IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JOHN BAXLEY, JR., et al,
on their own behalf and on behalf
of all others similarly situated,

Plaintiffs,

v. **Civ. Act. No. 3:18cv01526**

BETSY JIVIDEN, in her official capacity as
Commissioner of the WEST VIRGINIA
DIVISION OF CORRECTIONS AND
REHABILITATION, et al.

Defendants.

PLAINTIFF'S REPLY IN SUPPORT OF THEIR EMERGENCY MOTION [DOC. 161]

Plaintiffs merely seek to ensure that WVDCR adequately addresses the serious risk of a COVID-19 outbreak in a WVDCR facility in order to protect putative class representatives and others similarly situated from a serious risk of injury and death. In keeping with their failure to communicate with Plaintiffs prior to filing of this motion, Defendants' response to Plaintiffs' motion refuses to acknowledge the seriousness of the situation, and instead asserts a series of straw man legal arguments in order to avoid sharing or implementing a meaningful plan for saving inmate and correctional officer lives. As explained further below, Defendants' arguments lack not just compassion, but also legal merit. Plaintiffs address each in turn.

I. Argument

A. The global COVID-19 pandemic is just the sort of extraordinary circumstance that justifies the extraordinary relief of a mandatory injunction.

Defendants are correct that mandatory injunctions are justified only in extraordinary circumstances. *See In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526 ("Mandatory preliminary injunctions generally do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief."

(alterations omitted)). But a global pandemic is just such an extraordinary circumstance that "*demands* such relief." *See id.*; *see also United States v. Martin*, No. CR PWG-19-140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) (recognizing "the unprecedented magnitude of the COVID-19 pandemic"). "On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. At that time, there were more than 118,000 cases in 114 countries, and 4,291 people had died. Merely two weeks later, there [were] at least 458,927 cases identified in 172 countries and at least 20,807 people ha[d] died." *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *2 (S.D.N.Y. Mar. 26, 2020) (internal citations omitted). Projections by the Centers for Disease Control and Prevention indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the epidemic without effective public health intervention, with as many as 1.5 million deaths in the most severe projections. Chas Danner, *CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Mag. (Mar. 13, 2020), https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7mdead.html. "Although there is not yet a known outbreak among the jail and prison populations, inmates may be at a heightened risk of contracting COVID-19 should an outbreak develop." *United States of Am., v. Dante Stephens, Defendant.*, No. 15-CR-95 (AJN), 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (citing, *e.g.*, Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 Clinical Infectious Diseases 1047, 1047 (Oct. 2007), https://doi.org/10.1086/521910 (noting that in jails "[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise"); Claudia Lauer & Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, Associated Press (Mar. 7, 2020)). As a Maryland district court recently noted, correctional facilities may have "successfully dealt with past viruses and outbreaks of

communicable diseases" but those outbreaks "pale in scope with the magnitude and speed of transmission of COVID-19." *See United States v. Martin*, No. CR PWG-19-140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020). "With no known effective treatment, and vaccines months (or more) away, public health officials have been left to urge the public to practice 'social distancing,' frequent (and thorough) hand washing, and avoidance of close contact with others (in increasingly more restrictive terms)—all of which are extremely difficult to implement in a detention facility." *Id.* As the result, a diverse group, including prosecutors and the United States Attorney General, has urged immediate action to slow the crisis. *See, e.g.*, Letter from Judges and former AUSAs, *available at* https://fairandjustprosecution.org/; Letter from Public Health Officials, *available at* https://thejusticecollaborative.com/; Report on COVID-19, Prison Policy Initiative, https://www.prisonpolicy.org/blog/2020/03/27/slowpandemic/.

In the short period of time since the present motion was filed, the risks have dramatically increased as West Virginia has attempted to slow the outbreak. Demonstrating the speed with which infection travels in an institution, over the course of a week, twenty-nine people at Sundale Nursing Home in Morgantown, WV, were diagnosed with COVID-19. *See* "A WV Nursing Home Had 29 COVID-19 Cases," Charleston Gazette-Mail (Mar. 31, 2020). On March 26, 2020, a sample national COVID-19 Plan was released to aid correctional facilities in ensuring an appropriate response. (Ex. A.) On March 27, the Supreme Court of Appeals of West Virginia has indicated that state courts and prosecutors work toward setting reduced bond for pretrial detainees to limit incarceration rates. (Ex. B.) Meanwhile—as is clear from its response brief—WVDCR has not made public any plans to control an outbreak, nor has it taken any action like that undertaken in other states to reduce overcrowding to ensure proper social distancing in DCR facilities. Indeed, as testimony will show, inmates report that they see little to no change in procedures related to the outbreak.

As outlined below, and in Plaintiffs' Emergency Motion, each of the factors that courts use when deciding whether to grant a preliminary injunction—even an extraordinary mandatory one—weighs in favor of relief here. *See In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 170–71 (4th Cir. 2019), as amended (Oct. 31, 2019) (To prevail on a request for a preliminary injunction, "the plaintiff must establish that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm absent the requested preliminary relief, (3) the balance of the equities weighs in its favor, and (4) a preliminary injunction is in the public interest."). That is especially so because "[i]n applying th[e] four-factor test [for preliminary injunctions], the irreparable harm to the plaintiff and the harm to the defendant are the two most important factors." *See In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526 (alterations omitted). Here, the risk of harm to Plaintiffs is incredibly high, and the risk of harm to Defendants is minimal, if not nonexistent. *See infra*. As the result, the balance of equities clearly weighs in favor of the injunction, and the injunction should be granted.

1. The risk of irreparable harm is astronomically high.

The grave risk of harm—including death—from COVID-19 on incarcerated populations who are not protected by a rigorous plan to prevent the spread of COVID-19 in the facilities where they are housed satisfies the irreparable harm standard for a preliminary injunction.

Defendants do not dispute that the risk of COVID-19 presents a risk of irreparable harm to Plaintiffs. Defendants pivot, however, and claim that Plaintiffs should simply trust them that they intend to implement an appropriate plan—without any knowledge or information about what DCR's purported plan would entail. Defendants claim that Plaintiffs' concern that WVDCR's undisclosed plan may be inadequate is insufficient to demonstrate irreparable harm.[1]

[1] Defendants' allegation in this context that Plaintiffs displayed a lack of candor to the court is wholly unfounded. Plaintiffs' emergency motion states that Defendants responded to the American Civil Liberties Union's request for information about WVDCR's COVID-19 plan by "stating that DCR's plan is exempt from disclosure to the public . . . but also attaching a letter that purports to outline the WVDCR's COVID-19 response plan, with sensitive

This is not the case. First, Plaintiffs merely seek to ensure that WVDCR adequately addresses the serious risk of a COVID-19 outbreak in a WVDCR facility. Plaintiffs would be thrilled to learn that WVDCR has already done so, if that is the case. Indeed, Plaintiffs attempted to avoid this motion and any diversion of resources via communication with Defendants about COVID-19. (*See* Defendants' Exhibit 3.) Plaintiffs hope that Defendants already have an adequate plain in place to combat the COVID-19 pandemic, but, respectfully, cannot just take their word for it. Moreover, as Plaintiffs will show through testimony of inmates housed in WVDCR custody, Plaintiffs have more than a mere assumption that the plan is inadequate—in fact, according to individuals living in WVDCR institutions, WVDCR has taken essentially no measures to protect inmates in its care from infection and transmission of COVID-19.

The requirements of an appropriate plan are no mystery. Defendants are aware of a "COVID-19 Pandemic Response Plan" that has been circulated nationally, and which calls for specific measures to be taken to limit deaths from COVID-19 in prisons and jails. (*See* Ex. A.) Despite this publicly available document setting forth best practices, Defendants continue to refuse to provide any specific plan to assure Plaintiffs that appropriate and necessary actions are being taken to protect them. Instead, Defendants have provided an affidavit from Commissioner of the WVDCR, Betsy Jividen, which purports to describe the measures WVDCR has put into place regarding COVID-19.[2] (*See* Response Exhibit 1.) Defendant Jividen references—but does not provide—a March 11, 2020 memorandum issued to all WVDCR employees. However, Defendant Jividen's explanation of this memo provides no meaningful detail about the topics it purports to address. Moreover, the memo (according to the affidavit) does not appear to address

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security information removed." (*See* Emergency Motion at 6.) Plaintiffs then attached that correspondence to their Emergency Motion. Far from hiding WVDCR's claim that they have a plan from the Court, Plaintiffs openly disclosed that fact in their motion. That Defendants' allegations about candor directly contradict the *text* of Plaintiffs' emergency motion is, at minimum, troubling.

staffing and health care plans for when staff must stay home sick; staffing plans for when inmate workers must be quarantined; additional precautions for vulnerable populations; housing for inmates exposed to COVID-19; coordination with community hospitals for treatment of infected inmates; or techniques for social distancing including reducing prison populations. (*See id.*) The Jividen affidavit also states that on March 20, 2020, "WVDCR adopted a Policy Directive entitled 'COVID-19 RESPONSE PLAN.'" (*Id.*) It provides even less detail with respect to the contents on that plan, so it is simply not possible to tell whether it address all of the areas that must be addressed in an appropriate plan to control an inevitable outbreak. (*See* Ex. __.) While Jividen further asserts that she "issued a memorandum to all facility superintendents and directors discussing 'Interim Guidance from the Centers for Disease Control and Prevention,'" this guidance simply instructs institutions to address these issues, but is not an actual plan for implementing them, much less one specific to WVDCR facilities. (*See* Response Exhibit 2.)

In short, Defendants have provided insufficient evidence that there is no likelihood of harm to Plaintiffs. Defendants have presented no evidence that they have an adequate plan, nor do they present any evidence that such a plan has been effectively implemented before it is too late and infections begin overwhelming WVDCR facilities at an exponential rate. To the contrary, without a clear, robust, plan to address COVID-19, as well as a guarantee of adequate implementation of such a plan, Plaintiffs face serious consequences to their health and lives.

Turning to a legal strategy, rather than their clearly inadequate evidentiary one, Defendants cite a number of cases denying deliberate indifference claims against prison officials by inmates who contracted swine flu. (*See* Response at 14-15.) Each of those cases, by the Defendants' own citations to them, rested their decision on the fact that the facility had taken reasonable steps to protect that inmate from infection and complications. The heart of Plaintiffs'

[2] Defendants also make factual assertions in their Response regarding the contents of the WVDCR's COVID-19

request is to ensure that WVDCR has taken such measures. As of yet, Defendants have not provided evidence that WVDCR has done so. Short of that evidence, these cases are inapposite. Only after Defendants provide evidence of a plan will the question become whether that plan is "reasonable," and whether it has actually been implemented. But there can be no discussion of those questions at this point because WVDCR has refused to share their plan, let alone evidence of its implementation.

Defendants argue that the mere "fear that they someday may be exposed to or contract COVID-19 is not sufficient" to establish a serious medical condition. Not only does such argument ignore all the evidence relating to the exceptional nature of the COVID-19 pandemic, it completely ignores *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993), which clearly states that "the Eighth Amendment protects against future harm to inmates" and it would thus "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." "[T]he Court of Appeals cases to the effect that the Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering are *legion*." *Id.* at 34 (emphasis added). To the extent that Defendants argue that the risk that the COVID-19 pandemic poses to incarcerated individuals is not sufficiently imminent to justify relief, Plaintiffs direct the Court's attention to the expert affidavits they have provided to the Court, the other factual citations Plaintiffs have provided detailing the risk of COVID-19 to incarcerated populations, and the testimony Plaintiffs will present on April 2, 2020. Indeed, as experts and evidence in other states makes clear, the only real way to protect the inmate population in West Virginia is to implement a meaningful plan *prior to* infection and spread of the deadly disease.

2. Defendants will suffer no harm if the injunction is granted.

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plan which are not supported by any document in the record. Plaintiffs will not address those factual assertions at this time because they have no evidentiary proof to support them.

Defendants will suffer no harm if the injunction is granted. Developing a plan to prevent the spread of COVID-19 in West Virginia's DCR facilities protects not only the inmate population, but all WVDCR employees, their families, and the community at large. Ultimately, an appropriate plan will reduce spread of the virus, death, and avoid overwhelming the already limited correctional and community health care systems. Defendants contend that Plaintiffs ask the Court to micromanage WVDCR's response, but Plaintiffs have not drafted a plan themselves, nor have they asked the Court to draft a plan, they have merely requested that the Court order the Defendants to draft and implement a plan that addresses topics supported by the CDC guidance that WVDCR has already identified as valuable. If WVDCR has already done so, it will not be harmed by sharing that plan with Plaintiffs' counsel and providing evidence that it is being adequately implemented. With respect to WVDCR's security concerns about releasing its COVID-19 plan, Plaintiffs have already offered enter into a protective order that would limit release of any sensitive portions of the plan to the public and restrict such portions from viewing by any current inmates. This Court could enter a protective order with the appropriate level of restriction. As the result, Defendants have demonstrated no harm from the proposed injunction.

3. Plaintiffs' requested relief is in the public interest.

Developing and implementing a rigorous plan to combat COVID-19 is clearly in the public interest. First, such actions will help to halt the spread of COVID-19 in the jails and prisons, saving numerous lives. In addition, an outbreak in the jails or prisons would overwhelm community hospitals, thus eliminating already limited health care resources available to the general population. These actions would also serve WVDCR's own employees and contractors, who will further be protected by implementation of an appropriate plan. Finally, such a plan will limit community spread of the virus outside the facilities, as it will help prevent WVDCR employees and contractors from bring the virus back to their own families and communities

throughout the state.

Defendants focus their argument on public interest on Plaintiffs' request for release of inmates to allow for appropriate social distancing measures, pursuant to CDC guidelines, to be implemented. Defendants claim that "premature mass release of inmates who are incarcerated by virtue of being accused and/or convicted of a crime against the citizens of the State of West Virginia" is not in the public interest. This misstates Plaintiffs' request. Rather than seeking random mass release, Plaintiffs seek sufficient release of inmates who are deemed a limited public risk or who are at high risk for death from COVID-19. This request is consistent with actions limited measures already being implemented in West Virginia. (*See* Ex. B.) It is also consistent with actions taken by states and courts all over the country, as well as the federal Bureau of Prisons. *See e.g.*, The New York Times, "'Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars," available at https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html; ABC 7 News, "130 inmates released early from Orange County jail system as 5 test positive for COVID-19," available at, https://abc7.com/orange-county-coronvirus-oc-jails-covid-19-cases-coronavirus/6065898/; *In re Request to Commute or Suspend County Jail Sentences*, Docket No. 084230 (N.J. Mar. 22, 2020) (releasing large class of defendants serving time in county jail "in light of the Public Health Emergency" caused by COVID-19), https://www.njcourts.gov/notices/2020/n200323a.pdf; *Thakker v. Doll*, No. 1:20-cv-480-JEJ (Mar. 31, 2020) (granting TRO releasing high-risk immigration detainees from custody due to the dangers of COVID-19) (attached); *Basank v. Decker*, No. 20-cv-2518, (S.D.N.Y. Mar. 26, 2020) ("*[t]he nature* of detention facilities makes exposure and spread of the [coronavirus] particularly harmful" so granting TRO and releasing high-risk plaintiffs), https://www.nysd.uscourts.gov/sites/default/files/2020-03/20-cv-

2518%20Basank%20v.%20Decker%20et%20al.pdf; *Coronel v. Decker*, 20-cv-2472-AJN, Dkt. No. 26 (S.D.N.Y. Mar. 27, 2020) (granting TRO and releasing from immigration detention facility in light of COVID-19), https://www.nysd.uscourts.gov/sites/default/files/2020-03/20-cv-2518%20Basank%20v.%20Decker%20et%20al.pdf.[3] The measures currently being taken in West Virginia, however, do not address the life-threatening nature of this virus to inmates with significant underlying conditions, such as asthma, COPD, cancer, HIV, heart disease, and a myriad of other conditions that have been demonstrated to lead to higher mortality rates among those who contract COVID-19, as set forth in Plaintiffs' opening brief. (*See* Doc. 161 at 3-4.) Now is the time to undertake these measures in a thoughtful and considered way—prior to a coming outbreak in the inmate population, when it will be too late.

There has been no indication that temporarily releasing low-risk offenders, such as those who are incarcerated for non-violent crime, elderly, ill, or close to being released anyway, has

[3] *See also, e.g.*, *Xochihua-James v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020) (unpublished) (*sua sponte* releasing detainee from immigration detention "[I]n light of the rapidly escalating public health crisis"); *United States v. Meekins*, Case No. 1:18-cr-222-APM, Dkt. No. 75 (D.D.C. Mar. 31, 2020) (post-plea, pre-sentence release order releasing defendant with three pending assault charges due to extraordinary danger COVID-19 poses to folks in detention); *United States v. Davis*, No. 1:20-cr-9-ELH, Dkt. No. 21 (D. Md. Mar. 30, 2020) (releasing defendant due to the "urgent priority" of decarcerating, to protect both the defendant and the community, and to preserve Sixth Amendment rights in this perilous time); *United States v. Marin*, No. 15-cr-252, Dkt. No. 1326 (E.D.N.Y. Mar. 30, 2020) ("[F]or the reasons stated in his motion, including his advanced age, significantly deteriorating health, elevated risk of dire health consequences due to the current COVID-19 outbreak, status as a non-violent offender, and service of 80% of his original sentence."); *United States v. Muniz*, Case No. 4:09-cr-199, Dkt. No. 578 (S.D. Tex. Mar. 30, 2020) (releasing defendant serving 188-month sentence for drug conspiracy in light of vulnerability to COVID-19: "[W]hile the Court is aware of the measures taken by the Federal Bureau of Prisons, news reports of the virus's spread in detention centers within the United States and beyond our borders in China and Iran demonstrate that individuals housed within our prison systems nonetheless remain particularly vulnerable to infection."); *Fraihat v. Wolf*, No. 20-CV-590 (C.D. Cal. Mar. 30, 2020) (noting risk of asymptomatic spread and unsafe conditions in immigration detention mean "[t]he balance of equities tip sharply in [Fraihat's] favor" and thus ordering release); *United States v. Bolston*, Case No. 1:18-cr-382-MLB, Dkt. No. 20 (N.D. Ga. Mar. 30, 2020) (releasing defendant in part because "the danger inherent in his continued incarceration at the R.A. Deyton Detention Facility . . . during the COVID-19 outbreak justif[y] his immediate release from custody"); *United States v. Hector*, Case No. 2:18-cr-3-002, Dkt. No. 748 (W.D. Va. Mar. 27, 2020) (granting release pending sentencing after Fourth Circuit remanded detention decision requiring court to specifically consider extraordinary danger posed by COVID-19 to folks in prison); *United States v. Jaffee*, No. 19-cr-88 (D.D.C. Mar. 26, 2020) (releasing defendant, citing "palpable" risk of spread in jail and "real" risk of "overburdening the jail's healthcare resources"; "the Court is . . . convinced that incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant's release to home confinement"); *United States v. Underwood*, Case No. 8:18-cr-201-TDC, Dkt. No. 179 (Mar. 31, 2020) (encouraging release to furlough of elderly defendant in BOP custody because, even though no positive of COVID-19 in his facility, "there is significant potential for it to enter the prison in the near future").

posed any risk to the public in the states where inmates have been released. Moreover, the benefit to the public of controlling an outbreak of COVID-19 in this state with a highly vulnerable population of elderly people and those with pre-existing respiratory illness—many of whom are caring for their grandchildren—is immeasurable, both in terms of the lives of our State's residents and the long-term economic impacts of any substantial outbreak in West Virginia. Plaintiffs' request—for Defendants to develop and implement an appropriate plan to control the outbreak and resulting loss of life—is clearly in the public interest.

4. WVDCR's lack of plan to address the COVID-19 pandemic violates Plaintiffs' constitutional right to be free from harm while in custody.

With respect to the third factor, the likelihood of success on the merits, failing to develop contingencies to address the extremely likely event of COVID-19 outbreaks in one or more of the West Virginia DCR facilities would violate the constitutional rights of Plaintiffs and others housed in DCR facilities. As the Supreme Court has explained, an inmate's constitutional rights are violated by conditions that pose an unreasonable *risk* of future harm, even if that harm has not yet come to pass. *See Helling*, 509 U.S. at 33-34 and constitutional discussion, *supra*. That harm is encompassed by this lawsuit about the conditions of confinement overall in Western Regional Jail and the provision of medical and mental health care to inmates in WVDCR facilities.

B. Plaintiffs' emergency motion relates directly to the subject matter of this lawsuit.

Defendants claim that Plaintiffs' motion is not within the scope of this lawsuit because the complaint does not mention COVID-19. But, as this Court has previously recognized, "This putative class action arises from allegations that the West Virginia Department of Corrections and Rehabilitation ('WVDCR') has failed 'to meet its minimum constitutional requirements of ensuring the safety and health of inmates in its custody.'" [Mem. Op. & Order at 2, Doc. 110, quoting 2nd Am. Compl., Doc. 67.] The issues raised in the present motion—that WVDCR has

failed to meet its constitutional obligations of ensuring inmate health and safety during the current viral pandemic—clearly maps directly on to the claims raised in this litigation.

The cases Defendants cite for support of their argument that Plaintiffs cannot ask for injunctive relief regarding COVID-19 because their complaint does not mention COVID-19 are inapposite. In *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 616 (4th Cir. 2009), the Fourth Circuit held that the plaintiff could not raise a new instance of defamation that was not pleaded before the district court in his appeal of the district court's grant of summary judgment. In *Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 F. App'x 556, 563-64 (4th Cir. 2008), the Fourth Circuit affirmed the district court's grant of summary judgment on a particular issue that they held had not been effectively pleaded because plaintiffs are not permitted to add claims at the summary judgment stage without amending their complaint. This rule is at least in a part, a rule of fairness. It would be unfair to expect defendants to respond to a new claim raised only at the summary judgment or appellate stage without having the opportunity to engage in discovery on that claim. *See Barclay White Skanska, Inc*, 262 F. App'x at 564 ("[Plaintiff]'s failure to include the disputed change orders in its Amended Complaint deprived [Defendant] of the opportunity to have discovery on this issue."). No such concern arises here, where Plaintiffs are asking for a preliminary injunction because of a new viral pandemic which implicates the very same legal claims that were raised in Plaintiffs' complaint.

C. Plaintiffs' requested relief is available and appropriate.

Defendants cite a number of Prison Litigation Reform Act (PLRA) sections, apparently in an attempt to assert that Plaintiffs' requested relief is impermissible. (*See* Response at 5-6.) Defendants fundamentally misunderstand the PLRA. First, Defendants contend that the Plaintiffs have not exhausted their administrative grievance remedies prior to filing this motion, which they contend is required by 42 U.S.C. § 1997e(a). The PLRA, however, requires the exhaustion

of administrative remedies before filing an *action*; it does not require exhaustion prior to each *motion* filed. *See id.* As the result, the argument simply does not apply here.

Second, as to whether Plaintiffs exhausted prior to filing suit, "failure to exhaust available administrative remedies is an affirmative defense, not a jurisdictional requirement, and thus inmates need not plead exhaustion, nor do they bear the burden of proving it." *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008). Plaintiffs anticipate fully briefing the issue of presuit administrative exhaustion in response to any appropriate motion filed by Defendants, in accordance with the Court's briefing schedule. In short—in relation to the question of whether Plaintiffs exhausted prior to filing this litigation, to the extent that the grievance process has been available to Plaintiffs (which it largely has not)—Plaintiffs have exhausted their grievances with relation to Defendants' failure to provide adequate medical care during their incarceration.[4]

Furthermore, this emergency situation calls for an exception to the administrative exhaustion requirement. *See Evans v. Saar*, 412 F. Supp. 2d 519, 527 (D. Md. 2006) (declining to dismiss the case for non-exhaustion, because "given the shortness of time, [the] Court [was] unprepared to decide whether [plaintiff's] failure to exhaust [was] attributable to his delay in filing his administrative claim or the State's delay in deciding it."); *Howard v. Ashcroft*, 248 F. Supp. 2d 518, 533–34 (M.D. La. 2003) (holding that prisoner fighting transfer from community corrections to a prison did not have to exhaust where it was clear that her claim would be rejected, her appeal would take months, and that prison officials wanted to transfer her despite her pending appeal); *Salesky v. Balicki*, Civil No. 10–5158, 2010 WL 4973626, at *2–3 (D.N.J.

[4] Of course, exhaustion does not need to be as specific as Defendants claim. In other words, exhaustion of the failure to provide adequate medical care is sufficient to cover the issues raised in the present motion, because these are the same constitutional issues. *Wilcox v. Brown*, 877 F.3d 161, 167 n.4 (4th Cir. 2017) ("to satisfy the exhaustion requirement, grievances generally need only be sufficient to "alert[ ] the prison to the nature of the wrong for which redress is sought."); *Langley v. Huntington Police Dept*, No. 3:17-CV-03520, 2018 WL 652866, at *15 (S.D.W. Va. Jan. 9, 2018), report and recommendation *adopted sub nom. Langley v. Huntington Police Dep't*, No. CV 3:17-3520, 2018 WL 650208 (S.D.W. Va. Jan. 31, 2018) (same); *Wilson v. Frame*, No. 2:19-CV-00103, 2020 WL 1482145, at *5 (S.D.W. Va. Mar. 23, 2020) (same).

Nov. 29, 2010) (unpublished) (holding that a case could go forward despite non-exhaustion to avoid irreparable harm when prisoner alleged that his cancer had gone untreated for six months).

Defendants also claim that no preliminary injunction is permitted under 18 U.S.C. § 3626(a)(2) unless the court has given "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief[.]" As discussed throughout Plaintiffs' Emergency Motion and this Reply, the requested relief is in the best interest of public safety because it will help to prevent the spread of COVID-19 in West Virginia and consequently help to prevent overwhelming West Virginia's health care facilities with cases of COVID-19. Defendants are correct that no *preliminary* injunction under 18 U.S.C. § 3626(a)(2) can extend beyond ninety days "unless the court makes the findings required under [the statute] for the entry of prospective relief and makes the order final before the expiration of the 90-day period" but that is not a reason that the Court cannot order the requested preliminary injunction here. Indeed, with any luck, ninety days shall be a sufficient period of time to ensure that a proper plan has been implemented and allow the grave risk of the pandemic to pass. As the result, this argument also fails.

Defendants go on to assert that the Court may only order relief that "extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right[.]"Defendants do not articulate what part of Plaintiffs' requested relief goes further than necessary. Indeed, Plaintiffs' proposed relief is narrowly tailored to the constitutional violation here, and cleaves carefully to that relief adopted in other states. (*See* Ex. A.) As a result, this argument fails.

Plaintiffs further clearly do not ask the Court to "micromanage the West Virginia prisons and Regional Jails." (*See* Response at 6.) Rather, Plaintiffs simply request that the Court order Defendants to prepare an appropriate plan to protect Plaintiffs and other inmates from life-

threatening infection and death. Defendants cite *O'Dell v. Netherland*, 112 F.3d 773, 776-77 (4th Cir. 1997); this case is simply inapposite. *O'Dell* dealt with an order by a district court that a death row inmate be allowed to have *contact* visits—meaning, allowing touching and no supervision—with his paralegal, who also happened to be his wife, when she was acting as his *paralegal* (the inmate was permitted to have spousal visits with his wife when she was acting only as his spouse). *See id.* The Fourth Circuit stayed the district court's order that the inmate be allowed to have contact visits with his wife when she was acting as his paralegal, pending appeal, and noted that the district court's order had shown "little, if indeed any, deference to the prison warden's reasonable judgment that, in the interest of prison security, [the inmate] should not be allowed contact visits from [his wife/paralegal]." *O'Dell*, 112 F.3d at 776. Defendants claim that Plaintiffs motion is a similar attempt to "micromanage" WVDCR policy. But *O'Dell* is inapposite here. Here, Plaintiffs merely request that the Court order Defendants to develop and implement a reasoned plan for dealing with a global pandemic. Plaintiffs have listed a number of relevant issues that plan should address, but have not attempted to dictate to the Court or Defendants *how* that plan should address those issues. The request at hand allows ample opportunity for WVDCR's policy makers to exercise their "reasonable judgement . . . in the interest of prison security" about how to address the listed concerns. *See O'Dell*, 112 F.3d at 776.

Defendants go on to assert that this Court does not have authority to order Defendants to include a plan for release and social distancing in their COVID-19 response plan, pursuant to the PLRA and their own legal authority. (Response at 6.) Again, Defendants misunderstand the law. The PLRA does limit the ability of a court to "enter a prisoner release order" to certain specific circumstances and pursuant to certain procedures. *See* 18 U.S.C. § 3626(a)(3). However, just as Plaintiffs do not request that this Court draft a COVID-19 plan, Plaintiffs do not request that this Court enter a prisoner release order. Instead, Plaintiffs simply request that the Court order

Defendants to exercise their statutory authority to grant furloughs and to present an appropriate plan to do so.

While DCR contends that it has no authority to release inmates within its custody and control, this is simply not the case. DCR ignores the statutory authority that it has been granted to create and operate a furlough program for inmates. Under section 15A-4-2 of the West Virginia Code, the Commissioner of the WVDCR is authorized to establish a furlough program for inmates, including both those housed as pretrial detainees and those committed to DCR's custody for a felony offense. Moreover, the furlough program permits furloughed inmates to reside outside an institution. W. Va. Code § 15A-4-2(a).

First, the Commissioner is authorized to establish a furlough program for pretrial and misdemeanant inmates, through policy directive that require no formal review or legislative process. § 15A-4-2(b). The only limitations placed on such a program requires that the Commissioner must "establish[] criteria for which inmates are not likely to jeopardize public safety," as well as other guidelines necessary to ensure public safety. § 15A-4-2(b)(2), (3). While the program may include furloughs for purposes of visiting terminally ill family members or attending funerals, the program is not limited to these circumstances. § 15A-4-2(b)(1). Accordingly, DCR has the clear authority—and in this situation, the responsibility—to create a program that temporarily releases inmates who have chronic illness, underlying health conditions, are elderly, pregnant, and/or who have little time left on their sentences, where such inmates have a safe environment to which they can be released, and who do not pose a threat to public safety, in order to reduce crowding within the DCR facilities and reduce the threat of loss of life and significant illness due to an outbreak of COVID-19 in the jail and prison system.

In addition, the Commissioner has been authorized by the Legislature to create a furlough program for convicted felons through legislative rule. § 15A-4-2(a). Despite this statute having

become effective as of July 1, 2018, Defendants have failed to promulgate legislative rules to create a furlough program for inmates convicted of felony offense. As part of a COVID-19 response plan, it would be wholly appropriate for this Court to order Defendants to utilize its statutory authority to promulgate legislative rules to create a furlough program to address the threat of death presently posed by the COVID-19 pandemic. Such action would be consistent with, and further, the actions already taken by the West Virginia Supreme Court of Appeals and Executive Branch. (*See* Ex. B.)

Importantly, Plaintiffs motion does not ask this Court to order the release of inmates. Rather, it seeks that this Court require Defendants to create and implement a plan to ensure the protection of and care for inmates faced with infection by COVID-19. As recommended by best practices, this plan should necessarily include (but certainly not be limited to) utilization of all available methods to ensure that DCR facilities maintain sufficient space to ensure proper social distancing measures, including release of appropriate inmates. It is well within DCR's authority to undertake such measures, and Plaintiffs simply request that the Court order it to do so. Because this is wholly appropriate—and indeed required—by both statute and constitutional standards, Plaintiffs request that their motion be granted.

D. Defendants' "kit motion" argument is nothing more than a red herring with no legal support.

Defendants' response to Plaintiffs' motion for relief spends a lot of pages on a red herring: the apparently unthinkable fact that Plaintiffs' counsel here have shared information and resources with other attorneys in the United States who are working to ensure that incarcerated individuals do not unnecessarily fall victim to the global pandemic because of their conditions of confinement. Defendants cite no legal authority for their implied contention that there is something nefarious about coordinating efforts with other advocates across the country during a global pandemic that will affect inmates in nearly identical ways across the country. They cite no

legal authority for their implied contention, because no such authority exists. They similarly cite no legal authority for their implied contention that attaching affidavits of experts that have been used in other litigation is somehow wrong. Plaintiffs have not represented that these experts have looked at WVDCR facilities specifically. Their insights into the potential effects of the COVID-19 pandemic in correctional facilities is nevertheless as relevant here as they are in other locations. As Defendants will surely agree, the nature of confinement in correctional facilities across the United States is substantially similar; there is no basis to suggest that inmates confined in WVDCR facilities are somehow immune to the risks of COVID-19 that inmates in other states face. Defendants have cited no authority—legal or otherwise—to suggest that Plaintiffs' provision of expert reports on the general risks associated with institutional confinement during this global pandemic is a violation of law or ethics. Of course, it is impossible for Plaintiffs to present specific expert response to Defendants' proposed plans, given that Defendants have refused to provide it. However, Plaintiffs' national expert, Dr. Homer Venters, will be present at the April 2, 2020, hearing and will share his insights after hearing about the specific conditions in West Virginia from incarcerated individuals and DCR staff. While DCR opposed this effort, it should address any concern raised.

Similarly, Defendants'—once again, implied—contention that Plaintiffs have violated their duty of candor to this Court by not disclosing that a district court in the state of Washington denied a motion filed by attorneys and parties wholly unrelated to the case at issue, who requested the release of petitioners being held in civil detention by Immigration and Customs Enforcement in Tacoma, Washington, is nonsensical. The West Virginia Rules of Professional Conduct (which Defendants notably fail to cite) address attorneys' duty of candor to the court with respect to legal authority in Rule 3.3(a)(2). The Rule states that "A lawyer shall not *knowingly*: . . . (2) fail to disclose to the tribunal legal authority in the *controlling* jurisdiction

known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]" WV R RPC Rule 3.3 (emphasis added). Defendants make no attempt to allege that Plaintiffs' counsel knew about the result in *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1304557, at *1 (W.D. Wash. Mar. 19, 2020) (though perhaps they intend to—once again—imply that knowledge because Plaintiffs' motion borrows language from the motion filed in that case[5]). But more importantly, the Western District of Washington is not the controlling jurisdiction in this case, nor is a decision involving ICE detention facilities. Not "disclosing" a court's denial of a motion there in a procedurally unrelated case can therefore not be a violation of the duty of candor here.

Beyond that, Defendants' contention that the motion the Western District of Washington court rejected is "substantively identical" to Plaintiffs' motion here is incorrect. The petitioners in *Dawson* were not involved in ongoing litigation against respondents about the lack of constitutionally minimum access to medical treatment and care; those petitioners are in ICE custody—not division of corrections custody, and they requested no other relief except their own release. Plaintiffs regret having to give this much space in their Reply brief to a response to these frivolous arguments. But Plaintiffs' counsel take seriously allegations—even implied ones—of violations of the Rules of Professional Conduct.

E. Defendants' contentions about FOIA are likewise a red herring.

Finally, WVDCR suggests that Plaintiffs' motion is nothing more than the manifestation of "dissatisfaction with not being provided a copy of the COVID-19 Policy Directive" or relatedly, "nothing but an improper attempt to use this Court as a de facto appeal of the FOIA

[5] The offending "identical" sections amounts to 1 paragraph in both briefs which contains two large block quotes from *Helling v. McKinney*, 509 U.S. 25 (1993), the premiere Supreme Court case on the constitutional implications of communicable disease outbreaks in correctional facilities. Other motions applying *Helling*'s constitutional reasoning to the current pandemic have been filed across the country, and some have been successful. *See*, *e.g.*, *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *PEDRO BRAVO*

process." (Response at 9, 3; *see also id.* at 20.) Defendants provide no basis for these claims. Plaintiffs merely attached correspondence between WVDCR and ACLU to show the Court what WVDCR has been willing to share publicly about its COVID-19 plan. Defendants appear to want it both ways: they object to the appending of this correspondence to Plaintiffs' motion, but also accuse Plaintiffs of lack of candor to the court for not disclosing information that is *in* that correspondence (namely, that WVDCR says that it has a plan).

Regardless, it's unclear why Defendants make this argument at all. Plaintiffs are actively involved in litigation against Defendants about the conditions of confinement and provision of medical care to inmates in WVDCR custody. Plaintiffs are not required to use FOIA to obtain documents that they are already entitled to via discovery in this case. Defendants do not even address Plaintiffs discovery request, referenced in Plaintiffs' Emergency Motion, for "all policies, operating procedures, protocols, and/or directives governing the provision of medical and/or mental health care, including diagnosis and treatment, which have been in effect at any West Virginia Regional Jail facility since January 1, 2019." (*See* Emergency Motion at 6 (citing Pl.'s 2d Set of Req,s for Prod. of Docs. to Defendants No. 11).) Defendants provide no basis for withholding WVDCR's COVID-19 plan in light of this discovery request, and indeed acknowledge that Plaintiffs did in fact request this supplement—which Defendants refused, with no basis. (Defs.' Ex. 3.)

Regardless, Defendants' argument is simply an attempt to distract from the true issues raised in this motion: a request that Defendants appropriately and quickly respond to the real and present threats posed by the COVID-19 outbreak, and work to ensure that lives are not lost. Plaintiffs do not seek a document; rather, they seek actual action to protect themselves and those similarly situated who are within Defendants' sole care and custody.

III. Conclusion

As Courts and public officials around the country have recognized, lives are at immediate risk without appropriate meaningful action. As a result, Plaintiffs respectfully request that the Court order Defendants to create and implement an appropriate plan, as set forth herein and in their motion, to prevent the spread of COVID-19 and appropriately treat any impacted individuals.

JOHN BAXLEY, JR., et. al., on behalf of themselves and other similarly situated inmates,

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COVID-19 Pandemic Response Plan

March 26, 2020

What's New since the March 19, 2020 Version?

On March 23, 2020, the Centers for Disease Control and Prevention (CDC) published "Interim Guidance On Management of COVID-19 in Correctional and Detention Facilities". The guidance is very detailed and provides an excellent roadmap for correctional facilities responding to COVID-19. This version of the COVID-19 Pandemic Response Plan integrates most of the CDC guidance, as well as other infection prevention and control best practices.

Below are substantive updates primarily based on the new CDC guidance. All changes in this version are highlighted in YELLOW to facilitate recognition of What's New. For readability, these highlights can all be removed In MSWORD® by going to the far-right ribbon of "Home" and "Select All". Then go to the "Font" section and select *ab* (highlighter) and select "No Color"

Element 1. Administration/Coordination:

The purpose of this section is to provide step-by-step guidance for Chief Executive Officers and the leadership team of a correctional facility. It is now divided into two phases: Phase I. Preparation Steps for COVID-19 (for preparing for the possibility of COVID-19 in a facility); and Phase II. Response Steps for Managing COVID-19 (for steps to take once COVID-19 is identified in a staff person or incarcerated person).

Phase I. Preparation Steps for COVID-19

- Emphasis is placed on coordinating with local law enforcement & court officials to reduce crowding:
  - alternatives to in-person court appearances
  - maximize use of existing policies for alternatives to incarceration
  - expedite implementation of compassionate release policies
  - explore strategies to reduce new intakes to the correctional facility
  - explore strategies for releasing inmates at low risk for violent crime –particularly those with risk factors for severe COVID-19
- A new section on personnel policies and practices was added.
- The rest of this section tracks closely with the recommendations in Elements #2 - #13.

Phase II. Response Steps for Managing COVID-19

- The text in this section closely parallels the CDC guidance.
- Reference this section once a case of suspected or confirmed COVID-19 is identified in a staff person or incarcerated person.

Element 2 Communication:

- Additional recommendations are added regarding signage throughout the facility.
- Additional key communication messages for employees were added.
- Communication message for incarcerated persons were added– that sharing drugs and drug preparation equipment can spread COVID-19.

Element 3. General Prevention Measures:

- Environmental Cleaning: More detail is provided regarding cleaning/disinfecting hard surfaces, soft (porous surfaces), and electronics. Emphasis is placed on the need to clean dirty surfaces prior to disinfecting them. CDC is recommending use of household bleach solutions, alcohol solutions, EPA registered household disinfectants (so hospital-grade disinfectants are not required).

COVID-19 Pandemic Response Plan

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What's New since the March 19, 2020 Version? (*continued*)

- Social distancing measures: Additional examples of social distancing measures are included.
- Infection prevention & control guidance for staff screening visitors, staff, and new intakes was added.

Element 4. Visitors / Volunteers / Contractors / Lawyers:

- If visits are continuing, post signage to instruct visitors to postpone visits if respiratory illness. Screen visitors for symptoms and a temperature prior to entry.
- Attachment 1a. Visitor Screening form was added .

Element 5. Employee Screening:

- Attachment 1b. Employee Screening form was revised.

Element 6. New Intake Screening:

- Attachment 2. New Intake Screening form was revised.

Element 8. Personal Protective Equipment:

- N95 respirators are generally preferred over face masks, if available.
- **Table 3. COVID-19 Personal Protective Equipment Recommendations** provides an at-a-glance chart to identify the type of PPE to be used in various situations. Consider posting this throughout your facility.

Element 10. Isolation (Symptomatic Persons):

- Ideally isolation will occur in a private room with a bathroom attached. CDC provides guidance on the order of preference for rooms for isolating inmates. Cohorting is a last resort option.
- If possible, designated custody staff should be assigned to monitor isolated individuals to minimize exposures.
- Specific guidance regarding handling isolation room laundry is provided.
- Specific guidance regarding handling food service items is provided.
- Information is provided regarding cleaning spaces where COVID-19 cases spent time.

Element 11. Care for the Sick:

- Identify if ill persons have risk factors for COVID-19 complications. Those with increased risk should be monitored more closely.
- Implement telemedicine or provider-to-provider consultations for management of COVID-19 patients.

Element 12. Quarantine:

- Close contact to COVID-10 is defined and discussed
- CDC recommends that close contacts be quarantined individually if feasible. Cohorting multiple quarantined close contacts could result in transmission of COVID-19 to persons who are uninfected so should only be practiced if there are no other available options.
- CDC provides guidance on the order of preference for rooms for quarantining inmates
- CDC recommends that PPE for quarantine include: face mask, eye protection, gloves. A gown should be worn if close contact with a quarantined person is anticipated.
- **Attachment 4. Quarantine Room Sign was revised.**

Element 13. Data Collection, Analysis and Reporting was added.

Element 14. Summary, Evaluation and Continuous Quality Improvement was added.

COVID-19 Pandemic Response Plan

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Plan Overview (March 16, 2020)

COVID-19 presents unique challenges for containment in the confined correctional environment. Knowledge about COVID-19 and public health guidance for responding to this Pandemic is evolving quickly. Adaptable and updatable practical tools are needed to develop infection prevention and control plans for COVID-19 across a diverse array of U.S. jails and prisons.

This COVID-19 Correctional Pandemic Response Plan provides an outline of infection prevention and control information that should be considered for correctional facilities related to a COVID-19 response. The plan outline is paired with a fillable MS WORD® Implementation Worksheet that can be easily customized to address local issues of concern for the facility and affected community.

The 1918-19 influenza pandemic provides important lessons for responding to COVID-19. During the 1918–19 influenza ("flu") pandemic, certain cities fared better than others. Those U.S. cities that both acted promptly to control the flu and implemented multiple layers of protective measures had fewer flu cases and lower overall mortality. This VitalCore COVID-19 Correctional Response Plan includes multiple layers of protective measures to minimize the impact of the virus in the correctional environment.

The Response Plan is divided into 14 response elements. Each element is outlined in the plan with a corresponding section of the Implementation Worksheet. When completing the Worksheet, it is recommended to reference the corresponding text in the Response Plan. This worksheet can be readily adapted to meet the unique challenges of a specific facility.

This COVID-19 Correctional Response Plan is based upon current guidance from the CDC that is adapted for the correctional setting. It is anticipated that the CDC guidance will continue to change so the plan will require updating accordingly.

Effective response to the extraordinary challenge of COVID-19 is going to require that all disciplines in a correctional facility come together to develop, modify and implement plans as information and conditions change. Swift, decisive, yet evidenced-based planning is paramount. I hope you find this document useful in advancing our collective efforts to better ensure the health and safety of our correctional workers and our incarcerated patient populations.

Viola Riggin, CEO
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COVID-19 Pandemic Response Plan

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COVID-19 Overview

This guidance provides general information regarding the COVID-19 pandemic and will be updated regularly.

What is Coronavirus Disease 2019 (COVID-19)?

Coronavirus Disease 2019 (COVID-19) is a respiratory illness that can spread from person-to-person. The virus that causes COVID-19 is a Novel Coronavirus that was first identified during an investigation into an outbreak in Wuhan, China and is now causing an International Pandemic.

How is the virus causing COVID-19 transmitted?

The virus is thought to spread mainly between people who are in close contact with one another (within approximately 6 feet) through respiratory droplets produced when an infected person coughs or sneezes. It also may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes.

What are the symptoms of COVID-19?

Patients with COVID-19 have had mild to severe respiratory illness with symptoms of:

- Fever
- Cough
- Shortness of breath

Complications of COVID-19 can include pneumonia, multi-organ failure, and in some cases death.

How can I help protect myself?

People can help protect themselves from respiratory illness with everyday preventive actions.

- Avoid close contact with people who are sick.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Wash your hands often with soap and water for at least 20 seconds.
- Use an alcohol-based hand sanitizer that contains at least 60% alcohol if soap and water are not available.

How long does it take for symptoms to develop?

The estimated *incubation period* (the time between being exposed and becoming ill) averages 5 days after exposure with a range of 1-14 days.

Is there a vaccine?

There is currently no vaccine to protect against COVID-19. The best way to prevent infection is to take everyday preventive actions, like avoiding close contact with people who are sick and washing your hands often.

Is there a treatment?

There is no specific antiviral treatment for COVID-19. People with COVID-19 can seek medical care to help relieve symptoms.

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COVID-19 Pandemic Response Plan Elements

1. Administration/Coordination

This section on Administration/Coordination is designed for use by Chief Executive Officers to provide a broad overview of the plan. The subsequent elements provide detailed information about how to implement the plan. This section is divided into two phases:

PHASE I. PREPARATION STEPS for COVID- 19 summarizes activities that all correctional facilities should be engaged in while preparing for the possibility of COVID-19 in the facility. These steps can be used as an outline for daily meetings about COVID-19 to quickly review the status of plan implementation.

PHASE II. RESPONSE STEPS for MANAGING COVID-19 summarizes activities that should be implemented after case(s) of suspected or confirmed COVID-19 have been identified in the facility in either a staff person or incarcerated person.

PHASE I. PREPARATION STEPS for COVID-19

a) Coordination of Facility Response

- It is critically important that correctional and health care leadership meet regularly to review the current status of COVID-19, review updated guidance from the Centers for Disease Control and Prevention (CDC) and flexibly respond to changes in current conditions.
- Regular meetings should be held, roles and responsibilities for various aspects of the local response determined, and evidence-based plans developed and rapidly implemented.
- Consideration should be given to activating the Incident Command System within the facility to coordinate response to the crisis.
- Responsibility should be assigned for tracking National and Local COVID-19 updates.

b) Coordination with local law enforcement and court officials to minimize crowding.

- Explore alternatives to in-person court appearances.
- Maximize use of existing policies for alternatives to incarceration.
- Expedite implementation of compassionate release policies.
- Explore strategies to reduce new intakes to the correctional facility.
- Explore strategies for releasing inmates at low risk for violent crime –particularly those with risk factors for severe COVID-19.

c) Review Personnel Policies and Practices

- **Review the sick leave policies** of each employer in the facility to determine which officials will have authority to send symptomatic staff home.
- **Review/revise/devise telework policies.**
- **Review contingency plans for reduced staffing.**

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- **Consider offering alternative duties to staff at** higher risk of severe illness with COVID-19.
- **Remind staff to stay at home if they are sick**
- **Institute employee screening of all employees** (see Element #5)
- **Send staff home if they are identified with identified symptoms** (fever, cough or shortness of breath) and advise to follow CDC recommended steps for persons with COVID-19 symptoms
- **Utilize following criteria for *symptomatic* staff to return to work:**
  - no fever for at least 72 hours (i.e., 3 full days of no fever without use of medicine that reduces fever); ***AND***
  - other symptoms improved (e.g., cough or shortness of breath have improved); ***AND***
  - at least 7 days have passed since symptoms first appeared

- **Identify staff with COVID-19 Exposures** (see definition of close contact in Element #12)
  - **If a staff member has a confirmed COVID-19 infection, inform other staff about possible exposure to COVID-19** (maintaining confidentiality per American with Disabilities Act.
  - **Decide if exposed staff will self-quarantine for 14-days or work wearing face mask.**
    - NOTE: CDC recommends that employees, who are COVID-19 close contacts, self-monitor for symptoms and, if feasible—given staffing constraints—be under self-quarantine for 14 days. If due to staffing constraints, self-quarantine is determined not to be feasible, then asymptomatic exposed staff should come to work and wear a face mask (cloth or disposable) while working, with frequent hand hygiene.

d) Communication (Element #2)**:**

- **Initiate and maintain ongoing communication with local public health authorities**
- **Communicate with community hospital** about procedures for transferring severely ill inmates.
- **Develop and implement ongoing communication plans** for staff, incarcerated persons, and families.

e) **Implement General Prevention Measures** (Element #3)

- **Promote good health habits among employees** (Table 1)
  - Review current policy regarding alcohol-based hand sanitizer and consider relaxing restrictions to allow more staff to carry individual-sized bottles for hand hygiene.
- **Conduct frequent environmental cleaning of high touch surfaces.** Increase number of inmate workers assigned to this duty.
- **Institute social distancing measures to prevent spread of germs.** Review list of possible measures listed in Element #3 and develop plans for your facility.
  - **Make decisions about movement**
    - Minimize movement both within the facility and between facilities

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        - Consider restricting transfers of incarcerated persons to and from other jurisdictions unless necessary for medical evaluation, isolation/quarantine, clinical care, extenuating security concerns or to prevent overcrowding.
    - Postpone non-urgent outside medical visits

- **Employees stay at home if sick.** Review communications with employees about this.
- **If influenza vaccination is still in stock offer to unvaccinated staff (higher priority) and incarcerated persons.**
- **Implement infection prevention control guidance for staff doing screening** (of visitors, employee, new intakes) (Element #3)

f) Make decisions about access for visitors, volunteers, contractors and lawyers (Element #4)

- Communicate with potential visitors
- Institute screening of visitors for symptoms and temperature (Attachment #1a)

g) Institute Employee Screening (Element #5) (Attachment #1b)

h) Institute New Intake Screening (Element #6) (Attachment #2)

i) Appropriately manage and test symptomatic incarcerated persons (Element #7)

- Suspend co-pays for incarcerated persons seeking medical evaluation for respiratory symptoms.

j) Attempt to acquire needed personal protective equipment (PPE) and other supplies (Element #8)

- Ensure that sufficient stocks of hygiene supplies, cleaning supplies, personal protective equipment (PPE) , and medical supplies are available and there is a plan in place for re-stocking.
- Review Table 3. COVID-19 Personal Protective Equipment Recommendations and post as needed in facility.
- Implement staff training on donning and doffing PPE.

k) Assure that transport officers have received training on safe transport utilizing PPE (Element #9).

- Identify staff who will provide transport

l) Identify rooms to be used for isolation (Element #10) and quarantine (Element #12).

- NOTE: CDC strongly recommends single rooms for persons isolated and quarantined. Cohorting of groups of persons should be done as a last resort.
- Print out color isolation and quarantine signs for future use (Attachment #3 & Attachment #4).
- Discuss how custody staff will be assigned to work in isolation/quarantine rooms.

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- Appropriately train staff and incarcerated workers who work in laundry and food service.
- Train staff and incarcerated workers on how to clean spaces where COVID-19 workers spent time.

m) Health services should review procedures for caring for the sick (Element #11)

- Maintain communication with public health authorities to determine how COVID-19 testing will be performed and recommended criteria for testing
- Explore options for expanding telehealth capabilities.

PHASE II. RESPONSE STEPS for MANAGING COVID-19

n) Implement alternative work arrangements, as deemed feasible.

o) Suspend all transfers of incarcerated persons to and from other jurisdiction and facilities unless necessary for medical evaluation, medical isolation/quarantine, extenuating security concerns, or to prevent over-crowding.

p) When possible, arrange for lawful alternatives to in-person court appearances.

q) Consider quarantining all new intakes for 14 days before they enter the facility's general population, if feasible.

r) Incorporate screening for COVID-19 symptoms and a temperature check into release planning. Provide inmates who are under isolation or quarantine who are releasing with education about recommended follow-up.

s) Coordinate with local public health authority regarding persons being isolated/quarantined with COVID-19.

t) Communicate with community hospital regarding potential need to transfer severely ill inmates.

u) Hygiene:

- Continue to ensure that hand hygiene supplies are well-stocked in all areas of the facility.
- Continue to emphasize practicing good hand hygiene and cough etiquette

v) Environmental Cleaning:

- Continue emphasis on cleaning and disinfection especially on frequently touched surfaces
- Reference specific cleaning and disinfection procedures for areas where a COVID-19 case spent time (Element #10)

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x) Implement medical isolation of confirmed or suspected COVID-19 cases (see Element #10). Implement telehealth modalities as much as possible.

y) Implement quarantine of close contacts of COVID-19 cases (see Element #12).

z) Implement system for tracking information about incarcerated persons and staff with suspected/confirmed COVID-19 and quarantined persons (Element #13).

2. Communication

- The importance of regular communication with staff, the incarcerated population, and their families cannot be over-emphasized. You cannot communicate too much.
- Specific methods of communication for all groups should be established. Staff should be assigned to be responsible for crafting and disseminating regular updates.
- Post signage throughout the facility communicating the following:
  - For all: symptoms of COVID-19 and hand hygiene instructions
  - For incarcerated/detained persons: report symptoms to staff
  - For staff: stay at home when sick; if symptoms develop while on duty, leave the facility as soon as possible and follow CDC-recommended steps for persons who are ill with COVID-19 symptoms.
  - Ensure that signage is understandable for non-English speaking persons and those with low literacy
- During COVID-19, group educational sessions should be avoided and instead, communicate with electronic and paper methods of communication.
- Key communication messages for employees include:
  - Symptoms of COVID-19 and its health risks
  - Reminders about good health habits to protect themselves, emphasizing hand hygiene.
  - The importance of staying home if signs and symptoms of fever, cough, or shortness of breath or if known close contact with a person with COVID-19.
  - Review of sick leave policy
  - If staff develop fever, cough, or shortness of breath at work: immediately put on a face mask, inform supervisor, and leave facility, and follow CDC recommended steps for persons who are ill with COVID-19 symptoms.
  - Elements of the facility COVID-19 Response Plan to keep employees safe, including social distancing.
- Key communication messages to incarcerated persons:
  - The importance of reporting fever and/or cough or shortness of breath (and reporting if another incarcerated person is coughing in order to protect themselves). Indicate how these reports should be made.
  - Reminders about good health habits to protect themselves, emphasizing hand hygiene.
  - Communicate that sharing drugs and drug preparation equipment can spread COVID-19.
  - Plans to support communication with family members (if visits are curtailed).
  - Plans to keep incarcerated persons safe, including social distancing.

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- Key communication messages for families:
  - Information about visiting. If visiting is curtailed information about alternatives to in-person visits.
  - What the facility is doing to keep incarcerated persons safe.
- Local public health authorities: Contact should be made and maintained with local public health authorities to get local guidance, especially with regard to managing and COVID-19 testing of persons with respiratory illness.
- Local hospital: Communication should also be established with your local community hospital to discuss referral mechanisms for seriously ill incarcerated persons.

3. General Prevention Measures

Throughout the duration of the COVID-19 pandemic the following general prevention measures should be implemented to interrupt viral infection transmission. These are listed in *Table 1* below.

Table 1. General Prevention Measures
a. **Promote good health habit**s among employees and incarcerated individuals: 1) Avoid close contact with persons who are sick. 2) Avoid touching your eyes, nose, or mouth. 3) Wash your hands often with soap and water for at least 20 seconds. 4) Cover your sneeze or cough with a tissue (or into a sleeve). Then throw the tissue in the trash. 5) Avoid non-essential physical contact. Avoid handshakes, "high-fives" b**. Conduct frequent environmental cleaning of "high touch" surfaces.** c**. Institute social distancing measures to prevent spread of germs**, e.g., minimize self-serve foods, minimize group activities. d. **Employees stay at home if they are sick.** e**. Influenza (flu) vaccine is recommended for persons not previously vaccinated.** **f. Infection prevention and control guidance for persons doing screening (visitors, employees, new intakes)**

a. Good Health Habits

- Good health habits should be promoted in various ways, i.e., educational programs, posters, campaigns, assessing adherence with hand hygiene, etc.
- This CDC website has helpful educational posters:
- Each facility should assure that adequate supplies and facilities are available for hand washing for both incarcerated individuals and employees, including: soap, running water, hand drying machines or disposable paper towels.
- Provide tissues and no-touch trash receptacles for disposal.
- With approval of the Chief Executive Officer (CEO), health care workers should have access

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to alcohol-based hand rub.

- Provisions should be made for employees and visitors and new intakes to wash their hands when they enter the facility.

b. Environmental Cleaning

- The frequency of routine cleaning of surfaces that are frequently touched should be increased. These can include doorknobs, keys, handrails, telephones, computer keyboards, elevator buttons, cell bars, etc.
- One strategy is to increase the number of incarcerated individuals who are assigned to this duty.
- Hard Surfaces:
  - If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
  - For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.
    - Diluted, unexpired household bleach can be used if appropriate for the surface. Never mix household bleach with ammonia or any other cleanser.
    - Prepare bleach solution by mixing: 5 tablespoons (1/3 cup) bleach per gallon of water or 4 teaspoons of bleach per quart of water
- Soft (porous) surfaces, i.e., carpeted floor, rugs, drapes
  - Remove visible contamination and clean with appropriate cleaners for these surfaces
  - If washable, launder in hottest water setting for the item and dry completely
  - Otherwise, use products with EPA-approved viral pathogens claims
- Electronics cleaning and disinfection
  - For electronics such as tablets, touch screens, keyboards, and remote controls, remove visible contamination if present.
  - Follow the manufacturer's instructions for all cleaning and disinfection products.
  - Consider use of wipeable covers for electronics.
  - If no manufacturer guidance is available, consider the use of alcohol-based wipes or spray containing at least 70% alcohol to disinfect touch screens and other surfaces. Dry surfaces thoroughly to avoid pooling of liquids.

c. Social Distancing Measures

Strategies for social distancing are myriad and markedly dependent on local factors. Various administrative measures should be implemented to reduce contact between people and reduce chance of spreading viruses. It is recommended that an interdepartmental brainstorming meeting be held to discuss what would work in your facility.

Examples of such measures include:

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- Common areas
  - Enforce increased space between individuals in holding cells, as well as in lines and waiting areas such as intake (e.g., remove every other chair in a waiting area).
- Recreation
  - Choose recreation spaces where individuals can spread out
  - Stagger time in recreation spaces
  - Restrict recreation space usage to a single housing unit (where feasible), performing.
  - Disinfection between individual use of equipment and between groups
  - Eliminate close-contact sports, i.e., basketball, soccer
  - Emphasize individual activities, i.e., running, walking, jumping jacks
  - Stop the use of equipment that multiple people will touch
- Meals
  - Stagger meals
  - Rearrange seating in dining hall to increase space between individuals, e.g., remove every other chair and use only one side of a table
  - Minimizing self-serve foods, e.g., eliminate salad bars
  - Provide meals inside housing units or cells
- Group activities
  - Limit size of group activities
  - Increase space between individuals during group activities
  - Consider alternatives to existing group activities, in outdoor areas or other areas where individuals can spread out
  - Suspend group programs*

  *Note: With discontinuation of group activities, it is vitally important to creatively identify and provide alternative forms of activity to support the mental health of incarcerated individuals during the pandemic.
- Education
  - Convert curriculum to self-study
  - Provide education through use of video modalities

- Housing
  - Arrange bunks so that individuals sleep head to foot
  - Rearrange scheduled movements to minimize mixing of individuals from different housing units
  - Ensure thorough cleaning/disinfection of living space when inmates leave
  - If space allows, reassign bunks to provide more space between individuals (ideally 6 feet or more in all directions
- Medical
  - Leverage telehealth modalities, e.g., tele-video and provider to provider consultation
  - If possible, designate a room near each housing unit to evaluate individuals with COVID-19 symptoms
  - Designate a room near intake area to evaluate new intakes with identified COVID-19 symptoms or exposure risk before they move to other parts of facility
  - Discontinue pill-lines and administering medication on units

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    - Assure that inmates who come to sick call with respiratory symptoms are immediately placed in separate room with mask on and perform hand hygiene.
- Minimize inmate movement
    - Minimize transferring of inmates between units
    - Stopping movement in and/or out
    - Suspending work release programs
- Providing virtual visits

d. Sick/exposed employees remain home

- COVID-19 could gain entrance to a facility via infected employees. Staff should be educated to stay home if they have fever and respiratory symptoms.
- If employees become sick at work, they should be advised to promptly report this to their supervisor and go home.
- Employees should be advised to consult their health care provider by telephone.
- Employees who are sick should be advised to follow CDC guidance on What to do if you are sick?
- Determine employee policy regarding quarantine, i.e., exposed employees self-quarantine for 14 days or come to work wearing a facemask and frequent hand hygiene. Exposed staff should promptly report symptoms if they occur.

e. Influenza vaccination

- While influenza season is still ongoing flu vaccination remains an important measure to prevent an illness that presents similarly to COVID-19.
- If there is influenza vaccine still in stock, unvaccinated staff (highest priority) and incarcerated persons should be offered the flu vaccine.

f. Infection prevention & control guidance for staff screening visitors, staff, and new intakes.

The following is a protocol to safely check an individual's temperature:

    - Perform hand hygiene
    - Put on a face mask, eye protection (goggles or disposable face shield that fully covers the front and sides of the face) and a single pair of disposable gloves*
    - Check individual's temperature
        - Non-contact or disposable thermometers are preferred over reusable oral thermometers.
        - If disposable or non-contact thermometers are used and the screener did not have physical contact with an individual, gloves do not need to be changed before the next check. If non-contact thermometers are used, they should be cleaned routinely as recommended by CDC for infection control.
        - If performing oral temperature check on multiple individuals, ensure that a clean pair of gloves is used for each individual and that the thermometer has been thoroughly disinfected in between each check.
    - Remove and discard PPE
    - Perform hand hygiene

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* Note: CDC recommends wearing a gown for this process. Given the current shortage of gowns in many facilities this is not routinely recommended in this plan.

4. Visitors / Volunteers / Contractors / Lawyers

- Consideration should be given to begin limiting access to the facility by visitors and volunteers and non-essential contractors.
  - Arrangements should be made to increase options for incarcerated persons to communicate with their families via telephone or tele-video.
- If possible, legal visits should occur remotely.
- Communicate with potential visitors instructing them to postpone visits if they have respiratory illness. Post signage regarding visitor screening.
- All visitors should be screened for symptoms and a temperature taken prior to entry utilizing the form in Attachment 1a.

5. Employee Screening

- In locations where it is identified that there is sustained COVID-19 community transmission, employees should be screened upon arrival with a temperature, and asked questions about respiratory symptoms and if they have had contact with a known COVID-19 patient (Attachment 1b).
- This form can be laminated for employees to review the questions for individuals to verbally respond to them.
- A temperature should also be taken ideally with a no-touch infra-red thermometer.
- Employee screenings do not require documentation unless the person responds "YES" to any question or has a temperature.
- Screening can be performed by any staff person with training.
- Employees who screen positive for symptoms should be sent home and advised to consult their healthcare provider.
- Employees who have had close contact with a COVID-19 case should self-monitor for symptoms (i.e., fever, cough, or shortness of breath) and, if feasible given staffing constraints, be under self-quarantine for 14 days. If due to staffing constraints, self-quarantine is not feasible, asymptomatic exposed staff should come to work and wear a face mask (cloth or disposable) while working, with frequent hand hygiene.

6. New Intake Screening

- New intakes should be screened per usual protocols. Consider conducting this screening outdoors or in a covered area (weather and logistics permitting).
- Temperature should be taken, ideally with an infra-red no-touch thermometer with staff wearing PPE as described in Element #3f.

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- Additional questions should be asked regarding symptoms and exposure to COVID-19 (Attachment 2).
- New arrivals should be segregated from other incarcerated individuals until the screening process has been completed.
- If new intakes are identified with symptoms then ***immediately place a face mask on the person,*** have the person perform hand hygiene, and place them in a separate room with a toilet while determining next steps. Staff entering the room shall wear personal protective equipment (PPE) in accordance with guidance in Element #8.
- Identify incarcerated persons who were transferred with the symptomatic new intake for need for quarantine (see Element #12).
- If new intakes report history of exposure to COVID-19 then they should be placed in quarantine (see Element #12).

7. Initial Management and Testing of Cases of Respiratory Illness

- **Source control (placing a mask on a potentially infectious person) is critically important.** If individuals are identified with symptoms, then *immediately place a face mask on the patient* and have them perform hand hygiene.
- Place them in a separate room with a toilet and sink while determining next steps. If the facility has an airborne infection isolation room this could be used for this purpose. Staff in the same room shall wear personal protective equipment (PPE) as outlined in Element #8.
- Decisions about how to manage and test incarcerated persons with mild respiratory illness should be made in collaboration with public health authorities. The vast majority of persons with respiratory illness will not have COVID-19, especially during seasonal flu season. It is unlikely that hospitals will have the capacity to evaluate incarcerated persons with mild respiratory illness.
- The CDC current priorities for testing are listed at this link.
- CDC recommendations for clinical specimens for COVID-19 include collecting and testing upper respiratory tract specimens (nasopharyngeal swab). New (3/24/20) CDC recommendation indicate that if nasopharyngeal swabs are not feasible that nasal swabs are an acceptable alternative.

  CDC also recommends testing lower respiratory tract specimens, if available. For patients who develop a productive cough, sputum should be collected and tested for COVID-19.

  Note: rapid blood tests for COVID-19 have become commercially available that test for IgG and IgM. These indicate that the results should not be the sole basis to diagnose or exclude infection. Therefore, at this time it is recommended that these tests not be used.
- If feasible, during flu season it is recommended that rapid flu tests with nasopharyngeal swab be performed. It is important that nasopharyngeal swabs be performed correctly.
- ***Nasopharyngeal swabbing should only be performed by staff with demonstrated competency***. See instructional video at: https://www.youtube.com/watch?v=DVJNWefmHjE
- Suspend co-pays for incarcerated persons seeking medical evaluation for respiratory symptoms.

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8. Personal Protective Equipment (PPE) and Other Supplies

PERSONAL PROTECTIVE EQUIPMENT

- The CDC recommends the following PPE when a person comes into contact with a person with suspected or confirmed COVID-19.
  - **N95 respirator or face mask**
    - N95 respirators are preferred. When N95 respirators are in short supply they should be reserved first for use when a patient is undergoing an aerosol-generating procedure including testing for COVID-19 and second for confirmed COVID-19 patients.
    - N95 respirators should not be worn with facial hair that interferes with the respirator seal.
    - If N95 respirators are to be used, they must be used in the context of a fit-testing program. Fit testing is specific to the brand/size of respirator to be used.

Table 2. Definitions of "Face Masks" and "Respirators"
Face Masks: Disposable FDA-approved masks, which come in various shapes and types (e.g., flat with nose bridge and ties, duck billed, flat and pleated, pre-molded with elastic bands).
Respirators: N-95 or higher filtering, face-piece respirators that are certified by CDC/NIOSH.

  - **Gown**
    - If gowns are in short supply they can be reserved for times when direct, close contact with a patient is being implemented.
  - **Gloves**
  - **Eye Protection** (goggles or disposable face shield that fully covers the front and sides of the face).
    - This does not include personal eyeglasses.
    - If reusable eye protection is used, it should be cleaned and disinfected in accordance with manufacturer's instructions.
- It is strongly emphasized that hand hygiene be performed before and after donning and doffing PPE.
- Staff who are wearing PPE should be trained on its use. CDC instructions on donning and doffing PPE are available at: https://www.cdc.gov/hai/pdfs/ppe/ppe-sequence.pdf.
- Inventory current supplies of PPE.
- CDC (3/17/20) has published new recommendations on strategies to use in the absence of available PPE.
- Criteria for using various types of PPE based upon the situation is outlined in Table 3 (next page).
- Make contingency plans for the probable event of PPE shortages during the COVID-19 pandemic (see CDC guidance on optimizing PPE supplies). CDC now recommends that in the case of shortage of disposable face masks that re-usable cloth masks can be considered.

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OTHER SUPPLIES

- Other supplies that should be obtained and inventory tracked include:
  - Standard medical supplies and pharmaceuticals for daily clinic needs
  - Tissues
  - Liquid soap
  - Bar soap
  - Hand drying supplies
  - Alcohol-based hand sanitizer containing at least 60% alcohol (where permissible based on security restrictions)
  - Cleaning supplies, including EPA-registered disinfectants effective against the virus that causes COVID-19
  - Sterile viral transport media and sterile swabs to collect nasopharyngeal specimens if COVID-19 testing is indicated

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Table 3. COVID-19 Personal Protective Equipment Recommendations

Situation	N95 respirator	Face mask	Eye protection	Gloves	Gown/ coveralls
STAFF					
Staff performing temperature checks on: staff, visitors, or incarcerated/detained persons		X	X	X	1
Isolation: Staff providing medical care for suspected/confirmed COVID-19 cases	X [2]		X	X	X
Isolation: Correctional staff entering isolation room	X [2]		X	X	X
Staff present during aerosolizing procedure on suspected or confirmed COVID-19 case (including testing)	X		X	X	X
Staff handling laundry (from a COVID-19 case or case contact)				X	X
Staff handling used food service items (from a COVID-19 case or case contact)				X	X
Staff cleaning an area (where a COVID-19 case has spent time)	*Additional PPE may be needed based on the disinfectant label.*			X	X
Transport of suspected/confirmed COVID-19	X [2]		*During transport*		
Prior to & following transport (if close contact)	X [2]		X	X	X
Quarantine: No direct contact with asymptomatic persons who are close contacts to COVID-19		X	X	X	
Quarantine: Direct contact with asymptomatic persons (including medical care/temperature checks)		X	X	X	X
INCARCERATED/DETAINED PERSONS					
Confirmed or suspected COVID-19 cases, or showing symptoms of COVID-19		X			
Laundry worker (handling items from COVID-19 case or case contact)				X	X
Food service worker (handling items from COVID-19 case or case contact)				X	X
Worker performing cleaning (areas where COVID-19 case has spent time)	*Additional PPE may be needed based on the disinfectant label.*			X	X
Quarantine: Asymptomatic COVID-19 close contacts [3]	*Apply face masks for source control, as feasible, based on local supply, especially if cohorted*				

1 Note: CDC recommends wearing a gown for this process. Given the current shortage of gowns in many facilities this is not routinely recommended in this plan.

2 A NIOSH-approved N95 is preferred. However, based on local and regional situational analysis of PPE supplies, face masks (including cloth face masks) are an acceptable alternative when the supply chain of respirators cannot meet the demand. During this time, available respirators should be prioritized for procedures that are likely to generate respiratory aerosols, which would pose the highest exposure risk to staff.

3 If a facility chooses to quarantine new intakes (without symptoms or known exposure to a COVID-19 case) before integrating into the facility's general population, face masks are not necessary.

Adapted from: CDC. Interim Guidance On Management of COVID-19 in Correctional and Detention Facilities (Table 1); 3/24/19. Available at: https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Min_Mod_Trans

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9. Transport

If a decision is made to transport a patient with signs and symptoms of severe respiratory illness, to a health care facility the following guidance should be followed regarding transport.

- Notify the receiving health care facility of the pending transport of a potentially infectious patient.
- Patient wears a face mask and performs hand hygiene.
- Correctional officer wears face mask (or N-95 respirator). Wear gloves, gown, and eye protection if in close contact with inmate prior to transport.
- Prior to transporting, all PPE (except for face mask / N-95 respirator) is removed and hand hygiene is performed. This is to prevent contaminating the driving compartment.
- Ventilation system should bring in as much outdoor air as possible. Set fan to high.
- DO NOT place air on recirculation mode.
- Weather permitting, drive with the windows down.
- Following the transport, if close contact with the patient is anticipated, put on new set of PPE. Perform hand hygiene after PPE is removed.
- After transporting a patient, air out the vehicle for one hour before using it without a face mask or respirator.
- When cleaning the vehicle wear a disposable gown and gloves. A face shield or face mask and goggles should be worn if splashes or sprays during cleaning are anticipated.
- Clean and disinfect the vehicle after the transport utilizing instructions in Element #3b.

Table 4. Definitions of "Isolation" and "Quarantine"
Isolation: Confining individuals who are **sick** either to single rooms or by cohorting them with other viral infection patients.
Quarantine: Confining asymptomatic persons who are **contacts to COVID-19** while they are in the incubation period (up to 14 days for COVID-19).

10. Isolation (*Symptomatic Persons*)

- **Isolation Defined:** A critical infection control measure for COVID-19 is to promptly separate incarcerated individuals who are sick with fever or respiratory symptoms away from other incarcerated individuals in the general population. Ideally isolation will occur in a private room with a bathroom attached. If not, incarcerated individuals will have to wear a face mask to go to the bathroom outside the room.
- **Cohorting:** As a last resort option, persons with diagnosed COVID-19 can be cohorted together. *Inmates with laboratory confirmed COVID-19 should be housed separately from those with undiagnosed respiratory illness.*
- The CDC guidelines describe the order of preference of rooms for isolating inmates.
- Rooms where incarcerated individuals with respiratory illness are either housed alone or cohorted should be identified and designated "Respiratory Infection Isolation Room". No

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special air handling is needed. The door to the isolation room should remain closed.

- Note: The PPE requirements for COVID-19 do not fall into any one of the usual categories for the CDC transmission-based precautions, i.e., droplet, airborne, or contact. For the purposes of this document we have labeled the precaution sign "Respiratory Infection Isolation Room" since the rooms may house persons with undiagnosed respiratory infection as well as diagnosed COVID-19.

- **Signage:** A sign should be placed on the door of the room indicating that it is a Respiratory Infection Isolation Room that lists recommended personal protective equipment (PPE) (see Attachment 3) described in Element #8.
- **Face Masks:** If available—to minimize the likelihood of disease transmission—persons who are isolated or cohorted should wear a face mask while isolated. Face masks should be replaced as needed. It is particularly important for those cohorted with undiagnosed respiratory illness to wear a mask so that persons with respiratory illnesses other than COVID-19 are protected.
- **Bunk beds:** Depending on how ill the incarcerated individuals are, bunk beds may or may not be suitable.
- **Assignment of custody staff:** If feasible, designated custody staff should be assigned to monitor isolated individuals in order to minimize exposures.
- **Provide individuals in isolation with tissues**, and if permissible and available, a lined no-touch trash receptacle.
- **Dedicated medical equipment**, i.e., blood pressure cuffs should be left in room (ideally) or decontaminated in accordance with manufacturer's instructions.
- **Masks outside of room:** If individuals with respiratory illness must be taken out of the isolation room, they should wear a face mask and perform hand hygiene before leaving the room.
- **Aerosol generating procedures:** If a patient who is in isolation must undergo a procedure that is likely to generate aerosols (e.g., suctioning, administering nebulized medications, testing for COVID-19) they should be placed in a separate room. An N-95 respirator (not a face mask), gloves, gown, and face protection should be used by staff.
- **Laundry:**
  - Laundry from a COVID-19 cases can be washed with other individuals' laundry.
  - Individuals handling laundry from COVID-19 cases should wear disposable gloves, discard after each use, and perform hand hygiene.
  - Do not shake dirty laundry. This will minimize the possibility of dispersing virus through the air.
  - Launder items using the hottest appropriate water setting and dry items completely.
- **Food service items.** Cases under medical isolation should throw disposable food service items in regular trash in their medical isolation room. Non-disposable food service items should be handled with gloves and washed with hot water or in a dishwasher. Individuals handling used food service items should clean their hands after removing gloves.
- **Criteria for discontinuing isolation**
  - For individuals who will NOT be tested to determine if they are still contagious:
    - The individual has been free from fever for at least 72 hours without the use of fever-reducing medications; AND
    - The individual's other symptoms have improved (e.g., cough, shortness of breath); AND
    - At least 7 days have passed since the first symptoms appeared

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- For individuals who had a confirmed positive COVID-19 test but never showed symptoms:
  - At least 7 days have passed since the date of the individual's first positive COVID-19 test; AND
  - The individual has had no subsequent illness
- **Cleaning spaces where COVID-19 cases spent time**
  - Close off areas used by infected individual. If possible, open outside doors and windows to increase air circulation in the area.
  - Wait as long as practical, up to 24 hours under the poorest air exchange conditions before beginning to clean and disinfect.
  - Ensure that persons performing cleaning wear recommended PPE for isolation (See Table 3).
  - Thoroughly clean and disinfect utilizing instructions in Element #3b with an emphasis on frequently touched surfaces.

11. Care for the Sick

- There are no specific treatments for COVID-19 illness. Care is supportive.
- Identify if ill persons have risk factors for COVID-19 complications. Those with increased risk should be monitored more closely.
- Treatment consists of assuring hydration and comfort measures. The recipe for oral rehydration solution is in Table 4 below.
- Acetaminophen is the preferred antipyretic for treating fever in most patients with COVID-19 considering its efficacy and safety profile. Ibuprophen is as an alternative, antipyretic choice; however, it can cause kidney damage and other adverse effects in some patients. Recent reports suggest that ibuprophen may worsen the course of COVID-19; however, this theoretical risk is still under investigation.
- Patients should be assessed at least twice daily for signs and symptoms of shortness of breath or decompensation.
- A low threshold should be used for making the decision to transport an inmate to the hospital if they develop shortness of breath.
- Implement telemedicine or provider-to-provider consultations for management of COVID-19 patients.

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Table 5. Oral Rehydration Solution Recipe
1-gallon clean water 10-tablespoons of sugar 4-teaspons salt **Directions:** Stir up. Do not boil. Can add sugar -free drink mix to flavor. Use within 24 hours.

12. Quarantine (*Asymptomatic Exposed Persons*)

- **The purpose of quarantine** is to assure that incarcerated individuals who are known to have been exposed to the virus are kept separate from other incarcerated individuals to assess whether they develop viral infection symptoms. If cases of COVID-19 are identified, it may be appropriate to identify close contacts and quarantine them in a separate room or unit.
- **Close contact defined:** In the context of COVID-19, an individual is considered a close contact if they have:
  - Been within 6 feet of a COVID-19 case for a prolonged period of time OR
  - Had direct contact with infectious secretions of a COVID-19 case

  Considerations when assessing close contact include the duration of exposure and the clinical symptoms of the person with COVID-19 (i.e., coughing likely increases exposure risk as does exposure to a severely ill patient).
- **Identification of Quarantine Rooms:** Facilities should make every effort to quarantine close contacts of COVID-19 cases individually. Cohorting multiple quarantined close contacts could result in transmission of COVID-19 to person who are uninfected. Cohorting should only be practiced if there are no other available options.
  - If an entire housing unit is under quarantine due to contact with a case from the same housing unit, the entire housing unit may need to be treated as a cohort and quarantine in place.
  - Ideally do not cohort individuals who are at higher risk of severe illness from COVID-19.
  - CDC guidelines describe the order of preference for housing of inmates in quarantine.
- **Signage: T**he door to the Quarantine Room should remain closed. A sign should be placed on the door of the room indicating that it is a Quarantine Room which lists recommended personal protective equipment (PPE) (see Attachment 4). PPE includes face mask, eye protection, gloves, and a gown if close contact with a quarantined person is anticipated.
- **Face masks:** (*If there is a sufficient supply of face masks*) To minimize the likelihood of disease transmission to persons cohorted in quarantine, quarantined persons should be required to wear a face mask. Face masks should be replaced as needed.
- As feasible, the beds/cots of quarantined incarcerated individuals should be placed at least 6 feet apart.

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- **No Movement:** Quarantined incarcerated individuals should be restricted from being transferred, having visits, or mixing with the general population.
- **PPE:** A face mask, eye protection and gloves are recommended for staff who are in direct, close contact (within 6 feet) of asymptomatic quarantined incarcerated individuals.
- **Monitoring:** CDC recommends that inmates in quarantine should be screened twice daily for symptoms including subjective fever, and a temperature. Symptomatic patients need to be isolated.
- **Laundry:**
  - Laundry from quarantined persons can be washed with other individuals' laundry.
  - Individuals handling laundry from quarantined persons should wear disposable gloves, discard after each use, and clean their hands after.
  - Do not shake dirty laundry. This will minimize the possibility of dispersing virus through the air.
  - Launder items using the hottest appropriate water setting and dry items completely.
  - Clean and disinfect clothes hampers according to guidance above for surfaces. If permissible, consider using a bag liner that is either disposable or can be laundered.

- **Meals** should be provided to quarantined individuals in their quarantine spaces. Disposable food service items can be disposed of in regular trash. Individuals handling used food service items should wear gloves and dishes washed in hot water. Wash hands after removing gloves.
- **The duration of quarantine** for COVID-19 is the 14-day incubation period. If a new case is identified in the quarantine unit then the 14-day quarantine period starts again.

13. Data Collection, Analysis & Reporting

Implement systems for tracking information about incarcerated persons and staff with suspected/confirmed COVID-19

- **Ill/Exposed Staff Persons**: The following basic information should be tracked on a line list
  - Symptomatic Y/N
  - Date of symptom onset
  - Exposed? Y/N
  - Date of exposure
  - Current status (will change over time)
    - Exposed – Working
    - Exposed – Self-Quarantine
    - Person Under Investigation (PUI)- testing pending
    - PUI, test result pending
    - PUI, tested negative
    - Laboratory confirmed case

- Date left work
- Date returned to work

- **Incarcerated Persons - Symptomatic**: The following basic information should be tracked on a line-list:
  - Date of symptom onset
  - Reported symptoms (fever, cough, shortness of breath)
  - Date isolated
  - Influenza tested? Y/N
  - Influenza result
  - Date COVID-19 tested
  - Date COVID-19 test result
  - Result
  - Current status (will change over time)
    - Person Under Investigation (PUI)- testing pending
    - PUI, test result pending
    - PUI, tested negative
    - Laboratory confirmed case
  - Current housing: Isolation
  - Date isolation discontinued
  - Hospitalized Y/N
  - Hospitalization Date
  - Deceased Y/N

NOTE: Incarcerated persons who are identified with suspected/confirmed COVID-19 must be reported to public health authorities. You will be asking questions about cases found on this CDC COVID-19 reporting form.

- **Incarcerated Persons – Exposed**
  - Date of exposure
  - Current Housing
    - Quarantined – alone
    - Quarantined – cohort
  - Date quarantine discontinued
  - Developed signs and symptoms of COVID-19? Y/N
  - Date Isolated

14. Summary, Evaluation and Continuous Quality Improvement (CQI)

Periodically and at the conclusion of the outbreak review the implementation of the COVID-19 Pandemic Response Plan and identify what has worked well and what has not worked well, total numbers of cases and contacts treated/evaluated. Engage the CQI committee in evaluating the facility pandemic response. Identify areas for improvement and report these recommendations to the leadership team.

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COVID-19 Pandemic Response Plan Implementation Worksheet	
This MS Word® template worksheet is designed for facilities to operationalize the guidance in this COVID-19 Response Plan. It should be adapted to the unique needs of your facility.	
Date Updated:	**Completed by:**
1. Administration/Coordination	
Coordination of Response	
Identify members of the facility leadership team responsible for COVID-19 response planning and implementation: **Will the facility utilize the Incident Command System? YES NO** **If not, how will COVID-19 response plans be developed and implemented?** **Schedule regular meetings to review implementation of all elements listed in the Administration/Coordination section of the document.**	
Who is responsible for monitoring COVID-19 updates from CDC and State Health Department? **CDC Website:** https://www.cdc.gov/coronavirus/2019-ncov/index.html **State of _____** **Website:_____**	
Coordinate response with local law enforcement and court officials. ▪ **Explore alternatives to in-person court appearances:** ▪ **Maximize use of existing policies for alternatives to incarceration:** ▪ **Expedite implementation of compassionate release policies:**	

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- **Explore strategies to reduce new intakes to the correctional facility:**
- **Explore strategies for releasing inmates at low risk for violent crime –particularly those with risk factors for severe COVID-19**:

Personnel Policies and Practices.

- **Review the sick leave policies of each employer that operates in the facility.**
  - **Do policies actively encourage staff to stay home when sick? YES NO. If no, how will staff be encouraged to stay home if sick?**
  - **What officials will have the authority to send symptomatic staff home?**
- **Identify staff whose duties would allow them to work from home and review/revise telework policies.**
- **What/where are contingency plans for reduced staffing?**
- **Will your facility offer revised duties to staff who are at higher risk of severe illness with COVID-19? YES NO**
- **What mechanisms are in place to remind staff to stay at home if they are sick?**
- **When will you institute employee screening of all employees (see Element #5) (even if you are not in a community with sustained community transmission)?**
- **Review and incorporate into your plans the criteria for staff to return to work with COVID-19 symptoms:**
- **Review guidelines regarding COVID-19 Exposures/Quarantine. What is the policy in your facility regarding staff related to self-quarantine vs continue working with face mask?**

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- **The plan suggests consider relaxing restrictions on allowing alcohol-based hand sanitizer. In this facility the following categories of staff can carry alcohol-based hand sanitizer:**

Movement

How will movement be minimized within the facility?

How will movement be minimized between facilities?

Will non-urgent medical visits be postponed? YES NO

Will copays for incarcerated persons seeking medical evaluation for respiratory symptoms be waived? YES NO

2. Communication

The mechanisms for regular updates (paper/electronic/telephonic) will be as follows:

-----Staff:

-----Incarcerated persons:

-----Families of incarcerated persons:

The following staff person(s) are responsible for assuring regular communication with stakeholders:

Review recommendations regarding signage in the facility. What signage will be posted in the

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facility and where will it be posted?

c. Local Public Health Agency:

Contact person(s) for COVID-19:

Phone:

Email:

d. Communicate with your local health department and discuss guidance on management and COVID-19 testing of persons with respiratory illness.

Document date of communication and the plans discussed: __/__/__

e. Local community referral hospital: _____

Contact person(s) for COVID-19:

Phone:

Email:

3. General Prevention Measures

a. Good Health Habits: How will good health habits be promoted with your staff (e.g., posters, leadership emphasizing hand hygiene, email messages to staff)?

1) Are there facilities for employees and visitors to wash hands when entering and leaving the facility? YES NO If no, what are plans to address this issue?

2) Are there facilities for incarcerated individuals to wash hands at intake? YES NO If no, what are plans to address this issue?

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3) **Are soap dispensers or hand soap available in all employee and incarcerated person restrooms? YES NO What is the plan to assure that soap dispensers are refilled regularly?**
4) **What is the plan to assure incarcerated individuals have an adequate supply of bar soap?**
5) **Is signage for hand hygiene and cough etiquette at entry, in public and visible areas around?**
6) **Are tissues available? YES NO If so, where?**
7) **Are no-touch trash receptacles available? YES NO If so, where?**

b. Environmental Cleaning:

Review updated CDC recommendations regarding environmental cleaning – noting that common EPA-registered household disinfectants are considered effective?

What disinfectants will you use in your facility?

(*If deemed necessary*) purchase EPA hospital-grade disinfectants from Schedule N: https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2. (Recommended products are both a surface cleaner and disinfectant with a 3-minute wet time or less.)

Identify "high-touch" surfaces in this facility (i.e., doorknobs, keys, telephones):

The following plan will be implemented to increase frequency and the extent of cleaning and disinfection of high-touch surfaces in this facility:

c. **Social Distancing Measures: What administrative measures is your facility going to institute to increase social distancing within your facility (Review across all departments in the facility)?**

REVIEW additional suggested measures in the plan. It is recommended that an interdepartmental group review the list and brainstorm what would work In your facility. Then add those agreed upon to the list below.

1) **Measure…**

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The following new activities will be implemented for incarcerated persons while they are confined to a housing unit:

d. Employees Stay Home When Sick: Does communication with employees include message that they should stay home when sick or under quarantine? YES NO

Sick employees should be advised to follow CDC guidance on What to do if you are sick?

e. Flu Vaccine: Is there flu vaccine in stock? YES NO If yes, number of doses?

If yes, what plans are there to continue offering vaccination to employees who have not been vaccinated?

If yes, what plans are there to continue offering vaccination to incarcerated persons who have not been vaccinated?

f. Review and implement infection prevention and control guidance for staff screening visitors, staff, and new intakes. How will these be implemented?

4. Visitors / Volunteers / Contractors / Lawyers

What changes in procedures / polices are being instituted in response to COVID-19 for:

a. Visitors:

b. Volunteers:

c. Non-Essential Contractors:

d. Lawyers:

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What signage/communication is being used to communicate with visitors?

Is screening for visitors for symptoms and temperature being implemented? YES NO
If yes, who will be conducting this screening?

5. Employee Screening

Is sustained community-transmission occurring in your community? YES NO
If yes, screening of employees upon arrival to work is recommended.

Do you have an infrared no-touch thermometer for this purpose? YES NO If no, what are your plans for acquiring them?

What are your plans for employee screening?

The following system will be utilized for employees to report illness/exposures and to track this information:

6. New Intake Screening

It is recommended that new arrivals be isolated from rest of population until screening is performed. New intakes should be screened with temperature and questionnaire.

Where will screening occur?

Who will conduct screening?

What other screening logistics are being considered?

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7. Initial Management and Testing of Cases of Respiratory Illness

It is recommended that individuals with symptoms be immediately issued a face mask and be placed in a separate room with a toilet and sink.

What separate room will be used for this purpose?

Do you have capacity in this facility to perform rapid flu tests? YES NO
If yes, what are plans to assure competency in nasopharyngeal swabbing?

What are current recommendations from your local health department regarding COVID-19 testing?

Review CDC recommendation for clinical specimens? Do you have needed supplies for testing? YES NO If no, what are your plans to obtain them?

8. Personal Protective Equipment and Other Supplies

Date: __ /__/__ What is the current inventory of the following PPE:

Face Masks:

N-95 respirators:

Gowns (disposable):

Gowns (washable):

Eye Protection- Goggles:

Eye Protection—Disposable face shields:

What is your plan for securing and maintaining an adequate supply of PPE?

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If respirators are available what activities will they be prioritized for?

What is your plan for fit-testing correctional officers?

What is your plan for fit-testing health care workers?

What are your plans for training regarding donning & doffing of PPE?

Correctional Officers? Who? When?

Health Care Workers?

Review Table 3. COVID-19 Personal Protective Equipment Recommendations. What are your plans for posting this chart throughout the facility?

4. Review supply list in plan and determine current stock. What are your strategies for acquiring more supplies during this time of shortage?

- Standard medical supplies for daily clinic needs
- Tissues
- Liquid soap
- Bar soap
- Hand drying supplies
- Alcohol-based hand sanitizer containing at least 60% alcohol (where permissible based on security restrictions)
- Cleaning supplies, including EPA-registered disinfectants effective against the virus that causes COVID-19
- Sterile viral transport media and sterile swabs to collect nasopharyngeal specimens if COVID-19 testing is indicated

9. Transport

What categories of staff will be responsible for transport of ill persons?

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What is your plan for training transport officers on procedures for transport?

10. Isolation / Cohorting (*Symptomatic Persons*)

Review CDC guidelines regarding the order of preference of rooms for isolating inmates. Are there any changes to your responses below based upon this? *(On right-hand ribbon go to "Management" and scroll down to "Medical Isolation…"*

What is your capacity for isolating ill inmates in single rooms with a toilet?

Detail available rooms:

What is your capacity for cohorting inmates together in a room with toilets/sinks?

Detail available rooms or unit:

What is your plan for designating and training officers assigned to isolation rooms on isolation room procedures?

Is it feasible to designate specific custody staff to only monitor isolated individual to minimize exposures? YES NO

If yes, how will staff be selected for this duty?

Review recommendations for laundry and food service items? What are your plans for educating staff and incarcerated workers regarding these recommendations?

Review recommendations for cleaning spaces where COVID-19 cases spent time. What are your plans for training staff and incarcerated workers regarding these recommendations?

11. Care for the Sick

Do you have an adequate supply of Tylenol and other medications for supportive care of a respiratory illness?

How will you identify if ill persons have risk factors for COVID-19 complications who are in need of closer monitoring?

What plan will you have for monitoring ill inmates?

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March 26, 2020

12. Quarantine
Review CDC guidelines regarding the order of preference of rooms for isolating inmates. Are there any changes to your responses below based upon this? (On right-hand ribbon go to "Management" and look for "Quadrating Close Contacts…" **What rooms could be used for individual quarantine?** **What rooms could be used for charted (group quarantine)?** **How do you plan to monitor persons under quarantine?** **What is your plan for supplying face masks needed for an entire housing unit of incarcerated persons for a period of 14 days?** **What is you plan/ability to provide single rooms for exposed persons who have risks for complications, e.g., over age 60 or with medical risk factors?** ***Note that the BLUE Quarantine sign has been changed. Destroy these signs if you have printed them and print the RED Quarantine sign (which includes wearing gowns if close contact with quarantined persons).***
12. Data Collection, Analysis, and Reporting
What is your plan for ongoing collection of data on staff and incarcerated persons with suspected/confirmed for COVID-19 or history of exposure? **Who is responsible for data collection, and analysis?** **This person should be prepared to updated numbers at each of the regularly schedule planning meetings.**
14. Summary, Evaluation and Continuous Quality Improvement (CQI)
Who is responsible for ongoing evaluation of the pandemic response? **How will these evaluations be incorporated into local planning meetings?**

COVID-19 Pandemic Response Plan

March 26, 2020

Attachment 1a. COVID-19 Visitor Screening Form (revised 3/25/20)

- It is suggested that this be form be laminated. Upon arrival to the facility that visitors are be asked to respond verbally to these questions and a temperature taken.
- Screening can be conducted by any staff person.
- If an answer to one of the questions is YES or a temperature exceeds 100.4 then hand the ask the visitor to leave immediately. Advise them to communicate with their doctor by telephone.

YES **NO**	**In the past 14 days, have you had contact with a person known to be infected with COVID-19 (corona virus)?**
Today or in the past 24 hours, have you had any of the following symptoms?	
YES **NO**	**Fever, felt feverish, or had chills?**
YES **NO**	**Cough?**
YES **NO**	**Difficulty Breathing?**
	Temperature

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Attachment 1b. COVID-19 Employee Screening Form (revised 3/25/20)

- It is suggested that this be form be laminated. Upon arrival to the facility the employees are be asked to respond verbally to these questions and a temperature taken.
- Screening can be conducted by any staff person.
- If an answer to one of the questions is YES or a temperature exceeds 100.4 then hand the employee a mask to wear and send them home and recommend that they call their supervisor and consult their doctor.
- A written copy of this form is only required for employees that answer YES to any of the screening questions or have a temperature exceeding 100.4.

YES **NO**	**In the past 14 days, have you had contact with a person known to be infected with COVID-19 (corona virus)?**
Today or in the past 24 hours, have you had any of the following symptoms?	
YES **NO**	**Fever, felt feverish, or had chills?**
YES **NO**	**Cough?**
YES **NO**	**Difficulty Breathing?**
	Temperature

Screening Date: ____/____/_____

Employee Name (Last/First): _____

Phone Number: _____

Screening Employee Name: _____ Signature:_____

COVID-19 Pandemic Response Plan

March 26, 2020

Attachment 2. COVID-19 New Intake Screening Form (revised 3/25/20)

1. Assess the Risk Of Exposure **Have you……**		
☐ Yes ☐ No	In the past 14 days, have you had contact with a person known to be infected with COVID-19 (corona virus) ?	
2. Assess for Signs or Symptoms of Illness • Persons with symptoms of illness or cough should be masked immediately and separated from others. **Do you have a……..**		**Date of Onset:**
☐ Yes ☐ No	**Fever, felt feverish, or had chills? Record temperature:**	
☐ Yes ☐ No	**Cough?**	
☐ Yes ☐ No	**Difficulty Breathing?**	
3. ***If YES SYMPTOM questions, place mask on person and have them perform hand hygiene and evaluate in accordance with instructions in Element 7.***		
4. If YES to ANY RISK questions, but NO, to all SIGNS or SYMPTOMS, place person in QUARANTINE.		

Inmate Name: _____ **Number:** _____

Employee Name: _____ **Date:** ___/___/___

Employee Signature: _____

COVID-19 Pandemic Response Plan

March 26, 2020

Attachment 3. Respiratory Infection Isolation Room Sign

On the following page is a Respiratory Infection Isolation Room sign for posting on the doors of isolation units.

COVID-19 Pandemic Response Plan

March 26, 2020

Respiratory Infection Isolation Room Precautions

PRECAUCIONES de sala de aislamiento de infección respiratoria

TO PREVENT THE SPREAD OF INFECTION,

ANYONE ENTERING THIS ROOM SHOULD USE:

Para prevenir el esparcimiento do infecciones, todas las peronas que entren e esta habitacion tienen que:

	HAND HYGIENE ***Hygiene De Las Manos***
	Face Mask or N-95 Respirator ***Mascara Facial o Respirador N95***
	Gloves ***Guantes***
	GOWN ***Bata***
	Eye Protection ***Protección para los ojos***
	Ensure that the door to this room remains closed <u>at all times</u>. ***Asegurese de mantener la puerta de esta habitacion carrada <u>todo el tiempo</u>.***

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March 26, 2020

Attachment 4. Quarantine Room Sign

On the following page is a Quarantine Room Sign for posting on the doors of housing units being used for quarantine. Note that this sign was modified in the March 25, 2020 version of this document to include use of gown when in close contact with a person in quarantine, i.e., medical personnel taking temperatures.

COVID-19 Pandemic Response Plan

March 26, 2020

Quarantine Room Precautions

PRECAUCIONES de sala de Cuaratena

TO PREVENT THE SPREAD OF INFECTION,

ANYONE ENTERING THIS ROOM SHOULD USE:

Para prevenir el esparcimiento do infecciones, todas las peronas que entren e esta habitacion tienen que:

	HAND HYGIENE ***Hygiene De Las Manos***
	Face Mask or N-95 Respirator ***Mascara Facial o Respirador N95***
	Gloves ***Guantes***
	GOWN – only if close contact ***Bata-solo si hay contacto cercano***
	Eye Protection ***Protección para los ojos***
	Ensure that the door to this room remains closed <u>at all times</u>. ***Asegurese de mantener la puerta de esta habitacion carrada <u>todo el tiempo</u>.***

SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
ADMINISTRATIVE OFFICE

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MEMORANDUM

TO: **CIRCUIT COURT JUDGES**
MAGISTRATES

FROM: **LISA A. TACKETT**
DIRECTOR, COURT SERVICES

DATE: **MARCH 27, 2020**

SUBJECT: **COVID-19 AND PRE-TRIAL RELEASE**

In light of the risk of a potential COVID-19 outbreak in jail facilities, the Department of Military Affairs and Public Safety ("DMAPS") and various groups have reached out to the Supreme Court of Appeals of West Virginia to help develop appropriate guidance.

The Court's March 22, 2020 Administrative Order states that "bond hearings" are considered emergency matters that can proceed during the period of Judicial Emergency. It is requested that Circuit Judges and Magistrates contact the Prosecuting Attorney in each county and request that the Prosecutors and the Assistant Prosecutors review the most recent list of pretrial detainees to identify any pre-trial individuals who do not constitute a public safety risk and may be appropriate candidates for PR or reduced bond. See Rule 46(g) of the West Virginia Rules of Criminal Procedure. Judicial officers are asked to request this action by the Prosecutors by the close of business on March 30, 2020.

Once those individuals are identified, the Prosecutor and defense attorney may consider submitting an agreed order for a PR or a reduced bond, and the judicial officer should deem such requests as emergency, time-sensitive matters for consideration under the March 22 Order. Judges and magistrates may also act *sua sponte* to set bond hearings, where deemed appropriate, to further address these concerns.

As always, judicial officers must fully consider the safety of the public and victims when setting bond or ordering bond revisions in light of the COVID-19 concerns. Factors that may be considered in making such determinations include special treatment of older individuals or individuals with an underlying health condition that make them especially susceptible to complications from the virus. When considering new incarcerations, judicial officers may

consider, while balancing the safety of the public and victims, whether PR or reduced bonds are appropriate to address concerns related to COVID-19.

Moving forward, MAPS has agreed to periodically provide additional information relating to current correctional facility populations. It is anticipated that such information will be identified by county. Judicial officers are requested to review the updated lists that will be distributed from DMAPS via the Administrative Office and continually assess the need to further address the unique concerns related to COVID-19 as outlined above.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BHARATKUMAR G. THAKKER, *et al.*, Petitioners-Plaintiffs,	:	1:20-cv-480
v.	:	Hon. John E. Jones III
CLAIR DOLL, *in his official capacity as Warden of York County Prison, et al.*, Respondents-Defendants.	:	

MEMORANDUM AND ORDER

March 31, 2020

Pending before the Court is the Motion for Temporary Restraining Order and/or Preliminary Injunction filed by Petitioners-Plaintiffs Bharatkumar G. Thakker, Abedodun Adebomi Idowu, Courtney Stubbs, Rigoberto Gomez Hernandez, Rodolfo Augustin Juarez Juarez, Meiling Lin, Henry Pratt, Jean HErdy Christy Augustin, Mayowa Abayomi Oyediran, Agus Prajoga, Mansyur, Catalino Domingo Gomez Lopez and Dexter Anthony Hillocks (collectively "Petitioners").[1] (Doc. 7). The Motion has been briefed by the parties. (Docs. 12; 35; 46). The Court has received an *amicus* brief from a group of public health officials and human

[1] Petitioners' counsel advised that Mayansur and Agus Prajoga were released from immigration detention on March 27, 2020. (Doc. 33). Accordingly, their request for release from custody is moot.

rights experts, (Doc. 36), as well as a factual update and supplemental authority filed by Petitioners. (Docs. 33 and 34). Thus, this matter is ripe for our review.

For the reasons that follow, the temporary restraining order shall be granted and the Respondents shall be directed to immediately release Petitioners today on their own recognizance.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Petitioners are a diverse group of individuals from around the world who are being held in civil detention by Immigration and Customs Enforcement (ICE) at York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility, ("the Facilities"), while they await final disposition of their immigration cases.

Each Petitioner suffers from chronic medical conditions and faces an imminent risk of death or serious injury if exposed to COVID-19. Thakker is 65 years old and suffers from high blood pressure and cholesterol and has kidney failure. Further, he is currently suffering from symptoms similar to those of COVID-19. (Doc. 12, Ex. 3). Idowu, 57, had type II diabetes as well as high blood pressure and cholesterol. He is also currently sick. (Doc. 12, Ex. 4). Stubbs is 52 years old and is immunocompromised due to a kidney transplant he received 6 years ago. He has a heart stent and also suffers from type II diabetes and blood clots. (Doc. 12, Ex. 5). Hernandez, 52, suffers from diabetes, dental problems and

an ulcer. (Doc. 12, Ex. 7). Juarez, 21, suffers from diabetes and is currently sick with COVID-19 type symptoms, including trouble breathing. (Doc. 12, Ex. 8). Lin is 45 years old and suffers from chronic pain due to a forced sterilization, as well as chronic hepatitis B and liver disease. (Doc. 12, Ex. 9). Pratt, age 50, suffers from diabetes and high blood pressure. (Doc. 12, Ex. 10). Augustin, 34 years old, suffers from multiple conditions including diabetes, high blood pressure, nerve pain, limited mobility and pain from a prior bladder and intestine reconstruction, anemia, PTSD and depression. (Doc. 12, Ex. 11). Oyediran is a 40-year-old asthmatic suffering from high blood pressure and cholesterol. (Doc. 12, Ex. 12). Lopez, age 51, has contracted the flu four times while in ICE custody since November of 2018 and is concerned that he is especially susceptible to contracting COVID-19. (Doc. 12, Ex. 15). Finally, Hillocks, age 54, has been diagnosed with leukemia. He also suffers from diabetes, anemia, high blood pressure and cholesterol. (Doc. 12, Ex. 16).

Several Petitioners have reported symptoms similar to those of COVID-19. None have been quarantined, isolated, or treated. (Doc. 12 Exs. 3; 4; 8).

Named as Respondents are: Clair Doll, Warden of York County Prison; Angela Hoover, Warden of Clinton County Correctional Facility; Craig A. Lowe, Warden of Pike County Correctional Facility; Simona Flores-Lund, Field Office Director, ICE Enforcement and Removal Operations; Matthew Albence, Acting

Director of ICE; and Chad Wolf, Acting Secretary of the Department of Homeland Security.

II. DISCUSSION

In a matter of weeks, the novel coronavirus COVID-19 has rampaged across the globe, altering the landscape of everyday American life in ways previously unimaginable. Large portions of our economy have come to a standstill. Children have been forced to attend school remotely. Workers deemed 'non-essential' to our national infrastructure have been told to stay home. Indeed, we now live our lives by terms we had never heard of a month ago—we are "social distancing" and "flattening the curve" to combat a global pandemic[2] that has, as of the date of this writing, infected 719,700 people worldwide and killed more than 33,673.[3] Each day these statistics move exponentially higher. It is against this increasingly grim backdrop that we now consider the Petitioners' claims for habeas relief.

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[2] The World Health Organization ("WHO") officially declared COVID-19 as global pandemic on March 11, 2020. *See WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION, (March 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[3] *See Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION, https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (last accessed March 31, 2020).

A. Threshold Questions: Standing and the Propriety of a Habeas Petition

Respondents raise two threshold challenges to the Petitioners' Motion. First, Respondents contend that Petitioners lack standing because they have not alleged an injury in fact. Next, Respondents submit that Petitioners cannot challenge their conditions of confinement through a habeas petition. Taking the latter challenge first, we note that federal courts, including the Third Circuit, have condoned conditions of confinement challenges through habeas. *See Aamer v. Obama*, 742 F.3d 1023, 1032 (D.C. Cir. 2014); *see also Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242-44 (3d Cir. 2005); *see also Ali v. Gibson*, 572 F.2d 971, 975 n.8 (3d Cir. 1978). Accordingly, we find that Petitioners have appropriately invoked this court's jurisdiction through a 28 U.S.C. § 2241 petition for writ of habeas corpus.

Respondents' standing challenge can also be easily resolved. Respondents essentially contend that because the Petitioners themselves do not have COVID-19 and their likelihood of contracting the illness is speculative, Petitioners cannot establish that they would suffer a concrete, non-hypothetical injury absent a temporary restraining order. However, as the Supreme Court observed in *Helling v. McKinney*, 509 U.S. 25, 33 (1993), "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 COVID-19 pandemic is moving rapidly and expansively throughout Pennsylvania. Vast regions of the

Commonwealth are now under stay-at-home orders, and social distancing the norm to prevent the spread of this deadly virus. And yet, Respondents would have us offer no substantial relief to Petitioners until the pandemic erupts in our prisons. We reject this notion. Since "[a] remedy for unsafe conditions need not await a tragic event," it is evident that the Petitioners have standing in this matter. *Id.*

B. Temporary Restraining Order

i. Legal Standard

Courts apply one standard when considering whether to issue interim injunctive relief, regardless of whether a petitioner requests a temporary restraining order ("TRO") or preliminary injunction. *See Ellakkany v. Common Pleas Court of Montgomery Cnty.*, 658 Fed.Appx. 25, 27 (3d Cir. July 27, 2016) (applying one standard to a motion for both a TRO and preliminary injunction). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Apple Inc. v. Samsung Electronics Co.*, 695 F.3d 1370, 1373–74 (Fed. Cir. 2012) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008)).

The Supreme Court has emphasized that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the

movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Apotex Inc. v. U.S. Food and Drug Admin.*, 508 F.Supp.2d 78, 82 (D.D.C. 2007) ("Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly."). "Awarding preliminary relief, therefore, is only appropriate 'upon a clear showing that the plaintiff is entitled to such relief.'" *Groupe SEC USA, Inc. v. Euro–Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter*, 555 U.S. at 22).

ii. Irreparable Harm

To succeed on their Motion, Petitioners "must demonstrate. . .the probability of irreparable harm if relief is not granted." *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) (internal quotations omitted). "In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial". . .the temporary restraining order. . ."must be the only way of protecting the plaintiff from harm." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). The moving party must demonstrate that it is likely to suffer "actual or imminent harm which cannot otherwise be compensated by money damages," or it "fail[s] to sustain its substantial burden of showing irreparable harm." *Frank's GMC*, 847 F.2d at 103. The mere risk of injury is insufficient. The moving party must establish that the harm is imminent and

probable. *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997). Additionally, "a showing of irreparable harm is insufficient if the harm will occur only in the indefinite future. Rather, the moving party must make a clear showing of immediate irreparable harm." *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992).

The Petitioners' claim is rooted in imminent, irreparable harm. Petitioners face the inexorable progression of a global pandemic creeping across our nation—a pandemic to which they are particularly vulnerable due to age and underlying medical conditions. At this point, it is not a matter of *if* COVID-19 will enter Pennsylvania prisons, but *when* it is finally detected therein. It is not unlikely that COVID-19 is already present in some county prisons—we have before us declarations that portions of the Facilities have been put under ineffective quarantines due to the presence of symptoms similar to COVID-19 among the inmate population.[4] Indeed, we also have reports that a correctional officer at Pike has already tested positive for COVID-19. (Doc. 33 at 1).

Public health officials now acknowledge that there is little that can be done to stop the spread of COVID-19 absent effective quarantines and social distancing procedures. But Petitioners are unable to keep socially distant while detained by

[4] We also have allegations that prison guards have shown symptoms while interacting with inmates.

ICE and cannot keep the detention facilities sufficiently clean to combat the spread of the virus. Based upon the nature of the virus, the allegations of current conditions in the prisons, and Petitioners' specific medical concerns, detailed below, we therefore find that Petitioners face a very real risk of serious, lasting illness or death. There can be no injury more irreparable.

a. Seriousness of the virus

COVID-19 is a type of highly contagious novel coronavirus that is thought to be "spreading easily and sustainably in the community."[5] Experts believe that it can live on some surfaces for up to 72 hours after contact with an infected person.[6] A simple sneeze or brush of the face without washing your hands is now known to easily spread the virus, which generally causes fever, cough, and shortness of breath. (*How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL; Doc. 12 at 15).

In most people, these symptoms are relatively mild. (Doc. 12 at 15). However, the effects of COVID-19 can be drastically more severe in older individuals or those with medical conditions. (Doc.10, Ex. 2). In some cases, COVID-19 can cause serious, potentially permanent, damage to lung tissue, and

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[5] *How Coronavirus Spreads*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html (last accessed March 31, 2020).

[6] *New Coronavirus Stable for Hours on Surfaces*, NATIONAL INSTITUTE OF HEALTH (March 17, 2020), https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces.

can require extensive use of a ventilator. (*Id.*). The virus can also place greater strain on the heart muscle and can cause damage to the immune system and kidneys. (*Id.*). These long-term consequences and the likelihood of fatality increase in those of advanced age and those with other medical conditions, like the Petitioners here. (*Id.*). For those in high-risk categories, the fatality rate is thought to be approximately fifteen percent. (*Id.*).

There is currently no vaccine for COVID-19, nor are there known, clinically-tested therapeutic treatments. (*Id.*). As a result, public health officials have touted the importance of maintaining physical separation of at least six feet between individuals, now commonly known as "social distancing." (*Id.*). Experts have also emphasized that proper hand hygiene with soap and water is vital to stop the spread. (*Id.*). Beyond these measures, health professionals can do little to combat this highly infectious disease. (*Id.*).

b. Prevalence of the virus

The United States now records more confirmed cases of COVID-19 than any other country in the world.[7] As of the date of this writing, there were in excess of

[7] Nicole Chavez, Holly Yan, and Madeline Holcombe, *US has more Known Cases of Coronavirus than any Other Country*, CNN, https://www.cnn.com/2020/03/26/health/coronavirus-thousand-deaths-thursday/index.html (last accessed March 31, 2020).

164,458 cases of the virus in America, with 3,167 fatalities.[8] This represented an increase of 2,651 cases in only *twenty-four hours*. (*Id*).

Indeed, Pennsylvania currently reports 4,087 confirmed cases of COVID-19, with 48 fatalities.[9] Troublingly, that number represents nearly double the confirmed cases reported a mere four days ago—on March 27, 2020, Pennsylvania reported a total of 2,218 cases, with 22 deaths. *Id.* The three counties which house the Facilities are located in York County, Pike County, and Clinton County. They currently report a total of 93 cases: 54 in York County and 39 in Pike County.[10] Clinton County has not yet reported any confirmed cases of COVID-19. *Id.* As of March 27, 2020, the Governor of Pennsylvania placed both York County and Pike County under a stay-at-home order in an attempt to slow the spread of the virus.[11]

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[8] Niko Kommenda, Pablo Gutiérrez, and Juweek Adolphe, *Coronavirus Map of the US: Latest Cases State by State*, THE GUARDIAN, https://www.theguardian.com/world/ng-interactive/2020/mar/27/coronavirus-map-of-the-us-latest-cases-state-by-state (last accessed March 31, 2020).

[9] *Coronavirus (COVID-19): Pennsylvania Overview,* PENNSYLVANIA DEPARTMENT OF HEALTH, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed March 31, 2020).

[10] *Coronavirus (COVID-19): Pennsylvania Overview,* PENNSYLVANIA DEPARTMENT OF HEALTH, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last accessed March 31, 2020).

[11] *Governor Wolf and Health Secretary Expand 'Stay at Home' Order to Nine More Counties to Mitigate Spread of COVID-19, Counties Now Total 19*, WEBSITE OF THE GOVERNOR OF PENNSYLVANIA, https://www.governor.pa.gov/newsroom/governor-wolf-and-health-secretary-expand-stay-at-home-order-to-nine-more-counties-to-mitigate-spread-of-covid-19-counties-now-total-19/ (last accessed March 31, 2020).

Average Pennsylvanians in these counties can no longer leave their homes for anything but essential trips to gather supplies, medications, or to perform work essential to our national infrastructure—COVID-19 spreads so easily and rapidly that public health officials have determined that social isolation is necessary to keep our hospital systems from becoming overwhelmed. *Id*. The same rationale applies, perhaps even more so, to immigration detention facilities housing high-risk populations.

c. Unique nature of detention facilities

Various public health officials have warned that the nature of ICE detention facilities makes them uniquely vulnerable to the rapid spread of highly contagious diseases like COVID-19. COVID-19 is transmitted primarily through "close contact via respiratory droplets produced when an infected person coughs or sneezes." (Doc. 12 at 18; Doc. 12, Ex. 1). Immigration detention facilities are particularly at risk for such close contact because they are considered "congregate settings, or places where people live or sleep in close proximity." (Doc. 12, Ex. 1). Such conditions provide "ideal incubation conditions" for COVID-19. (*Id.*).

Within the past few weeks, two medical experts for the Department of Homeland Security authored a letter to Congress warning of the unique dangers COVID-19 poses to ICE detention facilities. Specifically, they described the current ICE detention environment as a "tinderbox" in which:

> [a]s local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community. . .To be more explicit, a detention center with a rapid outbreak 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 [hospitals] fill up and overwhelm the ventilator resources, those ventilators are unavailable when the infection inevitably is carried by staff to the community and are also unavailable for all the usual critical illnesses (heart attacks, trauma, etc).[12]

The experts contrasted this scenario with a situation in which ICE detainees were released from "high risk congregate settings," allowing the "volume of patients sent to community hospitals to level out," which they believed would provide much more favorable outcomes, both for the detainees and the surrounding communities. *Id*. "At a minimum," these health experts urged, the government "should consider releasing all detainees in high risk medical groups such as older people and those with chronic diseases." *Id.* ICE detention facilities, they warned, are so poorly equipped to allow safe social distancing practices and are unlikely to have the ability to provide adequate medical care in the case of a COVID-19 outbreak. *Id.* The consequences, they maintain, could be disastrous. *Id*.

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[12] Catherine E. Shoichet, *Doctors warn of 'tinderbox scenario' if coronavirus spreads in ICE detention*, CNN, https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/ (last accessed March 28, 2020).

Indeed, we have before us declarations stating that such high-risk conditions are present in the detention facilities at issue in this case. Both Petitioners and lawyers familiar with the ICE facilities at issue here have attested to overcrowding that makes social distancing impossible at all three facilities. At the York facility, for example, inmates are housed in dormitory-style conditions, in which 60 people reside in each housing block. (Doc. 12, Ex. 18). That space is used for both eating and sleeping. (*Id.*). Petitioners report that not even the medical staff wear gloves when in contact with inmates. (Doc. 12, Ex. 11). Detainees must eat their meals four-to-a-table, with approximately three feet of space between individuals. (*Id.*).

At Clinton, inmate bunks are often less than two feet apart, and inmate declarations show that it is difficult to keep more than a two feet distance between inmates, let alone the recommended six feet. (Doc. 12, Ex. 10). The laundry facilities at Clinton are also reported to be chronically broken, preventing detainees from keeping their clothes and bedding clean. (*Id.*). Indeed, for a total of 72 men, Clinton provides only four sets of sinks and showers. (*Id.*). The Facility is also reported to have bugs mice, and rats, which add to the unsanitary conditions experienced by detainees. (*Id.*).

At Pike, detainees share eight-by-ten or twelve foot cells with two other men. (Doc. 12, Ex. 13). Those cells also contain a sink and a shower. (*Id*). Some men at Pike report being forced to share cells with other individuals currently exhibiting

COVID-19 symptoms or report exhibiting symptoms themselves while housed with other inmates. (Doc. 12, Exs. 3; 4; 8). Inmates at Pike are also usually forced to remain within two feet of other individuals, even while in the common areas of the facility. (Doc. 12, Ex. 4). They are also required to buy their own soap, are not given hand sanitizer, and are forced to share cleaning supplies with an entire block of cells. (Doc. 12, Exs. 3; 13).

ICE guidance states that these types of risks are mitigated by quarantining detainees with symptoms and by housing those with a higher risk of exposure separately from the rest of the detainee population. (Doc. 12, Ex. 1). The Respondents further proffer that the Facilities are practicing "cohorting," an "infection prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic." (Doc. 35 at 12). This practice is meant to last for fourteen days, the duration of the virus's incubation period. The Petitioner's declarations, however, show that these practices are not being followed. At least two Petitioners aver that they are experiencing symptoms and have not been isolated from other individuals. (Doc. 12, Exs. 3; 4; 8). Furthermore, all Petitioners have a higher risk of exposure, and none have been moved to separate housing. Indeed, it does not even seem that ICE is providing detainees with proper information on how they can combat the virus on their own. (Doc. 12, Ex. 3). Troublingly, some facilities seem to have shut off detainee access

to news outlets, thereby preventing the detention facility's population from informing themselves on best practices to prevent transmission. (Doc. 12, Ex. 5).

d. Petitioners are at uniquely high risk for contracting COVID-19

Not only are the Facilities themselves uniquely suited to rapidly spread COVID-19, but also Petitioners themselves are members of high-risk groups that are likely to feel the effects of the virus more keenly than the average individual.[13] Each of the Petitioners before us has an underlying medical condition that heightens their risk of serious COVID-19 effects, among them asthma, diabetes, heart conditions, hepatitis, and immunocompromising conditions such as leukemia and organ transplants.

e. The threat to high-risk individuals posed by COVID-19 constitutes irreparable injury

Various courts across the nation have found that COVID-19, coupled with the lack of hygiene and overcrowding present in detention facilities, will pose a greatly heightened risk to inmates. *See Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir.

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[13] *People at Risk for Serious Illness from COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (Mar. 20, 2020), https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html ("Older people and people of all ages with severe underlying health conditions—like heart disease, lung disease and diabetes, for example—seem to be at higher risk of developing serious COVID-19 illness"); *Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (Mar. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html (stating that "moderate to severe asthma," "heart disease," "obesity," and "diabetes" are conditions that trigger higher risk of severe illness from COVID-19).

Mar. 23, 2020) ("[I]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court."); *United States v. Stephens*, No. 15 Cr. 95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) ("[I]nmates may be at a heightened risk of contracting COVID-19 should an outbreak develop."); *United States v. Garlock*, 18 Cr. 418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) ("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. Notably, 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." (citations omitted)).

Courts have also acknowledged the particular risks facing older inmates and those with underlying medical conditions. *See United States v. Martin*, No. 19 Cr. 140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) ("[T]he Due Process Clauses of the Fifth or Fourteenth Amendments, for federal and state pretrial

detainees, respectively, may well be implicated if defendants awaiting trial can demonstrate that they are being subjected to conditions of confinement that would subject them to exposure to serious (potentially fatal, if the detainee is elderly and with underlying medical complications) illness."). At least one court has ordered the release on bail of an inmate facing extradition on the basis of the risk the pandemic poses to his health. *Matter of Extradition of Toledo Manrique*, No. 19 MJ 71055, 2020 WL 1307109, at *1 (N.D. Cal. Mar. 19, 2020) ("These are extraordinary times. The novel coronavirus that began in Wuhan, China, is now a pandemic. The nine counties in the San Francisco Bay Area have imposed shelter-in-place orders in an effort to slow the spread of the contagion. This Court has temporarily halted jury trials, even in criminal cases, and barred the public from courthouses. Against this background, Alejandro Toledo has moved for release, arguing that at 74 years old he is at risk of serious illness or death if he remains in custody. The Court is persuaded. The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.").

Indeed, courts have even specifically held that COVID-19 constitutes an irreparable harm that supports the grant of a TRO. *See Vasif "Vincent" Basank, et al v. Decker*, 2020 WL 1481503 at *4-5 (S.D.N.Y. March 26, 2020) ("The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO"); *Castillo v.*

Barr, CV-20-00605-TJH (C.D. Cal. 2020) (granting a TRO to immigration detainees due to the COVID-19 pandemic); *see also Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995) (finding irreparable harm "premised ... upon [the district court's] finding that [Petitioner] was subject to risk of injury, infection, and humiliation"); *Mayer v. Wing*, 922 F. Supp. 902, 909 (S.D.N.Y. 1996) ("[T]he deprivation of life-sustaining medical services. . .certainly constitutes irreparable harm.").

The painful new reality is that we are constantly at risk of contracting a deadly virus and are experiencing previously unimagined safety measures to stop its spread. This virus spares no demographic or race and is ruthless in its assault. The precautions being adopted to stop it should apply equally, if not more so, to the most vulnerable among us. Petitioners have shown that adequate measures are not in place and cannot be taken to protect them from COVID-19 in the detention facilities, and that catastrophic results may ensue, both to Petitioners and to the communities surrounding the Facilities. We therefore find that the likely irreparable injury to Petitioners, as high-risk individuals, satisfies the first element of our TRO analysis.

iii. Likelihood of Success on the Merits

Petitioners argue that their continued incarceration in ICE detention facilities exposes them to serious risks associated with COVID-19 which violate their due

process rights. (Doc. 12 at 27). We find that Petitioners are likely to succeed on the merits of their claim.[14]

To bring a Fifth Amendment due process claim, Petitioners must show that their conditions of confinement "amount[ed] to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). "To determine whether challenged conditions of confinement amount to punishment, this Court determines whether a condition of confinement is reasonably related to a legitimate governmental objective; if it is not, we may infer 'that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees.'" *E. D. v. Sharkey*, 928 F.3d 299, 307 (3d Cir. 2019) (quoting *Hubbard v. Taylor*, 538 F.3d 229, 232 (3d Cir. 2008)). In other words, we must ascertain whether the conditions serve a legitimate purpose and whether the conditions are rationally related to that legitimate purpose. *Hubbard* 538 F.3d at 232.

Considering the Facility conditions previously discussed, we can see no rational relationship between a legitimate government objective and keeping Petitioners detained in unsanitary, tightly-packed environments—doing so would

[14] The Respondents argue that Petitioners do not have a legitimate due process claim because they have no "liberty or property interest" in a purely "discretionary grant of humanitarian parole." (Doc. 35 at 28). We disagree. "Unsanitary, unsafe, or otherwise inadequate conditions" are sufficient to state a Due Process Claim and we shall thus proceed with our analysis. *Petty v. Nutter*, No. 15-3430, 2016 WL 7018538, at *2 (E.D. Pa. Nov. 30, 2016); *Grohs v. Lanigan*, No. 16-7083, 2019 WL 1500621, at *11 (D.N.J. Apr. 5, 2019) ("extreme heat combined with lack of potable water, as well as generally unsanitary conditions" are sufficient to state a conditions-of-confinement claim).

constitute a punishment to Petitioners. Despite the Respondents' protests to the contrary, we need not find that the Facilities had the "express intent" to punish Petitioners with the conditions alleged. (Doc. 35 at 37). Instead we ask whether the conditions are rationally related to a legitimate government objective. *Hubbard* 538 F.3d at 232. Here, they are not.

The Respondents maintain that "preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective." (Doc. 35 at 38). They cite a great deal of authority supporting this point, and we do not disagree. (*Id*.). However, we cannot find that unsanitary conditions, which include overcrowding and a high risk of COVID-19 transmission, are rationally related to that legitimate government objective.

Social distancing and proper hygiene are the *only* effective means by which we can stop the spread of COVID-19. Petitioners have shown that, despite their best efforts, they cannot practice these effective preventative measures in the Facilities. Considering, therefore, the grave consequences that will result from an outbreak of COVID-19, particularly to the high-risk Petitioners in this case, we cannot countenance physical detention in such tightly-confined, unhygienic spaces.

The global COVID-19 pandemic and the ensuing public health crisis now faced by American society have forced us all to find new ways of operating that prevent virus transmission to the greatest extent possible. We expect no less of ICE.

We note that ICE has a plethora of means *other than* physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and routine check-ins. Physical detention itself will place a burden on community healthcare systems and will needlessly endanger Petitioners, prison employees, and the greater community. We cannot see the rational basis of such a risk.[15]

We therefore find that Petitioners are likely to succeed on the merits of their due process claim that their conditions of confinement expose them "to serious risks associated with COVID-19." (Doc. 12 at 35).

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[15] Moreover, not only have Petitioners established a likelihood of success on the merits on their Fifth Amendment claim, but, in fact, they have also demonstrated that their claim is likely to be successful under the more exacting Eighth Amendment standards as well. To succeed in proving that conditions of confinement violate the Eighth Amendment, a plaintiff must show: (1) the deprivation alleged must objectively be "sufficiently serious," and (2) the "prison official must have a sufficiently culpable state of mind," such as deliberate indifference to the prisoner's health or safety. See Thomas v. Tice, 948 F.3d 133, 138 (3d Cir. 2020) (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)). COVID-19 has been shown to spread in the matter of a single day and would well prove deadly for Petitioners. Such a risk is objectively "sufficiently serious." Furthermore, the Supreme Court has recognized authorities can be "deliberately indifferent to an inmate's current health problems" where they "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). There is no requirement that Petitioners show that "they actually suffered from serious injuries" to succeed on this claim. *See Helling*, 509 U.S. at 33. Instead, if Petitioners can show that the conditions "pose an unreasonable risk of serious damage to their future health," they may succeed on their claim. *Helling*, 509 U.S.at 35) (alteration omitted). The current measures undertaken by ICE, including "cohorting" detainees, are patently ineffective in preventing the spread of COVID-19. Indeed, we now have reports of a positive test amongst the employees at Pike County prison, thereby greatly increasing the likelihood that COVID-19 is present in the prison population.

iv. Balancing of the Equities and Public Interest

The equities at issue and public interest weigh heavily in Petitioners' favor. First, and as described, Petitioners face irreparable harm to both their constitutional rights and their health. Second, we find that the potential harm to the Respondents is limited. While we understand and agree that preventing Petitioners from absconding and ensuring their presence at immigration proceedings is important, we note that Petitioners' failure to appear at future immigration proceedings would carry grave consequences of which Petitioners are surely aware. Further, it is our view that the risk of absconding is low, given the current restricted state of travel in the United States and the world during the COVID-19 pandemic.

Finally, the public interest favors Petitioners' release. As mentioned, Petitioners are being detained for civil violations of this country's immigration laws. Given the highly unusual and unique circumstances posed by the COVID-19 pandemic and ensuing crisis, "the continued detention of aging or ill civil detainees does not serve the public's interest." *Basank,* 2020 WL 1481503, *6; *see also Fraihat v. U.S. Imm. and Customs Enforcement*, 5:19 Civ. 1546, ECF No. 81-11 (C.D. Cal. Mar. 24, 2020) (opining that "the design and operation of detention settings promotes the spread of communicable diseases such as COVID-19"); *Castillo v. Barr*, CV-20-00605-TJH (C.D. Cal. 2020). Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest, and

the release of these fragile Petitioners from confinement is one step further in a positive direction.

III. CONCLUSION

In times such as these, we must acknowledge that the *status quo* of a mere few weeks ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly. We now face a global pandemic in which the actions of each individual can have a drastic impact on an entire community. The choices we now make must reflect this new reality.

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. Our Constitution and laws apply equally to the most vulnerable among us, particularly when matters of public health are at issue. This is true even for those who have lost a measure of their freedom. If we are to remain the civilized society we hold ourselves out to be, it would be heartless and inhumane not to recognize Petitioners' plight. And so we will act.

Based on the foregoing, we shall grant the requested temporary restraining order. Respondents, and the York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility shall be ordered to immediately

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release the Petitioners **today** on their own recognizance without fail.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Petitioners' Motion for Temporary Restraining Order, (Doc. 7), is **GRANTED**.
2. Respondents, and the York County Prison, Clinton County Correctional Facility and Pike County Correctional Facility **SHALL IMMEDIATELY RELEASE** the Petitioners **TODAY** on their own recognizance.
3. This TRO will expire on April 13, 2020 at 5:00 p.m.
4. No later than noon on April 7, 2020, the Respondents shall **SHOW CAUSE** why the TRO should not be converted into a preliminary injunction.
5. The Petitioners may file a response before the opening of business on April 10, 2020.

s/ John E. Jones III

John E. Jones III
United States District Judge