UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

Favian Busby, Michael Edgington, Russell Leaks, and Joseph Nelson, *on their own behalf and on behalf of those similarly situated*; Petitioners-Plaintiffs, v. Floyd Bonner, Jr., *in his official capacity*, Shelby County Sheriff, and the Shelby County Sheriff's Office, Respondents-Defendants.	Case No. 2:20-cv-2359-SHL

PETITIONERS-PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INTRODUCTION

1. Plaintiffs Favian Busby, Russell Leaks, and Joseph Nelson, and the Classes of individuals they represent, are pretrial detainees seeking emergency relief finding that their continued detention at the Shelby County Jail (the "Jail") violates the Fourteenth Amendment's protections from unconstitutional punishment and unconstitutional confinement and their statutory rights under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act.[1]

2. To resolve Plaintiffs' claims, the Court evaluates the continued threat that COVID-19 poses to medically vulnerable and disabled detainees, the adequacy of the current steps taken by the Jail, and the legal standards applicable to Plaintiffs' claims.

3. COVID-19 continues to create a high risk of irreparable injury to Plaintiffs absent an injunction, Plaintiffs are likely to succeed on the merits of their Fourteenth Amendment claims and their claims under the ADA and the Rehabilitation Act, and the public interest favors their release.

4. The only adequate remedy at this time is to order Plaintiffs released from detention on appropriate conditions.[2]

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[1] Michael Edgington does not meet the Class criteria as defined by the Court. *See* Order, ECF No. 38, Pg.ID 691–92. Accordingly, Plaintiffs' counsel no longer seek relief on his behalf. Russell Leaks is being held pretrial on allegations concerning a parole violation and he is therefore still entitled to relief.

[2] The term "release" refers to the discharge of detained individuals from the physical confines of the Shelby County Jail, not necessarily release from all forms of custody. Release options may include, but are not limited to: supervised release (including through the use of GPS or other forms of location monitoring), enlargement of custody to a halfway house residential placement if one is deemed safe for medically vulnerable persons, transfer to a hospital or other facility, or diversion to alternative community and treatment programs. Indeed, Shelby County already maintains a

PROPOSED FINDINGS OF FACT

I. Procedural Background

5. On May 20, 2020, Plaintiffs filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a class action complaint for declaratory and injunctive relief seeking release from the Jail in light of their medical vulnerabilities and disabilities and the threat to their safety at the Jail.[3]

6. Plaintiffs brought four independent claims for release: (i) unconstitutional punishment in violation of the Fourteenth Amendment; (ii) unconstitutional confinement in violation of the Fourteenth Amendment; (iii) discrimination on the basis of disability in violation of Title II of the ADA; and (iv) discrimination on the basis of disability in violation of Section 504 of the Rehabilitation Act.[4]

7. Simultaneously, Plaintiffs filed a motion for temporary restraining order seeking immediate release,[5] a motion for class certification,[6] and a motion for expedited consideration.[7]

8. In support of their motion for a temporary restraining order, Plaintiffs filed declarations from Dr. Nina Fefferman, professor at the University of Tennessee, Knoxville in both the Department of Ecology and Evolutionary Biology and the Department of

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Pretrial Services Department "offering alternatives to incarceration at every stage of the criminal justice system." *See Pretrial Services*, SHELBY CTY. TENN., https://www.shelbycountytn.gov/250/Justice-Initiatives (last visited May 19, 2020); *see also* Decl. of Bill Powell ("Powell Decl."), ECF No. 2-5, ¶ 11.

3 *See* ECF No. 1. On June 16, Plaintiffs amended their petition. *See* ECF No. 50.

4 *See id.* at Pg.ID 18–22.

5 *See* ECF No. 2.

6 *See* ECF No. 3.

7 *See* ECF No. 4.

Mathematics; Dr. Joe Goldenson, formerly the Director and Medical Director for the Jail Health Services of the San Francisco Department of Public Health; Dr. Marie Griffin, professor of medicine and health policy at Vanderbilt University in Nashville; Josie Holland, Esq.; Bill Powell; Ann L. Schiller, Esq.; Josh Spickler, Esq.; Michael R. Working, Esq.; and, Stella Yarbrough, Esq.[8]

9. On May 21, 2020, the Court granted Plaintiffs' motion for expedited consideration and ordered Defendants to file responses to the motions for a temporary restraining order and for class certification by noon on May 26, 2020 and scheduled a hearing on those motions on May 27, 2020.[9]

10. On May 26, 2020, Defendants moved to dismiss Plaintiffs' petition pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[10] Defendants also filed briefs in opposition to Plaintiffs' motions for a temporary restraining order and for class certification.[11]

11. In support of their opposition to Plaintiffs' motion for a temporary restraining order, Defendants also filed declarations from Chief Jailer Kirk Fields, Shelby County District Attorney General Amy Weirich, Shelby County Criminal Court Division VI Judge John W. Campbell, Shelby County Criminal Court Division VIII Judge Christopher Craft, Shelby County Health Officer Dr. Bruce Randolph, and Shelby County Jail Medical Director Dr. Donna Randolph.[12]

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8 *See* ECF Nos. 2-1–9.

9 *See* ECF No. 15, Pg.ID 274.

10 *See* ECF No. 25.

11 *See* ECF Nos. 26 and 27.

12 *See* ECF Nos. 27-1–6.

12. On May 27, 2020, the Court held a hearing and heard oral argument from both parties as well as testimony from Dr. Joe Goldenson, M.D.[13]

13. On May 29, 2020, Plaintiffs submitted their opposition to Defendants' motion to dismiss and Defendants replied on June 4.[14]

14. On June 10, the Court entered an Order denying Defendants' motion to dismiss and granting in part and denying in part Plaintiffs' motion for class certification by certifying a Class and Subclass.[15] The Court also ordered Defendants to file a list of Class and Subclass members on the docket no later than noon on June 12, 2020.[16]

15. On June 12, Defendants moved to amend the Court's prior Order and to extend the deadline for filing their list of Class and Subclass members,[17] which the Court granted.[18]

16. On June 12, the Court entered a further Order addressing Plaintiffs' motion for temporary restraining order. The Court held its ruling on Plaintiffs' motion for a temporary restraining order in abeyance and ordered, due to the conflicting facts presented by the parties and pursuant to Federal Rule of Evidence 706, an inspection of the Jail by an independent inspector.[19]

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13 *See* ECF No. 36.

14 *See* ECF Nos. 35 and 37.

15 *See* ECF No. 38.

16 *See id.* at Pg.ID 691.

17 *See* ECF No. 40.

18 *See* ECF No. 42.

19 *See* ECF No. 45, Pg.ID 734.

17. On June 18 the Court held a hearing with the parties to consider the appointment of the independent inspector.[20] Also on June 18 the Court entered an Order appointing Michael K. Brady, an expert witness in the field of jail and prison operations as it relates to the prevention and mitigation of the spread of infectious diseases and public health in the correctional setting, to conduct an inspection of Jail.[21] The Court instructed Mr. Brady to "render an expert opinion on the current health and safety of medically-vulnerable Plaintiff-detainees at the Shelby County Jail in light of the COVID-19 pandemic, including but not limited to the Facility's compliance with the pertinent CDC and Shelby County Public Health guidelines and other applicable standards."[22]

18. On June 19, Plaintiffs filed a motion for expedited discovery and expedited briefing and exhibited thereto a set of interrogatories, requests for production, notices calling for the depositions of Chief Fields, Dr. Bruce Randolph, Dr. Donna Randolph, and a request to conduct an expert inspection of the Jail.[23]

19. Defendants responded to the motion for expedited discovery on June 22, 2020.[24]

20. On June 23, the Court held a hearing regarding Plaintiffs' motion for expedited discovery and heard argument from both parties.[25] Also on June 23, the Court granted in part and limited in part Plaintiffs' motion for expedited discovery. The Court

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[20] *See* ECF No. 66.

[21] *See* ECF No. 56, Pg.ID 843.

[22] *Id.*

[23] *See* ECF Nos. 57, 57-1–6.

[24] *See* ECF No. 64.

[25] *See* ECF No. 73.

ordered Defendants to produce all written discovery by June 29, to make Chief Fields and Drs. Bruce and Donna Randolph available for depositions, and allowed Plaintiffs to conduct an independent inspection of the Jail, subject to certain conditions.[26]

21. On June 30, Mr. Brady submitted his inspection report.[27] On July 1, the Court held a further hearing to hear evidence from Mr. Brady and both parties were afforded an opportunity to cross examine him.[28]

22. On July 10 and 13, the Court held an evidentiary hearing.[29] On July 10, the Court heard testimony from Plaintiff Russell Leaks, Robert Pigram, a Class member, and Dr. Homer Venters, who conducted an inspection of the Jail on behalf of Plaintiffs. On July 13, the Court heard testimony from Chief Fields, Attorney General Weirich, and Judge Campbell.

II. Weighing the Evidence.

23. The issues in this case concern the Jail's operations and the prevention and mitigation of the spread of COVID-19. These are medical and scientific questions. Accordingly, the testimony of the experts in the case, especially those that provided live testimony—Drs. Goldenson and Venters and Mr. Brady—are accorded greater weight than the fact witnesses that presented evidence in this case.

24. Dr. Goldenson is an expert with 28 years' experience working in correctional health in the San Francisco County Jail.[30] For 23 years, Dr. Goldenson was

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[26] *See* ECF No. 69, Pg.ID 986.

[27] *See* ECF Nos. 76 and 80.

[28] *See* ECF No.

[29] *See* ECF Nos. 108 and 111.

[30] Hr'g Tr. 75:21-76:4 (May 27, 2020), ECF No. 36.

the director and medical director of health services in the San Francisco County Jail.[31] Dr. Goldenson developed communicable disease policies in his role as medical director in the jail and oversaw clinical and administrative operations.[32]

25. Dr. Venters is a physician, internist, and epidemiologist with over a decade of experience in correctional health, who has conducted numerous inspections to evaluate correctional facilities' responses to COVID-19.[33] Since April 2020, Dr. Venters has been asked to conduct court-ordered inspections of six other facilities to evaluate their COVID-19 responses.[34] Dr. Venters has been invited to present COVID-19 guidance to a number of organizations including the National Academy of Sciences, the National Association of Counties, and the American Medical Association.[35]

26. Mr. Brady is an expert in prison and jail operations, the ADA, and the prevention and mitigation of the spread of infectious disease and public health in the correctional setting from an operational and non-clinical perspective.[36]

27. Although they were afforded an opportunity to do so, Defendants neither sought to conduct their own expert inspection of the Jail nor did they provide any other expert testimony or evidence concerning the conditions at the Jail.[37]

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31 Hr'g Tr. 75:25-76:2 (May 27, 2020), ECF No. 36.

32 Hr'g Tr. 76:2–6 (May 27, 2020), ECF No. 36.

33 Report of Dr. Homer Venters dated July 9, 2020 ("Venters Report"), ECF No. 107-1, ¶¶ 1, 5.

34 *Id.* at ¶ 5.

35 *Id.* at ¶ 6.

36 Michael K. Brady, Final Report of Covid-19 Inspection of the Shelby County Men's Jail at 201 Poplar Avenue, Memphis TN 38103 ("Brady Report"), ECF No. 80, Pg.ID 1169.

37 Deposition of Kirk Fields ("Fields Dep.") (attached hereto as Ex. A) Tr. 28:7–11 (Q: I'm assuming you have no training in epidemiology A: You're correct); Deposition of

28. Mr. Leaks and Mr. Pigram testified credibly and reliably, and subject to cross-examination despite concerns over retaliation for their testimony, about their firsthand knowledge of the conditions of their confinement in the Jail.

29. Chief Fields's testimony is unreliable because it is inconsistent in significant and critical respects with the testimony of Dr. Donna Randolph.[38] And, according to Mr. Brady, Chief Fields does not spend much time in the Jail's living units.[39]

III. Plaintiffs and the Class and Subclass Members Risk Loss of Health or Life from COVID-19 While Confined in the Jail.

30. COVID-19 is a serious illness caused by SARS-CoV-2, a novel coronavirus.[40] In severe cases, COVID-19 can require hospitalization and lead to respiratory failure and death.[41] COVID-19 is both more infectious and more deadly than other serious communicable diseases such as H1N1 or tuberculosis.[42]

31. Persons infected with COVID-19 can require advanced medical support including mechanical ventilation and extracorporeal membrane oxygenation.[43] This heightened level of care is extremely resource intensive. It requires specialized equipment, the supply of which is limited. It also requires an entire team of healthcare providers,

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Dr. Donna Randolph ("D. Randolph Dep.") (attached hereto as Ex. B) Tr. 28:2–28:2 (no training in epidemiology or infection control).

38 Of the two, only Chief Fields presented live testimony subject to cross-examination. *See* Hr'g Tr. (July 13, 2020), ECF No. 111.

39 Brady Inspection Report, ECF No. 80, Pg.ID 1191.

40 Decl. of Dr. J. Goldenson ("Goldenson Decl."), ECF No. 2-2, ¶ 8; Decl. of Dr. M. Griffin ("Griffin Decl."), ECF No. 2-3, ¶ 3.

41 Goldenson Decl. ¶ 8; Griffin Decl. ¶¶ 5, 8.

42 Hr'g Tr. 76:24–77:2 (May 27, 2020), ECF No. 36.

43 Griffin Decl. ¶ 7.

including 1:1 or 1:2 nurse to patient ratios, intensive care physicians, and respiratory therapists.[44]

32. Since this lawsuit was filed, the severity of the pandemic in Tennessee generally and Shelby County specifically has increased dramatically. As of July 15, 2020, there have been 66,016 confirmed cases of COVID-19 in Tennessee and 758 deaths.[45] In Shelby County alone there have been 14,804 cases and 229 deaths.[46] On May 20, the average number of deaths that week in Tennessee was five.[47] On July 13, the weekly average number of deaths was 13.[48]

33. As of mid-May, around the time Plaintiffs commenced this action, 151 detainees and 66 staff members at the Jail had tested positive.[49] As of July 10, according to the Sheriff's Office, 169 detainees had tested positive.[50] On July 12, 2020, it was reported that a further seven detainees and another eleven staff members at the Jail had

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44 Griffin Decl. ¶ 7.

45 The New York Times, *Tennessee Coronavirus Map and Case Count* (last updated July 15, 2020), *available at* https://www.nytimes.com/interactive/2020/us/tennessee-coronavirus-cases.html.

46 *Id.*

47 *Id.*

48 *Id.*

49 Yolanda Jones, *West Tennessee Prisons, Shelby County Jail Hit Hard by Coronavirus*, Daily Memphian (May 18, 2020), *available at* https://dailymemphian.com/article/14121/tennessee-departmentof-correction-shelby-county-jail-covid-19-testing-positive.

50 Shelby County Sheriff, *Weekly Coronavirus/Covid-19 Update* (Jul. 10, 2020), *available at* https://twitter.com/ShelbyTNSheriff.

tested positive for COVID-19.[51] There are currently eleven individuals detained at the Jail who are positive.[52] Two detainees have required hospitalization for COVID-19.[53]

34. There is no vaccine for COVID-19 and no known cure.[54] Defendants at all relevant times knew that there is no vaccine or known cure for COVID-19.[55] COVID-19 is transmitted by air and touch through aerosol droplets created when an infected person coughs, sneezes, or talks.[56] COVID-19 is able to move fairly freely from one unit to another in the Jail because the respiratory droplets that transmit the virus can persist and travel in the air.[57]

35. Maintaining at least six feet of physical distance between individuals ("social distancing") is one of the only known ways to prevent the spread of COVID-19.[58] This is true because the virus that causes COVID-19 is "highly infectious," and can be transmitted by people exhibiting few or no symptoms of the disease.[59] Vigilant hygiene,

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51 *See* Sara Mcaraeg, *COVID-19 Cases Spike In Shelby County Corrections as Hearings Continue In Class-Action Jail Suit*, Memphis Commercial Appeal (Jul. 12, 2020), *available at* https://www.commercialappeal.com/story/news/health/2020/07/12/covid-19-cases-spike-shelby-county-jails-lawsuit-continues/5424075002/.

52 *See* Hr'g. Tr. 65:15–16 (July 13, 2020), ECF No. 111.

53 *See* D. Randolph Dep. Tr. 73:9–14, ECF No. 99-1.

54 Griffin Decl. ¶ 4.

55 Hr'g Tr. 94:5–8 (July 13, 2020), ECF No. 111 (Q: Is it fair to say, Chief, that what you did know as of February 2020 is that they didn't have a cure of a vaccine and that the virus was potentially deadly? A: That's correct.).

56 Venters Report ¶ 13(a); *see also Social Distancing*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited July 14, 2020).

57 Venters Report ¶ 22(d).

58 Goldenson Decl. ¶ 14.

59 *Id.* at ¶ 13.

including frequent washing of hands with soap and water, are also important measures to prevent spread of the virus.[60]

36. The CDC recognizes that "[c]orrectional and detention facilities face challenges in controlling the spread of infectious diseases because of crowded, shared environments and potential introductions by staff members and new intakes."[61]

37. In large part because adequate social distancing is impossible in congregate settings, in correctional facilities such as the Jail the risks of virus transmission are particularly high.[62]

38. It is undisputed that the Plaintiffs, and the Class and Subclass members that they represent, are at heightened risk of severe illness or death from COVID-19.

39. Mr. Busby has been diagnosed with diabetes and he receives injections of insulin based on his blood sugar level.[63] Mr. Busby has also been diagnosed with hypertension.[64]

40. Mr. Nelson is 51 years old. He was diagnosed with diabetes and he receives two doses of insulin weekly and two tablets of Metformin daily to manage his diabetes.[65] Mr. Nelson also has hypertension secondary to diabetes and he has high cholesterol.[66]

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60 *See* Goldenson Decl. ¶ 14.

61 Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities—United States, February–April 2020*, CDC (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm.

62 Griffin Decl. ¶ 11; Hr'g Tr. 12:10–12 (July 1, 2020), ECF No. 84; Brady Report, ECF No. 80, Pg.ID 1185.

63 *See* Decl. of J. Spickler ("First Spickler Decl."), ECF No. 2-7, ¶ 9.

64 *See id.* at ¶ 10.

65 *See* Decl. of W. Dozier ("Dozier Decl."), ECF No. 51, ¶ 6.

66 *See id.* at ¶¶ 7–9.

41. Mr. Leaks is 65 years old.[67] Mr. Leaks has been diagnosed with chronic liver disease, hepatitis, hypertension, an irregular heartbeat, and an enlarged prostate for which he takes medication. Mr. Leaks has suffered from a heart attack.[68]

42. On June 10, 2020, the Court certified a Plaintiff Class and Subclass of persons who are, by reason of the medical vulnerabilities and/or disabilities, at high risk of severe infection and/or death from COVID-19.[69]

43. The Jail population is more than 86 percent African American.[70] African Americans are both statistically more likely to have the medical conditions that increase the risk of complications or death from COVID-19,[71] approximately five times more likely

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67 *See* Decl. of J. Spickler ("Third Spickler Decl."), ECF No. 52, ¶ 4.

68 *See id.* at ¶ 6.

69 *See* Order, ECF No. 38, Pg.ID 690–91.

70 *Shelby County, TN*, MACARTHUR FOUNDATION, SAFETY + JUSTICE CHALLENGE, http://www.safetyandjusticechallenge.org/challenge-site/shelby-county/ (last visited July 15, 2020).

71 Black Americans at 60 percent more likely to have been diagnosed with diabetes than white Americans. *See Diabetes and African Americans*, U.S. DEP'T OF HEALTH & HUMAN SERVS. OFFICE OF MINORITY HEALTH https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=18 (last visited July 20, 2020). Black Americans are also 40 percent more likely to have hypertension. *See Heart Disease and African Americans*, U.S. DEP'T OF HEALTH & HUMAN SERVS. OFFICE OF MINORITY HEALTH https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=19 (last visited July 20, 2020).

to require hospitalization,[72] and at least 3.6 times more likely to die[73] from COVID-19 than white Americans.[74]

IV. The Jail Does Not Protect the Medically Vulnerable.

44. Mr. Brady found that the "Wellpath COVID-19 response plan is inadequate to protect the vulnerable inmates housed in the Shelby County Jail."[75] He also found that that "Wellpath leadership needs to be more aggressive and more vocal about protecting the vulnerable inmates in their care" and that it should insist that "harmful practices [to their patients] be discontinued."[76]

45. Prior to the Court's Order that the Jail produce a list of medically vulnerable and disabled detainees, the Jail did not have such a list. Dr. Donna Randolph, the Shelby County Jail Medical Director, testified that she was not aware of such a list.[77] She stated that she neither reviewed detainees' medical histories to determine whether they are at high risk from COVID-19 nor did she know if anyone else had.[78]

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[72] COVID-19 in Racial and Ethnic Minority Groups, Centers for Disease Control and Prevention (June 25, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html (last visited July 14, 2020).

[73] *The Color of Coronavirus: COVID-19 Deaths by Races and Ethnicity in the U.S.*, APM RESEARCH LAB (July 8, 2020), https://www.apmresearchlab.org/covid/deaths-by-race.

[74] Tiffany Ford, et al., *Race Gaps in COVID-19 Deaths Are Even Bigger Than They Appear*, Brookings (June 16, 2020), https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/ (last visited July 14, 2020).

[75] Brady Report, ECF No. 80, Pg.ID 1187.

[76] Brady Report, ECF No. 80, Pg.ID 1189.

[77] D. Randolph Dep. Tr. 85:11–85:14.

[78] *Id.* at 85:15-85:20.

46. Chief Fields testified that he relied on Wellpath to construct the list, but he did not know how it was prepared or if the list was accurate.[79]

47. Chief Fields testified that not until the Order of this Court did the Jail develop a list of detainees vulnerable to COVID-19,[80] which could explain why, notwithstanding the Court's notice on May 27 that, "if I do require you to turn over the list at some point, I'm going to want that list turned over immediately,"[81] and despite the Court's "hope" that Defendants were tracking the information "as people are housed,"[82] Defendants still required an extension of the deadline before filing it with the Court.[83]

48. Dr. Donna Randolph testified that, despite the COVID-19 pandemic, she did not treat detainees with chronic conditions any differently from the rest of population, stating, "I just try to take care of everybody the same and try to keep everybody safe, whether they have a chronic condition or they don't."[84]

49. Instead, according to Mr. Brady, "[t]he vulnerable inmates/ADA inmates . . . are scattered throughout the jail in all security levels on all floors."[85] He recommended that the Jail "identify living units where the vulnerable population can be sequestered away

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79 Hr'g Tr. 87:20-88:16 (July 13, 2020), ECF No. 111.

80 Hr'g Tr. 87:20–88:2 (July 13, 2020), ECF No. 111.

81 Hr'g Tr. 102:18–103:1 (May 27, 2020), ECF No. 36.

82 *Id.* at 104:12–19.

83 *See* Respondents-Defendants' Motion, ECF No. 40.

84 D. Randolph Dep. Tr. 88:20–89:8.

85 Brady Report, ECF No. 80, Pg.ID 1180.

from the rest of the general populations."[86] And, Mr. Brady identified housing that could be used to segregate the medically vulnerable population.[87]

50. Dr. Venters also reported that there is no "plan to cohort or house together people who are medically vulnerable," which is a "*basic* approach that allows for increased focus on screening, infection control and social distancing among the most vulnerable detained people."[88]

51. Based on his inspection, Dr. Venters observed that there "did not appear to be any specific effort to create a COVID-19 plan for the care of each medically–vulnerable patient."[89] For example, Jail staff have never asked Mr. Leaks whether he needed any modifications or accommodations in the 5B pod where he is housed in light of his medical conditions and the COVID-19 pandemic.[90]

52. Dr. Venters also observed that there is no daily screening of their temperature or for symptoms of COVID-19.[91] And, Dr. Venters noted that there is no plan of care for those patients who are recovering from COVID-19.[92] Mr. Pigram noted that persons quarantined in Pod 6B after testing positive for COVID-19 were not given medical care.[93] When persons in quarantine with COVID-19 asked for Tylenol for headaches, they

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86 *Id.* at Pg.ID 1188.

87 *Id.*

88 Venters Report ¶ 25(a) (emphasis added).

89 *Id.* ¶ 25(c).

90 Hr'g Tr. 29:3–12 (July 10, 2020), ECF No. 108.

91 *Id.* ¶ 25(b)

92 *Id.* ¶ 25(d)

93 Hr'g Tr. 95:8–95:16 (July 10, 2020), ECF No. 108.

were told to order Tylenol on commissary.[94] However, only ibuprofen was available on commissary, which is not recommended for COVID-19 patients.[95] Mr. Pigram put in a sick call the day he arrived in 6B, but did not get an answer until one week later.[96] Individuals experiencing symptoms were told to put in sick calls, and then told that they were being referred to a physician, but they never saw a physician.[97]

V. Adequate Social Distancing Is Impossible at the Jail.

53. The CDC defines social distancing as "the practice of increasing the space between individuals and decreasing the frequency of contact to reduce the risk of spreading a disease (ideally to maintain at least 6 feet between all individuals, even those who are asymptomatic).[98] Social distancing is the "cornerstone of reducing transmission of respiratory diseases such as COVID 19."[99] Wearing masks and increasing cleaning, although helpful, are not substitutes for social distancing.[100] According to Mr. Brady, one

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94 *Id.* at 95:8–20.

95 *Id.* at 95:21–96:5.

96 *Id.* at 96:13–17.

97 *Id.* at 96:13–24.

98 *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last reviewed July 15, 2020).

99 *Id.*; *see also* Griffin Decl. ¶ 4 ("One known effective way to reduce the risk of infection is to practice 'social distancing.'").

100 Hr'g Tr. 79:14–80:1 (May 27, 2020), ECF No. 36 (Q: Can't [the issue of asymptomatic or presymptomatic spread] be addressed with masks, potentially gloves, ... cleaning supplies . . .? A: Well, all the efforts that you're mentioning, you know, would be helpful, but they really are not foolproof. . . . The mask does not completely block transmission of the virus.); *id.* at 80:2–6 (Even with mask use and cleaning services, an inability to practice social distancing "presents a constant risk that people that are housed in the facility could get infected.")

of the core principles for any COVID-19 operational response in jails is social distancing.[101]

54. Detainees testified, and were subject to cross-examination, regarding the impossibility of social distancing in the Jail. Mr. Pigram testified that cellmates spend 18 hours a day in their cells together, that it is impossible to remain six feet apart there, and that they can reach out and touch one another from any place in the cell.[102] Mr. Leaks also testified that it is impossible to keep six feet of distance from others in the line for meals or when eating at the tables or in their bunks.[103] Several detainees reported to Mr. Brady that "social distancing is not possible."[104]

55. For example, in H pod, where Plaintiff Favian Busby is assigned, 42 men share a common area which they must use to eat meals, recreate, and receive medication at the time this motion was filed.[105] Of those 42, 26 had a cellmate.[106] During meals and while watching TV or playing cards, detainees sit at tables four feet in diameter where they cannot maintain social distancing.[107] Security staff in H pod move throughout the pod in close proximity to incarcerated people.[108]

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[101] Brady Report, ECF No. 80, Pg.ID 1173.

[102] Hr'g Tr. 88:17–89:8 (July 10, 2020), ECF No. 108.

[103] Hr'g Tr. 44:17–45:6 (July 10, 2020), ECF No. 108.

[104] Brady Report, ECF No. 80, Pg.ID 1183.

[105] First Spickler Decl. ¶¶ 11, 13, 16.

[106] *Id.* ¶ 13.

[107] *Id.* ¶¶ 13, 16.

[108] *Id.* ¶ 15.

56. As of July 10, 2020, Mr. Leaks is housed in 5B pod which is an open dormitory-style unit with 32 bunk beds.[109] The dormitory is approximately 50' x 160'.[110] As of June 10, there were 22 men in 5B.[111] Mr. Leaks slept on the lower section of a bunk positioned approximately two feet from another bunk bed.[112] A detainee at one bunk could easily reach out his hands and touch a detainee on a another bunk.[113] Bunkbeds are placed about three and a half feet apart.[114] The detainees are assigned to a specific bed by classification and cannot change the assignment themselves.[115] The detainees spend on average 14 to 15 hours a day at their bunks.[116] They are on lock down, for example, from 9:00 p.m. to 8:00 a.m. and cannot leave their bunks during that time.[117] They have to stay in their bunks even if someone is coughing or sick right next to them.[118] Detainees in 5B share nine toilets, four showers, and six phones.[119]

57. Mr. Leaks sleeps right next to the restroom door, which is three and a half feet away from his bed.[120] Detainees in 5B walk past Mr. Leak's bed every time they have

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[109] Third Spickler Decl. ¶¶ 10, 11.

[110] *Id.* ¶ 11.

[111] *Id.* ¶ 10.

[112] *Id.*; Hr'g Tr. 36:6–36:12; 37:9–37:16 (July 10, 2020), ECF No. 108.

[113] Hr'g Tr. 37:6–37:12 (July 10, 2020), ECF No. 108.

[114] *Id.* at 37:3–37:16.

[115] *Id.* at 36:16–37:2.

[116] *Id.* at 37:22–37:25.

[117] *Id.* at 38:15–39:2.

[118] *Id.*

[119] Third Spickler Decl. ¶ 10.

[120] Hr'g Tr. 37:25–38:6 (July 10, 2020), ECF No. 108.

to use the restroom.[121] They typically walk within one foot of Mr. Leaks' bunk, and sometimes even touch the bunk in the middle of the night.[122]

58. The eating area in 5B has seven tables on one side and five tables on the other.[123] The tables are three and a half feet wide, and as many as five people can sit at the table at a given time.[124] A detainee sitting at a table can easily touch the hand of another man sitting across him.[125] The tables are in close proximity to the telephones, the TV, and five or six bunks.[126]

59. During meal time, the detainees in 5B line up behind each other to receive their trays through the bars at the sally port separating the pod and the hallway outside.[127] It is impossible to keep a six feet distance from others in the line.[128] After they receive their trays, detainees eat at the tables for 20 minutes before the trays have to be taken out of the pod.[129] It is impossible to keep a six feet distance from others at the table.[130] Detainees can also eat at their bunks.[131] It is similarly impossible to keep six feet of distance from others while eating at the bunks.[132] Mr. Leaks, who is medically vulnerable,

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[121] *Id.* at 38:8–38:13.

[122] *Id.*

[123] Hr'g Tr. 39:4–39:16 (July 10, 2020), ECF No. 108.

[124] *Id.*

[125] *Id.* at 43:22–44:3.

[126] *Id.* at 39:18–39:23.

[127] Hr'g Tr. 39:25–40:13 (July 10, 2020), ECF No. 108.

[128] *Id.* at 44:17–44:21.

[129] *Id.*

[130] *Id.* at 44:17–44:21.

[131] *Id.* at 44:4–44:15.

[132] *Id.* at 44:17–45:6.

used to eat at his bunk often. Right before Mr. Brady's visit he was moved. He has since stopped eating at his bunk because his new bunk is too close to the restroom.[133]

60. Detainees in 5B use phones throughout the day.[134] The phones are near to the tables, the bathrooms, and some of the bunks.[135] When detainees are using the phones, it is not possible for them to socially distance from others in the pod.[136] The phones are also placed right next to each other, so a detainee on one phone could easily touch another one on the phone next to him by just bending his elbow a little.[137]

61. During pill call, detainees line up behind each other to receive their medication.[138] As of July 10, approximately 16 to 20 people stand in line at a time for pill call.[139] During those times, it is impossible to keep six feet of distance from others in the line.[140]

62. Pod officers walk around 5B pod for security checks and in so doing walk within a few feet of the detainees incarcerated there.[141] Two officers in 5B tested positive for COVID-19 and took leave from work for about six weeks in May.[142] Before they tested

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[133] *Id.*

[134] *Id.* at 56:22–57:19.

[135] *Id.* at 57:21–58:11

[136] *Id.* at 60: 4–60:14.

[137] *Id.*

[138] *Id.* at 51:14–52:3.

[139] *Id.* at 52:4–52:6.

[140] *Id.* at 52:7–52:21.

[141] *Id.* at 46:12–46:19.

[142] *Id.* at 48:11–48:23.

positive, they were in close contact with the detainees in 5B, handing out trays and doing random searches, including pat-downs, of the detainees every day.[143]

63. A week before Mr. Brady's inspection, the Jail taped the floor around the phones in 5B and in some other areas without giving detainees instructions as to what the tape is for.[144] By July 10, some of the tape had peeled off.[145]

64. In L Pod, where Michael Edgington was housed as of May 20, 2020, most detainees share a 6' x 10' cell with one other person.[146] At meal times, 30-33 detainees sit between four tables; each table is approximately four feet in diameter, with room for four seats around it.[147] People line up next to each other to get their trays.[148] "Rockmen"—detained persons with special jobs and privileges—wear gloves and masks while serving food, but the men lining up for food are very close to each other while they wait.[149] By the television in L-pod, there are 10-13 loose chairs, where detainees sit side by side with little room between them.[150] There is one shower with three shower heads, in which multiple people shower at once and it is not possible to stay six feet from each other inside the

[143] *Id.* at 48:24–49:9.

[144] *Id.* at 60:16–61:14.

[145] *Id.* at 60:16–61:16.

[146] Decl. of J. Spickler ("Second Spickler Decl."), ECF No. 5, ¶ 6.

[147] *Id.* ¶ 7.

[148] *Id.* ¶ 8.

[149] *Id.* ¶ 10.

[150] *Id.* ¶ 7.

shower.[151] People generally line up for the shower in close proximity to each other.[152] Some people also line up in close proximity daily to get their medication.[153]

65. In Pod 4A, where Plaintiff Class Member Robert Pigram was housed as of July 10, 2020, the cells are approximately 4' to 5' x 7.5', and contain a bunkbed, toilet, sink, desk, and stool.[154] The top and bottom bunks are approximately 2' to 2.5' apart.[155] Cellmates spend 18 hours a day in their cells together.[156] During that time, it is impossible to remain six feet apart—detainees can reach out and touch one another from any place in the cell.[157] The communal area of Pod 4A is approximately 12' x 30' and holds approximately 44 people; it is impossible to remain six feet apart in the communal area.[158]

66. Defendants are aware that adequate social distancing is impossible at the Jail. Chief Fields testified that detainees cannot always stay six feet apart and that detainees in isolation are unable to keep six feet apart "at all times."[159] Dr. Bruce Randolph testified that it is impossible for detainees to remain six feet apart at all times in the Jail.[160] This is an inherent shortcoming of the structure of the Jail that cannot be remedied by attempted changes in procedure.

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[151] *Id.*

[152] *Id.* ¶ 9.

[153] *Id.* ¶ 12.

[154] Hr'g Tr. 87:2–87:17 (July 10, 2020), ECF No. 108.

[155] *Id.* at 87:18–87:20.

[156] *Id.* at 88:17–87:24.

[157] *Id.* 89:2–89:8.

[158] *Id.* 103:4-103:28.

[159] Fields Dep. Tr. 76:17–77:3.

[160] B. Randolph Dep. Tr. 79:11–15.

67. Mr. Brady found that "the Shelby County Jail is not maximizing its efforts to enforce social distancing in its living units."[161] The "only place" Dr. Venters "really saw social distancing in the whole facility was in the booking area."[162] Dr. Venters "observed a lack of social distancing through all areas of the Jail" and concluded that "social distancing is not being facilitated or practiced with the rigor required to prevent disease spread."[163] Dr. Venters also testified that there is "very little effort to implement social distancing, particularly in the common spaces, outside housing areas, also inside the housing areas, both in the sleeping areas as well as the common spaces."[164]

68. Although the Jail has placed six-foot markers to encourage social distancing, Dr. Venters observed that even with the markers, people are still brushing up against each other, and that the "most crucial element" of ensuring social distancing "is the training and behavior of the security staff."[165] During pill call, social distancing is only being practiced, said Dr. Venters, "for those four or five seconds" when detainees step to the pill call window to receive medication.[166]

69. Mr. Brady also concluded that "there is no concentrated and coordinated effort to assemble and present information to the courts regarding an inmate's medical conditions that may make him vulnerable to serious illness or death while housed in the

[161] Brady Report, ECF No. 80, Pg.ID 1189.

[162] Hr'g Tr. 154:18–23 (July 10, 2020), ECF No. 108.

[163] Venters Report ¶ 15(a).

[164] H'rg Tr. 119:19–22 (July 10, 2020), ECF No. 108.

[165] Hr'g Tr. 159:6–14 (July 10, 2020), ECF No. 108.

[166] Hr'g Tr. 156:3–5 (July 10, 2020), ECF No. 108.

jail."[167] He also found that there is no "consistent multi-disciplinary effort within the jail to secure alternative custody venues for vulnerable inmates."[168]

70. Dr. Donna Randolph confirmed that, "in the context of the coronavirus," she had not worked with the Jail's Special Assistant-Criminal Justice Expediter "about the potential release of any detainees" because her "patients are well cared for" and because she "didn't have anybody that [she] – that even though they fit into [the medically vulnerable] categories], that [she] was concerned about."[169]

71. According to documents produced by Defendants in this action, for the period between March 12, when the Tennessee state governor declared a state of emergency, and June 24, the average population in the Jail was 1,854. On June 24, the total population was 1,826.[170] As of July 10, the population was 1,857.[171] And, there are still 450 medically vulnerably and/or disabled detainees in in the Jail who are members of the Plaintiff Classes.[172]

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[167] Brady Report, ECF No. 80, Pg.ID 1193.

[168] *Id.*

[169] D. Randolph Dep. Tr. 121:9–19.

[170] *See* "Daily Population 3-12-20 to 6-24-20" (attached hereto as Ex. E).

[171] *See* Shelby County Sheriff, "Weekly Cornavirus/Covid-19 Update" (Jul. 10, 2020), *available at* https://twitter.com/shelbytnsheriff?lang=en.

[172] *See* ECF Nos. 43 and 44.

VI. The Jail Does Not Test Adequately for COVID-19.

A. To Track and Contain the Spread of COVID-19, Comprehensive Testing is Necessary.

72. COVID-19 can be spread by persons not experiencing symptoms, and asymptomatic spread of the disease appears to be higher than other illnesses.[173]

73. On June 13, 2020, the CDC formally recommended testing of all persons in "settings that house vulnerable populations in close quarters for extended periods of time," including "correctional and detention facilities," in order to enable "early identification of asymptomatic individuals."[174] The CDC further recommends "initial testing of everyone residing and/or working in the setting, [r]egular (*e.g.*, weekly) testing of everyone residing and/or working in the setting, and [t]esting of new entrants into the setting and/or those re-entering after a prolonged absence (*e.g.*, one or more days)."[175]

74. Mr. Brady testified that testing is a "much more scientifically sound way to detect the COVID-19 virus in asymptomatic individuals and symptomatic individuals" than "timing out" the virus.[176] He agreed that, in fact, the "only definitive way to know who has COVID-19 is through testing."[177]

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[173] Hr'g Tr. 138:15–18 (July 10, 2020), ECF No. 108 ([I]t might be the case that a significant amount of the virus could be stopped if we did not have asymptomatic spread, but unfortunately, with this virus, we have a fair amount of asymptomatic spread.); Hr'g Tr. 79:9–13 (May 27, 2020), ECF No. 36 ([T]here's no way to ensure that this afternoon, someone was coming on duty for the afternoon or the evening shift won't be asymptomatic or presymptomatic and bring the virus into the jail and thereby risk exposing anyone they initially come into contact with.).

[174] *Overview of Testing for SARS-CoV-2,* Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/ hcp/testing overview.html#asymptomatic_without_exposure (last updated June 13, 2020).

[175] *Id.*

[176] Hr'g Tr. 17:15–18:12, (July 1, 2020), ECF No. 84.

[177] *Id.* 18:15–18.

75. Defendants are aware that COVID-19 positive individuals may be contagious even though they are not asymptomatic.[178] Dr. Venters testified that it has been general knowledge from around mid- to late-March that "COVID-19 can be transmitted from person to person before somebody develops symptoms."[179]

B. The Jail Failed to Test Staff and Detainees for Long Periods of Time.

76. The Jail has not tested either staff or detainees for long periods of time, despite knowing that the population contained a number of positive COVID-19 individuals. Between April 24, 2020 and April 30, 2020, thirty-two staff members were tested on-site for COVID-19, five of whom tested positive.[180] The first tests for COVID-19 among detainees took place between March 24, 2020 and April 9, 2020.[181] Eighteen tests were performed on eighteen detainees, all of whom tested positive. Between March 24, 2020 and April 30, 2020, of the 334 detainees tested for COVID-19, 157 tested positive.[182]

77. No testing was conducted on staff between April 30, 2020 and June 12, 2020.[183] As of June 9, 2020, no one in any of the three dormitory-style pods on the 5th floor of the Jail had been tested for COVID-19, despite several people displaying possible symptoms.[184] Similarly, no testing was conducted on detainees between April 30, 2020

[178] B. Randolph Dep. Tr. 63:7-12.

[179] Hr'g Tr. 167:17–22 (July 10, 2020), ECF No. 108.

[180] Respondents-Defendants' Responses to Plaintiffs' First Set of Expedited Interrogatories, ECF No. 103-2, Pg.ID 1670–71.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Dozier Decl. ¶¶ 12–13.

and June 10, 2020.[185] Testing resumed on June 10, 2020, the same date on which the Court denied Defendants' motion to dismiss.

78. Chief Fields testified that, starting in the middle of April the Jail started to get notices that there was a shortage of test kits and for most of May the Jail did not have testing kits.[186] But Dr. Bruce Randolph, the Health Officer at the Shelby County Health Department, testified that the Health Department had testing kits for the Jail and has not denied a request by the Jail for testing kits.[187]

79. Cases continue to climb among the staff and detainee population at the Jail. As of July 10, 2020, the Shelby County Sheriff's Office ("SCSO") reported an increase of seven new detainee cases from the week prior, and among agency employees, SCSO reported an increase of 11 cases in the same period.[188]

C. The Jail's "Non-Test Based" Approach Is Inadequate.

80. Contrary to the CDC's recommendation for a "wider approach to asymptomatic testing" for jails and other congregate settings,[189] the Jail employs a "non-test based" approach to COVID-19.[190] As Mr. Brady testified, "[a] nontest-based strategy

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185 *Id.*

186 Hr'g Tr. 95:14–19 (July 13, 2020), ECF No. 111.

187 B. Randolph Dep. Tr. 48:2–13.

188 Sarah Macaraeg, *COVID-19 Cases Spike in Shelby County Corrections as Hearings Continue in Class-action Jail Suit*, MEMPHIS COMMERCIAL APPEAL (July 12, 2020), https://www.commercialappeal.com/story/news/health/2020/07/12/covid-19-cases-spike-shelby-county-jails-lawsuit-continues/5424075002/

189 Hr'g Tr. 163:14–22 (July 10, 2020), ECF No. 108 ("In May, the CDC started to explicitly link correctional settings to other congregate care settings" which "should consider a much more broad approach to testing, which would . . . include asymptomatic folks.").

190 Brady Report, ECF No. 80, Pg.ID 1176.

. . . leaves too many loopholes and too many gaps to be effective."[191] As a result, "the testing is not adequate to track infections in the facility."[192]

81. The Jail does not test asymptomatic patients, at intake or otherwise, even though they are aware that asymptomatic patients may be contagious.[193] The protocols that the Jail relies on do not include testing asymptomatic patients[194] and the Shelby County Health Department does not recommend testing of asymptomatic individuals.[195] Both the Jail's protocols and the Health Department's recommendations contravene CDC guidelines.[196]

82. Moreover, "given the punitive conditions in which those who test positive for COVID-19 are housed . . . [detainees] are disincentivized from reporting symptoms or taking a COVID-19 test."[197] Dr. Venters testified that people with whom he spoke complained of being locked up in the medical isolation unit without being allowed out of their cells and without a health checkup from Friday evening to Monday morning.[198] Detainees in other parts of the Jail have expressed similar concerns.[199] As a result, said Dr.

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[191] Hr'g Tr. 3:6–8 (July 1, 2020), ECF No. 84.

[192] Venters Report ¶ 19.

[193] D. Randolph Dep. Tr. 36:4–19; *see also* Hr'g Tr. 167:3–5 (July 10, 2020) ("We've known from March . . . that there was asymptomatic transmission of COVID-19.").

[194] Defs' Hr'g Ex. 3, Wellpath Policy, last revised on June 10, 2020, ECF No. 101-7.

[195] B. Randolph Dep Tr. 58:16–21; 113:10–12.

[196] Hr'g Tr. 163:14–164:17 (July 10, 2020), ECF No. 108 (noting CDC recommendations to increase testing, including for asymptomatic people, and other correctional facilities that conducted asymptomatic testing in March and April).

[197] Hr'g Tr. 120:6–12 (July 10, 2020), ECF No. 108.

[198] *Id.*

[199] *See* First Spickler Decl. ¶ 6 (noting that several people in H pod with Plaintiff Busby refused to report symptoms out of concern for being sent to the 6th floor quarantine pods).

Venters, incarcerated people "were reluctant to report symptoms or that they were reluctant to get tested."[200]

83. Rather than seek out people who may be contagious, or encourage detainees to come forward with their symptoms, Defendants place an "obligation" on detainees to report symptoms.[201]

84. The testing at the Jail, therefore, is "too limited" particularly in light of the concerning inability to undertake contact tracing, social distancing, and "the lack of ability to keep the virus from spreading around outside places like quarantine units, new admission units, [and] the medical isolation unit."[202]

D. The Jail Failed to Adhere to Wellpath's Policy for COVID-19 Testing.

85. The Jail at all times lacked a testing policy.[203] The Jail also has no plans to conduct initial and periodic testing of individuals in accordance with CDC recommendations.[204] Instead, the Jail relied on Wellpath, a third-party medical provider, to develop a testing policy.

86. Wellpath issued a policy that addressed post-testing management of patients who have tested positive.[205] The policy calls for a 21-day quarantine for a patient who has

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[200] Hr'g Tr. 120:17–121:1 (July 10, 2020), ECF No. 108.

[201] *Id.* at 177:13–178:11 (Q: "Well, I mean, there is an obligation upon someone who feels sick to tell somebody." A: "[I]n managing outbreaks behind bars . . . and this is true of basic public health . . . when we want to find a problem, we go look for it. We don't wait for it to come to us. . . . [T]hat approach" will result in "getting people sicker and later.").

[202] Hr'g Tr. 121:18–23 (July 10, 2020), ECF No. 108.

[203] Fields Dep. Tr. 41:7–19

[204] B. Randolph Dep. Tr. 57:25–58:12

[205] Wellpath Policy, approved on May 12, 2020, ECF No. 27-1, Pg.ID 460–63.

tested positive, followed by two negative tests, before the COVID-19 positive patient is returned to the general population.[206]

87. Dr. Donna Randolph testified under oath that at no time did the Jail ever implement the Wellpath testing recommendation. Instead, after a supposed 21-day quarantine, detainees who had previously tested positive were released into the general population without any further testing.[207]

88. Dr. Donna Randolph also testified that the Jail has never followed Wellpath's recommendation for testing patients at intake, or for testing them again seven and ten days after a positive test result.[208]

89. Mr. Brady confirmed that, if a detainee tests positive for COVID-19 at intake, his temperature is taken for 21 days, but no additional COVID-19 tests are performed before the detainee is released into general population.[209]

90. Indeed, Mr. Pigram testified that detainees who had tested positive for COVID-19 and who insisted on being tested before being released back to the general population were pepper sprayed by Jail staff for refusing to leave their unit without being tested—notwithstanding the adverse effects that pepper spraying could have on them while they were infected with COVID-19—but they were not tested before they were reintroduced to general population.[210]

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[206] *Id.*

[207] D. Randolph Dep. Tr. 100:10–101:19.

[208] *Id.* at 35:23–37:4.

[209] Brady Report, ECF No. 80, Pg.ID 1176.

[210] Hr'g Tr. 98:1–102:3 (July 10, 2020), ECF No. 108.

91. Despite knowing of this incident,[211] from April until the second day of the evidentiary hearing in this case on July 13, Chief Fields wrongfully believed that detainees who tested positive had to have two negative tests before they were released back into the general population. That was never happening. At the July 13 evidentiary hearing, Chief Fields acknowledged that these detainees, who had tested positive for COVID-19, were not actually re-tested before they were reintroduced to the general population.[212]

92. Chief Fields admitted on cross examination that failure to test people who had tested positive and letting them back into the general population increased the "risk of the spread of virus throughout [the] entire facility."[213] Indeed, Chief Fields admitted that, because they were letting people back into the general population without testing them, whatever efforts the Jail had made to contain the spread of the virus "would be for naught."[214]

VII. The Jail Has No Effective Medical Isolation or Quarantine.

93. According to Dr. Venters, "'medical isolation' refers to the practice of taking people who have COVID-19 or have symptoms of COVID-19, separating them from other people, and providing them with additional surveillance and care."[215] Medical isolation is a critical component of contact tracing: when a new COVID-19 case is

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[211] *Id.*

[212] Hr'g Tr. 94:20–95:5; 97:10–98:3 (July 13, 2020), ECF No. 111.

[213] Hr'g Tr. 80:15–19 (Jul. 10, 2020), ECF No. 111.

[214] Hr'g Tr. at 80:20–25 (July 10, 2020), ECF No. 111.

[215] Venters Report ¶ 21.

identified, the appropriate response is to "find[] all of the known contacts of that person," "identify[] them accurately," and "put[] them somewhere separate."[216]

94. As Dr. Venters explained, absent comprehensive testing, mitigating the spread of the disease at the Jail required "rigorous isolation of persons with potential and known exposure to the disease."[217]

A. The "Medical Isolation Unit" for COVID-19 Positive Detainees Provides No Isolation.

95. At the Jail, the medical isolation unit is on 2A, where people with confirmed cases of COVID-19 are detained. Dr. Venters testified that he had "very grave concerns about the medical isolation practices" because the medical isolation unit on 2A is enclosed by bars, rather than a solid door.[218] It has "no physical separation" and is not actually isolated "because of the open nature and the free flow of air and virus from the people who are positive in that unit to the unit across the way. . . the common areas that connect to that unit."[219] Again, this is an inherent problem with the structure of the Jail that cannot be remedied through a change in procedures.

96. Ensuring that there is "a physical separation between the COVID patients and everybody else" is "the most basic thing that the CDC tells us we need," according to Dr. Venters.[220] Dr. Venters stated that "the open nature of the medical isolation unit represents a deviation from CDC recommendations and basic infection control

[216] Hr'g Tr. 122:9–19 (July 10, 2020), ECF No. 108.

[217] Venters Report ¶ 20.

[218] Hr'g Tr. 123:14–21 (July 1, 2020), ECF No. 108.

[219] *Id.*

[220] *Id.* at 180:5–11.

principles."[221] Dr. Venters opined that the medical isolation unit on 2A "represent[s] a threat to the health of staff and detainees."[222]

B. There Is No Isolation Because Detainees Congregate in Advance of Court Visits.

97. According to Mr. Brady, although the Jail's stated policy is that post-intake, detainees "must remain in medical isolation for 21 days prior to being released to general population,"[223] in fact detainees are not isolated for the full 21-day period.[224] Instead, as Mr. Brady testified, throughout the 21-day period, detainees "are required to be moved from their isolation units through the court tunnel and into holding cells for the General Sessions Courts and the Criminal Courts of Shelby County. The medically isolated inmates are mixed in the Court Division specific holding cells with 20-25 other general population inmates from throughout the jail for up to 4 hours . . . in the morning and afternoon multiple times a week."[225]

98. Mr. Brady observed no social distancing in two of the three holding cells.[226] Mr. Leaks testified that the area in which detainees are held from one and a half to five hours a day awaiting court is "packed to the limits."[227]

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[221] Venters Report ¶ 22.

[222] *Id.*

[223] Brady Report, ECF No. 80, Pg.ID 1176.

[224] Hr'g Tr. 30:16–19 (July 1, 2020), ECF No. 84.

[225] Brady Report, ECF No. 80, Pg.ID 1181; Hr'g Tr. 30:20–31:25 (July 1, 2020), ECF No. 84.

[226] Brady Report, ECF No. 80, Pg.ID 1181.

[227] Hr'g Tr. 32:23–33:11 (July 10, 2020), ECF No. 108.

99. Mr. Brady found that this practice "defeats the whole purpose of medical isolation"[228] and "undermines the integrity and purpose of the 21-day medical isolation that is designed to prevent the introduction of the Covid-19 virus into the jail population."[229] As a consequence, Mr. Brady concluded that the practice "unquestionably puts vulnerable inmates and the ADA inmates at an unreasonable risk of harm from potential exposure to asymptomatic Covid-19 positive inmates."[230]

100. Dr. Venters was "left with the impression that the purported 21-day" period was "not being consistently followed."[231] Dr. Venters asked several times for information about the isolation practices, and was told by leadership that "people might be [in isolation] for short periods of time before going to another spot in the facility."[232]

101. In speaking with patients in medical isolation in Unit 2A, Dr. Venters also found that the daily health assessments of the individuals who have tested positive are inadequate. The assessments are conducted through the bars, without any assessments on weekends, and no one listens to their lungs.[233]

102. The leadership at the Jail, including Chief Fields, Assistant Chief Hubbard, Dr. Donna Randolph, and Mr. Jeremy Sanders, "[a]ll verified that [the movement of detainees out of quarantine on the lower level] was taking place."[234] In an April 28, 2020

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[228] Hr'g Tr. 32:8-12 (July 1, 2020), ECF No. 84

[229] Brady Report, ECF No. 80, Pg.ID 1187.

[230] *Id.* at Pg.ID 1181.

[231] Venters Report ¶ 15(b).

[232] Hr'g Tr. 126:6–9 (July 10, 2020), ECF No. 108.

[233] Venters Report, ¶ 26.

[234] Brady Report, ECF No. 80, Pg.ID 1181.

email, Tiffany Ward, Assistant Chief, stated as a matter of policy: "Inmates in quarantine may go to court. The Court Tunnel will call for the inmate only when the court division is ready for the inmate."[235]

103. Despite knowing that its isolation practices were ineffectual, only after Mr. Brady filed his report did the Jail attempt to work with the Shelby County Criminal Courts to arrive at a safer procedure for bringing detainees to Court.[236] These attempts have ineffectual because, even if they reduce the amount of traffic in the tunnel between the Jail and the courts, detainees are still required to leave isolation and to mix with detainees from the general population. As of July 13, the Jail still had not implemented sufficient video feeds to allow detainees to appear remotely.[237]

C. The Jail Does Not Quarantine Detainees Who May Have Been Exposed to the Virus.

104. According to Dr. Venters, "[q]uarantine" refers "to separating people who may have been exposed to COVID-19 from everyone else for a period of up to 14 days with daily surveillance for new symptoms."[238] Dr. Venters explained that the rationale behind quarantine, as delineated by the CDC, is that if the Jail wants to "control the disease," they need to "be able to have some sense of where the next case is coming from," which is not possible if "the quarantine group is kind of mixing with other groups."[239]

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[235] Emails from T. Ward to L. Talley et al. RE: Quarantine / Isolation Pods, May 8, 2020 (SCSO#000032) (attached hereto as Ex. D).

[236] Hr'g Tr. 58:4–13 (July 13, 2020), ECF No. 111.

[237] Hr'g Tr. 139:10–21; Brady Report, ECF No. 80, Pg.ID 1188.

[238] Venters Report ¶ 21.

[239] Hr'g Tr. 127:20–128:3 (July 10, 2020), ECF No. 108.

105. But the Jail's so-called "quarantine units," like its so-called "medical isolation units," are fronted by open bars where "three units come together in a small shared hallway," allowing "for free movement of air (and virus) into and out of the three units."[240] As Dr. Venters testified, "this is particularly problematic for quarantine" because the purpose of quarantine is "to put people who have potentially been exposed to COVID in one spot and . . . to keep them separate from everybody else."[241]

106. Dr. Venters stated that he has "never seen a facility rely on a housing unit to serve as an isolation or quarantine unit for the purposes of disease control that has open bars and no solid door," which he opined as a "deeply disturbing practice that. . . is out of touch with basic practices of infection control."[242] As with social distancing generally and with the medical isolation unit, this is a structural problem with the Jail facility.

VIII. The Jail Has Not Made Reasonable Modifications for Detainees with Disabilities.

107. It is undisputed that Plaintiffs, and the members of the Subclass that they represent, have disabilities within the meaning of the ADA and the Rehabilitation Act.

108. It is undisputed that if the Subclass becomes infected with COVID-19, their chances of serious illness or death is higher than for people who are not medically vulnerable.

109. Chief Fields, as director of the Jail, oversees the implementation of the Jail's ADA policy.[243] He has delegated responsibility for ensuring the Jail's compliance with the

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[240] Venters Report ¶ 21, Hr'g Tr. 126:24–127:6 (July 10, 2020), ECF No. 108.

[241] Hr'g Tr. 126:24–127:6, (July 10, 2020), ECF No. 108.

[242] Venters Report ¶ 28.

[243] Hr'g Tr. 84:14–24 (July 13, 2020), ECF No. 111.

ADA to Wellpath.[244] However, Dr. Donna Randolph does not know whether anybody oversees the Jail's compliance with the ADA.[245] She also does not know to what kinds of disabilities the ADA applies.[246]

110. Chief Fields is also unfamiliar with the disabilities that are covered by the ADA and he has never heard of the Rehabilitation Act.[247] Chief Fields is unable to say who in the Jail—as a group or a class of people—is protected by the ADA, despite the fact that, under the Jail's policy for ADA accommodation requests, Chief Fields is the final arbiter regarding any requests that are in dispute.[248] And, during his entire tenure as Chief Jailer, Chief Fields has not received a single appeal.[249]

111. Chief Fields was unable to estimate how many requests for accommodations under the ADA the Jail receives per month and does not know on what the Jail's decisions to grant or deny a request for an accommodation are based.[250] Chief Fields is "responsible for reviewing ADA grievances," but he has never seen a grievance form filed relating to a request for an accommodation.[251]

112. According to Chief Fields, the only accommodation that is being made for disabled detainees who are medically vulnerable to COVID-19 is that they are being housed based on the decisions of the medical staff and they are given more direct attention

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[244] Fields Dep. Tr. 35:11–36:4.

[245] D. Randolph Dep. Tr. 124:13–15.

[246] *Id.* at 123:19–21.

[247] Hr'g Tr. 84:25–85:1 (July 13, 2020), ECF No. 111; Field Dep. Tr. 88:17–19.

[248] *Id.* at 85:3–19.

[249] *Id.* at 85:20–86:5.

[250] Fields Dep. Tr. 44:16–19, 45:4–11.

[251] *Id.* at 113:10–14, 114:25–115:5.

from the medical staff. That is all Chief Fields contends is being done for disabled detainees,[252] but even this testimony is disputed by Mr. Leaks and Mr. Pigram.[253]

113. Conversely, it is undisputed that, other than possible extra "attention" from medical staff, while detained at the Jail people with disabilities who are particularly vulnerable to COVID-19 receive no additional protection from infection, no greater access to social distancing, no greater access to PPE, and no socially distant way to access food, medical care, or pill call.[254]

114. Chief Fields testified that releasing detainees would neither have any impact on his ability to manage the Jail, nor require a fundamental change in the purpose of the Jail, nor would granting Plaintiffs' motion require the Jail to take any unreasonable steps or actions in terms of the core functions of the Jail.[255]

IX. Plaintiffs, and the Members of the Classes they Represent, Cannot Be Made Safe Now.

115. As Dr. Goldenson explained, "there can be no set of conditions that a jail could impose that would make the medically vulnerable reasonably safe," because "given the nature of confinement . . . there's not enough space to [social distance]" and because

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[252] *Id.* at 90:18–91:3.

[253] Hr'g Tr. 30:16–20 (Jul. 10, 2020), ECF No. 108 ("Q: Mr. Leaks, I'm just wondering if the jail staff have ever asked you if you needed any conditions changed in the pod given your conditions and the COVID-10 outbreak? . . . A: No, ma'am."); *id.* at 84:14–23 ("Q: Mr. Pigram, since the COVID-19 pandemic broke out, have you ever been offered sort of special care by the jail staff to prevent you from contracting the virus, given your condition? . . . A: No special care. I only receive -- right now, I'm only taking folic acid and Tylenol, is the only things they're giving me.").

[254] Fields Dep. Tr. 59:23–60:2; *see* D. Randolph Dep. Tr. 89:6–8 ("I just try to take care of everybody the same and try to keep everybody safe, whether they have a chronic condition or they don't.")

[255] *Id.* at 92:1–16.

"there's really no way, given the fact that staff, including custody staff and medical staff are coming in and out on a daily basis . . . [that] even with the best screening that you can do, there's no way to ensure that someone is not going to bring the virus into the facility."[256]

116. Mr. Brady found that the Jail's response to COVID-19 "is inadequate to protect the vulnerable inmates housed in the Shelby County Jail" because adequate social distancing among detainees is impossible, there is no adequate medical isolation, the Jail's non-testing approach is "ineffective and useless," and the Jail does not cluster the vulnerable detainees in housing units together away from the general population.[257]

117. Dr. Venters similarly concluded that, "because the improvements [he] recommend[ed]" could not "occur fast enough to protect medically vulnerable persons from COVID-19," it was his "opinion that medically vulnerable people housed in the Shelby County Jail should be evaluated for release."[258]

118. Dr. Venters reached this conclusion based on the "lack of . . . either capacity or willingness" to create protections for persons at high risk of serious illness at the Jail,[259] and because the Jail lacks the facilities "to meet the basic needs for quarantine and medical isolation and cohorting of medically vulnerable patients."[260] Accordingly, Dr. Venters concluded that there "are some dynamics in the Jail that cannot be improved, which also

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[256] Hr'g Tr. 78:3–25 (May 27, 2020), ECF No. 36.

[257] Brady Report, ECF No. 80, Pg.ID 1187.

[258] Venters Report ¶ 32.

[259] Hr'g Tr. 129:5–9 (July 10, 2020), ECF No. 108.

[260] Venters Report ¶ 31(a); Hr'g Tr. 130:11–20 (July 10, 2020), ECF No. 108 ("Q: [D]o you think if all these recommendations were adopted, that people at high risk of serious illness if they contract COVID-19 would be sufficiently safe? A: Not with the physical – not with the units I saw, no.")

render medically vulnerable people unsafe."[261] As a result, he found that "medically vulnerable patients are at elevated risk of COVID-19 as long as they are in the [Jail]."[262]

119. Plaintiffs are not safe and they cannot be made sufficiently safe now to prevent irreparable constitutional injury.

PROPOSED CONCLUSIONS OF LAW

X. Plaintiffs Have Satisfied the Requirements for Injunctive Relief.

120. Plaintiffs applied for a temporary restraining order, *see* ECF No. 2, but because Defendants are on notice and the Court allowed time for extensive briefing and conducted several hearings, including a two-day evidentiary hearing and a hearing to question Mr. Brady, the Court should treat Plaintiffs' motion as one for a preliminary injunction rather than for a temporary restraining order. *See Malam v. Adducci*, No. 20-10829, 2020 WL 3512850, at *2 (E.D. Mich. June 28, 2020) (citing *Perez-Perez v. Adducci*, No. 20-10833, 2020 WL 2305276, at *3 (E.D. Mich. May 9, 2020)). Here, the linguistic difference between a temporary restraining order and a preliminary injunction is largely academic as the same factors apply to both. *See Perez-Perez*, 2020 WL 23005276, at *3 (citing *Ohio Republican Party v. Brunner*, 543 F.3d 357, 362 (6th Cir. 2008)).

121. In determining whether to grant a preliminary injunction, courts evaluate four factors: whether (1) the movant has a strong likelihood of success on the merits; (2) the movant would suffer irreparable injury absent an injunction; (3) granting the injunction would cause substantial harm to others; and (4) the public interest would be served by granting the injunction. *Ne. Ohio Coal. for Homeless and Serv. Emps. Int'l Union, Local*

[261] Venters Report, ¶ 31.

[262] Venters Report, ¶ 31(a). Hr'g Tr. 130:11–20 (July 10, 2020), ECF No. 108.

1199 v. Blackwell, 467 F.3d 999, 1009 (6th Cir. 2006). These four factors "are not prerequisites that must be met, but are interrelated considerations that must be balanced together. For example, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movants will suffer absent the stay." *Id.* (internal quotations omitted).

122. Plaintiffs face a high risk of irreparable injury absent an injunction, they are likely to succeed on the merits of their Fourteenth Amendment claims and of their ADA and Rehabilitation Act claims, and the public interest favors granting the relief they seek.

A. Plaintiffs Have Demonstrated a Likelihood of Irreparable Harm Absent an Injunction.

123. Plaintiffs are likely to experience irreparable injury absent an injunction, both in the form of loss of health or life and in the form of an invasion of their constitutional rights. *See Malam*, 2020 WL 3512850, at *3; *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("When constitutional rights are threatened or impaired, irreparable injury is presumed.").

124. In considering the risk of irreparable harm, the Court should consider the current severity of the COVID-19 pandemic and the conditions at the Jail, including the extent to which any failure at the Jail to implement precautionary measures increases the risk to Plaintiffs. *See Malam*, 2020 WL 3512850, at *3.

125. Population reduction is significant only insofar as it allows detainees, including those who are asymptomatic but positive, to remain six feet apart at all times. *See id.* (finding that "[w]hether the Calhoun County Correctional Facility has a detainee population of three or 300, it fails to meet public health standards if those detainees cannot socially distance themselves.").

126. "A jail establishing COVID-19 precautions without ensuring adequate social distancing is the equivalent of 'a NASCAR driver who spurns a seatbelt and helmet because she plans not to crash.'" *Malam*, 2020 WL 3512850, at *8 (quoting *Savino v. Souza*, Case No. 1:20-10617-WGY (D. Mass. June 18, 2020), ECF No. 225).

127. Because Plaintiffs are likely to succeed on the merits of their Fourteenth Amendment claims, "no further showing of irreparable injury is necessary." *Malam*, 2020 WL 3512850, at *9 (citing *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984)).

B. Plaintiffs Have Demonstrated a Likelihood of Success on the Merits.

Unconstitutional Punishment under the Fourteenth Amendment to the U.S. Constitution.

128. The gravamen of Plaintiffs' claim is that there are no conditions of confinement that would permit their safe detention. Accordingly, the Court construes Plaintiffs' lawsuit as challenging whether they can be safe in detention for the duration of the COVID-19 pandemic absent some change in the totality of the circumstances, such as a vaccine, therapeutic, or other unanticipated technological advancement that diminishes the threat of the pandemic. *See Malam*, 2020 WL 3512850, at *10.

129. As pretrial detainees, Plaintiffs are protected by the Due Process Clause of the Fourteenth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

130. Under the Due Process Clause of the Fourteenth Amendment, persons in pretrial custody cannot be punished as part of their detention. *See id.* (holding that "under the Due Process Clause, a detained person may not be punished prior to an adjudication of guilt in accordance with due process of law.").

131. "In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due

process of law . . . the proper inquiry is whether those conditions amount to *punishment of the detainee*." *Id.* (emphasis added).

132. If a restriction or condition "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.* at 539.

133. For a claim of unconstitutional punishment, "a pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate [that is, non-punitive] governmental objective or that it is excessive in relation to that purpose." *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015).

134. Defendants have only two legitimate interests in Plaintiffs' pretrial detention: to prevent a credible risk of flight and to prevent a credible, serious risk to public safety. *See Stack v. Boyle*, 342 U.S. 1, 8 (1951); *United States v. Salerno*, 481 U.S. 739, 745 (1987).

135. Here, the Court must determine whether Plaintiff's continued detention is punitive because the conditions of their confinement are unconstitutionally unsafe. The Sixth Circuit has applied *Bell* to conditions of confinement claims. *See Gay Inmates of Shelby Cty. Jail v. Barksdale*, 819 F.2d 289, 1987 WL 37565, at *2 (6th Cir. June 1, 1987) (holding that ""[t]he conditions of confinement of convicted inmates are evaluated under an eighth amendment standard, but a somewhat different standard applies to pretrial detainees because, 'under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt.'")

136. The test articulated in *Bell* is applicable here. *See Malam*, 2020 WL 3512850, at *18; *see also Kingsley*, 576 U.S. at 398 (finding that "[t]he *Bell* Court applied [an] objective standard to evaluate a variety of . . . conditions, including . . . double bunking. In doing so, it did not consider the . . . officials' subjective beliefs about the policy.").[263]

137. Plaintiffs have rebutted any presumption that the conditions of their continued detention provide reasonable care or safety during the COVID-19 pandemic. *Malam*, 2020 WL 3512850, at *18 (finding that "that Plaintiffs each have a heightened risk of a dire outcome from COVID-19; Plaintiffs face a significant risk of COVID-19 infection while at the Calhoun County Correctional Facility; and Defendants' precautionary measures, even where followed, do not sufficiently mitigate that risk.").

138. Plaintiffs continued detention at the Jail during the COVID-19 pandemic is not rationally related to either interest and it is excessive in relation to both because Plaintiffs are not reasonably safe despite being entitled to "reasonable safety." *Youngberg*, 457 U.S. at 324.[264]

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[263] It would be bizarre if the liability standard for pretrial detention was *lower* for excessive-force allegations than for unconstitutional conditions allegations. A *higher* liability standard is appropriate in force cases than in other conditions cases because of courts' "appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second change," *Whitley v. Albers*, 475 U.S. 312, 320 (1986), and because of prison officials' "competing obligations" to "take into account the very real threats . . . unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used." *Id.* If excessive force is judged using an objective standard, at least as favorable approach to conditions cases follows *a fortiori*. Such an approach is consistent with longstanding law respecting other forms of detention. *See, e.g. Youngberg v. Romeo*, 457 U.S. 307, 321–322 (1982) (finding that individuals involuntarily confined because of their intellectual disabilities "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

[264] Further, both pretrial violence and pretrial flight are rare events. Many systems measure these risks using proxy variables that are more common: re-arrest (which

139. Because Plaintiffs are not reasonably safe at the Jail during the COVID-19 pandemic their continued detention is punitive. *See Malam*, 2020 WL 3512850, at *18 (holding that "the finding the Plaintiffs' current detention constitutes punishment flows logically from the Court's finding that Plaintiffs face irreparable injury absent an injunction.").

140. There are not any conditions of confinement such that Plaintiffs' continued detention would not be excessive in relation to Defendants' interest. *Id.* "Accordingly, any conditions of confinement at the [Jail], as it exists today, are likely to be unconstitutionally punitive." *Id.*

Unconstitutional Confinement in Violation of the Fourteenth Amendment to the U.S. Constitution.

141. The Fourteenth Amendment also protects pretrial detainees from unconstitutional conditions of confinement. That protection is at least as expansive as the protection from cruel and unusual punishment accorded to post-conviction prisoners under the Eighth Amendment. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)

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does not necessarily indicate that a person represents a danger to the community) and failures to appear (which occur for innocuous reasons short of flight). *See, e.g.*, *McNeil v. Comm. Prob. Services, LLC*, 2019 WL 633012 at *14–15 (M.D. Tenn. Feb. 14, 2019), *aff'd*, 945 F.3d 991 (6th Cir. 2019) (evaluating and adopting empirical evidence that in the District of Columbia, where 93 percent of all arrestees are released pretrial without money bond conditions, 98 percent are not arrested for crimes of violence during the pendency of their case); *Schulz v. State*, 330 F.Supp.3d 1344, 1361–63 (N.D. Ala. 2018) (noting "considerable evidence" that court date reminders are effective to reduce failure to appear rates, and that pretrial recidivism and missed court dates can both be managed effectively by unsecured bonds); *see also* Shima Baradaran Baughman, *Predicting Violence*, 90 Tex. L. R. 497, 527 (2012) (evaluating large dataset and noting "even among felony defendants, there is a relatively low level of re-arrest pretrial" with only 1.9 percent of all felony defendants arrested for a violent felony during the pretrial period).

(holding that the Due Process Clause protects pretrial detained persons to at least the same extent as the Eighth Amendment protects convicted persons).

142. Unconstitutional confinement claims are assessed under a "deliberate indifference" framework imported from the analysis regarding cruel and unusual punishment under the Eighth Amendment. *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (holding that a "prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment.").

143. The Eighth Amendment's deliberate indifference analysis, which only applies to post-conviction prisoners and is inapplicable here, involves an objective and subjective prong. *See Wilson v. Williams*, 961 F.3d 829, 840 (6th Cir. 2020). "To satisfy the objective prong, an individual must show 'that he is incarcerated under conditions posing a substantial risk of serious harm.' Under the subjective prong, an official must "know[ ] of and disregard[ ] an excessive risk to inmate health or safety.'" *Id.* at 840 (omitting citations) (quoting *Farmer*, 511 U.S. at 834, 837).

144. It remains an open question in the Sixth Circuit whether the culpable-state-of-mind rules applied to post-conviction prisoners apply to pretrial detainees. *See Cameron v. Bouchard*, No. 20-1469, 2020 WL 3867393, at *5 (6th Cir. July 9, 2020) (finding that "[s]ince *Kingsley*, the circuits have split on whether deliberate indifference claims arising under the Fourteenth Amendment are still governed by *Farmer* (requiring an objective inquiry for an officer's state of mind) or instead are governed by *Kingsley* (requiring an objective inquiry for an officer's state of mind). We have not ruled on the issue. We need not resolve the issue today") (omitting citations).

145. Although it remains an open question in the Sixth Circuit, *Kingsley* "calls into serious doubt whether [Plaintiffs] need even show that show that the individual defendant-officials were subjectively aware of [the risk to their safety]." *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018).

146. Here, because there is no requirement that a pretrial detainee demonstrate the wanton infliction of pain to establish a constitutional violation, Plaintiffs "can prevail by providing only objective evidence[.]" *Kingsley*, 576 U.S. at 398.

147. Even if Plaintiffs are required to prove the subjective prong of the deliberate indifference analysis, despite the fact that they are pretrial detainees and may not be punished at all under the Fourteenth Amendment, the evidence shows that Defendants knew that Plaintiffs "face a substantial risk of serious harm," but Defendants "disregard[ed] that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847.

148. The facts before the Sixth Circuit in *Cameron* and *Wilson* were different. In *Cameron*, the Sixth Circuit found that the Oakland County Jail in Michigan took numerous steps to prevent the spread of COVID-19, including "quarantining any inmate experiencing symptoms of COVID-19 and any inmate who had contact with a symptomatic inmate; checking inmates who were in symptomatic quarantine three times a day with a full set of vitals including a temperature check; placing inmates that tested positive in the positive COVID-19 cells . . . using prepackaged meals for food service . . . promoting social distancing by reducing cell numbers depending upon inmate classification; and providing access to COVID-19 testing to the entire inmate population." *Cameron*, 2020 WL 3867393, at *5.

149. In *Wilson*, the court found that the federal Bureau of Prisons had implemented a six-phase plan to mitigate the risk of COVID-19 spreading at the Elkton Prison and that it had quarantined, isolated, and tested effectively and in accordance with CDC guidance. *Wilson*, 961 F.3d at 841. Importantly, however, in *Wilson* the district court did not hold an evidentiary hearing prior to granting a preliminary injunction and it did not attempt to resolve factual discrepancies in the declarations provided by the parties. *Id.* at 843 n.4.

150. The deficiencies at the Jail are more serious, more glaring, and more dangerous, and they establish that Defendants "acted with reckless disregard to the significant risk of serious harm" to Plaintiffs. *See Pimentel-Estrada v. Barr*, No. C20-495, 2020 WL 209430, at *16 (W.D. Wash. Apr. 28, 2020) (finding ICE acted with reckless disregard to the significant risk of serious harm to detainee from COVID-19).

Discrimination on the basis of disability in violation of Title II of the ADA, 42 U.S.C. § 12131, and Section 504 of the Rehabilitation Act. 29 U.S.C. § 794.

151. Independent of the merits of their constitutional claims, Plaintiffs are likely to obtain the relief they seek on the merits of their statutory claims. Defendants' violations of the ADA are clearly cognizable under 28 U.S.C. § 2241, which extends the writ of habeas corpus to an individual "in custody in violation of the Constitution *or laws* or treaties of the United States." 28 U.S.C. § 2241 (emphasis added); see also *Bogovich v. Sandoval*, 189 F.3d 999, 1004 (9th Cir. 1999) (holding that, "[i]f an ADA claim challenges the validity or duration of confinement, the prisoner's sole federal remedy is the writ of habeas corpus.").

152. To establish a case of discrimination under Title II of the ADA or the Rehabilitation Act, a plaintiff must show "that he (1) is disabled under the statutes, (2) is

'otherwise qualified' for participation in [a state or local government] program, and (3) 'is being excluded from participation in, denied the benefits of, or subjected to discrimination' because of his disability or handicap, and (4) (for the Rehabilitation Act) that the program receives federal financial assistance." *Hollis v. Howard*, No. 16-5115, 2016 WL 9804159, at *2 (6th Cir. Dec. 21, 2016) (quoting *Gohl v. Livonia Pub. Sch. Dist*., 836 F.3d 672, 682 (6th Cir. 2016)).

153. Plaintiffs and members of the Subclass are individuals with disabilities for purposes of the ADA and the Rehabilitation Act. *See* 42 U.S.C. § 12102. They are "qualified" for the programs, services, and activities that Plaintiffs challenge. 42 U.S.C. § 12131(2).

154. The Jail is a "public entity," and it is covered by Title II of the ADA. *See* 42 U.S.C. §§ 12131(1), 12132. The Jail receives federal financial assistance, and it is covered by the Rehabilitation Act. *See* 29 U.S.C. § 794(a).

155. Title II of the ADA requires that public entities refrain from discriminating against qualified individuals on the basis of disability. *See* 42 U.S.C. § 12132.

156. The regulations implementing Title II of the ADA and implementing the Rehabilitation Act require that public entities avoid policies, practices, criteria, or methods of administration that have the effect of excluding or discriminating against persons with disabilities in the entity's programs, services, or activities. *See* 28 C.F.R. § 35.130(a), (b)(3), (b)(8). The regulations implementing Section 504 of the Rehabilitation Act impose the same requirements. *See* 34 C.F.R. § 104.4(b); 28 C.F.R. § 41.51(b)(3)(i).

157. Further, a public entity must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on

the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

158. "Title II imposes affirmative obligations on public entities and does not merely require them to refrain from intentionally discriminating against the disabled." *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004); 28 C.F.R. §§ 35-102(a), 35.130(a)-(b); *Pierce v. D.C.*, 128 F. Supp. 3d 250, 269 (D.D.C. 2015) (holding that "nothing in the disability discrimination statutes even remotely suggests that covered entities have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned.").

159. "[A]dequate social distancing necessary to combat COVID-19 is a service provided to incarcerated individuals" within the meaning of the ADA and the Rehabilitation Act. *See Denbow v. Maine Dept. of Corrections*, No. 1:20-cv-00175, 2020 WL 3052220, at *22 (D. Me., June 8, 2020).

160. If, by reason of a disability, a medically vulnerable detainee needs more social distancing than others, it is uncontested that providing some measure of such social distance would be a reasonable accommodation within the meaning of the ADA. *See id.*

161. Other programs, services, and activities to which disabled detainees are entitled to equal access and equal benefit within the Jail include: meals, pill call, medical and mental health care, adjudication of their criminal cases, and safe housing. See 28 C.F.R. App. B, Part 35, "[T]itle II applies to anything a public entity does;" *Fraihat v. U.S. Immigration and Customs Enf't*, No. EDCV 19-1546 JGB, 2020 WL 1932570, at *26 (C.D.

Cal. Apr. 20, 2020) (in ICE detention, "[t]he programmatic 'benefit' in this context . . . is best understood as participation in the removal process.")

162. The Jail's passive and ill-defined approach to providing reasonable accommodations or modifications to disabled detainees fails to meet its affirmative obligations to provide equal access and equal benefits to the Jail's services, programs, and activities. Jail officials offered contradictory statements about how—and whether—people with disabilities are being accommodated in the Jail. Chief Fields has never seen an accommodation request form from a detainee, believes that Wellpath is responding to accommodations, and believes that he has "delegated" ADA compliance to Wellpath.[265] Wellpath's medical director testified that she is not aware that Wellpath—or anyone else—is responsible for ADA compliance.[266]

163. In any event, the Jail cannot avoid its obligations under the ADA or Section 504 of the Rehabilitation Act "through contractual, licensing, or other arrangements" with third parties. 28 C.F.R. § 35.130(b)(1).

164. The Jail has failed to meet its affirmative obligations to: provide reasonable modifications; afford disabled detainees equal benefit to its services, programs, and activities; and, avoid policies, practices, criteria or methods of administration that have the effect of excluding or discriminating against people with disabilities.

165. As a result of these failures, continued detention of Subclass members during the COVID-19 pandemic violates their ADA and Rehabilitation Act rights.

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[265] Hr'g Tr. 85:20–24, 88:24–89:1; 87:9–19 (July 13, 2020).

[266] D. Randolph Dep. Tr. 124:13–15.

166. Because "Plaintiffs have demonstrated that the Jail has failed to make reasonable accommodations to allow members of the Disabled Class to participate safely in the programs of the Jail, Plaintiffs have demonstrated a likelihood of success on their disability claim." *Ahlman v. Barnes*, No. SACV 20-835, 2020 WL 2754938, at *12 (C.D. Cal. May 26, 2020).

C. The Balance of the Equities Favors Plaintiffs.

167. When the government opposes the issuance of preliminary injunctive relief, as Defendants do here, the final two factors—the balance of equities and the public interest—merge, because "the government's interest is the public interest." *Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

168. "The public has an interest in preserving Plaintiffs' constitutional rights and in protecting public health." *Malam*, 2020 WL 3512850, at *19 (citing *G&V Lounge Inc. v. Mich. Liquor Control Comm.*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

169. The Court must balance these interests against the public's interest in preventing a credible risk of flight and a credible, serious risk to public safety, neither of which require continued detention. *See Stack v. Boyle*, 342 U.S. 1, 8 (1951); *United States v. Salerno*, 481 U.S. 739, 745 (1987).

170. The balance of equities weighs in Plaintiffs favor. Plaintiffs have tailored the relief sought in their motion to comport with the various factors that must be accounted for to promote the public interest. The relief Plaintiffs' seek conditions their release on (a) their ability to quarantine safely,[267] (b) the absence of clear and convincing proof that they

[267] Mr. Busby could safely quarantine at his brother's house in Memphis. He would have access to his own room. *See* First Spickler Decl., ECF No. 2-7, ¶ 8. Mr. Nelson

present a risk of flight or danger that both (i) outweighs the risk of severe illness or death presented by their confinement in the Jail and (ii) cannot be reasonably managed by less restrictive conditions of pretrial release, such that continued detention of the individual is reasonable under those circumstances; and (c) the absence of a specific plan by Defendants to mitigate the risk Plaintiffs face from continued detention subject to confirmation from an Independent Medical Professional that, in light of that plan, Defendants can assure Plaintiffs' reasonable safety.

XI. The Remedy Plaintiffs Seek is Within the Court's Habeas Jurisdiction.

171. The only adequate remedy at this time is to order Plaintiffs released from detention on appropriate conditions. *See Pimentel-Estrada*, 2020 WL 2092430, at *19 (finding that, "although there may be, as a theoretical matter, conditions under which Petitioner could be detained that would not violate his constitutional rights, the record in this case provides no reason for the Court to believe Respondents could realistically create such conditions on an appropriate timeline.")

172. It is well within the Court's habeas jurisdiction to grant release, broadly defined, subject to conditions. Indeed, it is the typical relief granted in federal habeas corpus. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 858 (2018) (Thomas, J., concurring) (A writ of habeas corpus may be "styled in the form of a conditional or unconditional release order."). *See also Herrera v. Collins*, 506 U.S. 390, 403 (1993) ("The typical relief granted in federal habeas corpus is a conditional order of release . . . ."); *Chin Yow v. United*

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could safely quarantine with Venessa Retic, his fiancée. He would have access to his own room. *See* Dozier Decl., ECF No. 51, ¶ 5. Mr. Leaks could safely quarantine at the house belonging to his mother and sister. He would have his own room. *See* Third Spickler Decl., ECF No. 52, ¶ 5.

States, 208 U.S. 8, 13 (1908) (awarding habeas relief by ordering the release of non-citizen if certain conditions were not satisfied).

CONCLUSION

The Court should grant Plaintiffs' Motion.

Dated: July 15, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrea Woods, certify that on July 15, 2020, I caused a true and correct copy of the foregoing document to be filed and served electronically via the Court's ECF system. Notice of this filing will be sent by e-mail to all parties of record by operation of the Court's ECF system.

Respectfully submitted,

/s/ Andrea Woods