IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, CENTRAL DIVISION

FRAZIER, *et al.*	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
GRAVES, *et al.*	)	**Judge Kristine G. Baker**
	)	
Defendants.	)	**Case No. 4:20cv434**
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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Plaintiffs respectfully submit this response memorandum in opposition to State Defendants' Motion to Dismiss Plaintiffs' Amended Complaint.

INTRODUCTION

Arkansas has allowed more of its incarcerated population to contract COVID-19 than the prison systems of Mississippi, Alabama, New York, Pennsylvania, Delaware, Massachusetts, Washington, Minnesota, Iowa, New Mexico, Hawaii, Vermont, West Virginia, Utah, Alaska, Wyoming, Nevada, Rhode Island, Montana, North Dakota, Nebraska, South Dakota, Maine, and New Hampshire—*combined.* [1] The Ouachita River Unit alone has had more incarcerated people infected than the prison systems of 32 states. [2] The COVID-19 infection rate within the Arkansas incarcerated population is fifty percent higher than the second worst state prison system and nearly

[1] *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons?utm_medium=email&utm_campaign=share-tools&utm_source=email&utm_content=post-top (last visited Sept. 10, 2020).

[2] *See id.*; Ark. Dep't of Health, *Congregate Settings Report, 9.3.2020*, (Sept. 3, 2020), https://www.healthy.arkansas.gov/images/uploads/pdf/Congregate_Settings_9.3.20.pdf.

twice as high as the third worst.[3] And people incarcerated in Arkansas's Department of Corrections ("DOC") facilities have died from COVID-19 at a higher rate than the incarcerated population in every state except New Jersey, a state where the COVID death rate is seven times higher than in Arkansas.[4] In a country with 50 different state correctional systems, Arkansas's mismanagement of the COVID-19 pandemic has been singular, and it has been staggering.

The reasons for COVID-19's unprecedented spread in Arkansas correctional facilities are not hard to identify. COVID-19 is an airborne virus, yet prison staff continuously fail to wear masks or wear them improperly. People incarcerated in DOC facilities received DOC-issued masks, but those masks were so plainly defective that wardens and deputy wardens brought their own masks from home and hid them underneath the DOC-issued ones. Guards who test positive report to work through the same secure entrance as uninfected DOC employees. Incarcerated people continue to work, eat, sleep, and live in spaces where social distancing is impossible. Some incarcerated people are forced to attend classes or work shoulder-to-shoulder with scores of other incarcerated people. DOC facilities mix incarcerated people who test positive for the virus with those who test negative. Medical care is difficult, and sometimes impossible, to come by. Incarcerated persons' medical needs are often ignored, and some like Derick Coley—who test positive—have been left to die in administrative segregation without medical attention. Efforts at cleaning and disinfecting may have increased in May 2020, but have largely reverted to pre-pandemic levels.

[3] *See id.*

[4] *Death rates from coronavirus (COVID-19) in the United States as of September 7, 2020, by state*, Statista, https://www.statista.com/statistics/1109011/coronavirus-covid19-death-rates-us-by-state/ (last visited Sept. 10, 2020).

State Defendants have been on notice of these continued problems since at least this summer—after Plaintiffs filed suit, after a preliminary injunction hearing, and after exposés from the New Yorker, NPR, The Nation, and Mother Jones. Yet the problems persist. Because of Defendants' deliberate indifference, at least 5,748 incarcerated people and 399 staff members have been infected by COVID-19, and at least 39 incarcerated people have died. The Defendants' motion to dismiss tries to repackage their failure and indifference as diligence and success. But that effort is unavailing. Whether Plaintiffs will adduce facts sufficient to establish the Defendants' liability is a question for trial. For the purposes of this motion to dismiss, the only relevant question is whether Plaintiffs have adequately pled claims for relief under the Eighth Amendment, habeas corpus, and the ADA. Because Plaintiffs have done so, this Court should reject the Defendants' motion to dismiss.

ARGUMENT

I. STATE DEFENDANTS ARE NOT IMMUNE FROM PLAINTIFFS' CLAIMS

A. THE STATE DEFENDANTS ARE NOT IMMUNE FROM PLAINTIFFS' CLAIMS FOR DECLARATORY RELIEF.

State Defendants' argument that they are immune from Plaintiffs' claims for declaratory relief are without merit. As explained below, Plaintiffs have properly asserted prospective claims for declaratory relief regarding State Defendants' policies and practices concerning COVID-19.

As State Defendants note in their brief, Plaintiffs seek an order "declaring Defendants/Respondents policies and practices regarding COVID-19 violate the Eighth Amendment to the United States Constitution." Am. Compl (Dkt. No. 84) at 91 (Prayer for Relief). The Amended Complaint details the ongoing policies and practices the Plaintiffs seek to be declared void for violating their constitutional and statutory rights. For example, Plaintiffs explain that "DOC rules continue to restrict access to [] crucial cleaning supplies, even in the midst of the

COVID-19 pandemic." *Id.* ¶ 164. A declaratory judgment would recognize Plaintiffs' right to be free from such ongoing illegal policies and practices regarding COVID-19 *prospectively*, regardless of whether an injunction is ultimately issued. For this reason, this court "has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 468 (1974) (citations omitted).

At times, Plaintiffs use past participles to describe ongoing policies and practices Plaintiffs challenge in their Amended Complaint. For instance, Plaintiffs explain how Defendants "have permitted" staff members who test positive to report to work. Dkt. No. 84 at ¶ 176. State Defendants erroneously argue that the use of this verb form indicates that Plaintiffs' claims are limited to Defendants' past actions. Defs' Br. in Supp. of Mot. to Dismiss (Dkt. No. 96) at 12. In so arguing, Defendants ignore the fact that "past participles [] are routinely used as adjectives to describe the present state of a thing." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1720 (2017). Whether described in the present tense or by use of past participles, Plaintiffs' Amended Complaint details ongoing policies and practices that should be declared unlawful and, therefore, void.

In their Amended Complaint, Plaintiffs clearly connect State Defendants' current policies and practices to the ongoing and impermissible risk of Plaintiffs contracting and succumbing to COVID-19. Plaintiffs explain that "a substantial part of the events, acts, and/or omissions giving rise to this action occurred, *and continue to occur*[.]" Dkt. No. 84 ¶ 17 (emphasis added). Importantly, Plaintiffs allege that "[b]ecause of inadequate COVID-19 prevention policies and ineffective implementation of policies that exist, people in DOC facilities cannot practice social distancing, control their exposure to large groups, practice increased hygiene, wear adequate

protective clothing, obtain specific products for cleaning or laundry, or avoid high-touch surfaces." *Id.* ¶ 6.

State Defendants erroneously assert that *Justice Network, Inc., v. Craighead Cty.*, 931 F.3d 753 (8th Cir. 2019) stands for the sweeping proposition that a declaratory judgment regarding a challenged act "initially implemented in the past" would be impermissibly retrospective. Dkt. 96, 13. It does not. The plaintiff in *Justice Network, Inc.*, however, was a uniquely situated private probation service provider challenging two judges' "case-by-case" cancellation of various probation fees that would have otherwise gone to the plaintiff. 931 F.3d at 758. The court in *Justice Network, Inc.* merely held that the facts presented in that case indicated that the plaintiff was seeking retrospective declaratory relief. 931 F.3d at 764 ("Having reviewed the complaint, we conclude that TJN's request for declaratory relief is *retrospective*; as a result, TJN is not entitled to such relief under § 1983. Although [TJN] ... refers to the judges' actions as 'policies,' essentially, ... [it] is asking the court to *invalidate* the actions of [Judges Boling and Fowler].") (emphases in original). Here, by contrast, Plaintiffs are seeking prospective declaratory relief against State Defendants' conduct that continues to expose them and thousands of other incarcerated people to a substantial risk of serious illness or death.

State Defendants' argument that ongoing policies implemented in the past cannot be subject to a declaratory judgment would limit declaratory judgments to cases where state officials announce they intend to implement policies or practices in the future, and would require litigation before the policies or practices even exist. As a result, incarcerated people harmed by ongoing unconstitutional policies and practices would have no avenue for seeking a declaration defining their legal rights to be free from said harms. This is simply not the law.

There are multiple cases in which incarcerated people like Plaintiffs have been allowed to seek a declaratory judgment concerning ongoing policies and practices—initially implemented in the past—that violate their constitutional rights. *See, e.g., Holt v. Sarver*, 442 F.2d 304, 304-305 (8th Cir. 1971) (affirming a "declaratory judgment to the effect that the respondents' acts, policies and practices violate [the incarcerated] petitioners' rights under the Eighth, Thirteenth and Fourteenth Amendments", including "the right to be fed, housed, and clothed so as not to be subjected to loss of health or life."); *Berger v. Clark*, No. 5:17CV00258 BRW/JTR, 2018 WL 10456565, at *1 (E.D. Ark. Jan. 4, 2018), *report and recommendation adopted,* No. 517CV00258BRWJTR, 2018 WL 10456720 (E.D. Ark. Jan. 9, 2018) (allowing a First Amendment claim for declaratory relief against the Director of the Arkansas Department of Corrections to proceed in a case challenging restrictions on incarcerate people's correspondence); *Nichols v. Nix*, 810 F. Supp. 1448, 1466-67 (S.D. Iowa 1993), *aff'd,* 16 F.3d 1228 (Table) (8th Cir. 1994) (unpublished opinion) (issuing a declaratory judgment that a regulation withholding disruptive materials from incarcerated people was invalid as applied to the incarcerated plaintiff); *Lyon v. Grossheim*, 803 F. Supp. 1538, 1556 (S.D. Iowa 1992) (same). These cases are similar to the instant case in that they all involve incarcerated plaintiffs seeking declaratory relief to void or nullify ongoing policies and practices concerning the conditions of their incarceration.

Accordingly, State Defendants are not entitled to immunity from Plaintiffs' claims for declaratory relief.

B. DEFENDANTS ROMERO AND BRADSHAW DO NOT HAVE SOVEREIGN IMMUNITY FROM PLAINTIFFS' CLAIMS

Defendants Jose Romero and Jerry Bradshaw have ample connection to the policies and practices challenged in the Amended Complaint to make them proper defendants in this matter, and to defeat their claims of sovereign immunity from this suit.

In considering the propriety of an official immunity suit, the touchstone is whether "there is some connection between the officials and enforcement of the challenged state law." *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015) (quotation marks omitted). If there is, the "Eleventh Amendment does not preclude jurisdiction over" the suit. *Id.* "A plaintiff need not mention *Ex parte Young* by name to properly invoke the exception, and courts focus instead on the factual allegations in the complaint." *Hanson v. Parisien*, No. 3:19-CV-00270, 2020 WL 4117997, at *4 (D.N.D. July 20, 2020); *see also Minnesota, ex rel. Hatch v. Hoeven*, 331 F. Supp. 2d 1074, 1079 (D.N.D. 2004) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.").

Importantly, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Such claims against individuals in their official capacity require proof that a policy or custom of the entity violated the plaintiff's rights. *Gorman v. Bartch*, 152 F.3d 907, 914 (8th Cir.1998). "[W]hen officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation." *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

i. Defendant Romero Is Sufficiently Connected to the Challenged Policies and Practices to Defeat His Claim of Immunity.

Plaintiffs' allegations and the public record demonstrate that Defendant Romero, his immediate predecessor, Nathaniel Smith, and the Department of Health (ADH) under Romero and Smith's auspices have created, and currently apply and interpret, various policies pertaining to COVID-19, which have been adopted and implemented in DOC facilities. These policies are challenged by Plaintiffs in the Amended Complaint. Most notably, ADH promulgated "guidance"

to state correctional officials regarding how to respond to the threat of the COVID-19 pandemic to incarcerated people. Dkt. No. 84 ¶ 149. Various State Defendants have admitted to taking certain measures regarding COVID-19 "[a]t the direction of the Arkansas Department of Health." Dkt. No. 36 at 5. The collaboration between state correctional officials and ADH has been aptly described as a "joint effort [that] is ongoing." *Id*. at 2. This evident collaboration flatly contradicts Defendant Romero's false claim that he has no connection to the challenged policies and practices.

Defendant Romero and ADH's specific connections to the challenged policies and practices are many. For instance, Plaintiffs allege that incarcerated people "who test positive are kept in substandard conditions in punitive isolation and areas of facilities that are not designed for housing—in many cases without access to running water or a restroom." Dkt. No. 84 ¶ 9. According to ADH, "[t]he Secretary of Health [i.e., Defendant Romero and his predecessor in office], in consultation with the Governor, has *sole* authority over all instances of quarantine [and] isolation . . . throughout Arkansas, as necessary and appropriate to control disease in the state of Arkansas." Ark. Dept. of Health, *Face Coverings Directive*, (July 18, 2020), modified Aug. 26, 2020), https://www.healthy.arkansas.gov/images/uploads/pdf/Face_Covering_DirectiveAmendFinal8.26.20.pdf (emphasis added). Given his "sole authority" over quarantine and isolation, Plaintiffs would not be able to obtain the relief they seek, which includes an order ensuring that incarcerated people who test positive are properly quarantined (*see* Dkt. No. 84 at 92 (Prayer for Relief)), unless Defendant Romero remains a defendant in this suit.

Further, Plaintiffs allege that "[i]ncarcerated people who presented symptoms of COVID-19 infection, or who were exposed to infected individuals, have been denied testing." Dkt. No. 84 ¶ 155. This allegation directly implicates Defendant Romero because his agency, ADH, along with Defendant Wellpath, decides which incarcerated people get tested for COVID-19. Ex. 1, Prelim.

Inj. Hr'g Tr., 237:23-25. Specifically, ADH does this by establishing a threshold (i.e., policy) that governs whether a test should be administered. *Id.* at 199:7-15. As noted by this Court, "[State Defendants] maintain that ADH along with Wellpath are determining whether COVID-19 testing should be conducted." Order Denying Prelim. Inj. (Dkt. No. 68) at 64. This too is a sufficient connection to defeat Defendant Romero's claim of immunity.

Plaintiffs also allege that "Defendants' failure to conduct needed contact tracing with follow-up testing facilitated the subsequent outbreaks of COVID-19 at [various] facilities." Dkt. No. 84 ¶ 182. This allegation implicates Defendant Romero because, according to ADC Director Dexter Payne, ADH decides whether to conduct contact tracing with follow up testing. Ex. 1, Prelim. Inj. Hr'g Tr., 216:18-23.

In addition, Defendant Romero is indisputably connected to the alarming policy of allowing DOC staff who have tested positive for COVID-19 to report to work at DOC facilities while still infected with the virus. Plaintiffs allege this policy places them at an impermissibly high risk of contracting and succumbing to COVID-19 during their incarceration. Dkt. No. 84 ¶ 176-77. Notably, this policy is contained in ADH's guidance to correctional officials (Dkt. No. 36-20); also, the letter informing staff who have contracted COVID-19 that they can report to work comes out of ADH, Defendant Romero's office (Dkt. No. 46-32).

Courts have found state officials to be sufficiently connected to challenged policies in cases that present a much more tenuous connections than those presented here. For instance, in *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011), the plaintiffs sued a state attorney general, challenging a criminal statute for which the attorney general could not initiate a prosecution and that the attorney general had no special role in enforcing. 638 F.3d at 630, 632. Still, the court found the attorney general's connection to the challenged statute to be sufficient for potential

liability under *Ex Parte Young*, because the attorney general was permitted to assist local prosecutors in enforcing the statute, was responsible for defending administrative decisions concerning the statute, and "appear[ed] to have the ability to file a civil complaint" under state law. *Id.* at 632.

Defendant Romero's connection to the policies and practices challenged by Plaintiffs is even stronger than that of the attorney general in *Arneson.* As explained above, Defendant Romero and the ADH have issued guidance and directives concerning how to prevent and mitigate the spread of COVID-19 in DOC correctional facilities, which were adopted by state correctional officials. Moreover, Defendant Romero and the ADH have issued directives and guidance that, as explained in the Amended Complaint, fail to adequately protect Plaintiffs from the threat of COVID-19, and actually expose Plaintiffs to more of a risk of contracting the virus than they would have faced otherwise. Just as the fact that the attorney general in *Arneson* could not necessarily act unilaterally in enforcing the challenged act did not immunize her from suit, Defendant Romero and ADH's collaboration with other state actors in adopting and implementing the challenged policies and practices does not shield them with the cloak of immunity.

ii. Defendant Bradshaw Is Sufficiently Connected to the Challenged Policies and Practices to Defeat His Claim of Immunity.

Defendant Bradshaw's connection to the challenged policies and practices is as strong or even stronger than Defendant Romero's. As explained in Plaintiffs' Amended Complaint, Defendant Bradshaw is "the administrative officer of ACC, and is responsible for supervising the administration of all ACC facilities." Dkt. No. 84 ¶ 89. He is one of the "Defendants [who] have failed to comply with the standards set by the Eighth Amendment and the [ADA] through their official policies—and the implementation of those policies." Dkt. No. 84 ¶ 8. As such, Defendant

Bradshaw is connected to the enforcement of the policies and practices Plaintiffs challenge and is, therefore, not immune from suit.

As Defendants note, Plaintiff Sims is currently incarcerated in an ACC facility, Central Arkansas Community Correction Center (CACCC). Dkt. No. 84 ¶¶ 54-57; Dkt. No. 96 at 17. The Amended Complaint details numerous failures in the response to the pandemic at CACCC. Dkt. No. 84 ¶ 164 (detailing the failure to implement intensified cleaning at CACCC), *see id* ¶ 170 (detailing the lack of social distancing at CACCC), *see id* ¶ 174 (detailing the failure to timely test symptomatic incarcerated people at CACCC). In addition, CACCC is one of the DOC facilities discussed throughout the Amended Complaint; DOC facilities include both the ADC and ACC facilities. *See, e.g.*, Dkt. No. 84 ¶¶ 131-32, 147-186.

It follows that Defendant Bradshaw's connection to the challenged policies and practices is sufficiently strong to defeat his claim of immunity because he administers the policies and practices at the ACC correctional facilities, including CACCC, where Plaintiff Sims is currently housed.

II. PLAINTIFFS HAVE STATED PLAUSIBLE EIGHTH AMENDMENT AND ADA CLAIMS

A. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT STATE DEFENDANTS HAVE EXHIBITED DELIBERATE INDIFFERENCE TO A SUBSTANTIAL RISK OF SERIOUS HARM.

State Defendants' arguments, though styled as a motion to dismiss, effectively seek summary judgment, despite the fact that the parties have yet to complete discovery. Rather than addressing the substance of the allegations in Plaintiffs' complaint, State Defendants inappropriately and repeatedly ask the Court to take judicial notice of facts outside the Complaint that are not properly the subject of judicial notice. This argument conflicts with Eighth Circuit precedent and confuses the appropriate question before the court when considering a motion to

dismiss. Additionally, State Defendants mistakenly argue that because the Court denied Plaintiffs' motion for a preliminary injunction, they are entitled to dismissal of Plaintiffs' entire complaint. Finally, State Defendants incorrectly assume, without basis, that completion of discovery would reveal no more than the limited discovery that occurred in advance of the hearing on Plaintiffs' motion for a preliminary injunction.

Plaintiffs have alleged more than sufficient facts to raise a plausible inference that State Defendants are violating the Eighth Amendment, which is all that is necessary for them to survive State Defendants' motion to dismiss.

i. Plaintiffs Have Sufficiently Alleged the Subjective Component of a Deliberate Indifference Claim.

A complaint need only plead factual allegations that are plausible or "raise a [plaintiff's] right to relief above the speculative level" in order to escape dismissal. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Stated otherwise, while plaintiffs must provide more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," *Iqbal*, 556 U.S. at 681, plaintiffs need not make "detailed factual allegations." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). A complaint withstands dismissal so long as it contains enough factual matter "to raise a reasonable expectation that discovery will reveal evidence" to support a plaintiff's claims. *Twombly*, 550 U.S. at 556.

The State Defendants argue that Plaintiffs fail to adequately allege the subjective prong of the deliberate indifference analysis – knowledge or reckless disregard of a risk of harm. *See* Dkt. No. 96 at 18-21. Yet, throughout their brief, State Defendants ask the Court to apply heightened and inapplicable standards that have no bearing on a motion dismiss. Notably, the State

Defendants' argument does not rely on any case that considered the pleading standard for review on a motion to dismiss.[5]

Indeed, when arguing that "what a plaintiff must allege at the pleading stage is that prison officials 'knew that their conduct was inappropriate in light of [the plaintiff's] risk,'" the State Defendants quote a case that resulted in a jury verdict in favor of the Plaintiff after trial. Dkt. No. 96 at 19 (quoting *Washington v. Denney*, 900 F.3d 549, 559, 565 (8th Cir. 2018) (holding that sufficient evidence exists that the officials violated Mr. Washington's Eighth Amendment rights). The Eighth Circuit in *Washington* – as well as the other cases relied on by the State Defendants – addresses how to *prove* deliberate indifference, not how to *plead* it. *See id.* at 559. The State Defendants are asking the Court to apply heightened and inapplicable standards to dismiss of Plaintiffs' deliberate indifference claim.

[5] *See* Dkt. No. 96 18-21, citing the following cases: *Helling v. McKinney*, 509 U.S. 25, 28-29 (1993) (on directed verdict and affirming a cause of action under the Eighth Amendment for future harm); *Morgan v. Robinson*, 920 F.3d 521, 523 (8th Cir. 2019) (summary judgment); *Letterman v. Does*, 789 F.3d 856, 865 (8th Cir. 2015) (affirming denial of summary judgment as to two Defendants); *Schaub v. VonWald*, 638 F.3d 905, 909, 914 (8th Cir. 2011) (affirming award for deliberate indifferent to medical needs on bench trial); *Langford v. Norris*, 614 F.3d 445, 449 (8th Cir. 2010) (on defendants motion for summary judgment); *Krout v. Goemmer*, 583 F.3d 557, 564 (8th Cir. 2009) (considering denial of summary judgment for qualified immunity); *Vaughn v. Gray*, 557 F.3d 904, 907 (8th Cir. 2009) (denial of a motion for summary judgment based on qualified immunity); *Lenz v. Wade*, 490 F.3d 991, 993 (8th Cir. 2007) (on appeal from bench trial); *Butler v. Fletcher*, 465 F.3d 340, 346 (8th Cir. 2006) (grant of summary judgment); *Alberson v. Norris*, 458 F.3d 762, 766 (8th Cir. 2006) (on motions for summary judgment); *Olson v. Bloomberg*, 339 F.3d 730, 731 (8th Cir. 2003) (denial of summary judgment on qualified immunity grounds); *Smith v. Jenkins*, 919 F.2d 90, 94 (8th Cir. 1990) (reversing the grant of summary judgment); *Bryan v. Endell*, 141 F.3d 1290, 1291 (8th Cir. 1998) (on trial before magistrate judge); *Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020) (preliminary injunction); *Plata v. Newsom*, Case No. 01-cv-01351-JST 2020 U.S. Dist. LEXIS 70271, *4 (9th Cir. April 17, 2020) (motion for emergency relief); *Clarke v. Taylor*, No. 2:13-CV-26, 2014 U.S. Dist. LEXIS 137230, *12; 2014 WL 4854585 (E.D. Ark. Sept. 29, 2014) (on motion for summary judgment); *Money v. Pritzker*, Case No. 20-cv-2093, 2020 U.S. Dist. LEXIS 63599, *75 (N.D. Ill. April 10, 2020) (motion for temporary restraining order and preliminary injunction).

The subjective component of a deliberate indifference claim requires that Plaintiffs plead sufficient facts to raise a plausible inference that Defendants knew of and disregarded a known risk to the health of incarcerated persons.[6] *See Barton v. Taber*, 820 F.3d 958, 965 (8th Cir. 2016); *See Barton v. Taber*, 820 F.3d 958, 965 (8th Cir. 2016); *King v. Barton*, 455 F. App'x. 709, 711 (8th Cir. 2012) (reversing dismissal where plaintiff established a plausible inference that Defendants knew and disregarded the risk, indicating that such knowledge can be inferred).

Here, Plaintiffs sufficiently state a cause of action under the Eighth Amendment "by alleging that [Defendants] have, with deliberate indifference, exposed [them] to levels of [COVID-19] that pose an unreasonable risk of serious damage to [their] future health." *Helling v. McKinney*, 509 U.S. 25, 35 (1993); *see DeGidio v. Pung* 920 F.2d 525, 533 (8th Cir. 1990) (holding that a plaintiff "could have a colorable claim under § 1983 if he could show that there is 'a pervasive risk of harm to inmates' of contracting the AIDS virus and if there is 'a failure of prison officials to reasonably respond to that risk.'") (citations omitted).

The requisite mental state – akin to criminal recklessness – can be inferred from circumstantial evidence, including evidence demonstrating that a medical need was obvious and that Defendants' response was "obviously inadequate." *See Barton*, 820 F.3d at 965. (citing *Thompson v. King*, 730 F.3d 742, 747 (8th Cir. 2013) ("However, if a response to a known risk is

[6] It is clear that the objective component, whether characterized as deliberate indifference to serious medical needs or a condition of confinement challenge, is satisfied. As the Supreme Court observed, the Eighth Amendment protects against future harm and exposure to infectious maladies "even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed." *See Helling v. McKinney*, 509 U.S. 25, 33 (1993). The State Defendants do not dispute that the objective component of what they characterize as Plaintiffs' deliberate indifference to serious medical needs claim has been adequately pleaded. *See* Dkt. No. 96 at 18-19.

obviously inadequate, this may lead to an inference that the officer 'recognized the inappropriateness of his conduct.'") (citation omitted).

Plaintiffs' allegations in the Amended Complaint more than sufficiently allege the circumstantial evidence that establishes State Defendants' mental state. For example, Plaintiffs have alleged that COVID-19 continues to spread unabated within Arkansas correctional facilities with 5,748 total confirmed infections of incarcerated people and 399 confirmed infections of corrections staff, as of the time of the filing of their amended complaint. Plaintiffs detail how State Defendants, after becoming aware of the existence of COVID-19 and the likelihood that it would spread to DOC facilities, disregarded the known risk of harm, including failing to plan for situations in which staff shortages occurred as a result of COVID-19. Dkt. No. 84 ¶¶ 147-57 (detailing State Defendants' knowledge of the risk COVID-19 poses and the minimal actions taken in response). Plaintiffs allege the obvious danger created by State Defendants' policy of requiring that infectious COVID-19 staff continue to work at DOC facilities for incarcerated people and staff who are not infected. *Id.* ¶ 177 (alleging that the practice places incarcerated people in great peril). Plaintiffs also allege that State Defendants disregarded a known risk of serious harm by failing to plan for the provision of PPE and PPE shortages. *Id.* ¶ 160. Contrary to the State Defendants' contention, Plaintiffs go well beyond simply alleging a failure by the State Defendants to develop a contingency plan for staff shortages before they had notice of the pandemic. *See* Dkt. No. 96 at 22. Nor can the State Defendants' motion of dismiss be sustained by arguing the adequacy of its policies. *See id.* Plaintiffs have sufficiently alleged that the policies created and implemented by the State Defendants are grossly inadequate to prevent or mitigate Plaintiffs' exposure to COVID-19. *See generally* Dkt. No. 84 ¶¶ 6-10; 147-237.

Contrary to the State Defendants' assertion, Plaintiffs are not required to plead a total or almost-total deprivation of care to survive a motion to dismiss. *See* Dkt. No. 96 at 18-19. "Grossly incompetent or inadequate care can constitute deliberate indifference," as can prison officials' decision to adopt "an easier and less efficacious course of treatment." *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (citing *Cotton v. Hutto*, 540 F.2d 412, 414 (8th Cir. 1976)); *accord McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999); *see also De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) ("[J]ust because [the defendants] have provided [the plaintiff] with some treatment consistent with the [WPATH] Standards of Care, it does not follow that they have necessarily provided her with constitutionally adequate treatment.").

It has also long been recognized that deliberate indifference with regard to institutional level challenges to prison health care can be sustained by allegations of systemic deficiencies as Plaintiffs allege here. *DeGidio v. Pung*, relied on by the State Defendants, *see* Dkt. No. 96 at 20, recognized that "a consistent pattern of reckless or negligent conduct is sufficient to establish deliberate indifference to serious medical needs." 920 F.2d at 533; *see also Dulany v. Carnahan*, 132 F.3d 1234, 1244 (8th Cir. 1997) (same). Indeed, "[a] series of incidents closely related in time . . . may disclose a pattern of conduct amounting to deliberate indifference to the medical needs of prisoners." *Bishop v. Stoneman*, 508 F.2d 1224, 1226 (2d Cir. 1974); *see also Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977) ("When systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hesitate to use its injunctive powers."). Plaintiffs detail the experiences of the individually named Plaintiffs and the Plaintiff class across different facilities receiving delayed or no COVID testing and medical care, despite displaying symptoms or being exposed to persons with symptoms; facing regular and avoidable exposure to COVID-19 as a result of consistent and repeated failures of the State Defendants to properly quarantine

COVID-positive or exposed individuals – a basic measure to prevent infection; and experiencing system-wide inadequacies in basic prevention measures (cleaning, PPE provisions and social distancing) and medical care. *See generally* Amend. Complaint; *id.* ¶¶ 6-10; 18-85, 147-23. This pattern of conduct amounts to a systemic failure by the State Defendants to combat the pandemic in Arkansas prisons, as has been painstakingly documented in the Amended Complaint.

The *DeGidio* court recognized that the question of whether the pattern of actions by prison officials in that case "constituted 'conduct . . . disregard[ing] a known or obvious risk that is very likely to result in the violation of a prisoner's constitutional rights' [was] a factual finding." *DeGidio*, 920 F.2d at 533 (quoting *Berry v. Muskogee*, 900 F.2d 1489, 1496 (10th Cir. 1990)). When, as here, Plaintiffs have plead sufficient facts to support an inference that prison officials' pattern of conduct reflects such a disregard of a known risk of harm, the resolution of this factual question is for summary judgment or trial – a conclusion supported by the fact that the State Defendants cite no cases on this issue involving dismissals at the pleadings stage. *See supra* note 5.

ii. State Defendants Incorrectly Argue that the Court May Take "Judicial Notice" of Internal DOC Documents.

The State Defendants insist that the Court rely on various extra-judicial documents and statements from State officials that contain the State Defendants' version of how they have addressed the COVID-19 crisis as part of the "public record." *See* Dkt. No. 96 at 21-22, 26-27. This argument violates the fundamental precept that Rule 12(b)(6) review generally must ignore materials outside the pleadings and treat all factual allegations in a complaint as true. *See Ashford v. Douglas Cty.*, 880 F.3d 990, 992 (8th Cir. 2018).

Although a court may take judicial notice of public records when considering such a motion, the records State Defendants cite are not public records, but rather internal DOC

documents produced in discovery. Accordingly, as the Eighth Circuit explained in *Stahl v. USDA*, the sole case State Defendants cite in support of their judicial notice argument, consideration of other external materials is impermissible. 327 F.3d 697, 700-01 (8th Cir. 2003) (explaining that while judicial notice could be taken of a existence of a Department of Agriculture regulation, it could not be taken of an affidavit); *Insulate SB, Inc. v. Advanced Finishing Sys.*, 797 F.3d 538, 543 n.4 (8th Cir. 2015) (declining, at the motion to dismiss stage, to consider a summary judgment order and a deposition transcript as evidence that the defendant engaged in wrongdoing); *Gildings v. Media Lodge, Inc.*, No. 4:17–CV–04068-RAL, 2018 WL 1763633, *3 (D.S.D. Apr. 12, 2018) ("This Court deems it improper to take judicial notice of the employee handbook, the Georgia state court order, or parts of Lokey's deposition when ruling on the motion to dismiss.").

Furthermore, even public documents can only be relied on in a limited capacity. Rule 201 of the Federal Rules of Evidence allows courts to take judicial notice of "adjudicative facts" appearing in public documents, but only if those facts are "not subject to reasonable dispute." Fed. R. Evid. 201. As discussed below, in each instance Plaintiffs dispute the facts in the documents on which the State Defendants rely. Accordingly, "[u]nder this standard, courts can take judicial notice of the existence of a public document, but cannot consider the statements or findings contained therein for the truth of the matter asserted." *Giddings*, 2018 WL 1763633 at*3; *Kushner v. Beverly Enters.*, 317 F.3d 820, 829–30 (8th Cir. 2003) ("The government's sentencing memorandum is a position paper offered here by the investors for the truth of the matters asserted therein, which the defendants dispute. Such disputed papers should not be the subject of judicial notice on a motion to dismiss.").

Nor does the fact that any such documents were admitted under the relaxed evidentiary rules of the preliminary injunction proceeding in this case warrant consideration of these

documents on motion to dismiss. *See McGehee v. Hutchinson,* No. 4:17-cv-00179 KGB, 2017 U.S. Dist. LEXIS 57836, *10 (E.D. Ark. Apr. 15, 2017) (recognizing that the court "has discretion to consider evidence in connection with a motion for preliminary injunction, including hearsay evidence, which would otherwise be inadmissible at trial").

Finally, even if the substance of these documents could be considered, State Defendants conveniently fail to discuss contrary evidence undercutting the evidence upon which they rely and highlighting the inappropriateness of such arguments. Given the detailed allegations Plaintiffs have presented, as well as the conflicting evidence on each of the relevant points, the motion to dismiss should be denied.

iii. Plaintiffs Have Presented Detailed Allegations Regarding State Defendants' Failure to Train Staff.

Plaintiffs sufficiently allege that State Defendants were deliberately indifferent to the risk of harm posed by COVID-19, by among other things, failing to properly train DOC staff. In *DeGidio,* the Eighth Circuit recognized that an intentional deprivation is not required to establish deliberate indifference, and that there can be liability for failure to train, where the failure to train amounts to deliberate indifference. *DeGidio*, 920 F.2d at 532 (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Liability attaches only where, as here, the failure to train amounts to a government policy or custom. *See DeGidio,* 920 F.2d at 532.

Plaintiffs have more than sufficiently alleged that State Defendants failed to implement the training and education necessary to prevent the spread of COVID-19 in DOC facilities, despite their awareness of the risk posed by COVID-19. Dkt. No. 84 ¶¶ 161–63. Plaintiffs allege that as early as March 11, 2020, State Defendants were aware of the risk that COVID-19 posed to individuals incarcerated in DOC facilities. *Id.* ¶ 147. Plaintiffs allege that, nonetheless, the guidance which State Defendants were responsible for creating and approving fails to discuss any

training that should be provided to correctional staff regarding the cleaning and disposal of PPE. *Id*. ¶ 161.

Plaintiffs also allege that despite knowledge of widespread problems with corrections staff properly following PPE protocol, "Defendants have not properly and sufficiently supervised and/or trained staff to ensure satisfactory compliance with DOC policies and procedures. Many DOC staff members wear their face masks below their nose—if they wear them at all. The few staff members who wear protective gloves do not change them regularly, in contravention of the CDC Guidance for the use of PPE." *Id.* ¶ 163

Likewise, Plaintiffs allege that State Defendants have failed to properly train staff regarding the posting of signage concerning reporting of individuals who test positive for COVID-19 or instructing staff to say home when sick. *Id*. ¶ 162. State Defendants, in response, inappropriately point to evidence beyond the pleadings that signs have been posted, Dkt. No. 96 at 26, but ignore Plaintiffs' declarations proving the contrary. Dkt. Nos. 46-22, ¶ 10; 50-2, ¶ 8.

Finally, Plaintiffs also allege that Defendants have failed to properly train staff regarding the proper cleaning and disinfecting of facilities, Dkt. No.84 ¶ 167; have failed to ensure train staff regarding the institution of staggered meal times and the arrangement of beds in a "head-to-toe" arrangement, *id*. ¶ 168; have failed to train staff on how to properly address suspected cases of COVID-19, *id*. ¶ 173; and have failed to train DOC staff on existing policies and procedures to prevent the spread of COVID-19, *id*. ¶ 186.

The obvious nature of the deficiencies in training and supervision is sufficiently alleged in Plaintiffs complaint and confirmed by the exponentially increasing number of incarcerated people and staff that continue to be infected by COVID-19. *Id.* ¶¶ 3–4.

iv. Plaintiffs Have Presented Detailed Allegations that State Defendants' Failure to Create and Implement Sufficient Policies and Practices to Prevent the Spread of the Virus Exhibits Deliberate Indifference.

Plaintiffs' allegations regarding State Defendants' deliberate indifference, however, are not limited to State Defendants' failure to train staff. Rather, Plaintiffs allege that Defendants' failure to train staff, in combination with their failure to create and implement a variety of other policies together, constitute unconstitutional deliberate indifference.

Plaintiffs allege that on March 23, 2020, ADC Director, Dexter Payne, stated that "in order to save lives and halt the spread of the virus we must be obedient to the recommendations of the Centers for Disease Control (CDC) and the Arkansas Department of Health (ADH)." Dkt. No. 84 ¶ 148. Despite being aware of the risk COVID-19 poses to individuals in correctional facilities, and their knowledge of the CDC guidance highlighting the measures that should be taken to prevent the spread of the virus, the State Defendants failed to create and implement policies requiring adequate hygienic, cleaning and disinfecting practices necessary to prevent the spread of COVID-19, *id*. ¶¶ 164–67; failed to create and implement policies to reduce crowding, and encourage social distancing, *id*. ¶¶ 168–72; failed to create and implement policies addressing suspected cases of COVID-19; failed to create and implement policies for managing staff that have contracted COVID-19; and failed to create and implement policies for the handling of incarcerated persons and corrections staff that have contacted individuals who have contracted COVID-19, as well as the handling of those who have tested positive for COVID-19. *Id*. ¶¶ 173–75, ¶¶ 176–77, ¶¶ 178–83. In many cases, Defendants' failures explicitly contradict CDC guidance.

a. Plaintiffs Sufficiently Allege that State Defendants' Failure to Implement Heightened Cleaning Measures Demonstrates Deliberate Indifference.

Contrary to State Defendants' allegations, Plaintiffs have sufficiently alleged that State Defendants' failure to implement the heightened cleaning measures called for by the CDC guidance, despite their awareness of the risk posed by COVID-19 and their knowledge of the insufficiency of existing cleaning protocols, demonstrated their deliberate indifference. *Id.* ¶ 164. Plaintiffs allege, among other things, that, as a result of DOC rules, Plaintiffs do not have access to adequate cleaning supplies for themselves or their environment. *Id.* Plaintiffs also allege that State Defendants have not intensified the cleaning of facilities. *Id.* ¶¶ 165–66. "[State Defendants] have been aware of the deficiencies in the cleaning and disinfecting of DOC facilities, as evidenced in sanitation logs and other forms of documentation and communication, but have not taken sufficient steps to remedy the ongoing problems throughout DOC through appropriate follow-up, supervision, and/or training." *Id.* ¶ 167.

In support, Plaintiffs include allegations from six witnesses – not three as State Defendants claim – that such cleaning is not occurring. *Id.* This is more than enough to survive a motion to dismiss. Contrary to State Defendants' claims, Plaintiffs do not need to provide a declaration from every facility to survive a motion to dismiss. Dkt. No. 96 at 26 (complaining that Plaintiffs' provided declarations from only three of ADC's 20 units). State Defendants present no authority in support of this position.

State Defendants cite to testimonial evidence and exhibits documenting internal orders, which are not public records, and which Plaintiffs dispute are in fact being carried out. Dkt. No. 96 at 26–27 (citing internal emails allegedly substantiating orders to clean, the Declaration of ADC Director Dexter Payne, and the testimony of ACC Deputy Director of Residential Services). Accordingly, they are not appropriate for consideration at this stage and certainly do not support dismissal of Plaintiffs' complaint. Regardless, even if they were, State Defendants fail to mention

the thirteen exhibits in response substantiating Plaintiffs' allegations, including not only nine declarations from the named Plaintiffs, but cleaning logs proving that cleaning is not occurring regularly as State Defendants claim. Dkt. Nos. 46-3, ¶ 13; 46-4, ¶ 15; 46-5, ¶ 6; 46-7, ¶ 14; 46-10, ¶ 12; 46-13, ¶ 7; 46-14, ¶¶ 15-19; 46-22, ¶¶ 5-6; 46-24, ¶ 9; 49-27; 49-30; 50-3; 50-12.

Finally, State Defendants misstate the relevance of the CDC guidance. Dkt. No. 96 at 26 (arguing that a deliberate indifference claim must be based on a constitutional violation not a failure to adhere to CDC guidance). Plaintiffs' underlying claim is not that State Defendants have failed to comply with the CDC guidance, and this failure provides the basis for an independent cause of action. Rather, Plaintiffs allege that State Defendants' failure to comply with the CDC guidance is evidence of a constitutional violation. By failing to follow federal guidelines specifically for correctional facilities, explaining the steps that they should have taken to reduce the risk of harm, and which they previously cited as authoritative, State Defendants exhibited deliberate indifference to the substantial risk of serious harm posed by COVID-19.

b. Plaintiffs Sufficiently Allege that State Defendants' Failure to Implement Social Distancing Measures Exhibits Deliberate Indifference.

Plaintiffs have sufficiently alleged that State Defendants' failure to implement social distancing measures, despite their awareness of the risk posed by COVID-19, the insufficiency of their practices and the importance of social distancing, as evidenced by federal guidelines, exhibits deliberate indifference. In support, Plaintiffs provide specific allegations regarding the actions State Defendants undertook despite their awareness that they would further endanger Plaintiffs, namely DOC's repeated daily transfer of individuals to and from specific facilities, in contravention of CDC's advice that incarcerated people should not be unnecessarily transferred from facility to facility. Dkt. No. 84, ¶ 169. Additionally, Plaintiffs allege various other specific

failures that State Defendants have failed to plan for and prevent, namely, that State Defendants allow group recreational activities and meals; State Defendants have failed to enforce requirements that incarcerated people rearrange beds such that they sleep "head-to-toe"; and that State Defendants have failed to implement available measures to reduce overcrowding. *Id*. ¶¶ 170–71.

Contrary to State Defendants' claims, Dkt. No. 96 at 27, the Court did not hold that the failure to space beds six feet apart in the midst of a pandemic does not violate the Eighth Amendment; rather, the Court acknowledged language in the CDC guidance that social distancing strategies may need to be tailored to the individual specifics of each facility. Dkt. No. 68 at 61–62. Moreover, here, State Defendants again mischaracterize Plaintiffs' argument. Plaintiffs do not allege that State Defendants' failure to space beds properly is itself a constitutional violation, but rather—in combination with the other evidence regarding State Defendants' failure to institute social distancing measures, despite their awareness of the risk posed by COVID-19 and the necessity of preventative measures—is evidence of their deliberate indifference.

State Defendants' arguments based on material produced in advance of the hearing on Plaintiffs' motion for a preliminary injunction are again flawed for several reasons. First, as discussed above, the materials cited are not public records, but rather the declarations of DOC officials and internal emails, and thus are not proper subjects for judicial notice. Dkt. Nos. 36-1, ¶¶ 72-74, 80-84; 49-22; 49-24; 49-25; 49-27; 49-28; 50-5; 50-6; 50-7; 50-9; 50-10; 50-13; 50-15; 63, at 176-77. Second, even if they were, as the Court also noted, Plaintiffs dispute whether such actions were actually taken. Dkt. No. 68 at 30 ("Plaintiffs dispute the effectiveness of these procedures and whether these procedures are carried out at all."). For example, although the CDC issued guidance on March 23, 2020, that incarcerated people sleep head to foot, the practice was

not purportedly implemented until the beginning of May. *Id*. at 62. State Defendants, unsurprisingly, treat such evidence as if it does not exist.

c. Plaintiffs Sufficiently Allege that State Defendants' Failure to Manage Incarcerated People and Staff Who Test Positive for COVID-19 Exhibits Deliberate Indifference.

Plaintiffs additionally allege that State Defendants' failure to create and implement policies for the adequate management of incarcerated people and staff who test positive for COVID-19 is evidence of deliberate indifference. Specifically, Plaintiffs allege, among other things, that State Defendants have failed to ensure that all people in DOC facilities with symptoms of COVID-19 are evaluated and treated. Dkt. No. 84 ¶ 173. In support, Plaintiffs provide detailed narratives from multiple Plaintiffs recounting how they have requested testing and treatment from DOC, but have been ignored and then housed with other incarcerated people who were non-symptomatic. *Id*. ¶ 174. State Defendants provide no response on this point.

Plaintiffs also allege that State Defendants have failed to adequately manage staff who test positive for COVID-19. *Id*. ¶ 176. They allege, among other things, that State Defendants have permitted – and at times required – staff who have tested positive for COVID-19 to return to work. *Id*. In response, State Defendants argue that the Court has already concluded that this practice does not constitute deliberate indifference. Dkt. No. 96 at 28. State Defendants, again, mischaracterize the Court's statements. The Court did not conclude that this practice could never be evidence of deliberate indifference, but rather, qualified its conclusion, emphasizing that "at this stage of the litigation, [and] on the limited record before it," Plaintiffs had not satisfied the stringent standard required for the issuance of a preliminary injunction. Dkt. No. 68 at 65. Plaintiffs have, however, adequately alleged the harms from this practice and State Defendants' awareness of them, such

that Plaintiffs should have the opportunity to seek discovery regarding its impact on Plaintiffs and what, if any, actions State Defendants undertook in response.

d. Plaintiffs Sufficiently Allege that State Defendants' Failure to Adequately Handle Individuals Who Come into Contact with Others Infected with COVID-19 Is Evidence of Deliberate Indifference.

Plaintiffs sufficiently allege that State Defendants' failure to adequately handle incarcerated people and/or corrections staff who have had contact with others known to have tested positive for COVID-19, despite their awareness of the contagious nature of the disease, particularly in correctional facilities, and the CDC's guidance on this point, is evidence of deliberate indifference. Plaintiffs specifically allege that State Defendants, despite this awareness, have not implemented a 14-day quarantine of individuals who have come into close contact with individuals who have contracted COVID-19 and have allowed staff who have come into contact with individuals who have contracted COVID-19 to return to work. Dkt. No. 84 ¶ 178.

State Defendants provide no specific response to these points. Instead, without support, they allege that departure from CDC guidance cannot support a deliberate indifference claim. Dkt. No. 96 at 29. Contrary to State Defendants' claims, courts have repeatedly found that failure to adhere to the CDC guidelines may constitute evidence of deliberate indifference. *See Chunn v. Edge*, No. 20cv1590, 2020 WL 3055669, *6 (E.D.N.Y. June 9, 2020) ("After reviewing the CDC guidelines and considering the testimony of the experts regarding those guidelines, I have given the CDC's guidance substantial weight in assessing petitioners' challenge to the conditions of confinement at the MDC."); *Gumns v. Edwards*, No. 20-231-SDD-RLB, 2020 WL 2510248, *5 (M.D. La. May 15, 2020) (crediting Defendants for updating their guidance to prisons and staff in accordance with evolving CDC guidelines); *Coreas v. Bounds*, No. TDC-20-0780, 2020 WL 1663133, *11 (D. Md. April 3, 2020) ("Even though ICE claims to be following CDC guidance,

there is no evidence of any actions to increase the distance among detainees, whether by moving detainees in double cells to single cells to the extent possible, or by requiring detainees to be separated by empty bunks in the dormitory or empty seats in the dining areas.").

State Defendants alternatively rely on language in the CDC Guidance providing that its recommendations may need to be adapted based on the physical space available in a facility. Dkt. No. 96 at 29. They continue that the DOC could reasonably conclude that a 14-day quarantine for individuals was not practicable, but this is a factual contention that will be the subject of discovery and should not be treated as beyond dispute. Whether State Defendants did consider the guidance and disregard it, and whether doing so was reasonable are all ultimately questions of fact that cannot be determined upon a motion to dismiss. At this stage, Plaintiffs' allegations that State Defendants have failed to take these measures, despite their awareness of the risks posed by COVID-19, are sufficient to defeat the motion to dismiss.

Finally, State Defendants include a series of general proclamations that prison officials are entitled to deference in matters of prison administration. *Id*. These broad statements of legal principle, unattached to any specific arguments, do not justify the dismissal of Plaintiffs' case. They are generally applicable in all cases alleging deliberate indifference. Nonetheless, as the Supreme Court has explained, cases alleging violations relating to the housing and movement of incarcerated people are subject to the same degree of judicial oversight as other claims in the correctional context:

> we see no significant distinction between claims alleging inadequate medical care and those alleging inadequate "conditions of confinement." Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. There is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under

> materially different constraints than their actions with respect to medical conditions. Thus, as retired Justice Powell has concluded: "Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the deliberate indifference standard."

Wilson v. Seiter, 501 U.S. 294, 303 (1991).

In summary, State Defendants improperly attempt to convert this motion to dismiss into a motion for summary judgment, despite the fact that the parties have yet to complete discovery. In doing so, they repeatedly encourage the court to take judicial notice of records that are neither before the Court on this motion or proper maters to be considered. Where they are unable to do so, they distort the arguments Plaintiffs have presented. Properly considered, Plaintiffs have provided detailed allegations regarding eight specific ways in which State Defendants have exhibited deliberate indifference – each of which is supported by multiple examples and explanations. This is more than enough to survive a motion to dismiss.

B. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED THAT STATE DEFENDANTS HAVE VIOLATED THE ADA.

i. Plaintiffs Requested Reasonable Accommodations Under the ADA.

In their brief, Defendants argue that Plaintiffs have not alleged that they requested special accommodations due to their disabilities. Dkt. No. 96 at 32. This argument is false. The Amended Complaint's factual allegations regarding Michael Kouri and Nicholas Frazier, for example, specifically and explicitly state that each of the men requested reasonable accommodations under the ADA. Dkt. No. 84 ¶¶ 23, 29. Indeed, the Amended Complaint contains details of the specific accommodations requested by many of the Plaintiffs, such as a single-man cell for Mr. Kouri and daily access to cleaning supplies for Mr. Frazier. *Id.* ¶¶ 18-85. These detailed accounts of Plaintiffs' explicit requests for accommodations contradict State Defendants' argument, and reveal a factual

dispute that cannot be resolved at this stage in the litigation. *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 663 (8th Cir. 2001) ("We cannot resolve a factual dispute on a motion to dismiss.").

For the same reason, Defendants' argument that Plaintiffs did not allege State Defendants' prior knowledge of Plaintiffs' disabilities is also without merit. Dkt. No. 96 at 32. Plaintiffs' explicit requests for accommodations under the ADA were sufficient to place Defendants on notice of Plaintiffs' disabilities. In addition, State Defendants knew of Plaintiffs' disabilities through Plaintiffs' medical records, which are readily available to State Defendants, as is evidenced by the declaration filed by State Defendants, which contains information from the original Plaintiffs' medical files. Dkt. No. 36-23 ¶¶ 5-37. Notably, in this declaration, Defendants do not assert lack of knowledge of several of Plaintiffs' serious medical conditions, including Mr. Kouri's aortic heart valve degeneration (Dkt. No. 84 ¶ 18), Mr. Frazier's hepatitis (*Id.* ¶ 28), Mr. Kent's heart failure (*Id.* ¶ 30), and Mr. Neeley's rectal cancer (*Id.* ¶ 46). Defendants also do not cite a single case in which a court has found it implausible that correctional officials knew of the medical conditions of incarcerated people in the officials' custody and care.

Further, as explained *infra* in Parts C and D, Plaintiffs exhausted their administrative remedies before bringing their ADA claims in this suit.

i. Plaintiffs Have Sufficiently Alleged that the State Defendants Denied Plaintiffs' Reasonable Requests for Accommodations.

In the Amended Complaint, Plaintiffs plausibly allege that they have requested reasonable accommodations (e.g., access to effective disinfectants and uncrowded living arrangements) necessitated by their disabilities amid the COVID-19 pandemic, and that State Defendants have refused to provide these reasonable accommodations. State Defendants' failure to provide the requested accommodations places Plaintiffs, and the putative disability subclass, at an even greater

risk of contracting or succumbing to COVID-19 due to their disabilities. Moreover, State Defendants' failure to accommodate effectively denies Plaintiffs equal access to DOC facilities compared to able-bodied incarcerated people and, therefore, constitutes discrimination within the ADA.

The ADA prohibits public entities, including state prisons, from discriminating on the basis of disability. *See, e.g. Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998). Under the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see also Mason v. Corr. Med. Servs., Inc.*, 559 F.3d 880, 886 (8th Cir. 2009). "'[D]eliberate refusal of prison officials to accommodate [an inmate's] disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs' may constitute a violation of Title II." *Brown v. Houston*, No. 8:16CV217, 2018 WL 1309833, at *7 (D. Neb. Mar. 13, 2018) (citing *United States v. Georgia*, 546 U.S. 151, 157 (2006)).

To prevail on an ADA claim, a plaintiff must simply show that they have requested a reasonable accommodation, which the defendant has failed to provide. *Hills v. Praxair, Inc.*, No. 11-CV-678S, 2012 WL 1935207, at *15 (W.D.N.Y. May 29, 2012); *see also Falls v. Hous. Auth. of Jefferson Par.*, No. 15-6501, 2016 WL 1366389, at *6 (E.D. La. Apr. 6, 2016) ("[The plaintiff] does not need to prove the reasonableness of his accommodation request in order to survive a motion to dismiss. All plaintiff is required to show to overcome defendants' motion is that he has plead facts that 'raise a right to relief above the speculative level.'" (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiffs easily meet this standard. *See, e.g.* Dkt. No. 84 ¶¶ 23, 27, 29, 50.

As with their other arguments, Defendants' complaints regarding the reasonableness of Plaintiffs' requested accommodations are inappropriate at the motion to dismiss stage. Courts in this circuit, and around the country, have repeatedly held that because the reasonableness of an accommodation is a highly specific, fact-intensive inquiry, it can be decided only after discovery, upon a motion for summary judgement, and not on a motion to dismiss. *See Madden v. Mo. Dep't of Corr.*, No. 2:11-cv-04087-FJG, 2011 WL 3101826, at *3 (W.D. Mo. July 25, 2011) ("[E]stablishing lack of reasonable accommodation is not part of Madden's burden in stating a claim for relief."); *Baribeau v. City of Minneapolis*, No. 06-4953, 2007 WL 2123307 at * 4 (D. Minn. July 20, 2007) (explaining that plaintiffs' alleged failure to establish all the elements of a reasonable accommodation claim is an issue for summary judgment, not a motion to dismiss); *Badalamenti v. La. Dep't of Wildlife & Fisheries*, 439 F. Supp. 3d 801, 808 (E.D. La. 2020) ("This Court holds that the reasonableness of Plaintiff's accommodation request or his ability to utilize other accommodations are inappropriate inquiries at the motion to dismiss stage. Plaintiff 'does not need to prove the reasonableness of his accommodation request in order to survive a motion to dismiss.'" (quoting *Falls*, No. 15-6501, 2016 WL 1366389, at *6)); *Ability Ctr. of Greater Toledo v. Lumpkin*, 808 F. Supp. 2d 1003, 1024 (N.D. Ohio 2011) ("Determining whether a modification or accommodation is reasonable always requires a fact-and context-specific inquiry . . . A motion to dismiss is therefore not the proper occasion for defendant's argument that the proposed modification is unduly burdensome." (citations omitted)); *Tully-Boone v. N. Shore-Long Island Jewish Hosp. Sys.*, 588 F. Supp. 2d 419, 425 (E.D.N.Y. 2008) (finding it inappropriate to decide reasonableness of plaintiff's accommodation request on motion to dismiss); *Martinez v. Bitzer Prods. Co.*, No. 11 C 6811, 2012 WL 1409537, at *2 (N.D. Ill. Apr. 23, 2012) ("Whether these duties are considered essential functions of Martinez's job, and whether or not he could

perform essential duties with or without reasonable accommodation requires a factual inquiry into the demands of his job and the nature of his disability that is beyond the scope of the pleadings."); *Wilson v. Broward Cty.*, No. 04-61068-CIV-MARRA/SELTZER, 2006 WL 8431515, at *3 (S.D. Fla. Jan. 13, 2006) ("[T]he Court notes that determinations of reasonableness involve questions of fact that are beyond the scope of a motion to dismiss.").

Defendants allege that none of the accommodations Plaintiffs have requested are reasonable, but they only mention Plaintiffs' request for alcohol-based hand sanitizer and bleach. Def's Mot. to Dismiss, at 3 (arguing that alcohol-based sanitizer is not needed because soap is available and bleach is not appropriate given security concerns). Defendants' arguments on this point, which turn on the availability and effectiveness of other cleaning supplies, as well as the legitimacy of Defendants' security concerns, reinforce exactly why courts have found these arguments to be barred at the pleadings stage. *See, e.g. Rinehart v. Weitzell*, 964 F.3d 684, 689 (8th Cir. 2020) ("To the extent Defendants raise arguments as to the merits of Rinehart's [ADA] claims, they are misplaced. The case has not yet reached the stage for those arguments . . . the question before us is merely whether Rinehart has stated a claim, not whether Defendants can avoid liability through justification."). Without discovery, this Court cannot fully determine whether the supplies available actually obviate the need for the accommodations requested or whether their provision would unreasonably threaten the security of the facility. Moreover, as discussed above, the mere fact that the Court denied Plaintiffs' request for preliminary relief on this point does not establish that Defendants are entitled to dismissal of Plaintiffs' claim.

Defendants' refusal to accommodate the named Plaintiffs' and putative disability subclass's disability-related needs include, but are not limited to, Defendants' failure to ensure that subclass members are not exposed to staff that are not infected with the virus, Dkt. No. 84 ¶ 176,

ensure that staff use protective equipment, *Id.* ¶ 163, and ensure that common areas in incarcerated persons' living units are regularly cleaned, *Id.* ¶ 164. In addition, Defendants have failed to ensure that members of the disability subclass, all of whom are especially vulnerable to COVID-19, are provided with housing options other than crowded barracks and cells where social distancing is impossible. *Id.* ¶¶ 167-71. Each of these are basic steps that all correctional systems and facilities should be taking.

The denial of the opportunity to participate in basic activities such as sleeping, showering, and eating without threat to their lives deprives Plaintiffs of an equal opportunity to enjoy those activities. Plaintiffs are being offered the choice between their safety and engaging in the activities that their peers without disabilities engage in without facing such severe risks. Defendants' imposition of this perilous choice on Plaintiffs runs afoul of the ADA. *See Brown*, No. 8:16CV217, 2018 WL 1309833, at *7; *see also Allen v. Morris*, No. 4:93CV00398 BSM-JWC, 2010 WL 1382112, at *8 (E.D. Ark. Jan. 6, 2010), *report and recommendation adopted*, No. 493CV00398BSM-JWC, 2010 WL 1382116 (E.D. Ark. Apr. 2, 2010) (considering, and allowing to go forward, claim that prison's failure to make reasonable accommodations that would enable obviously disabled plaintiff to safely shower violated Title II); *Phipps v. Sheriff of Cook Cty.*, 681 F. Supp. 2d 899, 916 (N.D. Ill. 2009) (collecting cases holding that "showering, toileting, and lavatory use [are] regarded as programs and/or services under the ADA.").

Defendants argue that Plaintiffs' ADA claim should be dismissed to the extent that Plaintiffs seek release pursuant to the ADA. This argument employs a narrow view of the breadth of relief possible in this matter. The Eighth Circuit has recently recognized that a failure to meet the unique housing needs of someone with a disability may run afoul of the ADA. *Rinehart*, 964 F.3d at 689 (finding an incarcerated plaintiff stated a valid claim for relief by alleging that

correctional officials would not allow him to obtain a desirable class status unless he moved to a specific housing assignment that would not accommodate his disability). Here, the Plaintiffs allege that their and the putative disability subclass's needs cannot be met in the conventional DOC correctional facilities amid the pandemic. If the Court finds immediate release to not be appropriate under the ADA, this Court could, in the meantime, enjoin State Defendants from continuing to confine the Plaintiffs and the members of the disability subclass in facilities that place them at an alarmingly high risk of contracting and succumbing to COVID-19.

Plaintiffs, therefore, have properly pleaded valid ADA claims.

C. PLAINTIFFS' CLAIM FOR RELEASE IS COGNIZABLE IN HABEAS.

Preiser v. Rodriguez, 411 U.S. 475 (1973), conclusively shows that petitioners' claim for release is cognizable in a habeas petition. In *Preiser,* the Supreme Court made clear that where an incarcerated person is "challenging the fact or duration of his physical confinement itself[] and . . . seeking immediate release or a speedier release from that confinement," his claim falls within "the heart of habeas corpus." *Id.* at 498. Under these circumstances, a habeas petition is not just one potential remedy; it is "his sole federal remedy . . . ." *Id.* at 499. In contrast, where a prisoner's claims "relate[] solely to the States' alleged unconstitutional treatment of them while in confinement," and he does not challenge the fact of his confinement or seek release, a § "1983 action is a proper remedy." *Id.* at 498-99.

Here, Petitioners have sought "immediate[] release" because the Respondents "cannot currently mitigate the risks to . . . Petitioners sufficient to satisfy the Eighth Amendment by any means short of release from custody." Dkt. No. 84 ¶ d; *id.* ¶ 266. Put otherwise, petitioners have alleged that the very fact of their confinement is itself illegal because under the current circumstances their continuing confinement in a manner than does not permit adequate social distancing necessarily violates the Eighth Amendment. As such, they are seeking immediate

release. As myriad courts have recognized, *Preiser* holds that claims like Petitioners' should be raised in habeas. *See, e.g.*, *Wilson v. Williams*, 961 F.3d 829, 837-38 (6th Cir. 2020); *Angelica C. v. Immigration & Customs Enf't*, No. 20-CV-913 (NEB/ECW), 2020 WL 3441461, at *10–11 (D. Minn. June 5, 2020), *report and recommendation adopted*, No. 20-CV-913 (NEB/ECW), 2020 WL 3429945 (D. Minn. June 23, 2020); *Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020); *Torres v. Milusnic*, No. CV204450CBMPVCX, 2020 WL 4197285, at *6-7 (C.D. Cal. July 14, 2020).

Ignoring *Preiser* entirely, the State argues that Petitioners' claim for release can only be raised pursuant to § 1983—an approach that *Preiser* expressly forbids. *See Preiser*, 411 U.S. at 500. In the State's telling, the Eighth Circuit has classified claims like Petitioners' as "conditions of confinement" claims and has ruled that they may never be raised in habeas. The State further asserts that its view is "overwhelmingly" supported by other courts and that, where courts have allowed such claims to proceed in habeas, "[v]irtually every" such case hails from a circuit that disagrees with the Eighth Circuit and permits conditions-of-confinement claims in habeas. Dkt. No. 96 at 35-37.

Each one of the Defendants' contentions is incorrect. To start, the Eighth Circuit has never considered, much less resolved, the question of whether claims like Petitioners' should be construed as conditions-of-confinement claims. *Preiser* squarely held that such claims are *not* conditions claims, and no Eighth Circuit decision has ever suggested otherwise. Indeed, no Eighth Circuit decision could suggest otherwise because the Eighth Circuit cannot overrule a decision of the Supreme Court. Two district court decisions from this Circuit—which the State fails to cite—have reached a similar conclusion. Both cases ruled that claims like Petitioners' are properly brought in habeas because they challenge the fact or duration of confinement and are not conditions

claims. *See Angelica C.*, 2020 WL 3441461, at *10–11; *Mohammed S. v. Tritten*, No. 20-CV-783 (NEB/ECW), 2020 WL 2750109, at *2 (D. Minn. May 14, 2020). Furthermore, even if Petitioners' claims were properly construed as conditions-of-confinement claims—which they are not—binding case law from this Circuit permits such claims to be raised in habeas. *See Willis v. Ciccone*, 506 F.2d 1011, 1014 (8th Cir. 1974).

Finally, the Defendants' representations about case law from other jurisdictions are simply incorrect. Countless court decisions have ruled that habeas claims like those at issue here challenge the fact of confinement and may proceed on that basis. These rulings come from circuits that permit conditions-of-confinement claims in habeas and from every circuit that does not. In short, the Defendants' position is expressly foreclosed by *Preiser*, finds no support in the Eighth Circuit, and has been rejected by court after court.

The Supreme Court's decision in *Preiser* is fatal to the State's argument. In *Preiser*, the Court considered whether state incarcerated people who were deprived of good-time credits could seek relief under § 1983. *See Preiser*, 411 U.S. at 476-77. To answer that question, the Court conducted an extensive inquiry into the history of habeas corpus and its appropriate scope. As part of the Court's analysis, it divided claims raised by incarcerated individuals into two camps: those that challenged the fact or duration of confinement and sought release, and those that related "solely to . . . unconstitutional treatment . . . while in confinement." *See id.* at 499-500. Claims that fell in the former camp represented "the heart of habeas corpus" and must be raised in a habeas petition. *See id.* For those in the latter camp, "a § 1983 action is a proper remedy." *Id.* at 499. The Court expressly reserved the question whether conditions claims could also be raised in habeas. *See id.* at 499–500 ("This is not to say that habeas corpus may not also be available to challenge

such prison conditions. . . . But we need not in this case explore the appropriate limits of habeas corpus as an alternative remedy to a proper action under § 1983. That question is not before us.").

The Court defined these two categories of claims in terms of what the claimants were challenging and what they were seeking—and not in terms of the arguments they raised in support of relief. Thus, it does not matter whether a petitioner challenges the fact of his confinement by raising an argument about his underlying conviction or an argument about the effects of an unprecedented pandemic. It matters only that he *has* challenged the "fact or duration of his physical imprisonment" and seeks "immediate release or a speedier release from that imprisonment." *Id.* at 499-500. Similarly, conditions-of-confinement claims are defined by what the claimants are challenging and what they are seeking. In cases where plaintiffs "solely" challenge their unconstitutional treatment in prison, their claims fall outside of the "heart of habeas corpus" because they are not "challenging the fact or duration of . . . physical confinement itself" or "seeking immediate release or a speedier release." *Id.* at 498–99. Instead, they seek either damages or injunctive relief that will halt their "unconstitutional treatment" while maintaining their physical imprisonment. *See id.* (discussing legal claims in conditions-of-confinement cases).

Preiser permits only one interpretation of Count II in Petitioners' Amended Complaint: Petitioners have raised a claim that falls within "the heart of habeas corpus" and must be raised by means of a habeas petition.[7] *See id.* at 498-500. The named Plaintiffs who bring claims under this Count, and the high-risk subclass, have challenged the "very fact" of their "physical imprisonment" because they allege that no set of conditions can preserve their rights or their health

[7] In contrast, Count I is, in fact, a conditions-of-confinement claim. In that count, Plaintiffs seek to change their conditions of confinement, do not seek release, and do not challenge the fact or duration of their confinement. Because that claim is a conditions-of-confinement claim, Plaintiffs raised it under § 1983.

in the midst of this pandemic. Dkt. No. 84 ¶ 265-66. In other words, Petitioners contend that their physical imprisonment itself has been rendered unlawful by Defendants' actions that have allowed the pandemic to spread through Arkansas's prisons. And the remedy they seek is "immediate[] release." *See* Dkt. No. 84 ¶ d. A claim that seeks release and challenges the fact of an individual's confinement is—by definition—a core habeas claim and—also by definition—*not* a conditions-of-confinement claim. *See Preiser*, 411 U.S. at 498-500. *Preiser* is unambiguous on this point, and the Supreme Court has reaffirmed the *Preiser* rule time and time again. *See, e.g.*, *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005) (citing *Preiser*, 411 U.S. at 482, 489) (holding that a "prisoner in state custody" "must seek federal habeas corpus relief" "to challenge the 'fact or duration of his confinement'"); *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974) (same).

Since the onset of the COVID-19 pandemic, courts across the country have recognized that *Preiser* permits claims like those at issue here to proceed in habeas. For instance, in *Barrera*, No. 4:20-CV-1241, 2020 WL 1904497, at *4, petitioners raised a similar habeas claim to the one at issue here, and the defendants countered with the same argument made by the Defendants in this case: that petitioners' claims must fail because the Fifth Circuit does not allow conditions-of-confinement claims to be brought in habeas petitions. The district court rejected the defendants' argument for the same reason urged here by Petitioners. "The mere fact that Plaintiffs' constitutional challenge requires discussion of conditions" in their detention facility does not bar relief in habeas. *See id.* Unlike a conditions claim, plaintiffs did "not challenge the specific mitigation measures [the detention facility chose] to implement; rather, Plaintiffs argue that there are no possible steps that [the facility] can take that would protect their constitutional rights while they remain detained during the COVID-19 pandemic in its current form." *Id.* "Because Plaintiffs are challenging the fact of their detention as unconstitutional and seek relief in the form of

immediate release, their claims fall squarely in the realm of habeas corpus." *Id.*; *see also id.* (quoting *Preiser*, 411 U.S. at 500) ("Where an individual is 'challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release,' the proper remedy is a writ of habeas corpus.").

The Sixth Circuit reached the same conclusion in *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020). The defendants in *Wilson* raised an identical argument to the defendants in *Barrera* and the Defendants in this case: that petitioners had raised a conditions-of-confinement claim that was not cognizable in habeas. *Id.* at 838. The Sixth Circuit rejected this argument, stating that defendants' "attempts to classify petitioners' claims as 'conditions of confinement' claims . . . are unavailing." *Id.* As the Sixth Circuit explained, petitioners did not seek to modify their current conditions of confinement; they sought release based on the argument that "there [we]re no conditions of confinement sufficient to prevent irreparable constitutional injury at [their prison]." *Id.* The fact that they sought release was dispositive under the Supreme Court's binding precedent: "Because petitioners seek release from confinement, 'the heart of habeas corpus,' jurisdiction is proper" in habeas. *Id.* (quoting *Preiser*, 411 U.S. at 498).

Dozens of district court decisions have reached the same conclusion. Where petitioners are seeking release from confinement because there is no set of conditions that can protect their rights, their claims are properly raised in a habeas petition. *See infra* notes 10 and 11. The State's motion to dismiss simply ignores these cases and ignores the Supreme Court's decisions in *Preiser* and *Wilkinson* that control the legal question here. This Court should reject it.

The State's principal argument is that two Eighth Circuit cases—*Kruger v. Erickson*, 77 F.3d 1071 (8th Cir. 1996), and *Spencer v. Haynes*, 774 F.3d 467 (8th Cir. 2014)—bar Petitioners from pursuing their claim for release in habeas. In the State's view, *Kruger* and *Spencer* hold that:

1) Petitioners' claim must be construed as a conditions-of-confinement claim, and 2) the Eighth Circuit forbids individuals from raising conditions-of-confinement claims in habeas. To prevail on their argument, both of the State's contentions must be correct. If Petitioners' claim is not a conditions-of-confinement claim, then Petitioners can indisputably raise it in habeas. And if the Eighth Circuit does not forbid individuals from raising conditions-of-confinement claims, then Petitioners may proceed in habeas regardless of how their claim is construed.

The State's first contention—that *Kruger* and *Spencer* require this Court to construe Petitioners' Count II as a conditions claim that must be raised under § 1983—is incorrect for multiple reasons. First, this Court cannot construe Count II as a conditions claim because *Preiser* holds that where a petitioner challenges the fact of his confinement and seeks immediate or speedier release, that claim *must* be raised in habeas and *must not* be raised under § 1983. *See Preiser*, 411 U.S. at 498-500. *Preiser* further establishes that conditions-of-confinement claims "relate[] solely to … unconstitutional treatment," do not challenge the fact of confinement, and do not seek immediate or speedier release. *See id.* Precedents of the Supreme "Court must be followed by the lower federal courts . . . ." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). Thus, *Kruger* and *Spencer* could not require Petitioners to bring their claim under § 1983 rather than habeas when *Preiser* and *Wilkinson* require Petitioners to bring their claim under habeas rather than § 1983.

Second, *Kruger* and *Spencer* did not address, much less resolve, the question of how to construe a claim like Petitioners' claim. In both *Kruger* and *Spencer*, the claimant raised a legal challenge that *Preiser* classified as a conditions-of-confinement claim, and the question before the Court was whether habeas or § 1983 presented the proper vehicle for the claim. For instance, Mr. Kruger filed a habeas petition claiming that prison officials had violated his rights by taking a sample of his blood and sought an injunction that would require the state to destroy the blood

sample or return it to him. *See id.* He challenged solely the unconstitutional conduct of prison officials and did not challenge the legality of his confinement or seek any kind of release. *See id.* Similarly, Mr. Spencer filed a habeas petition alleging that prison officials had violated his rights by placing him in four-point restraints for thirty hours as punishment for his behavior. *See Spencer*, 774 F.3d at 469. Just like Mr. Kruger, he solely challenged one instance of unlawful conduct by a prison official and did not challenge the legality of his confinement or seek release. *See id.* In both cases, the Eighth Circuit ruled that Petitioners had raised conditions-of-confinement claims and, thus, could not proceed in habeas. *See id.* at 469-71; *Kruger*, 77 F.3d at 1073-74. The sole issue presented in *Kruger* and *Spencer* and the sole issue discussed and decided in *Kruger* and *Spencer* was whether claims that indisputably qualified as conditions-of-confinement claims under *Preiser* could proceed in habeas. The Eighth Circuit's answer to that question has no bearing on the legal issue before this Court, as two district courts in this circuit have already determined. *See Angelica C.*, 2020 WL 3441461, at *10 (ruling that "*Spencer* and *Kruger* are distinguishable"); *Mohamed S.*, 2020 WL 2750109, at *2 (quoting *Spencer*, 774 F.3d at 469) ("It appears to this Court that habeas jurisdiction is appropriate and outside the holding of *Spencer*, which specifically noted that the petitioner there did not 'seek a remedy that would result in an earlier release from prison.'").

Furthermore, both *Kruger* and *Spencer* make clear that they did not modify *Preiser*'s rule regarding the boundary between habeas claims and § 1983 claims in any way; they simply applied *Preiser*'s rule to the facts before them. *See Kruger*, 77 F.3d at 1073 ("In *Preiser*[,] the Supreme Court delineated what constitutes a habeas action as opposed to a 42 § 1983 claim."); *Spencer*, 774 F.3d at 469 (relying solely on *Kruger* and *Preiser* for its explanation of how to classify claims). Their explanations of the *Preiser* rule are somewhat less detailed than the articulation in *Preiser* but the substance is the same. As *Kruger* explains, courts must examine "the substance of the

relief" sought. 77 F.3d at 1073. In a § 1983 action—that is, in a conditions-of-confinement claim—a prisoner may "seek money damages or injunctive relief from unlawful treatment." *Id.* In contrast, a habeas petitioner challenges "the length of his detention."[8] *Id.* Similarly, *Spencer* describes conditions-of-confinement claims—relying on *Preiser*—as those that do not "seek a remedy that would result in an earlier release from prison." *Spencer*, 774 F.3d at 469. Here, in contrast, the "substance of the relief" sought by Petitioners is immediate release from prison. Even if one believed that *Kruger* and *Spencer* were applying a different rule than *Preiser*—which they are not—*Kruger* and *Spencer* both establish that Petitioner has raised a claim that sounds in habeas, and not a conditions-of-confinement claim.[9]

The State's argument to the contrary rests, in significant part, on a quotation taken out of context. According to the State, *Spencer* holds that "if a prisoner's 'constitutional claim *relates to* the conditions of his confinement . . . a habeas petition is not the proper claim to remedy his alleged injury.'" Dkt. No. 96 at 34 (quoting *Spencer*, 774 F.3d at 470) (emphasis added). At first blush, this suggests that Petitioners cannot bring a claim in habeas if it relates in some way to their conditions of confinement, even if they challenged their fact of confinement and sought release.

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[8] *Kruger*'s citation to *Preiser* makes clear that *Kruger*'s allusion to "the length of his detention" is simply a paraphrase of *Preiser*'s statement that habeas petitioners seek "immediate release or a speedier release." *See id.*

[9] The State argues that Petitioners' requested relief—release to home confinement—is not permissible in habeas. As *Preiser* makes clear, the State's argument is exactly backwards. Where an incarcerated person requests immediate or speedier release from his "physical imprisonment," his claim must be raised in habeas. *Preiser*, 411 U.S. at 500. The State's argument turns entirely on its imprecise use of the word "custody." *See* Dkt. No. 96 at 35. *Preiser* makes clear that release from "physical imprisonment" *is* a release from custody for purposes of habeas. *See Preiser*, 411 U.S. at 484, 485, 487, 498, 500 (using interchangeably the terms "release from illegal custody," "release form unlawful physical confinement," "release from physical custody," "release from [physical confinement],"and "release from" "physical imprisonment"). Indeed, the one case that the Defendants rely on also equates "detention" with "custody." *See Kruger*, 77 F.3d at 1073. Because Petitioners have undisputedly requested release from "physical imprisonment," their claim sounds in habeas, not § 1983.

This would constitute a marked departure from *Preiser*, which held that conditions-of-confinement claims "related solely to . . . unconstitutional treatment . . . in confinement" and did not "challeng[e] the fact or duration" of confinement or "seek[] immediate release or a speedier release from that confinement." *Preiser*, 411 U.S. at 498-99. If the State's assertion were correct, it would fundamentally redefine the relationship between habeas claims and § 1983 claims.

But the State's assertion is not correct. By including the two preceding sentences and the language omitted in the State's quote, it becomes clear that *Spencer* is, in fact, just applying the rule in *Preiser*:

> Spencer does not challenge his conviction, nor does he seek a remedy that would result in an earlier release from prison. Rather, Spencer argues on appeal that being put in four-point restraints for such an extended period of time violated his Eighth Amendment right against cruel and unusual punishment. As such, Spencer's constitutional claim relates to the conditions of his confinement. Consequently, a habeas petition is not the proper claim to remedy his alleged injury.

Spencer, 774 F.3d at 469-70 (citation omitted). The full language in the opinion supports Petitioners' argument, not the State's, because—unlike Petitioners—the plaintiff in *Spencer* did not "seek a remedy that would result in an earlier release from prison." *Id.*

The State also contends that Petitioners "cannot bring th[eir] claim in a habeas proceeding" because it "has nothing to do with the legality of their sentences as imposed." Dkt. No. 96 at 34; *see also id.* at 35 ("Plaintiffs still could not bring that claim because they do not contend that their sentences are unlawful . . . ."). This assertion—which is unsupported by any authority and unaccompanied by any argument—is patently wrong. The State appears to conflate claims raised under 28 U.S.C. § 2255—which may only challenge an individual's sentence, *see* 28 U.S.C. § 2255(a)—with claims raised under the broader habeas provisions of 28 U.S.C. § 2241 or 28 U.S.C. § 2254, which permit any challenge to illegal custody. *See* 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a).

And yet again, *Preiser* forecloses the State's argument. As in this case, the legal challenges in *Preiser* "ha[d] nothing to do with the legality of their sentences as imposed." Dkt. No. 96 at 34. Rather than challenge "their sentences as imposed," the plaintiffs in *Preiser* challenged the cancellation of their good-time credits. The Supreme Court held that such a claim is not only permissible in habeas, it constitutes "the heart of habeas corpus," and its "sole federal remedy is a writ of habeas corpus." 411 U.S. at 498, 500; *see also Wolff*, 418 U.S. at 554 (same). The State's argument is also foreclosed by Eighth Circuit precedent, which has repeatedly permitted habeas petitioners to challenge the execution of their sentences instead of the legality of their sentences as imposed. *See, e.g.*, *United States v. Knight*, 638 F.2d 46, 47 (8th Cir. 1981) (observing that "[w]e have frequently held that an attack on the manner in which a sentence is executed . . . may be cognizable in a habeas corpus petition").

The State's attempted reliance on *Kruger* and *Spencer* also fails in one final respect. As the State observes, the Eighth Circuit has held that conditions claims are not cognizable in habeas. *See Spencer*, 774 F.3d at 470 ((citing *Kruger*, 77 F.3d at 1073 (per curiam)). But the Eighth Circuit has *also* held that conditions claims *are* cognizable in habeas. *See Willis v. Ciccone*, 506 F.2d 1011, 1014 (8th Cir. 1974) ("[I]t it is generally acknowledged that habeas corpus is a proper vehicle for any prisoner, state or federal, to challenge unconstitutional actions of prison officials."); *see also Aamer v. Obama*, 742 F.3d 1023, 1037-38 (D.C. Cir. 2014) (observing that Eighth Circuit "completely overlook[ed] their own post-*Preiser* precedent recognizing that conditions of confinement sound in habeas"). Given the inconsistency between *Spencer* and *Kruger* on the one hand and *Willis* on the other, *Willis* controls because it preceded *Kruger*, and *Kruger* was not an *en banc* ruling. *See Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (holding that "when faced with conflicting panel opinions, the earliest opinion must be followed 'as it should have

controlled the subsequent panels that created the conflict'") (citation omitted). Thus, conditions-of-confinement claims are cognizable in habeas in the Eighth Circuit, and even if this Court views Petitioners' claim as a conditions-of-confinement claim, which it is not, *Willis* permits Petitioners to raise their claim in habeas.

The State also tries to buttress its misplaced reliance on *Kruger* and *Spencer* by arguing that "courts have overwhelmingly rejected Plaintiffs' construction of their claim." Dkt. No. 96 at 35. This effort is also unavailing. According to the State, "Plaintiffs focus on just two [cases]" where habeas relief was granted because "[v]irtually every other case granting habeas relief on such claims has ruled that they *are* condition-of-confinement claims and can be heard in habeas because local circuit precedent has condoned condition-of-confinement habeas petitions." *See id.* at 35-36. The State's contention cannot survive an actual review of the existing case law. In reality, even in circuits where conditions-of-confinement claims are sometimes permitted in habeas, courts have repeatedly allowed claims like Petitioners' to proceed for the same reasons urged here by Petitioners and disputed by the State: because they challenge the Petitioners' fact of confinement and seek release.[10]

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[10] *See, e.g.*, *Baez v. Moniz*, No. 20-10753-LTS, 2020 WL 2527865, at *1-2 (D. Mass. May 18, 2020) (ruling that petitioners' claim sounds in habeas and "is properly viewed, at least in part, as a challenge to the fact or duration of petitioners' confinement"); *Gomes v. United States Dep't of Homeland Sec., Acting Sec'y*, No. 20-CV-453-LM, 2020 WL 3258627, at *3 (D.N.H. June 16, 2020) (ruling that petitioners' claims were properly raised in habeas because petitioners requested "'immediate release or placement in community-based alternatives to detention'") (citation omitted); *Denbow v. Me. Dep't of Corr.*, No. 1:20-cv-00175-JAW, 2020 WL 3052220, at *8 (D. Me. June 8, 2020) (citation omitted) ("Because 'Petitioners and Class Members challenge the fact of their confinement, which, they allege, has 'become unconstitutional because of the COVID-19 pandemic risk,'" "the habeas remedy applies even if the alleged violation arises from unlawful conditions of confinement."); *Martinez-Brooks v. Easter*, No. 3:20-cv-00569 (MPS), 2020 WL 2405350, at *16 (D. Conn. May 12, 2020) (petitioners' claim was a proper habeas claim because they "contend[ed] that the fact of their confinement in prison itself amounts to an Eighth Amendment violation under these circumstances, and nothing short of an order ending their confinement at FCI Danbury will alleviate that violation."); *Fernandez-*

The State further contends that "courts in Circuits like the Eighth that bar condition-of-confinement claims from being heard in habeas overwhelmingly conclude that claims like Plaintiffs' are condition-of-confinement claims and therefore cannot be heard in habeas." Dkt. No. 96 at 37. That contention is also belied by the law. To start, although the State fails to acknowledge them in its brief, two district courts in the Eighth Circuit have addressed the precise question at issue here. Both agreed with Petitioners' construction of their claim, and both agreed that *Kruger* and *Spencer* were inapposite. *See Angelica C.*, 2020 WL 3441461 at *10-11 (permitting petitioners to raise a claim in habeas because "[r]elease is not a remedy allowed for under a civil rights

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Rodriguez v. Licon-Vitale, No. 20-cv-3315 (ER), 2020 WL 3618941, at *28 (S.D.N.Y. July 2, 2020) ("The Court therefore concludes that the inmates challenge, at least in part, the "fact of confinement."); *Bystron v. Hoover*, No. CV 3:20-602, 2020 WL 1984123, at *3 (M.D. Pa. Apr. 27, 2020) (explaining that "the court must look to the remedy requested by the inmate to determine if he is seeking relief available in a habeas petition," and where a petitioner seeks release, the sole federal remedy lies in habeas); *Nohasses G. C. v. Decker*, No. CV 20-4653 (ES), 2020 WL 2507775, at *6 (D.N.J. May 15, 2020) ("Here, Petitioner seeks immediate release from ICE custody, which is a remedy available through a habeas petition, not in a civil rights action."); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020) (quoting *Preiser*, 411 U.S. at 498) ("First, and most fundamentally, although the grounds on which they seek release relate to their conditions of confinement, Petitioners seek complete release from confinement, which is 'the heart of habeas corpus.'"); *Cameron v. Bouchard*, No. 20-10949, 2020 WL 2569868, at *27 (E.D. Mich. May 21, 2020), *on reconsideration*, No. 20-10949, 2020 WL 2615740 (E.D. Mich. May 22, 2020), *and vacated on other grounds*, No. 20-1469, 2020 WL 3867393 (6th Cir. July 9, 2020) at *27 (holding "§ 2241 is the proper vehicle for Plaintiffs to challenge the continued confinement of medically-vulnerable Jail inmates during the COVID-19 pandemic" because "Plaintiffs seek release . . . based on the fact of their confinement"); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *3 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) at *3 (holding that "where a petitioner claims no set of conditions would be sufficient to protect her constitutional rights, her claim should be construed as challenging the fact, not conditions, of her confinement and is therefore cognizable in habeas"); *Prieto Refunjol v. Adducci*, No. 2:20-CV-2099, 2020 WL 2487119, at *17 (S.D. Ohio May 14, 2020), *reconsideration denied*, No. 2:20-CV-2099, 2020 WL 3026236 (S.D. Ohio June 5, 2020) (permitting petitioners' claim to proceed in habeas because "[a] lawsuit raising the question of the validity of a prisoner's confinement is the archetypal habeas case"); *Calhoun v. Barr*, No. 1:20-CV-666, 2020 WL 4670558, at *3 (W.D. Mich. Aug. 12, 2020) ("[T]here can be no question that Plaintiff is challenging the fact or extent of his confinement, a challenge that must be brought as a habeas petition.").

action"); *Mohammed S.*, 2020 WL 2750109, at *2 ("In such situations, where the relief requested is release, and the argument is that confinement itself is unconstitutional, this Court agrees that it has the authority to release individuals from custody through a § 2241 petition.").

The State's claim fares no better when considering "courts in Circuits like the Eighth Circuit." *Spencer* identified four circuits that completely prohibit individuals from bringing conditions-of-confinement claims in habeas: the Fifth, Seventh, Ninth, and Tenth Circuits. Contrary to the State's assertions, district courts in every one of those circuits have ruled that COVID-related claims in which Petitioners seek release are properly raised in habeas.[11]

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[11] *See, e.g.*, *Beswick v. Barr*, No. 5:20-CV-98-DCB-MTP, 2020 WL 3525196, at *3 (S.D. Miss. May 18, 2020), *report and recommendation adopted*, No. 5:20-CV-98-DCB-MTP, 2020 WL 3520312 (S.D. Miss. June 29, 2020) ("The undersigned finds that the Petitioner has brought a habeas matter because the requested relief challenges the fact or duration of his confinement."); *Armas v. Ramos*, No. 6:20-CV-00741, 2020 WL 4577136, at *4 (W.D. La. July 6, 2020), *report and recommendation adopted sub nom. Corzo Armas v. Ramos*, No. 6:20-CV-00741, 2020 WL 4577117 (W.D. La. Aug. 7, 2020) ("Because Petitioner challenges the validity of her continued confinement and because she seeks immediate release from confinement as the remedy, the Court finds that Petitioner . . . may do so through a "fact or duration" claim asserted under 28 U.S.C. § 2241."); *Dada v. Witte*, No. 1:20-CV-00458, 2020 WL 2614616, at *1 (W.D. La. May 22, 2020) ("Despite Respondent's best efforts to convince this court that this case is a conditions of confinement case rather than a fact of confinement case, we find otherwise."); *Ruderman v. Kolitwenzew*, No. 20-CV-2082, 2020 WL 2449758, at *8 (C.D. Ill. May 12, 2020) (permitting petitioners to pursue claim in habeas because it bears on "whether the fact of his confinement is constitutional in light of the conditions caused by the COVID-19 pandemic" in addition to conditions of confinement); *Ochoa v. Kolitwenzew*, No. 20-CV-2135, 2020 WL 2850706, at *6 (C.D. Ill. June 2, 2020) (same); *Torres v. Milusnic*, No. CV204450CBMPVCX, 2020 WL 4197285, at *7–8 (C.D. Cal. July 14, 2020) ("Because Petitioners contend there are no set of conditions of confinement that could be constitutional, the Court finds Petitioners challenge the fact of their confinement."); *Gutierrez-Lopez v. Figueroa*, No. CV2000732PHXSPLJFM, 2020 WL 2781722, at *6 (D. Ariz. May 27, 2020) ("Because Petitioner claims that her continued detention under the present conditions is unconstitutional and that her immediate release is the only effective remedy, Petitioner's claims can be viewed as challenging the fact, not simply the conditions, of her confinement."); *Urdaneta v. Keeton*, No. CV2000654PHXSPLJFM, 2020 WL 2319980, at *6 (D. Ariz. May 11, 2020) (same); *Bent v. Barr*, No. 19-CV-06123-DMR, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020) (quoting *Muhammad*, 540 U.S. at 750, 124 S.Ct. 1303) ("This is patently a 'challenge[ ] to the validity' of his confinement."); *Singh v. Barr*, No. 20-CV-02346-VKD, 2020 WL 2512410, at *5 (N.D. Cal. May 15, 2020) (permitting claim to proceed in habeas based on *Bent*); *Essien v. Barr*, No. 20-CV-1034-WJM, 2020 WL 1974761, at *3 (D. Colo.

In sum, the State's position is foreclosed by *Preiser*, is inconsistent with *Kruger* and *Spencer*, and has been rejected by literally dozens of courts across the country. Accordingly, this Court should likewise reject this meritless argument.

D. PETITIONERS DID NOT NEED TO EXHAUST THEIR HABEAS CLAIMS IN ARKANSAS STATE COURTS BECAUSE NO RELIEF WAS AVAILABLE.

Respondents contend that Petitioners' habeas claim faces "an insurmountable roadblock" because 28 U.S.C. § 2254(b)(1)(A) requires Petitioners to exhaust the remedies available to them in state court before a federal court may grant relief in habeas. Dkt. No. 96 at 41–42. This assertion is incorrect. Even if Respondents are correct that Petitioners' habeas claim brought under 28 U.S.C. § 2241 should be construed as a petition under 28 U.S.C. § 2254,[12] and even if the exhaustion requirement is binding on Petitioners in the context of a life-threatening pandemic,[13]

Apr. 24, 2020) ("[T]he Court finds that the Supreme Court's *Preiser* decision controls here: when a prisoner or detainee 'is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.'"); *Teague v. Crow*, No. CIV-20-441-C, 2020 WL 4210513, at *1 n.3 (W.D. Okla. June 24, 2020), *report and recommendation adopted*, No. CIV-20-441-C, 2020 WL 4208941 (W.D. Okla. July 22, 2020) (construing petitioner's filing as "a habeas petition under § 2241 as it challenges the execution of his sentence and seeks immediate release from confinement for a period of quarantine").

[12] Respondents correctly observe that the Eighth Circuit has held that habeas claims brought by state petitioners challenging the execution of their sentences should be considered pursuant to 28 U.S.C. § 2254. *See, e.g.*, *Singleton v. Norris*, 319 F.3d 1018, 1022 (8th Cir. 2003) (citing *Crouch v. Norris*, 251 F.3d 720 (8th Cir. 2001)). Respondents do not dispute that Petitioners' claim falls within the plain language of 28 U.S.C. § 2241 or that myriad other courts have decided claims like Petitioners under § 2241. And the Eighth Circuit has never considered the proper vehicle for bringing a claim under the factual circumstances presented by COVID-19. But this Court need not address this issue because the exhaustion requirement of 28 U.S.C. § 2254 is not an obstacle to the relief sought by Petitioners, and Respondents raise no other reason why § 2254 prohibits consideration of the merits. For example, the general rules limiting second or successive habeas petition under § 2254 do not apply when, as here, the basis for Petitioners' claim did not arise until well after the imposition of their state court sentence. *See Singleton*, 319 F.3d at 1023. Similarly, the limitations imposed by 28 U.S.C. § 2254(d) are not applicable here because Petitioners' claim was not "adjudicated on the merits in State court proceedings."

[13] *See infra* at Part II(D).

Petitioners need not bring an action in state court because Arkansas does not provide an available procedure by which Petitioners may obtain release for their federal claim. *See* 28 U.S.C. § 2254(b)(1)(B)(i) (writ of habeas corpus shall not be granted unless it appears that "there is an absence of available [s]tate corrective process").

The Amended Complaint in this case alleges that Petitioners and the High Risk Subclass are entitled to immediate release because Respondents are violating their Eighth Amendment rights, and no remedy short of release could satisfy the Eighth Amendment. Dkt. No. 84 ¶¶ 265–66. State Defendants contend that Petitioners could have raised an Eighth Amendment claim in Arkansas state courts under 42 U.S.C. § 1983 or the Arkansas Civil Rights Act, Ark. Code Ann. 16-123-105. *See* Dkt. No. 96 at 42. But State Defendants do not so much as argue that Petitioners could obtain release in Arkansas State courts under either cause of action. Instead, they simply assert that Arkansas courts "might" rule that Petitioners' claim for release is cognizable under Section 1983. *See id.* The State does not explain how or why the Arkansas courts "might" reach such a conclusion except that "many courts"—in other jurisdictions, with different laws—have allegedly done so. *See id.* Based solely on this unsubstantiated assertion, the State argues that this "Court can be, at best, unsure" whether the Arkansas courts would deny relief. And "[i]f a federal court is *unsure* whether a claim would be rejected by the state courts, the habeas proceeding should be dismissed without prejudice or stayed [until] the claim is fairly presented to them." Dkt. No. 96 at 42 (quoting *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995) (emphasis added by the State).

This Court should reject the Defendants' argument out of hand because the State has not even advanced an argument that Arkansas state courts provide an available state corrective process. If this Court disagrees, it should still reject the State's argument because the argument is meritless.

Sloan does not help the Defendants because Petitioners' claim for release would clearly be rejected by the Arkansas State courts. *See Sloan*, 54 F.3d at 1381–82. *Sloan* does not require Petitioners to prove futility to a mathematical certainty; Petitioners need only show that the relevant procedural vehicle "would likely not be available to [them]." *Id.* at 1382. Here, Petitioners have no procedural vehicle available to them because Arkansas state law bars Petitioners from seeking release under 42 U.S.C. § 1983, the Arkansas Civil Rights Act, and state postconviction. Furthermore, Petitioners cannot seek relief under § 1983 or the Arkansas Civil Rights Act—which provides the same protections—because binding Supreme Court precedent forbids it. *See Preiser*, 411 U.S. at 500.

For incarcerated individuals seeking to challenge the execution of their sentence, Arkansas law provides just one avenue: filing a state post-conviction petition pursuant to Arkansas Rule of Criminal Procedure 37. "*All* grounds for post-conviction relief from a sentence imposed by a circuit court . . . must be raised in a petition under this rule." Ark. R. Crim. P. 37.2(b) (emphasis added). If Petitioners had a state court remedy, therefore, it would lie under Rule 37. Arkansas's post-conviction scheme tracks federal habeas: Petitioners can only obtain release by Arkansas's state habeas analogue, not its § 1983 analogue.

Respondents do not invoke Rule 37, because it is plainly unavailable to Petitioners for two reasons. First, Rule 37 imposes time limits by which Petitioners must file their claims, which depend upon the resolution of the underlying criminal case. *See* Ark. R. Crim. P. 37.2(c) (imposing 60- and 90-day filing limits depending on the resolution of the underlying criminal matter). The time limitations imposed by Rule 37.2 are jurisdictional, and "where they are not met, a trial court lacks jurisdiction to grant postconviction relief." *Carter v. State*, 2010 Ark. 231, 2, 364 S.W.3d 46, 49 (2010). Here, Petitioners are time-barred by Rule 37.2(c) from raising the claims that they

have brought in federal habeas because their underlying criminal cases were resolved more than 90 days ago. Second, Rule 37 is narrower than habeas corpus, and Petitioners' claims are not cognizable under Rule 37. *See, e.g.*, *Whitmore v. State*, 771 S.W.2d 266, 272 (Ark. 1989) (holding that "Rule 37 does not apply to the execution of a sentence"). Consequently, Arkansas law does not provide Petitioners with an "available [s]tate corrective process," and their federal claim is not barred by the exhaustion requirement in 28 U.S.C. § 2254. *See Sloan*, 54 F.3d at 1381-82 (finding that return to state court was futile for petitioner where "state habeas . . . would likely not be available to [him]").

Additionally, Petitioners do not have an available state corrective process because neither § 1983 nor the Arkansas Civil Rights Act entitle them to seek release. As Respondents explain, the Arkansas Civil Rights Act "provid[es] identical protections to section 1983." *See* Dkt. No. 96 at 42. But as the Supreme Court has made clear, filing a civil action pursuant to § 1983 is not the proper procedure for seeking release; filing a petition for a writ of habeas corpus is. "[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." *Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (citing *Preiser*, 411 U.S. at 488–90). Thus, a state statute that affords "identical protections to section 1983," *see* Dkt. No. 96 at 42, has identical limitations: it does not provide Petitioners with an available procedure by which they may seek release.

In sum, Petitioners were under no obligation to seek release in Arkansas state courts because release was not available to them in Arkansas state courts. The State has offered no legal theory or argument to the contrary, and any such argument would be meritless. Thus, the State's exhaustion argument should be rejected.

E. EVEN IF ARKANSAS DID PROVIDE STATE REMEDIES, THIS COURT SHOULD WAIVE THE EXHAUSTION REQUIREMENT BECAUSE OF THE GRAVE THREAT POSED BY COVID-19.

Even if Petitioners did have available state court remedies (and they do not), the failure to exhaust would not require the dismissal of Petitioners' federal habeas claims. "[A plaintiff's] failure to exhaust his remedies in state court . . . does not divest a federal court of jurisdiction over the petition." *Puertas v. Overton*, 272 F. Supp. 2d 621, 626 (E.D. Mich. 2003) (citation omitted). Rather, a court should assess whether "unusual or exceptional circumstances" exist such that "the interests of comity and federalism will be better served by addressing the merits." *Id.* at 627 (quoting *Granberry v. Greer*, 481 U.S. 129, 134 (1987)). Indeed, 28 U.S.C. § 2254(b)(1)(B)(ii) provides that exhaustion of state court remedies is not required where circumstances exist that render such process "ineffective to protect the rights of the applicant."

In *Chitwood v. Dowd*, the Eighth Circuit recognized that "[c]ourts may grant habeas relief in 'special circumstances,' even though [] petitioner did not exhaust state remedies." 889 F.2d 781, 784 (8th Cir. 1989). Determining whether such special circumstances exist is a factual question for the district court. *See id.* In *Chitwood*, petitioner sought habeas relief after the negligent action of state officials impaired the proper execution of his sentence, leading to an undue extension of his incarceration. Although Mr. Chitwood had not exhausted his stated court remedies, he sought relief in federal court through a writ of habeas corpus, arguing that he did not have time to exhaust his state-court claims before his sentence expired, leading to a loss of justiciability. *Id.* at 785. The district court ruled, and the Eighth Circuit affirmed, that the combination of the state officials' action and the threatened mootness of his claims constituted special circumstances that permitted him to proceed in federal court without exhausting his state court remedies. *Id.*

Petitioners in this case are similarly situated to the petitioner in *Chitwood*. As in *Chitwood*, the execution of Petitioners' sentence is threatened by the actions of state officials—here, the deliberate indifference of Respondents, who have violated Petitioners' Eighth Amendment rights. And as in *Chitwood*, the delay inherent to the exhaustion of state court remedies would render their claims moot. Petitioners require relief immediately to ensure that they do not become infected with COVID-19; any delay—much less the delay required for (futile) state court exhaustion—would likely mark the difference between sickness and health.

Other district courts in the Eighth Circuit have also permitted petitioners to pursue habeas relief without exhausting their state claims when circumstances dictated that state corrective processes would be "ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii). Thus, in *Reeves v. McSwain*, the court found the plaintiff was procedurally unable to exhaust their remedies because of the location of their incarceration and therefore excused them. No. 4:12CV2185 ACL, 2016 WL 812572 (E.D. Mo. Mar. 2, 2016). And in 2007, a district court found special circumstances warranted relief in a similar situation: "[o]n the information before the [c]ourt, it appears that petitioner's incarceration in another state will result in an inordinate delay in the processing of petitioner's claims in Missouri state court, thereby rendering such state processes ineffective in securing the rights of petitioner in this cause." *Metzger v. Nixon*, No. 4:06CV999 HEA, 2007 WL 2746726 *3–4 (E.D. Mo. Sept. 18, 2007).

Similarly, a district court in Michigan applied this exception when pursuit of state court procedure could amount to a death sentence. In *Puertas*, the court waived the exhaustion requirement for a 76-year-old prisoner with coronary disease and bladder cancer who had recently gone into remission, releasing him on bond pending a decision on his petition for a writ of habeas corpus. 272 F. Supp. at 628. In doing so, the court found that the petitioner's "age, ill health, and

dire need for continued medical treatment" warranted special consideration. *Id*. Considering the situation, "the interests of comity and federalism" were better served by addressing the merits of the petition rather than allowing the petitioner to risk death in prison while awaiting adjudication in state court. *Id*. at 627 (quoting *Granberry*, 481 U.S. at 131).

The same conclusion is warranted here. Requiring Petitioners in the High Risk Subclass to file a new action in state court could easily be the difference between life and death. COVID-19 has continued to spread unchecked through the Arkansas prison system, infecting incarcerated individuals to date.[14] Pursuing state court remedies at this juncture will serve no benefit to comity or federalism; it will merely expose Petitioners to grave and unnecessary additional risks. This Court has the power to consider Petitioners' petition on the merits and should do so.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request the Court deny State Defendants' Motion to Dismiss Plaintiffs' Amended Complaint.

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[14] Ark. Dep't of Corrections, Coronavirus (COVID-19) UPDATES, 9.10.20 (Sept. 10, 2020), https://adc.arkansas.gov/coronavirus-covid-19-updates.

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CERTIFICATE OF SERVICE

I, Omavi Shukur, hereby certify that on September 10, 2020. I caused the foregoing to be filed via the Court's electronic filing system, which effectuated service upon all counsel.

/s/ Omavi Shukur
One of the Attorneys for Plaintiffs and the Putative Classes