COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

Suffolk, ss. Super. Ct. No. 20-00855-D

STEPHEN FOSTER, **MICHAEL GOMES**, **PETER KYRIAKIDES**, **RICHARD O'ROURKE**, **STEVEN PALLADINO, MARK SANTOS**, **DAVID SIBINICH**, **MICHELLE TOURIGNY**, **MICHAEL WHITE**, **FREDERICK YEOMANS**, and **HENDRICK DAVIS**, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

CAROL MICI, Commissioner of the Massachusetts Department of Correction, **GLORIANN MORONEY**, Chair Massachusetts Parole Board, and **THOMAS TURCO**, Secretary of the Executive Office of Public Safety and Security,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INTRODUCTION

The COVID-19 crisis in the Massachusetts Department of Correction ("DOC") is worse now than at any time since the pandemic began and the DOC has shown that it is utterly incapable of protecting the people in its custody. In the past six weeks over 1,000 prisoners have been confirmed infected, over two thirds of the total infections to date. Five incarcerated people have died in the past month, bringing the death toll to thirteen.[1] All the measures DOC has put in place to control the spread of infection, such as lockdowns, mask use, and disinfection, have failed. Although the Supreme Judicial Court ("SJC") has stated repeatedly, starting over six months ago, that "the situation is urgent and unprecedented and that a reduction in the number of people who are held in custody is necessary," *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, 484 Mass. 431, 445 (2020), *Foster v. Comm'r of Correction*, 484 Mass. 698, 701 (2020), Defendants have taken only the most minimal available steps to reduce the prison population.

Regardless of whether the Defendants could have reasonably believed their efforts to be sufficient in June when COVID cases were in decline and the SJC denied Plaintiffs' previous preliminary injunction motion, it is now clear that they are not doing enough. The failure to take meaningful action to expand the use of parole, medical parole, home confinement, sentence-reduction credits, and other measures has created a substantial risk of serious harm to all in DOC custody, to which Defendants have shown deliberate indifference, in violation of the Plaintiffs' rights under the U.S. Constitution and the Massachusetts Declaration of Rights.

[1] *Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Ct.*, No. SJC-12926, Special Master's Weekly Report (Mass. December 17, 2020) ("Special Master's Report") (showing three deaths since December 3), Deborah Becker, *2 Mass. Prisoners Hospitalized With COVID-19 Die A Day After Being Granted Medical Parole*, WBUR News, updated December 4, 2020, available at https://www.wbur.org/news/2020/11/30/massachusetts-prisoners-coronavirus-medical-parole-deaths (reporting deaths in late November of two prisoners who were granted medical parole while hospitalized for COVID-19 and thus not reported as in DOC custody).

Urgent action is needed to enable adequate social distancing by decarcerating those who can safely rejoin the community so that they and the remaining prison population are protected from further serious illness and death.

PROCEDURAL HISTORY

Plaintiffs filed this suit on April 17, 2020, with the Single Justice, seeking emergency relief in light of the threat of COVID-19 in Massachusetts prisons and jails. At the time, 319 prisoners, guards, and staff in Massachusetts correctional facilities had tested positive for the virus. Compl. ¶ 6. The Single Justice referred the case to this Court for an expedited fact finding and to the full Supreme Judicial Court for decision on the preliminary injunction motion in the first instance. This Court conducted an evidentiary hearing between April 27 and April 29 and received affidavits and agreed-upon facts submitted by the parties. On May 1, the Court issued its factual findings. The parties then briefed the case for the SJC, which heard argument on May 7, 2020.

On June 2, the SJC issued its decision denying Plaintiffs' motion for preliminary injunction. *Foster*, 484 Mass. at 732. In the decision, the SJC reaffirmed that "a reduction in the number of people who are held in custody is necessary." *Id.* at 701 (quoting *Comm. for Pub. Counsel Servs.*, 484 Mass. at 445). It also noted the pandemic would "continue to demand extraordinary, and coordinated, efforts by all parties," and took pains to point out that the DOC had the ability to reduce the number of people incarcerated through the use of home confinement, as well as other measures adopted by other states. *Id* at 732-33; *see also id.* at 733 ("The specific measures the defendants might choose to reduce the number of incarcerated individuals in DOC custody are not as important as the goal of reduction"). Nonetheless, it found in light of the emergency circumstances that the actions by Defendants at that time had met the constitutional minimum. *Id.* at 724. In a concurrence, the late Chief Justice Gants emphasized the

need for the DOC to be proactive in reducing the prison population, including through the use of home confinement, before an additional wave of infections broke in the fall and winter:

> Reducing the size of the prison population, especially the size of the elderly and infirm prison population, in a manner that is consistent with law and public safety takes time, both to identify appropriate candidates for release and to ensure that they have appropriate release plans. **But there will be time before the fall to accomplish sensible reductions in the size of the prison population**, including the release or transfer to home confinement of many elderly and medically vulnerable prisoners, to give prison superintendents the better options to protect the physical and mental health of inmates that come with fewer prisoners.

Id. at 740–41 (2020) (Gants, C.J., concurring) (emphasis added); *see id.* at 735 ("[T]here is considerably more that the DOC and the parole board can do to reduce the inmate population, consistent with law and appropriate in terms of public health and safety. . . . [A]lthough what the DOC and parole board are doing <u>now</u> may not likely demonstrate a reckless disregard for the health and safety of prisoners arising from the risk of transmission of the COVID-19 virus, continuing unchanged along that same path in the months ahead might constitute reckless disregard, especially if we are hit with a new wave of COVID-19 cases.") (emphasis in original). Despite this warning, since the SJC issued its decision the DOC has done essentially nothing to reduce the number of people in its custody. Indeed, it has resisted establishing a home confinement program, claiming that it was not required and that it would be inconvenient and inappropriate to set up during the pandemic. In the meantime, the number of confirmed COVID-19 infections among prisoners, guards, and staff has exploded to over 2,250, with more new cases every day,[2] and there is no evidence that the current approach of DOC or the Parole Board will bring the virus under control.

[2] Special Master's Report at 62.

FACTS

On June 2, 2020, when the Supreme Judicial Court issued its prior decision, 407 people in DOC custody had been reported as infected with COVID-19. In each of her interrogatory responses in this case, Commissioner Mici inserted boilerplate language touting the fact that the virus was under control and that there were no longer any cases in the DOC.[3] Indeed, the commissioner admitted that she has no plan to combat any surge of cases apart from repeating the same ones that resulted in the current outbreak.[4] But as predicted by virtually every public health official,[5] and by the SJC, the fall and winter have brought a resurgence of the virus that the Defendants remain completely unprepared for.

Beginning at the end of October, the number of positive cases among DOC prisoners, guards, and staff spiked dramatically. On October 28, there were 476 prisoners, 137 guards, and 96 other staff who had tested positive for the virus.[6] As of the most recent Special Master's report, the numbers have grown more than three-fold to 1,642 prisoners, 479 guards, and 130 staff. *Id.* Some facilities have had hundreds of positive tests in recent weeks: MCI Norfolk has had 416 new positive prisoner tests since October 29.[7] MCI Shirley has had 280.[8] NCCI Gardner

---

[3] Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Every Response ("The DOC's extraordinary efforts in screening, testing, identification, prevention, containment, and education enabled it to reduce the COVID-positive inmate population to zero.").
[4] *See* Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Response No. 16 ("The plans, procedures, and preparations are the same as those that have enabled the DOC to reduce the positives among the inmate general population to zero.").
[5] *See, e.g.*, Aria Bendix, *CDC director predicts this fall and winter will be 'one of the most difficult times we've experienced in American public health*,' Business Insider (July 14, 2020), available at https://www.businessinsider.com/cdc-director-robert-redfield-deadly-coronavirus-surge-fall-winter-2020-7.
[6] Special Master's December 17 Weekly Report at 62.
[7] *Id.* at 69.
[8] *Id.* at 87.

has had 162.[9] MCI Concord has had 284.[10] Five people have died in the past month alone.[11] Just in the few days since the Special Master's December 17, 2020 report, the number of cases has continued to spike, with over 125 new prisoner cases between December 17 and December 22.[12] And over 200 correctional officers currently have active COVID-19 infections.[13]

This explosion of cases shows no sign of slowing. Every single one of DOC's 16 facilities has active COVID-19 cases, and dozens of new cases are caught each time DOC implements facility-wide testing.[14] The danger will only increase with colder weather in coming months, as community spread of the virus is expected to increase, and spread among prisoners is likely to grow even further.[15] Correctional facilities, which already contain almost half of the largest clusters of infection in the state,[16] will continue to burn with infection.

Nothing the Defendants have done since the spring, from distributing and mandating masks to eliminating group programs, curtailing recreation, and ending visits with family, has stemmed the tide of the virus. Defendants have adamantly refused to do the one thing most likely to control infections: create more room for social distancing by reducing the population.

I. THE DOC STILL HAS DANGEROUSLY DENSE POPULATION LEVELS

DOC's facilities remain so crowded that prisoners are helpless to avoid constant close contact with others. On June 2, 2020, the SJC found that meaningful reduction in the prison

---

[9] *Id.* at 71.
[10] *Id.* at 79.
[11] *See* n.1, *supra*.
[12] *See DOC COVID-19 Inmate Dashboard, https://www.mass.gov/info-details/doc-covid-19-inmate-dashboard*
[13] Special Master's December 17 Report at 62.
[14] *Id*. at 64-95.
[15] *See* Declaration of Amir Mohareb, MD, at 174-179.
[16] *See* New York Times, "Massachusetts Coronavirus Map and Case Count, *available at* https://www.nytimes.com/interactive/2020/us/massachusetts-coronavirus-cases.html#county. As of December 20,2020 the site showed that eleven out of 25 largest clusters in the state were at correctional facilities, seven of those DOC facilities) (colleges and universities are listed separately).

population was necessary.[17] Since then, the DOC's population has declined slightly,[18] due almost entirely to a drop in the number of admissions. However, prison populations density has not shown a meaningful decline. The DOC is required by legislation to report the total number of prisoners within each correctional facility who are housed in a cell: (i) alone; (ii) with one other person; or (iii) with two or more other people.[19] The percentage of the population housed with at least one other person was 53.3 percent on June 15, 2020; it is now 50.7 percent.[20] And the number housed in a room with three or more people has actually gone up slightly, from 18.7% to 19.2%.[21]

At the time of the SJC's ruling, five institutions were over their design capacities and the system overall was operating at 89 percent of design capacity.[22] As of December 14, 2020, the population remained at 89 percent of design capacity, and five prisons remain over their design capacities.[23] Then, as now, a majority of prisoners are housed with at least one other person,[24] and at many prisons the proportion is much higher: 91 percent at NCCI Gardner, 75 percent at the MTC, 72 percent at MCI-Concord, 63 percent at OCCC, 66 percent at Pondville Correctional

---

[17] *Foster*, 484 Mass. at 701.
[18] *See* Special Master's Report at 61-62 (showing decline of approximately 6.5 percent during that period, from 7,147 to 6,664).
[19] *See* Chapter 93 of the Acts of 2020.
[20] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download; https://www.mass.gov/doc/6-15-20-institution-cell-housing-report/download
[21] *Id.*
[22] As Dr. Mohareb explains, even prisons at design capacity "may still have too high a risk of COVID-19 spread." *See* Ex. 1, Mohareb. Decl. at 143-56.
[23] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download for population numbers and https://www.mass.gov/doc/prison-capacity-first-quarter-2020/download for design capacity, which show the following comparison of actual population to design capacity: MCI-Norfolk 1209/1084, or 111 percent; MCI-Shirley 1074/1019, or 105 percent; NCCI Gardner 843/598, or 140 percent; OCCC 696/580, 120 percent; Pondville 106:100, or 106 percent).
[24] *See* https://www.mass.gov/doc/6-15-20-institution-cell-housing-report/download (June 14, 2020 data); https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download (December 14, 2020 data).

Center, and 55 percent at MCI-Shirley. Some prisons have actually increased density during this period,[25] while others have declined only nominally.[26]

This crowding elevates the risk of COVID-19 regardless of mask use and other infection control policies,[27] and it is no surprise that the most densely populated prisons have experienced the greatest outbreaks. Four prisons account for 1,069 new infections since October 29, nearly all of the total of 1,085 new infections during that period. MCI-Norfolk, operating at 111 percent of its design capacity, had 416; MCI-Shirley, at 105 percent of capacity, had 280; NCCI Gardner, at 140 percent capacity, had 162; and MCI-Concord, where 72 percent share a cell with at least one other person, and 108 with two or more, had 284 cases.[28]

The physical plant at these prisons exacerbates the issues posed by the ongoing density issues, amplifying the impacts of overcrowding. MCI-Norfolk, MCI-Concord, MCI-Shirley, NCCI Gardner, Old Colony Correctional Center, Pondville Correctional Center, Northeastern Correctional Center, and Souza Baranowski Correctional Center have all been cited numerous times by the Department of Public Health ("DPH") for having cells that are too small with inadequate floor space, including in double bunked cells and dorms.[29] At MCI-Norfolk, 376

---

[25] Bridgewater State Hospital has gone from 90% of its design capacity (206/227) to 96% (218/227); the Massachusetts Treatment Center's population increased from 93% of design capacity (527/552) to 98% (552/561).

[26] MCI Framingham has reduced its population by three people, from 179 to 176; MCI Norfolk has reduced by 34 people, from 1,243 to 1,209; OCCC has reduced by 12 people from 708 people to 696.

[27] Ex. 1, Mohareb Decl. at 250-71.

[28] *See* Special Master's Report for infection numbers; https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download for population numbers; and https://www.mass.gov/doc/prison-capacity-first-quarter-2020/download for design capacity.

[29] https://www.mass.gov/doc/mci-norfolk-november-14-2019/download; https://www.mass.gov/doc/mci-concord-december-11-2019/download; https://www.mass.gov/doc/mci-shirley-december-4-2019/download; https://www.mass.gov/doc/north-central-correctional-institute-in-gardner-september-24-2019/download; https://www.mass.gov/doc/old-colony-correctional-center-december-13-2019/download;

people are housed with one other person, and 107 people are housed with two or more other people. At MCI-Concord, 260 people live with one other person, and 108 people live with two or more other people. At MCI-Shirley 470 people live with one other person, and 128 people live with two or more others. At NCCI Gardner 252 people live with one other person and 519 people live with two or more other people. At Old Colony Correctional Center 358 people live with one other person, and 82 people live with two or more others. Pondville has 76 people double bunked, Northeastern Correctional Center has 40 people double bunked, and Souza Baranowski Correctional Center has 100 people double bunked.[30] All these facilities house people in cells that fail to meet the DPH minimum cell size standard.

These crowded settings pose all of the dangers of congregate living. Prisoners live in dormitories holding from 40 to 80 people, in bunk beds so close they can touch their neighbors' beds.[31] Even those in single or double cells are jeopardized by crowded lines for medication and

https://www.mass.gov/doc/pondville-correctional-center-norfolk-december-19-2019/download; https://www.mass.gov/doc/northeastern-correctional-center-september-30-2019/download; https://www.mass.gov/doc/souza-baranowski-correctional-center-september-16-2019/download

[30] https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download

[31] Ex. 4, p. 83, Declaration of **Michael Maramaldi** ¶ 4 (Concord) (in dorm, 80 people, all day and night within 6 feet of each other; line up for medications); Ex. 4, p. 44, Declaration of **John Ecker** ¶ 3 (Gardner); Ex. 4, p. 30, Declaration of **Todd Cummins** ¶ 3 (Gardner); Ex. 4, p. 4, Declaration of **Ju-Bang Allah** ¶ 2 (Concord) (dorm with 60-70 people in it; on top of bunk bed, someone below him; within 6 feet someone 24/7); Ex. 4, p. 107, Declaration of **Miguel Rivera** ¶ 3 (Gardner) (two dorms connected, approximately 40 people bunk beds three feet from one other; can touch beds on either side of him from own bed); Ex. 4, p. 50, Declaration of **Stephen Foster** ¶ 4 (Norfolk) (in four-man cell; shared space with adjacent two-man cell; even when two-man cell became empty, they kept him and others in the four-man).

meals, and crowded common spaces;[32] double-celled prisoners bear further risk from all their cellmates' exposures.

II. THE PRISON ENVIRONMENT PRESENTS ACUTE COVID-19 RISKS

Correctional facilities have become one of the most high-risk settings for COVID-19 transmission[33] for a number of reasons, including physical design, poor ventilation, lack of natural light, the circulation of staff and visitors, and lack of ability to manage infection control.[34] Prison overcrowding is a known cause of COVID-19 spread in Massachusetts and nationally.[35] "The factors that increase COVID-19 transmission risk in correctional settings all contribute by increasing the population density and the amount of time people spend in close contact to each other within facilities."[36] It is now understood that close contact with an infected person, even if brief and intermittent, is the most common cause of infection,[37] and that infected people are most likely to spread the illness *before* they develop symptoms.[38] The CDC estimates that 50% of

---

[32] *See* Ex. 4, p. 73, Declaration of **James Keown** ¶ 9 (Norfolk) (for meals, 20 men line up one foot apart; in confined space with no ability to soc distance); Ex. 4, p. 66, Declaration of **Michael Gomes** ¶ 16 (Shirley minimum) (lines up for meals; lines up for regular insulin shots); **Cummins Decl.** ¶ 8 (Gardner) (not possible to social distance, throughout day constantly within 6 feet of others; lines for food, meds; eat on beds); Ex. 4, p. 92, Declaration of **Ramon Olan** ¶¶ 5-8 (Pondville) (lines, phones, vending machines, meds, canteen); Ex. 4, p. 12, Declaration of **John Baptista** ¶ 4 (Gardner) (lines for meals, meds) and ¶ 9 ("I must come in close contact with at least 30 different prisoners every day even though I try to keep to myself."); Ex. 4, p. 7, Declaration of **Robert Anderson** ¶ 3 (Shirley) (64 prisoners, almost all in single cells, but social distance not possible—within six feet of someone else whenever out of cell, comes in contact with nearly all people in unit every day); ¶¶ 5-8 (meals, phones, meds, canteen); Ex. 4, p. 58, Declaration of **Alan Gaudreau** ¶¶ 3-7 (Norfolk) (people are in a hallway 5 feet wide all day long, with no way to socially distance; also impossible to distance in lines for medication or food); **Ecker Decl.** ¶ 3-5 (Gardner) ("Sometimes the basement is like Grand Central Station").
[33] Ex. 1, Mohareb Decl. at 101-02 and n.19.
[34] *Id*. at 102-22.
[35] *Id*. at 163-172.
[36] *Id*. at 223-25.
[37] *Id*. at 125-30.
[38] *See* Emily A. Wang, Bruce Western, Emily P. Backes and Julie Schuck, eds., *Decarcerating Correctional Facilities During COVID-19: Advancing Health, Equity and Safety*, National Academies of Sciences, Engineering, and Medicine, at 2-2 (hereinafter, NASEM Report),

COVID-19 transmission occurs prior to the onset of symptoms, and further, the approximately 40% of infected people who *never* develop symptoms are still 75% as likely as those with symptoms to transmit the virus.[39] Because a crowded prison environment increases the risk of close contact with asymptomatic carriers, "depopulation has been shown to be an effective intervention" in reducing COVID-19 spread.[40]

Prisoners are also more vulnerable than the general population to complications and death from COVID-19. They are more likely to have co-morbidities increasing their vulnerability to COVID-19,[41] and they receive delayed access to medical care, arriving at hospitals at a more advanced stage of the disease than others.[42] In addition, the density of correctional facilities may increase the viral load that is transmitted, leading to more severe infection.[43] Controlling for age, sex, and race/ethnicity, the mortality rate among Massachusetts prisoners is twice the rate of the general population.[44] One study has shown that prisoners are sicker on arrival at hospitals, more likely to be admitted to the intensive care unit, and more likely to require interventions like mechanical ventilation and life support.[45] However, we now know that even mild COVID-19 cases can have severe, long-term effects, including impaired memory, limited concentration, and

---

https://www.nap.edu/catalog/25945/decarceratingcorrectional-facilities-during-covid-19-advancing-health-equity-and.

[39] *See* Centers for Disease Control and Prevention, *Pandemic Planning Scenario*, https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html (updated September 10, 2020).

[40] Ex. 1, Mohareb Decl. at 230-36.

[41] *Id.* at 201-05.

[42] *Id.* at 194-201.

[43] *Id.* at 208-19.

[44] *Id*. at 184-86.

[45] *Id.* at 186-91 and n.40.

extreme fatigue.[46] According to the CDC, "people who are not hospitalized and who have mild illness can experience persistent or late symptoms."[47]

A vaccine will not eliminate this danger from the prison setting. Governor Baker has announced that people living and working in congregate settings will be the fourth group to receive the COVID-19 vaccine in phase one of the state's vaccination program.[48] However, completion of this phase is not expected until at least February 2021 and it "remains unclear just how officials plan to roll out a vaccination program for an estimated 22,000 people who work or are incarcerated in jails and prisons,"[49] particularly given a 20 percent shortfall in the number of doses shipped in December.[50] Furthermore, as Dr. Amir Mohareb explains, immunity is not immediate after the vaccine and outbreaks will persist after vaccine distribution begins.[51] In addition, the effectiveness of the vaccine in some populations is uncertain, and it is not known whether those who receive the vaccine can nevertheless transmit the virus to others.[52] For these reasons, "public health officials have warned against abandoning social distancing measures

---

[46] See Rita Rubin, *As Their Numbers Grow, COVID- "Long Haulers" Stump Experts*, J. of Am. Med. Ass'n (Sept. 23, 2020), https://jamanetwork.com/journals/jama/fullarticle/2771111.
[47] Centers for Disease Control and Prevention, *Long Term Effects of COVID-19*, https://www.cdc.gov/coronavirus/2019-ncov/long-termeffects.html?ACSTrackingID=USCDC_425-
[48] See Press Release, *Baker-Polito Administration Announces Initial Steps for COVID-19 Vaccine Distribution* (Dec. 9, 2020) (hereinafter Phase One Press Release), https://www.mass.gov/news/baker-polito-administration-announces-initialsteps-for-covid-19-vaccine-distribution.
[49] See Laura Crimaldi, *Inmates, Correctional Workers to be Among First to get Vaccine in Mass. but Rollout Plan is Hazy*, Boston Globe (Dec. 12, 2020)
[50] *See* "Mass. Will Receive Fewer Pfizer Vaccine Doses This Month Than Expected," WBUR Common Health blog (updated December 18, 2020) *available at* https://www.wbur.org/commonhealth/2020/12/18/mass-will-receive-fewer-pfizer-vaccine-doses-than-planned
[51] Ex. 1, Mohareb Decl. 298-99.
[52] *Id.* at 300-05.

following vaccine distribution."[53] And a vaccine will be of no help to individuals who are exposed to COVID-19 from now until whenever distribution begins.

III. The Defendants Have Failed To Make Meaningful Use Of Existing Release Mechanisms

Despite the clear dangers of housing people in congregate settings like prisons, direction from the SJC to reduce the prison population, and an explosion of COVID-19 in overcrowded DOC facilities, Defendants have done next to nothing to pursue meaningful population reduction.

A. Defendants Have Failed To Utilize Home Confinement

Commissioner Mici has wholly failed to utilize home confinement to reduce the population during the pandemic. Despite the SJC explicitly affirming Commissioner Mici's authority to release prisoners on home confinement back in June, she still has not released a single person on home confinement.[54] Incredibly, DOC has cited to the virus as a reason for *not* releasing people:

> Unfortunately, the COVID-19 pandemic, and especially the recent spike in Massachusetts cases, has made implementation of a home confinement program much more difficult. . . . For a number of reasons, placing inmates in the community at this time is potentially risky. . . . DOC expects that in 2021, either when COVID abates or a vaccine is widely available, it will expand the home confinement program for participation by eligible and suitable inmates.[55]

The DOC has never provided an explanation of why it did not implement home confinement during the summer and fall, when it was actively taking credit for the lack of active cases in DOC facilities.[56]

---

[53] Ex. 1, Mohareb Decl. 305-07.
[54] Special Master's Report at 63.
[55] Defs.' Status Report on the Implementation of a Home Confinement Program (Dec. 1, 2020) at 2-3.
[56] Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Response Nos. 1-23 ("The DOC's extraordinary efforts in screening, testing, identification, prevention, containment, and education enabled it to reduce the COVID-positive inmate population to zero.").

B. Defendants Have Failed To Maximize Use Of Earned Good Time

Rather than ensuring that every prisoner has the opportunity to maximize sentence reduction credits ("earned good time"), the Defendants have restricted the ability to earn such credits. During the lockdown, prisoners have been unable to earn the full 15 days per month allowed by law for participation in rehabilitative, vocational and educational programs or work assignments, and which many prisoners had been receiving. *See* G.L. c. 127, § 129D. Instead, nearly all programming has been cancelled, and prisoners have been limited to paper packets that they can complete in their cell, for which the DOC is allowing a maximum of only 10 days per month.[57]

Neither have prisoners been able to earn additional sentence reductions allowed by law for completion of programs. Under § 129D, DOC prisoners are additionally eligible for 10 days credits as "Boost Time" when they complete certain programs or activities, and up to 80 days of "Completion Credit" when they finish certain longer-lasting programs or activities. In the Spring, the DOC allowed a limited number of prisoners near release to earn up to 42.5 additional days off of their sentences through boost time, completion time, and additional earned good earn time, resulting in 46 releases between April 10, 2020 and July 3, 2020.[58] No such opportunities have been announced this fall or made available to the many prisoners that counsel has heard from in

[57] *See* **Baptista Decl. ¶** 10 (earns five days for his in-unit job, unable to earn more right now); Ex. 4, p. 86, Declaration of **Emmett Muldoon ¶** 12 (only programming is journaling, for 10 days month, but he can't write the required 15-20 pages due to multiple sclerosis); **Rivera Decl. ¶** 12 (only program available is journaling, for 10 days per month); Ex. 4, p. 102, Declaration of **Ariel Pena ¶** 3 (he can only do journals for 10 days per month; was in the Boston College program before pandemic, earning 15 days per month. Got college credit for completing his class by mail, but no earned good time; has a job shoveling snow but gets no good time); **Ivey Decl. ¶¶** 16-17 (had been in Tufts college program several hours a day, and in book club every week for two hours; now only program available is journaling, for 10 days a month); Ex. 4, p. 128, Declaration of **Ethan Woodward ¶** 4 (has lost 27.5 days of earned good time to date due to lockdowns).
[58] *See* Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Response No. 1.

the course of preparing this motion.[59] Indeed, for prisoners such as Ethan Woodward, completion credits are impossible because they cannot finish the programs they are enrolled in.[60]

C. Defendants Have Failed To Utilize Furlough

Defendants have not released a single prisoner on furlough during the pandemic.[61] DOC's only justification for not using furloughs is its asserted belief "that it is bad policy to release an inmate who will need to be re-incarcerated."[62]

D. Defendants Have Failed To Utilize Medical Parole

Commissioner Mici has not made meaningful use of medical parole during the pandemic to reduce the incarcerated population. Overall the number of medical parole petitions granted remains abysmally low, particularly in light of the number of petitions filed and the age and medical condition of the DOC population.[63] According to data produced by DOC, from the beginning of March until the data cuts off in early September 2020, there were 286 medical parole petitions filed, of which only 8 had been granted.[64] Moreover, DOC has made no effort to identify and petition on behalf of medically vulnerable prisoners, despite the fact that the statute explicitly authorizes petitions by "a medical provider of the correctional facility or a member of

---

[59] *See* **Maramaldi Decl. ¶** 7 (getting 15 days a month, but no boost or completion credits); **Rivera Decl. ¶** 12 (journaling restarted in November for 10 days a month, but no boost or completion credits); Ex. 4, p. 63, Declaration of **Michael S. Gomes ¶¶** 7-8 (only 69 days away from completing sentence but not able to earn completion credit).

[60] **Woodward Decl. ¶** 4 (has been enrolled in the Correctional Recovery Academy program, a six-month program, for nine months; was supposed to graduate a while ago but has not been able to due to lockdown).

[61] Factual Findings of the Superior Court (May 1, 2020) at p. 29.

[62] *Id.*

[63] Factual Findings of the Superior Court (May 1, 2020) at p. 23 (noting higher rate of chronic diseases and more rapid aging in prison population, and 983 prisoners in DOC custody over age 60 in 2019).

[64] *See* Ex. 8, Medical Parole Log, cited by Def. Mici's Responses to Pls.' First Set of Interrogatories, Response No. 18. While the Special Master's most recent report indicates that 40 petitions have been granted, that number appears to include all medical parole petitions ever filed, including those filed years before the pandemic began. *Compare id.*

the department's staff." G.L. c. 127 § 119A(c)(1). Of the 286 petitions since March 1, 2020, not a single one was initiated by the DOC, and only one was instituted by its medical provider.[65] Contrary to Commissioner Mici's testimony that DOC "has taken numerous steps to expedite the medical parole process,"[66] the data produced by DOC in this litigation shows that they are taking *longer* to reach decisions on medical parole petitions than they did before the pandemic. Since March 1, 2020, it has taken Commissioner Mici an average of 63.4 days from the date of the request to make a decision; before March, she took an average of only 60.2 days.[67] Indeed, the average of 63.4 days is barely shorter than the statutory maximum of 66 days. G.L. c. 127 § 119A(c)(1) & (e). Lastly, Commissioner Mici has recently been granting medical parole to prisoners fatally ill with COVID-19 only hours before their deaths—too late to benefit the petitioners, but early enough to allow DOC to avoid counting them as prisoners who died in custody from COVID-19.[68]

E. Defendants Have Failed To Expand Parole

Defendants have likewise failed to utilize parole in order to reduce the population in custody in light of the pandemic. Each month this year for which the Parole Board produced data, it has held fewer parole hearings and issued fewer positive votes than it did during the same

---

[65] *See id.*
[66] Factual Findings of the Superior Court (May 1, 2020) at p. 27.
[67] *See id.*
[68] Deborah Becker, *2 Mass. Prisoners Hospitalized With COVID-19 Die A Day After Being Granted Medical Parole*, WBUR News, updated December 4, 2020, available at https://www.wbur.org/news/2020/11/30/massachusetts-prisoners-coronavirus-medical-parole-deaths (reporting deaths in late November of two prisoners who were granted medical parole while hospitalized for COVID-19 and thus not reported as in DOC custody); Ex. 2, Affidavit of Joshua Dohan ¶ 34 (noting that Commissioner Mici only granted COVID-positive prisoner medical parole after medical director determined "that the appropriate course to take now is to end intubation, and provide end of life comfort care").

month last year.[69] In addition to the lower totals, the Parole Board has also granted parole at a lower rate since the pandemic started.[70] The only apparent explanation for the lack of a higher parole rate is that the Parole Board, despite explicit direction from the SJC, is not appropriately considering the risk to individuals from COVID-19 when making its parole decisions.[71]

In addition to granting fewer people parole, the Parole Board has also continued to hold dozens of people in custody despite a positive parole vote due to requirements it imposes before releasing people[72] that often make no sense in light of the current pandemic. For example, the Parole Board is continuing to require some people with positive parole votes to spend time at minimum security facilities despite the fact that there's no meaningful programming currently offered at them due to the pandemic,[73] or to participate in specific programs that are no longer available.[74] Although at the urging of the SJC, the Board successfully, with the help of CPCS, reduced the backlog of people with a positive vote who nonetheless remained in prison, the number of prisoners actually released on parole has been trending down since June.[75] The Parole Board also continues to hold people in custody for technical violations (*i.e.,* a violation of parole where no new crime is alleged)[76] and for new charges where the criminal court has granted

[69] Ex. 7, Def. Gloriann Moroney's Responses to Pls.' First Set of Interrogatories, Response Nos. 1 & 2 (showings chart of hearings held and positive parole votes each month from Jan. 2019 through July 2020).
[70] *Id.* (charts showing a positive parole vote rate of 60.16% from March-July 2019 and 56.44% from March-July 2020).
[71] *See* Ex. 2, Dohan Aff. ¶¶ 26-34.
[72] Ex. 7, Def. Gloriann Moroney's Responses to Pls.' First Set of Interrogatories, Response No. 4 ("As of July 31, 2020, there are 98 offenders with positive parole votes who are required to fulfill a prescription prior to release").
[73] *See, e.g.*, Pena Decl. ¶ 2 (requiring nine months at minimum facility despite no ability to participate in programming).
[74] *See* Ex. 4, p. 27, Declaration of **Jermaine Celester** ¶ 12 ("In order to get parole, I am required to do CRA, but it is impossible to attend this program during lockdown. I have completed all other programs and schooling").
[75] Ex. 2, Dohan Aff. ¶ 9-12.
[76] *See* Ex. 4, p. 41, Declaration of **William Dortch** ¶ 2 (parole revoked after friend gave him sneakers while on work assignment); Dohan Aff. ¶¶ 35-36.

release pending trial.[77] Indeed, between March and June this year, 98 people on parole were returned to prison for alleged technical violations.[78] They were then required to wait in prison, during the pandemic, for their parole hearings, which resulted in a parole revocation 61% of the time despite no new crime being alleged.[79]

The Parole Board has also been unjustifiably slow in issuing decisions following hearings for people serving parole-eligible life sentences, who make up nearly 13% of the DOC population and who are disproportionately older and therefore more vulnerable to the coronavirus.[80] While the Parole Board's prior practice was to issue decisions within two weeks of a hearing, it now takes an average of six to seven months.[81] For example, Randy Williams has been waiting on a decision from his hearing in September for over three months.[82] Since August 1, 2020, the Parole Board has issued only 17 "lifer" decisions, none of which is from a hearing in July, August, September, October, November, or December.[83] Compounding the delay, the Parole Board often requires liferstо serve time at a minimum security facility, which the DOC categorically bars until *after* they receive a positive parole vote.[84]

Lastly, though only a few dozen prisoners are eligible, DOC has not considered or recommended anyone in their custody for early parole consideration, and consequently not a single person has been granted early parole.[85]

---

[77] *See* **Pope Decl.** ¶ 1 (released by court pending new charge but held by Parole Board on parole detainer).
[78] Ex. 2, Dohan Aff. ¶ 36.
[79] *Id.*
[80] *Id.* ¶ 13 (noting as of January 1, 2020, there were 490 people over age 50 and 255 over age 60 serving parole-eligible life sentences).
[81] *Id.* ¶¶ 16, 20 n.3.
[82] **Williams Decl.** ¶ 1.
[83] Ex. 2, Dohan Aff. ¶ 18.
[84] *Id.* ¶¶ 21-25.
[85] Ex. 6, Responses of Def. Carol Mici to Pls.' Second Set of Interrogatories, Response No. 1 ("The number of inmates considered and forwarded to the Parole Board after approval for early consideration by the DOC, and released by the Parole Board, is zero.").

IV. THE DOC CANNOT SAFELY ISOLATE AND QUARANTINE AT CURRENT POPULATION LEVELS

DOC's population density makes it difficult to safely quarantine those who may have been exposed to COVID and isolate those who have tested positive in many prisons.[86] For example, in MCI-Norfolk, for most of the fall those who were confirmed as positive were held in large dormitories known as the P-1 and P-2 units, which had for years been closed as housing due to their disrepair. During much of the fall, sick prisoners subsisted in these dorms with many sinks, showers, and urinals not functioning and forced to clean up their own blood and vomit and to sleep in upper bunks without ladders.[87] Those who had potentially been exposed to the virus but not confirmed positive were held in single cells on the third floor of the Restrictive Housing Unit (RHU), which also housed prisoners being held for discipline or other reasons on the lower

[86] **Regarding MCI-Norfolk**, *see* Ex. 4, p. 131, Declaration of **Edward Wright** ¶ 1-2, 4-7 (59 year old with, diabetes and hypertension; tested negative, then one week later got cellmate transferred from unit with positives; cellmate was ill with symptoms body aches, lethargy, coughs; Mr. Wright was retested on Dec. 9 and was positive); **Foster Decl.**¶ 3 (No cases in his unit; took test and was moved after test to building where no one had been tested; then they tested everyone in that building, and 6 positives were taken out of that building); **Woodward Decl.** ¶ 5 (people sick in unit with him, people moved from COVID-positive to negative units without, apparent reason). **Regarding MCI-Concord**, *see* **Dortch Decl.** ¶ 7 (17 men in dorm tested positive, not taken out of unit for 8 hours; Dortch then got covid, was hospitalized for 13 days); **Allah Decl.** ¶ 4, 6 (COVID positive, bad symptoms; after being moved between RHU, HSU, and Hospital, RHU nurse said to finish quarantine for 5-6 days, but the next day he was moved back to his open dormitory with 70 people, still having symptoms); Ex. 4, p. 1, Declaration of **Justice Ainooson** ¶ 8 (health services unit not isolating inmates who get sick by moving them out of unit; mostly leave them in unit and isolate them in their cells, where air can still circulate to rest of us). **Regarding the Massachusetts Treatment Center**, *see* Ex. 4, p. 18, Declaration of **Robert Brown** ¶ 12 (person in unit with symptoms tested positive for COVID and was moved out; instead of testing the rest of the unit they moved the residents to the remaining five units in the treatment center, not knowing whether they were positive or negative; about a week later, they did testing and there was an explosion of COVID in all the units, including eight in his unit); **Regarding NCCI**, *See* **Rivera Decl.** ¶ 12 (people in quarantine who hadn't tested positive were mingled with those who had).

[87] *See* **Gaudreau Decl. ¶¶** 20-22.

floors.[88] On December 14, the DOC emptied the P units. Some people were moved to the RHU, where they were mixed with those on various floors, a particularly risky move given the open-barred doors.[89] Others were sent to the 8-2 unit, so that people who had been confirmed positive with the PCR test were mixed in double cells with others who tested negative with a rapid test and were awaiting PCR test results. When those PCR results came back negative, the prisoners were sent back to their regular housing units even though they could have been infected while awaiting the results.[90]

This lack of quarantine and isolation space at MCI-Norfolk particularly endangers medically vulnerable prisoners like those in the Clinical Stabilization Unit (CSU), an open dormitory housing sick, elderly, and infirm prisoners in need of assistance in daily living. Recently, when one resident tested positive after a hospital trip, there were not enough isolation cells in the health services unit to house all of the others who subsequently tested positive, so they all remained in the CSU, and all residents of the unit became infected.[91] Declarant Gabriel Megna is one of those; with morbid obesity and heart failure, he now suffers severe COVID symptoms and fears for his life.[92]

V. THE DOC CANNOT PROVIDE ADEQUATE MEDICAL CARE OR MENTAL HEALTH CARE AT CURRENT POPULATION LEVELS

Unchecked COVID infections endanger all prisoners by overloading a privatized medical care system that provided sub-par care before the pandemic.[93] Sick-call requests, which a state audit found were not promptly or properly responded to before the pandemic, now routinely go

---

[88] *Id.* ¶ 24.
[89] *Id*.
[90] *Id.* ¶ 25.
[91] Ex. 4, p. 90, Declaration of **Gabriel Megna** ¶¶ 4, 5.
[92] **Megna Decl.** ¶¶ 1, 5. Further, John Rooney attests that prison workers go directly from assisting infected people in the CSU to their regular housing units. Ex. 4, p. 113, Declaration of **John Rooney** ¶ 20 (using former name for the unit, Assisted Daily Living (ADL) Unit).

unanswered for weeks, if they're answered at all.[94] A diabetic prisoner who developed bedsores on his buttocks that caused bleeding put in a sick slip that as of last week had not been answered for two weeks.[95] Prisoners are not receiving timely or adequate treatment for chronic diseases and other serious but non-emergent conditions. For example,

- A person with Hepatitis C, who is supposed to have bloodwork done every four weeks, has not had it done since October 5.
- A 58-year-old man with pulmonary heart disease and high cholesterol who is normally seen every three months was not seen this year from February until October 28, when staff believed he was having a brain hemorrhage and he was taken to the emergency room. He got a CT scan at the hospital, but has never been told the results or seen any medical provider since.[96]
- A 67-year-old woman at MCI-Framingham with Crohn's disease and severe anemia, as well as severe spinal stenosis for which she requires surgery—in

---

[93] A state audit report issued on January, 9, 2020, found that DOC sick call request forms were not processed promptly and properly, with prisoners often waiting more than a week to see a medical provider after requesting care. The State Auditor stated, "Without timely treatment for physical and mental health issues, an inmate's condition could worsen." Suzanne Bump, Office of the State Auditor, *Massachusetts Department of Correction Official Audit Report* 11-12 (Jan. 9, 2020), available at https://www.mass.gov/audit/audit-of-the-massachusetts-department-of-correction-doc. A federal court recently found that the DOC was "neither able nor willing to provide" for a prisoner's medical needs, and that as a result of its "woeful disregard" for his well-being, the DOC was "slowly killing him." *Reaves v. Mass. Dep't of Correction*, 392 F. Supp. 3d 195, 200, 210 (D. Mass. 2019). And last month a U.S. Department of Justice investigation concluded that the DOC denies adequate mental health care and supervision to prisoners experiencing mental health crises, in violation of the Eighth Amendment. U.S. Dept. of Justice, Civil Rights Division, "Investigation of the Massachusetts Department of Correction," Nov. 17, 2020, at 1, available at https://www.justice.gov/opa/press-release/file/1338071/download.

[94] *See, e.g.*, **Gaudreau Decl.** ¶ 17 (sick slips answered "sporadically"); Ex. 4, p. 38, Declaration of **Amos Don** ¶ 11 (two weeks so far without response to sick slip for worsening anemia); **Ainooson Decl.** ¶ 10 (response can take "weeks, sometimes over a month"); **Anderson Decl.** ¶ 22 (no response to sick slip describing symptoms of COVID; received response to second sick slip four days); **Foster Decl.** ¶ 12-21 (no response to approximately 9 or 10 sick slips since October 5 for prescribed medications not received and other issues); *see also* **Williams Decl.** ¶ 12.

[95] **Muldoon Decl.** ¶ 13; *see also* id. ¶ 7 (while in quarantine, not permitted to see doctor about big change in insulin dose without his knowledge, or for pitting edema).

[96] **Gaudreau Decl.** ¶ 18.

addition to her depression, anxiety, and PTSD—suffered in solitary confinement for 10 weeks without medical or mental health care.[97]

- A prisoner with diabetes is supposed to get insulin three times a day but often does not; nor does he receive the diabetic diet he requires.[98] Another prisoner has also not received his diabetic meals; instead he gets "food that makes me sick," such as cake instead of toast for breakfast. His "blood sugar has been out of control."[99]

- Medical staff have repeatedly failed to provide another prisoner with his medications for diabetes and other conditions; this person has also been denied use of his nebulizer for his chronic obstructive pulmonary disease (COPD) and asthma and has not been provided a new CPAP machine to replace the damaged one he is forced to used.[100]

- A person who requires physical therapy for his spine condition—which when untreated causes pain and weakness in his arms and legs, as well as a shooting pain and paralysis in his hand that sometimes leaves him unable to hold a pen—has not received this therapy since January, despite a reassessment in August that confirmed that he still needs it.[101]

On top of the inadequate medical care, mental health care has effectively vanished just when it is needed most. Prisoners no longer have regular one-on-one visits with mental health counselors,[102] and there is no longer any group therapy.[103] Instead, mental health staff make periodic rounds in the housing units, where prisoners wishing to speak to a counselor must do so

---

[97] Ex. 4, p. 47, Declaration of **Diane Farley** ¶ ¶ 5-6.
[98] Ex. 4, p. 104, Declaration of **Che Pope** ¶ 11; *see id.* (medical staff have also failed to check Mr. Pope's blood pressure in two months, even though his hypertension requires regular monitoring).
[99] Ex. 4, p. 98, Declaration of **Joseph Palmisano** ¶ 12; *see also* **Pope Decl**. ¶ 11 (blood sugar often too high).
[100] **Rooney Decl.** ¶¶ 15, 16.
[101] **Anderson Decl.** ¶ 19.
[102] *See, e.g.*, **Gaudreau Decl.** ¶ 15; Ex. 4, p.110 Declaration of **Paul Robinson** ¶ 15; **Cummins Decl.** ¶ 10; **Anderson Decl.** ¶ 17; **R. Brown Decl.** ¶¶ 7-8; **Maramaldi Decl**. ¶ 9.
[103] **S. Brown Decl.** ¶ 6(k); **R. Brown Decl.** ¶ 7-8.

in a common area or dorm with other prisoners and COs nearby.[104] The lack of privacy deters many prisoners from speaking to mental health staff at all.[105]

The lack of treatment has had severe consequences for prisoners' psychological health.[106] A prisoner in a unit created to be an alternative to solitary confinement for men with serious mental illness stated: "All of the solitary time, lack of treatment, and lack of programming caused many men in the STP to deteriorate. . . . During the lockdowns I saw more self-harm than any other time in my 17 years of incarceration."[107] Moreover, prisoners in acute distress often do not have access to mental health staff. When a prisoner "calls crisis," the officers ask only whether they are going to self-harm, and if the answer is no, the officers do not inform mental health workers of the call for help.[108] A prisoner with serious mental illness whose requests for mental health treatment and to be placed on suicide watch went unanswered on three occasions injured himself each time, pulling out four toenails and cutting himself.[109] Other prisoners have engaged in acts of self harm.[110] These awful outcomes were foreseeable in a prison system where

---

[104] *See, e.g.*, **Dutcher Decl. ¶** 13 (an officer is always at mental health workers' side); **Anderson Decl. ¶** 17; **Cummins Decl. ¶** 10; **Smith Decl. ¶** 13.

[105] *See, e.g.*, **Maramaldi Decl. ¶** 9 (have not spoken to mental health since lockdown because of lack of privacy); **Cummins Decl. ¶** 10; **Gaudreau Decl. ¶** 15; **Smith Decl. ¶** 13; **Anderson Decl. ¶** 17 ("[T]o talk to mental health, you have to stand in the middle of the unit with guys lined up behind you, people walking by, and with officers standing two or three feet away. There is no privacy or confidentiality. I had this experience once and I refuse to do it again because there is no privacy.").

[106] *See, e.g.*, **Ecker Decl. ¶** 2 (mental health of a prisoner with Autism Spectrum Disorder and schizoaffective disorder worsening); **S. Brown Decl. ¶** 6(j) ("Between my severe back injury (for which surgery has been delayed) and lack of mental health treatment, I have gone through waves of severe anxiety, depression, and stress.").

[107] **S. Brown Decl. ¶** 4(g).

[108] **Palmisano Decl. ¶** 14; *see also* **Gaudreau Decl. ¶** 16; **Anderson Decl. ¶** 18; Ex. 4, p. 121, Declaration of **Jonathan Westgate ¶** 10 ("It took putting a razor blade to my neck for them to have a clinician come see me while in crisis.").

[109] **Anderson Decl. ¶** 18.

[110] **R. Brown Decl. ¶** 8 (noting "serious mental health crises going on in the [Massachusetts] [T]reatment [C]enter," including "three people who attempted suicide by people slicing their throats"); **S. Brown Decl. ¶** 4(g).

24 percent of prisoners have serious mental illness, and where the Department of Justice recently concluded treatment of suicidal prisons fell far below constitutional standards even before COVID.[111]

VI. The DOC Cannot Protect The Prisoners Most Vulnerable To Complications Or Death From COVID-19 At Current Population Levels.

Prisoners with medical vulnerabilities are harmed not just by the stress on the prison medical system, but also by DOC's failure to identify those at risk of severe illness from COVID and provide them with additional protection. As this Court found, based on Defendant Mici's testimony, at least 50 percent of all in her custody are over age 60 or have a medical condition putting them at high risk from COVID.[112] Yet she acknowledged that it would be impossible (at current population levels) to give these people the relative safety of a single cell.[113] Rather, she has asserted, "[t]he DOC treats all inmates as if they are at increased risk."[114] This is cold comfort now that over 1,600 COVID cases have been reported in DOC, equal to nearly one in four of the current population. Those most likely to suffer complications or death are left to risk infection just like the others.

VII. The DOC Has Resorted To Cruel And Harmful Lockdown Measures In An Attempt To Control The Virus At Current Population Levels

The population density in DOC has forced the use of draconian lockdowns in an attempt to control the spread of infection. Lockdowns have continued despite the DOC's

---

[111] U.S. Dept. of Justice, Civil Rights Division, *Investigation of the Massachusetts Department of Correction*, Nov. 17, 2020, at 3 ("DOC fails to provide adequate mental health care to prisoners in mental health crisis"), available at https://www.justice.gov/opa/press-release/file/1338071/download

[112] *See* Factual Findings of the Superior Court (May 1, 2020) at p. 8.

[113] *Id.*

[114] Ex. 5, Def. Mici's Responses to Pls.' First Set of Interrogatories, Response Nos. 3, 4.

acknowledgement that they create a serious risk of harm to prisoners,[115] and the SJC's description of the dangers of the practice:

> The CDC's interim guidance notes that measures taken by correction facilities to reduce transmission of COVID-19, such as canceling activities and visitation, may be deleterious to the mental health of inmates. These effects necessarily will be even more pronounced for inmates in solitary cells, who are segregated from all other humans for twenty-three or more hours per day.

Foster, 484 Mass. at 731.

> Many are confined to small cells for some 23 hours a day, often with a cellmate.[116]

Across the board, prisoners are deprived of indoor and outdoor recreation,[117] library,[118]

[115] "[A]s the commissioner's counsel acknowledged at oral argument, while the pandemic continues, the lockdown conditions instituted by the DOC to prevent a serious risk of harm themselves risk becoming Eighth Amendment violations." *Foster*, 484 Mass. at 731.

[116] *See, e.g.*, **Ivey Decl. ¶** 12 (shares small cell with one other person; spends most of time lying or sitting on top bunk; can only pace so much; "I am stiff as a board and my joints ache"); **Don Decl. ¶** 9 (stuck in a tiny cell with no room to move); Ex. 4, p. 55, Declaration of **James Garry ¶¶** 5, 10, 11 (in cell at least 23 hrs/day with no recreation, programs, or jobs; "Essentially this is 'seg' status except I'm in a double. It has essentially been this way for 8 months.").

[117] *See, e.g.,* **Maramaldi Decl. ¶** 3 (can't exercise, library, gym); M. **Gomes Decl. ¶** 21 (no gym, basketball court); **Ecker Decl. ¶** 6-9 (no rec yard); **Ainooson Decl. ¶¶** 4, 6 (23 hrs a day in cell, with only, 30-60 minutes recreation indoor rec and no outside rec; everyday must choose between cleaning cell and showring, can't do both).

[118] *See* **Ecker Decl. ¶** 8 (no law library or regular library); **Smith Decl. ¶** 4 (no law library access for 1.5 months, now very limited); **Brown Decl. ¶** 11 (no library; has been to library once in last nine months, used to go once a week or more).

educational and rehabilitative programs,[119] and group religious services.[120] "The most difficult restriction to deal with is not being able to leave the unit or be in programs. There is nothing to keep us occupied, and every day feels the same."[121]

This isolation can be akin to the suffering induced by solitary confinement, as the SJC has recognized,[122] and indeed some such as Eugne Ivey experience it as such.[123] Joseph Palmisano describes "excruciating isolation"; he has attempted suicide twice in the last four months, and was twice sent for psychiatric evaluation.[124] Randy Williams describes the desperation he sees all around him: "Inmates are cutting up, swallowing things, and hurting themselves in other ways. There is so much pressure on us that you don't know what to do with yourself. There are guys that are a lot worse off than I am, and you can see the effect on them.

---

[119] *See* Ex. 4, p. 81, Declaration of **John Little** ¶ 8-9 (no programming; handouts and worksheets "are not at all a good substitute for real programming"); **M. Gomes Decl.** ¶ 20 (is in Correctional Recovery Academy; now it's just one reading packets once a week and a written quiz on Friday); **Ecker Decl.** ¶ 9 (taking computer course but can't access computers during lockdown, just gets booklets); **R. Brown Decl.** ¶¶ 9, 10 (all programming canceled; in-cell pamphlets "not effective when we are left to do it by ourselves without feedback from treatment providers or other group members"); **Ainooson Decl.** ¶ 9 (no programming, just journals – not nearly as good as regular programming); **Olan Decl.** ¶ 10 ("I am given a packet or booklet for programming but there are no mentors or counselors to help answer questions.").
Williams Decl. ¶ 11 (no programming; getting pamphlets "doesn't compare to real programming-,"); **Gaudreau Decl.** ¶ 8 (was in CRA, in person canceled so they get 1 packet, 1 test per week "This is not useful; it's just a dog and pony show."); **Ivey Decl.** ¶ 17 (no in-person programs, just journaling).

[120] **Farley Decl.** ¶ 11; **Robinson Decl.** ¶ 12 (used to be very involved in religious services, going two or three times a week, but now hasn't been to services since March).

[121] **Westgate Decl.** ¶ 7; *see also* **Don Decl.** ¶ 9 (locked in with "nothing to keep my mind off of the stress and anxiety of my situation keeps me up all night, reliving trauma, worrying about my family").

[122] *See Foster*, 484 Mass. at 731-732 (citing CDC guidance that cancelation of activities and visits may be deleterious to mental health, and noting, "These effects necessarily will be even more pronounced for inmates in solitary cells, who are segregated from all other humans for twenty-three or more hours per day. Solitary confinement, even when imposed for good reason, "bears 'a ... terror and peculiar mark of infamy.') (quoting *Davis v. Ayala*, 576 U.S. 257, 135 S. Ct. 2187, 2209, (2015) (Kennedy, J., concurring)).

[123] Ivey says that it brings back traumatic memories of his many years in solitary confinement, and that he can't sleep and his thoughts race. **Ivey Decl.** ¶ 13.

[124] **Palmisano Decl.** ¶ 11.

They don't know what to do but hurt themselves."[125] Severe anxiety, depression, and trauma are common byproducts of the lockdown, with physical effects such as weight changes and high blood pressure.[126] The lack of exercise and access to the outdoors only worsens the physical and emotional effects of the lockdown.[127]

Compounding the isolation, contact with loved ones is difficult or impossible, as in-person visits have stopped, and the ability to make telephone calls is limited by competition for the phones during the short period out of cell and by the cost of calls.[128] It is hard to overstate

---

[125] Ex. 4, p. 125, Declaration of **Randy Williams** ¶ 9.

[126] *See* **Celester Decl. ¶ 9** (Lockdown is "very difficult to deal with mentally. I am depressed: I am not sleeping, I am anxious, I am worried about family members, and I am worried about getting COVID again. . . . I haven't been taking care of myself the way I normally do – I've gained 30 lbs., and I haven't cleaned my cell or gotten my haircut. The stress of this experience is making my blood pressure dangerously high."); **Don Decl.** ¶ 6 ("Being stuck in a tiny cell with no room to move, and nothing to keep my mind off of the stress and anxiety of my situation keeps me up all night, reliving trauma, worrying about my family"); **Pope Decl.** ¶ 12 ("We are people, we are humans, and we have been left to sit and stare at walls and wonder if we're going to die"; had been playing chess before COVID which had been helping with depression' can't play now; "Now, I just sit in my cell and sleep."); **Ainooson Decl.** ¶ 11 ("The stress level in here is very high. People are losing family members to COVID and aren't able to see loved ones.").

[127] *See* Ex. 4, p. 95, Declaration of **Anthony Olszewski** ¶ 11 ("The difference with access to outdoors is night and day. I have a traumatic brain injury which affects my gait and my speech. I used to try to walk on flat surfaces outdoors for therapy, to keep strengthened for walking. My inability to walk outside during COVID has harmed my strength, stability, and balance."); **Foster Decl.** ¶ 17 (has gained 40 pounds in past 6-7 months from not being active; bad for heart condition); Ex. 4, p. 15, Declaration of James **Bowen** ¶ 12 (used to work out 5x/week, but very difficult in cell; health has declined, has lost 20 lbs); **Robinson Decl.** ¶¶ 13, 17 (decline in physical and mental health due to lack of exercise; exercise helps manage high blood pressure and anxiety); **Garrey Decl.** ¶ 13 (hasn't been outside since September); **Ivey Decl.** ¶ 10 (has only been outside for 90 minutes since late October); **Maramaldi Decl.** ¶ 3 (has not been out of dorm room since October); **Lavin Decl.** ¶ 5 (hasn't been out in over a month and a half).

[128] *See* **Maramaldi Decl.** ¶ 5 (visits have been suspended for months); **Lavin Decl.** ¶ 10 (no in-person visits since March. Mother and son used to visit; not being able to see them has had negative effect on MH); **M. Gomes Decl.** ¶ 22 (only 1 free call per week and 1 free "text message" a day, half of what it was during the last lockdown; last in person visit was 1 year ago); **Foster Decl.** ¶¶12- 13, 15 (used to get 1-2 visits 1a month visits from father and visits from close friends; has not had a visit since February; misses family; not having personal contact takes emotional toll; is supposed to have phone access 30 minutes a day, but you have to choose between calling your attorney and family); Ex. 4, p. 30, Declaration of **Todd Cummins** ¶¶ 6-7 (no visits; only 1 phone call and if answering machine picks up, that's the free call); **Palmisano Decl.** ¶ 15 (no visits, even with daughter who lives 20 minutes away); **Rivera Decl.** ¶¶ 6-7

what this means to many of those incarcerated. Says Edward Wright: "Because we cannot see family members, there is a constant state of anxiety here with everyone worrying about their loved ones. We do not know if they are sick or will get sick. It is nerve wracking."[129] James Bowen last saw his wife in person a year ago; he used to see his sons monthly and now hasn't seen them in 9 months, nor has he seen any of his 8 grandchildren. "I miss my family and get upset a lot," he says, "I find myself teary eyed more often."[130] Steven Brown cannot see his mother or siblings, even though "maintaining our connection is the most important thing in my life."[131] Without family contact or mental health support, Robert Anderson says he was "cutting up and self-injuring a lot" during the lockdown last spring; he feels even more cut off from his family now.[132]

Visits from lawyers are also being hindered, as attorneys are now required to show a negative COVID test within the past 72 hours.[133] This requirement is a severe barrier to attorney visits,[134] further increasing prisoners' isolation. And while DOC is facilitating Zoom calls between prisoners and their counsel, the inability to meet in person seriously compromises legal representation in criminal and other cases.[135] It is also irrational because DOC fails to require equivalent testing of officers and staff members who roam the facility during eight-hour shifts

---

(family usually visits every week, difficult not to see them; length and number of phone calls have been cut); **Don Decl.** ¶ 5 (connection to loved ones, particularly 12 year-old son, severely disrupted); **Gaudreau Decl.** ¶ 12-13 (one 20-min call per day, so you have to choose between loved one or an atty; "[T]he lack of visits is affecting my marriage."); **Pope Decl.** ¶ 10 (MCI-Norfolk has not allowed in-person visits since I got here in June and there are no video visits here yet. Not being able to see my fiancee and other family has made me even more depressed).

[129] **Wright Decl.** ¶ 17.

[130] **Bowen Decl.** ¶ 13.

[131] Ex. 4, p. 21, Declaration of **Steven Brown** ¶ 6.

[132] **Anderson Decl.** ¶¶ 12-13.

[133] *See* Ex. 3, Declaration of Randy Gioia, ¶ 2.

[134] *See Id.* ¶¶ 3-15.

[135] *Id.* ¶¶ 16-17.

with much greater prisoner contact than attorneys have, but who nevertheless have been subjected to only one round of asymptomatic testing during the fall pandemic.

ARGUMENT

To issue a preliminary injunction the court must determine (1) that the moving party has demonstrated a likelihood that it would prevail on the merits; (2) that denial of the injunction would result in irreparable harm; and (3) that the risk of irreparable harm outweighs the any similar risk of harm to the defendants. *Doe v. Worcester Pub. Sch*., 484 Mass. 598, 601 (2020). Where a public entity is a party, the court may also consider whether granting preliminary relief is in the public interest. *Id*.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

There is no doubt that Plaintiffs face a substantial risk of serious illness and death from COVID-19 infection now that it is clear that all the measures DOC has taken to contain COVID-19 have failed to protect them. The virus has infected prisoners and staff in every DOC facility and is raging out-of-control in multiple institutions, with no sign of abating. Despite Defendants' knowledge that the virus has overpowered all their efforts to contain it, they continue to disregard the SJC's warning that releases are necessary. And they still refuse to take readily available steps to reduce the prison population to a level necessary to remedy the unsafe and unconstitutional conditions that now exist inside our correctional facilities. As a result, plaintiffs continue to live, sleep, and eat in conditions that force them to go without the social distancing that virtually all medical and scientific experts say is essential for their safety.

A. Confining Plaintiffs Under Current Conditions Where COVID-19 Is Rampant And Out-of-Control Subjects Them To A Substantial Risk Of Harm

The SJC has already concluded in *Foster* that the "plaintiffs almost certainly will succeed in establishing the objective component of their claims under the Eighth Amendment." 484

Mass. at 718. Indeed, the same risk of contracting COVID-19 that exists in Massachusetts prisons, where physical distancing is not feasible, has been recognized by the CDC and by courts across the country. *See, e.g*., *Baez v. Moniz*, U.S. Dist. Ct., 460 F.Supp.3d 78, 89 (D. Mass. 2020) ("There is, and can be, no meaningful dispute that COVID-19 presents a substantial risk of serious harm to health, to the proposed class of petitioners in this case as well as to members of society at large"); *Refunjol v. Adducci*, U.S. Dist. Ct., 461 F. Supp. 3d 675, 707 (S.D. Ohio 2020) ("The objective component of the inquiry is beyond debate. Nobody can dispute that COVID-19 is a sufficiently serious medical need"); *Frazier v. Kelley*, U.S. Dist. Ct., No. 4:20-cv-00434-KGB, 2020 WL 2110896, at *6 (E.D. Ark. May 4, 2020) ("[I]t cannot be disputed that COVID-19 poses an objectively serious health risk to named plaintiffs and the putative classes given the nature of the disease and the congregate living environment of the ... facilities").

Plaintiffs face more than an abstract risk of COVID-19 infection. Since the end of October, more than 1,200 prisoners have contracted COVID-19, and the number of positive cases among DOC prisoners, officers, and staff continues to soar.[136] There is now an active COVID-19 case in every single one of DOC's 16 correctional facilities.[137] Some facilities have had hundreds of confirmed cases in recent weeks: Since October 29, MCI Norfolk has had 416 prisoner cases.[138] MCI Shirley has had 280.[139] NCCI Gardner has had 162.[140] And MCI Concord has had 284.[141] Five people have died in the past month alone.[142] Over 200 correctional officers have active COVID-19 infections that that have been reported to the DOC, and many other staff

[136] Special Master's Report at 62.
[137] *Id.* at 64-95.
[138] *Id.* at 69.
[139] *Id.* at 87.
[140] *Id.* at 71.
[141] *Id.* at 79.
[142] *See* n.1, *supra*.

members are infected,[143] As the SJC recently pointed out in *Commonwealth v. Nash*, "we have seen that the COVID-19 virus spreads rapidly, and that a few cases, or even no reported cases, on any given day or in any given place can quickly change to many cases." 2020 WL 7364784, at *9. This is largely because the people in DOC custody continue to live in crowded congregate settings where it is literally impossible for them to practice the social distancing that everyone knows is essential for their safety. This extraordinarily perilous situation demands that DOC take immediate action to reduce population to a level that does not place the lives of prisoners in jeopardy.

B. The DOC's Harsh Lockdown Restrictions Place Prisoners At Substantial Risk Of Serious Harm

While COVID-19 presents a serious danger to prisoners, the measures used to control infection at current population levels are themselves causing severe harm. In an attempt to contain infection amongst prisoners living in close quarters, DOC has imposed cell confinement, suspended group rehabilitative and educational programs, severely limited indoor and outdoor exercise, and barred in-person visits with loved ones. In June, the SJC noted that this restrictive environment itself "risk[s] becoming an Eighth Amendment violation." *See Foster*, 484 Mass. at 731. The deprivations have now clearly crossed that line and are causing substantial harm to prisoners. While some of the restrictions eased somewhat over the summer, as the infection rate slowed in the community and in prisons, they have now resumed in force in the wake of new COVID-19 outbreaks that started in late October, with no prospect of abatement over the winter.

In June, the Court warned, "[C]ancelling activities and visitation may be deleterious to the mental health of inmates. These effects necessarily will be even more pronounced for inmates in solitary cells, who are segregated from all other humans for twenty-three or more

[143] Special Master's Report at 62.

hours per day." 484 Mass. at 731-32 (quoting *Davis v. Ayala*, 576 U.S. (2015) (Kennedy, J., concurring), and other cases). Six months later, this is precisely the situation that many plaintiffs painfully describe in their current declarations. Eugene Ivey compares his cell confinement to his time in long-term solitary confinement;[144] Joseph Palmisano describes "excruciating isolation" resulting in two suicide attempts and psychiatric evaluations;[145] and a host of others describe the extreme emotional effects of enforced idleness and inability to leave their cells.[146] As the SJC recognized, deprivation of visits is similarly harmful. *See* 484 Mass. at 731. Here, too, class members poignantly describe the emotional toll of having visitors barred during this time of extreme stress for both prisoners and family members.[147]

The SJC also warned that although "deprivation of exercise may be reasonable in certain situations, such as during a state of emergency[,] . . . [l]ong-term deprivation of exercise on the other hand, may constitute an impairment of health forbidden under the [E]ighth [A]mendment." *Foster*, 484 Mass. at 732 (citations and internal quotations omitted). Here, too, the deprivation has become extreme. Some prisoners have not been outdoors for weeks or months.[148] Lack of access to indoor or outdoor exercise has taken a physical as well as an emotional toll on many.[149]

---

[144] **Ivey Decl. ¶** 13.
[145] **Palmisano Decl. ¶** 11.
[146] *See supra* n.126.
[147] *See supra* pp. 26-27 and n.128.
[148] *See* **Gerry Decl. ¶** 13 (hasn't been outside since September); **Ivey Decl. ¶** 10 (has only been outside for 90 minutes since late October); **Maramaldi Decl. ¶** 3 (has not been out of dorm room since October); **Lavin Decl. ¶** 5 (hasn't been out in over a month and a half).
[149] *See* **Olszewski Decl. ¶** 11 ("The difference with access to outdoors is night and day. I have a traumatic brain injury which affects my gait and my speech. I used to try to walk on flat surfaces outdoors for therapy, to keep strengthened for walking. My inability to walk outside during COVID has harmed my strength, stability, and balance."); **Foster Decl. ¶** 17 (has gained 40 pounds in past 6-7 months from not being active; bad for heart condition); **Bowen Decl. ¶** 12 (used to work out 5x/week, but very difficult in cell; health has declined, has lost 20 lbs); **Robinson Decl. ¶¶** 13, 17 (decline in physical and mental health due to lack of exercise; exercise helps manage high blood pressure and anxiety).

Compounding these harms, the lockdown also prevents prisoners from fully accessing medical and mental health care. Prisoners confined to their cells or dormitories cannot visit the health services unit and are reliant on sick slips to get attention for medical needs. Yet as discussed *supra* at pp. 19-21, these can go unanswered for weeks, if they are answered at all. The need to limit prisoner movement and interactions with non-correctional staff also contributes to the lack of access to chronic care, physical therapy, and specialty care, and to the cancellation of group and individual mental health counselling just when it is most needed.[150]

Each of these harms—cell confinement, isolation, lack of activity, cancellation of visits, lack of exercise, and denial of medical and mental health care—by itself endangers prisoners and can violate the Constitution. *Foster*, 484 Mass. at 731-32. When they are imposed in combination, during a time of unparalleled fear and anxiety caused by the pandemic, they constitute "serious deprivation[ ] of basic human needs," *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

C. The Defendants' Failure To Reduce The Prison Population Demonstrates Deliberate Indifference To Plaintiffs' Health And Safety

In *Foster*, the SJC ruled that plaintiffs had not established that they were likely to be able to show deliberate indifference to prisoner health or safety on the part of the defendants. 484 Mass. at 724. Prison officials are deliberately indifferent when they "fail[] to take reasonable measures to abate" a known, substantial risk of harm. *See Farmer v. Brennan*, 511 U.S. 825, 829, 847 (1994); *see also Zingg v. Groblewski*, 907 F.3d 630, 635 (1st Cir. 2018) (deliberate indifference established by a "fail[ure] to take steps that would have easily prevented" a known harm); *Ahearn v. Vose*, 64 Mass. App. Ct. 403, 417 (2005) (correctional staff violate the Eighth

[150] *See supra* pp. 21-23 and nn.102-105.

Amendment when they "fail[] to take 'easily available measures' to reduce the known risk to the plaintiffs' health").

As the late Chief Justice Gants stated in his *Foster* concurrence, the essence of the SJC's holding was that DOC was doing "the best it can" to manage the COVID emergency. 484 Mass. at 735. The Court considered it particularly significant that the DOC was in compliance with the guidelines recommended by the CDC for correctional facilities, and that it had put into place various protective measures, such as requiring all prisoners and staff to wear masks, barring visits except from lawyers; isolating people who are symptomatic; increasing cleaning and the distribution of PPE; suspending most group programming and work releases; and severely restricting contact with other prisoners. *Id* at 721-22. The SJC also observed that DOC had begun to implement a system-wide testing plan which "will provide much of the testing relief that the plaintiffs, and the amicus American Civil Liberties Union, urge this court to order." *Id* at 723-24.

The timing of the SJC's conclusion in *Foster* that DOC was doing enough in June to satisfy its constitutional obligation is significant. As this Court recently recognized, when the SJC issued its opinion, the number of COVID-19 cases in the DOC had dropped dramatically, going from a high of 101 new cases in the week of May 4-10, 2020 to 11 new cases in the week of May 24-31, 2020. *See* Mem. of Decision and Order on Pls.' Mot. for an Order Requiring Implementation of a Home Confinement Program (Dec. 18, 2020) at p. 3. Furthermore, the overall DOC population had declined by over 400, going from 7,642 to 7,233. *Id*. Even though this constellation of facts suggested there was reason to believe that DOC might have the virus under control, the SJC nonetheless took pains to reiterate that, due to the COVID-19 pandemic, the situation inside the Commonwealth's jails and prisons "is urgent and unprecedented, and that a reduction in the number of people who are held in custody is necessary." *Foster* 484 Mass. at

701 (quoting *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, 484 Mass. 431, 445, (2020)). To drive home this point, it also remarked that "[e]ven the commissioner acknowledged at oral argument that reducing the number of incarcerated individuals being held in any given facility, if it can be done lawfully, is a desirable goal for controlling the spread of communicable diseases such as COVID-19." 684 Mass. at 732. And it cited to the "numerous measures . . . undertaken in other States to reduce prison populations, among them release to home confinement, enhanced good time sentence deductions, and early parole," clearly expressing its belief that Defendantsshould consider similar actions. *Id*. Although it declined to order Defendants to do so, the Court commented that the "specific measures the defendants might choose to reduce the number of incarcerated individuals in DOC custody are not as important as the goal of reduction." *Id.* at 733.

The SJC did not give the Defendants a free pass to do nothing. Significantly, it declared that "it appears that the COVID-19 pandemic will continue to demand extraordinary, and coordinated, efforts by all parties," including the courts and the executive branch. *Id.* at 732. It also warned that if it were to conclude at a later point that the measures taken by Defendantsto mitigate the spread of COVID-19 prove to be inadequate, then it has the obligation to devise a remedy, which might include an order that Defendants to release people from custody. *Id* at 733. Since its *Foster* decision, the SJC has continued to emphasize the vital importance of decreasing the prison population. Earlier this month, it again explained that "we must take such steps as are open to us to reduce the number of incarcerated individuals, and to protect those who remain incarcerated from the dangers of COVID-19". *Commonwealth v. Nash,* -- Mass. --, 2020 WL 7364784 at *9 (December 14, 2020). It also stated that requiring judges to take COVID-19 into account in making release decisions helps in "achieving the objective" it announced in *Christie*

v. Commonwealth, 484 Mass. 397 (2020)—"to safely and responsibly reduce the population of prisons and jails in the face of the pandemic." *Id* at *8.

As discussed *supra*, the steps DOC has taken to mitigate the spread of the virus have proven to be patently insufficient to protect prisoners from COVID-19. The fact that DOC may have implemented protective measures inside the prisons does not excuse Defendants' failure to do what the SJC said they should have been doing all along, and what is now obviously necessary: reduce the prison population to a level where prisoners can practice effective social distancing.

The deliberate indifference standard "does not mandate perfect implementation, but it also does not set a bar so low that any response by officials will satisfy it." *Valentine v. Collier*, 141 S. Ct. 57, 2020 WL 6704453, *4 (Nov. 16, 2020) (Sotomayor, J., dissenting) (internal citations omitted). Because the Constitution prohibits not just a complete absence of treatment, but also inadequate treatment, prison officials cannot insulate themselves from liability by taking steps that are clearly insufficient to address a serious risk of harm. *See Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985); *see also Savino v. Souza*, 459 F. Supp. 3d 317, 329 (D. Mass. 2020) (holding that detainees were likely to establish deliberate indifference notwithstanding steps the jail had taken to attempt to protect them from COVID-19 where detainees identified "cavernous holes in the government's mitigation strategy"); *DeGidio v. Pung*, 920 F.2d 525, 531 (8th Cir. 1990) (affirming district court's determination that jail's response to a tuberculosis outbreak, while not non-existent, was inadequate and therefore unconstitutional) (cited with approval in *Foster*, 484 Mass. at 719-20).

Thus, courts have found that the failure to reduce a prison population reflects deliberate indifference when other measures have proved "insufficient" or "ineffectual" to adequately

protect prisoners' health and safety. *See Brown v. Plata*, 563 U.S. 493 (2011) (ordering release of thousands of California prisoners after state officials were unable to provide constitutionally adequate health care due to severe overcrowding); *see also Harris v. Angelina Cty., Tex*., 31 F.3d 331, 335-36 (5th Cir. 1994) (rejecting the County's argument that it lacked deliberate indifference because it had done "everything in its power" to remedy overcrowding, including construction, transfers, and alternatives to incarceration). Courts have also ordered releases to protect prisoners from COVID-19. *See In re Von Staich*, 56 Cal. App. 5th 53, 270 Cal. Rptr. 3d 128, 149-50 (Cal. App. 2020) (ordering 50 percent reduction in the population of San Quentin prison to remedy deliberate indifference to risk of substantial harm to prisoners); *Campbell, et al. v. Barnes*, Case No. 30-2020-1141117, Order on Writ of Habeas Corpus and Writ of Mandamus (Cal. Orange Cnty. Super. Ct. filed Dec. 11, 2020) (ordering jail to reduce population in congregate living areas by 50 percent to ensure proper social distancing); *Valenzuela Arias v. Decker*, No. 20 CIV. 2802 (AT), -- F.Supp.3d --, 2020 WL 1847986, at *4 (S.D.N.Y. Apr. 10, 2020) (ameliorative measures would "likely result in some reduction of risk of infection, but . . . are far from sufficient" where social distancing was impossible); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 449 F.Supp.3d 205, 215 (S.D.N.Y. Mar. 26, 2020) (finding measures "patently insufficient" when respondents "could not represent that the detention facilities were in a position to allow inmates to remain six feet apart from one another").

D. The DOC's Current Population Levels And Housing Practices Make It Impossible For Plaintiffs To Protect Themselves By Social Distancing

As explained in detail in the Facts section, *supra* at pp. 5-9, DOC's facilities remain so crowded that effective social distancing remains impossible for most of the people incarcerated in DOC prisons. They continue to sleep, eat, recreate, use the bathroom facilities and stand in line to receive medications, all while within six feet of other prisoners. Although the overall

DOC population has declined slightly, the reduction has obviously been insufficient to prevent the massive spread of COVID-19 in DOC prisons. This is not surprising given that the small drop in the number of prisoners has produced no meaningful change in housing practices or population density. The percentage of the population housed with at least one other person was 53.3 percent on June 15, 2020; it is now 50.7 percent.[151] And the number housed in a room with three or more people has actually gone up slightly, from 18.7% to 19.2%.[152] Furthermore, cells and dorms in numerous DOC institutions fail to comply with minimum cell size and floor space standards that the DPH has established to safeguard the well-being of prisoners[153] independently of any need to protect against contagious diseases.[154]

As of December 14, 2020, the overall DOC population remained at 89 percent of design capacity, and five prisons remained over their design capacities.[155] A majority of prisoners are still housed with at least one other person,[156] and at many prisons the proportion is much higher: 91 percent at NCCI Gardner, 75 percent at the MTC, 72 percent at MCI-Concord, 63 percent at

---

[151] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download; https://www.mass.gov/doc/6-15-20-institution-cell-housing-report/download

[152] *Id.*

[153] https://www.mass.gov/doc/mci-norfolk-november-14-2019/download; https://www.mass.gov/doc/mci-concord-december-11-2019/download; https://www.mass.gov/doc/mci-shirley-december-4-2019/download; https://www.mass.gov/doc/north-central-correctional-institute-in-gardner-september-24-2019/download; https://www.mass.gov/doc/old-colony-correctional-center-december-13-2019/download; https://www.mass.gov/doc/pondville-correctional-center-norfolk-december-19-2019/download; https://www.mass.gov/doc/northeastern-correctional-center-september-30-2019/download; https://www.mass.gov/doc/souza-baranowski-correctional-center-september-16-2019/download

[154] *See* Ex. 1, Mohareb. Decl. at 143-56.

[155] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download for population numbers and https://www.mass.gov/doc/prison-capacity-first-quarter-2020/download for design capacity, which show the following comparison of actual population to design capacity: MCI-Norfolk 1209/1084, or 111 percent; MCI-Shirley 1074/1019, or 105 percent; NCCI Gardner 843/598, or 140 percent; OCCC 696/580, 120 percent; Pondville 106:100, or 106 percent).

[156] *See* https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download (December 14, 2020 data).

OCCC, 66 percent at Pondville, and 55 percent at MCI-Shirley. Some prisons have actually increased density during this period,[157] while others declined only nominally.[158]

This crowding elevates the risk of COVID-19 regardless of mask use and other infection control policies,[159] and it is no surprise that the densest prisons have experienced the greatest outbreaks. Four prisons account for 1,069 new infections since October 29, nearly all of the total of 1,085 new infections during that period. MCI-Norfolk, operating at 111 percent of its design capacity, had 416; MCI-Shirley, at 105 percent of capacity, had 280; NCCI Gardner, at 140 percent capacity, had 162; and MCI Concord, where 72 percent share a cell with at least one other person, and 108 with two or more, had 284 cases.[160] Yet DOC has done nothing to reduce the number of individuals housed in these institutions.

E. The Defendants Have Failed To Take Reasonable And Necessary Measures To Reduce The Prison Population

As explained in detail in the Facts section above, DOC has granted no furloughs, made little if any increase in the use of medical parole, and there has been a significant *decrease* in the ability to earn good time deductions as a result of the suspension of work and programming opportunities. And, as the Court is aware, DOC is still resisting implementation of a home confinement program, claiming that it would be irresponsible to release prisoners in the midst of the COVID-19 crisis despite the SJC's recommendations and the opinions of medical and

---

[157] Bridgewater State Hospital has gone from 90% of its design capacity (206/227) to 96% (218/227); the Massachusetts Treatment Center's population increased from 93% of design capacity (527/552) to 98% (552/561).

[158] MCI Framingham has reduced its population by three people, from 179 to 176; MCI Norfolk has reduced by 34 people, from 1,243 to 1,209; OCCC has reduced by 12 people from 708 people to 696.

[159] Ex. 1, Mohareb Decl. at 250-271.

[160] *See* Special Master's Report, December 17, 2020 for infection numbers; https://www.mass.gov/doc/12-14-20-institution-cell-housing-report/download for population numbers; and https://www.mass.gov/doc/prison-capacity-first-quarter-2020/download for design capacity.

correctional experts.[161] Defendants' hostility to releases is further illustrated by Governor Baker's recent veto of language approved by the Legislature in the FY2021 Budget requiring monitoring and oversight of DOC's utilization of release mechanisms.[162] DOC's intransigence and excuses for its failure to use all available release mechanisms defy reason and demonstrate the need for judicial intervention.

II. WITHOUT THE RELIEF SOUGHT, PLAINTIFFS WILL SUFFER IRREPARABLE HARM

The danger to incarcerated persons posed by COVID-19 is immediate and impossible to remedy after the fact, as courts across the country have routinely recognized. *See, e.g., Rafael L.O. v. Tsoukaris*, No. CV 20-3481 (JMV), 2020 WL 1808843, at *8 (D.N.J. Apr. 9, 2020) ("Against this backdrop, Petitioners have demonstrated irreparable harm should they remain in confinement."); *Thakker v. Doll*, 451 F. Supp. 3d 358, 370 (M.D. Pa. 2020) ("[C]atastrophic results may ensue, both to Petitioners and to the communities surrounding the Facilities."); *Arias v. Decker*, No. 20 CIV. 2802 (AT), 2020 WL 2306565, at *4 (S.D.N.Y. May 8, 2020) ("Petitioners have shown irreparable harm by establishing the risk of injury to their health and constitutional rights."). This is particularly true for those that are already medically vulnerable. *See Coronel v. Decker*, 449 F. Supp. 3d 274, 281 (S.D.N.Y. 2020) (finding that "[d]ue to their serious underlying medical conditions" and their placement in immigration detention, where they are "at significantly higher risk of contracting COVID-19," the petitioners "face a risk of severe,

[161] See Emily A. Wang, Bruce Western, Emily P. Backes and Julie Schuck, eds., Decarcerating Correctional Facilities During COVID-19: Advancing Health, Equity and Safety, National Academies of Sciences, Engineering, and Medicine, at 2-2 (hereinafter, NASEM Report), https://www.nap.edu/catalog/25945/decarceratingcorrectional-facilities-during-covid-19-advancing-health-equity. The National Academy of Science Decarceration Report recommends that correctional authorities assess the optimal population level of their facilities to adhere to public health guidelines during the pandemic, and identify candidates for release from prison and jail in a fair and equitable manner and engage other officials outside the correctional system as necessary to expedite decarceration to the optimal level.

[162] *See* Conference Report H. 5164, Section 8900-0001, https://malegislature.gov/Budget/ConferenceCommittee

irreparable harm"). But, as the SJC has recognized, the risk is not limited to only prisoners who are older or who have underlying conditions. *Commonwealth v. Nash*, No. SJC-12976, 2020 WL 7364784, at *10 (Mass. Dec. 14, 2020) ("Even healthy individuals incarcerated in facilities with little or no COVID-19 outbreaks at a given moment still remain at risk").

The harm from the widespread isolation imposed by the DOC in their attempt to contain the virus is similarly irreparable. *See, e.g.*, *V.W. by & through Williams v. Conway*, 236 F. Supp. 3d 554, 588–89 (N.D.N.Y. 2017) ("continued use of solitary confinement" and "deprivation of education services" created risk of irreparable harm); *Reynolds v. Arnone*, 402 F. Supp. 3d 3, 45 (D. Conn. 2019) (depriving prisoner "of contact social visits and meaningful social interaction" and preventing ability to engage in "educational and recreational programming" threatened irreparable harm); *Larocque v. Turco*, No. SUCV202000295, 2020 WL 2198032, at *15 (Mass. Super. Feb. 28, 2020) (denial of constitutional rights during one-week lockdown constituted irreparable harm).

Averting the harm from the virus requires "extraordinary, and coordinated, efforts by all parties, as well as the courts." *Foster*, 484 Mass. at 732. As Chief Justice Gants observed in the spring, it takes time "both to identify appropriate candidates for release and to ensure that they have appropriate release plans." *Foster*, 484 Mass. at 741 (Gants, C.J. concurring). Despite this exhortation, Defendants have done nothing to identify such candidates or effectuate their releases, and the virus is now raging again through DOC facilities. Because DOC has shown no willingness to undertake this process on its own, this Court must issue the preliminary injunction to avert the irreparable harm.

III. AN INJUNCTION IS IN THE PUBLIC INTEREST AND WILL NOT HARM DEFENDANTS

Incarcerated people are members of the public and have an obvious interest in the requested relief. *Cf. Christie v. Commonwealth*, 484 Mass. 397, 401 (2020) (in considering "danger to other persons and the community" in stay of execution pending appeal, a court should consider "not only the risk *to others* if the defendant were to be released and reoffend, but also the health risk *to the defendant* if the defendant were to remain in custody") (emphasis in original); *see also Commonwealth v. Nash,* 2020 WL 7364784 *8 (explaining that because of COVID-19, courts should consider releasing people who do not qualify for release using conventional criteria). The non-incarcerated public also has a strong interest in the requested relief. As the SJC has recognized, "an outbreak [of COVID-19] in correctional institutions has broader implications for the Commonwealth's collective efforts to fight the pandemic" because it "will further burden the broader health care system that is already at risk of being overwhelmed." *Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 437 (2020). Indeed, during just the first wave of infections in the spring, dozens of prisoners required beds in local hospitals.[163] Dozens more will doubtless be needed as the number of infections in DOC facilities have nearly quadrupled since then. The SJC also saw the danger that prison contagion will spread through correctional, medical, and other staff entering prisons daily who "risk bringing infections home to their families and broader communities." *Committee for Pub. Counsel Servs.*, 2020 WL 1659939, at *4. Empirical studies have since confirmed the SJC's prediction that spread of the virus within prisons fuels spread in the communities that surround them.[164] Accordingly, the public interest in dampening the explosion of COVID-19 in DOC

[163] Ex. 9, Hospitalizations - Covid Spreadsheet (showing 48 hospitalizations as of September 2020), cited by Def. Mici's Responses to Pls.' First Set of Interrogatories, Response No. 6.
[164] Gregory Hooks and Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, Prison Policy Initiative (December 2020), available at https://www.prisonpolicy.org/reports/covidspread.html ("The number of people in prisons and

facilities is even stronger today than it was in the spring, when the number of infections was lower both in the community and in prisons.

With respect to the Defendants, there is no potential harm. Granting the preliminary injunction will merely further an objective that they themselves have endorsed in sworn testimony before this Court, as well as reduce the fiscal and operational burden of incarcerating so many people during the pandemic, and free up resources to house and care for those who remain imprisoned.

REQUEST FOR RELIEF

In light of the foregoing, urgent relief is needed to protect class members in DOC facilities from COVID-19 and the deprivations caused by DOC's recurring lockdowns. Specifically, Plaintiffs seek the following relief, in addition to all other relief the Court deems just and proper:

For the duration of the COVID-19 emergency, enjoin Defendants and their agents, officials, employees, and all persons acting in concert with them from:

a. Housing any prisoner in any correctional facility where the population exceeds the Design/Rated capacity of that institution;
b. Housing any prisoner in a cell, room, dorm, or other living area that does not meet the minimum size standards established by the Department of Public Health in 105 CMR 451.320-322.
c. Housing any prisoner in a cell, room, dorm, or other living area where they must sleep, eat, or recreate within six feet of another person.

---

jails has led to more COVID-19 cases, among those working or confined in these facilities and among those who simply live near them.").

Further, the Court should order the Defendants to immediately reduce the number of people confined in DOC facilities by at least a sufficient number to ensure compliance with the relief requested above, prioritizing release for members of the medically vulnerable subclass. Mechanisms for population reduction should include but not be limited to:

a. Immediate implementation of a home confinement program to consider prisoners at all DOC institutions for possible release on home confinement, regardless of any statutory exclusions, and with a presumption in favor of home confinement for members of the medically vulnerable subclass;
b. Use of furloughs, including allowing furloughs for longer than the 14 days authorized by G.L. c. 127, § 90A;
c. Maximizing the award of good conduct deductions, including completion credits and "boost time" under G.L. c. 127, § 129D, and authorizing the award of more such deductions than is permitted by § 129D, including sufficient credits to accomplish the immediate release of all prisoners who are now within three months of their discharge date, and giving one year of good time credit to all those currently incarcerated;
d. Identifying all prisoners who may qualify for medical parole, under G.L. c. 127, § 90A, taking all necessary steps to ensure that a medical parole petition is filed immediately, considering the risk of COVID-19 in making medical parole decisions in accordance with the SJC's directives in *Christie v. Commonwealth,* 484 Mass. 397, 401-402 (2020) and *Commonwealth v. Nash*, 2020 WL 7364784 (December 14, 2020), and granting medical parole to those who qualify as quickly as possible and in no event more than one week after the petition is filed.

Further, the Court should order Defendant Moroney and the Parole Board to:

a. Consider the dangers posed by COVID-19 to potential parolees when assessing whether their "release is not incompatible with the welfare of society," as required by G.L. c. 27, § 130, and, consistent with the SJC rulings in *Christie v. Commonwealth, supra,* and *Commonwealth v. Nash*, 2020 WL 7364784 (December 14, 2020), explain in its written decision how it weighed those dangers, on an individualized basis for each petitioner,in making its parole decisions;

b. Issue written decisions within two weeks of all lifer hearings;

c. Presumptively grant parole to all parole-eligible individuals unless it makes a determination based on clear and convincing evidence that the person cannot live at liberty without violating the law;

d. Cease revoking parole for technical violations or issuing parole detainers to hold people in custody pending parole revocation hearings for technical violations or when a court has released the person pending trial on new charges.

In order to promptly effectuate compliance with this relief, Plaintiffs ask that the Court order Defendants to report weekly on the status of implementation.

CONCLUSION

For all the above reasons, the Court should allow Plaintiffs' Emergency Motion for Preliminary Injunction forthwith.

Dated: December 23, 2020

Respectfully Submitted,

/s/ Michael J. Horrell
Elizabeth D. Matos (BBO #671505)
James R. Pingeon (BBO #541852)
Bonita P. Tenneriello (BBO #662132)
David Milton (BBO #668908)
Michael J. Horrell (BBO #690685)
PRISONERS' LEGAL SERVICES
50 Federal Street, 4th Floor
Boston, MA 02110
Telephone: (617) 482-2773
lmatos@plsma.org
jpingeon@plsma.org
btenneriello@plsma.org
dmilton@plsma.org
mhorrell@plsma.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on December 23, 2020 by email to the counsel of record.

/s/ Michael J. Horrell
Michael J. Horrell

Appendix of Unreported Cases

Campbell, et al. v. Barnes, Case No. 30-2020-1141117, Order on Writ of Habeas Corpus and Writ of Mandamus (Cal. Orange Cnty. Super. Ct. filed Dec. 11, 2020)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
Civil Complex Center
751 W. Santa Ana Blvd
Santa Ana, CA 92701

SHORT TITLE: Campbell vs. Don Barnes, in his official capacity as Sheriff of Orange County, California

CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2020-01141117-CU-WM-CXC**

I certify that I am not a party to this cause. I certify that the following document(s), ORDER ON WRIT OF HABEAS CORPUS AND WRIT OF MANDATE dated 12/11/20, have been transmitted electronically by Orange County Superior Court at Santa Ana, CA. The transmission originated from Orange County Superior Court email address on December 11, 2020, at 1:46:48 PM PST. The electronically transmitted document(s) is in accordance with rule 2.251 of the California Rules of Court, addressed as shown above. The list of electronically served recipients are listed below:

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
CKENDRICK@ACLU.ORG

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
CSTUBBS@ACLU.ORG

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
OENSIGN@ACLU.ORG

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
PELIASBERG@ACLU.ORG

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
ZBRENNAN-KROHN@ACLU.ORG

MUNGER TOLLES & OLSON LLP
ARIEL.TESHUVA@MTO.COM

MUNGER TOLLES & OLSON LLP
JACOB.KREILKAMP@MTO.COM

MUNGER TOLLES & OLSON LLP
MICHELE.HYLAS@MTO.COM

MUNGER TOLLES & OLSON LLP
ROBIN.GRAY@MTO.COM

MUNGER TOLLES & OLSON LLP
SARA.MCDERMOTT@MTO.COM

MUNGER TOLLES & OLSON LLP
STEPHEN.HYLAS@MTO.COM

MUNGER TOLLES & OLSON LLP
TREVOR.TEMPLETON@MTO.COM

ORANGE COUNTY COUNSEL
KAYLA.WATSON@COCO.OCGOV.COM

ORANGE COUNTY COUNSEL
KEVIN.DUNN@COCO.OCGOV.COM

ORANGE COUNTY COUNSEL
LAURA.KNAPP@COCO.OCGOV.COM

ORANGE COUNTY COUNSEL
REBECCA.LEEDS@COCO.OCGOV.COM

SCHONBRUN, SEPLOW, HARRIS, HOFFMAN & ZELDES LLP
HOFFPAUL@AOL.COM

SCHONBRUN, SEPLOW, HARRIS, HOFFMAN & ZELDES LLP
IWASHINGTON@SSHHLAW.COM

Clerk of the Court, by: V Hartins, Deputy

Campbell et al. v. Barnes

Orange County Superior Court

Civil Complex Center

Case No. 30-2020-1141117

ORDER ON WRIT OF HABEAS CORPUS AND WRIT OF MANDATE

The Petition

Petitioners Cynthia Campbell, Monique Castillo, Sandy Gonzalez, Cecibel Caridad Ortiz, Mark Trace and Don Wagner, on behalf of themselves and all others similarly situated, filed their Verified Petition for Writs of Mandate and Habeas Corpus and Complaint for Injunctive Relief on June 2, 2020. The respondent is Don Barnes, in his official capacity as Sheriff of Orange County, California. The petition was filed as a class action.

Pursuant to a Stipulation filed August 20, 2020, Petitioners Cynthia Campbell and Sandy Gonzalez, on behalf of themselves and all others similarly situated, and Monique Castillo, Cecibel Caridad Ortiz and Mark Trace filed their Verified Amended Petition for Writs of Mandate and Habeas Corpus and Complaint for Injunctive and Declaratory Relief, against Respondent Don Barnes, in his official capacity as Sheriff of Orange County, California. The Verified Amended Petition (hereinafter simply "Petition") was again filed as a class action. The Petition is supported by four volumes of documentary evidence, including expert declarations, as discussed more fully herein.

Motion Practice and Order To Show Cause

The Court on October 29, 2020 denied Respondent's motion to dismiss or stay, and overruled Respondent's demurrers, for the reasons more fully discussed on the record during the hearing and as set forth in the Court's October 29, 2020 Minute Order. As reflected in the Minute Order, the Court further found as follows:

> "Having reviewed the Unredacted Verified Amended Petition for Writs of Mandate and Habeas Corpus and Complaint for Injunctive and Declaratory Relief (ROA 107) filed September 9, 2020, along with the documents filed in support thereof (ROAs 147 through 151), as well as the documents filed in support of and in opposition to the motions ruled on today (including the documents attached to Petitioners' request for judicial notice (ROA 169)), the Court finds that Petitioners have made a prime facie showing that they are entitled to relief. Accordingly, the Court hereby issues an Order to show cause, pursuant to CRC rule 4.551(c)."

The Minute Order further specified dates for the filing and service of the Return, and the filing and service of the Denial. The Minute Order also provisionally set a date for an evidentiary hearing, on December 7, 2020.

Although not addressed in the Minute Order, the Court also ordered that the expedited hearing was being set only for the Habeas petition, and that the Court would not attempt to apply/follow class action procedures on the same expedited basis. As further discussed hereunder, the class action claims are not at issue in this decision, but both Petitioners and Respondent have requested that the Court rule not only on the Habeas petition but also on the petition for writ of mandate.

Respondent's Return and Petitioners' Denial (Traverse)

Respondent duly filed his Return to Order to Show Cause re-Petition for Writ of Habeas Corpus; Opposition to Writ of Mandate, Injunctive and Declaratory Relief on November 16, 2020. Respondent also filed, in support of the Return, a declaration of Joseph Balicki, a declaration of C. Hsien Chiang, M.D, and Exhibits A through P.

Petitioners filed their Denial in Response to Respondent-Defendant Don Barnes' Return to Order to Show Cause on November 30, 2020. On the same date Petitioners also filed their Request for Judicial Notice in Support of Petitioner's Denial, a Memorandum of Points and Authorities in Support of Plaintiffs-Petitioners' Denial, the declaration of Michelle C Nielsen, and four volumes of supporting evidence including three expert declarations and numerous fact witness declarations (as discussed in more detail hereunder).

The Court held a status conference on December 2, 2020. As will be more fully reflected in the record of that hearing, and as summarized in the Court's December 2, 2020 Minute Order, the Court discussed with counsel whether either side contended that an evidentiary hearing was necessary to determine any disputed fact(s). Petitioners and Respondent had taken the position in their respective briefs that no evidentiary hearing was necessary, and both sides reiterated that position at the hearing. Based on the Court's review of the Petition, Return, and Denial, and their respective supporting papers, the Court was likewise of the view that it did not appear that Petitioners' entitlement to relief depended on the resolution of any issues of fact. Accordingly, the Court ruled that there would not be an evidentiary hearing on December 7, 2020, but that oral argument on the petition, specifically on the petition for a writ of habeas corpus and the petition for a writ of mandate, would be heard on that date at 10 a.m. By agreement with the parties, the matter was set for hearing via CourtCall.

The Court heard oral argument on December 7, 2020 and took the matter under submission.

Discussion and Findings

Having considered the Petition, the Return and Denial, and all papers filed in support and opposition, the arguments of counsel, and the applicable law, the Court now finds as follows.

No Evidentiary Hearing Is Necessary

The Petition alleges the facts cited below, with footnoted references to the supporting evidence. (The footnote references are omitted in the citations below.)

Except as expressly noted below, Respondent has failed in his Return to allege any facts, or in most instances even to address argument, in response to these facts alleged by Petitioners. This notwithstanding the requirement that "[t]he factual allegations of a return must also respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful. (Citations omitted.) In addition to stating facts, the return should also, 'where appropriate, . . . provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed. (Citation omitted.)'" *People v. Duval,* (1995) 9 Cal.4th 464, 476.

Thus, the following holding in *In re Ivan Von Staich*, 56 Cal.App.5th 53 (hereinafter *Von Staich*) is particularly apposite:

> "[T]hese statements are conclusions the Attorney General has failed to support with any factual allegations contradicting petitioner's allegations that reduction of the San Quentin population by at least half is essential to protect inmates' health, much less evidence supporting such allegations. It is respondents' burden to "*allege additional facts* that *contradict*" the allegations of the petition and "'where appropriate, . . . provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed.'" (*People v. Duvall* (1995) 9 Cal.4th 464, 476, 483 (*Duvall*).) When the state offers " 'nothing more in support of their claim that petitioner's confinement is lawful than a general denial of his [factual] allegation[s],' " then " '[b]y alleging only a conclusionary statement of ultimate fact in their return, the People have indicated a willingness to rely on the record.' [Citation.] . . . '[And] the merits of petitioner's claim can be reached without ordering an evidentiary hearing.' " (*Duvall,* at p. 479, quoting *In re Lewallen* (1979) 23 Cal.3d 274, 278; accord, Pen. Code, § 1485.5.)"

Id. at 67-68.

The Allegations of the Petition

The relevant facts alleged by Petitioners, and not challenged by Respondent (except to the extent specifically noted below), include the following:

"This petition seeks urgent habeas and mandamus relief to protect medically vulnerable people and people with disabilities detained at the Orange County Jail, all of whom are at imminent risk of serious illness and death from COVID-19." Petition at 3:1-3.

"We are in the midst of the most dangerous pandemic in generations." Petition at 3:8.

"COVID-19 is a novel communicable virus that has proved unusually fatal. Many have been sickened, and many have died. Individuals like the Petitioners/Plaintiffs, with certain underlying conditions and/or of advanced age are at increased risk of COVID-19-related complications and death." Petition at 4:1-4.

"There is no vaccine or cure for COVID-19. The virus is highly contagious. Additionally, congregate settings, like jails, pose heightened problems because of poor ventilation and close living quarters where detained individuals cannot practice social distancing, the "cornerstone of reducing transmission of respiratory diseases such as COVID-19." This is true at the Orange County Jail, where detained individuals cannot isolate and have no ability to maintain safe social distance. The Commander of Custody Operations of the Orange County Jail concedes that the "[t]he Sheriff's jail facilities do not allow for spacing of six feet between incarcerated people."" Petition at 4:5-12

"The dangerous conditions at the Orange County Jail pose a particular threat to Petitioners/Plaintiffs and other medically vulnerable individuals. They are among a list of approximately 500 detainees whom Respondent identified as medically vulnerable and at heightened risk of serious infection and death, but not released." Petition at 4:13-5:1

"Public health expertise counsels that aggressive measures, including reducing the jail population, are our last and best chance to slow the growth of new infections in the jail and in the surrounding community. Jails are not closed off from the communities around them; every day, custody, medical, and support staff and contractors who have direct contact with detainees enter and leave the facility, along with detainees who are newly booked into the jail, leave and return for court hearings, and leave upon release. For this reason, an outbreak in the jail can spread easily to the surrounding community, often through jail staff who become infected and bring the virus home." Petition at 5:17-6:3

"Petitioner/Plaintiff Sandy Gonzalez is a 27-year-old woman who is currently being held at the Central Women's Jail. Ms. Gonzalez is pre-trial and is charged with two felony second-degree robbery charges and a misdemeanor charge for possession of a controlled substance in case 20NF0814. She is also charged with two

additional misdemeanor charges in case 20CF0617. On April 23, 2020, the Court ordered that her bond in the felony case would remain at $50,000.00, but lowered her bond in the misdemeanor case to $1.00. The case summary notes indicate that she appeared via video on both cases on May 13, 2020. Like the other named women Petitioners/Plaintiffs, Ms. Gonzalez was housed in P-13. She is medically vulnerable and has Type 2 diabetes and a history of smoking. She was exposed to her cellmate Ms. Ortiz, who developed COVID-19 symptoms on May 11. Ms. Gonzalez was tested for COVID-19 on the evening of May 14, 2020. The following day, on May 15, 2020, after the results confirmed her illness, Ms. Gonzalez was moved to a disciplinary isolation cell as a result of her COVID-19 diagnosis. Ms. Gonzalez is a protected individual for purposes of California Government Code section 11135." Petition at 11:4-17

"Plaintiff Mark Trace is a 53-year-old man who was formerly held in the Central Men's Jail. He pled guilty to one count of possession of a controlled substance with intent to sell in 19WF2586 and was sentenced to one year and four months at the Jail. Before being transferred to the Central Men's Jail, he was held at the Theo Lacy Facility until March 10. Mr. Trace is medically vulnerable. He has multiple, significant underlying health conditions. These include sclerosis of the liver, Hepatitis C and D, asthma, tuberculosis, valley fever, and seizures. He was housed in a Module D-20, in a single person cell that had open bars and shared air with the approximately 12 other individuals in his module. He was unable to consistently practice social distancing during his time in custody, and his access to medical care slowed after the COVID-19 outbreak began. He missed his medication on March 20 and April 13, and went several days without an inhaler. Mr. Trace resides in Orange County, and is a protected individual for purposes of California Government Code section 11135." Petition at 13:10-21

> Respondent addresses this allegation only by pointing out that plaintiff Mark Trace is now again being held in the Orange County Jail for alleged probation violations. Response, 1:16-17.

"The novel coronavirus that causes COVID-19 has led to a global pandemic. As of September 5, 2020, there were more than 26,468,030 reported COVID-19 cases throughout the world and more than 187,000 deaths in the United States. Projections indicate that as many as 300,000 people in the U.S. will die from COVID-19 by December 1, 2020, accounting for existing interventions." Petition at 4:16-20

"The virus is known to spread from person to person through respiratory droplets, close personal contact, and contact with contaminated surfaces and objects. There is no vaccine against COVID-19 and no known medication to prevent or treat infection. Social distancing— deliberately keeping at least six feet of space between persons to avoid spreading illness —and a vigilant hygiene regimen, including washing hands frequently and thoroughly with soap and water, are the only known effective measures for reducing the transmission of COVID-19. Because

the coronavirus spreads among people who do not show symptoms, staying away from people is the best way to prevent contracting the virus." Petition at 15:1-8

"The risk of illness or death from COVID-19 is increased for older populations. A recent analysis found that mortality rates for individuals age 65-74 and 75-84 are respectively 90 times and 220 times higher than for individuals age 18-29. And in a February 29, 2020 preliminary report, individuals age 50-59 had an overall mortality rate of 1.3%, while those age 70-79 had an 8% mortality rate." Petition at 15:13-16:2

"People of any age who have certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental disabilities, and asthma, also have an elevated risk. Early reports estimate that the mortality rate for those with cardiovascular disease was 13.2%, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer. People with any of these conditions are people with disabilities protected under California disability rights laws." Petition at 16:3-11

"People in congregate environments where they live, eat, and sleep in close proximity are at increased danger of contracting COVID-19, as already evidenced by the rapid spread of the virus across the country in jails, in cruise ships and nursing homes. In particular, it is virtually impossible for people who are confined in crowded prisons, jails, and detention centers to engage in the necessary social distancing and hygiene required to mitigate the risk of transmission. For example, dramatic outbreaks have taken hold in the Cook County Jail in Chicago and San Quentin State Prison in Northern California, the latter of which has seen more than two-thirds of the prison population become infected. The CDC also warns of "community spread" where the virus spreads easily and sustainably within a community where the source of the infection is unknown." Petition at 18:15-19:8

"Correctional settings further increase the risk of contracting COVID-19 due to the high numbers of people with chronic, often untreated, illnesses housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, presence of many high-contact surfaces, and no possibility of staying at the necessary distance from others." Petition at 19:9-12

"Numerous public health experts, including Dr. Gregg Gonsalves, Ross MacDonald, Dr. Marc Stern, Dr. Oluwadamilola T. Oladeru and Adam Beckman, Dr. Anne Spaulding, Dr. Homer Venters, Jaimie Meyer, the faculty at the Johns Hopkins schools of nursing, medicine, and public health, and Josiah Rich have all strongly cautioned that people booked into and held in jails are likely to face serious, even grave, harm due to the outbreak of COVID-19." Petition at 21:1-6

"The CDC is a federal agency that is part of the U.S. Department of Health and Human Services. It serves as the national focus for developing and applying disease prevention and control, environmental health, and health promotion and health education activities designed to improve the health of the people of the United States. The CDC is responsible for controlling the introduction and spread of infectious diseases, and provides consultation and assistance to other nations and international agencies to assist in improving their disease prevention and control, environmental health, and health promotion activities. It also provides program expertise and assistance in responding to Federal, State, local, and private organizations on matters related to disease prevention and control activities." Petition at 21:7-22:2

"Because of the extraordinary danger that COVID-19 will spread in jails and prisons, the CDC issued specific guidance for dealing with correctional and detention facilities, including local jails, published on March 23, 2020. The guidance acknowledges that incarcerated people are forced to exist "within congregate environments" that "heighten[] the potential for COVID-19 to spread once introduced," especially given that "[t]here are many opportunities for COVID-19 to be introduced into a correctional or detention facility," including "daily staff ingress and egress" as well as "high turnover" of "admit[ted] new entrants."" Petition at 22:3-9

Respondent addresses this allegation only by noting that the CDC guidelines are constantly being updated. Return, 3:10-18.

"The CDC directs that detention facilities medically isolate confirmed and suspected cases and quarantine of contacts. According to the CDC, "[f]acilities should make every possible effort to place suspected and confirmed COVID-19 cases under medical isolation individually." Further, quarantined individuals should be "housed separately, in single cells with solid walls . . . and solid doors that close fully." Cohorting should only be considered as a last resort, and even then all incarcerated people must have enough room to retain at least 6 feet of space between each other at all times. If a facility has no option but to implement cohorting, it must do so while following several strict precautions. These precautions include mandating that individuals wear face masks at all times, ensuring that individuals with laboratory-confirmed cases are not mixed with individuals who have not tested positive, and ensuring that individuals with respiratory problems are not cohorted "unless no other options exist."" Petition at 22:10-20

"Respondent has not ensured social distancing at the Jail. The Orange County Jail consists of four physically separate facilities that operate as a single system. There is constant movement of staff and incarcerated people among each of the four facilities, widening the circles of potential outbreak and exposure. These facilities include the Men's Central Jail, the Women's Central Jail, the Theo Lacy Facility, and the Intake and Release Center. Each of these facilities is configured

differently and has a different type of housing. The rated capacity of each facility is determined on a biannual basis by the California Board of State and Community Corrections (BSCC), an independent statutory agency that, inter alia, inspects local correctional facilities in California for compliance with Title 15 regulations, which set minimum standards for these facilities. The rated capacity of a facility means the maximum number of incarcerated occupants for which a facility's cells or dormitories, except those dedicated for health care or disciplinary separation housing, were planned and designed in conformity to Title 15 regulations (maintained by BSCC) and Title 24 regulations (maintained by the California Building Standards Commission)." Petition at 24:3-16

> These allegations are unchallenged, save only that it is now undisputed that the Women's Central Jail has closed, so that inmates formerly housed there are now housed elsewhere within the Orange County Jail.

"In the last BSCC inspection, the Orange County Jail was found out of compliance with Title 24 requirements in multiple housing units, including Theo Lacy barracks A through H, because these units contained additional bunks that were used on a regular basis and that resulted in the Jail being unable to meet the BSCC's minimum per-person square footage requirements in its current configuration. Theo Lacy has a rated capacity of 2,080 occupants. It is composed of a large number of barrack style dorms, seven module units where people are housed in two-person cells that share common day rooms and shower facilities, and two module units where people are housed in single-person cells that share common day rooms and shower facilities. The Men's Central Jail has a rated capacity of 1,219 occupants. It is composed primarily of module units where people are housed in cells that vary in size from four to eight occupants; occupants share toilet and shower facilities. There are also dormitory style units where occupants share common day rooms, shower, and toilet facilities. The Women's Central Jail has a rated capacity of 274 occupants. It is composed primarily of dormitory style units which sleep up to 30 occupants in one unit, where occupants share toilet and shower facilities. There is also one unit where people are housed in single cells and share shower facilities. The Intake and Release Center has a rated capacity of 407 occupants. It is composed primarily of module units where people are housed in single-person cells that share common day rooms and shower facilities. Collectively, the Orange County Jail has a total of 51 medical isolation cells. Petitioners Campbell and Gonzalez and putative class members are held in each of these facilities." Petition at 25:1-26:2

> Respondent addresses this allegation only by pointing out that petitioner Campbell has now been released from the Orange County Jail. Return, 1:7-9. And, as noted above, the Women's Central Jail is now closed.

"Given the current population, social distancing in these facilities is not possible. It was clear from the site inspection on July 15, 2020 that "many parts of the jails remain very crowded." People in the Orange County jail are regularly

housed in group barracks or in multiple-person cells (often containing as many as 8 bunks in each cell) that share dayrooms with other cells. The largest number of people are housed in the Theo Lacy facility, which consists largely of large barrack-style dorms. People in barracks sleep in bunk beds in close proximity to each other, much closer than six feet apart. People in multi-person cells sleep in similarly close proximity. Even persons who are detained in single or double bunked cells often remain constantly in close proximity and air space with others in their modules. Indeed, the Commander of Custody Operations of the Orange County Jail has conceded unequivocally that the "[t]he Sheriff's jail facilities do not allow for spacing of six feet between incarcerated people."" Petition at 26:13-27:6

"Housing units in jails generally lack adequate ventilation, a factor that facilitates the likelihood of airborne transmission of COVID-19. Some cells have open bars and many open directly into communal day rooms. Detainees congregate in groups in the day rooms, often in numbers too large for social distancing. They share phones "basically shoulder to shoulder with each other," and share communal shower spaces. Many detainees must also share communal toilets. They are forced to line up close together to receive mail." Petition at 27:7-28:2

"Like the incarcerated staff, OCSD staff with the virus who travel the jail facilities are another source of infection. Respondent has provided documents indicating that at least 27 correctional and health staff at the Jail tested positive for COVID-19 between March 27, 2020 and June 25, 2020. Infected staff worked in every one of the four facilities at the jail, including the Intake Release Center, Men's Central Jail, Women's Central Jail, and Theo Lacy, and worked in a range of positions involving close contacts with detainees, including as contract physicians, pharmacy technicians, institutional cooks, and deputy sheriffs in the jails, bailiff department, transportation bureau and civil process center. In the last week for which Respondent provided data, June 18 through June 25, 12 staff tested positive." *Id.*, at 29:5-13

"Although Respondent has increased testing, the testing still falls short of the CDC recommendation for sentinel monitoring of asymptomatic individuals in congregate living settings. Detection of asymptomatic and mildly symptomatic individuals is critical because those individuals can transmit the disease; in fact, in recent testing, approximately 88 percent of inmates who tested positive were asymptomatic. Both California and the federal government have identified testing of all individuals in jails as a priority. Without knowing who in the Jail has COVID-19, Respondent cannot effectively track close contacts. Respondent has failed to provide for adequate contact tracing, a "priority" in congregate settings and a "key strategy for preventing further spread of COVID-19."" Petition at 33:5-13

> Respondent responds to this allegation only by confirming that testing on staff is conducted only when requested by the staff (Chiang Decl., para. 14), and testing of inmates is done only for new intakes (Chiang Decl. para. 14),

for "inmates who report or exhibit symptoms consistent with COVID-19," (*id.*) and for asymptomatic quarantined inmates upon leaving quarantine. *Id.*

"Respondent has further failed to follow the CDC's guidance with respect to isolation of suspected cases and its use of cohorting. Only after people test positive for COVID-19 are they removed from their barrack or modular housing and transferred to isolation. Respondent is not making "every effort to quarantine close contacts of COVID-19 cases individually," increasing the risk that others will be infected. People who have been exposed to positive cases have not always been quarantined and are themselves often still in group settings, where new individuals are added." Petition at 33:14-34:3

"The Disability Subclasses include everyone in the Medically-Vulnerable classes who is vulnerable because of a disability, as defined under California law. This includes everyone in the Medically-Vulnerable classes except those vulnerable solely because of age or pregnancy status. All other conditions that increase risk for COVID-19 complications or death—including lung conditions, asthma, heart conditions, obesity, diabetes, kidney disease, liver disease, HIV, immune dysfunction, autoimmune disorders, cancer treatment, and history of organ or bone marrow transplantation—are disabilities under California disability rights laws. People in the Orange County Jail who have any of these conditions are medically-vulnerable people with disabilities protected by California Government Code section 11135, in addition to being protected by the state constitutional provisions that protect all medically-vulnerable subclass members." Petition at 37:3-13.

Respondent's Return, and Petitioners' Traverse

It appears from the Return, and was confirmed during oral argument, that Respondent has effectively ignored the factual allegations above (and the documentary and other evidence underpinning them) because of Respondent's overarching contention that, whatever the facts, he has taken reasonable and adequate steps to create as safe an environment as is reasonably possible within the jails under his jurisdiction.

Respondent has identified his measures to address the COVID-19 pandemic, and their impact, to include the following. (As with the recitation of Petitioners' allegations above, the Court here omits the internal citations to supporting evidence, which can be found in the Return itself.)

"At the earliest part of the pandemic, the Sheriff exercised his discretionary authority under Government Code section 8568 to release inmates, lowering the population by almost 50% at one point to maximize possibilities for social distancing." Return, 2:1-3.

"At the very outset, the Sheriff released thousands of inmates to allow for social distancing, developed a thorough testing/quarantine protocol, provided personal protective equipment ("PPE"), enhanced medical screening for anyone

entering the Jail, suspended nonessential visits, and dramatically increased access to hygiene and cleaning supplies." Return, 3:19-22.

"All public visiting has been suspended since March 13, 2020. Anyone entering the Jail is temperature screened. Arrestees that enter the Jail are screened for COVID-19 and are isolated for 14 days to ensure there is no transmission within the jail. They are tested upon the end of their 14-day isolation period before entering general inmate population. Once in general population, they have PPE, unlimited soap and hand sanitizer. The cleaning and disinfection regimen is second to none. Inmates only program with their cohort to prevent cross-exposure within the jail, even when there are no active cases. In other words, once a cell block is COVID-free—much as seen in New Zealand—that group may interact within normal jail operating rules (with, of course, PPE and distancing) because they are not at risk of infecting each other." Return, 4:5-15.

"The Sheriff's Department's Herculean response drove down the inmate infection numbers from a daily rate from a 7-day average positivity rate of 50.6 percent on May 1, to a current 7-day average positivity rate of 1.2 percent. The current total of infected individuals across all custodial institutions at the Orange County Jail is six ("6"). Of that, 5 are new bookings, not under the control of the Orange County Sheriff. Society is experiencing a third wave, but the jail has barely had spiked [sic] in contagion." Return, 3:27-4:4.

"The best demonstration of what is to come is to look at what has been happening. The trend line is extremely positive and in the direction of inmate and staff safety. Every indication is that this will continue in that direction, notwithstanding record COVID-19 infection rates in in the community and a third wave of COVID-19 striking at society generally. The injunction by the federal district court has been stayed since August 5, 2020 (Ahlman v. Barnes 591 U.S. __ (2020), No. 20A19.) the Orange County Jail COVID-19 numbers have continued to precipitously fall without any court injunction, oversight, or orders." Return, 19:15-22.

Further particulars, generally in support of what is noted above, are contained in the Declaration of Joseph Balicki, dated November 16, 2020, and the declaration of Doctor Chiang, dated November 16, 2020.

Petitioners' Denial responds in detail to the allegations of the Return, including through numerous additional declarations and other supporting documentary evidence.

In summary, the Denial:

1. Points out that the Return "fails entirely to controvert the allegations at the heart of their Complaint: Respondent has failed to maintain the Orange County Jail at a level that allows for social distancing, or to consider medically vulnerable detainees for removal to a location where social distancing is possible. Respondent further offers no evidence or facts

to dispute Petitioners' factual or legal allegations regarding disability discrimination." Denial at 3:8-13.

2. Argues that Petitioners' uncontroverted evidence shows that Respondent's measures are insufficient to protect incarcerated people from COVID-19 because the Jail has failed to reduce its population to levels advised by the County's own health authority, ensure social distancing, provide universal or surveillance COVID-19 testing, and enforce universal mask usage, among other failures. Denial at 10:4-8.

As noted, the Denial attaches numerous additional declarations, along with other documentary evidence. The declarations demonstrate not the absence of measures alleged by Respondent, but rather their inconsistent application. These declarations are consistent with those filed in support of the Petition. Because Respondent did not have an opportunity (other than at oral argument) to respond to the Denial, the Court is not basing its findings herein on any contested issues in the later declarations.

By way of example, the Court's finding that mask usage by deputies is inconsistent and not strictly enforced is not based on the declarations filed by Petitioners, but on the deposition testimony of Respondent's own staff.

Request for Judicial Notice

Petitioners' unopposed Request for Judicial Notice is granted, with the exception of Ex. 56.

The Facts Established By The Evidence

The following facts have been proven by Petitioners by a preponderance of the evidence, either because they are alleged, with proper foundation, and not challenged by Respondent, or because they are expressly conceded by Respondent, or because they are established via Judicial Notice.

1. All the facts alleged in the section of this ruling entitled The Allegations of the Petition above, some of which are repeated, in summary form, below.
2. COVID-19 is a deadly public health crisis. Petition at 3:8-14.[1]
3. COVID-19 is highly contagious. Petition at 4:5. The virus is known to spread from person to person and through respiratory droplets, close personal contact, and contact with contaminated surfaces and objects. Petition at 15:1-2.
4. COVID-19 can be transmitted by asymptomatic carriers. Petition 15:7-8. Respondent's Ex. C, CDC Guidelines as of March 23, 2020, at p. 8 ("Because many individuals infected with COVID-19 do not display symptoms, the virus could be present in facilities before cases are identified."). Respondent's Ex. F,

[1] When citing to the Petition, the Court is including the citation to the evidence identified there, for example, in this instance, the unchallenged declaration of expert witness Doctor Joe Goldenson.

CDC Guidelines updated as of October 21, 2020, tenth page under "Prevention." (Same). Balicki Decl., Petition Appendix 624:23-625:8.

5. Absent a vaccine or other effective treatment, the best way to slow and prevent the spread of the virus is through social or physical distancing, which involves avoiding human contact, and staying at least 6 feet away from others. *Von Staich*, at 70. The cornerstone of reducing transmission of respiratory diseases such as COVID-19 is social distancing. Petition 4:8. Social distancing - deliberately keeping at least 6 feet of space between persons to avoid spreading illness - and a vigilant hygiene regimen, including washing hands frequently and thoroughly with soap and water, are the only known effective measures for reducing the transmission of COVID-19. Petition 15:3-6.
6. The risk of illness or death from COVID-19 is increased for older populations. A recent analysis found that mortality rates for individuals age 65-74 and 75-84 are respectively 90 times and 220 times higher than for individuals age 18-29. Petition 15:13-15.
7. People of any age who have certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or an autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental disabilities, and asthma, also have an elevated risk. Petition 16:3-7.
8. At current population rates in the Jail, social distancing is not possible. Erin Winger Deposition, Denial Appendix 361:12-15.
9. Under current practices, social distancing is also not possible while inmates are being transported to court, or while inmates are being held at court. Capt. Martin Ramirez Deposition, Denial Appendix 274:3-16, 275:21-25.
10. Staff behavior away from work is not governed or monitored, making it impossible for Respondent to evaluate the risk of staff contracting the virus while away from work, or of introducing the virus into the jail. Captain Martin Ramirez Deposition, Denial Appendix 309:15-310:13; Capt. Patrick Rich Deposition, Denial Appendix 328, Depo. p. 22-25, and Depo. p. 144:25-145:3.
11. Staff are not tested except when they themselves request it. Staff are expected to self-report symptoms. The only "imposed" check regarding staff health is via temperature checks. Even if staff have symptoms, tests are not mandatory for them. Joanne Lim Deposition, Denial Appendix 268:11-21; Capt. Martin Ramirez Deposition, Denial Appendix 303:1-19; Lisa Von Nordheim Deposition, Denial Appendix 349:21-350:2.
12. Staff are provided masks and other PPE. There is no strict enforcement that they actually wear the masks. The Balicki declaration states that staff are provided masks and other PPE, but avoids stating that they are consistently required to wear them. 11/16/2020 Balicki Decl., para. 16. ("All deputies who

are working in quarantine or medical isolation areas or are otherwise exposed to potential COVID-positive inmates are provided full Personal Protective Equipment (PPE), including goggles, face masks, gowns, and N95 masks. All deputies who have contact with inmates are provided masks and gloves.") See, also, Joanne Lim Deposition, Denial Appendix 253a 13-16 regarding the absence of discipline for a failure to wear a mask; Capt. Martin Ramirez, Denial Appendix 290:5-292:5 (same); Lisa Von Nordheim Deposition, Denial Appendix 347:1-3 (same).

13. Hundreds of staff members interact with the inmates on a daily basis. See, for example, Capt. Martin Ramirez Deposition, Denial Appendix 313:16-19 ("Q. Okay. Approximately how many total staff enter the IRC on a typical day? A. There could be as many as 350 people a day walking in and out.")
14. In deciding precisely where to house an inmate, Respondent does not take medical vulnerability into account. Sgt. Dallas Hennessey Deposition, Denial Appendix 236:24-237:1, 237a:10-13; Dr. Chiang Deposition, Denial Appendix 230:2-7.
15. Similarly, where a disability renders an inmate medically vulnerable, the disability/medical vulnerability is/are not taken into account in deciding where to house the inmate. *Id.*
16. Petitioner Sandy Gonzalez is a 27-year-old woman currently held in the Orange County Jail. She is medically vulnerable and has Type II diabetes and a history of smoking. She was exposed to, and tested positive for, COVID-19 while in the Orange County Jail. She is a protected person under Government Code § 11135. Petition 11:4-17.
17. Petitioner Mark Trace is a 53-year-old man currently held in the Orange County Jail. He is medically vulnerable with significant underlying health conditions including sclerosis of the liver, hepatitis C and D, asthma, tuberculosis, valley fever and seizures. He is a protected person under Government Code § 11135. Petition 13:10-21.

The Applicable Law re Habeas Petition

The California Constitution guarantees the right to habeas corpus. (Cal. Const., Art. I, § 11; *In re Reno* (2012) 55 Cal.4th 428, 449.) The availability of the writ is implemented by Penal Code section 1473, subdivision (a), which provides: "A person unlawfully imprisoned or restrained of his or her liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint."

Habeas corpus may be used to address violations of inmates' rights while in confinement, including challenges to the conditions of confinement. (*In re Bittaker* (1997) 55 Cal. App. 4th 1004, 1010 [the writ may be used by one lawfully in custody to obtain a declaration and enforcement of rights in confinement]. Moreover, the

statutory grounds for habeas corpus are non-exhaustive. Penal Code § 1473(d) expressly provides that "[t]his section does not limit the grounds for which a writ of habeas corpus may be prosecuted or preclude the use of any other remedies."

Habeas corpus applies to anyone who is in actual or constructive custody. (Pen. Code §§ 1472(a), 1474(2); *In re Catalano* (1981) 29 Cal. 3d 1, 8 [on probation]; *In re Sturm* (1974) 11 Cal. 3d 258, 265 [on parole]; *In re Geer* (1980) 108 Cal. App. 3d 1002, 1004 fn. 2 [on bail]; *In re Azurin* (2001) 87 Cal. App. 4th 20 [writ of habeas corpus available to one on parole, probation, bail, or a sentenced prisoner released on his own recognizance pending hearing on the merits; "The thrust of these cases is that a person is in custody constructively if he may later lose his liberty and be eventually incarcerated"].)

Here, there is no dispute that Petitioners Sandy Gonzalez and Mark Trace are currently in the custody of Respondent. Each may properly allege a habeas corpus claim.

In exercising habeas jurisdiction, the courts " 'must abide by the procedures set forth in ... [Penal Code] sections 1473 through 1508.' " (*People v. Romero* (1994) 8 Cal.4th 728, 737, quoting *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 865.) Those procedures include a verified petition alleging unlawful restraint, naming the custodian, specifying the facts on which the claim is based, and including reasonably available documentary evidence supporting the claims. (Pen. Code §§ 1474–1475; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *Romero, supra,* at 737.) Additionally, the petition must state whether any prior application has been made and the result of those proceedings and must allege that the petition is timely or demonstrate good cause for delay. (Pen. Code § 1475; *In re Robbins* (1998) 18 Cal.4th 770, 780–781, 805; *In re Clark* (1993) 5 Cal.4th 750, 783, 798, fn. 35.) The petition must comply with the content and form required by Cal. Rules of Court, Rules 8.40(b) to (c) relating to document covers and Rule 8.204(a) to (c). (Cal. R. Ct. 8.384(a)(1).)

The Petition complies with these requirements.

"As a matter of equal protection, conditions of confinement which violate the rights of sentenced prisoners also violate those of pretrial detainees, absent any justification for differential treatment." *Inmates of the Riverside County Jail v. Clark* (1983) 144 Cal.App.3d 850, 858.

While Petitioners rely on article I, section 7 of the California Constitution, with respect to pre-trial inmates, and article I, section 17 of the California Constitution, with respect to post-conviction inmates, both sides appear to agree that on the facts presented here, the Court must find that Respondent acted with "deliberate indifference" for there to be a constitutional violation.

As was recently held in *In Re Von Staich:*

> "The Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution both require correctional officials to provide inmates adequate medical care. (*Estelle v. Gamble, supra,* 429 U.S. at p. 103; *Inmates of the Riverside County Jail v. Clark, supra,* 144 Cal.App.3d at p. 859.) In order to prevail on a constitutional claim of inadequate care, a prisoner must establish that the responsible prison official treated him with "deliberate indifference to serious medical needs." (*Estelle,* at p. 104.) "Deliberate indifference" is established where the challenged deficiency is "sufficiently serious," and prison officials "know[] that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it." (*Farmer, supra,* 511 U.S. at p. 847.) Prison officials may not be "deliberately indifferent to the exposure of inmates to a serious communicable disease" (*Helling v. McKinney* (1993) 509 U.S. 25, 33), and the placement of inmates in places to which infectious diseases could easily spread constitutes a constitutional violation. (*Hutto v. Finney, supra,* 437 U.S. at p. 682.) Deliberate indifference may be proven by circumstantial evidence and it may be inferred from "the very fact that the risk was obvious." (*Farmer,* at p. 842.)"

Id. at 68-9.

See also, *Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1125 [for pre-trial detainees, deliberate indifference requires that (1) defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) those conditions put the plaintiff at substantial risk of suffering serious harm; (3) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved; and (4) by not taking such measures, the defendant caused the plaintiff's injuries]; *Cortez v. Skol* (9th Cir. 2015) 776 F.3d 1046, 1052 [for post-conviction detainees, an additional showing that the public official was "subjectively aware of the risk involved" but nonetheless "acted with deliberate indifference to" safety is required].

Importantly, deliberate indifference does not require improper motive or an intent to harm. *Farmer v. Brennan,* (1994) 511 U.S. 825, 842-3. At oral argument, Respondent's counsel argued that the Court should not find deliberate indifference because Petitioners had not demonstrated a deliberate intent to harm. That is not the standard.

What is shown here is that COVID-19 is indeed deadly serious, and that Respondent was and is fully aware of the dangers and risks presented by the virus. Respondent's own papers fully concede as much, and it is for that very reason that Respondent has put in place the many measures he describes. If those measures,

taken together, do not constitute reasonable measures to abate the risk, deliberate indifference has been established.

Here, the facts compellingly demonstrate that the measures taken lack the very cornerstone of a successful abatement plan, namely a sufficient reduction in Jail population to enable proper social distancing.

In his Return, Respondent himself identifies a significant reduction in inmates as one of the measures he took to address the pandemic. Return, 1:23-2:3. ("Even as the CDC was issuing interim guidelines . . . The Sheriff's Department was releasing inmates, and (largely through its Correctional Health Services unit) implemented its own broad slate of inmate and staff precautions, mirroring the guidance issued by the CDC. At the earliest part of the pandemic, the Sheriff exercised his discretionary authority under Government Code section 8568 to release inmates, lowering the population by almost 50% at one point to maximize possibilities for social distancing.")

As reflected in a March 27, 2020 email from Erin Winger, the Deputy Agency Director at Correctional Health Services, containing the "Recommendations for Social Distancing in Jail," of herself and Doctor C. Hsien Chiang, the Administrative Manager for Correctional Health Services, the recommendations to Respondent included the following:

> "As you are aware, social distancing is the cornerstone of reducing transmission of COVID-19; therefore, CHS strongly recommends the Sheriff's department to promote or enhance social distancing in all housing areas through population management of each housing location."
>
> "In our opinion, the ideal scenario in the jail to promote social distancing, is that all congregate living areas reduce population by 50%. This includes all dormitory and barracks style housing and multi-person cells."
>
> "Reduce the population by 50% of all CJX dorms, prioritized by the size of the housing capacity. i.e. prioritize reduction to the largest dorms followed by smaller dorms."
>
> "Reduce the population by 50% of all TL barracks prioritized by the size of the housing capacity. i.e. prioritize reduction to the largest barracks followed by smaller ones."
>
> "Reduce population by 50% of all multi-person cells in all facilities, prioritized by the size of the cell capacity. i.e. 8 bunk cell > 6 bunk cell > etc."

> "CHS stands ready to assist in population reduction through identifying and prioritizing individuals with the highest risk factors for complications from COVID-19."

Exhibit 1 to Balicki Depo, Denial Appendix 363-4.

As noted, consistent with these recommendations, Respondent reduced inmate population, and himself highlights that fact in his Response. What Respondent's Return completely fails to address, however, is how the social distancing aspect of his remedial measures could continue once the population started to increase, to its present over capacity levels, or what now renders social distancing less necessary.

During oral argument, Respondent's counsel purported to address this issue by explaining that where multiple persons were housed together, or were otherwise in constant contact with each other, they were all COVID-19 free, and were therefore not a danger to each other. What that explanation entirely fails to address is that the inmate population comes into contact with hundreds of members of Respondent's staff on a daily basis, any one whom may be an unwitting carrier of the virus. The explanation also fails to address the crowded conditions experienced during transportation to and from court, and while housed at court.

There is, and can be, no dispute that if the virus is transmitted to one person in the group setting of a barracks or dormitory, nothing would prevent its transmission to all others in the group. That is precisely Petitioner's contention, supported by expert testimony, and the contention goes wholly unanswered.

As stated in *Von Staich*:

> "Respondents' contention that the measures they have taken constitute a reasonable response to the risk posed by COVID-19 misconstrues the petition. Petitioner and the scientists he relies upon do not say the measures respondents took to combat the outbreak of COVID-19 at San Quentin are unreasonable *in and of themselves*, but only because they are unaccompanied by a dramatic reduction of the prison population, which is a sine qua non of *any* reasonable remedial effort. The target of the petition is not what respondents have done but what they refuse to do. None of the commendable steps respondents have taken to contain the spread of COVID-19 will be effectual, petitioner and his experts maintain, unless considerable room is made for inmates to physically distance themselves from one another effectively because, in the absence of a vaccine, physical distancing is now by far the most effective way of limiting transmission of COVID-19."

Id. at 70.

That is the situation here. Respondent has taken many commendable steps to combat the virus, and deserves credit for the reduction in infections within the Orange County Jail. But it is not a reasonable part of the overall strategy simply to cling to the hope that the virus will not be introduced into the non-socially distancing jail population via staff, the manner and frequency of transportation to and from court, and the holding cell protocols at the court.

During closing argument, Respondent's counsel argued that nowhere was safer than in the Orange County Jail, where Respondent had created a "COVID bubble." As he further noted, they were hoping desperately the bubble didn't pop.[2]

That is more or less precisely the point here.

Without appropriate social distancing, Respondent cannot predict or control when the bubble might be popped by the introduction of COVID-19 into the jail population. It appears unreasonable, and no one is suggesting, that Respondent's staff can themselves be quarantined or improperly dictated to in their private lives. The logistical complications of transporting inmates to and from court, and housing them at court while awaiting their respective hearings, means all risk of COVID-19 infections/transmission cannot be eliminated. Precisely because Respondent cannot be expected to achieve measures that *eliminate* the risk of COVID-19 entering the jail, reasonable measures must be taken to ensure that if the virus enters, it is an isolated or otherwise manageable transmission, and not one able to run rampant through a significant portion of the jail.

Again, as found in *Von Staich*:

"The Urgent Memo states, and the Attorney General does not provide conflicting factual allegations or evidence, that more than half of the 800 inmates who live in the north and west blocks, which have cells with open-grills and poor ventilation, have at least one COVID-19 risk factor, and an alarming 300 have four or more such risk factors, so that an outbreak in those housing units "could easily flood—and overwhelm—San Quentin as well as Bay Area hospitals." The statement in the Urgent Memo that a 50 percent reduction of the population "will allow every cell in North and West Blocks to be single-room occupancy" indicates that the current reduction of the prison population to about 100 percent of capacity required double-celling, which itself necessarily prevents physical distancing.

The Urgent Memo also points out, and again it is factually undisputed, that approximately "500 inmates are currently living in the Reception Center," (footnote omitted) and that the gymnasium has been converted into a dormitory with "little to no ventilation," "creating high risk for a catastrophic super spreader event." The Urgent Memo states, in bolded and underlined print, that **"[t]his unit should be**

[2] Regrettably, since the December 7th hearing the bubble has popped, as further discussed in footnote 3 on page 28. Because these recent events confirm, and do not in any way alter, the Court's conclusions herein, they are not discussed further.

prioritized for closure as a dorm, once sufficient population reduction has been achieved through release." Dormitories provide congregate living space, which is inimical to physical distancing."

Id. at 71-2. (Emphasis in original.)

Here, exactly the same risk is identified in the unchallenged declaration of Dr. Joe Goldenson:

> Close living quarters and often overcrowded conditions in jails, prisons, and detention centers facilitate the rapid transmission of infectious diseases, particularly those transmitted by airborne droplets through sneezing or coughing. In these congregate settings, large numbers of people are closely confined and forced to share bunk rooms, bathrooms, cafeterias, and other enclosed spaces. They are physically unable to practice social distancing, which the CDC has identified as a "cornerstone of reducing transmission of respiratory diseases such as COVID-19. (Citation omitted.) Within these facilities, space and resource limitations - and the resulting inability of inmates and employees to practice social distancing (citation omitted) - make it extremely difficult to effectively quell the explosive growth of a highly contagious virus.
>
> While jails are often thought of as closed environments, this is not the case. A large number of custody, medical, and other support staff and contractors who have direct contact with detainees enter and leave the facility throughout the day. New arrestees arrive daily and detainees are released every day. Since there is no effective way to screen for newly infected or asymptomatic individuals, they can unknowingly transmit COVID-19 to the jail population. Detainees are often transferred to other facilities, and to and from Court. They are routinely transferred in crowded and enclosed vehicles like buses with social distancing is not possible.
>
> To minimize the risk of COVID-19 in the Orange County Jail the following minimum conditions are required: incarcerated persons must be able to [maintain] distance of 6 feet or more from each other at all times, including in communal areas; there are no barracks style dormitories and sharing of cells is minimized; there are adequate numbers of medical isolation cells for any inmate with confirmed or suspected infection, as well as quarantined cells for close contacts of symptomatic cases and new arrivals ....

The risk is further described in the unchallenged declaration of Doctor Daniel Parker as follows:

> This disease has the capability of spreading quickly, exhibiting exponential growth. The doubling times during the beginning of the epidemic in Orange County was around 3 days, with total confirmed cases doubling in their

account every three days. In a close quarters situation, where individuals are unable to practice social distancing, this doubling time could be even higher. (Emphasis added.)

Because of the close quarters and low-hygiene conditions inside of the jail, it could easily become a reservoir for the virus. Since there is traffic in and out of the jails from incoming incarcerated individuals, visitors, and workers, it may not be possible to keep the disease prevalence from being high.

Doctor Parker inspected the Orange County Jail on July 15, 2020 and in his declaration dated September 7, 2020 (Petition Appendix 630-637), he reported and opined as follows:

"Based on my observations, I believe there are two central issues for COVID-19 epidemiology in the Orange County Jail:

1.) Risk of importation: This can occur via new inmates, visitors to the jail, detainees leaving and returning to the jail for court, or through deputies or other workers at the jail. Dr. Chiang noted that recently there has been an increase in workers who have tested positive which is not surprising given the heavy burden of disease in Orange County.

Although the changes that the Department has made likely reduce the risk of importation (e.g., temperature checks and screening at intake), it is my conclusion that a significant risk of importation remains. Importation may still occur due to lag time between contagiousness and the appearance of symptoms, which is currently estimated to be two days; because some individuals with the disease will remain asymptomatic; because of contact with staff who travel in and out of the facility; because of contact with other individuals in transport and in court; and because of human error (e.g., as shown by the inadvertent early release of a COVID-19 positive individual from medical isolation, as referenced in Defendants' July 10, 2020 compliance report.) See https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7081172/ (incubation period is roughly 5 days); https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm (presymptomatic transmission likely occurring 2 days before onset of symptoms).

Because of these factors and others, even if Defendants takes other steps towards stemming the risk of importation, I believe that the jails will never be a fully closed system. (Emphasis added.)

2.) Risk of spread if/when importation occurs: Although the overall jail population has decreased from before the COVID-19 outbreak, it was clear from the inspection that many parts of the jails remain very crowded. The

dorm and barrack-style housing (in contrast to the modular-style housing) presents the greatest risk of COVID-19 spread when importation occurs. The dorm-style units I observed were densely populated, and these are the areas that are primed for a severe outbreak if the disease is introduced into the sector. Those sectors are akin to a tinderbox, waiting for a spark. (Emphasis added.)

Questions remain about whether or not this disease can spread via airborne transmission. Transmission between modular cells will be unlikely if the disease is not airborne. On the other hand, if the disease can spread via airborne transmission then the shared ventilation between cells and sectors may pose a danger. Assuming there is no airborne transmission, the greatest risk of spread is therefore for inmates housed in dorm and barrack-style housing and for individuals in modular housing who share communal dayrooms.

Testing symptomatic persons, quarantining all of their contacts, and practicing hygiene (providing face coverings, hand soap, hand sanitizer) is necessary. Checking all incoming persons to the jail is necessary, including quarantine of all incoming inmates. Keeping the jail population at a minimum, and keeping inmates in modular rather than dorm or barrack-style housing, is also necessary to prevent massive outbreaks from spreading from individual cases." (Emphasis added.)

As previously noted, Respondent does not challenge any of these findings, except indirectly by his factually unsupported contention that social distancing is rendered unnecessary by the other measures taken. The only declarations filed in support of Respondent's Return are the declarations of Commander Joseph Balicki and Doctor C. Hsien Chiang.

Commander Balicki identified the previous reduction in inmate population in positive terms, noting that "[t]his decrease in jail population not only allowed us to achieve proper social distancing between inmates pursuant to CDC guidelines and free up modular housing, but now we can preemptively quarantine all new bookings for 14 days prior to introducing new inmates to the jail population." Balicki Dec. 3:21-24.

The rest of his declaration entirely fails to address the impact of the subsequent *increase* in jail population

Dr. Chiang entirely avoids discussing his specific recommendation to Respondent concerning reduction in jail population, except as follows:

"CHS has provided the Orange County Sheriff's Department mitigation strategies (consistent with the CDC Guidance) that contain recommendations based on the various housing unit configurations to promote social distancing to minimize the transmission and spread of COVID-19."

At his deposition, he confirmed his recommendation, in the following terms:

"Q. Okay. And could you elaborate, why was it important to make space?

A. Well, if you want to create social distancing, effective social distancing, that, you know, is defined as 6 feet apart, then you need that space to be able to do so.
Q. I see. And in order to achieve that space then, in your opinion, was it necessary to reduce the population of living areas by 50 percent?
A. Yes, that was my opinion."

Dr. Chiang entirely fails to address whether any of the "recommendations . . . to promote social distancing" were or continue to be implemented, or, critically, why his recommendations should no longer apply.

"Deliberate indifference" is established where the challenged deficiency is "sufficiently serious," and prison officials "know[] that inmates face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it." *Von Staich,* 56 Cal.App.5th at 69. (Internal citations omitted.)

That is precisely the situation the Court finds proven here.

Disability Discrimination

The facts found proven above also demonstrate disability discrimination in violation of Government Code section 11135.

In addition to Petitioners Gonzalez and Trace, who remain in Respondent's custody, Petitioner Campbell is also entitled to pursue declaratory and injunctive relief. The California Supreme Court has held that release does not prevent a habeas petitioner from seeking relief on behalf of similarly situated others when, as here, the conduct at issue is "capable of repetition, yet evading review." *In re Robin M.*, (1978) 21 Cal. 3d 337, 341 fn. 6 (1978) (citation omitted).

Respondent is failing to meet his obligations to Petitioners and similarly situated incarcerated people under state disability rights laws. As the uncontroverted evidence here shows, many people who are medically vulnerable to COVID-19 are vulnerable because of chronic health conditions that are also disabilities. People with these conditions—including lung conditions, asthma, diabetes, HIV, cancer treatment, kidney disease, liver disease—are people with disabilities protected by the California Constitution and also by California disability rights laws.

Petitioners Gonzalez, Trace and Campbell allege that they have disabilities protected by Section 11135. Respondent does not contest this, nor does he contest

that no special consideration is given to those disabilities in terms of protection against potential COVID-19 exposure.

Section 11135 grants protections to people with disabilities that are at least as strong as the protections provided by Title II of the Americans with Disabilities Act and its implementing regulations. Gov't Code § 11135(b); see Bassilios v. City of Torrance, CA, 166 F. Supp. 3d 1061, 1074 (C.D. Cal. 2015).

Disability" is defined broadly, to include, inter alia, a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). "Major life activity" is itself broadly defined, and includes "the operation of a major bodily function," such as "functions of the immune system, normal cell growth . . . neurological, brain, respiratory, circulatory, [or] endocrine" systems. 42 U.S.C. § 12102(2)(B).

Several conditions in the proposed disability subclass, including Petitioner Gonzalez's disabilities, are expressly identified in regulations as presumptively protected disabilities. 28 C.F.R. § 35.108(d)(2)(iii) ("it should easily be concluded" that "diabetes substantially limits endocrine function . . . epilepsy . . . substantially limits neurological function . . . (HIV) infection substantially limits immune function"). As noted above, Section 11135 is at least coextensive with the protections of the ADA.

Respondent's obligations under Section 11135 include an affirmative duty to make reasonable modifications to ensure that people with disabilities do not face greater harm than others in the jail. 28 C.F.R. § 35.130(b)(7)(i). Reasonable modifications may include changes to the jail's operations to protect disabled detainees—treating disabled and nondisabled people exactly alike can itself be disability discrimination. See McGary v. City of Portland, 386 F.3d 1259, 1265–67 (9th Cir. 2004).

Respondent's obligations under Section 11135 also include a responsibility to institute nondiscriminatory policies and methods of administration to avoid disability discrimination. 28 C.F.R. § 35.130(b)(3)(i)–(ii).

The uncontested facts found here include that conditions in the Jail do not permit proper social distancing, there is no mandatory testing of staff or asymptomatic detainees after intake, and no strictly enforced policy of requiring masks for all staff interaction with inmates. These conditions are calculated to cause disproportionate—potentially deadly—harm to disabled detainees.

The extent of Respondent's accommodation for medically vulnerable inmates, which include those with disabilities at issue here, appears to be as follows:

"The Sheriff has maintained a list of all medically vulnerable inmates housed at the Jail and routinely reviews the medically vulnerable list to see if there are sentenced inmates who have 6 months or less remaining on their sentence who qualify for early release. The Sheriff employs the same procedure for non-medically vulnerable inmates with 60 days or less remaining on their sentence." Return at 36:5-9.

This accommodation entirely fails to address the uncontested fact that for medically vulnerable inmates (including those with a qualifying disability) not released, the current conditions in the Jail place them at substantially greater risk of and from a COVID-19 infection than the inmate population at large. This is disability discrimination.

Petition for Writ of Mandate

Notwithstanding the expedited nature of these proceedings, Petitioners and Respondent have asked the Court to rule, on the papers and without the need for an evidentiary hearing, on Petitioners' request for a writ of mandate. Return, pp. 25-29, and 38:20-21; Denial 40:13-14.

The same facts found proven by Petitioners, discussed above, entitle Petitioners to a writ of mandate.

Petitioners' writ of mandate has two prongs. First, Petitioners contend that Respondent must exercise his duties in a manner that do not derogate the constitutional rights of others. Petition 45: 2-3. Second, Petitioners contend that Respondent's failure to release or transfer medically vulnerable and disabled individuals out of the Jail is an abrogation of his duties under Government Code section 8658 (erroneously cited in the Petition as 8686). Petition 45: 9-13.

Government Code section 8658 provides as follows:

"In any case in which an emergency endangering the lives of inmates of a state, county, or city penal or correctional institution has occurred or is imminent, the person in charge of the institution may remove the inmates from the institution. He shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them. Such person shall not be held liable, civilly or criminally, for acts performed pursuant to this section."

As to the first prong, Respondent does not challenge the premise alleged, but contends that he has in all respects complied with his duties.

As to the second prong, Respondent agrees the pandemic is an emergency as defined in Government Code section 8658, but again he contends that he has properly exercised his discretion under that section. He further argues that section 8658 vests him with discretion to act, and that the Court cannot enjoin that discretion. Respondent concedes, however, that "[i]n a rare instance, a court may entertain a writ of mandate based on an abuse of discretion in a 'quasi-legislative act,' '*but only* if the action taken is so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law; this test is highly deferential.'" Carrancho v. California Air Resources Bd. (2003) 111 Cal.App.4th 1255, 1265. (Emphasis in original.) Return 27:10-14.

As was also held in *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 540:

> "Mandamus is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as "ministerial" or "legislative."

Respondent cites to *California Attorneys for Criminal Justice v, Newsom*, Supreme Court of California, En Banc, May 13, 2020, WL 2568388, for the proposition that "[t]he petition establishes no clear and mandatory duty on the part of the [Respondents] to take the requested action." Return 26: 10-12. What Respondent omits, however, is that there the duty referred to was the alleged duty of the Governor and the Attorney General to take action to prevent state and local authorities with custody over noncitizen inmates from facilitating their transfer to federal immigration authorities. *Id.* at *1. The petition for writ of mandate was denied on that basis, with the Supreme Court further holding:

> "The denial is, however, without prejudice to the institution of any action for writ of mandate or prohibition against responsible authorities with respect to conduct that may unnecessarily expose inmates in their custody to significant risks to their health and safety. Such claims may be brought in the superior courts of appropriate counties."

Id. at *2.

Here, Respondent is without dispute the responsible authority over the inmates in his custody in the Orange County Jail.

For the reasons already stated, the Court concludes that Respondent is not exercising his duties in a manner that does not derogate the constitutional rights of others; instead Respondent's acts, and failures to act, constitute "conduct that may

unnecessarily expose inmates in [his] custody to significant risks to their health and safety." *Id.*

Regarding Government Code section 8658, it is not clear whether that section imposes merely a discretion, or a specific mandate. While it states that the person in charge "may remove the inmates from the institution" it goes on to provide, in relevant part, that "[h]e shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them."

Interpreting this section to give Respondent discretion, the Court finds as a matter of law that Respondent has abused his discretion in failing to consider for release all medically vulnerable inmates, including those with disabilities.

In *Von Staich* the Court of Appeal found that "Respondents thus have authority [under section 8658] to include all elderly inmates eligible for parole in the expedited release plans it has developed in response to the COVID-19 crisis, but have chosen not to do so despite such inmates' heightened vulnerability to the virus and reduced risk of dangerousness to the public" and concluded, among other things: "We agree with petitioner that respondents' failure to accompany the measures they are taking with a drastic reduction of the prison population is not reasonable." Von Staich, 56 Cal.App.5th at 77, 79.

Here, too, Respondent has chosen not to include all medically vulnerable inmates in the expedited release plans he has developed in response to the COVID-19 crisis, notwithstanding that he has also failed to accompany the measures he has taken with a drastic reduction of the jail population.

Again, from *Von Staich*:

> "As we have been at pains to emphasize, the immediate need is for a reduction of the San Quentin inmate population that will allow sufficient physical distancing among the inmates who remain. This might be accomplished by releasing or transferring the most vulnerable inmates, but it might also be accomplished by releasing or transferring other inmates so as to create the space necessary to protect the vulnerable at San Quentin."
>
> Id at 82.

Because Respondent has failed to reduce jail population sufficiently to ensure appropriate social distancing, the abuse of discretion lies in his failure to then consider all medically vulnerable inmates, including those with disabilities rendering them medically vulnerable, for release under the authority granted by section 8658.

Disposition:[3]

The Court finds and declares as follows:

A. Respondent's deliberate indifference to the substantial risk of serious harm from COVID-19 infection to Petitioners Sandy Gonzalez, Mark Trace, and other medically vulnerable people in Respondent's custody violates their rights under the California Constitution, Article 1, sections 7 and 17.

B. Respondent's failure to provide reasonable accommodations to Petitioners and to other people in Respondent's custody who have disabilities that make them medically vulnerable to serious harm from COVID-19 infection violates their rights under Government Code section 11135.

C. Respondent has abused his discretion in failing to exercise his clear and present duty under Government Code section 8658 to consider for release Petitioners and all other incarcerated people who are medically vulnerable to COVID-19, whose lives are endangered by the COVID-19 emergency.

D. The Court has the power under Penal Code section 1484 to order habeas relief to Petitioners and to issue a general declaration of the rights of other incarcerated people similarly situated to the Petitioners.

E. The Court has the power under the Code of Civil Procedure section 1085 to issue a writ of mandate to compel Respondent to take corrective action, as

---

[3] As ordered by the Court, on December 9, 2020 Petitioners filed a proposed Order addressing the proposed relief sought herein, and late on December 10, 2020 Respondent filed his Response thereto. The Response informs the Court that "[s]ince the hearing on December 7, 2020, circumstances have changed at the Orange County Jail (the "Jail"). There is currently a COVID-19 outbreak occurring at the Jail, with 74 inmates currently COVID-19 positive. There remain 75 pending COVID-19 test results." Return 2:4-6. The Response further states: "Respondent is contact tracing and believes the incident occurred due to 2 inmates being exposed at court however at this time there is no way to be sure." Return 2:20-21.

This very unfortunate development confirms the need to take all reasonable steps to ensure that if an outbreak occurs at the Jail, that outbreak is contained to the fullest extent reasonably possible. As all experts appear to agree, social distancing is an essential aspect of those reasonable steps.

his conduct violates rights guaranteed by the Constitution, and his clear and present duty under Government Code section 8658 to protect incarcerated people whose lives are endangered by the COVID-19 emergency.

Accordingly, the Court hereby **ORDERS** as follows:

1. The petitions for writ of habeas corpus and writ of mandate are granted.

2. Petitioners Gonzalez and Trace shall immediately, and no later than 48 hours from this Order, be released[4] or removed from the Orange County Jail by transfer to a facility that is able to provide the necessary physical distancing and other measures to protect against COVID-19, or to another placement meeting these criteria (collectively "transfer").

3. Respondent is Ordered to expedite the removal from the Orange County Jail, by means of release or transfer, of the number of inmates necessary to reduce the Orange County Jail population at least as follows: In all congregated living areas, reduce inmate population by 50%. This includes all dormitory and barracks style housing and multi-person cells. Specifically, reduce the population by 50% of all CJX dorms, reduce the population by 50% of all TL barracks, and reduce the population by 50% of all multi-person cells in all facilities.

4. The goal of the reduction Ordered in paragraph 3 above is to achieve proper social distancing and Respondent is Ordered to achieve reductions in excess of those specified in paragraph 3 if necessary to achieve this goal.

---

[4] The Court uses the term "release" or "released" to mean the discharge of detained individuals from the physical confines of the Orange County Jail, not necessarily release from all forms of custody. Release options and conditions remain in the discretion of Respondent.

Nothing herein is intended to limit the rights and duties of Respondent under Govt. Code section 8658.

5. Respondent is Ordered, once the appropriate reductions are achieved, to maintain such reductions to the fullest extent necessary to continue to maintain proper social distancing, until the current COVID-19 emergency is declared terminated.

6. Respondent is Ordered to impose and maintain a strict policy of facemask wearing compliance by all staff at any time such staff are within 6 feet of any inmate.

7. Respondent is Ordered to file with the Court, and to serve on Petitioners, by not later than December 31, 2020, Respondent's Release Plan designed to effectuate paragraph 3 above.

8. The Release Plan shall also identify the specific order or direction of Respondent to all his staff concerning the mandatory use of facemasks, as required by paragraph 6 above.

9. The Release Plan shall identify all persons identified as medically vulnerable persons then in Respondent's custody, and the intended disposition of such persons under the Release Plan.

10. For all persons identified as medically vulnerable whom Respondent does not intend to release or transfer, the Release Plan shall identify in full the measures taken or to be taken to protect the health of such persons (regarding COVID-19), including but not limited to the manner by which social distancing will be assured.

///

///

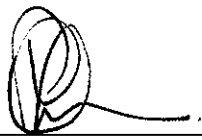
///

///

11. The Court hereby sets a status conference on January 8, 2021 at 1:30 PM in Department CX102. The parties are Ordered to file a joint status report concerning compliance with this Order, by not later than January 6, 2021.

IT IS SO ORDERED.

Date: December 11, 2020



Hon. Peter J. Wilson
Judge of the Superior Court