

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

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

Plaintiffs,

-v-

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

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

Defendants.

**PLAINTIFFS' EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER & INJUNCTIVE RELIEF
AND
BRIEF IN SUPPORT**

Plaintiffs, Elliott Abrams, Craig Seegmiller, Vincent Glass, Robert Reeves, and
Lamont Heard, on behalf of themselves and all others similarly situated, by and through
their counsel, Daniel E. Manville, Michigan State University Clinical Law Professor,
hereby move this Court, pursuant to Fed. R. Civ. P. 65, for entry of a Temporary

Restraining Order and Injunctive Relief. As demonstrated in the following brief, Defendants have violated the Eighth Amendment to the U.S. Constitution by failing to provide Plaintiffs with reasonably safe living conditions in the face of the current COVID-19 pandemic. As a result, Plaintiffs seek entry of a temporary restraining order requiring Defendants to take additional precautions to stem the spread of the virus.

CONCISE STATEMENT OF ISSUES PRESENTED

Should the Court issue a preliminary injunction and enjoin the Defendants from subjecting inmates to the COVID-19 virus where it is refusing to comply with CDC Guidelines?

Plaintiffs Answer: Yes.

CONTROLLING AUTHORITY FOR RELIEF SOUGHT

In determining whether to grant an emergency application for a temporary restraining order, courts evaluate four factors: 1) whether the movant has a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable injury absent an injunction; 3) whether granting the injunction would cause substantial harm to others; and 4) whether the public interest would be served by granting the injunction. *Northeast Ohio Coal. for Homeless and Serv. Emps. Intern. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). These four factors “are not prerequisites that must be met but are interrelated considerations that must be balanced together. For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay.” *Id.*

I) INTRODUCTION

The world is in the midst of a global health pandemic. The President has declared a national emergency. Across the country, 43 states and Washington, D.C. have issued, and in some cases extended, “Shelter-in-Place” Orders. As things stand, COVID-19 has no vaccine, no treatment, and no cure. The only option to keep infections to a minimum in an effort to contain this public health emergency is to practice social distancing, proper hygiene, and intensify cleaning.

Meanwhile, as COVID-19 is spreading wildly across the country, a much quieter outbreak is occurring within the Michigan Department of Corrections (“MDOC”) where inmates remain confined in crowded facilities where social distancing is virtually impossible. As a result, inmates and correctional staff alike are particularly vulnerable to serious illness and potentially even death from the COVID-19 virus.

With this in mind, Plaintiffs seek immediate class-wide relief requiring Defendants to take critical steps to provide reasonably safe living conditions in the face of the COVID-19 pandemic. Specifically, Plaintiffs seek changes to MDOC policy, as well as a change in the locations where inmates are kept in custody. These measures are not only in Plaintiffs’ best interests, but also in the best interest of correctional staff and the public at large because further outbreak of this virus will infect scores of individuals across our communities.

NOTICE OF COMPLIANCE WITH LOCAL RULE 7.1(a)

Local Rule 7.1(a) requires Plaintiffs to ascertain whether this motion will be opposed. However, because this motion is being filed contemporaneously with the Complaint, there is not yet an attorney of record for Defendants in this case. Thus, pursuant to Local Rule 7.1(a)(2)(B), the undersigned counsel certifies that he was not able to obtain concurrence in the relief sought in this motion.

II) **STATEMENT OF FACTS**

A. **COVID-19 IS SPREADING RAMPANTLY**

COVID-19 is spreading exponentially in Michigan and in the United States. The risk of harm is so outrageous that President Trump proclaimed that the COVID-19 outbreak in the United States constituted a national emergency, beginning March 1, 2020. (**Ex. 1, Proclamation 9994**).¹ As of April 28, 2020, 1,031,290 people in the United States have contracted COVID-19, with 57,043 people dying from the virus – figures that understate its spread, as they include only those who have managed to get tested. (**Ex. 2, Worldometer’s COVID-19**).² Because the virus spreads more rapidly when people are in close contact with each other, government officials in forty-three (43) states and Washington, D.C. have issued “stay-at-home” or “shelter-in-place” directives, with exceptions only for essential services like grocery shopping and trips to the pharmacy. (**Ex. 3, 43 States Now Have Stay-At-Home Orders**).³

Likewise, on March 23, 2020, Michigan Governor Gretchen Whitmer issued Executive Order 2020-21 in response to the COVID-19 outbreak. (**Ex. 4, MI Executive Order 2020-21**).⁴ The Order limited gatherings and travel, and required workers who are

¹ Proclamation 9994 of March 13, 2020, <https://www.federalregister.gov/documents/2020/03/18/2020-05794/declaring-a-national-emergency-concerning-the-novel-coronavirus-disease-covid-19-outbreak>

² <https://www.worldometers.info/coronavirus/country/us/>

³ Silverstein, Jason, “43 States Now Have Stay-At-Home Orders For Coronavirus. These Are The 7 That Don’t” (April 6, 2020), CBS News. Available at: <https://www.cbsnews.com/news/stay-at-home-orders-states/>

not necessary to sustain or protect life to stay home. (*Id.*) On April 9, 2020, the Governor reaffirmed the measures set forth in Executive Order 2020-21 and extended their duration to April 30, 2020. (**Ex. 5**, *MI Executive Order 2020-42*).⁵ Indeed, Michigan has become one of the global epicenters of the outbreak with a more than 37,778 reported cases and at least 3,315 deaths reported. (**Ex. 6**, *Michigan Data*).⁶

B. ~~COVID-19~~ PLACES PLAINTIFFS AT IMMINENT RISK OF SUBSTANTIAL
Reducing the spread of the virus is especially challenging in prisons. This is due to

a number of factors, including confined individuals' inability to protect themselves through social distancing, lack of medical and hygiene supplies, constant cycling of people through the prisons, and inadequate medical care within the prison itself. Compl. ¶¶ 7-57 and ¶¶ 96-112

In Michigan, as of April 22, 2020, 655 MDOC prisoners have tested positive for COVID-19. (**Ex. 6**, *Michigan Data*). This case count places MDOC as the sixth highest "jurisdiction" in the state, only surpassed by Genesee County (1,362), Macomb County (4,628), Oakland County (6,463), Wayne County (6,535) and Detroit City (8,026). (*Id.*) However, the growing devastation in other prisons around the country is a harbinger for

⁴ *Executive Order 2020-21* (COVID-19), State of Michigan (Mar. 23, 2020) https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626-,00.html

⁵ *Executive Order 2020-42* (COVID-19), State of Michigan (Apr. 9, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525182--,00.html

⁶ *Michigan Data*, State of Michigan (Apr. 22, 2020), https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html

what almost certainly awaits MDOC if immediate safeguards are not enacted. For instance, at the Marion Correction Institution in Marion, Ohio, 1,828 inmates have tested positive, along with 109 staff members. (**Ex. 7**, *Coronavirus in Ohio: More Than 1,800 Inmates at Marion Correctional Test Positive*).⁷

C. ~~STRONG PUBLIC HEALTH AND SAFETY CONCERNS WARRANT EARLY RELEASE OF INMATES~~

Based upon the heightened risk posed by COVID-19 in prisons, public health experts and prison administrators across the country have made it abundantly clear that inmates should be released from detention facilities, not only for their own safety, but also for the safety of others.⁸ In Michigan, Governor Whitmer has authorized enhanced early-release for county jails, local lockups, and juvenile detention centers in an effort to mitigate

⁷ *Coronavirus in Ohio: More Than 1,800 Inmates at Marion Correctional Test Positive*, The Columbus Dispatch (Apr. 19, 2020) <https://www.dispatch.com/news/20200419/coronavirus-in-ohio-more-than-1800-inmates-at-marion-correctional-test-positive>

⁸ See **Ex. 9**, *Letter from Bd. of Correction of the City of New York to Criminal Justice Leaders* (Mar. 21, 2020) (stating: “We urge you to follow your colleagues in Los Angeles County (CA), San Francisco (CA), Cook County (IL), Autauga County (AL), Augusta County (VA), Allegheny County (PA), Hamilton County (OH), Harris County (TX), Travis County (TX), and Cuyahoga County (OH), and take action now to release people from City jails.”) <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf> ; **Ex. 10**, *Linh Ta, Iowa’s prisons will accelerate release of approved inmates to mitigate COVID-19*, Times Republican (Mar. 23, 2020), <https://www.timesrepublican.com/news/todays-news/2020/03/iowas-prisons-will-accelerate-release-of-approved-inmates-to-mitigate-covid-19/> (stating, “To mitigate a possible outbreak and create more room in Iowa’s overcrowded prisons, the Iowa Department of Corrections plans to expedite the release of about 700 inmates...”); **Ex. 11**, *California Chief Justice Issues Second Advisory on Emergency Relief Measures* (Mar. 20, 2020), <https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures> .

the COVID-19 spread. (**Ex. 8**, *Executive Order No. 2020-29*).⁹ Similarly, Chief Justice Bridget M. McCormack and Executive Director of the Michigan Sheriffs' Association, Matt Saxton, have issued a joint statement urging judges and sheriffs to “use the statutory authority they have to reduce and suspend jail sentences for people who do not pose a public safety risk[,]. . . release far more people on their own recognizance while they await their day in court. . . [a]nd judges should use probation and treatment programs as jail alternatives.” (**Ex. 12**, *Joint Statement*).¹⁰

The federal government has also acknowledged the grave threat posed by a viral outbreak in prisons and detention centers. Indeed, on March 26, 2020, Attorney General William Barr stated that the Federal Bureau of Prisons is exploring the release of at-risk prisoners to home confinement in order to reduce the overall prison population. (**Ex. 13**, *AG William Barr Pushes Expansion of Home Confinement to Reduce Prison Populations Amid Coronavirus*).¹¹ Likewise, DHS's subject matter experts have stressed that COVID-19 is exponentially more likely to spread in “congregate settings,” such as prisons. (**Ex.**

⁹ Executive Order No. 2020-29 (Apr. 26, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523422-,00.html

¹⁰ Joint Statement (Mar. 26, 2020), [https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20\(03\).pdf](https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20(03).pdf)

¹¹ Alexander Mallin, *AG William Barr Pushes Expansion of Home Confinement to Reduce Prison Populations Amid Coronavirus*, ABC News (Mar. 26, 2020), <https://abcnews.go.com/Politics/ag-william-barr-pushes-expansion-home-confinement-reduce/story?id=69816504>

14, *Letter from Scott A. Allen and Josiah Rich to The Honorable Bennie Thompson at pg. 2, 3, 4, 5, 7*).¹² As such, “DHS should consider releasing all detainees in high risk medical groups, such as older people and those with chronic disease.” (*Id.* at 5-6).

Because the virus spreads more rapidly when people are in close contact with each other, the Center for Disease Control (“CDC”) has issued “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities.” (**Ex. 15**, *CDC Guidelines*).¹³ The CDC “document provides interim guidance specific for correctional facilities and detention centers during the outbreak of COVID-19, to ensure continuation of essential public services and protection of the health and safety of incarcerated and detained persons, staff, and visitors.” *Id.*

The CDC notes that “[t]here are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including daily staff ingress and egress; transfer of incarcerated/detained persons between facilities and systems, to court appearances, and to outside medical visits; and visits from family, legal representatives, and other community members. Some settings, particularly jails and detention centers, have high turnover,

¹² *Letter from Scott A. Allen and Josiah Rich, to The Honorable Bennie Thompson, Chairman, House Committee on Homeland Security (Mar. 19, 2020)*, <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html#document/p4/a557238>

¹³ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control and Prevention (Apr. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>

admitting new entrants daily who may have been exposed to COVID-19 in the surrounding community or other regions.” *Id.* at pg. 2. The CDC further notes that “[p]ersons incarcerated/detained in a particular facility often come from a variety of locations, increasing the potential to introduce COVID-19 from different geographic areas.” (*Id.*)

With regard to cleaning, the CDC emphasizes that “[e]ven if COVID-19 cases have not yet been identified inside the facility or in the surrounding community, begin implementing intensified cleaning and disinfecting procedures according to the recommendations.” *Id.* at pg. 9. These measures include disinfecting objects and surfaces in common areas and cleaning shared equipment. *Id.*

In addition to disinfection practices, correctional facilities should also “[r]einforce healthy hygiene practices, and provide and continually restock hygiene supplies throughout the facility, including in bathrooms, food preparation and dining areas, intake areas, visitor entries and exits, visitation rooms and waiting rooms, common areas, medical, and staff-restricted areas (e.g., break rooms).” *Id.* at pg. 10. Moreover, inmates should also be provided with no-cost access to: Soap... Running water, and hand drying machines or disposable paper towels for hand washing... Tissues and no touch trash receptacles for disposal. *Id.*

Most importantly, detention facilities should “[i]mplement social distancing strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of the presence of symptoms).” *Id.* at pg. 11. In this

regard, inmates should be separated in common areas, recreation spaces, dining halls, during group activities, and in their cells. *Id.*

D. ~~MDOC HAS ENDED OF THE MDOC~~ APPROPRIATE MEASURES TO

The MDOC acknowledges the risks involved and has allegedly enacted a number of measures to protect its inmates. (Ex. 16, *MDOC Response and Information on Coronavirus*).¹⁴ However, even if the guidance set forth by the MDOC were being followed, it is wholly insufficient to adequately shield inmates from the crisis at hand.

1. Inmates Cannot Practice Social Distancing

First, social distancing is virtually impossible in a prison setting. (Ex. 17, *Glass Decl. at ¶ 3*). In some areas, “bunks are separated by less than six (6) feet,” requiring inmates to contravene CDC Guidelines when they sleep. (Ex. 19, *Abrams Decl. at ¶ 5*). In addition to sleeping, in some facilities, food preparation, service and meals are communal, where inmates sit at tables just feet apart from one another. (Ex. 20, *Reeves Decl. at ¶ 5*; Ex. 17, *Glass Decl. at ¶ 4-6*). In others, prison staff makes no effort to ensure that prisoners wear face masks or keep at least six (6) feet when retrieving and returning meal trays. (Ex. 19, *Abrams Decl. at ¶ 14*). Indeed, MDOC spokesman, Chris Gautz, readily concedes that because inmates eat, sleep and live in closely confined quarters, they cannot achieve the social distancing needed to effectively prevent the spread of COVID-19:

¹⁴ *MDOC Response and Information on coronavirus (COVID-19)*, (updated Apr. 16, 2020), <https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronavirus-covid-19-250f43144337>

We've been practicing social distancing to the extent we can in a prison. Really anything outside of your immediate living area. If you're in a cell, obviously your bunkmate is going to be within 6 feet of you.

(**Ex. 21**, *Michigan Department of Corrections Taking Steps to Curb COVID-19*).¹⁵

2. Cleaning And Disinfecting Practices

Not only do inmates sleep within six feet of each other within their cells, but they also share sinks, toilets, showers, computers, telephones, microwaves, and drinking fountains, with very little disinfection between uses. (**Ex. 19**, *Abrams Decl. at ¶ 6-11 and 16*; **Ex. 22**, *Seegmiller Decl. at ¶ 9-10*; **Ex. 20**, *Reeves Decl. at ¶ 4*). Furthermore, some facilities are still operating a community laundry and most inmates only receive a change of uniform and linens twice a week. (**Ex. 19**, *Abrams Decl. at ¶ 17*). Finally, at least one inmate noted that his facility does not maintain a sufficient amount of cleaning supplies so that inmates may regularly disinfect cells, as recommended by CDC Guidelines. (**Ex. 19**, *Abrams Decl. at ¶ 15*).

3. Personal Protective Equipment (PPE)

Inmates, as a whole, are not being issued facemasks or other forms of PPE. Rather, inmates are only receiving masks *after* testing positive for COVID-19. (**Ex. 20**, *Reeves Decl. at ¶ 7*). Equally concerning is that several inmates have reported both officers and medical staff either not changing dirty PPE after use, or not wearing PPE at all. (**Ex. 19**,

¹⁵ Cody Butler, *Michigan Department of Corrections taking steps to curb COVID-19*, WILX (Apr. 8, 2020), <https://www.wilx.com/content/news/Michigan-Department-of-Corrections-taking-steps-to-curb-COVID-19-569483901.html>

Abrams Decl. at ¶ 13; Ex. 17, Glass Decl. at ¶ 7; Ex. 20, Reeves Decl. at ¶ 11; Ex. 23, Heard Decl. at ¶ 7).

According to a survey conducted by Harvard University and the National Commission on Correctional Health Care, who collected data from more than 320 facilities housing approximately 10 percent of the country's inmates across 47 states (the "Harvard Study"), "The nationwide shortage of personal protective equipment (PPE) as well as ancillary supplies (such as cleaning products and thermometer probes) is also a problem for correctional health care operations." (**Ex. 24, Harvard Study**).¹⁶

4. Quarantine and Isolation

Defendants are not quarantining inmates who have exhibited symptoms or even tested positive for COVID-19. (**Ex. 17, Glass Decl. at ¶ 8; Ex. 20, Reeves Decl. at ¶ 7**). In fact, in Lakeland Corrections Facility Housing Unit 2-E, which is a Pole Barn, inmates were recently told by health service and prison staff that due to some inmates already testing positive in that unit and the other unit inmates in that unit already being exposed to these positive tested inmates that there was no reason to further quarantine any of

¹⁶*First Research Findings Measure COVID-19 Prevalence In U.S. Prisons, Jails*, Harvard Kennedy School (April 09, 2020), <https://www.hks.harvard.edu/faculty-research/policy-topics/fairness-justice/first-research-findings-measure-covid-19-prevalence>

the inmates. This failure to quarantine inmates is becoming the standard procedure.¹⁷ Compl. at Introduction, pg. 4.

5. Adequate Health Care

Those who have been exposed to the virus or exhibit symptoms are not properly treated. Robert Reeves, who tested positive around March 28, 2020, is yet to see a physician, nor did he receive any information with regard to worsening symptoms “despite complaining of chest pain, coughing up blood, and having problems breathing.” (Ex. 20, *Reeves Decl. at ¶ 19*). Rather, he was “just told it was normal and to go through it.” (*Id.*)

6. Testing

Finally, Plaintiffs are seeking implementation of rapid testing as the current protocol is woefully insufficient:

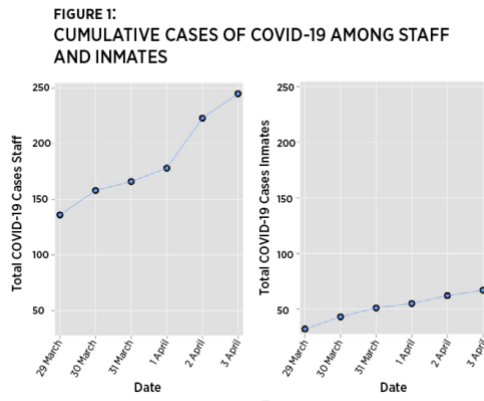
If a prisoner has symptoms and meets the criteria for testing, the MDOC will seek permission from the local health department in the county the prison is in to conduct a test utilizing a test kit. A limited number of test kits have distributed to all MDOC facilities, but can only be used after the MDHHS authorizes the test.

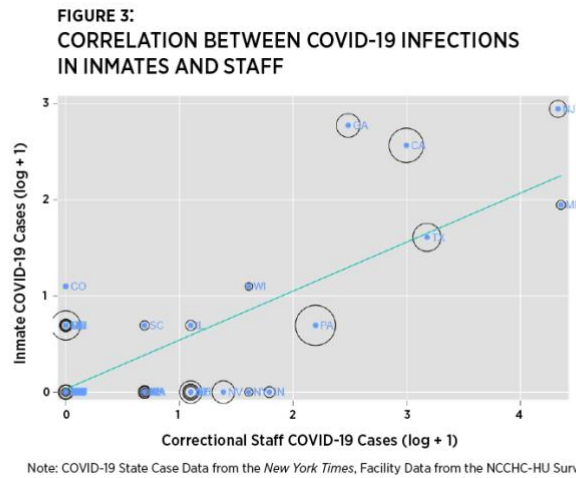
(Ex. 16, *MDOC Response and Information on Coronavirus*).

Thus, because MDOC cannot provide widespread testing, inmates and employees are entirely unaware about who has actually contracted the disease. This is especially concerning given that prison staff regularly cycles through the facilities. As a result, it is

¹⁷ Counsel Manville was schedule to have legal telephone calls with inmates at the Cotton Prison on April 17 and then another legal call on April 20 at the Parnall Prison. These calls were canceled due to entire housing units at each of these two prisons being placed under quarantine.

impossible for inmates to avoid interaction with these individuals who may be carriers of the virus. In fact, among the key findings of the Harvard Study were that correctional staff have a higher infection rate than inmates:





(Ex. 24, *Harvard Study*).

With correctional staff affected, the outbreak then spreads to the staff’s family and the community. As courts have noted, “[t]he more people we crowd into [a] facility, the more we’re increasing the risk to the community.” *United States v. Stephens*, No. 15-cr-95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020), *see* Ex. 30.

E. CONCLUSION

In sum, so long as Plaintiffs are detained, they cannot protect themselves by practicing social distancing, nor can Defendants provide the sanitization and hygiene required to avoid infection. Additionally, inmates and staff are not being regularly tested. For these reasons, Defendants have violated the Eighth Amendment to the U.S. Constitution by failing to provide Plaintiffs with reasonably safe living conditions. As a result, Plaintiffs seeks entry of a temporary restraining order requiring Defendants to take additional precautions to stem the spread of the virus.

III) LAW & ARGUMENT

A. ~~COURT HAS PRISONERS A POWER TO PROTECT PRISONERS WHILE~~

[T]he exponential growth of the novel coronavirus has resulted in emergency declarations by the President and the Governor, as well as governors of numerous other states. Due to the nature of this virus, the Court finds that the risk of contracting the virus in a prison environment, where at least 23 inmates have already tested positive, poses a sufficiently high risk, rendering this matter ripe for adjudication even though Plaintiff has not contracted the virus. The United States Supreme Court has held that the risk of contracting a serious disease may indeed constitute an unsafe, life-threatening condition that violates the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 33, ... (1993). Further, the Supreme Court held that it would “be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Id.* With the clear danger posed by COVID-19 in the [prison], Plaintiff has adequately demonstrated standing. [*Marlowe v. LeBlanc*, CV 18-63-BAJ-EWD, 2020 WL 1955303, at *2 (M.D. La. Apr. 23, 2020) *see* Ex. 27.]

When determining whether to grant injunctive relief, Court analyze four (4) factors:

“(1) whether the movant has a strong likelihood of success on the merits; (2) whether the

movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.” *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass’n.*, 110 F.3d 318, 322 (6th Cir. 1997). The court must balance each of the four factors and “no single factor is dispositive.” *City of Dearborn v. Comcast of Mich.*, 558 F. Supp. 2d 750, 754 (E.D. Mich. 2008).

Importantly, a federal courts equitable powers to enjoin unconstitutional prison conditions are not impaired by the Prison Litigation Reform Act’s (“PLRA”) exhaustion requirement. *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). Indeed, the Supreme Court has long recognized that federal courts possess a “traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction.” *Id.* at 604. As explained in *Wagner v. Taylor*, 836 F.2d 566 (D.C. Cir, 1987), “[i]f [a] court may eventually have jurisdiction of the substantive claim, the court's incidental equitable jurisdiction, despite the agency’s primary jurisdiction, gives the court authority to impose a temporary restraint in order to preserve the status quo pending ripening of the claim for judicial review.” *Id.* at 571. Accordingly, the Court held that although Title VII complainants must ordinarily exhaust administrative remedies before seeking judicial relief, district courts retain jurisdiction to grant interim injunctive relief where plaintiffs face irreparable injury. *Id.* at 574-576; *See also Jackson v. D.C.*, 254 F.3d 262, 268 (D.C. Cir.2001) (holding that

that “the PLRA contains nothing expressly foreclosing courts from exercising their traditional equitable power to issue injunctions to prevent irreparable injury pending exhaustion of administrative remedies.”); *Marlowe v. LeBlanc*, CV 18-63-BAJ-EWD, 2020 WL 1955303, at *2 (M.D. La. Apr. 23, 2020) (cited *Jackson*, COVIC-19 prison case); *Foster v. Gueory*, 655 F.2d 1319, 1321–22 (D.C.Cir.1981) (explaining that each individual plaintiff in a class-action suit need not have pursued the available administrative remedies “if at least one member of the plaintiff class has met the filing prerequisite.”)

B. ~~DEFENDANTS ARE VIOLATING THEIR FIDUCIARY DUTY TO DEFEND THEIR RIGHTS~~ CAUSE
Plaintiffs have retained two experts in this lawsuit. Both Dr. Adam Lauring and

Dr. Jeremy Young, are infectious disease specialists. The report by Dr. Lauring is attached as Ex. 25, along with his CV, and the report of Dr. Young is attached as Ex. 26, along with his CV.

Both experts are aware of the risk posed by infectious diseases in prisons is significantly higher than in the community, “both in terms of multiple risks of transmission and exposure to individuals who become infected.” Ex. 25, at para. 1; Ex. 36, at para. 5. There is also the issue of adequate of cleaning supplies being provided to inmates for self-cleaning and the cleaning of surfaces. *Id.* As Dr. Lauring stated based on his review of some of the declaration of named Plaintiffs:

The declarants attested to the fact that individuals confined have limited access to disinfectant, if at all, or basic cleaning supplies with which to clean their shared cells, shared living quarters, common areas, or high-touch surfaces. One declarant describes his only cleaning utensil as a mop. High-touch surfaces, such as light switches, door and sink knobs,

telephones, tables, etc., should be sanitized after each use. Failure to properly sanitize shared spaces, common areas, and high-touch surfaces that detained individuals heavily use, seriously increases the risk of the spread of COVID-19 and demonstrates the MDOC's failure to take the most fundamental precautions for preventing the spread of the disease.

Ex. 25, at para. 33.

Based on the housing situation in Michigan prison system, "it is nearly impossible for jails and prisons to provide the atmosphere of "shelter in place" or "stay at home" social distancing, given the number of individuals that work in and are housed in these facilities in the current system." Ex. 25, para. 26.

These experts are familiar with prison systems and how inmates are confined within the housing units. They both are certain that the spread of COVID-19 will soon reach the pandemic levels within the Michigan prison system. "[T]he growing devastation in other prisons around the country is a harbinger for what almost certainly awaits MDOC if immediate safeguards are not enacted." Ex. 29, Para. 12.

After his review of the declarations and numerous other documents, Dr. Young found that

Based on my understanding of the Lakeland Correctional Facility (LCF), my review of relevant materials, my experience working on public health in prisons and other correctional facilities, and my review of the relevant literature, **it is my opinion that LCF has failed to implement infection control procedures sufficient to prevent and manage a COVID-19 outbreak.** The current infection control measures in place to reduce the spread of COVID-19 at LCF are grossly inadequate, particularly considering its vulnerable population. My understanding is that many other MDOC facilities, not just LCF, are not following the appropriate measures of quarantine, social distancing, and hand hygiene necessary to

protect inmates. These MDOC facilities include, but appear to be not limited to: Macomb Correctional Facility (MRF), G. Robert Cotton Correctional Facility (JCF), and Parnall Correctional Facility (SMT). This could result in severe harm to detained individuals, prison staff, and the broader community. The reasons for this conclusion are detailed below.

Ex. 26, at para. 22.

Both experts recommended similar steps MDOC should undertake to prevent a pandemic that can cause the deaths of many inmates and staff. These recommendations are contained in the relief section of this complaint, so they need not be repeated here. Probably the MOST important recommendation made by these experts is that MDOC must act NOW.

It is my professional opinion that these steps are both necessary and urgent. The horizon of risk for COVID-19 in this facility is a matter of days, not weeks.

Ex. 25, Lauring, at para. 42.

It is my professional opinion that these steps are both necessary and urgent. The horizon of risk for COVID-19 in MDOC facilities is a matter of days, not weeks. This is an imminent threat to inmates, correctional employees and their families, and the greater community.

Ex. 26, Young, at para. 28.

To demonstrate a violation of the Eighth Amendment, convicted prisoners must show that defendants were deliberately indifferent to “a substantial risk of serious harm” and that they disregarded that risk by failing to take reasonable measures. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under this rubric, there is both an objective and a subjective component. *Id.* at 835-38.

1. **Objective Risk of Harm**

To satisfy the objective component, the Plaintiffs must demonstrate that the constitutional deprivation was “objectively, ‘sufficiently serious.’” *Id.* at 837-838, The Supreme Court has recognized that government authorities may be deemed “deliberately indifferent to an inmate’s current health problems” where authorities “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” including “exposure of inmates to a serious, communicable disease,” even when “the complaining inmate shows no serious current symptoms.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). As the Court noted, “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Id.*

“Objectively, the health risks posed by COVID-19 are abundantly clear.” *Awshana, et al. v. Adducci*, No. 20-10699, 2020 WL 1808906, at *7 (E.D. Mich. Apr. 9, 2020), see Ex. 31. Indeed, federal courts from coast to coast, including several jurists in this very district, have routinely recognized that “[d]etention exacerbates the threat of contracting COVID-19.” *United States v. Patino*, Case No. 18-20451, 2020 WL 1676766, at *3 (E.D. Mich. Apr. 6, 2020), see Ex. 32; *United States v. Kennedy*, Case No. 18-20315, 2020 WL 1493481, at *2 (E.D. Mich. Mar. 27, 2020) (describing “heightened risk of danger to detainees” noted by the CDC, because of “low capacity for patient volume, insufficient quarantine space, insufficient on-site medical staff, highly congregational

environments, inability of most patients to leave the facility, and limited ability of incarcerated/detained persons to exercise effective disease prevention measures (e.g., social distancing and frequent handwashing”, *see* Ex. 33; *Miller v. United States*, Case No. 16-20222-1, 2020 WL 1814084, at *3 (E.D. Mich. Apr. 9, 2020) (“While the COVID-19 pandemic is devastating in every region it invades, prison populations are subject to heightened vulnerability”), *see* Ex. 34; *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662 (E.D. Mich. Apr. 6, 2020) (Granting the temporary restraining order and ordering immediate release from ICE custody”), *see* Ex. 35.¹⁸

The foregoing line of precedent reflects the emerging judicial consensus that the close proximity in detention facilities and the medical risks of the COVID-19 virus combine to present an objectively sufficiently serious medical risk to all inmates. Indeed,

¹⁸ *See also Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877, at *1 (9th Cir. Mar. 24, 2020) (*sua sponte* ordering immediate release of immigrant petitioner “[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers”), *see* Ex. 39; *United States v. Muniz*, 2020 WL 1540325, at *1 (S.D. Tex. March 30, 2020) (Granting Defendant’s motion for compassionate release, noting “news reports of the virus’s spread in detention centers within the United States ... demonstrate that individuals housed within our prison systems nonetheless remain particularly vulnerable to infection [from COVID-19].”) (ordering, *sua sponte*, extension of convicted defendant’s surrender date and noting, “By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations. The chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual.”), *see* Ex. 36; *United States v. Stephens*, No. 15-cr-95, 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020) (granting motion for reconsideration of defendant’s bail conditions and releasing him from jail to home confinement, recognizing that “inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop.”), Ex. 30; *Thakker v. Doll*, No. 20-cv-480, 2020 WL 1671563, at *6 (M.D. Pa. Mar. 31, 2020) (The Court explained that “[s]ocial distancing and proper hygiene are the *only* effective means by which we can stop the spread of COVID-19” and that the petitioners had shown that, “despite their best efforts, they cannot practice these effective preventative measures in the Facilities.”) Ex. 29.

CDC Guidelines quite clearly reflect that COVID-19 is a highly contagious virus and have published a twenty-six (26) page manual to curb the spread of the contagion. (**Ex. 15**, *CDC Guidelines*). Those who have been infected with the virus may not become symptomatic for up to fourteen days. (*Id.* at 11). In light of these facts and the present lack of a vaccine or cure for the virus, frequent handwashing, social distancing, sanitation, and the use of PPE are the only available methods to protect against coronavirus infection. (*Id.* at 9-13).

However, affidavits submitted by Plaintiffs illustrates that inmates are being housed in congregate living situations as there are no restrictions when it comes to using the bathroom, bunking, and gathering in the cafeteria. (**Ex. 17**, *Glass Decl.* at ¶ 3-6; **Ex. 20**, *Reeves Decl.* at ¶ 5; **Ex. 19**, *Abrams Decl.* at ¶ 5 and 14). The MDOC has actually acknowledged this point, stating: “If you’re in a cell, obviously your bunkmate is going to be within 6 feet of you.” (**Ex. 21**, *Michigan Department of Corrections Taking Steps to Curb COVID-19*).¹⁹ The affidavits also reflect that inmates currently lack the means to attempt to protect themselves from a potential coronavirus infection, such as an adequate supply of soap, cleaning supplies, or with PPE such as facemasks. (**Ex. 19**, *Abrams Decl.* at ¶ 6-11 and 13-17; **Ex. 22**, *Seegmiller Decl.* at ¶ 9-10; **Ex. 20**, *Reeves Decl.* at ¶ 4, 7, and 11; **Ex. 17**, *Glass Decl.* at ¶ 7; **Ex. 23**, *Heard Decl.* at ¶ 7). Finally, the MDOC is not quarantining inmates who have exhibited symptoms, providing adequate medical

¹⁹ Cody Butler, *Michigan Department of Corrections taking steps to curb COVID-19*, WILX (Apr. 8, 2020), <https://www.wilx.com/content/news/Michigan-Department-of-Corrections-taking-steps-to-curb-COVID-19-569483901.html>

treatment when they exhibit symptoms and screening its population to identify, and separate, infected inmates. (Compl. at Introduction, pg. 4; **Ex. 17**, *Glass Decl. at ¶ 8*; **Ex. 20**, *Reeves Decl. at ¶ 7 and 19*; **Ex. 16**, *MDOC Response and Information on Coronavirus*). When this compilation of evidence is taken together, the MDOC conditions significantly increase the risk that inmates will contract and spread a highly contagious, life-threatening, virus with no vaccine, effective treatment, or cure. *See Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274 at *5 (S.D.N.Y. Mar. 27, 2020) (Holding that the correctional facilities measures “do nothing to alleviate the *specific, serious, and unmet* medical needs of... [inmates].”); *see also Basank v. Decker*, No. 20-CV- 2518, 2020 U.S. Dist. LEXIS 53191, 2020 WL 1481503, at *5) (S.D.N.Y. Mar. 26, 2020) (Holding that the general measures were “patently insufficient” to protect *any* inmates from infection absent “enforcement of requisite social distancing.”), *see Ex. 37*.

Moreover, 43 states and Washington, D.C. have issued “shelter-in-place” directives, closing public schools and non-essential businesses, banning people from eating in restaurants or even congregating in small groups, and requiring all residents to stay in their homes unless it is absolutely necessary to leave. (**Ex. 3**, *43 States Now Have Stay-At-Home Orders*). Even when they leave, people are advised to stay at least six feet from others, wear masks, avoid touching their faces, and routinely wash/sanitize their hands. The message is clear: the risk of contracting COVID-19 is objectively unprecedented.

As the Court explained in *Helling*, the Government violates the Eighth Amendment

when it confines a prison inmate in unsafe conditions and “ignore[s] a condition of confinement that is sure or very likely to cause serious illness.” *Id.* at 32. In recognition that Plaintiffs cannot maintain the necessary distance from their fellow inmates, nor do they have access to the requisite supplies to adhere to the government’s hygiene guidelines for preventing infection, Plaintiffs have shown a reasonable likelihood of success on their contention that current MDOC conditions creates an objectively substantial risk of serious harm in violation of the Eighth Amendment.

2. **Subjective Indifference**

The subjective component requires Plaintiffs to show that (1) “the official being sued subjectively perceived facts from which to infer a substantial risk to the prisoner,” (2) the official “did in fact draw the inference,” and (3) the official “then disregarded that risk.” *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 446 (6th Cir.2014). “Because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence....” *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 550 (6th Cir. 2009) (brackets, citation, and internal quotation marks omitted).

Here, in light of the statistical evidence it cannot be seriously disputed that government officials, including Defendants, are subjectively aware of the risks posed by COVID-19. Again, as of April 22, 2020, 655 MDOC prisoners have tested positive for COVID-19, placing it as the sixth highest “jurisdiction” in the state. (**Ex. 6**, *Michigan*

Data). The disparity between MDOC and other jurisdictions clearly supports the proposition that Defendants have been made well aware that prison conditions facilitate the spread of COVID-19 and exacerbate the risk of infection for prison inmates.

In addition to the empirical data, Governor Whitmer has implemented Executive Order 2020-29, the Michigan Sheriffs' Association has issued a "Joint Statement," and the CDC has published formal Guidelines, all directly aimed at safety within correctional institutions. (**Ex. 8**, *Executive Order No. 2020-29*; **Ex. 12**, *Joint Statement*; **Ex. 15**, *CDC Guidelines*). In fact, the MDOC's own publications emphasize awareness of the COVID-19 outbreak. (**Ex. 16**, *MDOC Response and Information on Coronavirus (COVID-19)*).

The list of reasonable measures to prevent the spread of COVID-19 is well delineated and publicized: "[s]ocial distancing and proper hygiene are the only effective means by which we can stop the spread of COVID-19." *Thakker v. Doll*, No. 20-cv-480, 2020 WL 1671563 at *8. (M.D. Pa. Mar. 31, 2020), see **Ex. 29**. The CDC has stated that social distancing of at least six feet at all times is the "cornerstone of reducing transmission" of COVID-19 within detention facilities, is pushing facilities to "[p]rovide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing," and is advising that facilities must, "[s]everal times a day, clean and disinfect surfaces and objects that are frequently touched, especially in common areas." (**Ex. 15**, *CDC Guidelines at pg. 4, 8 - 10*).

Despite this knowledge, as set forth in the prior section of this briefing, Defendants

are disregarding the grave risk posed by COVID-19 by failing to provide Plaintiffs with adequate space and cleaning/disinfecting supplies necessary to allow staff and inmates to remain safe. Nor have Defendants provided timely and adequate medical care to identify, isolate, and treat people who develop symptoms. As a result, the entire class has a substantial risk of contracting COVID-19.

In sum, COVID-19 is a threat to Plaintiffs' health and safety of a magnitude unseen in history. By failing to implement basic measures recommended by healthcare experts, the CDC, and Governor Whitmer - including access to basic medical screening and treatment protocols for infectious disease, providing adequate hygiene supplies, and giving people sufficient space to social distance – Defendants are knowingly exposing Plaintiffs, correctional staff and the public at large to the lethal virus in violation of the Eighth Amendment. Accordingly, Plaintiffs have shown that they are likely to succeed on the merits of their Eighth Amendment claims.

C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT EMERGENCY
An injury will be deemed irreparable when it “is not fully compensable by monetary

damages or [the] nature of the loss would make damages hard to calculate.” *S. Glazer’s Distributors of Ohio v. Great Lakes Brewing Co.*, 860 F.3d 844, 852 (6th Cir. 2017). Importantly, “when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.” *ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

In this case, Plaintiffs will suffer irreparable harm without a temporary restraining order. First and foremost, COVID-19 infection makes many people extremely ill and, in some people, it can be fatal. As of April 22, 2020, 198,668 people globally have been mortally injured as a result of the virus. (**Ex. 28**, *World Health Organization, Situation Report – 93*). Similarly, as of April 22, 2020, 655 MDOC inmates have tested positive for COVID-19, with 25 fatalities. (**Ex. 6**, *Michigan Data*). Indeed, there is no injury that is more irreparable than death. *See In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (Where, as here, Plaintiffs demonstrate “irreparable harm which decidedly outweighs any potential harm to the defendant,” the “degree of likelihood of success required” is less, and a plaintiff need only “serious questions going to the merits.”)

Moreover, the best option to keep infections to a minimum is to practice social distancing. However, the MDOC readily concedes that social distancing is not feasible: “If you’re in a cell, obviously your bunkmate is going to be within 6 feet of you.” (**Ex. 21**, *Michigan Department of Corrections Taking Steps to Curb COVID-19*). Thus, these grave risks to health are not an insignificant possibility for the Plaintiffs, most of whom have not been given sufficient soap, sanitizing agents, cleaning products, let alone PPE. As the Supreme Court aptly noted in *Helling*:

It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event.

Helling, 509 U.S. at 33; *Wilson v. Gordon*, 822 F.3d 934, 958 (6th Cir. 2016) (holding that

delay in medical treatment can constitute irreparable injury and noting that “[c]ourts routinely uphold preliminary injunctions where the alleged irreparable harm involves delay in or inability to obtain medical services”).

As such, being compelled to endure a highly contagious and deadly virus that has no vaccine, no treatment, and no cure, without appropriate lifesaving measures, readily satisfies irreparable injury threshold.

D. THE REQUISITE INJURY AND BALANCE OF EQUITIES WEIGH IN FAVOR OF
The final factor to be considered in determining whether to enjoin Defendants is a

balancing of the equities and determination of whether the public interest would be served from the issuance of an injunction. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that where the Government is the non-moving party, the third and fourth factors generally “merge” into one: “Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party.”); *Malam*, No. 20-10829, 2020 WL 1672662, at *13 (stating that “the final two factors - the balance of equities and the public interest – merge, because ‘the government’s interest is the public interest.’”). This factor, too, points decidedly in Plaintiffs’ favor.

First and foremost, the Sixth Circuit has squarely held that “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir.1994). Consequently, issuance of an injunction would serve the public interest as it would require the Defendants to

comply with CDC Guidelines and remedy the Eighth Amendment violation of Plaintiffs' constitutional rights.

Additionally, issuance of the injunction will slow the spread of the COVID-19 virus. As a result, Plaintiffs, prison staff and prison staff families will be protected from unnecessary exposure which could potentially result in serious illness and/or death. On the other hand, if MDOC continues the inadequate practices of double bunking without allowing inmates to "social distance" or ignoring basic CDC guidelines, the experts opine that the losses will be of incalculable quantity and duration. Plaintiffs' requested injunctive relief are now common-place in the free world and there is no reason they cannot be more frequently and expeditiously administered in prison.

Finally, the public interest is also best served by issuance of the injunction as it will alleviate the burden on local communities and health care infrastructure where the detention facilities are located. As one court wisely noted:

a COVID-19 outbreak at a detention facility could result in multiple detainees- five, ten or more- being sent to the local community hospital where there may only be six or eight ventilators over a very short period. As they fill up and overwhelm ventilator resources, those ventilators become unavailable for all the usual critical illnesses. And ventilators used to treat detainees cannot be used to treat others who contract the virus. . . . In the alternate scenario where detainees are either confined in conditions facilitating 'social distancing' or are released, the tinderbox scenario of a large cohort of people getting sick all at once is less likely to occur, and the peak volume of patients hitting the community hospital would level out.

Jones v. Wolf, Case No. 20-361, 2020 WL 1643857, at *13 (W.D.N.Y. Apr. 2, 2020)

(internal citations and quotations omitted), *see* **Ex. 38**.

On the other hand, if the Defendants are directed to become compliant with CDC Guidelines, then the only potential harm is economic: prison staff may have to expend additional time, and the state may have to expend additional money, to provide the information, hygiene products, cleaning agents, and medical treatment necessary to kill the virus. However, the challenges presented by a financial investment does not mean that constitutional protections fall by the wayside. Indeed, government officials are bound by constitutional requirements even when they are dealing with difficult and unfamiliar challenges to public health and safety. The government has chosen to incarcerate Plaintiffs. By making this decision, the government takes on an obligation to protect their health and safety. In turn, Defendants will also be safeguarding the health and safety of Defendants themselves, their families, prison staff and the community at large.

Ultimately, the financial burden required to reduce the substantial risk that Plaintiffs will be exposed to a deadly disease does not tip the balance in Defendants' favor because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Accordingly, the public interest would be served by issuance of a preliminary injunction requiring Defendants to implement constitutionally adequate measures to prevent the spread of COVID-19 in the MDOC.

IV) CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court GRANT this motion and issue a temporary restraining order and preliminary injunction ordering the relief requested in their motion.

Respectfully submitted,

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PROOF OF SERVICE

I, Daniel E. Manville certify, under penalty of perjury, that on April 30, 2020 , I caused a copy of the above document to be served by Email on CORI BARKMAN AND DEVIN O'DOWD, AGs in the Corrections Division, Attorney's Office due to the filing of an emergency motion for temporary restraining order and motion for class certification.

/s/ Daniel E. Manville
Daniel E. Manville