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

NICHOLAS FRAZIER, ALVIN HAMPTON, MARVIN KENT, MICHAEL KOURI, JONATHAN NEELEY, ALFRED NICKSON, HAROLD ("SCOTT") OTWELL, TRINIDAD SERRATO, ROBERT STIGGERS, VICTOR WILLIAMS, JOHN DOE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WENDY KELLEY, Secretary of Arkansas Department of Corrections; DEXTER PAYNE, Division of Correction Director, Arkansas Department of Corrections; JERRY BRADSHAW, Division of Community Correction Director, Arkansas Department of Corrections; ASA HUTCHINSON, Governor of Arkansas; BENNY MAGNESS, Chairman of Arkansas Board of Corrections; BOBBY GLOVER, Vice Chairman of Arkansas Board of Corrections; BUDDY CHADICK, Secretary of Arkansas Board of Corrections; TYRONNE BROOMFIELD, Member of Arkansas Board of Corrections; JOHN FELTS, Member of Arkansas Board of Corrections; WILLIAM ("DUBS") BYERS, Member of Arkansas Board of Corrections; WHITNEY GASS, Member of Arkansas Board of Corrections; all in their official capacities,

Defendants.

Case No. 4:20 cv434-RGB

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs Nicholas Frazier, Alvin Hampton, Marvin Kent, Michael Kouri, Jonathan Neeley, Alfred Nickson, Harold ("Scott") Otwell, Trinidad Serrato, Robert Stiggers, Victor Williams and Joe Doe file this memorandum in support of their emergency motion for a temporary restraining order and a preliminary injunction to seek immediate relief against the substantial risk of COVID-19 infection, illness, and death while incarcerated in Arkansas Department of Correction ("ADC") facilities.

Plaintiffs are requesting that the Court grant emergency relief today to protect Plaintiffs from the imminent risk of severe illness or death from exposure to COVID-19. Defendants are aware of the substantial risk posed by the virus and the recommended CDC steps to prevent its spread; nevertheless, they have failed to take steps to protect Plaintiffs. Defendants' failure to take steps to address the imminent risk caused by COVID-19 constitutes deliberate indifference in violation of Plaintiffs' Eighth Amendment rights. Further, Defendants' failure to provide Plaintiffs with disabilities with reasonable accommodations that would allow them to safely access the facility and maintain their health in light of the pandemic violates the Americans with Disabilities Act (ADA). The harms Plaintiffs will suffer as a result of their constitutional and statutory rights being violated are irreparable, and the balance of equities and public interest weigh in favor of immediate court intervention.

On Tuesday, April 21, Plaintiffs provided Defendants notice of Plaintiffs' claims and the imminent risks caused by their failure to take appropriate steps in light of COVID-19. Defendants have acknowledged receipt of the Complaint via email. However, they have not communicated to

Plaintiffs their position on the federal violations alleged and whether they intend to remedy said violations.

FACTUAL BACKGROUND

I. COVID-19 is a Highly Contagious, Deadly Disease that Poses a Serious Risk of Death or Injury to Anyone Who Becomes Infected.

The COVID-19 pandemic has created a public health emergency of historic proportions. Currently, more than two million individuals worldwide have tested positive for COVID-19, and more than 146,000 have died from the disease.[1] The pandemic has affected every corner of the world, and the United States sits at its epicenter.

The World Health Organization ("WHO") declared COVID-19 a pandemic on March 11, 2020.[2] The same day, Governor Asa Hutchinson signed Executive Order 20-03 ("EO 20-03") declaring a state of emergency,[3] and confirmed the first presumptive case of COVID-19 in Arkansas.[4] Governor Hutchinson noted,

> For months, Arkansas has been well prepared to respond to COVID-19. More than two months ago, the Arkansas Department of Health, under the leadership of Dr. Nathaniel Smith, designated more than 70 of its employees to work exclusively on COVID-19 . . . [I have] asked each of my Cabinet secretaries to prepare a continuity of operation plan in the event of an outbreak of the virus."[5]

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[1] *See Coronavirus Disease 2019 (COVID-19): Situation Report—89*, World Health Organization, (Apr. 18, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200418-sitrep-89-covid-19.pdf?sfvrsn=3643dd38_2.

[2] *WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020*, World Health Organization (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020.

[3] Ark. Proclamation No. 20-03 (Mar. 11, 2020), https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-03.__1.pdf.

[4] Governor Asa Hutchinson, Press Release, Mar. 11, 2020, https://governor.arkansas.gov/news-media/press-releases/governor-hutchinson-confirms-states-first-presumptive-positive-covid-19-cas.

[5] *See id.*

EO 20-03 has since been amended to specify procedures to be undertaken across the State, encouraging social distancing, disinfecting, and other reasonable precautions.

On March 13, President Trump declared "that the COVID-19 outbreak in the United States constitutes a national emergency."[6]

COVID-19 is a highly contagious disease. When "unconstrained, the coronavirus spreads exponentially, the caseload doubling at a steady rate."[7] Infected individuals can pass the virus to others by coughing, sneezing, or talking.[8] Individuals may become infected if they breathe in a respiratory droplet containing the virus, or touch a surface that has the virus on it and then touch their mouth, nose, or eyes.[9] The virus can survive in the air in droplet form for at least three hours, and it can survive up to one day on cardboard, two days on plastic, and three days on steel.[10] There is evidence that transmission of the virus can occur before the onset of symptoms or through infected individuals who never develop symptoms.[11]

[6] President Donald Trump, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/

[7] Kenneth Chang, *A Different Way to Chart the Spread of Coronavirus*, N.Y. TIMES (Mar. 20, 2020), https://www.nytimes.com/2020/03/20/health/coronavirus-data-logarithm-chart.html.

[8] *Coronavirus disease 2019 (COVID-19) Factsheet,* Centers for Disease Control and Prevention (Mar. 3, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf.

[9] *See id.*

[10] Neeltje van Doremalen et al., Correspondence, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, New England J. Medicine (Mar. 17, 2020), https://www.nejm.org/doi/full/10.1056/NEJMc2004973.

[11] Ex. 1, Golob Decl. at ¶ 6; Wycliffe E. Wei et al., *Presymptomatic Transmission of SARS-CoV-2 — Singapore, January 23 – March 16, 2020,* Morbidity and Mortality Weekly Report, 411-15 (Apr. 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm

Because COVID-19 is a novel virus, no vaccine exists and no cure has been developed.[12] Unlike the flu, there is no effective antiviral medication to prevent or treat infection.[13]

The combination of COVID-19's highly contagious nature and the lack of a vaccine or effective antiviral treatment mean that the disease spreads rampantly absent substantial public health interventions. Without such interventions, the CDC projects that 200 million people in the United States could become infected, and 1.5 million people could die.[14]

The only known effective means of controlling the virus are social distancing—remaining physically separated from known or potentially infected individuals—and the use of hygienic measures including hand washing.[15] For purposes of social distancing, the CDC recommends that individuals stay at least six feet away from others and "stay out of crowded places."[16]

The virus also spreads more quickly in poorly ventilated spaces. An infected person who speaks for five minutes in a poorly ventilated area can produce as many infection droplets of the virus as one infectious cough.[17] That effect is magnified when multiple people share a space, which "build[s] up" the concentration of infectious droplets in the air.[18]

The time period between when an individual becomes infected and the time that the individual exhibits symptoms varies from person to person.[19] The typical period is five days, but it can be as short as two days, and some people will never develop symptoms while still potentially

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[12] Ex. 2, Stern Decl."), at ¶ 5.
[13] Ex. 1 at ¶ 10.
[14] *See id.* at ¶ 11.
[15] *See id.* at ¶ 10-11; Ex. 2 at ¶ 1.
[16] *Public Health Recommendations after Travel-Associated COVID-19 Exposure*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html (last visited Apr. 19, 2020).
[17] *See id.*
[18] *See id.*
[19] Ex. 1 at ¶ 6.

spreading the disease.[20] As a result, the only way to establish the lack of risk from COVID-19 is through an aggressive testing regime.[21] People of all ages risk serious illness, injury, or death if they contract COVID-19.[22] Even mild cases of COVID-19 generally involve about two weeks of fevers and dry coughs and are more severe than the flu.[23]

According to the WHO, approximately 20% of people who contract COVID-19 require treatment by a specialist, and one in six becomes seriously ill.[24] In serious cases, individuals' lungs "become filled with inflammatory material [and] are unable to get enough oxygen to the bloodstream."[25]

For a significant number of people, contracting COVID-19 will end in death. In the United States, the fatality rate continues to rise. Although the recorded death rate was 1.35% in late March, it has now increased to nearly 5%.[26]

Although COVID-19 can cause serious symptoms for any individual, up to and including death, its effects are much more severe for certain populations.

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[20] *See id.* at ¶ 6.

[21] *See id.*

[22] CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19) — United States, February 12–March 16, 2020*, Morbidity and Mortality Weekly Report (Mar. 18, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm?s_cid=mm6912e2_w.

[23] Holly Secon and Aria Bendix, *There is a wide misconception of what a 'mild' case of COVID-19 looks like. It can be ugly and brutal.*, Business Insider (Apr. 16, 2020, 2:34 PM), https://www.businessinsider.com/mild-coronavirus-cases-high-fever-dry-cough-2020-3.

[24] Graham Readfearn, *What Happens to People's Lungs When They Get Coronavirus?*, The Guardian (Mar. 24, 2020), https://www.theguardian.com/world/2020/apr/15/what-happens-to-your-lungs-with-coronavirus-covid-19

[25] *See id.*

[26] Chris Mooney, Juliet Eilperin and Joel Achenbach, *As U.S. coronavirus fatality rate rises to 5 percent, experts are still trying to understand how deadly this virus is*, Wash. Post (Apr. 17, 2020), https://www.washingtonpost.com/health/as-officials-plan-to-reopen-the-economy-a-key-unknown-remains-how-deadly-is-the-coronavirus/2020/04/17/0bd2f938-7e49-11ea-a3ee-13e1ae0a3571_story.html

Among the highest risk populations, the fatality rate from COVID-19 is approximately 15%.[27] For high risk patients who do not die from the disease, the recovery period is prolonged, and individuals have a "profound" "need for extensive rehabilitation."[28]

Individuals older than 50 are more vulnerable to COVID-19, and those over 70 face a particularly serious risk of death from the disease.[29]

Various medical conditions also increase the risk of serious consequences from COVID-19 for individuals of any age. These conditions include lung disease, heart disease, diabetes, being immunocompromised (from cancer, HIV, autoimmune disease, etc.), blood disorders (including sickle cell disease), chronic liver or kidney disease, inherited metabolic disorders, stroke, developmental delay, or pregnancy.[30]

Black individuals have faced significantly increased risks of both infection and death from COVID-19 in Arkansas, making up less than 16% of the population, but accounting for 29.4% of confirmed cases, and 36.8% of deaths.[31] This is consistent with the severe racial disparities with respect to the pandemic in other parts of the country. In Illinois, Black people comprise less than 15% of the population but account for 30% of the state's cases and 40% of deaths.[32] Similarly, 40% of those who have died in Michigan from COVID-19 are Black as compared to 14% of the state's population.[33] The same trend is evident in Louisiana, where Black people make up 33% of

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[27] *Id.* at ¶ 4.
[28] *Id.*
[29] *See* Ex. 2 at ¶ 4; Ex. 1 at ¶ 3.
[30] Ex. 1 at ¶ 3.
[31] *ADH COVID-19 Demographic Slide Deck*, Ark. Dep't of Health, https://www.healthy.arkansas.gov/images/uploads/pdf/Presentation_-_Demographics_PPT.pdf (last updated Apr. 19, 2020)
[32] Jan Wolfe, *African Americans more likely to die from coronavirus, early data shows*, Reuters (Apr. 6, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-race/african-americans-more-likely-to-die-from-coronavirus-illness-early-data-shows-idUSKBN21O2B6 .
[33] *See id.*

the population but account for 70% of deaths.[34] COVID-19 has a disproportionately harmful effect on Black people because they are more likely to have pre-existing conditions that exacerbate the symptoms of the disease due to environmental and economic factors and because of inequalities in the health care system.[35]

II. Conditions in ADC Facilities Create Serious Risk of COVID-19-Related Infection, Disease, and Death.

On March 27 and April 15, 2020, Arkansas Secretary of the Department of Health Nathaniel Smith acknowledged that the correctional facility "setting[] pose[s] a high risk for transmission of COVID-19."

Indeed, correctional facilities are epicenters for infectious diseases, like COVID-19, because they have higher levels of risk factors for infection; conditions that unavoidably entail close contact in often overcrowded, poorly ventilated, and unsanitary facilities; and poor access to healthcare services relative to that available in community settings.[36]

Prisons are congregate environments (i.e., places where people live and sleep in close proximity).[37] In such environments, infectious diseases that are transmitted via the air or touch are

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[34] Lauren Zannolli, *Data from US south shows African Americans hit hardest by Covid-19*, The Guardian (Apr. 8, 2020), https://www.theguardian.com/world/2020/apr/08/black-americans-coronavirus-us-south-data.

[35] Wolfe, *supra* n.62; Colleen Walsh, *COVID-19 Targets Communities of Color*, Harvard Gazette, Apr. 14, 2020.

[36] Stuart A. Kinner et al., Comment, *Prisons and custodial settings are part of a comprehensive response to COVID-19*, 5 Lancet Public Health e188 (2020), https://www.thelancet.com/action/showPdf?pii=S2468-2667%2820%2930058-X; *see also* Bethany Young and Katie Robertson, *How Should Prisons and Jails Prepare for COVID-19?*, Urban Institute (Mar. 20, 2020), https://www.urban.org/urban-wire/how-should-prisons-and-jails-prepare-covid-19

[37] Ex. 2 at 2 ¶ 9.

more likely to spread, and therefore present an increased danger for the spread of COVID-19 if and when it is introduced into the facility.[38]

COVID-19 has been especially dangerous in areas of close confinement, such as cruise ships and assisted living facilities. In early March 2020, the highest known person-to-person transmission rates for the virus were in a nursing home in Kirkland, Washington and on cruise ships in Japan and off the coast of California.[39] More recently, the highest recorded transmission rates have been in Rikers Island, a jail facility in New York City, with a rate of transmission that recently was over seven times higher than the city overall.[40]

Because ADC prisoners are housed in close quarters, unable to maintain a six-foot distance from others, and share or touch objects used by others, the risks of contracting COVID-19 are greatly, if not exponentially, increased, as is already evidenced by the spread of COVID-19 in other congregate environments.[41]

The risk of COVID-19 spreading throughout ADC detention facilities is exceptionally high, in part, because of the presence of outsiders and staff, who may be asymptomatic or presenting COVID-19 symptoms in these facilities.[42] In fact, Dr. Robert Redfield, Director of the CDC, has warned that as many as 25% of individuals infected with COVID-19 may not show symptoms.[43] Thus, screening outsiders, including staff and visitors, for symptoms of COVID-19,

[38] *Id.*
[39] Ex. 1 at 3 ¶ 12.
[40] *Id.*
[41] Ex. 2 at 2 ¶ 9.
[42] Ex. 2. at 2 ¶ 9.
[43] Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times, Mar. 30, 2020, at https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html

will not necessarily prevent the introduction of COVID-19 from the outside because the virus can spread "before people show symptoms."[44]

Arkansas has already witnessed the spread of COVID-19 in its correctional facilities. At the end of March 2020, an agricultural worker at the Cummins Unit tested positive. Subsequently, on April 12, 2020, a person incarcerated at Cummins Unit tested positive for COVID-19; this was the first known positive case in the ADC incarcerated population. People housed in that individual's barracks were tested in the following days, revealing that 44 of the 46 other incarcerated people housed in his barracks were positive.[45]

The Cummins Unit now has the most confirmed cases of COVID-19 of any correctional facility in Arkansas with 600 incarcerated people testing positive as of April 19, 2020[46]—a more than 1,000% increase from April 13, when less than 50 incarcerated people in Cummins were confirmed positive.[47] In addition, 57 prisoners in a federal prison in Forrest City and 62 incarcerated parole and probation violators in Little Rock have tested positive for the virus.[48] Currently, incarcerated people make up approximately one in six verified COVID-19 infections

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[44] See Ctrs. for Disease Control & Prevention, *How COVID-19 Spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html.

[45] Max Brantley, *Coronavirus update: Big jump in Cummins prison cases; a goal of beginning a return to work May 4*, Ark. Times, April 17, 2020, https://arktimes.com/arkansas-blog/2020/04/17/coronavirus-update-big-jump-in-cummins-prison-cases-a-goal-of-beginning-a-return-to-work-may-4.

[46] Meghan Roos, *One Arkansas prison makes up almost a third of State's coronavirus cases*, Arkansas Times, Apr. 20, 2020, https://www.newsweek.com/one-arkansas-prison-makes-almost-third-states-coronavirus-cases-1499045.

[47] Max Brantley, *Coronavirus update: Big jump in Cummins prison cases; a goal of beginning a return to work May 4*, Ark. Times (Apr. 17, 2020), https://arktimes.com/arkansas-blog/2020/04/17/coronavirus-update-big-jump-in-cummins-prison-cases-a-goal-of-beginning-a-return-to-work-may-4

[48] *Id.*

statewide.[49] Even with these alarming figures, the actual number of COVID-19 infections in ADC detention facilities is likely much higher due to the lack of widespread testing.

Along with facing greater risk of infection, prisoners in Arkansas are also more likely to have underlying medical conditions that render them especially vulnerable to severe illness and even death from COVID-19. The Department of Justice has recognized that "[b]oth prisoners and jail inmates were more likely than the general population to report ever having a chronic condition or infectious disease."[50]

Health profiles of incarcerated people show that they are significantly sicker and more vulnerable to COVID-19 than the general population.[51] For example, incarcerated people are more likely to have medical conditions such as asthma, tuberculosis, hypertension, diabetes, and heart disease, as compared to the general population.[52]

"Chronic health conditions, such as diabetes, hypertension, and asthma, . . . [are a] growing proportion of correctional health care needs" due to "two trends: the aging prison population and the nation's general obesity epidemic. About 40% of all inmates are estimated to have at least one chronic health condition. With a few exceptions, nearly all chronic health conditions are more prevalent among inmates than in the general population."[53]

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[49] *Id.*

[50] U.S. Dep't of Justice, Bureau of Justice Statistics, *Medical Problems of State and Federal Prisons and Jail Inmates, 2011-12* p. 1 (2016), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf.

[51] Peter Wagner & Emily Widra, *No need to wait for pandemics: The public health case for criminal justice reform*, Prison Policy initiative (Mar. 6, 2020), https://www.prisonpolicy.org/blog/2020/03/06/pandemic/.

[52] *Id.*

[53] Alexandria Macmadu and Josiah D. Rich, *Correctional Health Is Community Health*, 13 Issues in Science and Technology, Vol. XXXII, No. 1 (2015), https://issues.org/correctional-health-is-community-health/.

The Department of Justice has reported 74% of prisoners to be overweight, obese, or morbidly obese.[54] Problems with obesity within the prison population is especially troubling in this pandemic because obesity may be an important predictor of severe COVID-19-related illness, especially among younger people.[55] This is because people with obesity may already have a compromised respiratory system, and "[a]bdominal obesity, [which is] more prominent in men, can cause compression of the diaphragm, lungs and chest capacity."[56]

In addition, the growing elderly prison population is especially at risk of serious COVID-19 disease or death. In fact, the "percentage of people in state prisons who are 55 and older more than tripled between 2000 and 2016," and, "[f]or the first time, older adults make up a larger share of the state prison population than people from 18 to 24."[57]

Because individuals in jails and prisons are considered physiologically comparable to individuals in the community several years older, many state departments of corrections and the Federal Bureau of Prisons define "elderly" or "older" variously between 50 and 60 years of age.[58] Accordingly, people over the age of 50 in correctional settings are considered vulnerable to the COVID-19 virus.[59]

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[54] U.S. Dep't of Justice, Bureau of Justice Statistics, *Medical Problems of State and Federal Prisons and Jail Inmates, 2011-12* p. 1 (2016), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf.

[55] Roni Caryn Rabin, *Obesity Linked to Severe Coronavirus Disease, Especially for Younger Patients*, N.Y. Times (Apr. 16, 2020), https://www.nytimes.com/2020/04/16/health/coronavirus-obesity-higher-risk.html.

[56] *Id.*

[57] Weihua Li and Nicole Lewis, *This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19*, Marshall Project (Mar. 19, 2020), https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19.

[58] Ex. 2 at ¶ 9.

[59] *Id.*

III. The Spread of Covid-19 In ADC Facilities Jeopardizes the Public Health of Surrounding Communities, Especially Black Communities.

Prisons are not fully closed environments. When the COVID-19 virus is introduced to a prison, all persons within the facility—whether they are staff or a incarcerated people—are at heightened risk of contracting the virus and, in turn, spreading the virus to others with whom they live or come into contact with in their own homes and neighborhoods.[60] The harm caused by a COVID-19 outbreak in a correctional facility, therefore, is not confined to those who are incarcerated or work in that facility. Instead, this harm poses a serious health risk to the surrounding community.[61]

For example, scarce community health resources like emergency departments, hospital beds, and ventilators would inevitably become more scarce in the event of a COVID-19 outbreak in a detention facility, because incarcerated people are more likely to have underlying medical conditions that carry a significantly increased risk of severe complications from COVID-19.[62]

A COVID-19 outbreak could exceed the capacity of the local health infrastructure because treatment for serious cases requires significant medical intervention, including ventilator assistance and intensive care support.[63] Of the twenty ADC facilities, nine are located in counties with no ICU beds in surrounding communities.[64] If the need for ICU beds and life-saving medical equipment exceeds supply, the death rate will increase for the entire population of Arkansas.

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[60] Peter Wagner & Emily Widra, *No need to wait for pandemics: The public health case for criminal justice reform,* Prison Policy Initiative (Mar. 6, 2020), https://www.prisonpolicy.org/blog/2020/03/06/pandemic/.

[61] Ex. 2 at ¶ 11.

[62] Ex. 2 at ¶ 9.

[63] *See id.* at ¶ 8.

[64] These facilities are Cummins Unit, Delta Regional Unit, East Arkansas Regional Unit, Grimes Unit, McPherson Unit, North Central Unit, Texarkana Regional Corrections Center, Varner and Varner Supermax Unit, Wrightsville Unit. *See Facilities,* Ark. Dep't of Correction,

The ADC runs twenty detention facilities across the state.[65] These facilities are not evenly distributed across Arkansas. Instead, they are concentrated in the southeastern part of the State, near Pine Bluff.[66]

Black people make up 15.7% of the Arkansas population.[67] Yet eight of the twenty ADC detention facilities are located in counties where Black individuals comprise a majority of residents.[68] In total, sixteen of the twenty ADC detention facilities are located in counties that have a higher percentage of Black people than the state—usually by a significant margin.[69]

If COVID-19 spreads throughout ADC's facilities, Black Arkansans will disproportionately suffer consequences from that spread, as compared to their percentage of the Arkansas state population.

IV. Defendants Intentionally Fail to Adopt and Implement Adequate Policies and Procedures to Prevent and Mitigate the Spread of COVID-19.

On March 11, 2020, Defendant Kelley issued a memorandum outlining the ADC's protocols to reduce the risk and combat the spread of COVID-19 within ADC facilities. This memorandum only encouraged regular hand washing, covering coughs and sneezes, avoiding

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https://adc.arkansas.gov/facilities (listing facilities and locations) (last visited Apr. 20, 2020); Ninette Sosa, *A Closer Look: Arkansas and ICU Beds by County*, KNWA Fox (Mar. 27, 2020), https://www.nwahomepage.com/lifestyle/health/coronavirus/a-closer-look-arkansas-and-icu-beds-per-county/ (listing ICU beds by county).

[65] *Facilities,* Ark. Dep't of Correction, https://adc.arkansas.gov/facilities (last visited April 20, 2020).

[66] *See id.*

[67] *Quick Facts: Arkansas*, United States Census, https://www.census.gov/quickfacts/AR (last visited April 20, 2020).

[68] *See Facilities,* Ark. Dep't of Corrections, https://adc.arkansas.gov/facilities (last visited April 20, 2020) (listing facilities and locations); Arkansas Demographics, https://www.arkansas-demographics.com/counties-cities-that-begin-with-A(last visited April 20, 2020) (providing demographic data for all Arkansas counties).

[69] *See id.*

handshakes, *continuing* cleaning (instead of intensifying it), and telling staff members to stay at home if ill.[70]

On March 23, 2020, the CDC published the CDC Guidance on COVID-19.[71] The purpose of the CDC Guidance is, in part, to help correctional facilities ensure the protection of the health and safety of incarcerated people. The ADC leadership, including Defendant Kelly, were made aware of the CDC guidance on March 23, 2020.

Defendants' departures from the CDC Guidance are many and have placed incarcerated people in ADC facilities at a significant and unnecessary heightened risk of infection, severe illness, and/or death despite widespread knowledge of the highly contagious nature of COVID-19 and the severe consequences of infection, especially among older people and people with underlying health and medical conditions.

Defendants failures to adopt and implement adequate policies and procedures to prevent and mitigate the spread of COVID-19 fall into seven broad categories, which are discussed below.

First, Defendants failed to adequately plan to prevent or mitigate the spread of COVID-19 in ADC correctional facilities. Importantly, the CDC Guidance recommends that correctional facilities should develop contingency plans for reduced workforces due to staff absences.

As a result of Defendants' failure to adequately plan for staff shortages, ADC correctional facilities are experiencing unmitigated staffing shortages amid the COVID-19 pandemic. These shortages place Named Plaintiffs and the putative class members at great risk. For example, some Ouachita River Unit staff are not being screened for COVID-19 symptoms, because the facility is

[70] Wendy Kelley, Sec. of Corrections, Memorandum (Mar. 11, 2020), https://ssl-adc.ark.org/images/uploads/Coronavirus_Notice_for_Web_-_3-11-2020.pdf.

[71] The CDC is a federal agency and the leading national public health institute of the United States. It is charged with protecting public health and safety through the control and prevention of disease.

desperate for staff due to staffing shortages amid the COVID-19 pandemic. This failure to screen staff is also in contravention of the CDC Guidance.

Another glaring departure from the CDC Guidance is the failure of Defendants to mandate plans to prevent the transfer of incarcerated people who have contracted COVID-19 from one ADC facility to another unless necessary. This lack of planning has resulted in COVID-19-positive people being transferred from one correctional institution to another. For example, one person recently transported to Ouachita River Unit from another ADC-affiliated correctional institution tested positive for COVID-19 upon arrival.

The CDC Guidance also calls for the provision of Personal Protective Equipment (PPE) and contingency planning for shortages of PPE, but Defendants do not have any such plans. Consequently, several of the Named Plaintiffs and the putative class members are being housed with incarcerated people who have symptoms of COVID-19, but have not been provided face masks to protect others in their barracks.

Other Named Plaintiffs have not received any masks, despite having severe underlying medical conditions, reporting symptoms of COVID-19, and repeatedly requesting PPE. For example, Mr. Kent, who has reported having COVID-19 symptoms, has requested a mask but has not received one, even though he submitted his request for a mask over three weeks ago.

When a mask is provided, any attempt to clean the mask requires incarcerated people being without the mask for an unsafe period. After a mask is handwashed, it cannot be worn while it is drying. Also, an incarcerated person who sends their mask to the laundry goes without the mask until it is returned to them, and even then, they risk their mask being damaged by the laundry machines. Alarmingly, many of the masks that are provided to incarcerated people come from Cummins Unit, which has the greatest known COVID-19 infection rate of any ADC detention

facility. Some of the incarcerated people making the masks at Cummins Unit are known to have COVID-19.

Second, Defendants have failed to implement the training and educational interventions necessary to prevent the spread of COVID-19 in correctional facilities. The CDC Guidance states that correctional staff and incarcerated people should be trained on donning, doffing, and disposing of PPE. However, Plaintiffs and the putative class members have not been instructed on how to properly don, doff, or dispose of PPE. Many ADC staff members wear their face masks below their nose—if they wear them at all—and do not change their protective gloves regularly, in contravention of the CDC Guidance for the Use of PPE. Moreover, those class members who have received face masks only have one, which, as mentioned above, they are required to wash themselves, leading to frequent handling of contaminated masks or no mask at all while it is drying.

Many Named Plaintiffs and putative class members are therefore being deprived of needed reminders of how they can protect themselves and others in the event they become symptomatic. For example, Mr. Kent, who is incarcerated in the Varner Unit, reports not seeing any signage related to COVID-19 in the prison.

Third, Defendants have not implemented the heightened hygienic, cleaning, and disinfecting practices called for by the CDC Guidance. Named Plaintiffs also do not have access to the cleaning supplies necessary to sanitize themselves, their personal items, or their living areas. Indeed, ADC rules continue to restrict access to such crucial cleaning supplies, even in the midst of the COVID-19 pandemic.

Defendants' failures are also reflected in the unsanitary conditions of ADC's correctional facilities. For example, Mr. Otwell's bathroom in Ouachita River Unit is only cleaned once a week,

at the most. Mr. Nickson's shared showers in Cummins Unit are similarly filthy, which is why he chooses to clean himself using the sink in his cell instead of the prison's shared showers.

Notably, a man who works in sanitation at Ouachita River Unit has confirmed that the sanitation work crew does not clean the prison's kitchen. Food from this unsanitary kitchen is served on dining tables that are washed with recycled, soiled brownish water.

In addition, ADC has not followed the CDC's recommendation that staff clean shared surfaces several times a day. Even though Mr. Serrato shares a barracks with over 40 people, frequently touched surfaces in his barracks are only disinfected bi-monthly, instead of several times a day as recommended by the CDC.

These unsanitary conditions and inadequate levels of cleaning and disinfecting, which are in contravention of the CDC Guidance, place Named Plaintiffs and the putative class members at an inexcusably higher risk of contracting COVID-19.

Fourth, Defendants have failed to adequately implement measures to reduce crowding, minimize interpersonal contact, and encourage social distancing. The ADC has not heeded the CDC's caution against unnecessarily transferring incarcerated people from one facility to another. As was the case before the COVID-19 pandemic, dozens of incarcerated people are currently being transported from Ouachita Unit to other ADC correctional facilities daily. Similarly, the transfer of incarcerated people into Varner Unit from other ADC correctional facilities has continued unabated amid the pandemic.

Dozens of incarcerated people are currently engaging in recreational activities and having meals together in the same place, at the same time. For example, Mr. Kouri and Mr. Serrato have all spent recreation time with incarcerated people from other barracks amid the COVID-19

pandemic. Also, people incarcerated in ADC detention facilities sit within two feet of each other while dining; this is in contravention of the CDC's recommendation of six feet of social distancing.

Named Plaintiffs and the putative class members are similarly unable to social distance in their barracks, where they sleep. Mr. Otwell is housed in a barracks in which the beds are located within 2.5 feet of each other. Mr. Serrato's bed is similarly situated within 2.5 feet of the beds of men around him.

This inability to social distance, paired with a failure to adequately implement measures to reduce overcrowding, place Named Plaintiffs and the putative class members at a heightened risk of contracting COVID-19.

Fifth, Defendants do not adequately address suspected cases of COVID-19. If an incarcerated person exhibits symptoms of COVID-19, the CDC Guidance calls for them to be immediately given a face mask, placed in isolation, provided a medical evaluation and treatment, and evaluated for possible testing. In contrast, the ADC is not providing symptomatic people a mask, is not medically evaluating or treating them, and does not evaluate them for testing.

Named Plaintiffs have firsthand experience with ADC's inadequate treatment of incarcerated people exhibiting symptoms of COVID-19. For example, Mr. Kent has informed prison staff that he has symptoms of COVID-19, but has not received medical treatment, despite being especially vulnerable to contracting COVID-19 due to his serious heart condition. When Mr. Kouri, who is severely obese and therefore vulnerable to COVID-19, reported COVID-19 symptoms, such as shortness of breath and a cough, he was not evaluated for testing. Instead, he was provided eyedrops and sent back to his regular barracks. Alarmingly, Mr. Kouri comes into contact with over a hundred people in the prison per day, including people in his barracks, some of whom are bedridden and exhibiting symptoms of COVID-19. Similarly, Mr. Nickson, who, as

a 61-year-old diabetic, has an increased risk of contracting and dying from COVID-19, was not placed in isolation, despite his reporting symptoms of COVID-19. Instead, he is still being housed with his non-symptomatic roommate.

Sixth, Defendants do not adequately handle incarcerated people or staff who have had contact with people known to have tested positive for COVID-19 ("Close Contact Case"). In contravention of the CDC Guidance, Defendants have not implemented a 14-day quarantine of Close Contact Cases (with the exception of positive incarcerated people's cellmates), nor does it call for monitoring Close Contact Cases for COVID-19 symptoms. Defendants also depart from the CDC Guidance by not requiring ADC staff who have had close contact with a COVID-19-positve person to not return to work unless they are asymptomatic 14 days after their exposure to COVID-19. Instead, Defendants permit staff members who actually test positive to go to work, provided they only come into contact with infected incarcerated people. These omissions place Named Plaintiffs and the putative class members in great peril.

Seventh, Defendants have woefully inadequate policies and procedures for addressing the presence of a person who has tested positive for COVID-19 in an ADC detention facility. In the event of an incarcerated person or staff member testing positive for COVID-19, the CDC Guidance calls for the facility to close off the areas used by the person who contracted COVID-19. These areas are to be well ventilated for at least 24 hours before they are disinfected by people equipped with proper PPE. Defendants, however, have not implemented any of these measures.

In addition, Defendants have departed from the CDC Guidance by not informing incarcerated people that someone in their correctional facility has tested positive for COVID-19, thereby foregoing an opportunity to encourage incarcerated people to exercise more vigilance in their hygiene and cleaning habits when such extra vigilance is needed most. Not even people

incarcerated at Cummins Unit, with its alarmingly high COVID-19 infection rate, have been informed of the extent of the outbreak in the prison.

While ADC has policies concerning precautions that can be taken when dealing with incarcerated people diagnosed with diseases that can be transmitted via air, respiratory droplets or contact with surfaces containing a virus, these years-old policies do not explain when these precautions should be taken.

Defendants know that the above-mentioned failures to adequately prevent and mitigate against the risk of COVID-19 spreading throughout ADC correction facilities unnecessarily heighten the risk of Plaintiffs and the putative class members contracting COVID-19.

On April 8, 2020, the Arkansas Civil Liberties Union sent a letter to Governor Hutchinson, emphasizing the need to comply with the CDC Guidance in ADC facilities, in part, by mandating social distancing and minimizing the transfer of incarcerated people from one detention facility to another. This letter was also sent to Defendant Kelley. Despite receipt of the serious warnings in this letter, Defendants have failed to implement any of the recommendations.

LEGAL STANDARD

When determining whether to grant a TRO or preliminary injunction, the Court must consider: (1) the threat of irreparable harm to the movant; (2) the movant's likelihood of success on the merits; (3) the balance between the harm to the movant and the injury that granting an injunction would cause other interested parties; and (4) the public interest. *Kroupa v. Nielsen*, 731 F.3d 813, 818 (8th Cir. 2013) (internal quotation marks omitted) (citing *Dataphase Sys. Inc. v. CL Sys.*, 640 F.2d 109, 114 (8th Cir. 1981)).

While no single factor is determinative, *Dataphase*, 640 F.2d at 114, the Eighth Circuit has made clear that in weighing whether to grant a preliminary injunction, the "likelihood of success

on the merits is most significant." *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp.*, 59 F.3d 80, 83 (8th Cir. 1995) (internal citation omitted). Despite the importance of the likelihood of success on the merits, the inquiry should focus on "whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase*, 640 F.2d at 113. A court may also apply a "sliding scale in weighing whether preliminary relief is warranted." *Planned Parenthood of Wisconsin v. Van Hollen,* 963 F. Supp. 2d 858, 864 (W.D. Wis. 2013) (internal citations omitted). "[T]he more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while . . . supporting some preliminary relief." *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co*., 582 F.3d 721, 725 (7th Cir. 2009).

The same showing is required to obtain either a temporary restraining order or a preliminary injunction. *See ACLU of Minnesota v. Kiffmeyer*, No. 04-CV-4653, 2004 WL 2428690, at *2 (D. Minn. Oct. 28, 2004).

Further, under Federal Rule of Civil Procedure 65(b), a court may issue a temporary restraining order without notice to Defendants if "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). Where the adverse party has received notice of a motion for a temporary restraining order and a hearing has been held on the motion, it is proper for the court to consider the motion as one for a preliminary injunction. *See Van Hollen*, 963 F. Supp. 2d at 865.

ARGUMENT

As outlined in the Complaint, Plaintiffs are individual prisoners in the custody of the State of Arkansas seeking to represent all prisoners in ADC custody. Named Plaintiffs in the High Risk

and Disability Subclasses are individual prisoners who are especially vulnerable to COVID-19 because of their advanced age, underlying medical conditions, and/or disability, seeking to represent other prisoners who are similarly situated. Under current conditions, it is overwhelmingly likely that thousands of Plaintiffs will contract a serious, and sometimes lethal, virus with no cure. There are nearly 600 prisoners in ADC custody who have contracted COVID-19, nearly ten times the number of persons who were infected just five days before. *See* Governor Asa Hutchinson, Press Conference, April 20, 2020, https://www.youtube.com/watch?v=rhbt9s0dLuk&feature=youtu.be; CORONAVIRUS (COVID-19) UPDATES, ADC, https://adc.arkansas.gov/coronavirus-covid-19-updates (reporting the number of individuals infected on April 14, 2020 and April 17, 2020). Without urgent action, countless more prisoners will become seriously ill or die within a matter of weeks or months. Plaintiffs, therefore, request that the Court grant a temporary restraining order or a preliminary injunction ordering: 1) ADC to undertake essential preventative measures within facilities, in line with the recommendations of the CDC and Plaintiffs' experts, to prevent the further spread of COVID-19; and 2) the appointment of an expert to determine the members of the High Risk and Disability Subclasses, who, due to age, medical condition or disability, merit temporary medical furlough from confinement.

Once a plaintiff demonstrates entitlement to preliminary relief, courts have broad power to fashion equitable remedies to address constitutional violations in prisons. *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978). Although courts must "be sensitive to the state's interest[s]," courts "must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners [and] . . . may not allow constitutional violations to continue simply because a remedy

would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U.S. 493, 511 (2011).

Plaintiffs in this case are likely to succeed on the merits of their claims under both the U.S. Constitution and the ADA. COVID-19 is an extremely contagious and dangerous disease, the effects of which are exacerbated in ADC facilities where, due to overcrowding, Plaintiffs are not able to appropriately social distance, adequately clean themselves and their surroundings and sufficiently protect themselves without necessary equipment. The Defendants are well aware of these dangers. ADC tracks on its website the soaring rates of infection among prisoners and staff, as well as the measures that must be taken to prevent COVID-19's spread and the particular danger it poses to medically vulnerable prisoners. Nonetheless, Defendants have repeatedly refused to take even the most basic preventative measures.

Injunctive relief is necessary because the danger here, vulnerable people condemned to prolonged illness and potential death, is the quintessential irreparable harm. There is also an overwhelming public interest in limiting the spread of COVID-19, both to minimize further infections and to reduce strain on overwhelmed health systems. *See* Ex. 2, ¶¶ 11, 15 (explaining that the elevated risk in correctional facilities "poses a risk not only to the health of the individuals who contract COVID-19, but to the community at large"). Finally, during this global COVID-19 pandemic, given that Defendants have failed to implement even the most basic preventive measures, and any interest Defendants would otherwise have in keeping especially vulnerable inmates imprisoned is substantially outweighed by the imminent risks to the Plaintiffs' safety, the balance of equities weighs heavily in favor of the Plaintiffs.

Accordingly, this Court should order: 1) that immediate protective measures be taken in all ADC facilities, in line with the recommendations of Plaintiffs' experts and the CDC; and 2) the

appointment of an expert to determine those people who are at risk of serious illness or death due to serious underlying medical conditions, people over the age of 50, and people with disabilities particularly vulnerable to COVID-19 who shall be immediately transferred on medical furlough to home confinement.

I. Plaintiffs are Likely to Succeed on the Merits of their Constitutional and ADA Claims.

To show a likelihood of success on the merits, a movant need not show "a greater than fifty per[cent] likelihood that he will prevail on the merits." *Dataphase*, 640 F.2d at 113. Instead, the question is whether the movant has a "fair chance of prevailing." *Phelps–Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007), *modified on reh'g,* 545 F.3d 685 (8th Cir. 2008) (internal citation omitted). Given the importance of this factor to the ultimate decision, the Eighth Circuit has advised against a "wooden application" of the probability test. *Dataphase*, 640 F.2d at 113.

Plaintiffs in the General Class and High Risk Subclass are likely to establish that their conditions of confinement in ADC custody place them at substantial risk of serious harm from COVID-19, in violation of their Eighth Amendment rights. Additionally, Plaintiffs in the Disability Subclass are likely to also establish that the denial of cleaning supplies, protective equipment, and medical furlough places them in significant harm's way in violation of the Americans with Disabilities Act's reasonable accommodations provision.

A. Plaintiffs Are Likely to Succeed on the Merits of their Constitutional Claims.

Plaintiffs are likely to establish that their conditions of confinement in ADC custody render them at substantial risk of contracting COVID-19 and suffering prolonged injury and possible death. The Supreme Court has long held that when state officials "strip[] [prisoners] of virtually every means of self-protection and foreclose[] their access to outside aid, [they] are not free to let the state of nature take its course." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). State officials

instead have a responsibility under the Eighth Amendment to "take reasonable measures to guarantee the safety of the inmates . . . ." *Id.* at 832.

"The Eighth Amendment standard for conditions of confinement is whether the defendants acted with deliberate indifference." *Davis v. Or. Cty.*, 607 F.3d 543, 548 (8th Cir.2010). A prison official is deliberately indifferent if he "knows of and disregards" a substantial risk of serious harm to an inmate. *Farmer*, 511 U.S. at 837. "There is both an objective component and a subjective component to a claim of deliberate indifference . . . : (1) whether a substantial risk to the inmate's safety existed, and (2) whether the officer had knowledge of the substantial risk to the inmate's safety but nevertheless disregarded it." *Davis*, 607 F.3d at 548. "The subjective component requires that the official was both aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and he must also draw the inference." *Id*. at 548–49 (internal citations omitted). "[D]eliberate indifference includes something more than negligence[,] but less than actual intent to harm; it requires proof of a reckless disregard of the known risk." *Crow v. Montgomery*, 403 F.3d 598, 602 (8th Cir. 2005) (internal citations and quotations omitted).

In *Helling v. McKinney*, 509 U.S. 25 (1993), the Supreme Court held that the Eighth Amendment forbids deliberate indifference to conditions that "pose an unreasonable risk of serious damage to . . . future health." *Id.* at 35. The Supreme Court in *Helling* addressed exposure to secondhand smoke, but it recognized that "deliberate[] indifferen[ce] to the exposure of inmates to a serious, communicable disease" would similarly violate the Eighth Amendment, even if a prisoner currently shows no serious symptoms. *Id.* at 33.

Courts in the Eighth Circuit have followed suit. In *DiGidio v. Pung*, the Eighth Circuit, agreeing with various other circuits, upheld the district court's decision that "a consistent pattern of reckless or negligent conduct [in response to a tuberculosis outbreak] [wa]s sufficient to

establish deliberate indifference to serious medical needs." 920 F.2d 525, 533 (8th Cir. 1990). The Court specifically cited "the failure to develop written infection control policies, the failure to keep adequate medical records and charts, and the failure to provide a full-time doctor and medical director." *Id*. at 531.

"A court need not wait until an inmate bleeds to death or until institutional health care deficiencies reach catastrophic proportions in order to exercise its declaratory or injunctive powers." *Cody v. Hillard,* 599 F. Supp. 1025, 1055 (D.S.D. 1984), *aff'd,* 799 F.2d 447 (8th Cir. 1986), *on reh'g,* 830 F.2d 912 (8th Cir. 1987), (internal citation omitted) (citing *Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir. 1977) (institutional practices need not be defective in maximum degree before eighth amendment violation is found)). A "[p]laintiff need not have contracted the disease for an actionable claim to be stated." *Brown v. Moore*, 93 F. Supp. 3d 1032, 1041 (W.D. Ark. 2015).

Here, Plaintiffs have a strong likelihood of success on their Eighth Amendment claim because they satisfy both the objective and subjective components of the deliberate indifference test. Conditions in Arkansas prisons undeniably create a "substantial risk to [the Plaintiffs'] safety," and Defendants have "knowledge of [that] substantial risk . . . but nevertheless disregarded it." *Davis*, 607 F.3d at 548 (internal citation omitted).

1. Plaintiffs in the General Class and High-Risk Subclass Are at Substantial Risk of Serious Harm.

Plaintiffs are objectively at substantial risk of serious harm. There is no vaccine or cure for COVID-19. Ex. 1, ¶ 5, Ex. 1, ¶ 10. Once an individual contracts the illness, the consequences are serious. Ex. 1, ¶ 9 ("COVID-19 can severely damage the lung tissue, requiring an extensive period of rehabilitation and in some cases a permanent loss of respiratory capacity.").

The conditions in prisons inherently make it difficult for prisoners to engage in social distancing and undertake other imperative protective measures prisoners on their own. See Ex. 1, ¶ 9 ("Prisons are congregate environments, i.e. places where people live and sleep in close proximity. In such environments, infectious diseases that are transmitted via the air or touch are more likely to spread."); Ex. 1, ¶ 13 ("Given the avid spread of COVID-19 in skilled nursing facilities and cruise ships, it is reasonable to expect that COVID-19 will also spread rapidly in detention centers such as prisons and jails, particularly when residents cannot engage in social distancing measures, cannot practice proper hygiene, and cannot isolate themselves from infected residents and staff.").

Plaintiffs in this case are being detained in conditions that dramatically increase the likelihood that they will contract COVID-19 and fall seriously ill because they cannot maintain adequate social distancing as mandated by the CDC. Plaintiffs are housed in close quarters, forced to eat, sleep, bathe, and perform all daily life activities in a communal setting. Ex. 3, Kouri Decl., ¶¶ 7 (noting that he interacts with at least 110 other prisoners daily); Ex. 4, Serrato Decl., ¶ 4 (reporting that there are 46 racks in each barrack with only 2.5 feet between each bed); Ex. 5, Otwell Decl., ¶ 6 (reporting that he comes into contact with at least 150 prisoners and 30 correctional staff each day and sleeps 3 feet from the next bed); Ex. 2, ¶ 9; Ex. 1, ¶ 13.

The risks posed by ADC's congregate settings are exacerbated by lack of access to PPE for prisoners and many staff members, Ex. 3, ¶ 12 (noting that only two officers within the facility properly wear masks); Ex. 6, Kent Decl., ¶ 5 (reporting that the facility has refused to provide prisoners protective masks); Ex. 7, Stiggers Decl., ¶ 3 (same); Ex. 8, Frazier Decl., ¶¶ 5-6 (describing how he had to make a mask out of a shirt because the prison refused to provide them), and a lack of per-use cleaning of shared items like toilets, sinks, and showers, which are almost

always accessed by numerous individuals before they are sanitized. Ex. 3, ¶ 14 (noting that he cannot clean himself, but must rely on porters); Ex. 8., ¶ 7 (reporting that prisoners do not have enough cleaning supplies).

Prisoners simply cannot maintain proper social distancing under these conditions. Prisoners share their dayrooms and showers, Ex. 7, ¶ 4 (noting that he shares toilet and sink and that he uses the shower at the same time as 5 other individuals); Ex. 9, Nickson Decl., ¶ 7 (noting that only option for showers is communal), and must rely on multiple staff to prepare and deliver their meals and medications. Ex. 5, ¶¶ 7, 11 (describing the delivery of food by workers without masks). Plaintiffs are at the mercy of security and medical staff, who may carry the virus without showing symptoms, and who often fail to take even simple precautions like wearing face masks and disposable gloves. *Id*; Ex. 3, ¶ 13 (recounting that nurses distributing medication were not wearing masks and told prisoners to stop worrying about it and asking about it); Ex. 4, ¶ 6 (reporting that half of correctional officials do not wear masks).

Under these circumstances, Plaintiffs in the General Class, as well as the High-Risk Subclass – Plaintiffs who are over the age of 50 and are medically vulnerable – are likely to succeed on the merits. Ex. 2, ¶ 9; Ex. 1, ¶ 13. Plaintiffs in the High Risk Subclass are at an especially high risk of harm from the virus due to the high rate of chronic health conditions within the subclass. Ex. 6, ¶ 3 (history of heart failure and high cholesterol); Ex. 3, ¶ 3 (heart disease, high blood pressure, and extreme obesity); Ex. 4, ¶ 3 (tuberculosis and asthma); Ex.9, ¶ 3 (diabetes); Ex. 8., ¶ 3 (asthma); Ex. 7, ¶ 3 (same); *see also* Ex. 10 Hampton Decl.; Ex. 11 Neeley Decl.; Ex. 12 Williams Decl. Elderly prisoners and those with underlying medical conditions are in particular danger; they not only face a near-certain risk of serious illness, but also death. Ex. 1, ¶ 7 (“Vulnerable people include people over the age of 50, and those of any age with underlying health problems

such as – but not limited to – weakened immune systems, hypertension, diabetes, blood, lung, kidney, heart, and liver disease, and possibly pregnancy."). They typically experience COVID-19 symptoms more severely and are far more likely to develop complications as a result of the virus. Ex. 2, ¶ 8 ("Vulnerable people who are infected by the COVID-19 virus can experience severe respiratory illness, as well as damage to other major organs.").

2. Despite Being Aware of This Risk, Defendants Have Failed to Address It.

Simply put, Plaintiffs are risking their lives every moment they remain in custody in current conditions in prisons throughout Arkansas. Defendants have long been aware of this fact and, also, aware of what must be done to prevent these harms. As ADC's spokesperson recently admitted, ADC "knew the virus would eventually make its way into the state's prison system." Paige Cushman, *'It's Like Mad Max in Here', Arkansas Inmate Says Conditions Woeful Amid Outbreak*, ABC7 News (KATV), (Apr. 15, 2020), https://katv.com/news/local/its-like-mad-max-in-here-inmates-at-arkansas-prison-panic-amid-outbreak.

The Arkansas Department of Corrections tracks, twice per week, the number of prisoners and staff who have contracted COVID-19. CORONAVIRUS (COVID-19) UPDATES, ADC, https://adc.arkansas.gov/coronavirus-covid-19-updates. According to this tracker, COVID-19 is already in ADC facilities across the state: as of April 17, 2020, 34 ADC employees had tested positive and 163 ADC prisoners had tested positive. *Id*. The number of incarcerated persons infected nearly tripled over the number three days immediately prior. *See id.* (reporting that as of April 14, 2020, 61 individuals were infected). Conditions in the Cummins Unit, within ADC, have already become catastrophic. Forty-four prisoners in one barracks in the unit have contracted the virus. John Moritz, *44 of 47 Inmates Infected in Cummins Prisons Barracks*, Ark. Democrat Gazette, (Apr. 14, 2020), https://www.arkansasonline.com/news/2020/apr/14/44-of-47-inmates-

infected-in-cummins-pr/. On April 19, 2020, Arkansas Governor Asa Hutchinson announced that 348 prisoners in all at the Cummins Unit had tested positive for the virus. Governor Asa Hutchinson (@AsaHutchinson), Twitter (April 19, 2020, 2:31 P.M.), https://twitter.com/AsaHutchinson/status/1251941439216521217. As the State's Director of Health explained, "you can understand how efficiently COVID-19 can be spread in that setting." Moritz, *44 of 47 Inmates Infected in Cummins Prisons Barracks*, *supra*. On April 20, 2020, state representatives stated that they believe the total number of infected prisoners is now close to 600. *See* Governor Asa Hutchinson, Press Conference, April 20, 2020, *supra*.

All evidence indicates that the number of individuals with COVID-19 will increase by multiples in the coming days and weeks. History teaches that when an epidemic occurs nationally, people in custody experience a disproportionately high number of cases. At Rikers' Island, for example, the infection rate is currently more than six times the rate of infection for New York City, and more than 42 times the national infection rate. *See COVID-19 Infection Tracking in NYC Jails*, Legal Aid Soc'y, https://www.legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/ (last visited April 20, 2020).

Defendants are aware of the dangers COVID-19 poses to not only medically vulnerable Plaintiffs, such as those in High Risk Subclass, but also the General Class. On March 20, 2020, the ADC posted a flyer stating: "COVID-19 is known to cause a greater risk for severe illness in older adults and persons with underlying health conditions or compromised immune conditions. Younger people can be infected and spread the disease to others, too." ADC, *Coronavirus Disease (COVID-19) Precautions for Entering Correctional and Detention Facilities* (2019), https://adc.arkansas.gov/images/uploads/COVID-19_-_Facility_Entrance_Precautions_-_POSTER_11x17_-_March_20_2020-FINAL.pdf.

Additionally, Defendants are aware of what, at a minimum, must be done to prevent the spread of COVID-19. The ADC website provides that face masks help prevent the spread of COVID-19 and the steps that must be taken to keep these coverings sanitary. *See* CORONAVIRUS (COVID-19) UPDATES (Apr. 16, 2020), ADC, citing *Use Cloth Face Coverings to Help Slow Spread*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html (last reviewed Apr. 13, 2020). The website goes on to link to a separate Frequently Asked Questions document that outlines the "steps" that can be "take[n] to reduce our risk of getting COVID-19[.]" ADC, *Arkansas Joint Information Center, COVID-19*, (Mar. 17, 2020), https://adc.arkansas.gov/images/uploads/FAQs_Prepare_Your_Home_and_Children_ADEM-3-17-20.pdf. Among other things, it provides that individuals should regularly clean surfaces that are frequently used. *Id*. If someone contracts the virus, the document provides that they should "get immediate medical attention." *Id*. As early as March 15, 2020, ADC posted a separate informational document entitled "COVID-19 Health Care Resources" outlining the steps being undertaken to prevent the spread of the virus among the general public. See CORONAVIRUS (COVID-19) UPDATES (Mar. 15, 2020), ADC, citing UAMS Health Resources, *COVID-19 Health Care Resources*, https://adc.arkansas.gov/images/uploads/COVID19_in_Arkansas_UAMS-ACH-ADH-3-15-2020.pdf. These include free screenings, available 24 hours a day, 7 days a week to anyone who believes they may have contracted the virus. *Id.*

Under Arkansas law, Defendants have the ability to address this matter by not only ensuring that proper cleaning supplies are available, suitable distance between prisoners is possible, and regular care is provided to those infected, but they also have the ability to release individuals who, given their extreme vulnerability, cannot be safely confined in a congregative

setting. Under Ark. Code Ann. § 12-28-604, once an emergency due to overcrowding is declared, as it was on March 2, 2020, the Director of the ADC may recommend prisoners for parole, transfer or discharge. *See* ADC, *Minutes of the Arkansas Parole Board* (Feb. 27, 2020), https://www.paroleboard.arkansas.gov/Websites/parole/images/02%2027%20Mins.pdf, at 4 (declaring an emergency).

Yet, as discussed above, despite this knowledge and their ability to address the matter, Defendants have failed to take appropriate action, but have chosen instead to leave individuals in ADC custody to suffer. In response to a letter from the ACLU of Arkansas, on March 18, 2020, raising concerns about the combined effect of overcrowding and COVID-19, Arkansas Governor Asa Hutchinson said that he was not considering the release of additional prisoners. John Moritz, *Arkansas' Prisons, Jails Take Steps to Protect Inmates' health*, Ark. Democrat Gazette, (Mar. 23, 2020), https://www.arkansasonline.com/news/2020/mar/23/prisons-jails-take-steps-to-protect-inm/?bcsubid=1b2ea125-2aec-4788-b130-dbbbe56f1502&pbdialog=covid19-login. Likewise, although, on March 16, 2020, ADC issued a press release entitled "DOC Takes Steps to Prevent Spread of COVID-19", it discussed nothing more than limits on visitation. Press Release, ADC, *DOC Takes Steps to Prevent Spread of COVID-19*, (Mar. 16, 2020), https://adc.arkansas.gov/images/uploads/COVID_News_Release_-_Inmate_Visitation_Suspension_ADC-3-16-2020.pdf. On April 19, 2020, only after news of the outbreak at Cummins Unit and reports that hundreds of prisoners had been infected, the Governor announced the creation of a task force to study the release of a small subset of prisoners with less than six months left on their sentence. Governor Asa Hutchinson, Press Conference, April 19, 2020, *supra*. It is unclear when this will occur, and how many individuals will actually be released.

At a minimum, as ADC's own website attests, Defendants must, among other things, institute immediate testing, immediate screening, appropriate use of quarantine, and significant improvements in hygiene. Ex. 2, ¶ 13. Nonetheless, even these actions will not completely eliminate the risk, particularly for those individuals who are at increased risk of serious illness and death once they become sick. Ex. 2, ¶¶ 11, 14-15. The only way to fully protect against the imminent risk of substantial harm and possible death for the members of the subclasses of prisoners who are most vulnerable to the virus—people at advanced risk of serious illness or death due to age, disability, or sickness—is to immediately transfer them on temporary medical furlough to their homes to shelter in place before they contract the virus. *Id*.

A failure to meaningfully act in the face of an unprecedented pandemic that is killing thousands is clear indifference that leaves Plaintiffs—and particularly the vulnerable Plaintiffs in the High Risk Subclass for whom emergency medical release is sought—at imminent risk of serious harm and death.

B. Plaintiffs Are Likely to Succeed on the Merits of Their ADA Claims for the Disability Subclass.

Defendants' failure to provide Plaintiffs in the Disability Subclass with reasonable accommodations that would allow them to safely access the facility – as well as their failure to place prisoners with disabilities that make them particularly vulnerable to COVID-19 on furlough or home detention, where they could quarantine safely – is discrimination within the meaning of the Americans with Disabilities Act (ADA).

While the same conduct that violates the Eighth Amendment may also violate Title II of the ADA, the Supreme Court has recognized that Title II prohibits "a somewhat broader swath of conduct" than the Constitution itself forbids. *Allen v. Morris*, No. 4:93cv00398 BSM-JWC, 2010 WL 1382112, *7 (E.D. Ark. Jan. 6, 2010), *report and recommendation adopted*, No. 4:93CV00398

BSM-JWC, 2010 WL 1382116 (E.D. Ark. Apr. 2, 2010), quoting *United States v. Georgia*, 546 U.S. 151, 157, 160 (2006); *Tennessee v. Lane*, 541 U.S. 509, 533 n. 24 (2004). ADA claims, for example, do not require proof of deliberate indifference. *Morris*, 2010 WL 1382112, at *7.

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, 210 (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).

Courts in the Eighth Circuit have broadly construed the "services, programs, or activities" language in the ADA to encompass "anything a public entity does." *Bahl v. County of Ramsey*, 695 F.3d 778, 787 (8th Cir. 2012) (internal citations omitted). Department of Justice regulations further confirm that "title II applies to anything a public entity does." *Seremeth v. Board of County Commissioners of Frederick County*, 673 F.3d 333, 338 (4th Cir. 2012), quoting 28 C.F.R. Pt. 35, App. B; *see also* H.R. Rep. No. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 367, 1990 WL 125563 (stating that Title II is intended to apply to "all actions of state and local governments.").

Discrimination under the ADA includes failing to make reasonable modifications or accommodations that would allow a person with a disability to participate in a service, program or activity. The regulations implementing Title II of the ADA require that a public entity:

> make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7)(i).

In a failure-to-accommodate claim under the ADA, "the 'discrimination' is framed in terms of the failure to fulfill an affirmative duty—the failure to reasonably accommodate the disabled individual's limitations. . . . The known disability triggers the duty to reasonably accommodate and, if the [defendant] fails to fulfill that duty, [the Court] does not care if he was motivated by the disability." *Peebles v. Potter*, 354 F.3d 761, 767 (8th Cir. 2004) (internal citation omitted); *see also Sak v. City of Aurelia*, 832 F. Supp. 2d 1026, 1040 (N.D. Iowa 2011) (failure to accommodate is an independent basis for liability under the ADA, but accommodation is only required when necessary to avoid discrimination on the basis of disability, and accommodation must be reasonable) (citing 28 C.F.R. § 35.130(b)(7)).

Plaintiffs in the Disability Subclass, those who have serious medical conditions that make them particularly vulnerable to COVID-19, are qualified individuals with disabilities under the ADA. The ADA defines disability as having an impairment that substantially limits "major life activities." 42 U.S.C. § 12102(2). "Major life activities" include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* By definition, Plaintiffs have substantial physical impairments that already constitute disabilities under the ADA. *See e.g.* Ex. 6, ¶ 3 (history of heart failure and high cholesterol); Ex. 3, ¶ 3 (heart disease, high blood pressure, and extreme obesity); Ex. 4, ¶ 3 (Tuberculosis and asthma); Ex. 9, ¶ 3 (diabetes); Ex. 8., ¶ 3 (asthma); Ex. 7, ¶ 3 (same). By virtue of being incarcerated, they are qualified for the "programs and services" of ADC at issue, including the safe use of facilities and the safe care that ADC has a duty to provide to those in its custody. ADC Mission, Vision, Core Values and Goals, ADC, https://adc.arkansas.gov/goals-and-

objectives (stating that the department's mission is to "provide a safe and humane environment" for staff and prisoners).

ADC has discriminated against Plaintiffs in the Disability Subclass in violation of the ADA by denying them access to cleaning supplies, PPE and medical care, and not allowing them to shower and access common areas at appropriate distances that would allow them to use these facilities safely and preserve their health. "[D]eliberate refusal of prison officials to accommodate [a prisoner's] disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs" constitutes a violation of Title II. See *Georgia*, 546 U.S. at 157; *see also 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"); *Maxwell v. Olmsted Cty.*, No. 10cv3668, 2012 WL 466179, at *4 (D. Minn. Feb. 13, 2012) ("If [plaintiff] in fact made requests for accessible bathing facilities, and those requests went unanswered by the [detention center], he was denied access to a fundamental service or benefit under Title II."); *Morris*, 2010 WL 1382112, at *8 (considering, and allowing to go forward, claim that prison's failure to make reasonable accommodations that would enable obviously disabled plaintiff to safely shower constituted discriminatory intent under Title II of the ADA).

Additionally, for certain members of the Disability Subclass, additional cleaning supplies and protective measures will be insufficient due to the severity of their underlying medical condition, their particular vulnerability to COVID-19, and the dire consequences that would ensue were they infected. Thus, ADC has violated Title II by failing to provide them with the available accommodation of furlough or home detention that would allow them to enjoy the basic amount of safety necessary to preserve their health. "The hallmark of a reasonable accommodation is

effectiveness." *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 189 (2d Cir. 2015) (internal citation omitted). For certain individuals in the Disability Subclass, given their vulnerability, the likelihood of serious illness or death were they to acquire the disease, the extraordinary circumstances created by the virus and its prevalence in ADC facilities, release is the only effective measure of ensuring that they are not denied access to basic services and a basic level of health. Admittedly, temporary release is not a common accommodation, but these are uniquely dangerous circumstances. As courts have acknowledged, determining the "reasonableness of an [ ] accommodation is a 'fact-specific' question[.]" *Noll v. Int'l Bus. Machs. Corp.*, 787 F.3d 89, 94 (2d Cir. 2015) (internal quotation omitted). Finally, any argument that such an accommodation would "fundamentally alter" the nature of Defendants' system is undercut by the fact that ADC already allows for a limited class of individuals to be temporarily released in the case of serious illness or death of a family member. Ark. Admin. Code 004.00.2-812; *see also* Ark. Code Ann. § 12-41-104 (allowing for emergency furloughs from local correctional facilities "for occasions such as serious illness or death of a member of the inmate's family or other proper emergency"). Given the extraordinary risk posed by the virus to the Disability Subclass, an extension of the program to prisoners who themselves will be seriously ill or die unless they receive an accommodation is more than reasonable.

Accordingly, Plaintiffs are also likely to prevail on their claim that Defendants' refusal to provide Plaintiffs in the Disability Subclass appropriate cleaning supplies and protective equipment, as well as Defendants' failure to provide for the release of those individuals in the Disability Subclass acutely at risk, constitutes a denial of a reasonable accommodation in violation of the ADA.

II. Infection With a Lethal Virus That Lacks Any Vaccine or Cure Constitutes Irreparable Harm.

Each Plaintiff and class member incarcerated in ADC suffer an imminent risk of severe illness or death in light of COVID-19. There could be no greater irreparable harm. *Henderson v. Bodine Aluminum, Inc*., 70 F.3d 958, 961 (8th Cir. 1995) ("It is hard to imagine a greater harm than losing a chance for potentially life-saving medical treatment.").

Cases of COVID-19 across the country have increased exponentially in a matter of weeks and months. The virus has already spread to detention facilities throughout Arkansas. Plaintiffs have moved for a temporary restraining order and preliminary injunction for prisoners, including those prisoners who are most vulnerable, because the difference of even just a few days is a matter of life and death. The first positive COVID-19 test in the ADC system was reported on April 3, 2020, and identified four ADC staff members. On April 10, thirteen ADC staff members tested positive. Only four days later, on April 14, 2020, 61 incarcerated persons testified positive for the coronavirus along with 34 staff members. As of the date of this filing, nearly 600 incarcerated persons have testified positive for COVID-19 and at least 34 staff.

Given how quickly the disease spreads, there is a substantial probability that absent immediate relief from the Court, vulnerable prisoners will be infected with COVID-19. Further, Plaintiffs in the High-Risk Subclass are older adults or people with pre-existing medical conditions that increase the likelihood of severe illness or death if they contract COVID-19. Even for those who survive infection, there may be a prolonged recovery, including the need for extensive rehabilitation, neurological damage, and the loss of respiratory capacity.

In serious cases, an individual's lungs "become filled with inflammatory material [and] are unable to get enough oxygen to the bloodstream." Compl. at ¶ 11. Severe cases of COVID-19 cause acute respiratory distress syndrome ("ARDS") in which fluid displaces air in the lungs. COVID-19 patients with ARDS "are essentially drowning in their own blood and fluids because

their lungs are so full." *Id.* The virus's symptoms also include fever and chills that can last for weeks, excruciating pain, debilitating fatigue, an unremitting cough, uncontrollable diarrhea, and an inability to keep down food and water. *Id.*

It is undeniable that the effects of COVID-19 – a "life threatening illness" – are an irreparable injury. *Harris v. Blue Cross Blue Shield of Mo*., 995 F.2d 877, 879 (8th Cir. 1993) ("We entertain no question but that irreparable injury exist[s]" when the harm contemplated is "a life threatening illness."); *see also Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003) (noting that danger to plaintiffs' health is evidence of irreparable injury). The life-and-death stakes of the virus are sufficient to establish a likelihood of irreparable harm in support of injunctive relief. The meaningful risk of serious injury or death faced by Plaintiffs is also supported by Plaintiffs' experts and the CDC.

Moreover, even the failure to test for a disease has been sufficient to support a finding of irreparable harm. *See Boone v. Brown*, No. 05cv750, WL 2006997, at *14 (D.N.J. Aug. 22, 2005) (allegation of refusal to provide adequate testing for highly contagious infectious disease sufficient to demonstrate irreparable harm); *Austin v. Pa. Dep't of Corr*., No. 90cv7497, 1992 WL 277511, at *7 (E.D. Pa. Sept. 29, 1992) (granting preliminary injunction for prison to develop testing and protocol for Tuberculosis); *see also Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (state officials have an affirmative obligation to protect prisoners from infectious disease).

ADC's ongoing failure to provide conditions that allow people in its custody to perform the CDC-mandated protective measures, including social distancing, risks irreparable harm to Plaintiffs. *See Jones'El v. Burge*, 164 F. Supp. 2d 1096, 1125-26 (W.D. Wis. 2001) (recognizing that constitutionally inadequate conditions at supermax justified granting injunctive relief). The Constitution does not require that the vulnerable Plaintiffs whose request for relief is at issue in

this motion wait until they have contracted, been exposed to, or display symptoms of COVID-19 before obtaining injunctive relief. Mem. and Order, *Thaker v. Doll*, No. 20 C 0480, ECF No. 47, at *8 (M.D. Pa. Mar. 31, 2020) ("Petitioners face the inexorable progression of a global pandemic creeping across our nation—a pandemic to which they are particularly vulnerable to due to age and underlying medical conditions. At this point, it is not a matter of if COVID-19 will enter Pennsylvania prisoners, but when it is finally detected therein."); Op. and Order, *Coronel v. Decker*, No. 20cv2472, ECF No. 26, at *5 (S.D.N.Y. Mar. 27, 2020) ("Due to their serious underlying medical conditions, all Petitioners face a risk of severe, irreparable harm if they contract COVID-19.").

A review of the medical conditions suffered by several of the Named Plaintiffs demonstrates the irreparable harm these vulnerable prisoners will face if this Court does not grant them relief. Plaintiff Mr. Kouri, for example, suffers from aortic heart valve degeneration and is on blood thinners. He also suffers from hypertension and extreme obesity. Ex. 3, ¶ 3. Plaintiff Serrato has tuberculosis and suffers from asthma. Ex. 4, ¶ 3. Plaintiffs Mr. Frazier and Mr. Stiggers both suffer from asthma. Ex. 8., ¶ 3; Ex. 7, ¶ 3. Each one of these Plaintiffs, and others, *see* Compl. ¶¶ 20-34, and unnamed putative class members, suffer an imminent risk of severe illness or death when a COVID-19 positive individual comes into the prison. Simply put, their lives are on the line and the harm they face is clearly irreparable.

Further, for the purposes of a TRO, Plaintiffs have no adequate remedy at law. Only ordering Plaintiffs' requested remedies can prevent the impending serious illness or death. *See Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994).

Therefore, the "irreparable harm" factor weighs strongly in Plaintiffs' favor.

III. There is a Strong Public Interest in Minimizing the Spread of COVID-19 Through Social Distancing and Hygiene Practices.

The public is served by the preservation of constitutional rights. *D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1004 (8th Cir. 2019) (internal quotation and citations omitted). Indeed, it is always in the public interest to prevent the continuing violation of a plaintiff's constitutional rights. *Phelps-Roper*, 509 F.3d at 485 (holding that protecting constitutional rights is always in the public interest); *see also Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir.2003) ("Surely, upholding constitutional rights serves the public interest."). As stated above, Plaintiffs' constitutional rights are being violated.

Here, the public interest in minimizing the spread of COVID-19 is overwhelming and cannot be overstated. COVID-19 is highly contagious and can lead to serious illness and death. This is especially true for the sub-classes of Plaintiffs here. The virus has no vaccine or cure, meaning that each new infection will likely result in several more individuals becoming infected. Ex. 2, ¶ 5, Ex. 1, ¶ 10. Public health experts have thus unanimously agreed that the most critical actions that can be taken are preventive measures like self-isolating, maintaining a distance of six feet from all other individuals, and frequent disinfection. *See* Ex. 2, ¶ 13.

There is also a public interest in limiting the spread of COVID-19 within the prisons and in the community, as well as reducing the strain on overwhelmed health systems. Disturbingly, there is a dangerous shortage of ICU beds in the communities surrounding correctional facilities. Of the twenty ADC facilities, nine are located in counties with no ICU beds. Compl., ¶ 92. Six more are located in Jefferson County, which has 34 ICU beds. *Id.* All three of the facilities with the largest detention capacities and a growing number of COVID-19 cases—Cummins Unit, East Arkansas Regional Unit, and Varner Unit—are in counties with *no* ICU beds. *Id.*

As the virus has progressed throughout the country, it has become clear that if the need for ICU beds and life-saving medical equipment exceeds supply, the death rate will increase. The

overall hospitalization rate is 20.0 per 100,000, with the highest rates in persons 65 years and older (63.8 per 100,000) and 50-64 years (32.8 per 100,000). *COVID View, A Weekly Surveillance Summary of COVID-19 Activity*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html (last visited April 20, 2020). The hospitalization rates for COVID-19 in older people are higher than what is typically seen early in a flu season. *Id.*

Further, among all hospitalized patients, a range of 26% to 32% of patients were admitted to the ICU. *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html (last visited April 20, 2020). It is likely that the healthcare system of Arkansas will not be able to keep up with the needed supply of medical supplies if the virus continues to spread through its prisons uninhibited.

Prisoners in ADC are destined to become vectors of disease, and will inevitably infect several other prisoners, ADC employees, prison medical staff, and eventually, the surrounding communities when infected staff and employees leave the prisons and return to their homes. The results will be devastating for the Arkansas communities immediately surrounding ADC prisons. *See* Ex. 2, ¶¶ 11, 14 (explaining that the elevated risk in correctional facilities "poses a risk not only to the health of the individuals who contract COVID-19, but to the community at large").

As stated above, Defendants are aware of what, at a minimum, must be done to prevent the spread of COVID-19 within the prison and surrounding communities. As they have acknowledged, this includes providing free screening to anyone who believes they may have contracted the virus, face masks, and regular cleaning supplies for frequently used surfaces. *See supra* at 13.

Nevertheless, Defendants have failed to consistently take these minimal steps. It is in the public interest for ADC to immediately institute immediate testing, immediate screening, appropriate use of quarantine, and significant improvements in hygiene. Ex. 2, ¶ 13. Defendants have the ability to do each.

The public interest weighs heavily in favor of Plaintiffs.

IV. The Balance of Equities Favors Releasing Vulnerable Plaintiffs and Complying with CDC Guidelines Over Continued Detention and Inadequate Prevention in the Midst of this Public Health Crisis.

In evaluating the balance of equities, the Court should consider the harm of granting or denying the injunction upon both Plaintiffs and Defendants, as well as other interested parties, including the public. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991) (considering the effect of granting or denying the injunction on the parties' and public's interest). Here, the balance of equities weighs in favor of ordering the remedies Plaintiffs seek in order to drastically reduce prisoners' risk of contracting the virus and facilitating its spread to surrounding communities.

For the vulnerable prisoners seeking relief—prisoners with underlying medical conditions or disabilities who face a particular risk of severe illness and death from exposure to COVID-19, and those who are medically vulnerable because of their age—Plaintiffs' request is a matter of life and death. The balance of the equities in this case favors life.

There is no legitimate harm to Defendants in ADC from undertaking essential preventative measures within facilities, in line with the recommendations of the CDC and Plaintiffs' experts, to prevent the further spread of COVID-19.

Defendants may argue that a balance of equities does not favor Plaintiffs' request because of the costs of a preliminary injunction. But, even if it were obvious that Defendants could save money by continuing their inadequate response to COVID-19, the fiscal harm is outweighed by

the risk of serious illness and death faced by those incarcerated in ADC, ADC staff, and the surrounding community. *Todd v. Sorrell*, 841 F.2d 87, 88 (4th Cir.1988) (holding that financial harm to state was negligible in comparison to potentially fatal harm to plaintiff); *Nemnich v. Stangler*, No. 91-4517-CV-C-5, 1992 WL 178963 at *3 (W.D. Mo. Jan. 7, 1992) (holding that "harm to the plaintiffs' [lives] and health clearly outweighs any fiscal harm the state may suffer."). *J.D. v. Sherman*, No. 06-4153-CV-C-NKL, 2006 WL 3163053, at *8 (W.D. Mo. Oct. 27, 2006) (same).

Moreover, Plaintiffs acknowledge that they are in custody after having been found guilty of committing a crime. The remedies they seek are reasonable in light of the current pandemic. Plaintiffs do not seek unconditional release; rather, Plaintiffs request ADC take steps necessary to ensure compliance with the CDC guidelines. This may include, but not be limited to, particularly vulnerable Plaintiffs being transferred to their homes to self-isolate, while still in ADC custody and being monitored via electronic monitoring, until the emergency abates. These vulnerable prisoners' lives are on the line, as are the lives of ADC staff and members of the community who face greater exposure as a result of the prisoners' continued detention under current conditions.

Though Defendants' interests in incarceration may include retribution and deterrence, it does not include incarcerating individuals in a manner that creates a substantial risk of illness and death. Defendants have no interest in the inhumane treatment of Plaintiffs who have no means of self-protection from COVID-19. *Farmer*, 511 U.S. at 833. Under the extraordinary circumstances of this pandemic, any interests Defendants may have in the incarceration of Plaintiffs in its detention facilities are outweighed by Plaintiffs' interest in their health, safety, and life.

Recognizing such, federal courts across the country have granted temporary restraining orders brought on behalf of vulnerable individuals in custody. *See, e.g.,* Op. and Order, *Cameron*

v. Bouchard, No. 20-10949 (E.D. Mich. Apr. 17, 2020), ECF No. 12; Prelim. Inj. Order, *Valentine v. Collier*, No. 4:20cv1115 (S.D. Tex. April 16, 2020), ECF No. 40; Mem. and Order, *Thaker*, No. 20-cv-0480 (M.D. Pa. Mar. 31, 2020), ECF No. 47; Op. and Order, *Coronel.*, No. 20-cv-2472 (S.D.N.Y. Mar. 27, 2020), ECF No. 26; Mem. and Order, *Basank v. Decker*, No. 20-cv-2518 (S.D.N.Y. Mar. 26, 2020), ECF No. 11; Order, *Flores v. Barr*, No. 85-cv-4544 (C.D. Cal. Mar. 28, 2020), ECF No. 740.

These orders have provided precisely the relief Plaintiffs ask for here. In *Valentine*, the court recognized that prisoners face a high risk of serious illness or death from exposure to COVID-19 and, therefore, issued a preliminary injunction requiring Defendants to undertake preventative efforts similar to those Plaintiffs request here. *Valentine*, No. 20-cv-1115, ECF No. 40, at *1. These included, among other things, requirements that correctional facilities provide prisoners and staff sufficient cleaning supplies and PPE; establish regular cleaning protocols sufficient to prevent the outbreak; and suspend co-pays for medical treatment. *Id.*, at *2-5.

In *Thaker*, the district court recognized that "the status quo of a mere few weeks ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly . . . . The choice we now make must reflect this new reality." *Thaker*, No. 20-cv-0480, ECF No. 47 at 24. Accordingly, the district court found that even though the conditions in the local federal detention facilities were not insufficient because of intent or malice, "should we fail to afford relief" to medically vulnerable prisoners "we will be a party to an unconscionable and possibly barbaric result." *Id.*; *see also id.* ("Our Constitution and laws apply equally to the most vulnerable among us, particularly when matters of public health are at issue."). The district court, as a result, granted a temporary restraining order requiring the immediate release

of eleven prisoners in federal custody who suffer from chronic medical conditions and face a serious threat of injury or death if exposed to COVID-19. *Id*. at 2, 24–25.

The balance of equities weighs in favor of ordering the remedies Plaintiffs seek in order to drastically reduce prisoners' risk of contracting the virus and its spread to surrounding communities.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court grant a Temporary Restraining Order and a Preliminary Injunction as requested in Plaintiffs' Prayer for Relief in their complaint filed contemporaneously with this motion. Compl. pp. 45-48. Plaintiffs further request that Defendants refrain from destroying any information related to Plaintiffs' claims to preserve relevant discovery in this lawsuit including, but not limited to, video footage within its facilities, medical records, grievances and other complaints from prisoners, ADC responses to grievances and complaints, disciplinary records, and ADC policies and procedures related to COVID-19.

Dated: April 21, 2020

Respectfully submitted,

By: *_/s/Omavi Shukur_*

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**Pro hac vice* motions forthcoming

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CERTIFICATE OF SERVICE

I certify that on April 21, 2020, I filed the foregoing Plaintiffs' Emergency Motion for a Temporary Restraining Order and Preliminary Injunction electronically via the Court's CM/ECF system, which will send a copy to all counsel of record.

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