community spread in Miami-Dade County linked to COVID-19 cases" at the jail. R.100 at 43. Further, the public has no

[4] In defendants' motion, they suggest that the district court's preliminary injunction imposes a social distancing requirement "beyond anything the CDC requires without regard to the resource allocation among the various responsibilities of the County." Motion 17. Defendants fail to explain how. The injunction provides that defendants shall: "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." R.100 at 49-50; R.1-06 at 11 (CDC guidelines). And again, defendants have claimed they are already implementing such measures.

interest in the unconstitutional enforcement of the law. *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1290 (11th Cir. 2013).

## CONCLUSION

The Court should deny defendants' emergency motion to stay the district court's preliminary injunction pending appeal.

Respectfully submitted,

/s/ Alec Karakatsanis
Alec Karakatsanis (Counsel of record)
CIVIL RIGHTS CORPS
1601 Connecticut Ave. NW, Ste. 800
Washington, DC 20009
(202) 681-2409
alec@civilrightscorps.org

Lida Rodriguez-Taseff
DLA Piper LLP (US)
200 South Biscayne Blvd., Ste 2500
Miami, Florida 33131
(305) 423.8525
lida.rodriguez-taseff@dlapiper.com

May 1, 2020

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

1. Exclusive of the exempted portions of the brief, the brief contains 5,149 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Alec Karakatsanis
Alec Karakatsanis (Counsel of record)

May 1, 2020

## CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Alec Karakatsanis
Alec Karakatsanis (Counsel of record)