

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 20-cv-00756-NYW

EDWARD NELLSON, individually, and
a CLASS of similarly-situated persons,

Plaintiffs,

v.

WARDEN J BARNHART, in his individual and official capacity, and
UNITED STATES FEDERAL BUREAU OF PRISONS,

Defendants

**PLAINTIFFS' MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiff Edward Nellson and the Class he represents are prisoners at USP Florence, CO. The BOP has failed to properly address the COVID-19 pandemic sweeping through the country. Notably, the BOP is not screening inmates or staff members at USP Florence, CO. Without such screening, the BOP is also not testing and certainly not quarantining or isolating prisoners who test positive, or keeping staff members who test positive from each other and from prisoners. The BOP, at USP Florence, CO, is sitting on an infectious powder keg and is doing exactly nothing to prevent it exploding. Mr. Nellson and the Class he represents hereby move for a Temporary Restraining Order to remedy that situation.

Pursuant to Fed. R. Civ. P. 65 Mr. Nellson and the Class he represents respectfully ask the Court to order that BOP, at the USP Florence, CO facility:

- 1) immediately abandon its policy of inaction and begin screening prisoners and staff for symptoms of COVID-19;

- 2) immediately begin testing prisoners and staff demonstrating symptoms of COVID-19;
- 3) immediately quarantine all prisoners testing positive for COVID-19; and
- 4) immediately exclude all BOP staff testing positive for COVID-19 from contact with BOP prisoners.

PROCEDURAL HISTORY

Mr. Nellson filed his Complaint in this case on March 18, 2020. ECF No. 1. The Federal Bureau of Prisons was served on March 26, 2020. ECF No. 8. The United States Attorney General was served both directly and via a Process Clerk on March 27, 2020. ECF Nos. 7 and 9.

STANDARD OF LAW

Rule 65 of the Federal Rules of Civil Procedure allows a party to move for injunctive relief in the form of a temporary restraining order (“TRO”). A TRO or preliminary injunction is appropriate where the movant demonstrates that:

- a) there is a substantial likelihood of success on the merits;
- b) the TRO or preliminary injunction is necessary to prevent irreparable injury;
- c) the threatened injury outweighs the harm that the TRO or preliminary injunction would cause to the non-movant; and
- d) the TRO or preliminary injunction would not be averse to the public interest.

McDonnell v. City & County of Denver, 878 F.3d 1247, 1252 (10th Cir. 2018) (citing *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016)). Where, as here, a party seeks one of the three “disfavored” types of preliminary injunctions, “(1) preliminary injunctions that alter

the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford that movant all the relief that he could recover at the conclusion of a full trial on the merits,” the injunction “must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.” O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004) (citation omitted).

While the injunctive relief Plaintiffs seek here admittedly fall into two of the three categories of “disfavored” injunctions, they make a strong showing that they are likely to succeed on the merits of their Eighth Amendment claim, that there is a serious and immediate risk to their health and life absent preliminary relief, that the balance of harms tips overwhelmingly in their favor, and that protecting the constitutional rights of all individuals is in the public interest, thus meeting the standard set forth above.

FACTUAL BACKGROUND

A. COVID-19 is identified in Wuhan, China, and begins its spread.

China reported an outbreak of a flu-like illness in the city of Wuhan, in the Hubei province, to the World Health Organization on December 31, 2019. <https://www.pharmaceutical-technology.com/news/coronavirus-a-timeline-of-how-the-deadly-outbreak-evolved/> (last accessed on March 15, 2020). This new coronavirus is labelled COVID-19. Id.

Within 11 days the first death was reported in China. Id. The disease was confirmed to have spread to Thailand two days later, on January 13, 2020, and Japan two days after

that, on January 15, 2020. Id. South Korea and the United States reported their first cases of the virus within the next week. Id.

In response to this international spread, the World Health Organization (“WHO”) declared a health emergency on January 22, 2020. Id.

Over the next week Singapore, Nepal, France, Mexico, Sri Lanka, Germany, the United Arab Emirates, Australia, and Taiwan all report cases of the COVID-19 virus. Id. Additionally, by January 29, 2020, the first cases of community spread of COVID-19, that is spread within a country to individuals who had not visited Wuhan, China, or come into contact with someone who had, were reported in Japan, Taiwan, and Germany. Id.

On January 30, 2020, the United States reported its first case of domestic spread of the coronavirus. Id. The next day, with the death toll confirmed at 213, the WHO declared COVID-19 a global health emergency. Id.

By February 12, 2020, the death toll from COVID-19 has passed 1,100 and the Mobile World Congress was cancelled over fears of the virus. Id. By the next day, the death toll had risen by 254, to 1,369. Id.

On February 27, 2020, with the death toll from COVID-19 topping 2,800 and having spread to a dozen other countries, the United States detected the first suspected community spread case within the U.S.

On March 11, 2020, the WHO declared COVID-19 a pandemic. Id. At this time, the death toll has passed 5,800. Id. COVID-19 has spread to 126 countries and Vatican City. <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/world-map.html> (last accessed March 15, 2020).

B. COVID-19 spreads throughout the United States

Having confirmed the first case of COVID-19 in the United States on January 21, 2020, the virus has spread to 46 states and the District of Columbia, according to the Centers for Disease Control (“CDC”). <https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html> (last accessed on March 15, 2020). An employee of the New York Department of Corrections and an employee of the Washington Department of Corrections have tested positive for COVID-19 on March 15, 2020, and March 12, 2020, respectively.

As of March 13, 2020, the U.S. had reported 1,629 cases of COVID-19 and 41 deaths. Id. Those numbers are rapidly increasing. By March 15, 2020, according to other sources, COVID had reached over 3,000 cases and 57 deaths. <https://www.livescience.com/coronavirus-updates-united-states.html> (last accessed March 15, 2020).

Nursing homes nationwide, where people live in close quarters daily, have limited visitors and begun testing of residents and workers. <https://www.washingtonpost.com/nation/2020/03/12/coronavirus-seattle-nursing-homes/> (last accessed March 15, 2020).

The President declared the COVID-19 spread within the United States a national emergency on March 13, 2020. <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus->

disease-covid-19-outbreak/ (last accessed March 15, 2020). This proclamation noted that COVID-19 threatens to strain the U.S. hospital and medical resources. Id.

C. How COVID-19 is spread, its effects and its deadliness

COVID-19 is mainly spread person to person, both by being in close contact and from respiratory droplets spread through coughing and sneezing. <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (last accessed on March 15, 2020).

COVID-19 is, however, transmissible by contact with contaminated surfaces as well as by persons who do not show symptoms. Id.

While COVID-19 spread is slower than that of influenza, its reproductive number, that is the number of people infected per infected person, is between 2 and 2.5 times higher than that of the flu. https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf_2 (last accessed on March 15, 2020).

One major difference between COVID-19 and influenza is that, while there are some people who can spread the virus 24-48 hours prior to symptom onset, pre-symptom spread is not a primary driver of transmission for COVID-19. Id.

The main symptoms of COVID-19 are fever, cough, and shortness of breath. Id. It can, however, lead to pneumonia, cytokine storm, and multi organ failure leading to death. <https://www.aljazeera.com/news/2020/02/infected-coronavirus-200210205212755.html> (last accessed March 15, 2020).

15% of those infected with COVID-19 develop a severe infection, requiring hospitalization and oxygen treatment. https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf_2 (last accessed on March 15, 2020).

5% of individuals infected with COVID-19 develop critical infections, requiring ventilation in a hospital. Id.

3-4% of COVID-19 patients die as a result of the infection, which at this time is a rate well in excess of the flu, which has a mortality rate well below 0.1%. Id.

D. Testing is critical for containment of COVID-19.

With the heightened infectivity of COVID-19, social distancing, that is keeping a distance from infected individuals, and medical isolation are critical to prevent the spread of the virus. <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last accessed March 15, 2020).

Social distancing is not available for prisoners in BOP prisons, including USP Florence. BOP prisons currently house 175,483 prisoners per the BOP. https://www.bop.gov/mobile/about/population_statistics.jsp (last accessed March 15, 2020). This leaves prisoners like Nellson packed into close quarters, housed with other prisoners, with multiple cells in a single pod, sharing meals multiple times per day.

BOP prisoners, including those at USP Florence, including Plaintiff Nellson, and putative class members, take meals in a communal chow hall, utilize communal showers, have cells with open toilets in them, and have communal recreation areas.

Without the ability to isolate and engage in social distancing, isolation of prisoners who have COVID-19 from this population prior to passing the infection is critical to controlling the spread of this illness.

Isolating all prisoners with the symptoms of COVID-19, fever, cough, or shortness of breath, and testing for the virus is the only effective means to prevent the spread of COVID-19 in this captive population.

E. COVID-19 arrives in Colorado.

On March 10, 2020, Colorado had 33 cases of COVID. <https://www.nbc11news.com/content/news/15-total-cases-of-COVID-19-in-Colorado-one-confirmed-case-in-Gunnison-County--568667371.html> (last accessed March 15, 2020).

On March 14, 2020, Colorado Gov. Jared Polis issued the extraordinary executive order requiring all Colorado ski resorts to close.

As of March 15, 2020, there were 131 presumptive positive cases of COVID in Colorado and one confirmed death. <https://www.kktv.com/content/news/BREAKING--568535251.html>.

As of March 15, 2020, Colorado had identified COVID-19 cases in seventeen counties, including Denver County and Arapahoe County, both highly populated counties. Colorado has also identified one COVID-19 case in Pueblo County, a county near USP Florence and other BOP prisons.

On March 16, 2020, the Colorado Governor's Office ordered the closure of all bars, restaurants, theaters, and casinos statewide, for anything other than takeout or delivery.

https://drive.google.com/file/d/1pXAFPXCTLqBZvTJpuqrH45YeLB_Jc2wP/view (last accessed March 17, 2020). Even when people come to take out food, they are only allowed to be on premises five at a time. Id.

As stated above, USP Florence prisoners eat together and continue to serve each other food, with no testing or monitoring for symptoms. Further, USP Florence prisoners cannot be “five at a time” in their various living arrangements. Unable to take the precautionary measures, USP Florence prisoners are sitting ducks in this pandemic, at the mercy of Defendants’ inaction.

Upon information and belief, the number of COVID-19 infections is expected to grow exponentially over the next days and weeks, if not months.

F. The CDC and subject-matter experts recognize the risk of the spread of disease, like influenza, within its institutions.

Even with the flu, the CDC had recommended “Rapid Detection of Cases” to be done via testing of people with influenza-like illnesses to determine what viruses were circulating at the institution. https://www.cdc.gov/h1n1flu/guidance/correctional_facilities.htm (last accessed March 15, 2020).

Prisoner populations are sicker than the general population. A 2018 study in *The Lancet* that incarcerated individuals have a higher burden of infectious illnesses such as HIV, hepatitis B and C, syphilis and tuberculosis than non-incarcerated individuals. [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(18\)31251-0/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(18)31251-0/fulltext) (last accessed March 15, 2020). Further, incarcerated populations have chronic,

noninfectious diseases such as COPD, heart failure and kidney disease which also increase the risk for infections such as coronavirus. Id.

There are also clear indications that mortality is higher among the senior population. See e.g. [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext#seccestitle150](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext#seccestitle150) (last accessed March 15, 2020).

6% of the BOP population is aged 60 and above while 19.5% of the BOP prisoner population is aged 51 and above. https://www.bop.gov/about/statistics/statistics_prisoner_age.jsp (last accessed March 15, 2020).

G. The BOP's COVID-19 response is inadequate at USP Florence, CO.

The BOP, including USP Florence, has made a minimal response to the COVID-19 pandemic. The BOP has suspended social visits, prisoner movement, and legal visits. https://www.bop.gov/coronavirus/covid19_status.jsp (last accessed March 15, 2020). However, upon information and belief, neither BOP nor USP Florence have ordered COVID-19 testing kits. <https://abcnews.go.com/US/state-prisons-prepare-coronavirus-federal-prisons-providing-significant/story?id=69433690> (last accessed March 15, 2020).

There is **no** screening or testing of current prisoners in either USP Florence or BOP custody for COVID-19 and certainly not a systematic manner. Id. Neither BOP or USP Florence are making any effort to screen or test corrections officers, staff, or other individuals who work within these facilities for COVID-19. Id.

Further, upon information and belief, USP Florence prisoners assigned to kitchen and other sanitary-related duties are continuing to perform those duties. They are doing

this with **no systematic screening** and **no systematic testing** to ensure they are not carriers.

Without such screening, the Defendant is knowingly leaving Nellson and all similarly situated prisoners in USP Florence exposed to the spread of a deadly virus that has created a pandemic across the globe.

Further, upon information and belief, certain BOP facilities have no hand sanitizer and no soap for hand washing. <https://www.motherjones.com/politics/2020/03/the-coronavirus-is-spreading-and-reportedly-theres-no-soap-at-this-federal-jail-in-brooklyn/> (last accessed March 15, 2020).

ARGUMENT AND AUTHORITIES

The government has an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody. As the Supreme Court has made clear,

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment

DeShaney v. Winnebago County Dep't. Soc. Servs., 489 U.S. 189, 199-200 (1989).

Conditions that pose an unreasonable risk of future harm violate the Eighth Amendment's prohibition against cruel and unusual punishment, even if that harm has not yet come to pass.

A. Plaintiffs Have a Substantial Likelihood of Succeeding on the Merits of Their Eighth Amendment Claim.

To obtain a preliminary injunction or a temporary restraining order, Plaintiffs must show that they have a substantial likelihood of succeeding on the merits of their Eighth Amendment claims. McDonnell, 878 F.3d at 1252. In its prohibition of “cruel and unusual punishments,” the Eighth Amendment requires that prison officials provide prisoners with adequate medical care. Farmer v. Brennan, 511 U.S. 831, 832-33 (1994). To establish an Eighth Amendment claim, a plaintiff must satisfy “a two-pronged inquiry, comprised of an objective component and a subjective component.” Self v. Crum, 439 F.3d 1227, 1230 (10th Cir. 2006). The objective component requires a prisoner to demonstrate that he has a “sufficiently serious” medical need. Estelle v. Gamble, 429 U.S. 97, 104 (1976). A prisoner satisfies the subjective prong by showing that the defendants “knew of and disregarded an excessive risk to inmate health and safety.” Farmer, 511 U.S. at 834; Perkins v. Kansas Dep’t. of Corr., 165 F.3d 803, 809-10 (10th Cir. 1999).

1. Plaintiffs’ Medical Needs Satisfies the Objective Prong of the Eighth Amendment.

A prisoner satisfies the objective prong of an Eighth Amendment claim if he has a “serious medical need.” Estelle, 429 U.S. at 104. The existence of a medical need may be proven in two ways: the first is by demonstrating that the plaintiff has a serious medical need that “has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” Sealock v. Colorado, 218 F.3d 1205, 1209 (10th Cir. 2000); *see also* Al-Turki

v. Robinson, 762 F.3d 1188, 1192-93 (10th Cir. 2014). The second way a plaintiff may prove the objective prong of an Eighth Amendment claim is by showing that the condition puts him at substantial risk of serious harm. Helling v. McKinney, 509 U.S. 25, 33 (1993) (citing Hutto v. Finney, 437 U.S. 678, 682 (1978)); *see also* Shannon v. Graves, 257 F.3d 1164, 1168 (10th Cir. 2001) (“There is no requirement that an inmate suffer serious medical problems before the condition is actionable”).

Under this second formulation of the objective prong, “[t]he question is not limited to whether the inmate’s symptoms render a medical need sufficiently serious, but also extends to whether the potential harm to the inmate is sufficiently serious.” Mata v. Saiz, 427 F.3d 745, 752 (10th Cir. 2005).

That the Eighth Amendment protects against future harm to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is “reasonable safety.” . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet has happened.

Helling, 509 U.S. at 33 (quoting DeShaney, 489 U.S. at 200). The Court in Helling specifically recognized that the risk of contracting a communicable disease could constitute such an “unsafe, life-threatening condition”:

In Hutto v. Finney, 437 678, 682 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious,

communicable disease on the ground that the complaining inmate shows no serious current symptoms.

Id. at 33; *see also id.* at 34 (citing with approval Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974), which held that prisoners were entitled to relief under the Eighth Amendment when they showed, *inter alia*, “the mingling of inmates with serious contagious diseases with other prison inmates”).

In this case, Plaintiffs are at serious risk of severe illness or death from COVID-19. Thus, as the Court recognized in Helling and Hutto, the Constitution “require[s] a remedy” that ensures that protection of Plaintiffs’ safety. Helling, 509 U.S. at 33.

2. Plaintiffs’ Medical Needs Satisfies the Subjective Component of the Eighth Amendment.

Plaintiffs satisfy the subjective prong of their Eighth Amendment claim because the evidence shows that Defendants (1) know of and (2) are disregarding an excessive risk to their health and safety. *See, e.g., Farmer*, 511 U.S. at 834; Perkins, 165 F.3d at 809-10. The BOP is well aware of the danger COVID-19 presents to prisoners, yet has failed to take any action to address this.

The BOP has issued statements titled “BOP’s COVID-19 Response.” The BOP specifically shared guidance that “described best practices,” and “provided inmate and staff screening tools.” https://www.bop.gov/coronavirus/overview.jsp#bop_emergency_response (last accessed March 20, 2020). The BOP also circulated “guidance” to BOP field sites, stating, “On March 6, 2020, additional guidance was sent to BOP field sites to assess and review the BOP’s Personal Protective Equipment (PPE) inventory. A national acquisition plan is being

executed to obtain bulk purchases, stockpile supplies and coordinate distribution.” Based on this, it is unquestionable that BOP is aware of COVID-19’s existence, is aware that is a threat to prisoners and staff members.

Further, the BOP also published the “Federal Bureau of Prisons COVID-19 Action Plan.” https://www.bop.gov/resources/news/20200313_covid-19.jsp (last accessed March 20, 2020). In that Plan, the BOP states it will engage in “[e]nhanced health screening of staff” but only in areas with “sustained community transmission” and at “medical referral centers.” Id. The same Plan states that the BOP is using the following practices:

- All newly-arriving BOP inmates are being screened for COVID-19 exposure risk factors and symptoms.
- Asymptomatic inmates with exposure risk factors are quarantined.
- Symptomatic inmates with exposure risk factors are isolated and tested for COVID-19 per local health authority protocols.

Id. It is therefore evident that BOP is fully aware of the COVID-19 and the importance of knowing whether or not COVID-19 is within its prisoner and staff population.

3. Entering a TRO or Preliminary Injunction is Necessary to Prevent Irreparable Injury

To obtain a TRO or preliminary injunction, Plaintiffs must show that they will suffer an irreparable injury absent an injunction. McDonnell, 878 F.3d at 1252. Irreparable harm is often suffered when “the injury can[not] be adequately atoned for in money,” or when “the district court cannot remedy [the injury] following a final determination on the merits.” Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250 (10th Cir. 2001). Plaintiffs must also show that the serious injury is not mere speculation and “is of

such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.” Pinson v. Pacheco, 397 F. App’x. 488, 491-92 (10th Cir. 2010). However, Plaintiffs are not required to demonstrate that the irreparable harm is inevitable, but only that it “is *likely* in the absence of an injunction.” Winter v. Nat’l Res. Def. Council, 555 U.S. 7, 22 (2008).

Moreover, many courts have routinely recognized that when a constitutional right is deprived, an irreparable harm exists. Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001) (“When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary”); *see also* Elrod v. Burns, 427 U.S. 347, 373 (1976) (loss of a constitutional right “for even minimal periods of time, unquestionably constitutes irreparable injury”). Although Kikumura involved the deprivation of First Amendment rights, this rule has been applied in the Eighth Amendment context. *See* Edmisten v. Werholtz, 287 F. App’x. 728, 733 (10th Cir. 2008); *see also* Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996), *abrogated on other grounds by* City of Boerne v. Flores, 521 U.S. 507 (1997). Under this formulation, Plaintiffs will suffer irreparable injury from the deprivation of their Eighth Amendment rights if preliminary relief is not granted. As discussed above, Defendants’ deliberate indifference in denying them medically necessary treatment continuously violates Plaintiffs’ Eighth Amendment rights, and as such, they have demonstrated the threat of irreparable injury.

4. The Threatened Injury to Plaintiffs Outweighs the Harm to the BOP

Though “the Constitution does not mandate comfortable prisons,” Rhodes v. Chapman, 452 U.S. 337, 348 (1981), the risk of serious illness or death from COVID-19

significantly exceeds the inherent discomforts of confinement. In normal times, crowding and close quarters, the sharing of toilets, sinks, and showers, and communal food preparation and service may be considered uncomfortable. But in light of COVID-19, these conditions present a deadly threat to Plaintiffs' lives. The BOP's "Plan" underscores just how inadequate the BOP's approach the COVID-19 epidemic is insufficient.

First, the BOP is not screening staff systematically but only if infections have reached a certain number in their State. The BOP plan states that staff testing will only be implemented in "medical referral centers" or in communities "determined by the CDC" as a "sustained community transmission." https://www.bop.gov/resources/news/20200313_covid-19.jsp (last accessed March 20, 2020). This is a wait and see approach which will result in too little, too late. In other words, the BOP (including USP Florence) will wait until the CDC finds a high enough number of cases in the state before even implementing testing. Further, "screening" will be merely "self-reporting and temperature checks" but only for 30 days. *Id.* Again, this is too little, too late and endangers prisoners at USP Florence, CO.

Second, the BOP's Plan for prisoners fails to systematically screen prisoners. *Id.* Instead, the BOP is waiting for prisoners to have "risk factors" and "exposure risk factors." It is impossible for BOP to know whether prisoners and staff members have, in fact, been exposed if *it is not testing as a matter of course*. Further, the BOP's own plan does not mention screening through its facilities, including USP Florence, CO. Indeed, the BOP does not even have a protocol of its own, instead stating that it will isolate and test "per local health authority protocols." Considering this, the danger to prisoners is immense.

As is known by now, social distancing and hygiene measures are Plaintiffs' only defense against COVID-19. <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf> (last accessed March 20, 2020). Like cruise ships and nursing homes, which have been the sites for the most severe outbreaks of COVID-19, BOP facilities are "congregate environments" where people live, sleep, and eat in close quarters. *Id.* Prisons are places where disease control is of utmost importance, in part because social isolation is simply impossible. See, e.g., <https://www.vox.com/policy-and-politics/2020/3/17/21181515/coronavirus-covid-19-jails-prisons-mass-incarceration> (last accessed March 20, 2020); <https://www.forbes.com/sites/morgansimon/2020/03/17/want-to-slow-covid-19-legalize-marijuana-and-release-inmates/> (last accessed March 20, 2020).

These conditions pose even greater risk of infectious spread, and as a result, Plaintiffs face unreasonable harm from COVID-19 when the BOP fails to take any measure to protect them.

5. Entering a TRO or Preliminary Injunction Promotes the Public Interest

To obtain a preliminary injunction, the movant must demonstrate that "the injunction is not adverse to the public interest." McDonnel, 878 F.3d at 1252. Protecting the constitutional rights of all individuals is in the public interest. Awad v. Ziriax, 670 F.3d 111, 131-32 (10th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); Edmisten, 287 F. App'x. at 735 ("[D]efendants have a constitutional obligation to provide the required . . . care, and compelling defendants to perform that duty is not contrary to the public interest."); Sumnum v. Pleasant Grove City,

483 F.3d 1044, 1056-57 (10th Cir. 2007), *rev'd on other ground*, 555 U.S. 460 (2009). As explained above, the BOP is violating Plaintiff's constitutional rights but subjecting them to an immense risk of medical harm. Protecting the Plaintiffs from COVID-19 protects their constitutional rights and thus promotes the public interest.

CONCLUSION

For the foregoing reasons, pursuant to Fed. R. Civ. P. 65 Mr. Nellson and the Class he represents respectfully ask the Court to order that BOP, at the USP Florence, CO facility:

- 1) immediately abandon its policy of inaction and begin systematically screening prisoners and staff for symptoms of COVID-19;
- 2) immediately begin testing prisoners and staff exhibiting symptoms of COVID-19;
- 3) immediately quarantine all prisoners testing positive for COVID-19; and
- 4) immediately exclude all BOP staff testing positive for COVID-19 from contact with BOP prisoners.

on the matters raised in this Motion.

Respectfully submitted this 20th day of March 2020,

/s/ MARIA-VITTORIA G. CARMINATI
Maria-Vittoria G. Carminati (CO #50579)

NDH LLC
4601 DTC Blvd., Suite 300
Denver, CO 80237
720-445-5655
mvcarminati@ndh-law.com

/s/ MARIO WILLIAMS
Mario B. Williams (GA #235254)
Pro Hac Vice

NDH LLC

44 Broad Street NW, Suite 200
Atlanta, GA 30303
404-254-0442
mwilliams@ndh-law.com

/s/ ALEXANDRA PARROTT
Alexandra L. Parrott (CO #54188)

NDH LLC
4601 DTC Blvd., Suite 300
Denver, CO 80237
720-445-5655
aparrott@ndh-law.com

CERTIFICATE OF SERVICE

I certify that the foregoing was served on March 31, 2020, in the following manner

on the entities and individuals listed below:

CMRRR

US Attorney General – Civil
Process Clerk
555 Fourth Street NW
Washington, DC 20530-0001

CMRRR

Federal Bureau of Prisons
Legal Department
320 First Street NW
Washington, DC 20534-0001

CMRRR

United States Attorney General
William Barr
950 Pennsylvania Avenue NW
Washington, DC 20530-0009

CMRRR

Warden Barnhart
USP Florence – High
U.S. Penitentiary
PO Box 7500
Florence, CO 81226

/s/ MARIA-VITTORIA G. CARMINATI
Maria-Vittoria G. Carminati (CO #50579)