IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY MAYS, Individually and on behalf of a class of similarly situated persons; and JUDIA JACKSON, as next friend of KENNETH FOSTER, Individually and on behalf of a class of similarly situated persons,	)	
Plaintiffs-Petitioners,	)	Case No. 20-cv-2134
v.	)	
THOMAS DART, Sheriff of Cook County,	)	
Defendant-Respondent.	)	

PLAINTIFFS' MOTION FOR LEAVE TO FILE OVERSIZED BRIEF
IN RESPONSE TO THE COURT'S APRIL 3, 2020 ORDER

Plaintiff-Petitioner Anthony Mays and Plaintiff-Petitioner Judia Jackson, as the next friend of Kenneth Foster, on behalf of themselves and the classes they seek to represent, hereby respectfully ask this Court for leave to file an oversized brief of 26 pages in response to the Court's April 3, 2020 Order. In support of their request, Plaintiffs state as follows:

1. Plaintiffs have filed a class action lawsuit seeking injunctive relief for protection against the imminent risk of harm or death from COVID-19 at the Cook County Jail. Plaintiffs also have filed an Emergency Motion for a Temporary Restraining Order or Preliminary Injunction.

2. After Plaintiffs filed their Complaint and emergency motion, the Court entered an Order asking Plaintiffs to "provide their position regarding the applicability and effect of 18 U.S.C. § 3626 to their lawsuit and, in particular, to the relief they are requesting in the TRO/PI motion." Dkt. 10. That brief is due today at 12 noon and is attached to this motion. *Id.*

3. In order to provide the Court with a detailed discussion of the applicability of Section 3626 that Plaintiffs believe is appropriate, Plaintiffs require approximately 10 pages more than the default limit set out in Local Rule 7.1.

4. Accordingly, Plaintiffs respectfully request that this Court grant them leave to file an oversized brief of 26 pages to respond fully to the Court's April 3, 2020 Order. Granting Plaintiffs leave in this case is appropriate given the importance of the issues at stake in the litigation, as well as the arguments Plaintiffs anticipate the Defendant will raise in response.

5. Plaintiffs will have no objection to any corresponding request by the Defendant for leave to file an oversized brief in response later today.

WHEREFORE, Plaintiffs respectfully request that this Court grant their motion and give them leave to file a 26-page response to the Court's April 3, 2020 Order regarding the applicability of 18 U.S.C. § 3626 to their claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah Grady, an attorney, hereby certify that on April 6, 2020, I caused a copy of the foregoing to be filed using the Court's CM/ECF system, which effected service on all counsel of record.

/s/ Sarah Grady
Sarah Grady
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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PLAINTIFFS' RESPONSE TO THE COURT'S APRIL 3, 2020 ORDER

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INTRODUCTION

The Cook County Jail is now the site of the largest known cluster of COVID-19 cases in the United States.[1] Since the filing of the case, two days ago, the number of detainees infected with the disease has grown from 167 to at least 234; 78 staff are infected; 14 detainees are hospitalized.[2] These numbers rise every day, and the rate of infection in the Jail is now 32 times the rate in Cook County writ large. In the two weeks since it was first detected, 1 out of every 20 detainees at the Jail has become infected.[3] It is unclear how many have been tested or how many tests are outstanding.

Plaintiffs have filed a Complaint seeking an emergency writ of habeas corpus for detainees who are especially vulnerable to a grave risk of serious illness and death because of their age or medical condition. They also seek injunctive relief under 42 U.S.C. § 1983 to bring the conditions at the Jail into compliance with the Constitution, and to transfer those detainees at the Jail who have been exposed to the virus to a form of custody that is safe. In their motion for a temporary restraining order or preliminary injunction, Plaintiffs request three categories of relief: (1) for Subclass A, they seek immediate release through a writ of habeas corpus; (2) for Subclass B, they seek transfer to a safe environment; and (3) for the entire Class, they seek an Order requiring the Jail to adhere to CDC guidelines and take other actions required by medical

[1] "Coronavirus in the U.S.: Latest Map and Case Count," N.Y. Times (last updated Apr. 5, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html ("Though many of the first coronavirus cases in the United States were tied to overseas travel, localized outbreaks have become increasingly common." Cook County Jail is the top locale for this type of outbreak).

[2] COVID-19 Cases at CCDOC (last updated Apr. 5, 2020), https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/.

[3] *See infra* pg. 12.

consensus to bring the conditions of confinement at the Jail into constitutional compliance. Dkt. 2 at 11.

Plaintiffs submit this brief in response to the Court's request to "provide their position regarding the applicability and effect of 18 U.S.C. § 3626 to their lawsuit and, in particular, to the relief they are requesting in the TRO/PI motion." Dkt. 10. In summary: (1) Plaintiffs' first request, for habeas relief, is not governed by 18 U.S.C. § 3626. *Moran v. Sondalle*, 218 F.3d 647, 651 (7th Cir. 2000) (per curiam). (2) Plaintiffs' claims for emergency injunctive relief under Section 1983 comply with 18 U.S.C. § 3626 because they seek narrowly drawn injunctive relief that extends no further than what is required to ensure class members are held in constitutionally compliant conditions. (3) Neither of the requests for injunctive relief under Section 1983 constitutes a prisoner release order, 18 U.S.C. § 3626(a)(3), and thus the requirements of Section 3626(a)(3) do not apply to Plaintiffs' current requests. (4) Given the imminent threat that an uncontrolled outbreak at the Jail imposes on class members and to the general public, however, Plaintiffs believe that a three-judge panel should be convened in the event that immediate compliance with the Constitution is not achieved. The unprecedented global pandemic—an infectious disease spreading inside the Cook County Jail at a rate fifty times that of the general U.S. population—requires unique and prompt action by this Court to ensure that this Court is in a position to save as many lives as possible.

DISCUSSION

I. The Relevant Provisions of 18 U.S.C. § 3626.

The Prison Litigation Reform Act (PLRA) applies to "any civil action with respect to prison conditions," 18 U.S.C. § 3626, but not to petitions for habeas corpus. *Moran*, 218 F.3d at 651. Requests for relief under Section 3626 are governed by Subsection (a) of that statute, which

contains three core provisions: Subsection (1) governs all prospective relief, Subsection (2) governs preliminary injunctions and temporary restraining orders, and Subsection (3) governs "prisoner release order[s]."

Subsection (1) requires that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs," 18 U.S.C. § 3626(a)(1)(A), and instructs courts to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief" when considering whether "such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.* Further, the statute requires that courts not order a state official to exceed their authority under state law unless doing so is required by federal law to protect a federal right and no other relief will do. *Id.* § 3626(a)(1)(B). Courts refer to these requirements as the "needs-narrowness-intrusiveness" criteria. *E.g., Fields v. Smith*, 653 F.3d 550, 558 (7th Cir. 2011).

Subsection (2) applies the narrow-tailoring requirements of Subsection (1) to requests for preliminary injunctive relief, and further requires that all such relief "automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) [that the relief be narrowly tailored and minimally intrusive] . . . and makes the order final before the expiration of the 90-day period." 18 U.S.C. § 3626(a)(2).

Finally, Subsection (3) governs "prisoner release order[s]." *Id.* § 3626(a)(3). A "prisoner release order" is defined as "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." *Id.* § 3626(g)(4).

Subsection (3) imposes substantive and procedural requirements on prisoner-release orders. Procedurally, a prisoner-release order may issue only by order of a three-judge district court, and only after "a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order[,] and the defendant has had a reasonable amount of time to comply with the previous court orders." *Id.* at (3)(A) (numerals omitted). Substantively, "[t]he three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that crowding is the primary cause of the violation of a Federal right[] and no other relief will remedy the violation of the Federal right." *Id.* at (3)(E).

II. The PLRA Does Not Apply to Subclass A's Request for a Writ of Habeas Corpus.

The PLRA does not apply to habeas corpus actions. *Walker v. O'Brien*, 216 F.3d 626, 634 (7th Cir. 2000) ("[W]e conclude that cases properly brought under §§ 2241 or 2254 as habeas corpus petitions are not subject to the PLRA. In so doing, we bring this circuit into line with all of our sister circuits who have ruled on the matter." (citing *Davis v. Fechtel*, 150 F.3d 486, 488–90 (5th Cir.1998); *McIntosh v. United States Parole Commission*, 115 F.3d 809, 811–12 (10th Cir.1997); *Blair–Bey v. Quick*, 151 F.3d 1036, 1039–41 (D.C.Cir.1998)); *see also, Greyer v. Illinois Dep't of Corr.*, 933 F.3d 871, 878 (7th Cir. 2019) (observing that "habeas corpus petitions do not give rise to a strike under the PLRA."). Recent district court orders granting petitions for habeas corpus relief in light of COVID-19 have not applied the PLRA to those actions. *See, e.g.*, *Basank v. Decker*, ___ F. Supp. 3d ____, 2020 WL 1481503, at *7 (S.D.N.Y. Mar. 26, 2020) (granting petitioner's Section 2241 request for a TRO, releasing them

from immigration detention because of COVID-19); *Thakker v. Doll*, No. 20 C 0480, Dkt. 47 (M.D. Pa. Mar. 31, 2020) (attached as Ex. G) (same).[4]

III. Plaintiffs' Request for a Preliminary Injunction to Remedy Unconstitutional Conditions of Confinement at the Jail Satisfy Section 3626(a)(2) and Are Necessary, Although Potentially Insufficient, To Protect the Class.

A. Plaintiff's Proposed Injunctive Relief Regarding Conditions at the Jail Satisfies Section 3626(a)(2).

The relief Plaintiffs seek on behalf of the entire Class is, simply, constitutionally compliant Jail conditions so that everyone in the Class is protected from the rampant transmission of a virulent and lethal disease. As set forth in Plaintiffs' motion for a temporary restraining order or preliminary injunction, the Sheriff must comply with the CDC Guidance for Managing Detention and Correctional Facilities, including specific requirements for quarantine, medical isolation, access to trained medical staff to monitor and provide adequate care, sufficient soap, sanitizer and cleaning supplies, and—importantly—effective social distancing to the maximum possible extent for all staff and detainees. Pls.' Prelim. Inj. Mot., Dkt. 2, at 15-16. These mandates also echo the expert recommendations of the medical declarants who have extensive experience with Cook County and Illinois correctional medical care, including former medical directors of the Cook County Jail. *See* Complaint, Ex. B, Dkt. 1-2.

In particular, in their motion for a temporary restraining order or preliminary injunction, Plaintiffs seek an Order from this Court requiring the Jail to immediately take the following actions:

[4] There are, of course, questions as to what process would be appropriate to enable the Court to evaluate the claims of the members of Subclass A for a temporary restraining order granting habeas relief. Should the court desire briefing on those questions, Plaintiff is prepared to submit a memorandum on an expedited schedule.

- Acquire rapid testing for COVID-19 in adequate supply to ensure that all who enter the facility with the coronavirus can be quickly identified and medically isolated;

- Quarantine all new detainees until test results become available or, if testing cannot be done, for 14 days, unless they become symptomatic;

- Medically isolate all detainees who are positive for COVID-19 in a controlled, monitored environment in which they are not at risk for infecting others;

- Quarantine all detainees who are symptomatic and/or have been exposed to a confirmed case of COVID-19 in a controlled, monitored environment for the appropriate time period where they are not at risk for infecting others;

- Provide adequate medical staff to monitor all detainees within the Jail who are in medical isolation or under quarantine;

- Provide sufficient soap and hand sanitizer to all detainees so that detainees may frequently wash their hands;

- Provide masks to all detainees;

- Provide instruction to all staff and to all detainees regarding the importance of regularly sanitizing all surfaces and objects on which the virus could be present;

- Provide the soap and cleaning materials to enable this sanitizing, and supervise to ensure that sanitizing takes place between all uses of such surfaces and objects; and

- Mandate social distancing of detainees such that each is not at risk of exposure.

Dkt. 2 at 17-18. These steps are necessary to protect detainees at the Jail from further uncontrolled spread of COVID-19. They accordingly satisfy the criteria of section 3626(a)(2).

Section 3626(a)(2) permits a court to order injunctive relief if it finds that the relief, taken as a whole, is narrowly drawn, extends no further than necessary to correct the constitutional violation, and is the least intrusive means necessary to correct the constitutional violation. 18 U.S.C. § 3626(a); *see also Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1070 (9th Cir. 2010) (rejecting argument that PLRA requires provision-by-provision explanation of district court's findings; court must make findings considering its "order as a whole"); *see also Fields*, 653 F.3d at 558 (finding that district court properly complied with PLRA because court "evaluated the record *as a whole* and identified evidence that fully support[ed] the scope of the injunctive relief" (emphasis added)). The application of this requirement is case-specific, and "must be undertaken in light of both the magnitude of existing constitutional violations and the available alternative remedies." *Morales Feliciano v. Rullan*, 378 F.3d 42, 54 (1st Cir. 2004).

In *Brown v. Plata*, 563 U.S. 493 (2011), the Supreme Court explained that the narrow tailoring required by Section 3626(a) simply mandates "a fit between the [remedy's] ends and the means chosen to accomplish those ends." *Id.* at 531 (internal quotation marks omitted). Although the injunctive relief must not "reach out to improve prison conditions other than those that violate the Constitution[,]" narrow tailoring does not "suggest that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects." *Id.* Where the constitutional violation at issue is systemwide, systemwide relief is the appropriate, tailored remedy. *See, e.g., Benjamin v. Fraser*, 156 F. Supp. 2d 333, 345-55 (S.D.N.Y. 2001) (finding that systemwide injunctive relief satisfied the criteria of Section 3626(a) in class action litigation over the conditions of confinement for jail detainees), *aff'd, in part, at* 343 F.3d 35, 53-54 (2nd Cir. 2003), *overruled on other grounds in Caiozzo v. Koreman*,

581 F.3d 63 (2d. Cir. 2009); *Braggs v. Dunn*, 383 F. Supp. 3d 1218, 1265-1278 (M.D. Ala. May 4, 2019) (same). Indeed as the Second Circuit explained in *Benjamin*, affirming a district court's systemwide injunction order pertaining to prison ventilation, a systemwide injunctive order was in fact "more effective and less intrusive than an individual review of each window at the various facilities." 343 F.3d at 53.

As set forth in the Complaint, the current conditions at the Jail pose a substantial and imminent risk of serious harm to detainees housed there. *See Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019). The Complaint sets out evidence that, throughout the Jail, shared communal areas continue to be in use. That includes intake "bull pens" and dormitories for incoming detainees, and the housing of detainees in dormitories and other congregate settings in the Jail. *See* Dkt. 1 ¶ 40. The Complaint also explains that guards have not consistently worn personal protective equipment (PPE), and that detainees have been given none. *Id.* ¶ 41. The Complaint details that detainees have had inconsistent or limited access to soap and hand sanitizer, *id.*, and that detainees do not have access to clearing supplies. *Id.* And it sets out that detainees and staff throughout the Jail touch and share objects throughout the day—from door handles to phones to toilets to tables to lunch trays—that are not cleaned frequently enough to stop the spread of a virus that can live on such surfaces for days. *Id.* ¶¶ 11, 21, 35, 48.

The requested remedial measures are immediately needed to protect the health and safety of detainees at the Jail, and they are designed to address these failures. The injunctive relief sought by Plaintiffs is supported by the CDC's guidance on managing COVID-19 in jails, as well as evidence from doctors with experience with the Cook County correctional medical system, including Dr. Puisis, who was the Medical Director of the Cook County Jail from 1991 to 1996

and Chief Operating Officer for the medical program at the Cook County Jail from 2009 to 2012. Dkt. 1-2; *see also Benjamin*, 156 F. Supp. 2d at 345-55 (relying on expert testimony in finding that systemwide injunctive relief satisfied the needs-narrowness-intrusiveness criteria); *Braggs v. Dunn*, 383 F. Supp. 3d 1218, 1265-1278 (M.D. Ala. May 4, 2019) (same).

The requested relief protects not only the class members, but the safety of the public at large, a consideration encompassed within both subsections (a)(1)(A) and (a)(2) ("The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system . . . ."). The Jail is not a closed environment. The measures put in place to protect the Plaintiffs and class members will simultaneously impact the health and well-being of the community at large. The Complaint explains:

> By necessity, members of the free community, including correctional officers, social workers, attorneys, medical personnel, and many others must enter and leave jails on a daily basis. Staff arrive and leave each facility three times a day in large numbers, and there is no current, in-place ability to adequately screen staff for new, asymptomatic infection. In addition, new detainees are admitted into jails every day, many of whom may be asymptomatic and thus not flagged for quarantine, even with robust intake screening procedures. When the COVID-19 virus occurs and spreads within a jail, all persons, staff and prisoners alike, are at heightened risk of contracting the virus and, in turn, spreading the virus to others with whom they come in contact in their own homes and neighborhoods.

Complaint, Dkt. 1, at ¶ 25.

As the Governor's March 20, 2020 Executive Order makes clear, public safety is served by the emergency relief requested.[5] The implementation of the CDC Guidance measures and

[5] Executive Order in Response to COVID-19 (COVID Executive Order No. 8) (Mar. 20, 2020) (Executive Order), pg. 1-5, *available at* https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf (last visited Apr. 6, 2020); *see also* "Read Pritzker's Full Statement Announcing Illinois Stay-at-Home Order Extension," NBC5 (Mar. 31, 2020), https://www.nbcchicago.com/news/local/read-pritzkers-full-statement-announcing-illinois-stay-at-home-order-extension/2247976/ (last visited Apr. 4, 2020).

medical experts' recommendations will prevent prisoners from spreading COVID-19 to one another, then transmitting it to correctional staff, who may spread it to their families and their communities. *Cf. United States v. Alabama*, 2015 WL 3796526, at *4 (M.D. Ala. June 18, 2015) (approving a settlement that "will promote public safety by not only protecting the prisoners at Tutwiler [Prison for Women] from sexual abuse and harassment, it will also protect the prison guards"); *Duvall v. O'Malley*, 2016 WL 3523682, *11 (D. Md., June 28, 2016) (approving a consent judgment addressing medical and mental health care and living conditions, and holding that "the facilities will be safer and more orderly when this relief is fully implemented").

The evidence provided by Plaintiffs in their Complaint and motion for a temporary restraining order amply supports the findings required by Section 3626(a)(2): Experts and government agencies alike describe the measures for which Plaintiffs seek an injunction as necessary to protect against the spread of a deadly virus.

B. Plaintiffs' Proposed Injunctive Relief May Not Be Sufficient.

If the Court issues injunctive relief under Section 3626(a)(2), Plaintiffs respectfully submit that within 24 hours thereafter the Court should decide—either *sua sponte* pursuant to Section 3626(a)(3)(D), or pursuant to a submission by Plaintiffs under Section 3626(a)(3)(C)—whether to request the convening of a three-judge court to determine whether a prisoner release order should be issued. A timeline this short is extraordinary. But it is called for by the extraordinary circumstances unlike any living person has ever seen, in which a deadly virus has shut down life as we know it around the world and in which crowded U.S. jails and prisons are,

without intervention, about to become sites of mass sickness and death.[6] Section 3626 contemplates precisely such a remedy in circumstances like this.

Section (a)(3) provides that a three-judge panel may consider the appropriateness of a prisoner-release order if, *one*, the Court has entered an order under Section (a)(2) "to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order," and *two*, the Sheriff "has had a reasonable time to comply" with the Section (a)(2) order. 18 U.S.C. §§ 3626(a)(3)(A)(i)-(ii). Plaintiffs seek relief under Section (a)(2) to protect them, and the class they seek to represent, from being incarcerated in a jail where the conditions of confinement have incubated and accelerated the transmission of a fast-moving, lethal virus that threatens to make them seriously ill, damage their internal organs (possibly permanently), or kill them, in a matter of days. Being imprisoned in such circumstances violates Plaintiffs' rights, as set forth in Plaintiffs' motion for a temporary restraining order or preliminary injunction. Dkt. 2 at 13-14.

In public statements the Sheriff's office has repeatedly assured members of the public that it has taken extraordinary steps to protect the jail population from the pandemic. The Sheriff contends that he has made available increased cleaning supplies and personal protective

[6] For example, five prisoners have already died in a federal prison in Oakdale, Louisiana. Joseph Neff & Keri Blakinger, "Federal Prisons Agency 'Put Staff in Harm's Way' of Coronavirus, The Marshall Project (Apr. 3, 2020), *available at* https://bit.ly/2xVAeaE (last visited Apr. 6, 2020). And the Alabama Department of Corrections predicts that its death count will number 185. Connor Sheets, "Alabama prison system's COVID-19 plan anticipates widespread infection, deaths, National Guard intervention, AL.com (Apr. 5, 2020), *available at* https://www.al.com/news/2020/04/alabama-prison-systems-covid-19-plan-anticipates-widespread-infection-deaths-national-guard-intervention.html (last visited Apr. 6, 2020). The top doctor at Rikers Jail in New York days ago called the COVID-19 outbreak a "public health disaster." Miranda Bryant, "Coronavirus Spread at Rikers is a 'Public Health Disaster,' Says Jail's Top Doctor," The Guardian (Apr. 1, 2020), *available at* https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster (last visited Apr. 6, 2020); *see also* Jean Casella and Katie Rose Quandt, "U.S. Jails Will Become Death Traps in Coronavirus Pandemic," The Guardian (Mar. 30, 2020), *available at* https://www.theguardian.com/commentisfree/2020/mar/30/jails-coronavirus-us-rikers-island (last visited Apr. 6, 2020).

equipment,[7] that he has implemented aggressive testing protocols to ensure that sick individuals are quarantined,[8] and that he has re-opened an unused portion of the jail to accommodate those quarantined and sick detainees.[9] Indeed, the Sheriff's office has emphasized that it was well-prepared for COVID-19, and that the steps that the Sheriff has taken have been designed to carefully to protect the jail's population and employees.[10]

When put in its proper context—234 known cases of COVID-19 among Jail detainees within the span of two weeks—the Sheriff's assurance that all possible steps to combat the virus have already been taken brings Plaintiffs, and should bring this Court, little comfort. Even if the Sheriff's media statements are accurate, the official Cook County Department of Corrections (CCDOC) measures are woefully insufficient. Cook County is the host county for the Jail and virtually all its detainees and all of its employees hail from the County. As of this filing, there are 8,054 positive tests for COVID-19 in Cook County, with a total population of 5,150,233, a

[7] Tia Ewing, "Inmates concerned as COVID-19 spreads through Cook County Jail," Fox 32 (Apr. 3, 2020), *available at* https://www.fox32chicago.com/news/inmates-concerned-as-covid-19-spreads-through-cook-county-jail (last visited Apr. 6, 2020).

[8] Sean Lewis, "Sheriff Dart working to contain COVID-19 spread in Cook County Jail, WGN (Mar. 31, 2020), *available at* https://www.fox32chicago.com/news/inmates-concerned-as-covid-19-spreads-through-cook-county-jail (last visited Apr. 6, 2020).

[9] Cook County Sheriff's Office, "Sheriff Dart Institutes Comprehensive Precautionary Measures to Address COVID-19 Threat," (Mar. 20, 2020), https://www.cookcountysheriff.org/sheriff-dart-institutes-comprehensive-precautionary-measures-to-address-covid-19-threat/.

[10] Omar Jimenez, "America's largest single site jail is home to a new coronavirus cluster," CNN (Mar. 29, 2020), *available at* https://www.cnn.com/2020/03/29/us/detroit-coronavirus-cook-county-jail/index.html (last visited Apr. 6, 2020); Bill Hutchinson, "One of the largest single-site jails in the US grapples with 141 coronavirus cases," ABC News (Mar. 31, 2020), *available at* https://abcnews.go.com/Health/largest-single-site-jails-us-grapples-141-coronavirus/story?id=69871778 (last visited Apr. 6, 2020).

known infection rate of 1.56 per 1,000 people.[11] In the Jail, by contrast, there are 234 confirmed infections out of 4,661 detainees and employees—a known infection rate of 50.2 per 1,000 people. That is 32 times the rate in Cook County.[12] The first detainee tested positive for COVID-19 two weeks ago; now 1 in 20 detainees at the Jail are infected. Seventy-eight staff members are infected as well.[13] The Jail, in other words, is a dramatic accelerator of COVID-19, the Sheriff's efforts notwithstanding. As of today, the Jail is the largest known cluster of COVID-19 infections in the United States.[14]

There are three probable reasons for this, all of which are detailed in the Complaint. *First*, the reports from jail detainees and employees indicate that many of the Sheriff's aggressive protocols for cleaning, distribution of soap, and provision of PPE have not been implemented. The Sheriff's office has had a month to change its hygiene protocols to combat

[11] County infection figures: State of Illinois, Coronavirus (COVID-19) Response, https://coronavirus.illinois.gov/s/ (last visited Apr. 6, 2020). County population: U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/cookcountyillinois/PST120218 (last visited Apr. 6, 2020).

[12] *Compare* Cook County Jail infection figures: Cook County Sheriff, https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/ (last visited Apr. 6, 2020), *with* Cook County Jail population figures: Cook County Sheriff, https://www.cookcountysheriff.org/wp-content/uploads/2020/04/CCSO_BIU_CommunicationsCCDOC_v1_2020_04_03.pdf (last visited April 6, 2020).

[13] The Cook County Sheriff has 3,439 employees. See Cook County Board—Current Budget Information, https://www.cookcountyil.gov/Budget. Plaintiffs do not include jail staff in the Jail's infection rate because it is unclear how many staff work within the Jail. Additionally Jail staff work at, and are thus exposed to, the Jail only on certain days and for certain times of the day. Indeed news reports suggest that staff have drastically reduced the time they spend at the jail in order to protect themselves, making their high infection rate all the more troubling. *See* Tyler Kendall, "We're at war with no weapons": Coronavirus cases surge inside Chicago's Cook County Jail," CBSNews (Apr. 5, 2020), https://www.cbsnews.com/news/chicago-cook-county-jail-coronavirus-life-inside-covid-19-cases/ (last visited Apr. 6, 2020) (reporting that Jail "employees, who interact closely with inmates on a daily basis, are now going in once a week and working from home the other four.").

[14] *See Supra*, pg. 1 n.1.

COVID-19. The employee and detainee reports indicate that it is incapable of actually implementing such changes in such a short time.

Second, there are evidently too many detainees in the jail to implement the social distancing and quarantining necessary to slow the spread of COVID-19. Social distancing is the *sine qua non* for stopping COVID-19's spread.[15] The Court need look no further than our collective experience: in the last few weeks, to achieve social distancing governments around the world have plunged national economies into likely economic depressions. Were other, less draconian measures capable of meaningfully slowing COVID-19's spread, there is no question that social distancing would never have been ordered.

And as Dr. Puisis and his colleagues explain, however, social distancing is effectively impossible in correctional settings, for the simple reason that jails and prisons were designed as congregate security environments where social isolation is impossible. Puisis *et al.*, Dkt. 1-2 ¶¶ 23-24.

Third, as Dr. Puisis *et al.* point out, quarantine can also rapidly become impossible in such a setting:

> Inmates are still being admitted into Cook County Jail. New inmates are being quarantined. Known or suspicious cases of COVID-19 require isolation from others. However, the housing units are not set up for mass quarantine or isolation. The jail was built with security in mind not medical isolation or quarantine. For purposes of quarantine, the jail is cohorting groups of incoming inmates into tiers for a period of time. Because inmates continue to be incarcerated in the Jail, invariably, this will result in a significant portion of the jail dedicated to quarantine. It is recommended that quarantine continue for 14 days. If any individual in the cohort becomes COVID-19 positive, the entire group is again quarantined again for another 14 days. As the number of persons in quarantine

[15] Centers for Disease Control, Coronavirus Disease 2019 (COVID-19): Social Distancing, Quarantine, and Isolation, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited Apr. 6, 2020); Donald G. McNeil Jr., "Restrictions are Slowing Coronavirus Infections, New Data Suggest, N.Y. Times (Mar. 30, 2020), *available at* https://www.nytimes.com/2020/03/30/health/coronavirus-restrictions-fevers.html (last visited Apr. 6, 2020).

> grows, managing them clinically becomes insurmountable and will result in failure to manage.

Dkt. 1-2 ¶ 16 (footnote omitted).

In other words, the procedure for quarantine that Dr. Puisis describes—limited, as it must be, by the physical structure of the Jail—does not effectively segregate potentially infected, newly arriving detainees from one another, creating a need to quarantine larger and larger segments of the Jail's population. Eventually, capacity to manage medically those who are in quarantine will overwhelm Jail staff. Some of the detainee declarations attached to Plaintiffs' complaint suggest that this may already be happening.

The exceptional and horrific rate of infection in the Jail and the systemic problems identified in the Complaint—notwithstanding the Sheriff's insistence that everything possible is being done—suggest a stark reality. Even after the Court would order the Sheriff to comply with CDC Guidance, as Plaintiffs request the Court to do, it will become readily apparent (to the extent it is not already) that *those measures alone will be insufficient to protect the class and particularly the members of Subclass A from the unacceptable risk of infection and possible death.* Therefore, in the interest of saving lives in this unprecedented health emergency the Court should begin the process of setting up the three-judge panel that Section 3626(a)(3) requires to address the release of some members of the Class, including but not limited to those detainees most vulnerable to the disease.

Section 3626(a)(3)(A)(ii) provides that a release order may not be entered until the defendant has had "a reasonable amount of time to comply with" the Court's Section 3626(a)(2) order. "Reasonable" does not mean moderate or slow—it is a flexible standard designed to match the exigencies of the moment. *Kentucky v. King*, 563 U.S. 452, 462 (2011) (reasonableness requirement under the Fourth Amendment depends on the circumstances); *Tyler*

v. Anderson, 749 F.3d 499, 510 (6th Cir. 2014) ("reasonable time" as used in Federal Rule of Civil Procedure 60(b) "depends on the factual circumstances of each case"). *Cf. Black's Law Dictionary*, "Reasonable Time," (11th ed. 2019) ("The time needed to do what a contract requires to be done, based on subjective circumstances").

Indeed, the courts have already recognized that Section 3626(a)(3)(A)(ii)'s "reasonable amount of time" provision meets the exigencies of the COVID-19 epidemic. On April 4, the three-judge court in *Plata v. Newsom*, No. 90 C 0520, Dkt. 3261 (N.D. Cal. April 4, 2020) (attached as Ex. H), which had been impaneled years ago pursuant to an existing release order, held that Plaintiffs had not satisfied Section 3626(a)(3) because the three-judge court had been impaneled for purposes of granting different relief, and thus there had not been the requisite Section 3626(a)(2) order for which defendants had been given a "reasonable amount of time to comply." In its holding, however, the three-judge court made a point to emphasize that "[w]e recognize that what is reasonable in ordinary times may be quite different from what is reasonable in these extraordinary times." *Id.* at 7 n.9. In his concurrence, Chief Judge Mueller emphasized that, while Section (a)(2) had to be complied with first, under the circumstances of the COVID-19 epidemic, the Section (a)(3) release order could still be achieved quickly: "Given the availability of expedited proceedings before those district courts *to immediately exhaust the possibility of inmate transfers and relocations to secure facilities to achieve constitutionally acceptable conditions for the Plaintiff classes*, those proceedings must be invoked first. *Id.* at 15 (Mueller, J., concurring) (emphasis added).[16]

[16] If this Court determines that "reasonable time" as used in the PLRA contemplates some fixed, longer period, Plaintiffs respectfully submit that the provision would be unconstitutional as applied. Such an interpretation would unlawfully prevent the application of judicial equitable authority to save people's lives in the face of an unprecedented pandemic, *cf. Helling v. McKinney*, 509 U.S. 25, 33 (1993); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976), and must be avoided. *See Jones v. United* States, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co*., 213 U.S. 366

Plaintiffs have every reason to believe that the efficacy of any Section (a)(2) order will be quickly exhausted. The Sheriff's office claims it has already acted with alacrity to stop the virus. Yet COVID-19 is exploding within the jail, and it is growing by the hour. By all appearances, the Sheriff's office simply does not have the wherewithal to stop the spread of that virus within the Jail's four walls, despite its efforts. Plaintiffs therefore respectfully suggest that 24 hours is a reasonable amount of time to comply with any Section (a)(2) order, and that thereafter the remedy of removal will likely be required.

IV. Subclass B Seeks Transfer Within the Jurisdiction of the Sheriff in Response to a Growing Pandemic Inside the Jail, Relief That Satisfies the Need-Narrowness-Intrusiveness Criteria and Is Not a Prisoner-Release Order.

To remedy the spread of the disease, to which members of Subclass B members have already been exposed, the members of that subclass must be transferred to a safe facility or location within the Sheriff's jurisdiction and control. That relief could include transfer to home confinement or electronic home monitoring ("EHM"), which are programs under the Sheriff's control and supervision, or to any other safe condition of confinement.[17]

(1909)) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); *Gilmore v. California*, 220 F.3d 987, 998 (9th Cir. 2000) (9th Cir. 2000) ("The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.") (citing *DeBartolo Corp v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

[17] Subclass B Plaintiffs do not seek release from CCDOC custody, and thus this request does not implicate the mandates of *Preiser v. Rodriguez*, 411 U.S. 475 (1973). *Cf. Glaus v. Anderson*, 408 F.3d 382, 386 (7th Cir. 2005) ("In *Preiser v. Rodriguez*, the Supreme Court held that the writ of habeas corpus was the exclusive civil remedy for prisoners seeking release from custody.").

A. Plaintiffs' Requested Transfer Is Within the Court's Equitable Authority and Does Not Require the Sheriff to Exceed His Statutorily Prescribed Authority.

Nothing in the PLRA displaces district courts' "broad equitable powers to order the transfer of inmates to facilities better equipped to provide for their medical needs." *Reaves v. Dep't of Correction,* 392 F.Supp.3d 195, 209-10 (D. Mass. 2019) (stay pending appeal denied, 404 F. Supp. 3d 520) (citing *Johnson v. Harris*, 479 F. Supp. 333 (S.D.N.Y. 1979) (ordering prison to either transfer inmate to facility equipped to provide for his medical needs or to insure he is provided with adequate care stemming from prison's deliberate indifference to inmate's serious medical needs); *United States v. Wallen*, 177 F. Supp. 2d 455, 458 (D. Md. 2001) (ordering transfer of pretrial detainee to a hospital since "the Marshal's Service cannot assure this Court that it will provide the medical care that the Constitution mandates so long as he is held at MCAC").[18] This court, accordingly, may—and indeed must—order the transfer of prisoners from a facility infected with COVID-19 to another location within the Sheriff's control (where they will remain in the Sheriff's custody) to ensure that they receive constitutionally adequate medical care and are protected from physical harm. *Cf. Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (prison official can be liable "for denying humane conditions of confinement" where "he knows inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."); *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016) ("If a risk from a particular course of medical treatment (*or lack thereof*) is obvious

[18] *See also, e.g.,* ABA Standards for Criminal Justice, 23-6.2 (3d ed. 2011) ("A prisoner who requires care not available in the correctional facility should be transferred to a hospital or other appropriate place for care."); *cf. Murphy v. Lane*, 833 F.2d 106 (7th Cir. 1987) (court could consider plaintiff's civil rights claim for retaliatory transfer stemming from prison officials' transfer of plaintiffs to different prison less well-equipped to handle his psychiatric needs).

enough, a factfinder can infer that a prison official knew about it and disregarded it.") (citations omitted) (emphasis added).

And transfers of detainees are in fact directly contemplated by the Sheriff's state law authority under the County Jail Act, 730 ILCS 125/14, which states:

> At any time, in the opinion of the Warden, the lives or health of the prisoners are endangered or the security of the penal institution is threatened, to such a degree as to render their removal necessary, the Warden may cause an individual prisoner or a group of prisoners to be removed to some suitable place within the county, or to the jail of some convenient county, where they may be confined until they can be safely returned to the place whence they were removed.

Under the County Jail Act, transfer within the county includes to Electronic Home Monitoring (EHM), a program that is administered by the Sheriff. As the Sheriff emphasized in separate litigation concerning EHM, a case that was recently heard in the Seventh Circuit, it is solely within his Office's discretion whether to place pre-trial individuals in his custody on Electronic Monitoring: "Whether a given pretrial defendant is placed in the Sheriff's EHM Program as a condition of bond is a discretionary decision of the Sheriff's custody of prisoners on electronic monitoring." Br. of Defendant Appellees at 8 (attached as Ex. A), *Williams v. Dart*, Case No. 19-02108 (7th Cir.); *see also id*. at 7-8 ("The Sheriff's pretrial EHM Program is not a creature of statute—it is his own. Sheriff Dart has discretion to set parameters or guidelines for admission into his program. Whether a given pretrial defendant is placed in the Sheriff's EHM Program as a condition of bond is a discretionary decision of the Sheriff's.").

Anyone transferred to the Sheriff's EHM program as part of the requested relief requested by Subclass B would be subject not only to the conditions of that program as administered by the Sheriff, but by the strict conditions imposed by the Governor's emergency order, which prohibits non-essential travel and engaging in non-essential business, and mandates

everyone in the state to stay at their home or place of residence except when engaging in essential activities.[19]

B. The Requested Relief is Not a Prisoner Release Order.

An order mandating the removal of Subclass B prisoners from the Jail to another location in the Sheriff's custody, including but not limited to EHM, does not constitute a "prisoner-release order" as envisioned by 18 U.S.C. § 3626(a)(3), and thus does not mandate the impaneling of a three-judge panel, for two reasons.

First, the relief does not constitute a prisoner-release order because it does not concern prison crowding, which is what the relevant provision of the PLRA was enacted to address. For more than two decades, district courts have found that Section 3626(a)(3) does not apply to orders remedying violations of federal rights other than overcrowding. In *Doe v. Younger*, No. 91-187 (E.D. Ky. Sept. 4, 1996), Op. and Order (attached as Ex. B) at 10-12, the district court banned the housing of juveniles for more than 15 days in jail, where conditions were unacceptable for children. The court held that this was not a prisoner release order requiring a three-judge court under the PLRA, even where it had the effect of reducing the number of children in the facility: "[T]he court's order does not direct the release of any child. It is undisputed that counties . . . often house juveniles in need of a secure facility in other counties. In fact, such transfers from facilities in one county to facilities in another county or even another state are extremely common. Indeed, the Kentucky Juvenile Code specifically contemplates such transfers."

[19] *See supra,* Executive Order n.5. The applicability of the stay-at-home order to any class members transferred within the Sheriff's jurisdiction is also relevant to the PLRA's "needs-narrowness-intrusiveness" analysis, discussed in Part C, *infra*.

In *Plata v. Brown*, No. C01-1351-TEH, 2013 WL 3200587, at *8-10 (N.D. Cal. June 24, 2013), the court was faced with the sweeping transmission of coccidioidomycosis, or Valley Fever, "an infectious disease caused by inhalation of a fungus," in certain prisons within the California state prison system. *Id*. at *2. The court granted an exclusionary order for medically vulnerable prisoners, rejecting the defendants' argument that the PLRA barred the requested relief unless issued by a three-judge court:

> Here, looking at the [PLRA] statute as a whole requires reading the definition of "prisoner release order" in conjunction with the requirements for entering one. One such requirement is that a three judge court must determine, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right," before it can enter a prisoner release order. 18 U.S.C. § 3626(a)(3)(E)(i). Consequently, adopting Defendants' interpretation of "prisoner release order" would mean that a court could only order that prisoners be transferred from one prison to another if overcrowding were the primary cause of the violation of those prisoners' rights, and not if any other reason were causing the violation. Defendants have failed to point to anything in the legislative history that indicates an intent to limit the protection of inmates' constitutional rights in this manner . . . .

Id. at *9; *see also Reaves*, 404 F. Supp. 3d at 523 (same).

The *Plata* Court emphasized that "a statute should not be construed to displace courts' traditional equitable powers [a]bsent the clearest command to the contrary." *Id*. at * 9 (citing *Gilmore v. California*, 220 F.3d 987, 997 n.12, and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." (quotation marks and citations omitted))). And the PLRA's legislative record indicates that Congress did not intend to limit courts' ability to move or transfer prisoners as a result of other (non-crowding) constitutional violations—including those presented here. *See Reaves*, 404 F. Supp. 3d at 523 ("Accepting Defendants argument would mean that the only way a district court can order the release of a prisoner is for a violation of his constitutional rights

where overcrowding caused the violation, but not if any other reason caused the violation. Defendants have failed to present anything in the legislative history which evidences Congressional intent to limit the protection of inmates' constitutional rights in this way—presumably because there is no such history.").

In reaching their conclusions that the PLRA did not preclude orders that transferred medically vulnerable inmates, both the *Doe* Court and the *Plata* Court found the PLRA's legislative history to be consistent with the relief Plaintiffs seek here, because Congress enacted the PLRA's restrictions out of concern with prison population caps. *See*, *e.g.*, *Plata*, 2013 WL 3200587, at *9 ("Sponsors of the PLRA were especially concerned with courts setting 'population caps' and ordering the release of inmates as a sanction for prison administrators' failure to comply with the terms of consent decrees designed to eliminate overcrowding.") (citing *Gilmore v. California*, 220 F.3d 987, 998 n.14 (9th Cir. 2000)); *Doe v. Younger*, Ex. B, at 11 ("After reviewing the substantive provisions concerning prisoner release orders and the legislative history underlying this provision of the PLRA, it is clear that the prisoner release order provisions are directed at prison caps, *i.e.*, orders directing the release of inmates housed in a particular institution once that institution houses more than a specific number of persons. This is not that kind of case."); *see also* 141 Cong. Rec. S14414 (daily ed. Sept. 27, 1995) (remarks of Sen. Dole) (attached as Ex. C) ("Perhaps the most pernicious form of micromanagement is the so-called prison population cap…. By establishing tough new conditions that a Federal court must meet before issuing a prison cap order, this bill will slam-shut the revolving prison door."); Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. Miami Race & Soc. Just. L. Rev. 1, 27-28 (2016) (attached as Ex. D) (collecting congressional testimonies and reports identifying federal court-imposed prison population caps as the target of

the PLRA). Senators who supported Section 3626's restrictions did so expressly in response to federal court decisions "dictat[ing] prison population size and order[ing] excess prisoners released." 142 Cong. Rec. S10576-02, 1996 WL 522797 (remarks of Sen. Abraham) (attached as Ex. E). Indeed, an earlier version of a bill similar to the PLRA made direct reference to this purpose. The proposed amendment to Section 3626(a)(2), concerning "any relief whose purpose or effect is to reduce or limit the prison population" was specifically titled, "Restrictions on Court-Ordered Relief In Prison Overcrowding Cases." *See* Judicial Impact Statement, Violent Criminal Incarceration Act of 1995, H.R. 667 (June 21, 1995) (attached as Ex. F), at 4.[20]

Second, the requested relief is not the release of prisoners but only the *transfer* of those class members to another jurisdiction under the Sheriff's control (*i.e.*, on EHM, as set forth in Part A, *supra*), to remedy an undeniable and growing health crisis. Accordingly, Section 3626(a)(3) does not apply. *See Doe v. Younger*, Ex. B, at 12 ("[T]he court's order does not direct the release of any child."); *see also Plata*, 2013 WL 3200587, at *8 (prison-release order provisions of PLRA did not apply to order granting Plaintiffs' motion for mass transfer of prisoners in response to outbreak of infectious disease in California correctional facilities); *Reaves*, 404 F. Supp. 3d at 523 (holding that a three-judge panel was not required for order of transfer of quadriplegic prisoner to a non-corrections facility in which he would be treated by a physician with training to care for his substantial and numerous medical needs, as remedy for defendants' failure to provide adequate medical care).

[20] If Section 3626 is interpreted to preclude prisoner transfer to address an imminent risk of serious illness or death arising from a deadly virus, this provision would also be unconstitutional as applied for the same reasons set forth in Section III, *supra* n.16.

C. The Relief Requested for Subclass B is Narrowly Drawn, Extends No Further than Necessary, and is the Least Intrusive Means Necessary to Address the Violations at Stake.

The relief requested for Subclass B, like the relief requested for the Class as a whole, meets the need-narrowness-intrusiveness criteria in Section 3626(a). Because of the gravamen of the underlying complaint, which implicates literal matters of life or death, there is a strong fit between the violations at stake (the exposure of incarcerated individuals to conditions of confinement that threaten their health and safety), *see Helling*, 509 U.S. at 33, and the requested remedy (an order requiring the Sheriff to impose essential safeguards like social distancing and medical care or, to transfer prisoners from the physical facility where those conditions exist). *See Reeves*, 404 F.Supp.3d at 524 (transfer order met PLRA's narrow tailoring requirements where inmate would die if he was not moved); *cf. Morales Feliciano,* 378 F.3d at 54 ("The narrowness-need-intrusiveness criteria are, to some extent, self-explicating . . . . The application of those criteria is case-specific and must be undertaken in light of both the magnitude of existing constitutional violations and the available alternative remedies."). As discussed more fully above, the Jail is facing a crisis the likes of which has not been seen before. Subclass B members have already been exposed and therefore urgently require transfer to a safe place until the pandemic is over. District courts (including several in this Circuit) have granted a prisoner's request for preliminary injunctive relief in far less urgent situation circumstances than are facing Plaintiffs in this Court.[21]

[21] *See*, *e.g.*, *Abu-Jamal v. Wetzel,* 2017 WL 34700, at *12-20 (M.D. Pa. Jan. 3, 2017) (granting preliminary injunction requiring treatment of plaintiff's Hepatitis C with direct-acting antiviral medication such as Harvoni); *Norsworthy v. Beard*, 87 F.Supp.3d 1164, 1195 (N.D. Cal. 2015) (granting preliminary injunction to "provide Plaintiff with access to adequate medical care, including sex reassignment surgery"), *appeal dismissed as moot and remanded*, 802 F.3d 1090 (9th Cir. 2015); *Francis v. Hammond,* 2013 WL 12167887, at *6-7 (W.D. Wash. Mar. 4, 2013) (recommending preliminary injunction requiring orthopedic evaluation of plaintiff's shoulder injury), *report and recommendation adopted*, 2013 WL 12167888 (W.D. Wash. Apr. 10, 2013); *McNearney v.Washington Dep't of Corrs.*,

Finally, because whatever order this Court enters will leave full control and supervisory authority of the class members with the Sheriff and his correctional staff, there is little risk that the relief would adversely impact the criminal justice system. *Compare Turner v. Clelland*, 2016 WL 1069665, *4 (M.D.N.C., Mar. 16, 2016) (citing adverse impact provision in denying relief requiring "involving a federal court in the day-to-day administration of a prison").

CONCLUSION

In summary, Plaintiffs' requests for injunctive relief under Section 1983 meet the PLRA's need-narrowness-intrusiveness requirements because they seek narrowly drawn injunctive relief that extends no further than what is required to correct the significant and ongoing constitutional violation. Neither of Plaintiffs' current requests for Section 1983 injunctive relief constitutes a prisoner release order and thus the requirements of 18 U.S.C. 3626(a)(3) do not apply. Given the imminent threat facing the Jail, however, Plaintiffs believe

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2013 WL 392490, at *2-3 (W.D. Wash. Jan. 9, 2013) (noting prior order to provide required medical care, modifying order to terminate upon the plaintiff's impending release, which might occur before surgery could be performed, to make the order narrowly drawn and least intrusive), *report and recommendation adopted*, 2013 WL 392489 (W.D. Wash. Jan. 31, 2013); *Mitts v. Obandina*, 2012 WL 4060013, at *2 (S.D. Ill. Aug. 27, 2012) (granting preliminary injunction to provide prescribed medical care, holding order "the least intrusive means to correct the treatment deficiency"), *report and recommendation adopted*, 2012 WL 4059982 (S.D. Ill. Sept. 14, 2012); *Chan v. County of Sacramento*, 2011 WL 2636262, at *4 (E.D. Cal. July 5, 2011) (recommending preliminary injunction requiring defendants to have plaintiff examined by an independent dentist competent to perform root canals, permanent fillings, and dentures in order to develop and act on a treatment plan, though declining to recommend specific procedures); *Flynn v. Doyle*, 630 F.Supp.2d 987, 993-94 (E.D. Wis. 2009) (preliminarily enjoining defendants to submit a plan to ensure that medication is dispensed by persons with credentials equal to Licensed Practical Nurses, that they are trained in prison procedures, and that medication orders are timely processed and dispensed); *Perez v Cate*, 2009 WL 440508, at *4-5 (N.D. Cal. Feb. 23, 2009) (granting modification of stipulated injunction providing for improved dental care to prohibit the out of state transfer of prisoners who require dental care within 120 days; rejecting plaintiff's proposal to stop the transfers entirely pending creation of a revised screening process as not narrowly tailored and least intrusive); *Farnam v. Walker*, 593 F.Supp.2d 1000, 1017-18 (C.D. Ill. 2009) (preliminarily enjoining defendants to get the patient to an accredited Cystic Fibrosis Center for examination by a board-certified pulmonologist, and implement that specialist's medical treatment recommendations; specifying treatment to be provided pending that examination); *see also Plata*, 2013 WL 3200587 at *14-15 (directing removal of prisoners at risk for Valley Fever from prisons where it was prevalent; relying on expert evidence and professional society standards in determining compliance with § 3626).

that a three-judge panel should be convened in the event that immediate compliance with the Constitution is not achieved to protect Class Members from further harm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah Grady, an attorney, hereby certify that on April 6, 2020, I caused a copy of the foregoing to be filed using the Court's CM/ECF system, which effected service on all counsel of record.

/s/ Sarah Grady
Sarah Grady
Attorney for Plaintiffs

EXHIBIT A

No . 19-2108

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TAPHIA WILLIAMS, et al.	)	
	)	
Plaintiffs-Appellants,	)	District Court for the
	)	Northern District of Illinois
v.	)	District Court No. 18 CV 1456
	)	
THOMAS DART, et al.	)	Hon. Harry D. Leinenweber
	)	
	)	Judge Presiding
Defendants-Appellees.	)	
	)	

BRIEF OF DEFENDANT-APPELLEES THOMAS DART, ET AL.

Richard Gleason
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Appellate Court No: _____

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To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervener or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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n r Dar

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party, amicus or intervener is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervener's stock:

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JURISDICTIONAL STATEMENT

The jurisdictional statement of Appellant-Plaintiffs, Taphia Williams, *et al.*, is complete and correct pursuant to Cir. R. 28(b).

STATEMENT OF THE ISSUES

1. Whether the district court properly granted Sheriff Dart's motion to dismiss the Appellants' claims under 55 ILL. COMP. STAT 5/3-6019-20 alleging that Sheriff Dart failed to carry out valid court orders.

2. Whether the district court properly granted Sheriff Dart's motion to dismiss the Appellants' Fourth and Fourteenth Amendment substantive due process claims.

3. Whether the district court properly granted Sheriff Dart's motion to dismiss the Appellants' Fourteenth Amendment and Illinois Civil Rights Act equal protection claims.

4. Whether the district court properly granted Sheriff Dart's motion to dismiss the Appellants' Fourth Amendment claim for unlawful detention.

5. Whether the district court abused its discretion in denying the Appellants' motion for class certification.

STATEMENT OF THE CASE

The Appellants assert that a state court can compel Sheriff Dart to place pretrial defendants into Sheriff Dart's pretrial electronic home monitoring program (hereinafter "pretrial EHM program"). This assertion is the foundation of all but the

Appellants' equal protection claims, and—as the district court correctly determined—the assertion is without support in the law.

Additionally, the Appellants argue in their equal protection claims that Sheriff Dart's decision to initially deny the Appellants immediate admission into his pretrial EHM program was both motivated by the race of the Appellants, and disparately impacted minorities. As the district court correctly determined, the Appellants' allegations were conclusory and insufficient to state a claim.

Finally, the district court was correct to deny the Appellants' motion for class certification on the basis of typicality, though, the district court would also have been correct to deny their motion for class certification on the basis of either commonality or numerosity, or because the Appellants' counsel failed to fully explain their expertise and adequacy in serving as class counsel.

The district court's dismissal of the Appellants' claims and denial of the Appellants' motion for class certification should be affirmed.

SUMMARY OF THE ARGUMENT

Appellants' entire appeal is predicated on their mistaken notion that they had a right to placement in Sheriff Dart's EHM Program by virtue of their bond court judge's bail order, and that a state court has the authority to compel Sheriff Dart to place a given criminal defendant into the Sheriff's Pretrial EHM Program. These theories are without support in Illinois law. There is no statutory or constitutional right to placement in the Sheriff's EHM Program. Without a statutory or constitutional right to placement in Sheriff Dart's program, and because orders purporting to

compel Appellants' placement in Sheriff Dart's EHM Program are incapable of vesting Appellants with such a right, Appellants fail to identify a constitutional right that was violated. Appellants thus failed to state any cognizable claim in any of their equal protection claims, due process claims, or state law claims alleging that Sheriff Dart failed to execute "facially valid, binding orders."

Additionally, the district court was correct to conclude that Appellants' allegations of race-based discrimination were conclusory in nature, and thus not entitled to the presumption of plausibility.

STANDARD OF REVIEW

This Court reviews the district court's Rule 12(b)(6) dismissal de novo. *Lewis v. City of Chicago*, 914 F.3d 472, 475 (7th Cir. 2019).

Under the Federal Rules of Civil Procedure, a complaint's allegations need only to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Although "detailed factual allegations" are not required, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. A complaint must "include sufficient facts 'to state a claim for relief that is plausible on its face.'" *Cole v. Milwaukee Area Tech. Coll. Dist.*, 634 F.3d 901, 903 (7th Cir. 2011) (quoting *Justice v. Town of Cicero*, 577 F.3d 768, 771 (7th Cir. 2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows

the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In ruling on a Rule 12(b)(6) motion, the court "construe[s] the . . . [c]omplaint in the light most favorable to Plaintiff, accepting as true all well-pleaded facts and drawing all possible inferences in his favor." *Cole*, 634 F.3d at 903.

This Court reviews the district court's denial of class certification under an abuse of discretion standard. *Lacy v. Cook Cnty., Il.*, 897 F.3d 847, 863 (7th Cir. 2018). Abuse of discretion occurs "when a district court commits legal error or clearly erroneous factual findings. *Id*.

ARGUMENT

I. The District Court Did Not Err in Finding that Sheriff Dart Could Not Be Compelled by a State Circuit Court Judge to Enroll the Appellants in the Sheriff's EHM Program.

The district court was correct to dismiss Appellants' claims, and the district court's decision should be affirmed. Illinois law does not permit a state court to compel Sheriff Dart to place a pretrial defendant into his EHM program. First, a bond order setting forth EHM as a special condition of such bond is not binding on Sheriff Dart. Second, Sheriff Dart is in no way judicially estopped from making this argument.

A. A Special Condition of EHM Contained in a Bond Order is Not Binding on the Sheriff.

While the Sheriff seeks to accommodate a court's EHM orders whenever possible, he is not mandated to accept a given defendant into his EHM program merely by virtue of a court order purporting to require EHM supervision by the Sheriff as a special condition of bond. Illinois courts do not have the authority to compel the

Sheriff to monitor defendants via EHM while those defendants are out on bond in a *pretrial setting*. The Illinois Code of Criminal Procedure generally, and Illinois' bail statute specifically, delineates the entities whom Illinois courts may compel to electronically monitor such a defendant on bond. The bail statute provides that, as a special condition of bond, a court may order that a defendant:

> Be placed under direct supervision of the ***Pretrial Services Agency, Probation Department or Court Services Department*** in a pretrial bond home supervision capacity with or without the use of an approved electronic monitoring device subject to Article 8A of Chapter V of the Unified Code of Corrections [730 ILCS 5/5-8A-1].

725 ILL. COMP. STAT. 5/110-10(b)(14) (2018) (emphasis added.) Pretrial Services, the Probation Department, and the Court Services Department are all departments within the Office of the Chief Judge. Any mention of the Sheriff is omitted. "Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions ***." *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 442 (1992). This rule of statutory construction is based on logic and common sense." *Metzger v. DaRosa*, 209 Ill. 2d 30, 44 (2004).

In contrast, the Illinois bail statute further provides that other agencies (the Sheriff's Department, for example) *may* provide pretrial EHM, if that agency *agrees* to provide such service. Specifically, the Illinois bail statute states that a court may order as a condition of bond that a defendant:

> Remain in the custody of such designated person or organization ***agreeing to supervise his release***. Such third party custodian shall be responsible for notifying the court if the defendant fails to observe the conditions of release which the custodian has agreed to monitor, and shall be subject to contempt of court for failure so to notify the court.

725 ILL. COMP. STAT. 5/110-10(b)(13) (2018) (emphasis added). A court order is a pre-requisite enabling the Sheriff to place a given defendant on EHM. It is not a basis to compel such monitoring, because the Sheriff, like any other third-party designee contemplated by the statute, must *agree* to the monitoring.

In the present case, Sheriff Dart *did not agree* to supervise the release of the Appellants, because of the nature of the charges against the Appellants, the criminal background of the Appellants, and/or because the Appellants lacked a suitable residence from which to be electronically monitored.

As made clear in the statute, county courts may compel EHM *through their own offices—i.e.* the Probation Department, Pretrial Services, or Court Services—but they may not so compel the Sheriff. If an Illinois court wishes to compel EHM of a given defendant in a pretrial setting, such a court can instead mandate that one of *its own* departments provide that monitoring pursuant to 725 ILL. COMP. STAT. 5/110-10(b)(13). If such an order were entered in any of these cases, the Sheriff would have released Appellants.

By comparison, in the *post-conviction* setting, the authority for Illinois courts to order EHM through the "supervising authority" (defined to include the local sheriff) is based in statute, specifically 730 ILL. COMP. STAT. 5/5-8, *et seq*. (2018). This distinction illustrates the statutory state of Illinois law: Illinois courts do not have the statutory authority to impose upon the Sheriff an obligation to monitor a defendant on bond through EHM in a *pretrial setting*—that authority was never granted to the courts.

Appellants assert that Sheriff Dart doesn't have the right to disregard orders just because he disagrees with those orders. But that misses the point entirely. To the extent that these EHM orders purport to be binding on Sheriff Dart, those orders are void, and Sheriff Dart is not obligated to follow them. The Illinois Constitution states: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. 1970, ART. II, § 1. "The purpose of this doctrine is to ensure that each of the three branches of government retains its own sphere of authority, free from undue encroachment by the other branches." *People v. Izzo*, 195 Ill. 2d 109, 116 (2001).

The limitations of a circuit court's power to compel has long been recognized in Illinois. In discussing a circuit court order seeking to compel the provision of mental health treatment to a minor, the Illinois appellate court held that in the absence of statutory authority, the juvenile court could not order that a minor be treated at a private psychiatric hospital nor that the Department of Mental Health and Developmental Disabilities pay for such care. The court held that "the circuit court may not exceed its statutory authority no matter how desirable or beneficial the attempted innovation might be." *Dep't of Mental Health v. Cnty. of Madison (In re Peak)*, 59 Ill. App. 3d 548, 551 (5th Dist. 1978).

A court seeking to compel the Sheriff to place the petitioner on the Sheriff's EHM Program would be exceeding its statutory authority, encroaching upon the executive branch, and encroaching upon the discretion of the Sheriff, a constitutional officer. The Sheriff's pretrial EHM Program is not a creature of statute—it is his own.

Sheriff Dart has discretion to set parameters or guidelines for admission into his program. Whether a given pretrial defendant is placed in the Sheriff's EHM Program as a condition of bond is a discretionary decision of the Sheriff's.

In some cases, the basis for that discretionary decision is the petitioner's lack of a suitable address from which to be monitored. In other cases, it is the nature of a defendant's pending charge, or a defendant's violent recidivist background, the flight risk posed by a given defendant, or a combination of one or more of the foregoing. In each case, however, the Sheriff exercises his discretion, which is always based on practical considerations that take into account the resources available to the Sheriff at a given time as well as public safety. The judicial branch may not take as its own those discretionary powers vested in an executive officer. *People v. Stinger*, 22 Ill. App. 3d 371, 373 (2nd Dist. 1974).

A constitutional officer, such as the Sheriff, cannot be compelled to follow a void order. The Appellate Court addressed this very issue in *People v. Stinger*. In *Stinger*, the State's Attorney was ordered by the presiding judge to provide a court reporter for grand jury proceedings in a pending murder case. The State's Attorney refused and conducted the grand jury proceedings without a court reporter. The presiding judge held the State's Attorney in contempt for refusing to obey his order to provide a court reporter for the proceedings. The State's Attorney asserted that the presiding judge had no authority to order the State's Attorney to provide a court reporter.

On appeal, the presiding judge argued that, even if there was no express authority for him to order the State's Attorney to provide a court reporter, and it was error to do so, the State's Attorney did not have the right to disregard his order. The appellate court disagreed, and vacated the contempt finding. The Court stated that:

> One is justified in refusing to comply with a court order only if such order is utterly void, but it is no defense in a contempt proceeding to show that the order was merely erroneous…. [c]ontempt will not lie for violation of a void decree but voidness is established when the issuing court is found to have lacked jurisdiction to enter such an order. The test of jurisdiction is said to be whether the court has power to enter into the inquiry before it, and this is determined by (1) jurisdiction of the parties, (2) jurisdiction of the subject matter, and (3) power in the court to decide the particular matters presented. All such factors being present, the correctness of the court's determination has no bearing upon the initial question of jurisdiction.

Stinger, 22 Ill. App. 3d at 374. The Stinger Court held that the circuit court certainly had jurisdiction over the parties, and jurisdiction of the subject matter, but that in the absence of any statutory authority, the circuit court did not have the power to order the State's Attorney to provide a court reporter, and so the court's order failed the third test of jurisdiction. The order was thus void, and the appellate court vacated the finding of contempt. *Id.* at 375.

Similarly, circuit courts certainly had jurisdiction over the parties and the subject matter in Appellants' pending criminal cases, but they lacked the power to order the Sheriff to place anyone in the Sheriff's pretrial EHM program. Without that power, the special-conditions-of-bond order is not merely erroneous: to the extent that a court or any other individual seeks to enforce the order, it is void, and the Sheriff cannot be compelled to follow it. Nor could a void order from a bond court judge ever be deemed to vest Appellants with a right to anything.

The Sheriff had no duty to follow the EHM orders of the bond courts, because those orders were void. Since Sheriff Dart was not bound to follow the circuit court EHM orders, Appellants' state law claims under 55 ILL. COMP. STAT. 5/3-6019 and 55 ILL. COMP. STAT. 5/3-6020 fail. By extension, those orders were never capable of endowing Appellants with a right to placement in the Sheriff's EHM program, because the courts never had the authority to compel such placement. Without a constitutional right implicated, there can be no §1983 claim. Appellants never had a constitutional right to be placed in Sheriff Dart's EHM Program. Without that right, all of Appellants' claims fail.

B. Sheriff Dart is Not Judicially Estopped from Stating that He is Not Bound by Virtue of a Bond Court Order to Enroll a Pretrial Defendant into Sheriff Dart's Pretrial EHM Program.

Appellants argue that the Sheriff's arguments above are barred by judicial estoppel, claiming that the Sheriff's current arguments are opposite arguments advanced by the Sheriff in the cases of *Zachary Robinson v. Leroy Martin Jr.*, 2016 CH 13587 (Cir. Ct. Cook County 2016) and *Dawson v. Dart*, No. 11 C 7300, 2018 WL 2267792 (N.D. Ill. May 16, 2018). Appellants' Br. 24-25. In reality, the position of the Sheriff in this case is not in any way contrary to the position advanced by the Sheriff in either of those two cases, and is not in any way barred by judicial estoppel.

The *Robinson* case was a suit filed against the Chief Judge of the Criminal Division of the Circuit Court of Cook County, alleging in essence that bond court judges were setting high cash bonds, which unfairly discriminated against the poor and disproportionately affected people of minority groups. The Sheriff was also named, even though the Sheriff had no role in setting the cash bail amount. The

Sheriff's argument in the *Robinson* case—that the Sheriff cannot alter the cash bail amount in a bond order—is not a contrary position from the one taken in this case: that the Sheriff cannot be compelled by the Court to provide for the supervised release of Appellants via the Sheriff's EHM program.

Appellants additionally argue that Sheriff Dart lacks the authority to review bond court orders. In order to support this argument, as they did in the exact same way in the district court, Appellants again in their brief misrepresent this Court's opinion in *Richman v. Sheahan*, 270 F.3d 430, 437 (7th Cir. 2001) by claiming that this Court held "allowing sheriffs to 'act as appellate courts,' reviewing the validity of bond or other facially valid court orders is 'untenable.'" Appellants' Brief, p. 22. As Sheriff Dart noted in the district court when Appellants cited this same case for the same purported holding, Appellants replaced the word "requiring" with the word "allowing." *Richman* held not that the Sheriff lacked authority to investigate the validity of the bond court orders. Rather, the case held that the Sheriff did not have the duty to investigate the validity of the bond court orders. *Richman*, 270 F.3d at 437. There is nothing illegal or improper in Sheriff Dart electing to investigate the validity of orders directed to him.

While the Sheriff has no authority in the Bail Act to alter the cash bail ordered by a court, he does have authority to decline the pretrial supervised release of a defendant. That authority is found in the Illinois Bail Act, at 725 ILL. COMP. STAT. 5/110-10(b)(13).

Nor is any argument of the Sheriff's judicially estopped by the *Dawson* case. Dawson was shot by assailants while he was on the Sheriff's EHM program. After being shot, Dawson was hospitalized. While hospitalized, Dawson was arrested by the Cook County Sheriff and taken into custody (presumably at Cermak, the hospital unit within Cook County Jail). Dawson alleged that the Sheriff violated his Fourth Amendment rights in wrongfully detaining him after he was shot. In dismissing Dawson's claims, the Court found that a condition precedent to enrollment in the Sheriff's EHM program was a home from which to be monitored, and by virtue of being hospitalized after he was shot, Dawson was without a home and therefore the Sheriff no longer agreed to Dawson's continued placement in the Sheriff's EHM program, and was therefore not entitled to EHM placement. *Dawson*, 2018 WL 2267792, at *9, footnote 3. As in *Dawson*, here too the Sheriff is not violating Appellants' Fourth Amendment rights in refusing to release them. As in *Dawson*, Appellants may seek from the bond court an amendment to their conditions of bond, which many of Appellants have in fact done. In any case, there is nothing about the arguments made in *Dawson* which would judicially estop arguments made by the Sheriff in this case. Rather, the arguments made here, in *Dawson*, and in *Robinson* are entirely consistent.

II. The District Court Did Not Err in Dismissing Appellants' Fourteenth Amendment Substantive Due Process Claim.

Appellants have alleged that their continued detention following bond court by the Sheriff constituted, presumably, a violation of their right to bodily integrity, and therefore a violation of their substantive due process rights. The District Court was correct to dismiss this Count with prejudice.

The U.S. Supreme Court has limited the reach of the substantive component of the due-process clause guarantee to cases involving abuse of governmental power so arbitrary and oppressive that it shocks the conscience. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). This standard is met only by "conduct intended to injure in some way unjustifiable by any government interest." *Id*. at 854; see also, *Catinella v. Cnty. of Cook*, 881.F.3d 514 (7th Cir. 2018).

The Sheriff's alleged conduct in this case was neither so arbitrary or oppressive that it shocks the conscience, nor was it intended to injure in some way unjustifiable by any government interest. To the contrary, the Sheriff's continued detention of Appellants was predicated on and mandated by the bond court orders themselves, which conditioned each Appellant's release upon payment of the required bail and placement in the Sheriff's EHM program. As Appellants have stated repeatedly in their own pleadings, the Sheriff is bound to execute all valid orders, and can be held in contempt for failing to do so. The Sheriff would have been violating the court's order had he released the Appellants without placing them in his EHM program. Failing their placement, the Sheriff was not only justified in detaining the Appellants; he was required to detain the Appellants.

This reasoning is supported by the plain language of the Bail Act and the definitions of "bail" and "bail bond" found in the Illinois Code of Criminal Procedure. "Bail" is defined in the Code as the amount of money set by the court which is required to be obligated and secured as provided by law for the release of a person in custody in order that he will appear before the court in which his appearance may be required

and that he will comply with such conditions as set forth in the bail bond. 725 ILL. COMP. STAT. 5/102-6 "Bail" (2018). "Bail Bond" is defined as an undertaking secured by bail entered into by a person in custody by which he binds himself to comply with such conditions as are set forth therein. 725 ILL. COMP. STAT. 5/102-7 "Bail Bond" (2018).

The Illinois Bail Act establishes definitively that the Sheriff was not empowered to simply release the Appellants from his custody because the bond orders conditioned the Appellants' release upon the Appellants' placement in the Sheriff's EHM program. "Upon depositing this sum and any bond fee authorized by law, the person shall be released from custody subject to the conditions of the bail bond." 725 ILL. COMP. STAT. 5/110-7 "Deposit of Bail Security" (2018) (emphasis added.) Any pretrial defendant's release on bond is predicated on their satisfying all conditions of that bond.

The Appellants argue that "subject to" is a "term" undefined by the Bail Act, and is a term which has alternative definitions that should have been considered by the District Court, and which would not have led to the District Court's conclusion that the Appellants' release was conditioned upon their placement in the EHM program. (Appellant's Brief, p. 18) The Appellants, however, never raised this argument before the District Court. Failing to draw a district court's attention to an applicable legal theory waives pursuit of that theory on appeal. *United Cent. Bank v. Davenport Estate LLC*, 815 F.3d 315, 318 (7th Cir. 2016) (internal citations omitted).

The Appellant's statutory interpretation argument would be unpersuasive even if it were not waived, because when considered in its entirety, the Illinois Bail Act amply supports the interpretation of the phrase "subject to" adopted by the District Court. The "language and design of the statute as a whole may also provide guidance in determining the plain meaning of its provisions." *United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008) (internal citations omitted). The Illinois Bail Act, when considered in its entirety, indeed provides guidance in determining whether a pretrial defendant's release was conditioned upon his or her satisfaction of bond conditions imposed by the Court. For example, 725 ILL. COMP. STAT. 5/110-5 is titled "Determining the amount of bail and conditions of release." There is no statutory ambiguity which supports the Appellants' statutory interpretation argument.

In fact, a court in this district has already found that the Sheriff was justified in detaining a pretrial defendant when the Sheriff refused to place that pretrial defendant in the Sheriff's EHM program, and placement was a condition of that defendant's bond. See *Dawson v. Dart*, 2018 U.S. Dist. LEXIS 82902, *3 (N.D. Ill. 2018) (Durkin, C.J.) (finding that the plaintiff failed to plead a Monell claim because the Sheriff was justified in taking into custody a pretrial defendant on EHM for a pending burglary, when that individual was subsequently hospitalized, and so longer qualified for the Sheriff's EHM program.)

Moreover, in addition to following the court's orders, the Sheriff's additional justification in detaining the Appellants was his statutory duty to maintain public safety. "Each sheriff… shall prevent crime and maintain the safety and order of the

citizens of that county." 55 ILL. COMP. STAT. 5/3-6021 (2018). The Sheriff is not asserting, and has never asserted, that the Appellants were not appropriate candidates for some other form of monitoring, or monitoring on EHM provided by another entity, or for cash bail without any special conditions of bond. Rather, the Sheriff has steadfastly maintained that the Appellants were not appropriate candidates for his EHM program.

It is the Sheriff's statutory duty to refrain from placing on EHM more pretrial detainees with a recidivist background and/or pending charges alleging violence or gun crimes than he can responsibly monitor while still maintaining the public safety. This is a determination involving the day-to-day operation of Cook County jail, and is within the province and professional experience of the Sheriff. As the Supreme Court has noted, courts should ordinarily defer to corrections officials in such matters. *Bell v. Wolfish*, 441 U.S. 520, 548 (1979). The Sheriff's determination with respect to the Appellants is entitled to such deference here.

The Cook County Sheriff's pretrial EHM program was never intended to monitor individuals like Appellants out in the community while awaiting trial. Instead, the program was and remains intended to reduce the daily jail population by releasing into the community nonviolent individuals charged with nonviolent, lower-level crimes. The Sheriff does not have, as a routine matter, the resources to electronically monitor Appellants – and others similarly situated to them – out in the community. Nor does the Sheriff have access to infinite funds to provide such monitoring to an ever-increasing number of pretrial defendants.

It is precisely because the Sheriff does not have the resources to, on a routine basis, adequately electronically monitor defendants with criminal backgrounds or violent charges similar to the named Appellants in this case that Sheriff Dart did not place Appellants into his EHM program in the first place. It is the Sheriff's EHM program, after all. He is statutorily charged with imposing the rules and regulations for the administration of the jail, and is responsible for maintaining the public's safety. It is no revelation to judges, prosecutors, defense attorneys, and defendants that certain defendants do not qualify for Sheriff Dart's EHM program.

In fact, there is an entire group of defendants not placed in the program for a totally separate reason than the reason Appellants were refused placement. Administration of the EHM program requires that the person to be monitored have a home, and a phone and wi-fi service within that home. Every day there are over 100 people housed in the Cook County Jail who are charged with nonviolent crimes such as drug possession and retail theft with low bonds or I-Bonds, and with the special condition of bond being admitted into Sheriff Dart's EHM program. Unfortunately, in spite of the Court's bail order containing EHM as a condition of bond, Sheriff Dart cannot move these individuals into the EHM program because they are homeless, and thus cannot be electronically monitored.

It is ironic that Sheriff Dart is being portrayed by the Appellants as someone bent on keeping individuals in physical custody rather than being released on EHM. As explained in his letter to the County Board and attached to the Appellants' Complaint, Sheriff Dart has long advocated for these nonviolent individuals to have their

bonds reviewed by the individual judges who set the bail in the hopes that the individual judges would reduce the bonds to I-Bonds without the condition of EHM, and has long stated publicly that the public interest is not served by detention of these nonviolent individuals within the walls of the county jail. No one would suggest, or has suggested, that Sheriff Dart was disregarding a Court's bail order by not enrolling a homeless defendant in the EHM program. Everyone understands that regrettably, the Sheriff's Office cannot adequately monitor these individuals through EHM because of their homelessness and/or lack of wi-fi access. A home and wi-fi access are prerequisites to one's admission into the Sheriff's EHM program. These prerequisites of a home and wi-fi access is a condition imposed not by statute or by any court, but rather by the Sheriff in his review of the practical realities of his obligation to monitor those individuals to be placed on EHM.

The list of these nonviolent individuals who would be released on EHM but for their homelessness is provided every day to the Office of the Public Defender and any private defense attorneys representing these often-indigent defendants. On information and belief, Appellants here are not claiming to be "similarly situated" to these nonviolent individuals. Rather, Appellants and those "similarly situated" to Appellants fail to satisfy a different prerequisite for admission into the Sheriff's EHM program.

The Appellants here were refused placement in Sheriff Dart's EHM program for different reasons: their violent recidivist background and/or pending charges of violence. Specifically, public records establish that each of the Appellants is charged

with a violent offense, has an extensive violent criminal history, and/or poses a threat to the community. Taphia Williams is charged with aggravated kidnapping (a Class X felony). Gregory Cooper was out on bond for armed robbery with a firearm (a class X felony punishable by 21-45 years in prison) when he was arrested on a new charge of delivery of Heroin within 1,000 feet of a school (a class 1 felony). Marcus Johnson is charged with being a gang member in possession of a firearm (a class 2 felony), and at the time of his arrest was wanted for questioning in a murder. Joshua Atwater is charged with aggravated kidnapping (a class X felony) and aggravated criminal sexual assault (a class 2 felony). Tony Mason is charged with one count of armed habitual criminal and one count of delivery of between 100 and 400 grams of cocaine (both Class X felonies), after he was arrested and found in possession of over $1,100 in cash, multiple bags of crack cocaine, and a 9mm handgun outfitted with an extended clip containing 29 live rounds and another in the chamber.

In each case, there were constitutionally-permissible considerations for Sheriff Dart in determining whether or not a given pretrial defendant will be placed in his EHM program. Appellants failed to gain placement because of those considerations. Where the Sheriff cannot release to EHM a nonviolent homeless defendant because the defendant does not have a home to monitored within, the Sheriff cannot routinely place defendants like Appellants in his EHM because Appellants' violent criminal background and/or pending charges of violence indicate that Appellants pose a safety risk to the community, and an increased administrative and budgetary burdens to monitor.

In light of the Bail Act specifically, the Code of Criminal Procedure generally, and the Sheriff's duty to maintain public safety, the Sheriff's detention of the Appellants was justified, and certainly reasonable, but in any event fails to shock the conscience. After all, for purposes of due process, governmental action does not have to be the only alternative, or even the best alternative for it to be reasonable and constitutional. *Bell*, 441 U.S. at 542 (quoting in a footnote *Vance v. Bradley*, 440 U.S. 93 (1979). For all of these reasons, the Appellants' substantive due process claim fails as a matter of law, and the District Court's dismissal of the claim with prejudice should be affirmed.

III. The District Court Did Not Err in Dismissing the Appellants' Racial Discrimination Claims Under the Fourteenth Amendment and the Illinois Civil Rights Act.

The district court dismissed the Appellants' equal protection claims because the Appellants failed to sufficiently allege discriminatory impact upon a protected class and a discriminatory purpose on the part of Sheriff Dart. Instead, the Appellants' allegations purporting to support their equal protection claims were almost entirely conclusory.

For instance, Appellants alleged that "upon information and belief, numerous individuals of other races and identities who were similarly situated to the [Appellants], who posted bond or otherwise satisfied their conditions of release, were not detained pursuant to Dart's policy and were allowed to be placed on electronic home

monitoring." App. 19, Third Am. Compl., ¶44., p. A126.[1] The district court was not required to accept such conclusory allegations as true for the purposes of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

> The tenet that a court must accept as true all of the allegations in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Although for the purposes of a motion to dismiss courts must take all of the factual allegations in the complaint as true, they are not bound to accept as true a legal conclusion couched as a factual allegation.

Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

The conclusory nature of Appellants' pleadings are self-evident. For example, in the aforementioned ¶44, Appellants did not disclose the nature or severity of <u>their own</u> pending charges or criminal backgrounds, let alone allege that individuals of an unprotected class with those similar specific charges or criminal backgrounds were treated more favorably. Of the remaining allegations cited by the Appellants in their response brief to the district court, ¶41 and ¶46 were conclusory and/or legal conclusions, and ¶47 addressed—for unexplained reasons—a 2017 Department of Justice report which concluded that African Americans have been disproportionately targeted for decades by the Chicago Police Department. App. 19, Third Am. Compl., p. A126. The Appellants never explained to the district court what the Chicago Police Department has to do with the Sheriff's EHM program, or how a discriminatory purpose on the part of the Chicago Police Department would constitute proof or even a

[1] Throughout this brief, "App." refers to the appendix filed with Williams' opening brief, see docket entry 19.

relevant allegation as to a discriminatory purpose on the part of Sheriff Dart or discriminatory impact upon the Appellants.

Appellants assert that they adequately pleaded these claims because they have alleged invidious discrimination in their Complaint, which states:

> Sheriff Dart's statement that people from the South and West sides of Chicago—primarily African Americans—are to be the most closely scrutinized shows that Dart's policy of refusing to release certain detainees is motivated by racial bias and racist assumptions about the likelihood that people from primarily African American neighborhoods pose a public safety risk or are likely to reoffend.

App. 19, Third Am. Compl., ¶40, p. A126. Appellants assert that these allegations, along with the allegations in paragraphs 38 through 40 characterizing quotes of the Sheriff and his Chief Policy Advisor found in newspaper articles attached to the complaint as exhibits, are entitled to be presumed as true for the purposes of a 12(b)(6) motion. These allegations, however, are conclusory in nature, and as such *are not* entitled to be assumed as true. *Iqbal*, 556 U.S. at 681. Moreover, the newspaper articles themselves were exhibits to the Complaint. A copy of any written instrument which is an exhibit to a pleading is a part of thereof for all purposes. *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1992). Those exhibits speak for themselves, and are by any plain reading race-neutral. In any case, however, Appellants' *characterization* of those articles or the quotes contained therein—even though couched as allegations in the complaint—are, by definition, conclusory.

Setting aside the *conclusory* allegations of a complaint, a Court must consider the *factual* allegations in a complaint to determine if they *plausibly* suggest an entitlement to relief. *Iqbal*, 556 U.S. at 681. The *factual* allegations making up

Appellants' equal protection claims—to the extent they even exist—fail to plausibly suggest an entitlement to relief. The facts of the Iqbal case are instructive in analyzing the plausibility of Appellants' equal protection claims.

The *Iqbal* complaint alleged that the FBI under the direction of the FBI Director arrested and detained thousands of Arab Muslim men as part of its investigation of the events of September 11, and further claimed that the policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by Attorney General Ashroft and Mueller in discussions in the weeks after September 11, 2001. *Iqbal*, 556 U.S. at 682.

In analyzing the complaint's allegations, the Court held:

> Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose. The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of Al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim – Osama bin Laden – and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected links to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. *As between the obvious alternative explanation for the arrests, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.*"

Id. at 682 (emphasis added). Similar to the *Iqbal* case, Appellants here allege that their race was Sheriff Dart's motivating factor in deciding to refuse them enrollment in his EHM program. In support of this theory, Appellants alleged that "recent

publicly available documents from the Sheriff's office" show that as many as 85 individuals were detained pursuant to Dart's policy, and that at least 80% are African American, where African Americans make up only 30% of Chicago's population. App. 19, Third Am. Compl., ¶41-43, p. A126. However, as the district court noted, the racial makeup of the City of Chicago is irrelevant to the issues in this suit. Rather, the relevant population for comparison is that of the Cook County Jail. App. 19, Mem. Op. and Order, Nov. 4, 2019, p. A237.

Moreover, as in *Iqbal*, these allegations, taken as true, may be consistent with the Sheriff intentionally discriminating against Appellants because of their race, but given more likely explanations, they do not establish this purpose. In fact, other publicly records from the Sheriff establish that Appellants' race was *not* the cause of their being denied enrollment in the Sheriff's EHM program.

Specifically, the daily demographic composition of the Cook County Jail dating back to October of 2017 is available online at https://www.cookcountysheriff.org/data/. Those daily data sheets establish conclusively that the Sheriff does not discriminate against African Americans in determining who he enrolls in his pretrial EHM program. In fact, the daily data shows that African Americans have since at least October of 2017 consistently comprised approximately 70% of the Cook County Jail population, and have likewise consistently comprised approximately 70% of the Sheriff's EHM program population.

The Court may take judicial notice of matters of public record. *Anderson v. Simon*, 217 F.3d 472, 474 (7th Cir. 2000). These public records establish conclusively

that the vast majority of individuals enrolled in the Sheriff's EHM program are African American, and in fact that the proportion of African Americans enrolled in the Sheriff's EHM program roughly matches the proportion of African Americans in the Sheriff's custody. These public records prove false any allegation or insinuation that the Sheriff discriminates against African Americans in determining who he enrolls in his EHM program, and makes exceedingly implausible Appellants' claims that the Sheriff has excluded *Appellants* from enrollment in his EHM program because of their race.

Rather, the obvious alternative explanation for the Sheriff's refusal to enroll Appellants in his EHM program, explained in the emails and newspaper articles affixed as exhibits to Appellants' complaint, consisted of the following race-neutral facts, none of which was disputed by Appellants in their Response brief filed in the district court: (1) the Sheriff's EHM program was never intended for the pretrial supervision of individuals with violent recidivist backgrounds and/or pending charges of violence; (2) the Sheriff does not have infinite resources to administer any of his programs, including his pretrial EHM program, and individuals facing charges of violence, with violent recidivist backgrounds, and/or who pose a flight risk, require additional resources to monitor on EHM; and (3) Appellants are all facing charges of violence and/or have violent recidivist background.

Appellants' federal and state equal protection claims are simply implausible. "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a claim states a plausible claim for relief will… be a

context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679.

Like in *Iqbal*, as between the "obvious alternative explanation" for the Sheriff's refusal to enroll Appellants in the Sheriff's electronic home monitoring program, and the purposeful, invidious discrimination Appellants ask the Court to infer, discrimination was not a plausible conclusion. In light of the publicly available demographic data of the jail population, and the conclusory nature of Appellants' allegations, the district court was correct to dismiss these claims.

The Appellants cannot support their equal protection claims against Sheriff Dart merely by labeling him a racist. Their claims must be plausible. The Appellants' equal protection and civil rights claims, based entirely on irrelevant statistics and two misleading, out-of-context quotes from his policy director Ms. Smith—quotes that are entirely race-neutral—fail that test, and the district court was correct to dismiss those claims.

The Appellants now argue—for the first time—that "…it was obvious that Dart's consideration of arrest history would inevitably target African Americans for extended detention." Appellants' Br., p. 35. Appellants waived that argument, because they never asserted it before the district court. *United Cent. Bank v. Davenport Estate LLC*, 815 F.3d 315, 318 (7th Cir. 2016) (internal citations omitted). It is an unpersuasive and implausible argument even if it had not been waived, however,

considering the aforementioned publicly available statistical information maintained by the Sheriff as well as words of Sheriff Dart and his chief policy officer at the time Cara Smith in the articles repeatedly referenced by the Appellants.

Appellants failed to adequately plead an equal protection claim under either federal or state law, and the district court was correct to dismiss those claims. Appellants were not "targeted" because they are African American. Rather, Sheriff Dart's decision to refuse placement to Appellants was based upon their criminal background and/or the nature of their pending charge.

IV. The District Court Did Not Err in Dismissing the Appellants' Fourth Amendment Claim.

Appellants' Fourth Amendment claim is for alleged unlawful detention by Sheriff Dart, alleging that Sheriff Dart "…knowing that he had no legal justification, caused Appellants to be detained, violating Appellants' right to be free from unreasonable seizures guaranteed to them by the Fourth and Fourteenth Amendments of the United States Constitution." App. 19, Second. Am. Compl. at ¶111, p. A014. In reality, however, the detention of Appellants by Sheriff Dart followed a finding of probable cause to detain each Appellant made by a Circuit Court Judge.

The Fourth Amendment establishes the standards and procedures governing pretrial detention. *Manuel v. City of Joliet*, 137 S. Ct. 911, 914 (2017). "The Fourth Amendment protects the right of the people to be secure in their persons against unreasonable seizures. A person is seized whenever officials restrain his freedom of movement such that he is not free to leave. The general rule is that Fourth Amendment seizures are 'reasonable' only if based on probable cause to believe that the

individual has committed a crime." *Id.* at 917. The Fourth Amendment prohibits government officials from detaining a person unless a judge or grand jury makes a reliable finding of probable cause that the accused had committed the crime charges. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

Here, Appellants make no allegation in the district court that they were being held without the probable cause hearing required in *Gerstein*. In fact, each Appellant appeared before a Cook County Circuit Court Judge on each Appellant's felony case. On each case, a Circuit Court judge made a finding of probable cause to detain each Appellant. Nor did Appellants contest in the district court the factual bases of those findings.

The district court correctly ruled that, in failing to allege either (1) that Sheriff Dart detained Appellants in the absence of a finding of probable cause to believe each Appellant committed a crime, or (2) that Sheriff Dart detained Appellants after a finding of probable cause that was premised on unreliable or false information, the Appellants failed to state a Fourth Amendment cause of action. The Appellants now argue—for the first time—that in refusing to admit Appellants into his EHM program, Sheriff Dart "re-seized" Appellants. Appellants' Br., p. 39. This legal theory was never advanced by the Appellants in the district court, however, and is thus waived. *United Cent. Bank v. Davenport Estate LLC*, 815 F.3d 315, 318 (7th Cir. 2016) (internal citations omitted). Even if it were not waived, the argument is unpersuasive, because it again presumes that Appellants satisfied all conditions of bond to secure

their release. They did not. The Appellants failed to secure enrollment in Sheriff Dart's EHM program, which was a condition of their release.

V. The District Court Did Not Err in Denying the Appellants' Motion to Certify an Injunctive Class.

The district court did not abuse its discretion in denying Appellants' motion for class certification on the basis of typicality, though it would have been correct to deny the Appellants' motion for class certification on the basis of either commonality or numerosity, as well, or in requiring the Appellants' counsel to also more fully explain their expertise and adequacy in serving as class counsel.

In the district court, Appellants proposed that the following class be certified: "All individuals who have been detained, are currently being detained, or in the future will be detained at the Cook County Jail, even though their bond has been posted, in violation of a facially valid court order, pursuant to Dart's policy of conducting his own review of bond decisions made by Cook County Judges." App 19, Third Am. Compl., ¶121, p. A133.

A. Appellants' Purported Class Fails to Satisfy the Numerosity Requirement.

Appellants assert in their motion for class certification that their proposed class "easily meets" the 40-person standard. R. 2, Pls' Mot. for Class Certification, p. 3.[2] In their Third Amended Complaint, Appellants claim that their proposed class numbers in excess of 80 people. App. 19, Third Am. Compl., ¶¶124-125, p. A134. In addition to the named plaintiffs, Appellants claim that over 70 individuals are

[2] Throughout this brief, "R." refers to district court docket entries.

similarly situated to them and would be appropriate class members. App. 19, Third Am. Compl., ¶125, p. A134 (referring to a list of individuals on administrative review by the Sheriff, dated March 6, 2018, and attached to Appellants' Complaint as Exhibit G).

As Sheriff Dart argued before the district court, the vast majority of the orders for the individuals Appellants have referenced direct no particular agency to accept the individual into an EHM program. Of the entire list in Exhibit G of Appellants' Third Amended Complaint (which presumably includes even individuals who Appellants do not seek to add as class members), the undersigned counsel located only nine with bond court orders specifically placing or referring Appellants to the Sheriff's EHM program. App. 19, Third Am. Compl., Ex G., p. A217. Of the individuals named in Appellants' Third Amended Complaint at ¶125, only Terrance Strickland was so ordered. Of the nine named plaintiffs, the bond court orders of only three—Taphia Williams, Joshua Atwater, and Tony Mason—state that the Sheriff was to place them in the Sheriff's EHM program.

Apart from these 12 orders (the three named plaintiffs and the nine additional individuals from Exhibit G), the remaining orders do not identify whether the Court intended that pretrial services, the probation department, or the Sheriff administer electronic monitoring. These remaining orders do not specify which agency is supposed to administer electronic monitoring at all. Instead, they merely state "EM", "EM SCOB", or "electronic home monitoring as a special condition of bond."

Though true in the past the Sheriff has placed individuals with nonspecific EM orders into his EM program, the distinction between certain of the named Appellants' bond court orders and other named Appellants' bond court orders is not immaterial. Rather, Appellants' proposed class certification motion hinges on their allegation that the Sheriff violated a "facially valid bond order" directing him to place Appellants in his EHM program, and instead detained Appellants. This assertion presumes that each Appellant's state court order directed the Sheriff to place each Appellant in the Sheriff's EHM program.

When limited to the Appellants or potential class members with court orders purporting to place them specifically in the Sheriff's EHM program, Appellants' proposed class falls well short of satisfying the numerosity requirement. In fact, that group of individuals appears to number fewer than 15. Nor is the number of potential class members growing, as Appellants were all eventually—within 14 days, according to Appellants' Third Amended Complaint—placed on the Sheriff's EHM program, and the "unlawful policy" Appellants complain of—the Sheriff's administrative review of the criminal background of and charges pending against individuals ordered onto his EHM program—was ended by the middle of March, 2018, within two weeks of it having been started.

Given the small, discreet number of any similarly situated plaintiffs, joinder would not be impractical, and in fact would be a more efficient method of administering this case. As a result, Appellants fail to satisfy the numerosity prerequisite of Rule 23.

B. Appellants' Purported Class Fails to Satisfy the Commonality and Typicality Requirements.

Appellants' proposed class also fails to satisfy the commonality and typicality requirements of Rule 23. The district court found that while a state courts likely do not have the power to place the named Appellants in the Sheriff's EHM program, "it is still questionable whether the [Appellants'] prolonged detentions were lawful or whether their bond orders required their release." App. 19, Mem. Op., Sept. 13, 2018, p. A111. This Court went on to cite *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511 (7th Cir. 2009), which held that the constitutionality of an individual's detention depends on whether the length of the delay between the time the Sheriff was notified that bond had been posed and the time that the detainee was released was reasonable in any given case. *Harper*, 581 F.3d at 515. The *Harper* court held that this determination was an individual issue, and that liability would need to be determined on an individual basis. *Id.*

The constitutionality of each Appellant's detention is likewise an individual issue that should be determined on an individual basis. The administrative review conducted by the Sheriff sought to review the criminal backgrounds and pending charges against each individual referred to the Sheriff's EHM program to determine whether each individual was suitable for such placement. App. 19, Third Am. Compl., Ex. C "Letter from Sheriff Dart to Cnty. Bd. Pres., Toni Preckwinkle" at p. 2.

The administrative review procedure was occasioned by bail reform which took effect in Cook County in September 2017, and which dramatically increased the number of pretrial defendants placed on the Sheriff's EHM program from bond court. *Id.*,

p. 1. The Sheriff's policy was intended to mitigate any increased risks to public safety, and accounted for the resources available to the Sheriff to monitor these additional individuals at any given time. *Id*., pp. 3-4.

Though the policy guiding the Sheriff was the same in the case of each named Appellant, the basis for the continued detention of each individual was determined on a case by case basis, and included a review of each individual's pending charges and criminal background. Though all of the named Appellants were initially denied placement in the Sheriff's EHM program, each of the Appellants have distinct pending charges and criminal backgrounds which made each individual uniquely unsuitable for immediate placement in the Sheriff's EHM program at the time their placement was requested.

Public records establish that each of the Appellants are charged with different violent offenses, have extensive but distinct violent criminal history, and/or poses a different level of threat to the community. For example, Taphia Williams is charged with aggravated kidnapping (a Class X felony). Gregory Cooper was out on bond for armed robbery with a firearm (a class X felony punishable by 21-45 years in prison) when he was arrested on a new charge of delivery of Heroin within 1,000 feet of a school (a class 1 felony). Marcus Johnson is charged with being a gang member in possession of a firearm (a class 2 felony), and at the time of his arrest was wanted for questioning in a murder. Joshua Atwater is charged with aggravated kidnapping (a class X felony) and aggravated criminal sexual assault (a class 2 felony). Tony Mason is charged with one count of armed habitual criminal and one count of delivery of

between 100 and 400 grams of cocaine (both Class X felonies), after he was arrested and found in possession of over $1,100 in cash, multiple bags of crack cocaine, and a 9mm handgun outfitted with an extended clip containing 29 live rounds and another in the chamber. And so on.

In each individual case, the Sheriff's determination as to whether to immediately place the Appellants on his EHM program was based on the nature of the pending charges against each Appellant, each Appellant's unique criminal background, and the resources available to the Sheriff at the time the Appellants' placement was requested. Appellants failed to gain immediate placement because of those considerations. Although each was ultimately released, the reasonableness of the Sheriff's refusal to immediately place each Appellant in his EHM program depends on an individualized, case-by-case analysis. Apart from the fact that each of the Appellants was refused immediate placement in the Sheriff's EHM program, and in light of their unique criminal backgrounds, distinct pending charges, and different resources available for their monitoring depending on the day, there is no commonality among the named Appellants, and no typicality between the named Appellants and the alleged class members.

C. Appellants' Counsel Has Not Demonstrated They Possess the Requisite Experience Pursuant to Fed. R. Civ. P. 23(g)(1)(A)(ii).

No class should be certified in the first place, because Appellants have failed to satisfy all of the elements of Rule 23. Even if the Court found that Appellants did satisfy the requirements of Rule 23, Appellants' counsel have not demonstrated that they should be designated class counsel. Though Appellants' counsel in their Motion

for Class Certification cite to a Monell case they prosecuted, it is not apparent from the Motion that either named counsel has any experience prosecuting a class action case. The Sheriff requests that Appellants' counsel describe all of their relevant experience, and that the Court then make a determination as to the whether or not Appellants' counsel should be designated class counsel.

CONCLUSION

For the foregoing reasons, Defendants request that this Court affirm the district court's decisions granting Defendant's motion to dismiss and denying class certification, and remand the case to the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
F.R.A.P. 32(a)(7), F.R.A.P. 32(g) and C.R. 32(c)

I certify that the forgoing Defendant's-Appellee's Brief conforms to the rules contained in F.R.A.P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 10426 words.

/s/ Richard Gleason
Counsel for Defendant-Appellee

CERTIFICATE OF SERVICE

I certify that on December 13, 2019, I electronically filed the Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Richard Gleason
Counsel for Defendant-Appellee

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

/s/ Richard Gleason
Counsel for Defendant-Appellee

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON

CIVIL ACTION NO. 91-187

JOHN DOE, ET AL PLAINTIFFS

VS. OPINION AND ORDER

DON YOUNGER, ET AL DEFENDANTS

This matter is before the court on defendant Kenton County's motion to alter, amend and vacate this court's July 26, 1996 judgment and to stay the execution of that judgment (doc. #450), the motion of defendants Paul Patton and Doug Sapp to alter or amend the court's July 26, 1996 judgment (doc. #459), and the stipulated motion for an extension of time to file a petition for attorneys' fees (doc. #459). A telephonic hearing was held on these motions on August 29, 1996. For the reasons set forth below, Kenton County's motion to alter or amend is granted as to which juveniles are exempt from the 15 day limitation on length of stay, but the remainder of Kenton County's motion is denied. The motion of defendants Governor Paul Patton and Doug Sapp is denied in its entirety, and the stipulated motion for an extension of time to file a petition for attorneys' fees is granted.

Plaintiffs initiated this civil rights class action pursuant to 42 U.S.C. §1983. They challenge the constitutionality of the conditions of their confinement at the Kenton County Detention Center (KCDC) in Covington, Kentucky. After considering all

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evidence presented during a three day trial to the bench and considering all arguments made in post-trial briefs filed by the parties, the court entered its findings of fact and conclusions of law as well as an amended judgment on July 26, 1996. The parties seek alteration of portions of these documents.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WILL BE AMENDED CONCERNING THE EXEMPTION FROM THE 15 DAY LIMITATION ON LENGTH OF STAY

This case requires the court to balance significant conflicting interests -- the due process rights of incarcerated juveniles, the public's right to have juvenile crime and misbehavior addressed, and the separation of federal and state powers. As explained in the court's findings of fact and conclusions of law, the Kenton County Detention Center is clearly substandard in many respects. However, in the view of the court the conditions at the KCDC become unconstitutional and thus justify court intervention only when a juvenile is subjected to those substandard conditions for an extended period of time. To that end, the court imposed a time limit on the length of incarceration in this facility for juveniles who do not have the benefit of adult procedural protections, stating:

> Plaintiffs ask the court to close this institution. After careful reflection, the court has concluded that such an extreme act would violate the principles of judicial restraint and federalism. But the court has also concluded that confining a juvenile there for an extended period -- more than fifteen (15) days, unless there is probable cause to believe that the juvenile can be treated as an adult charged with a crime -- is punishment without due process of the law. What one can

> bear for a short period can be intolerable if prolonged.

Doc. #447 at 2. The court's amended judgment provides, "That, effective **August 15, 1996,** no juvenile not indicted for or convicted of a crime as an adult shall be held in the present Kenton County Detention Center for more than **fifteen (15) days.**" Doc. #449 at 1.

In its motion to alter or amend the judgment, Kenton County states, for the first time, that, given the procedures prescribed by the Kentucky Revised Code concerning youthful offenders, it is impossible to judicially determine whether a juvenile will be treated as an adult charged with a crime within fifteen days of the juvenile's initial incarceration at the KCDC. For this reason, Kenton County asks the court to revise its language concerning which juveniles are exempt from the fifteen day limit on length of incarceration at the KCDC.

In making its motion, Kenton County repeatedly sarcastically states that the court was "simply wrong" in concluding that juveniles who have not been charged with a crime and who have not been afforded the rights of those who are so charged are being held for lengthy periods in the KCDC. This statement is itself not only "simply wrong" but demonstrates a profound ignorance of the law of this case.[1]

It is fundamental that proceedings against juveniles, even

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[1] The court suggests that if one is going to be disrespectful, one ought to at least do his homework.

juveniles who have allegedly been in contempt of court, are not criminal proceedings. See, e.g., In re Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); Young v. Knight, 329 S.W.2d 195 (Ky. 1959); Alexander S. v. Boyd, 876 F. Supp. 773 (D.S.C. 1995). As the Supreme Court explained:

> The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.

Kent, 383 U.S. at 544 (emphasis added). More recently, the Kentucky Supreme Court has echoed those views, stating:

> It has been a principle theory of juvenile law that an individual should not be stigmatized with a criminal record for acts committed during minority. By providing young people with treatment oriented facilities rather than simple punishment, antisocial behavior can be modified and the offenders will develop as law abiding citizens. However, such treatment does limit the constitutional rights that are traditionally provided for adult offenders. Juvenile offenders are not afforded all the constitutional rights that adult offenders receive. They are afforded only the right to fair treatment. . . . The Kentucky juvenile justice system reflects this philosophy.

Jefferson County Department for Human Services v. Carter, 795 S.W.2d 59, 61 (Ky. 1990)(footnote and citations omitted)(emphasis added).

Even so basic a work as American Jurisprudence 2d, a primer of

American law, in the very first section of its article on Juvenile Courts notes the following basic principles:

> The purpose of juvenile court legislation is to provide for the disposition of delinquent, dependent, neglected, and abandoned children by providing a complete scheme for treatment thereof including the creation of a juvenile court which will investigate and try to rehabilitate minors.
>
> With respect to the delinquent child, the philosophy of juvenile court laws is that the juvenile is to be considered and treated not as a criminal, but as a person requiring care, education, and protection. A fundamental aim of juvenile court laws is the prevention of delinquency of children. Consequently, such laws are not punitive, but are corrective and protective in that their purpose is to make good citizens of potentially bad ones. In other words, the welfare of the child lies at the very foundation of the statutory scheme.

47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 1 (1995) (emphasis added).

As the above authorities and many others make abundantly clear, it is a trade-off. Juveniles may be deprived of some constitutional rights, such as the right to a jury trial and a speedy and public trial, because they are not being punished but treated. Therefore, all juveniles, except those being proceeded against as adults, have not even been accused of crimes. Again, this is so basic that one doubts if contrary assertions are made in good faith.[2]

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[2] Certainly, denial of these basics would not be "warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2).

The gravamen of this court's opinion is that detention at the KCDC for more than fifteen (15) days is punishment. Therefore, no juvenile may be so punished except those being proceeded against as adults.

Thus, in determining whether juveniles could constitutionally be housed in the substandard KCDC facility, the court protected those children who are not afforded the additional procedural rights available to adults. In keeping with the notion that federal courts have the authority only to require the constitutional minimum--not to impose their views of an ideal facility, the court elected to limit the length that any juvenile not ultimately protected by adult procedural rules may be incarcerated in the KCDC.

In Kentucky, a juvenile is protected by adult procedural requirements only if he is proceeded against as a "youthful offender." A "youthful offender" is a person who is transferred to Circuit Court to be indicted, tried and sentenced as an adult pursuant to KRS Chapter 640 and who is subsequently convicted in Circuit Court. KRS 600.020(52). To be eligible for treatment as a youthful offender, a juvenile must be accused of committing certain serious crimes.[3]

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[3]Those eligible to proceed as youthful offenders under KRS Chapter 640 include:
(a) a child charged with a capital offense, Class A felony or Class B felony who was at least fourteen years old at the time of the alleged commission of the offense (KRS 635.020(2));
(b) a child charged with a Class C or Class D felony who was at least sixteen years old at the time of the alleged commission of the offense and who previously had been found to have committed

The procedures by which it is determined that a child will be proceeded against as a youthful offender are contained in the Kentucky Unified Juvenile Code. To initiate these procedures, the county attorney must make a motion before the District Court to transfer the child to Circuit Court for treatment as a youthful offender. KRS 635.020 and KRS 640.010(2).[4] The District Court then conducts a transfer hearing pursuant to KRS 640.010. At that hearing, the District Court determines whether there is probable cause to believe that the child committed an offense and whether all age or other requirements for treatment as a youthful offender have been satisfied. KRS 640.010(2)(a). The District Court then considers a number of other factors concerning the circumstances surrounding the offense, the child, and the public and determines whether the child should be transferred to Circuit Court for treatment as a youthful offender. KRS 640.010(2)(b).

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felony offenses on two separate occasions (KRS 635.020(3));
(c) a child charged with a felony in which a firearm was used in the commission of the offense who was at least fourteen years old at the time of the alleged commission of the offense (KRS 635.020(4));
(d) a child charged with a felony who previously had been convicted as a youthful offender (KRS 635.020(5)); and
(e) a person who is at least eighteen years old and is charged with a felony that occurred prior to his eighteenth birthday (KRS 635.020(7)).

[4]In the case of a child charged with a felony in which a firearm was used and who is at least fourteen years old at the time of the alleged offense, KRS 635.020(4) provides for automatic treatment as a youthful offender. However, it appears from the language of KRS 640.010(1) and (2) that the county attorney must file a motion to transfer the child to Circuit Court in order to trigger the hearing that results in the automatic transfer.

Due to the serious consequences associated with treatment as a youthful offender, it is common for the child's attorney to seek additional time for investigation and preparation prior to the transfer hearing. At the telephonic hearing, the County Attorney, Garry Edmondson, personally orally certified to this court that all motions for transfer to the Circuit Court for treatment as a youthful offender are and will be made in the good faith belief that the facts support such a transfer. He also said he could make the necessary good faith determination within the 15 days.

Based upon the County Attorney's representation and the fact that it is impossible to ensure that a transfer hearing will commence within 15 days of incarceration without infringing the juvenile's right to adequate preparation and investigation, the court concludes that its July 26, 1996 findings of fact and conclusions of law and amended judgment should be modified to state:

> Confining a juvenile in the Kenton County Detention Center for an extended period of time -- more than fifteen (15) days unless the prosecutor has, in good faith, filed a motion to transfer the juvenile to Circuit Court for treatment as a youthful offender -- is punishment without due process of law.

Any statements contained in the court's July 26, 1996 findings of fact and conclusions of law or in the court's amended judgment filed that same day that are inconsistent with this statement shall be vacated.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WILL BE AMENDED TO TRACK LANGUAGE REQUIRED BY THE PRISON LITIGATION REFORM ACT OF 1995

In its motion to alter or amend, Kenton County contends that the court did not make specific findings required by the recently enacted Prison Litigation Reform Act of 1995, and, therefore, Kenton County is entitled to immediate release from the prospective relief provided by this court's July 26, 1996 amended judgment. Kenton County's argument is without merit.

The Prison Litigation Reform Act of 1995 provides, in part:

> The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C.A. §3626(a)(1)(A) (1996). The Act further provides for termination of prospective relief if the court fails to make such findings. 18 U.S.C. §3626(b)(2).

The court fully complied with the PLRA in its July 26, 1996 findings of fact and conclusions of law by paraphrasing the required findings. However, in an abundance of caution and in an effort to avoid any misunderstanding, the court hereby amends its July 26, 1996 findings of fact and conclusions of law to specifically state:

This court finds that the prospective relief ordered in this case is narrowly drawn, extends no further than necessary to correct the current and ongoing violation of the plaintiffs' Federal constitutional right to the due process of law, and is the least intrusive means necessary to correct the violation of that Federal right. The court has given substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by this relief. This finding is made in accordance with the

Prison Litigation Reform Act of 1995, 18 U.S.C. §3626(a)(1).

THE COURT'S AMENDED JUDGMENT IS NOT A "PRISONER RELEASE ORDER" WITHIN THE MEANING OF THE PLRA

Kenton County's final contention is that the court's July 26, 1996 amended judgment constitutes a "prisoner release order" as used in the PLRA, 18 U.S.C. §3626(a)(3). Therefore, according to Kenton County, the order in question can be entered only by a three-judge panel and only after a previously entered order for less intrusive relief has failed to remedy the constitutional deprivation. This contention is without merit.

The PLRA defines "prisoner release order" as "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C.A. §3626(g)(4)(1996). This definition must be read in conjunction with the substantive provisions concerning prisoner release orders and in view of the legislative history underlying those provisions.

To enter a prisoner release order, under the PLRA, a three-judge panel must find by clear and convincing evidence that: "(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." 18 U.S.C.A. §3626(a)(3)(E)(1996). In addition, the House Judiciary Committee's report provides:

> Subsection (a)(2): Prison <u>population</u> <u>reduction</u> relief

> This subsection makes prison caps the remedy of last resort, permitting a cap to be imposed only if the prisoner proves: 1) that crowding is the "primary" cause of the federal violation; and 2) that no other remedy will cure the violation. These requirements are imposed in recognition of the severe, adverse effects of prison caps and the accompanying prisoner releases relied on to meet the caps.
>
> * * *
>
> By requiring that a plaintiff inmate prove an actual violation of his constitutional rights based on the alleged overcrowding, this subsection will end the current practice of imposing prison caps when inmates have complained about the prison conditions but the presiding judge has made absolutely no finding of unconstitutionality or even held any trial on the allegations. In ordering or approving these caps, some judges now oversee <u>huge programs of releases to keep the prison population down</u> to whatever that judge considers an appropriate level.

House Committee on the Judiciary, Violent Criminal Incarceration Act of 1995, H.R. Rep. No. 21, 104th Congress, 1st Session, p. 25 (1995) (emphasis added).

After reviewing the substantive provisions concerning prisoner release orders and the legislative history underlying this provision of the PLRA, it is clear that the prisoner release order provisions are directed at prison caps, i.e., orders directing the release of inmates housed in a particular institution once that institution houses more than a specific number of persons. This is not that kind of case.

In the case at bar, the court ordered that children--other than those for whom the county attorney has filed a motion for transfer to Circuit Court as a youthful offender--not be incarcerated in the barren KCDC for more than 15 days. The court's

order does not impose a cap on the number of children incarcerated at the KCDC--it limits only the amount of time in which any particular child may be held under the substandard conditions present in the KCDC.

In addition, the court's order does not direct the release of any child. It is undisputed that counties, including Kenton County, often house juveniles in need of a secure facility in other counties. In fact, such transfers from facilities in one county to facilities in another county or even another state are extremely common. Indeed, the Kentucky Juvenile Code specifically contemplates such transfers. See, e.g., KRS 605.090 and KRS 615.030. Kenton County remains free to transfer juveniles in danger of exceeding the fifteen day limit from the KCDC to any other juvenile facility that is appropriate. Accordingly, the court's order does not come within the prisoner release order provision of the PLRA.

THE COMMONWEALTH DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT IS DENIED

Defendants Paul Patton, Governor of the Commonwealth of Kentucky and Doug Sapp, Commissioner of the Kentucky Department of Corrections (collectively "the Commonwealth defendants") raise three contentions in their motion to alter or amend the court's July 26, 1996 findings of fact and conclusions of law.

First, the Commonwealth defendants object to the court's referring to "state" officials, contending that the County officials have primary authority to operate the detention center.

For purposes of clarification, the court notes that "state" is used in the section 1983 sense of officials acting under color of state law and this included the Commonwealth defendants and the County defendants. In addition, the Commonwealth defendants' objection does not affect the court's judgment in this case.

Second, the Commonwealth defendants contend that the Commissioner of the Kentucky Department of Corrections does not "supervise" the KCDC, but they admit that the Commissioner has the authority to "monitor" and "inspect" the KCDC. This objection seems to be a simple matter of semantics and does not require any action on the part of the court. During the telephone conference concerning the motions to alter or amend judgment, counsel for the Commonwealth defendants indicated that she was concerned about the use of the word "supervise" because such supervision may have an effect on liability for the plaintiffs' attorneys' fees. As the court stated during the telephone conference, nothing in the findings of fact and conclusions of law is intended to imply a ruling concerning an attorneys' fee petition.

Finally, the Commonwealth defendants take issue with the court's statement that the defendants have not "produced any documentary evidence that these alternatives [to complete sprinkler suppression] were considered under the Codes FSES system or that they were ever approved by the state fire marshal." See doc. #447 at 28. As the court specifically reserved ruling on the fire safety issue until a court-appointed fire expert could be retained,

there is no need to revisit the evidence surrounding the fire safety issue at this time.

Therefore, the court being advised,

IT IS HEREBY ORDERED as follows:

1. That Kenton County's motion to alter, amend and vacate judgment (doc. #450-1) be, and it is, hereby **granted** as to the determination of what juveniles are exempt from the fifteen day limitation period. The court's July 26, 1996 findings of fact and conclusions of law and amended judgment are hereby modified to state:

> Confining a juvenile in the Kenton County Detention Center for an extended period of time -- more than fifteen (15) days unless the prosecutor has, in good faith, filed a motion to transfer the juvenile to Circuit Court for treatment as a youthful offender -- is punishment without due process of law.

Any statements contained in the court's July 26, 1996 findings of fact and conclusions of law or in the court's amended judgment filed that same day that are inconsistent with this statement are hereby vacated;

2. That the court's July 26, 1996 findings of fact and conclusions of law are hereby amended to specifically state:

> This court finds that the prospective relief ordered in this case is narrowly drawn, extends no further than necessary to correct the current and ongoing violation of the plaintiffs' Federal constitutional right to the due process of law, and is the least intrusive means necessary to correct the violation of that Federal right. The court has given substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by this relief. This finding is made in accordance with the

Prison Litigation Reform Act of 1995, 18 U.S.C. §3626(a)(1);

3. That the remainder of Kenton County's motion to alter, amend and vacate judgment (doc. #450-1) be, and it is, hereby **denied**;

4. That Kenton County's motion for stay of execution of judgment (doc. #450-2) be, and it is, hereby **denied** as moot;

5. That the motion of defendants Governor Paul Patton and Doug Sapp to alter or amend judgment (doc. #459) be, and it is, hereby **denied**; and

6. That the stipulated motion for an extension of time in which to file a petition for attorneys' fees until **October 15, 1996** (doc. #456) be, and it is, hereby **granted**.

This 4th day of September, 1996.

William O. Bertelsman

WILLIAM O. BERTELSMAN, CHIEF JUDGE

F I L E C O P Y

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
September 4, 1996

Case Number: 2:91-cv-00187

Barbara W. Jones

Keith D. Hardison

R. Thaddeus Keal

James M. Burd

Garry L. Edmondson

Shannon Wilber

James Bell

Kimberly A. Brooks

Mark I. Soler

Joseph U. Meyer

John Jay Fossett

E. D. Klatte

Barbara D. Bonar

Certificate of Mailing by _____.

EXHIBIT C

Vol. 141 WASHINGTON, WEDNESDAY, SEPTEMBER 27, 1995 No. 152

Congressional Record

United States
of America

PROCEEDINGS AND DEBATES OF THE 104th CONGRESS, FIRST SESSION

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(E) has as its sole purpose the acquisition and operation of an integrated communications satellite system and other telecommunications facilities dedicated to transmitting instruction, education, and training programming.

(2) INTERIM ACQUISITION OF TRANSPONDER CAPACITY.—As an interim measure to acquire a communications satellite system dedicated to instruction, education, and training programming, a corporation that meets the requirements of paragraph (1) may acquire unused satellite transponder capacity owned or leased by a department or agency of the Federal Government or unused satellite transponder capacity owned or leased by a non-Federal broadcast organization for reuse by schools, colleges, community colleges, universities, State agencies, libraries, and other distant education centers at competitive, low costs, subject only to preemption for national security purposes.

(3) ENCOURAGEMENT OF INTERCONNECTIVITY.—A corporation that meets the requirements of paragraph (1) shall encourage the interconnectivity of elementary and secondary schools, colleges, and community colleges, universities, State agencies, libraries, and other distant education centers with ground facilities and services of United States domestic common carriers and international common carriers and ground facilities and services of satellite, cable, and other private communications systems in order to ensure technical compatibility and interconnectivity of the space segment with existing communications facilities in the United States and foreign countries to best serve United States education, instruction, and training needs and to achieve cost-effective, interoperability for friendly end-user, "last mile" access and use.

(4) TECHNICAL AND TRAINING NEEDS.—A corporation that meets the requirements of paragraph (1) shall determine the technical and training needs of educations users and providers to facilitate coordinated and efficient use of a communications satellite system dedicated to instruction, education, and training to further unlimited access for schools, colleges, community colleges, universities, State agencies, libraries, and other distant education centers.

(b) ELIGIBLE LOANS.—The Secretary of Commerce may guarantee a loan under this section only if—

(1) the corporation described in subsection (a)(1) has—

(A) investigated all practical means of acquiring a communications satellite system;

(B) reported to the Secretary the findings of such investigation; and

(C) identified for acquisition the most cost-effective, high-quality communications satellite system to meet the purpose of this Act; and

(2) the proceeds of such loan are used solely to acquire and operate a communications satellite system dedicated to transmitting instruction, education, and training programming.

(c) LOAN GUARANTEE LIMITATIONS.—The Secretary of Commerce may not guarantee more than $270,000,000 in loans under the program under this section, of which—

(1) not more than $250,000,000 shall be for the guarantee of such loans the proceeds of which are used to acquire a communications satellite system; and

(2) not more than $20,000,000 shall be used for the guarantee of such loans the proceeds of which are used to pay the costs of not more than 4 years of operating and management expenses associated with providing integrated communications satellite system services through the integrated communications satellite system referred to in subsection (a)(1)(E).

(d) LIQUIDATION OR ASSIGNMENT.—

(1) IN GENERAL.—In order for a lender to receive a loan guarantee under this section the lender shall agree to assign to the United States any right or interest in the communications satellite system or communications satellite system services that such lender possesses upon payment by the Secretary of Commerce on such loan guarantee.

(2) DISPOSITION.—The Secretary may exercise, retain, or dispose of any right or interest acquired pursuant to paragraph (1) in any manner that the Secretary considers appropriate.

(e) SPECIAL RULE.—Any loan guarantee under this section shall be guaranteed with full faith and credit of the United States.

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary for each fiscal year to carry out this section.

(g) DEFINITIONS.—In this section:

(1) The term "acquire" includes acquisition through lease, purchase, or donation.

(2) The term "communications satellite system" means one or more communications satellites capable of providing service from space, including transponder capacity, on such satellite or satellites.

(3) The term "national security preemption" means preemption by the Federal Government for national security purposes.

Mr. DOLE (for himself, Mr. HATCH, Mr. ABRAHAM, Mr. KYL, Mr. REID, Mr. SPECTER, Mrs. HUTCHISON, Mr. THURMOND, Mr. SANTORUM, Mr. BOND, Mr. D'AMATO, and Mr. GRAMM):

S. 1279. A bill to provide for appropriate remedies for prison condition lawsuits, to discourage frivolous and abusive prison lawsuits, and for other purposes; to the Committee on the Judiciary.

THE PRISON LITIGATION REFORM ACT OF 1995

Mr. DOLE. Mr. President, I am pleased to join today with my distinguished colleagues, Senators HATCH, KYL, ABRAHAM, HUTCHISON, REID, THURMOND, SPECTER, SANTORUM, D'AMATO, GRAMM, and BOND, in introducing the Prison Litigation Reform Act of 1995.

This legislation is a new and improved version of S. 866, which I introduced earlier this year to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners. It also builds on the stop-turning-out-prisoners legislation, championed by Senators KAY BAILEY HUTCHISON and SPENCER ABRAHAM, by making it much more difficult for Federal judges to issue orders directing the release of convicted criminals from prison custody.

INMATE LITIGATION

Unfortunately, the litigation explosion now plaguing our country does not stop at the prison gate. According to Enterprise Institute scholar Walter Berns, the number of "due-process and cruel and unusual punishment" complaints filed by prisoners has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994. These suits can involve such grievances as insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety. The list goes on and on.

These legal claims may sound farfetched, almost funny, but unfortunately, prisoner litigation does not operate in a vacuum. Frivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens. The time and money spent defending these cases are clearly time and money better spent prosecuting violent criminals, fighting illegal drugs, or cracking down on consumer fraud.

The National Association of Attorneys General estimates that inmate civil rights litigation costs the States more than $81 million each year. Of course, most of these costs are incurred defending lawsuits that have no merit whatsoever.

Let me be more specific. According the Arizona Attorney General Grant Woods, a staggering 45 percent of the civil cases filed in Arizona's Federal courts last year were filed by State prisoners. That means that 20,000 prisoners in Arizona filed almost as many cases as Arizona's 3.5 million law-abiding citizens. And most of these prisoner lawsuits were filed free of charge. No court costs. No filing fees. This is outrageous and it must stop.

GARNISHMENT

Mr. President, I happen to believe that prisons should be just that—prisons, not law firms. That is why the Prison Litigation Reform Act proposes several important reforms that would dramatically reduce the number of meritless prisoner lawsuits.

For starters, the act would require inmates who file lawsuits to pay the full amount of their court fees and other costs.

Many prisoners filing lawsuits today in Federal court claim indigent status. As indigents, prisoners are generally not required to pay the fees that normally accompany the filing of a lawsuit. In other words, there is no economic disincentive to going to court.

The Prison Litigation Reform Act would change this by establishing a garnishment procedure: If a prisoner is unable to fully pay court fees and other costs at the time of filing a lawsuit, 20 percent of the funds in his trust account would be garnished for this purpose. Every month thereafter, an additional 20 percent of the income credited to the prisoner's account would be garnished, until the full amount of the court fees and costs are paid-off.

When average law-abiding citizens file a lawsuit, they recognize that there could be an economic downside to going to court. Convicted criminals should not get preferential treatment: If a law-abiding citizen has to pay the costs associated with a lawsuit, so too should a convicted criminal.

In addition, when prisoners know that they will have to pay these costs—perhaps not at the time of filing, but

eventually—they will be less inclined to file a lawsuit in the first place.

JUDICIAL SCREENING

Another provision of the Prison Litigation Reform Act would require judicial screening, before docketing, of any civil complaint filed by a prisoner seeking relief from the Government. This provision would allow a Federal judge to immediately dismiss a complaint if either of two conditions is met: First, the complaint does not state a claim upon which relief may be granted, or second, the defendant is immune from suit.

OTHER REFORMS

The Prison Litigation Reform Act would also allow Federal courts to revoke any good-time credits accumulated by a prisoner who files a frivolous suit. It requires State prisoners to exhaust all administrative remedies before filing a lawsuit in Federal court. And it prohibits prisoners from suing the Government for mental or emotional injury, absent a prior showing of physical injury.

If enacted, all of these provisions would go a long way to take the frivolity out of frivolous inmate litigation.

STOP TURNING OUT PRISONERS

The second major section of the Prison Litigation Reform Act establishes some tough new guidelines for Federal courts when evaluating legal challenges to prison conditions. These guidelines will work to restrain liberal Federal judges who see violations on constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems.

Perhaps the most pernicious form of judicial micromanagement is the so-called prison population cap.

In 1993, for example, the State of Florida put 20,000 prisoners on early release because of a prison cap order issued by a Federal judge who thought the Florida system was overcrowded and thereby inflected cruel and unusual punishment on the State's prisoners.

And, then, there's the case of Philadelphia, where a court-ordered prison cap has put thousands of violent criminals back on the city's streets, often with disastrous consequences. As Pro. John Diiulio has pointed out: "Federal Judge Norma Shapiro has singlehandedly decriminalized property and drug crimes in the City of Brotherly Love * * * Judge Shapiro has done what the city's organized crime bosses never could; namely, turn the town into a major drug smuggling port."

By establishing tough new conditions that a Federal court must meet before issuing a prison cap order, this bill will help slam-shut the revolving prison door.

CONCLUSION

Finally, Mr. President, I want to express my special thanks to Arizona Attorney General Grant Woods and to the National Association of Attorneys General. Their input these past several months has been invaluable as we have attempted to draft a better, more effective piece of legislation.

Mr. President, I ask unanimous consent that the full text of the Prison Litigation Reform, as well as a letter from the National Association of Attorneys General and a section-by-section summary, be reprinted in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 1279

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Prison Litigation Reform Act of 1995".

SEC. 2. APPROPRIATE REMEDIES FOR PRISON CONDITIONS.

(a) IN GENERAL.—Section 3626 of title 18, United States Code, is amended to read as follows:

"§3626. Appropriate remedies with respect to prison conditions

"(a) REQUIREMENTS FOR RELIEF.—

"(1) PROSPECTIVE RELIEF.—(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

"(B) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

"(2) PRELIMINARY INJUNCTIVE RELIEF.—In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

"(3) PRISONER RELEASE ORDER.—(A) In any civil action with respect to prison conditions, no prisoner release order shall be entered unless—

"(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

"(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

"(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

"(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

"(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

"(E) The court shall enter a prisoner release order only if the court finds—

"(i) by clear and convincing evidence—

"(I) that crowding is the primary cause of the violation of a Federal right; and

"(II) that no other relief will remedy the violation of the Federal right; and

"(ii) by a preponderance of the evidence—

"(I) that crowding has deprived a particular plaintiff or plaintiffs of at least one essential, identifiable human need; and

"(II) that prison officials have acted with obduracy and wantonness in depriving the particular plaintiff or plaintiffs of the one essential, identifiable human need caused by the crowding.

"(F) Any State or local official or unit of government whose jurisdiction or function includes the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

"(b) TERMINATION OF RELIEF.—

"(1) TERMINATION OF PROSPECTIVE RELIEF.—(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party—

"(i) 2 years after the date the court granted or approved the prospective relief;

"(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

"(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

"(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

"(2) IMMEDIATE TERMINATION OF PROSPECTIVE RELIEF.—In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

"(3) LIMITATION.—Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

"(4) TERMINATION OR MODIFICATION OF RELIEF.—Nothing in this section shall prevent any party from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

"(c) SETTLEMENTS.—

"(1) CONSENT DECREES.—In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

"(2) PRIVATE SETTLEMENT AGREEMENTS.—(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

"(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy for breach of contract available under State law.

"(d) STATE LAW REMEDIES.—The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

"(e) PROCEDURE FOR MOTIONS AFFECTING PROSPECTIVE RELIEF.—

"(1) GENERALLY.—The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions.

"(2) AUTOMATIC STAY.—Any prospective relief subject to a pending motion shall be automatically stayed during the period—

"(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

"(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under subsection (b)(4); and

"(B) ending on the date the court enters a final order ruling on the motion.

"(f) SPECIAL MASTERS.—

"(1) IN GENERAL.—(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a disinterested and objective special master, who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

"(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

"(2) APPOINTMENT.—(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

"(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

"(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

"(3) INTERLOCUTORY APPEAL.—Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

"(4) COMPENSATION.—The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Federal Judiciary.

"(5) REGULAR REVIEW OF APPOINTMENT.—In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

"(6) LIMITATIONS ON POWERS AND DUTIES.—A special master appointed under this subsection—

"(A) shall make any findings based on the record as a whole;

"(B) shall not make any findings or communications ex parte; and

"(C) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

"(g) DEFINITIONS.—As used in this section—

"(1) the term 'consent decree' means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but dues not include private settlements;

"(2) the term 'civil action with respect to prison conditions' means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

"(3) the term 'prisoner' means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

"(4) the term 'prisoner release order' includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

"(5) the term 'prison' means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

"(6) the term 'private settlement agreement' means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

"(7) the term 'prospective relief' means all relief other than compensatory monetary damages; and

"(8) the term 'relief' means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.".

(b) APPLICATION OF AMENDMENT.—

(1) IN GENERAL.—Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this Act.

(2) TECHNICAL AMENDMENT.—Subsections (b) and (d) of section 20409 of the Violent Crime Control and Law Enforcement Act of 1994 are repealed.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of subchapter C of chapter 229 of title 18, United States Code, is amended to read as follows:

"3626. Appropriate remedies with respect to prison conditions.".

SEC. 3. AMENDMENTS TO CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT.

(a) INITIATION OF CIVIL ACTIONS.—Section 3(c) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997a(c)) (referred to in this section as the "Act") is amended to read as follows:

"(c) The Attorney General shall personally sign any complaint filed pursuant to this section.".

(b) CERTIFICATION REQUIREMENTS.—Section 4 of the Act (42 U.S.C. 1997b) is amended—

(1) in subsection (a)—

(A) by striking "he" each place it appears and inserting "the Attorney General"; and

(B) by striking "his" and inserting "the Attorney General's"; and

(2) by amending subsection (b) to read as follows:

"(b) The Attorney General shall personally sign any certification made pursuant to this section.".

(c) INTERVENTION IN ACTIONS.—Section 5 of the Act (42 U.S.C. 1997c) is amended—

(1) in subsection (b)—

(A) in paragraph (1), by striking "he" each place it appears and inserting "the Attorney General"; and

(B) by amending paragraph (2) to read as follows:

"(2) The Attorney General shall personally sign any certification made pursuant to this section."; and

(2) by amending subsection (c) to read as follows:

"(c) The Attorney General shall personally sign any motion to intervene made pursuant to this section.".

(d) SUITS BY PRISONERS.—Section 7 of the Act (42 U.S.C. 1997e) is amended to read as follows:

"SEC. 7. SUITS BY PRISONERS.

"(a) APPLICABILITY OF ADMINISTRATIVE REMEDIES.—No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

"(b) FAILURE OF STATE TO ADOPT OR ADHERE TO ADMINISTRATIVE GRIEVANCE PROCEDURE.—The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act.

"(c) DISMISSAL.—(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action fails to state a claim upon which relief can be granted or is frivolous or malicious.

"(2) In the event that a claim is, on its face, frivolous or malicious, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

"(d) ATTORNEY'S FEES.—(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that—

"(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

"(B) the amount of the fee is proportionately related to the court ordered relief for the violation.

"(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant.

"(3) No award of attorney's fees in an action described in paragraph (1) shall be based

n an hourly rate greater than the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

"(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

"(e) LIMITATION ON RECOVERY.—No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

"(f) HEARING LOCATION.—To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted—

"(1) at the facility; or

"(2) by telephone or video conference without removing the prisoner from the facility in which the prisoner is confined.

Any State may adopt a similar requirement regarding hearings in such actions in that State's courts.

"(g) WAIVER OF REPLY.—(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

"(2) The court may, in its discretion, require any defendant to reply to a complaint commenced under this section.

"(h) DEFINITION.—As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.".

(e) REPORT TO CONGRESS.—Section 8 of the Act (42 U.S.C. 1997f) is amended by striking "his report" and inserting "the report".

(f) NOTICE TO FEDERAL DEPARTMENTS.—Section 10 of the Act (42 U.S.C. 1997h) is amended—

(1) by striking "his action" and inserting "the action"; and

(2) by striking "he is satisfied" and inserting "the Attorney General is satisfied".

SEC. 4. PROCEEDINGS IN FORMA PAUPERIS.

(a) FILING FEES.—Section 1915 of title 28, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "(a) Any" and inserting "(a)(1) Subject to subsection (b), any";

(B) by striking "and costs";

(C) by striking "makes affidavit" and inserting "submits an affidavit";

(D) by striking "such costs" and inserting "such fees";

(E) by striking "he" each place it appears and inserting "the person";

(F) by adding immediately after paragraph (1), the following new paragraph:

"(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined."; and

(G) by striking "An appeal" and inserting "(3) An appeal";

(2) by redesignating subsections (b), (c), (d), and (e) as subsections (c), (d), (e), and (f), respectively;

(3) by inserting after subsection (a) the following new subsection:

"(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess, and when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

"(A) the average monthly deposits to the prisoner's account; or

"(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

"(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

"(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

"(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.";

(4) in subsection (c), as redesignated by paragraph (2), by striking "subsection (a) of this section" and inserting "subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b)"; and

(5) by amending subsection (e), as redesignated by paragraph (2), to read as follows:

"(e)(1) The court may request an attorney to represent any person unable to afford counsel.

"(2) Notwithstanding any filing fee that may have been paid, the court shall dismiss the case at any time if the court determines that—

"(A) the allegation of poverty is untrue; or

"(B) the action or appeal—

"(i) is frivolous or malicious; or

"(ii) fails to state a claim on which relief may be granted.".

(b) COSTS.—Section 1915(f) of title 28, United States Code (as redesignated by subsection (a)(2)), is amended—

(1) by striking "(f) Judgment" and inserting "(f)(1) Judgment";

(2) by striking "cases" and inserting "proceedings"; and

(3) by adding at the end the following new paragraph:

"(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

"(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

"(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.".

(c) SUCCESSIVE CLAIMS.—Section 1915 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(g) In no event shall a prisoner in any prison bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious bodily harm.".

(d) DEFINITION.—Section 1915 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(h) As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.".

SEC. 5. JUDICIAL SCREENING.

(a) IN GENERAL.—Chapter 123 of title 28, United States Code, is amended by inserting after section 1915 the following new section:

"§ 1915A. Screening

"(a) SCREENING.—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

"(b) GROUNDS FOR DISMISSAL.—On review, the court shall dismiss the complaint, or any portion of the complaint, if the complaint—

"(1) fails to state a claim upon which relief may be granted; or

"(2) seeks monetary relief from a defendant who is immune from such relief.

"(c) DEFINITION.—As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.".

(b) TECHNICAL AMENDMENT.—The analysis for chapter 123 of title 28, United States Code, is amended by inserting after the item relating to section 1915 the following new item:

"1915A. Screening.".

SEC. 6. FEDERAL TORT CLAIMS.

Section 1346(b) of title 28, United States Code, is amended—

(1) by striking "(b)" and inserting "(b)(1)"; and

(2) by adding at the end the following:

"(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.".

SEC. 7. EARNED RELEASE CREDIT OR GOOD TIME CREDIT REVOCATION.

(a) IN GENERAL.—Chapter 123 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1932. Revocation of earned release credit

"In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit under section 3624(b) of title 18,

United States Code, that has not yet vested, if, on its own motion or the motion of any party, the court finds that—

"(1) the claim was filed for a malicious purpose;

"(2) the claim was filed solely to harass the party against which it was filed; or

"(3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.".

(b) TECHNICAL AMENDMENT.—The analysis for chapter 123 of title 28, United States Code, is amended by inserting after the item relating to section 1931 the following:

"1932. Revocation of earned release credit.".

(c) AMENDMENT OF SECTION 3624 OF TITLE 18.—Section 3624(b) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking the first sentence;

(B) in the second sentence—

(i) by striking "A prisoner" and inserting "Subject to paragraph (2), a prisoner";

(ii) by striking "for a crime of violence,"; and

(iii) by striking "such";

(C) in the third sentence, by striking "If the Bureau" and inserting "Subject to paragraph (2), if the Bureau";

(D) by striking the fourth sentence and inserting the following: "In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree."; and

(E) in the sixth sentence, by striking "Credit for the last" and inserting "Subject to paragraph (2), credit for the last"; and

(2) by amending paragraph (2) to read as follows:

"(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.".

PRISON LITIGATION REFORM ACT OF 1995—SECTION SUMMARY

Section 1: Short Title:

Entitles the Act as the "Prison Litigation Reform Act of 1995."

Section 2: Appropriate Remedies for Prison Conditions:

This section limits the remedies available to federal courts in suits challenging conditions of confinement and defines the procedures for seeking, enforcing, and terminating remedial relief in these cases. Highlights include appointment of a special 3-judge panel to consider any order that would impose a population cap on a prison or jail.

Prospective relief in prison conditions cases would not be allowed to extend any further than necessary to correct the violation of a federal right of an identifiable plaintiff. Federal courts would have to ensure that the relief is narrowly drawn and that it is the least intrusive means of correcting the violation, giving substantial weight to any adverse impact the relief might have on public safety.

Preliminary injunctive relief would expire after 90 days, unless made final before that date.

No prison population cap could be imposed unless:

(a) the court had previously entered an order for a less intrusive remedy that, after sufficient time for implementation, failed to correct the violation of the federal right; and

(b) a 3-judge panel finds by clear and convincing evidence that crowding is the primary cause of the violation and no other relief will remedy it, and finds by a preponderance of the evidence that crowding has deprived an identifiable plaintiff of an essential human need.

Public officials whose function includes the prosecution or custody of persons who could be released from, or not admitted to, a prison or jail as a result of a population cap would have standing to challenge the imposition or continuation of such a cap.

Prosective relief granted in conditions of confinement cases may be terminated on the motion of either party unless the court finds, based on the record, that the relief remains necessary to correct a current, ongoing violation of a federal right, and that the relief extends no further than necessary, is narrowly drawn, and is the least intrusive means to correct the violation of the right.

Federal court approval of consent decrees would be subject to the same limitations. Private settlements and remedies under state law would be unaffected.

The court would be required to rule promptly on any motion to modify or terminate prospective relief. After 30 days, an automatic stay on the prospective relief would apply during the pendency of the motion.

Courts would be authorized to employ an impartial special master for the preparation of proposed findings of fact in the remedial phase of complex prison conditions cases. The special master would be appointed from lists submitted by both parties, and would be compensated at a rate no higher than that for federal court-appointed counsel. The appointment would be reviewed every 6 months, and would lapse at the termination of the prospective relief. The special master's findings would be required to be on the record, and no ex parte findings or communications would be permitted.

Section 3: Amendments to Civil Rights of Institutionalized Persons Act (CRIPA):

Subsections (a) through (c): Technical amendments concerning references to the Attorney General.

Subsection (d): Suits by Prisoners.

This subsection rewrites Section 7 of CRIPA (42 U.S.C. 1997e), which is currently limited to provisions related to administrative remedies in connection with inmate lawsuits, to establish broader standards to govern suits filed by prisoners.

Requires inmates' administrative remedies be exhausted prior to the filing of a suit in federal court; removes requirement that state administrative remedies be certified by the Attorney General of the United States. Retains provision of current law stating that the absence of administrative remedies by itself does not provide the Attorney General with grounds to bring or intervene in a suit against a state or local prison.

Permits the court to dismiss, without hearing, inmate suits that are frivolous or malicious.

Limits attorney's fees that may be awarded to successful inmate plaintiffs. Fees must be directly and reasonably incurred in proving an actual violation of a plaintiff's rights, and would be based on an hourly rate no higher than that for other federal court appointed counsel. Also requires that up to 25% of a plaintiff's monetary judgement be applied towards attorney's fees.

Limits prisoner suits in federal court for mental or emotional injury to instances where the plaintiff shows physical injury as well.

Provides that in civil suits brought by a prisoner, any pretrial proceedings in which the prisoner must or may participate may be conducted at the prison or jail, by teleconference, or by videoconference whenever practicable.

Permits the defendant in a prisoner-initiated suit to waive reply without default, unless the reply is required by the court.

Subsections (e) and (f): Technical amendments concerning references to the Attorney General.

Section 4: Proceedings In Forma Pauperis:

This section reforms the filing of suits in forma pauperis by prisoners.

Requires an inmate seeking to file in forma pauperis to submit to the court a certified copy of the inmate's prison trust fund account.

Requires prisoners seeking to file in forma pauperis to pay, in installments, the full amount of filing fees, unless the prisoner has absolutely no assets.

Provides for appointed counsel for indigent in forma pauperis litigants, and requires the court to dismiss a suit filed in forma pauperis if the allegation of poverty is untrue, or if the suit is frivolous or malicious.

Requires payment of costs by unsuccessful prisoner litigants in the same manner as filing fees, if the judgment against the prisoner includes costs.

Prohibits, except in narrow circumstances, the filing of an in forma pauperis suit by a prisoner, who, on at least 3 prior occasions, has brought a suit that was dismissed because it was frivolous, malicious, or failed to state a claim upon which relief could be granted.

Section 5: Judicial Screening:

Requires judicial pre-screening of prisoner suits against government entities or employees; requires dismissal of suits which fail to state a claim upon which relief can be granted, or which seek monetary damages from an immune defendant.

Section 6: Federal Tort Claims:

Limits prisoner suits against the federal government for mental or emotional injury under the Federal Tort Claims Act to instances where the plaintiff shows physical injury as well.

Section 7: Earned Release Credit or Good Time Credit Revocation:

Reforms provisions governing the awarding of "good time" credit in the federal prison system.

Subsections (a) and (b): Permits a federal court to order the revocation of a federal prisoner's good time credit as a sanction for the filing of malicious or harassing claims, or for the knowing presentation of false evidence to the court.

Subsection (c): Revises present "good time" statute.

Requires exemplary adherence to prison rules by all prisoners in order to qualify for good time credit and permits Bureau of Prisons to award partial credit at its option.

Provides that progress toward a high school equivalency degree should be a factor for consideration in awarding good time credit.

Provides that future awards of good time credit will not vest prior to the prisoner's actual release date. Returns to the standard that applied prior to the enactment of the Sentencing Reform Act of 1986.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL,
Washington, DC, September 19, 1995.

Re Frivolous Inmate Litigation: Proposed Amendment to the Commerce, Justice, State Appropriations Bill.

Hon. BOB DOLE,
Senate Majority Leader, U.S. Senate, Washington, DC.

DEAR SENATOR DOLE: We write on behalf of the Inmate Litigation Task Force of the National Association of Attorneys General to express our strong support for the Prison Litigation Reform Act, which we understand you intend to offer as an amendment to the Appropriations Bill for Commerce, Justice, State and Related Agencies. As you know, the issue of frivolous inmate litigation has been a major priority of this Association for a number of years. Although a number of states—including our own—have enacted

ate legislation to address this issue, the states alone cannot solve this problem because the vast majority of these suits are brought in federal courts under federal laws. We thank you for recognizing the importance of federal legislation to curb the epidemic of frivolous inmate litigation that is plaguing this country.

Although numbers are not available for all of the states, 33 states have estimated that together inmate civil rights suits cost them at least $54.5 million annually. Extrapolating this figure to all 50 states, we estimate that inmate civil rights suits cost states at least $81.3 million per year. Experience at both the federal and state level suggests that, while all of these cases are not frivolous, more than 95 percent of inmate civil rights suits are dismissed without the inmate receiving anything. Although occasional meritorious claims absorb state resources, nonetheless, we believe the vast majority of the $81.3 million figure is attributable to the non-meritorious cases.

We have not had an opportunity to discuss the specifics of the amendment with every Attorney General, however, we are confident that they would concur in our view that this amendment will take us a long way toward curing the vexatious and expensive problem of frivolous inmate lawsuits. Thank you again for championing this important issue, along with Senators Hatch, Kyl, Reid and others, as it is a top priority for virtually every Attorney General. Your leadership on this issue and your continued commitment to this common sense legal reform is very important to us and our colleagues.

Sincerely,

FRANKIE SUE DEL PAPA,
Attorney General of Nevada, Chair, NAAG Inmate Litigation Task Force.
DANIEL E. LUNGREN,
Attorney General of California, Chair, NAAG Criminal Law Committee,
GRANT WOODS,
Attorney General of Arizona, Vice-Chair, NAAG Inmate Litigation Task Force,
JEREMIAH W. NIXON,
Attorney General of Missouri, Vice-Chair, NAAG Criminal Law Committee.

Mr. HATCH. Mr. President, I am pleased to be joined by the majority leader and Senators KYL, ABRAHAM, REID, THURMOND, SPECTER, HUTCHISON, D'AMATO, SANTORUM, and GRAMM in introducing the Prison Litigation Reform Act of 1995. This landmark legislation will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits. Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation.

Our legislation will also help restore balance to prison conditions litigation and will ensure that Federal court orders are limited to remedying actual violations of prisoners' rights, not letting prisoners out of jail. It is past time to slam shut the revolving door on the prison gate and to put the key safely out of reach of overzealous Federal courts.

As of January 1994, 24 corrections agencies reported having court-mandated population caps. Nearly every day we hear of vicious crimes committed by individuals who should have been locked up. Not all of these tragedies are the result of court-ordered population caps, of course, but such caps are a part of the problem. While prison conditions that actually violate the Constitution should not be allowed to persist, I believe that the courts have gone too far in micromanaging our Nation's prisons.

Our legislation also addresses the flood of frivolous lawsuits brought by inmates. In 1994, over 39,000 lawsuits were filed by inmates in Federal courts, a staggering 15 percent increase over the number filed the previous year. The vast majority of these suits are completely without merit. Indeed, roughly 94.7 percent are dismissed before the pretrial phase, and only a scant 3.1 percent have enough validity to reach trial. In my State of Utah, 297 inmate suits were filed in Federal courts during 1994, which accounted for 22 percent of all Federal civil cases filed in Utah last year. I should emphasize that these numbers do not include habeas corpus petitions or other cases challenging the inmate's conviction or sentence. The crushing burden of these frivolous suits makes it difficult for courts to consider meritorious claims.

In one frivolous case in Utah, an inmate sued demanding that he be issued Reebok or L.A. Gear brand shoes instead of the Converse brand being issued. In another case, an inmate deliberately flooded his cell, and then sued the officers who cleaned up the mess because they got his Pinochle cards wet.

It is time to stop this ridiculous waste of the taxpayers' money. The huge costs imposed on State governments to defend against these meritless suits is another kind of crime committed against law-abiding citizens.

Mr. President, this legislation enjoys broad, bipartisan support from State attorneys general across the Nation. We believe with them that it is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners. I urge my colleagues to support this bill, and look forward to securing its quick passage by the Senate.

Mr. KYL. Mr. President, special masters, who are supposed to assist judges as factfinders in complex litigation, have all too often been improperly used in prison condition cases. In Arizona, special masters have micromanaged the department of corrections, and have performed all manner of services in behalf of convicted felons, from maintaining lavish law libraries to distributing up to 750 tons of Christmas packages each year. Special masters appointed to oversee prison litigation have cost Arizona taxpayers more than $320,000 since 1992. One special master was even allowed to hire a chauffeur, at taxpayers' expense, because he said he had a bad back.

The Prison Litigation Reform Act, introduced as an amendment to the Commerce/Justice/State appropriations bill, requires the Federal judiciary, not the States, to foot the bill for special masters in prison litigation cases. Last July the Arizona legislature and Governor Symington cut off funds to special masters. It's time we take the Arizona model to the rest of the States.

The amendment also addresses prison litigation reform. Many people think of prison inmates as spending their free time in the weight room or the television lounge. But the most crowded place in today's prisons may be the law library. Federal prison lawsuits have risen from 2,000 in 1970 to 39,000 in 1994. In the words of the Third Circuit Court of Appeals, suing has because, recreational activity for long-term residents of our prisons.

Today's system seems to encourage prisoners to file with impunity. After all, it's free. And a courtroom is certainly a more hospitable place to spend an afternoon than a prison cell. Prisoners file free lawsuits in response to almost any perceived slight or inconvenience—being served chunky instead of creamy peanut butter, for instance, or being denied the use of a Gameboy video game—a case which prompted a lawsuit in my home State of Arizona.

These prisoners are victimizing society twice—first when they commit the crime that put them in prison, and second when they waste our hard-earned tax dollars while cases based on serious grievances languish on the court calendar.

In Arizona, Attorney General Grant Woods, who is here with us today, used to spend well over $1 million a year processing and defending against frivolous inmate lawsuits. But Grant successfully championed a reform bill, which went into effect last year, and the number of prison lawsuits was cut in half. Arizona prisoners still have the right to seek legal redress for meritorious claims, but the time and money once spent defending frivolous suits is now used to settle legitimate claims in a timely manner.

But the States alone cannot solve this problem. The vast majority of frivolous suits are brought in Federal courts under Federal laws—which is why I introduced the Prison Litigation Reform Act of 1995 last may with Senators DOLE and HATCH. We are incorporating that legislation into the Commerce/Justice/State amendment.

Federal prisoners are churning out lawsuits with no regard to this cost to the taxpayers or their legal merit. We can no longer ignore this abuse of our court system and taxpayers' funds. With the support of attorneys general around the country, I am confident that we will see real reform on this issue.

Mr. ABRAHAM. Mr. President, the legislation we are introducing today

will play a critical role in restoring public confidence in government's ability to protect the public safety. Moreover, it will accomplish this important purpose not by spending more taxpayer money but by saving it.

I would like to focus my remarks on the provisions addressing the proper scope of court-ordered remedies in prison conditions cases.

In many jurisdictions, including my own State of Michigan, judicial orders entered under Federal law have effectively turned control of the prison system away from elected officials accountable to the taxpayer, and over to the courts. The courts, in turn, raise the costs of running prisons far beyond what is necessary. In the process, they also undermine the legitimacy and punitive and deterrent effect of prison sentences.

Let me tell you a little bit about how this works.

Under a series of judicial decrees resulting from Justice Department suits against the Michigan Department of Corrections, the Federal courts now monitor our State prisons to determine.

First, how warm the food is; second, how bright the lights are; third, whether there are electrical outlets in each cell; fourth, whether windows are inspected and up to code; fifth, whether prisoners' hair is cut only by licensed barbers; and sixth, and whether air and water temperatures are comfortable.

This would be bad enough if a court had ever found that Michigan's prison system was at some point in violation of the Constitution, or if conditions there had been inhumane. But that is not the case.

To the contrary, nearly all of Michigan's facilities are fully accredited by the American Corrections Association. We have what may be the most extensive training program in the Nation for corrections officers. Our rate of prison violence is among the lowest of any State. And we spend an average of $4,000 a year per prisoner for health care, including nearly $1,700 for mental health services.

Rather, the judicial intervention is the result of a consent decree that Michigan entered into in 1982—13 years ago—that was supposed to end a lawsuit filed at the same time. Instead, the decree has been a source of continuous litigation and intervention by the court into the minutia of prison operations.

I think this is all wrong. People deserve to keep their tax dollars or have them spent on projects they approve. They deserve better than to have their money spent, on keeping prisoners in conditions some Federal judge feels are desirable, although not required by any provision of the Constitution or any law. And they certainly don't need it spent on defending against endless prisoner lawsuits.

Meanwhile, criminals, while they must be accorded their constitutional rights, deserve to be punished. Obviously, they should not be tortured or treated cruelly. At the same time, they also should not have all the rights and privileges the rest of us enjoy. Rather, their lives should, on the whole, be describable by the old concept known as "hard time."

By interfering with the fulfillment of this punitive function, the courts are effectively seriously undermining the entire criminal justice system. The legislation we are introducing today will return sanity and State control to our prison systems.

Our bill forbids courts from entering orders for prospective relief (such as regulating food temperatures) unless the order is necessary to correct violations of individual plaintiffs' Federal rights. It also requires that the relief be narrowly drawn and be the least intrusive means of protecting the Federal rights. And it directs courts to give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief.

It also provides that any party can seek to have a court decree ended after 2 years, and that the court will order it ended unless there is still a constitutional violation that needs to be corrected.

As a result, no longer will prison administration be turned over to Federal judges for the indefinite future for the slightest reason. Instead, the States will be able to run prisons as they see fit unless there is a constitutional violation, in which case a narrowly tailored order to correct the violation may be entered.

This is a balanced bill that allows the courts to step in where they are needed, but puts an end to unnecessary judicial intervention and micromanagement. I thank all my colleagues for their interest in this matter and hope we will be able to get something enacted soon.

ADDITIONAL COSPONSORS

S. 773

At the request of Mrs. KASSEBAUM, the name of the Senator from Alaska [Mr. STEVENS] was added as a cosponsor of S. 773, a bill to amend the Federal Food, Drug, and Cosmetic Act to provide for improvements in the process of approving and using animal drugs, and for other purposes.

S. 881

At the request of Mr. PRYOR, the names of the Senator from Vermont [Mr. LEAHY] and the Senator from Mississippi [Mr. LOTT] were added as cosponsors of S. 881, a bill to amend the Internal Revenue Code of 1986 to clarify provisions relating to church pension benefit plans, to modify certain provisions relating to participants in such plans, to reduce the complexity of and to bring workable consistency to the applicable rules, to promote retirement savings and benefits, and for other purposes.

S. 896

At the request of Mr. CHAFEE, the name of the Senator from North Dakota [Mr. DORGAN] was added as a cosponsor of S. 896, a bill to amend title XIX of the Social Security Act to make certain technical corrections relating to physicians' services, and for other purposes.

S. 949

At the request of Mr. GRAHAM, the names of the Senator from Kansas [Mr. DOLE], the Senator from Louisiana [Mr. JOHNSTON], the Senator from Illinois [Ms. MOSELEY-BRAUN], and the Senator from Minnesota [Mr. WELLSTONE] were added as cosponsors of S. 949, a bill to require the Secretary of the Treasury to mint coins in commemoration of the 200th anniversary of the death of George Washington.

S. 953

At the request of Mr. CHAFEE, the name of the Senator from North Dakota [Mr. CONRAD] was added as a cosponsor of S. 953, a bill to require the Secretary of the Treasury to mint coins in commemoration of black Revolutionary War patriots.

S. 955

At the request of Mr. HATCH, the name of the Senator from Vermont [Mr. JEFFORDS] was added as a cosponsor of S. 955, a bill to clarify the scope of coverage and amount of payment under the medicare program of items and services associated with the use in the furnishing of inpatient hospital services of certain medical devices approved for investigational use.

S. 1006

At the request of Mr. PRYOR, the name of the Senator from Wyoming [Mr. SIMPSON] was added as a cosponsor of S. 1006, a bill to amend the Internal Revenue Code of 1986 to simplify the pension laws, and for other purposes.

S. 1052

At the request of Mr. HATCH, the name of the Senator from New Hampshire [Mr. GREGG] was added as a cosponsor of S. 1052, a bill to amend the Internal Revenue Code of 1986 to make permanent the credit for clinical testing expenses for certain drugs for rare diseases or conditions and to provide for carryovers and carrybacks of unused credits.

S. 1200

At the request of Ms. SNOWE, the name of the Senator from Virginia [Mr. ROBB] was added as a cosponsor of S. 1200, a bill to establish and implement efforts to eliminate restrictions on the enclaved people of Cyprus.

S. 1219

At the request of Mr. FEINGOLD, the name of the Senator from New Mexico [Mr. BINGAMAN] was added as a cosponsor of S. 1219, a bill to reform the financing of Federal elections, and for other purposes.

AMENDMENT NO. 2784

At the request of Mr. KERRY his name was added as a cosponsor of amendment No. 2784 proposed to H.R.

EXHIBIT D

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University of Miami Race & Social Justice Law Review
Summer, 2016

Article
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ANTI-INCARCERATIVE REMEDIES FOR ILLEGAL CONDITIONS OF CONFINEMENT

INTRODUCTION

Opposition to mass incarceration has entered the mainstream. [1] But except in a few states, [2] mass *de*carceration has not, so far, followed: By ***2** the end of 2014 (the last data available), nationwide prison population had shrunk only 3% off its (2009) peak. Jail population, similarly, was down just 5% from its (2008) peak. All told, our current incarceration rate--7 per 1,000 population--is the same as in 2002, and four times the level in 1970, when American incarceration rates began their rise. [3]

Our bloated prisoner population includes many groups of prisoners who are especially likely to face grievous harm in jail and prison. In particular, well over half of American prisoners have symptoms of mental illness. And the most recent thorough analysis found that an astounding 15% of state prisoners and 24% of jail inmates "reported symptoms that met the criteria for a psychotic disorder." [4] In addition, 4 to 10% prisoners have a serious intellectual disability. [5] Prisoners with ***3** mental disabilities face grave difficulties in prison and jail; they can have trouble adapting to new requirements and understanding what is expected of them, getting along with others, and following institutional rules. In the absence of treatment and habilitation, they are more likely both to be victimized and to commit both minor and major misconduct. [6] Prisoners with mental disabilities are not alone; there are other groups of prisoners who are similarly vulnerable-- prisoners with serious chronic illnesses [7] and physical disabilities, [8] gay and transgender prisoners, [9] juveniles in adult facilities, [10] elderly prisoners, [11] minor offenders, [12] and so on. Each group faces higher-than-usual probabilities of victimization and harm behind bars.

In this symposium essay, I argue that when such difficulties are manifest, and create conditions of confinement that are illegal under the Eighth Amendment, Americans with Disabilities Act, or other source of law, plaintiffs should seek, and courts should grant, court-enforceable remedies diverting prisoners away from incarceration, in order to keep vulnerable populations out of jail and prison.

What's novel about this proposal is not the diversionary remedies themselves, but the connection of such programs to conditions of ***4** confinement litigation. Diversionary programs are, in fact, increasingly familiar. Reformers in many states have implemented many different diversion methods. Some programs address prisoners with mental illness or intellectual disabilities in particular; [13] others focus on other populations-- substance abusers, minor misdemeanant arrestees, veterans, etc. They include:

- Crisis intervention teams of officers linked to community mental health services and trained and supported in helping individuals with mental illness. [14]

- Deescalation techniques that avoid unnecessary arrests. [15]

- Substitution of citations for misdemeanor arrests.

- Diversion--sometimes by use of mental health courts that send offenders with mental illness to intensive treatment and supervision, but not jail or prison.

- Wraparound services that provide “treatment, rehabilitation, supportive services, and practical help” for people with severe and persistent mental illness. [16]

And prompted by jail and prison crowding, states, cities, and counties have likewise developed a menu of other reforms, less linked to particular populations, that seek to decrease incarceration, [17] including:

- Sentencing reform (replacing mandatory minimum sentences, limiting “three-strikes” coverage, reducing recommended sentences, etc.).

- Shifts in policing enforcement priorities. [18]

***5** - Bail reform, including “walk-through” arrangements under which arrestees are immediately released on bond.

- Parole reforms--improving risk-assessment processes, timeliness of hearings, and the tailoring of parole requirements to criminal histories. [19]

- Make earned and good-conduct reductions steeper, expand rehabilitation programs that offer sentencing credits. [20]

But only rarely have such initiatives--which I label "anti-incarcerative"--been imposed or negotiated as court-enforceable solutions for jail or prisons conditions problems. And when they have, it's mostly been to facilitate compliance with a court-ordered population cap. What I'm urging is a new generation of anti-incarcerative remedies in conditions lawsuits, unconnected to a population order, whose purpose is to keep vulnerable would-be prisoners out of harm's way by promoting workable alternatives to incarceration.

This essay proceeds as follows. In Part I, I describe the history of population caps in conditions of confinement lawsuits. These kinds of direct population limits--still available and valuable, in the right case--constituted a first generation of decarcerative conditions orders. They are important both historically and because they demonstrate that ordinary remedial law allows court orders that keep prisoners out of prison in order to avoid constitutional problems inside. I next highlight in Part II a few pioneering court orders that have specified anti-incarcerative remedies, hooked to alleged or proven unconstitutional conditions caused by crowding. Like the population caps, these orders have aimed explicitly at population reduction.

I move in Parts III and IV to two models for anti-incarcerative orders that are *not* premised on crowding. In Part III, I examine recent remedies addressing unconstitutional solitary confinement. Many of these recent orders have not simply barred prisons from imposing the solitary conditions plaintiffs allege are unconstitutional. Rather, they establish and regulate alternatives to solitary confinement. A final useful model, ***6** which I examine in Part IV, can be found in ongoing deinstitutionalization remedies in cases, on the model of *Olmstead v. L.C.*, [21] that enforce the Americans with Disabilities Act, which have focused more on provision of services in the community than on institutional exclusions. The orders in both Parts III and IV support my contention that the ordinary law of remedies allows entry of orders keeping prisoners out of a situation in which they would face unconstitutional harm.

Finally, in Part V, I explain why the Prison Litigation Reform Act's constraints on "prisoner release orders" should not obstruct a new generation of anti-incarcerative orders. The short answer is that--like solitary confinement and *Olmstead* orders--the anti-incarcerative orders I am advocating should not be considered "prisoner release orders" because they are not "reducing or limiting the prison population," in the way that Congress intended the PLRA to regulate.

Our national infatuation with incarceration has led to the damaging imprisonment of many vulnerable people in jails and prisons ill-equipped to house them safely--people with mental and physical disabilities, juveniles, the elderly, minor offenders, and others. When a particular facility or system is unable to provide these prisoners with lawful conditions of confinement, plaintiffs should seek, and federal courts should grant, anti-incarcerative orders that facilitate alternatives. [22]

I. POPULATION CAPS OVER TIME

In the first 25 years of jail and prison conditions-of-confinement litigation,[23] population caps were commonplace court-ordered remedies ***7** for unconstitutional conditions of confinement.[24] When crowding created or exacerbated unsafe conditions behind bars, these orders attacked the problem by specifying the number of prisoners allowed to be housed, or setting per-prisoner space requirements (which works out to the same thing, absent construction), or designating a permissible percentage of some measure of capacity. They established various kinds of release mechanisms and procedures, to be used as needed to meet the caps.

But federal court-ordered population caps came under increasing attack. The Supreme Court was skeptical nearly from the start, emphasizing in 1979 (in *Bell v. Wolfish*) and again in 1981 (in *Rhodes v. Chapman*) that crowding alone--in particular, double celling (housing two prisoners in a cell meant for one by substituting a bunk bed for the planned single bed)--did not constitute cruel and unusual punishment.[25] The Court emphasized that "deprivations of essential food, medical care or sanitation," "increase[d] violence," or other "intolerable" conditions were, rather, what the Constitution forbids.[26] Crowding was unconstitutional, the Court insisted, only if it caused these kinds of conditions. (The Court emphasized the point in *Wilson v. Seiter*, holding that plaintiffs in Eighth Amendment challenges to prison conditions must identify particular "deprivation[s] of ... identifiable human need[s] such as food, warmth, or exercise"; "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."[27])

Bell and *Rhodes* challenged but did not end population orders; caps continued to be entered in conditions of confinement cases addressing health, safety, sanitation, nutrition, and the like, for pretrial detainees and convicted offenders in jails and prisons. The theory was simple: when overpopulation of a prison stressed its capacity to safely house inmates, a ***8** population cap was one appropriate tool to restore constitutional conditions of confinement. On that theory, court-ordered caps governed Louisiana's prison system from 1983 to 1996; Florida's from 1977 to 1992, and Texas's from 1981 to 2001.[28] Many more such orders were operative in jail systems and individual prisons across the nation.[29]

Defendants--sheriffs, wardens, corrections heads--frequently agreed to population orders, which empowered them in varied ways in their particular political milieus. But many law enforcement actors objected strenuously to the caps. When prosecutors in Philadelphia argued that the cap on Philadelphia's jail system led to thousands of releases and caused thousands of new crimes, that cap, in *Harris v. City of Philadelphia*, became the *cause célèbre*[30] for the sponsors of the Prison Litigation Reform Act (PLRA).[31] The PLRA, passed in 1996 as part of the Newt Gingrich *Contract with America*,[32] imposed numerous high substantive and procedural hurdles to the entry of new population caps.[33] The new statutory obstacles to population caps are not, it should ***9** be emphasized, insurmountable.[34] Even after the PLRA's enactment, population caps have been entered in both jail and prison cases, in settlements,[35] orders contested by intervenors,[36] and litigated orders (including the statewide California order upheld on appeal to the Supreme Court).[37] But the incidence of caps has declined precipitously.[38]

II. SOME PIONEERING ANTI-INCARCERATIVE ORDERS

In a few conditions cases addressing crowding, court orders have mandated--in addition to or instead of population caps--both processes for developing anti-incarcerative remedies and substantive anti-incarcerative terms.[39] In this part, I develop insights stemming from five cases that challenged conditions of confinement and led to anti-incarcerative remedies. They are *Carruthers v. Israel*, a case filed in 1976 that addresses conditions at the Broward County Jail, in Fort ***10** Lauderdale, Florida;[40] *Carty v. Mapp*,[41] filed in 1994 and still reforming the Virgin Islands' Criminal Justice Complex, in St. Thomas; *McClendon v. City of Albuquerque*,[42] filed in 1995 against both city and county officials responsible for conditions in Albuquerque's jail; *Maynor*

v. Morgan County, a case filed in 2001 about conditions at a small jail in Decatur, Alabama;[43] and the consolidated cases of *Plata v. Brown* and *Coleman v. Brown*,[44] the California prison litigations whose population cap the Supreme Court approved in 2011.[45]

A. Procedural (planning) anti-incarcerative orders

The most common anti-incarcerative remedies are procedural and indirect--courts require defendants to convene multiple criminal justice stakeholders and to develop a plan (or, even less muscular, to *try* to develop a plan) that will decrease the population in the challenged facility. For example, orders entered in 1994 and 2013 in *Carty*, the Virgin Islands jail case, required the defendants to "actively manage their prisoner population, including seeking pretrial detention alternatives and reduced bails."[46] Similarly, defendants were instructed in the latter order to "develop[] and implement [] memoranda of understanding to ensure timely transfers of seriously mentally ill prisoners in need of inpatient or intermediate care, or those in need of acute stabilization, to an appropriate hospital or mental health facility."[47] (More definitely, the ***11** order required the defendants--which included the governmental entity for which the prosecutors worked to "offer [] sentences of time served for prisoners charged with misdemeanor and non-violent offenses."[48])

More formally, in *Maynor*, the comprehensive challenge to conditions of confinement in an Alabama jail in Decatur Alabama, a settlement agreement reached after the Court granted a preliminary injunction included the following requirement of an anti-incarceration "task force":

Recognizing that overcrowding at the Jail affects all aspects of Jail operations, the County Defendants agree to organize a local task force to identify and review alternative programs and methods for reducing the Jail population and to make recommendations regarding the implementation of such programs and methods. The task force shall include, but is not limited to the following officers, if they agree to serve: the sheriff; one or more members of the County Commission; the presiding circuit court judge; the district attorney; the county attorney; a criminal defense attorney; a representative from probation; and at least two community representatives. The task force shall diligently investigate and explore alternative methods for reducing the Jail population, including the creation of a Community Corrections and Punishment Program, as provided for in § 15-18-170, et seq., Code of Alabama, 1975; the expansion and development of one or more work release programs as now or hereafter authorized by law; the diversion of inmates to other institutions with available bed space; the release of inmates on their personal recognizance; and other alternative means of securing their attendance through such other means and methods as may be available. In reviewing the possible alternatives for preventing overcrowding at the Jail, the task force will consult with the Alabama Association of Community Corrections. County Defendants will report to Plaintiffs' counsel each September 15 and March 15, and through other regular communications, regarding local efforts by the task force and others to prevent overcrowding at the Jail.[49]

This was an entirely procedural order: it encouraged and facilitated, rather than requiring, anti-incarcerative measures. Compliance was slow, but the task force proposed a community corrections program that finally got started five years after the settlement, in 2006,[50] and that continues to operate today.[51]

***12** In a few cases, courts have brought in outside experts to assist or lead anti-incarcerative planning. For example, in the Broward County case, renewed crowding many years after initial litigation and settlement led the court in 2010 to appoint a "population management expert pursuant to Fed. R. Evid. 706," requiring him to "identif[y] and analyze[] the County's criminal justice processes and policies that affect the population level at the Broward County jail," "develop[] strategies and remedies to address those processes and policies so that the population level ... can be reduced without significantly affecting public

safety," and "identif[y] realistic options that have been successfully implemented in other jurisdictions that will reduce the need for current and future beds--especially for the pretrial felon population."[52] The expert's most recent report, completed in 2014, recommends a series of anti-incarcerative reforms, which could reduce jail population by about 20%. They include: filing criminal charges more promptly for people in jail;[53] a supervised release program for those unable to make their very low bails; allowing release on bail for some minor offenders currently barred from pretrial release; a community-supervision reentry program; community-based treatment for inmates with alcohol and drug treatment requirements; community-based mental health services for inmates declared incompetent to stand trial; and work release for inmates nearing the end of their sentences.[54] (It does not appear that the plaintiffs are pressing to make this plan court enforceable; they have the population ***13** cap already,[55] and these reforms are framed as ways to effectuate the cap, not as independent remedies.[56])

Similarly, in the Virgin Islands case, the Court appointed an expert--the same expert, as it happens--to conduct an assessment that:

(1) analyzes the Territory's criminal justice processes and policies that affect the population level at the Criminal Justice Complex (CJC) and CJC Annex [collectively, "the Jail"],

(2) includes strategies and remedies to address those processes and policies so that the population level at the Jail can be reduced without significantly affecting public safety,

(3) includes a baseline population forecast that would advise the territory on the impact of current criminal justice trends,

(4) identifies realistic options that have been successfully implemented in other jurisdictions that will reduce the need for future beds, and

(5) assesses the existing classification and disciplinary systems at the Jail and provides technical assistance to Defendants so they can make the best use of existing bed space to safely and appropriately house the prisoner population.[57]

After much litigation, the report is now underway.[58]

14** ***B. Substantive anti-incarcerative orders

When a federal court insists on a robust anti-incarcerative planning process, that improves the probability of a plan's development and even implementation. But occasionally, courts have gone further and imposed actual substantive anti-incarcerative remedies. The best-known example is in *Plata v. Brown* and *Coleman v. Brown*, the medical care and mental health care cases against the California prison system in which the District Court imposed, and the Supreme Court affirmed, a state-wide prison population cap of 137.5% of design capacity.[59] On remand from the Supreme Court, the state made substantial progress towards this population cap by means of shifting some prison population to jails, lessening the term of probation, and several other policy changes, together termed criminal justice "Realignment."[60] But population remained well over the limit until the District Court imposed several anti-incarcerative measures, including allowing several groups of inmates to more quickly accrue time off their sentences, and expanding parole for non-violent offenders, and medically incapacitated and elderly prisoners.[61] Each was made a fully enforceable court order.[62]

Less well known, but similarly joining a population cap[63] with anti-incarcerative orders is *McClendon v. City of Albuquerque*. *McClendon* ***15** began in 1995 when inmates at the Bernalillo County Detention Center in Albuquerque filed a class action

lawsuit alleging unconstitutional conditions of confinement caused by gross overcrowding. A subclass of inmates with mental disabilities was also declared, and separately represented. [64] In 1996, the court in *McClendon* entered a settlement agreement that included a procedural planning order. [65] But it also directly required the substantive anti-incarcerative remedy of civil commitment in circumstances where the defendants had sufficient authority to implement it without needing anyone else's agreement:

Defendants shall instruct UNMHSC [the University of New Mexico Health Services Center] to establish formal policies and procedures requiring the initiation of civil commitment proceedings whenever an individual diagnosed as having a mental or developmental disorder requests placement in a residential treatment or evaluation facility, assuming the court imposed conditions of confinement are consistent with such placement .... Residents shall be released for day treatment or habilitation whenever appropriate. [66]

When plaintiffs sought contempt sanctions in 2001 for noncompliance with the earlier settlement, litigation again led to a combination of procedural and substantive anti-incarcerative settlement provisions. A stipulated order explained that many diversionary strategies were going untried in Albuquerque: for example, "Increased intensive mental health case management, crisis housing, and detox services, as well as a drop-in center for psycho-social rehabilitation, would reduce overcrowding at the jail." [67] The order accordingly required ***16** four different planning sessions to bring together the various official and advocacy stakeholders to develop various anti-incarcerative approaches ("how to reduce the number of incarcerated individuals at BCDC who are awaiting resolution of probation or parole violation proceedings"; "how to include persons who do not have both a permanent address and a telephone in the Community Custody Program"; "how to implement an effective jail diversion program for persons with psychiatric or developmental disabilities"; and "how to expand the program for early resolution of criminal cases" [68]).

For each of the above plans, the cooperation of out-of-court parties was needed. By contrast, the defendants had unilateral authority with respect to policing. Accordingly, the same 2001 order included a more muscular substantive requirement, as well. The parties stipulated that:

Despite the efforts to date of the parties and the Court, 244 persons were brought into the jail by arresting officers in the month of March, 2001 and booked on petty misdemeanors, including, *inter alia*, shoplifting under $100, excessive sun screen material on vehicle windows, and unreasonable noise. Issuing citations for such non-violent petty offenses and using the jail's 'walk through procedure' for persons charged with such offenses would likely reduce unnecessary incarceration at BCDC." [69]

Accordingly, defendants agreed to entry of an order requiring them to "[p]rovide direction to law enforcement officials under the control of the City and/or the County to issue citations where appropriate and to use the 'walk through procedures,' rather than incarcerating individuals, where appropriate." [70] This set of requirements was strengthened in 2002, when the City Defendants entered into another stipulated order, that: "Defendants will continue to employ all existing population management tools." [71] Those "population management tools," included the "[p]re-trial services walk-through for misdemeanor warrants" described in 2001. [72] Other approaches were also added. For example, "APD officers have been instructed to obtain every possible phone number from people they stop and arrest or cite and release, and to write the phone number(s) on the face of the arresting/ citing document." [73] Subsequent litigation ***17** included various similar orders; the most recent settlement, reached in March 2016, collects and augments the scattered relevant provisions and sets them out again, with a requirement that a court-appointed expert audit. [74]

In sum, while anti-incarcerative orders have been very rare, they are not unheard of. Courts have entered both procedural orders mandating informal or formal anti-incarcerative planning, and substantive orders mandating particular anti-incarcerative programs.

III. SOLITARY CONFINEMENT ORDERS

As population caps have gone from routine to rare, a new type of order regulating particular types of incarceration--and barring particular types of prisoners from it--has developed. As American incarceration rates ballooned in the 1980s and 1990s, so too did our prisons' and jails' use of solitary confinement and other forms of restrictive housing. Increasing thousands of prisoners were confined to 22 or more daily hours of in-cell lockdown, with minimal chance for social interaction, programming, or occupation. [75] Advocacy efforts to reverse this trend have been intense and longstanding, and seem finally to be approaching fruition. President Obama recently wrote an op-ed in the *Washington Post* describing current practices as "an affront to our common humanity," [76] and three Supreme Court justices have inveighed against solitary confinement in recent separate writing. [77] Many corrections leaders are themselves beginning to seek change: the national association of heads of state corrections departments last year released a report that begins "Prolonged isolation of individuals in jails and prisons is a grave problem drawing national attention and concern," and explicitly ***18** "supports ongoing efforts to ... limit or end extended isolation." [78] Litigation continues to be a key lever for reform in this area; lawsuits push for change, and both settlements and litigated orders have modeled what that change could look like. [79]

Much of the solitary reform effort has followed a "special populations" strategy. The idea has been to exclude from solitary confinement--entirely, or in all but the most exceptional circumstances--prisoners particularly vulnerable to harm there. This path was marked by District Judge Thelton Henderson in *Madrid v. Gomez*, in 1995. In that case, Judge Henderson explained that isolated conditions "will likely inflict some degree of psychological trauma upon most inmates confined [in Pelican Bay's Special Housing Unit, or SHU] for more than brief periods." But, he held, only for "certain categories of inmates" was the likely harm sufficiently severe to constitute a "per se violat[ion]" of the Eighth Amendment's Cruel and Unusual Punishments Clause:

> those who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions in the SHU. Such inmates consist of the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. [80]

Following Judge Henderson's approach, in case after case, plaintiffs' counsel have sought--and often won, by litigated or settled judgment--orders excluding prisoners in vulnerable categories like these from solitary confinement. [81] More recent court orders have covered not just ***19** prisoners with mental illness and intellectual disabilities but other vulnerable populations: pregnant and youthful prisoners, for example. [82] (Only recently, in two settlements approved in 2016, has litigation more comprehensively narrowed the path into and widened the path out of solitary confinement. [83])

The special population orders have included simple bans. For example, in Wisconsin, first in a 2001 contested preliminary injunction, [84] and then in a 2002 settlement, prisoners with serious mental illness were barred from the Boscobel supermax prison: "No seriously mentally ill prisoners win be sent to SMCI nor will seriously mentally ill prisoners at the facility be

permitted to remain there." [85] Similarly, in Mississippi, a settlement stated flatly: "After December 1, 2007, Unit 32 will not be used for long-term housing of prisoners with Severe Mental Illness, other ***20** than those on Death Row." [86] Another Mississippi settlement, dealing with a private facility, stated in 2012, "MDOC will ensure that youth are never subjected to solitary confinement." [87] And in Indiana, following a court finding of unconstitutionality caused by the solitary confinement of prisoners with serious mental illness, a 2016 settlement provided, "no seriously mentally ill prisoners shall be placed in segregation/restrictive housing (including protective custody) if they are known to be seriously mentally ill prior to such placement." [88]

Thinking of solitary confinement units as "prisons within a prison," these exclusion orders are analogous to the first-generation prison population caps described in Part I: [89] they exclude people by way of negative commands. In addition, some solitary confinement orders--including some very recent ones that benefit prisoner plaintiffs beyond particularly vulnerable populations-- take a more affirmative approach. They (1) establish or regulate housing that substitutes for solitary confinement; and they set out parameters for a variety of programs and procedures intended to (2) slow and narrow the path in, and (3) broaden and speed the path out. While these are useful interventions in their own right, I offer the details here to make an argument, by analogy, that structurally similar kinds of orders could be used to keep people with serious mental illness out of prison altogether.

Each of these approaches fits comfortably into the permissible scope of injunctive remedies in civil rights cases. Caselaw dictates that litigated injunctions--and settlements, in prison and jail cases [90] --be tied to ***21** plaintiffs' injury, [91] but allows design of such remedies not just to stop unlawful conduct and repair the damage done [92] but to prevent further violations going forward [93] (as well as to facilitate oversight and enforcement of the more substantive terms [94]). Anti-incarcerative orders prevent further violations going forward.

A. Court orders or settlement provisions establishing alternatives to solitary confinement

Recent court orders in cases challenging the conditions of confinement in solitary have led to variously-named alternatives--secure housing in which prisoners receive therapeutic programming and substantial out-of-cell time. For example, a 2016 court order decrees Indiana's use of "mental health units" with additional therapeutic programming, group therapy, and other out-of-cell opportunities. [95] ***22** Recent landmark cases have extended this approach beyond prisoners with mental illness: a 2015 settlement in New York requires the creation of residential substance-abuse programs as "SHU-alternative[s] "for ... inmates selected ... who are serving confinement sanctions for nonviolent substance abuse-related misbehavior," and other alternatives for youthful prisoners and those who have intellectual disabilities. [96] And in California, a 2016 consent decree requires use of a "restrictive custody general population housing unit" for members of gangs, as well as others. [97]

B. Court orders or provisions narrowing/slowing the path into solitary confinement

Court orders in solitary confinement cases use a variety of techniques to narrow or slow prisoners' path into solitary confinement. They implement mental health treatment, to avoid the need. In the Virgin Islands, for example, a 2012 order requires "[m]ental health care and treatment, including ... (ii) adequate mental health programs for all prisoners with serious mental illness; ... and (v) ceasing to place seriously mentally ill prisoners in segregated housing or lock-down as a substitute for mental health treatment." [98] They substitute other approaches to prison discipline. So in Mississippi, in 2012: "MDOC will develop a behavior management policy that incorporates positive behavior intervention and supports for youth." [99] They moderate the sanctions applicable to various kinds of misconduct. In New York, under a 2015 consent decree, only the most serious misconduct can lead

to a term in solitary. [100]) And they centralize decisionmaking, to undercut the ability of dissenting officials to stymie reform. In a 2007 Mississippi consent decree, for example,

The process for admission to and release from administrative segregation will be centralized. A Warden who wishes to recommend that an inmate be housed in administrative segregation must submit to ***23** the Central Classification Office for review a referral form documenting the reason for the referral. If the Central Classification Office agrees with the recommendation, it will forward the referral form to the Commissioner or his designee for final review and approval. [101]

C. Court orders or settlement provisions broadening/speeding the path out of solitary confinement

Finally, settlements in solitary confinement conditions cases have opened or eased prisoners' route out of solitary. Cases have set up review processes, both retrospective (to clear out some of the existing population) [102] and prospective, to speed future releases. [103] And they have implemented "step-down" programs and housing units, "with the aim of returning inmates who successfully complete the program back to general population." [104]

IV. *OLMSTEAD* ORDERS (MODERN DEINSTITUTIONALIZATION)

I move in this Part to a third and final analogy to the anti-incarcerative orders I am urging. In 1999, the Supreme Court held in *Olmstead v. L.C. ex rel. Zimring* [105] that unjustified institutionalization of people with disabilities violates the Americans with Disabilities Act (ADA). The Court explained that "unjustified institutional isolation of persons with disabilities is a form of discrimination," because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and it "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." [106]

In the years since the *Olmstead* decision, advocates have brought a wave of deinstitutionalization litigation to enforce it. As Professor Sam Bagenstos explains, deinstitutionalization advocates have used litigation implementing the Olmstead approach to work towards "the twin goals of ... enabling people with disabilities to move out of institutional ***24** settings and promoting high-quality community services." [107] Since 2000, the population in large institutions for people with intellectual/ developmental disabilities is down over a third; [108] the number of residents in state and county mental hospitals is down about a quarter. [109] Olmstead orders are far from the only driver of this population decline, but they have contributed by setting out "extensive and detailed provisions governing the types of services the states must provide in the community to those who have been institutionalized or are at risk of institutionalization, the number of individuals who must receive those services, and timetables specifying when those services must be provided." [110]

Under *Olmstead*, the ADA doesn't require states to provide services to people with disabilities, but it does require that *when* services are provided, the setting be as integrated as practicable. In keeping with this integration insight, *Olmstead* orders are typically not exclusionary. That is, they bolster the alternatives to institutions, rather than barring admission to the large facilities that used to dominate service provision. For example, in *United States v. Delaware*, the 26-page settlement between the U.S. Department of Justice and the state of Delaware provided for statewide crisis services to "[p]rovide timely and accessible support to individuals with mental illness experiencing a behavioral health crisis, including a crisis due to substance abuse." [111] It detailed numerous items that would form a "continuum of support services intended to meet the varying needs of individuals with mental illness," including Assertive Community Treatment teams--multidisciplinary groups including a psychiatrist, a nurse, a psychologist, a social worker, a substance abuse specialist, a vocational rehabilitation specialist and a ***25** peer

specialist--to "deliver comprehensive, individualized, and flexible support, services, and rehabilitation to individuals in their home and communities," [112] and various kinds of case management. And it provided for supported housing ("an array of supportive services that vary according to people's changing needs and promote housing stability") and employment ("integrated opportunities for people to earn a living or to develop academic or functional skills"). Other *Olmstead* decrees contain similar provisions. [113]

As with Part II's solitary confinement orders, these *Olmstead* orders are offered here in support of an analogy, as useful models for conditions of confinement litigation. They remind us, structurally, that to solve a problem *inside* an institution it may be necessary to direct enforcement effort *outside*. In addition, they can serve as "go by's" for the design and drafting of key elements of crisis intervention and other anti-carcerative approaches.

V. THE PLRA'S PRISONER RELEASE ORDER PROVISION

So far in this essay, I've tried to demonstrate that anti-incarcerative orders would be a useful remedy for unlawful conditions of confinement, and that several types of analogous remedies are ready models for them. But, you should be asking (as always in jail and prison litigation) what about the Prison Litigation Reform Act? Does it stand in the way? As Part I describes, [114] population caps have since 1996 been tightly regulated by the Prison Litigation Reform Act--hence their sharp recent decline. All new court orders in prison and jail conditions cases are constrained by the PLRA's requirements of demonstrated need and narrow tailoring. [115] But are anti-incarcerative orders subject to the PLRA's particularly sharp "prisoner release order" constraints? In this Part, I argue that they are not.

The PLRA sets several onerous prerequisites for entry of "a prisoner release order," even on consent. Such an order is not allowed "unless" a prior order "for less intrusive relief ... has failed," [116] "crowding is the primary cause of the violation of a Federal right; and ... no other relief will remedy the violation of the Federal right." [117] Even then, only a ***26** specially convened three-judge panel can enter the order. [118] What counts as a "prisoner release order"? The statute defines the term to "include[] any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." [119] Do anti-incarcerative remedies designed to keep vulnerable populations out of jail and prison fit this definition? I think the answer is no.

In a particular case, anti-incarcerative remedies *could* have the "purpose ... of reducing or limiting the prison population." Indeed, in several of the cases highlighted in Part II, they do have that purpose. Consider for example, the Virgin Islands case mentioned in Part II. Recently the plaintiffs explained the basis of what they labeled the "population reduction remedy":

This population reduction remedy is foundational; compliance with it makes it easier to reach compliance with all other substantive provisions of the Agreement. The fewer prisoners there are at the Jail, the easier it is to supervise them appropriately, to house them safely, to separate known enemies, and to provide them with all services required under the Agreement. The fewer seriously mentally ill prisoners who are housed at the Jail, the easier it is to adequately treat and safely house the remaining mentally ill prisoner population. [120]

In this particular case, the point of the remedies in question is to assist in implementing a long-standing population cap.

But in this essay, I've been arguing for anti-incarcerative remedies with a quite different goal--a purpose not of population *reduction* but population *protection*, minimizing the admission to prison or jail of particularly vulnerable would-be prisoners--people with disabilities, the young, the old, non-violent offenders, LGBT people, etc. The success or failure of the anti-

incarcerative order would not turn on the affected jail or prison's population count. Such programs don't dictate who can or cannot be admitted to prison, and an anti-incarcerative order that imposes them would not be violated if a facility's population grows. Accordingly, I think it would be a stretch to consider this kind of order, with this kind of purpose, a PLRA-covered "prisoner release order."

Textually, such an order clearly lacks the "purpose ... of reducing or limiting the prison population." And it does not "direct[] the release from or nonadmission of prisoners to a prison." The textual question thus ***27** comes down to whether anti-incarcerative orders with a non-population-reduction purpose should nonetheless be deemed to have the *"effect* of reducing or limiting the prison population"--if, in fact, such a reduction takes place, which it might or might not. As I now develop, I think it's implausible to read the statutory word "effect" to reach so broadly; Congress's evident purpose for the "prisoner release order" provision was to cover population caps and orders that function like population caps. And the kind of broad reading of "effect" that would encompass anti-incarcerative orders would similarly sweep in orders that are even farther away from Congress's concerns.

The legislative history of the PLRA is fairly sparse: the statute was passed after just one hearing. Nonetheless, it sheds real light on Congress's intent. The prisoner release order provision was mentioned quite a few times-- throughout that one hearing, in the only committee report, and on the floor of the House and Senate. Each and every time, both the bill's supporters and its opponents make clear that the targets of the provision were jail and prison population caps and orders--for example, requirements to hold vacant a particular percentage of cells--functioned, like population caps, to compel the release or non-admission of prisoners. For example,

- The House Committee report noted: "Population caps are a primary cause of 'revolving door justice.'" [121]

- Congressman Bill McCullom, when he began debate on the bill that became the PLRA: "[F]ew problems have contributed more to the revolving door of justice than Federal court-imposed prison population caps. Cities across the United States are being forced to put up with predators on their streets because of this judicial activism." [122]

- Congressman Charles Canady, as he spoke in support of the bill: "it will make clear that imposing a prison or jail population cap should absolutely be a last resort" [123]

- Congressman Bill Young, in the same debate: the bill "prevents judges from placing arbitrary caps on prison populations." [124]

- Senator Orrin Hatch, in his prepared statement opening the only Senate hearing on the PLRA: "Prison population caps, which result in revolving door justice and the commission of untold ***28** numbers of preventable crimes, should be the absolute last resort." [125]

- Senator Kay Bailey Hutchison, at the same hearing, explained that her motivation for drafting the prisoner release order provision, was the murder of a friend of hers: "The murderer was on early release because of a case, the

Ruiz case in Texas, that requires us to release prisoners if we go above an 11-percent vacancy rate." [126] Therefore, "[m]y bill also provides that the courts not impose limits or reduction in prison population unless the plaintiff proves that overcrowding is the primary problem and there is no other solution available." [127]

• And, at the same hearing, former Attorney General William Barr testified in favor of the bill: "Even more troublesome ... is many decrees impose quite arbitrary population caps and space requirements" [128]

These quotes (and I could triple their number without changing their content) evidence Congress's clear goal for the statutory language it chose. "Purpose or effect of reducing or limiting the prison population" is language intended to reach both explicit population caps and requirements--about space per prisoner or cell vacancy rate--that are population caps in effect. Population caps do precisely what Congress forbids: they either "reduc[e] or limit[] the prison population." And Congress's skepticism about population caps explains the PLRA's "purpose or effect" language, too. That language is necessary to keep parties or judges from evading the statutory hurdles by entering an order, like a per-prisoner space requirement or an order requiring a percentage of empty cells, that functions like--but isn't quite--a population cap.

But there is absolutely nothing in the PLRA's legislative history to suggest that Congress's "prisoner release order" language was trying to target the kinds of anti-incarcerative remedies featured here--which lead to non-incarcerative outcomes for some people, but do not release or bar incarceration for anyone and do not require a decrease in jail or prison population. Indeed, a reading of "effect of reducing or limiting the prison population" that is broad enough to cover the kinds of remedies canvassed here--mental health diversionary practices, for example--would sweep in court orders far indeed from Congress's concerns. Imagine, for example, that a case alleging discrimination against some ***29** classes of prisoners (say, women or members of a particular race) results in an order equalizing plaintiffs' access to rehabilitative programming. Those new programming opportunities could well lead to earlier release of some prisoners, who are newly able to accrue sentencing credits, or newly attractive to parole boards. But surely that effect would not make the programming order a PLRA-limited "prisoner release order." Similarly, a court order in a due process case that regulates prison disciplinary hearings and causes fewer misconduct findings will similarly lead to the earlier release of some prisoners. Yet, again, it would extend the PLRA's restrictions far past Congress's intent to therefore consider such an order a "prisoner release order."

Thus it makes the most sense to conclude that when anti-incarcerative orders are about protection, not about population, they lack the "purpose or effect of reducing or limiting the prison population." Accordingly, like all court orders in jail and prison conditions cases, they may be entered only if they comply with the PLRA's ordinary requirements for entry of relief. [129] But the higher hurdles for "prisoner release orders" have no application.

CONCLUSION

When prisons and jails fail to comply with the laws that regulate them--when conditions of confinement violate prisoners' rights under the Eighth Amendment or the Americans with Disabilities Act, or some other legal provision--one solution would be to keep people particularly vulnerable to those violations out of harm's way, out of prison. Anti-incarcerative measures have gained track records in a variety of nonlitigation settings. They deserve a more prominent place in the remedial toolbox for conditions of confinement litigation as well.

Footnotes

a1 Henry M. Butzel Professor of Law, University of Michigan. My thanks to Ira Burnim and the Bazelon Center for Mental Health Law for convening the meeting that prompted me to write this paper, to the *University of Miami Race & Social Justice Law Review* for providing both an in-person and print forum for it, and to Sharon Dolovich and Sam Bagenstos for their comments. All remaining errors are mine. I also wish to acknowledge the generous support of the William W. Cook Endowment of the University of Michigan.

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1 *See, e.g.*, Devan Kreisberg, *Tough on Criminal Justice Reform*, NEW AM. WKLY. (Sept. 17, 2015), https://www.newamerica.org/weekly/tough-on-criminal-justice-reform/.

2 For information on New York, California, and New Jersey--the three states whose current prison population dropped about 25% off their respective peaks between 2006 and 2012--see MARC MAUER & NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES (July 2014), http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf. Colorado, Connecticut, Hawaii, Michigan, Rhode Island, and Vermont each also "achieved double-digit reductions during varying periods within those years." *Id.* at 2.

3 For correctional populations figures from 1980 to 2014, see BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ESTIMATED NUMBER OF PERSONS SUPERVISED BY U.S. ADULT CORRECTIONAL SYSTEMS, BY CORRECTIONAL STATUS, 1980-2014 (2016), http://www.bjs.gov/content/keystatistics/excel/Correctional_population_counts_by_status_19802014.xlsx. For 1970, see U.S. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NAT'L PRISONER STAT. BULL., NO. 47, NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS: 1968-1970, at 22, tbl.10c (Apr. 1972) (sentenced prisoners); for 1970, see LAW ENF'T ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, NATIONAL JAIL CENSUS 1970, at 10 tbl.2 (1971). U.S. population data is from the U.S. Census. *See*POPULATION DIVISION, U.S. CENSUS BUREAU, HISTORICAL NATIONAL POPULATION ESTIMATES: JULY 1, 1900 TO JULY 1, 1999 (rev. June 28, 2000), https://www.census.gov/population/estimates/nation/popclockest.txt; *Population Estimates: National Intercensal Estimates (2000-2010)*, U.S. CENSUS BUREAU, https://www.census.gov/popest/data/intercensal/national/nat2010.html (last visited June 26, 2016); *Population Estimates: National Totals: Vintage 2015*, U.S. CENSUS BUREAU, https://www.census.gov/popest/data/national/totals/2015/index.html (last visited June 26, 2016).

4 DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (rev. Dec. 14, 2006), http://www.bjs.gov/content/pub/pdf/mhppji.pdf; E. FULLER TORREY ET AL., THE TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY (Apr. 8, 2014), http://tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf; KiDeuk Kim, Miriam Becker-Cohen & Maria Serakos, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System: A Scan of Practice and Background Analysis*, URBAN INST. (Apr. 7, 2015), http://www.urban.org/research/publication/processing-and-treatment-mentally-ill-persons-criminal-justice-system/view/full_report.

5 *See* Tammy Smith et al., *Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning*, 43 EDUC. AND TRAINING IN DEV. DISABILITIES 421, 422 (2008), http://www.daddcec.org/Portals/0/CEC/Autism_Disabilities/Research/Publications/

Education_Training_Development_Disabilities/2008v43_Journals/ETDD_200812v43n4p421-430_Individuals_With_Intellectual_Developmental_Disabilities_Criminal.pdf.

6 *See, e.g.*, Joan Petersilia, Cal. Research Policy Ctr., Doing Justice? The Criminal Justice System and Offenders with Developmental Disabilities 10-11 (2000), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.113.6433&rep=rep1&type=pdf; Morris L. Thigpen et al., Nat'l Inst. of Corrections, U.S. Dep't of Justice, Effective Prison Mental Health Services: Guidleines to Expand and Improve Treatment (2004), https://s3.amazonaws.com/static.nicic.gov/Library/018604.pdf.

7 Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666 (2009), http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2008.144279.

8 JENNIFER BRONSON, LAURA M. MARUSCHAK & MARCUS BERZOFSKY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011-12 (Dec. 2015), http://www.bjs.gov/content/pub/pdf/dpji1112.pdf.

9 ALLEN J. BECK, MARCUS BERZOFSKY & CHRISTOPHER KREBS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12: NATIONAL INMATE SURVEY, 2011-12, at 16 (May 2013), http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf; ALLEN BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12-UPDATE: SUPPLEMENTAL TABLES (Dec. 9, 2014), http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.

10 E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013, at 8 tbl.7 (Sept. 30, 2014), http://www.bjs.gov/content/pub/pdf/p13.pdf.

11 *Id.*

12 *See, e.g.*, RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (Feb 2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf.

13 For a national survey of mental-health diversion programs, see THE CTR. FOR HEALTH & JUSTICE AT TASC, NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES (Dec. 2013), http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf.

14 *See* Randolph Dupont et al., *Crisis Intervention Team 10-Core Elements*, CRISIS INTERVENTION TEAM INT'L (Sept. 2007), http://www.citinternational.org/images/PDF/Core_Elements_Condensed.pdf; Letter from Jocelyn Samuels, Acting Assistant U.S. Att'y Gen. & Damon P. Martinez, Acting U.S. Att'y, Dist. of N.M., to Richard J. Berry, Mayor, City of Albuquerque (Apr. 10, 2014), http://www.clearinghouse.net/chDocs/public/PN-NM-0002-0001.pdf (criticizing absence of CIT).

15 *See, e.g.*, POLICE EXEC. RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES: AN INTEGRATED APPROACH TO DE-ESCALATION AND MINIMIZING USE OF FORCE (Aug. 2012), http://www.policeforum.org/assets/docs/Critical_Issues_Series/an%20integrated%C20approach%C20to%C20deescalation%C20and%C20minimizing%C20use%C20*o*f%C20force%202012.pdf.

16 *See, e.g.*, LEONARD I. STEIN & ALBERTO B. SANTOS, ASSERTIVE COMMUNITY TREATMENT OF PERSONS WITH SEVERE MENTAL ILLNESS (1998).

17 For a calculator that shows the impact of various proposed policy reforms, see Ryan King et al., *Reducing Mass Incarceration Requires Far-Reaching Reforms*, URBAN INST. (Aug. 2015), http://webapp.urban.org/reducing-mass-incarceration/index.html.

18 JAMES AUSTIN & MICHAEL JACOBSON, VERA INST. OF JUSTICE, HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? (2012), http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf.

19 JUDITH GREENE & MARC MAUER, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES, THE SENTENCING PROJECT (2010), http://www.sentencingproject.org/wp-content/uploads/2016/01/Downscaling-Prisons-Lessons-from-Four-States.pdf.

20 *See, e.g.*, JULIE SAMUELS, NANCY LA VIGNE & SAMUEL TAXY, STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM, URBAN INST. (Nov. 2013), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412932-Stemming-the-Tide-Strategies-to-Reduce-the-Growth-and-CuttheCost-of-the-Federal-Prison-System.PDF.

21 Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

22 In an intriguing article, Professor Alex Reinert has made a quite different argument, but one that might sometimes lead to a similar outcome; he urges that conditions of confinement doctrine embrace a principle of proportionality, under which certain "conditions could be constitutionally imposed as punishment for some classes of prisoners, but not constitutionally imposed on a different class of prisoner, either because of their crime of incarceration or particular characteristics." Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory*, 36 FORDHAM URB. L.J. 53, 85 (2009).

23 The Supreme Court opened the door to modern prison and jail conditions cases in Cooper v. Pate, 378 U.S. 546 (1964), *per curiam*, which allowed a religious discrimination case brought by a Black Muslim prisoner to proceed. *See* 382 F.2d 518 (7th Cir. 1967) for the outcome. Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970), was the first large-scale case to walk through that door. For lots of information about Holt and its many-opinion life, see *Holt v. Sarver, No. 5:69-cv-00024-GTE (E.D. Ark)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=553 (last visited June 26, 2016).

24 *See* Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 165 (2013). For lists and information about dozens of prison and jail population caps, see the Civil Rights Litigation Clearinghouse; the collections are available at http://bit.ly/Prison-Pop-Caps, and http://bit.ly/Jail-Pop-Caps. Statewide population caps were imposed in Louisiana, Florida, and Texas. For a full procedural history and copies of the many opinions and crucial orders, see *Williams v. McKeithen, No. 71-cv-0098B (M.D. La. 1971)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=722 (last visited June 26, 2016); *Costello v. Wainwright, No. 72-cv-00109 (M.D. Fla. 1972)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=644 (last visited June 26, 2016); and *Ruiz v. Estelle, No. 78-cv-00987 (S.D. Tex. 1978)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=960 (last visited June 26, 2016).

25 *See* Bell v. Wolfish, 441 U.S. 520, 540-43 (1979); Rhodes v. Chapman, 452 U.S. 337, 348-49 (1981).

26 Rhodes v. Chapman, 452 U.S. at 348.

27 Wilson v. Seiter, 501 U.S. 294, 305 (1991).

28 *See* Order Approving Settlement, Williams v. McKeithen, No. 71-cv-0098B (M.D. La. Sept. 26, 1996), at 1-2, http://www.clearinghouse.net/chDocs/public/PC-LA-0001-0009.pdf; Celestineo v. Singletary, 147 F.R.D. 258, 264 (M.D. Fla. 1993); Ruiz v. Johnson, 154 F. Supp. 2d 975, 995 (S.D. Tex. 2001).

29 *See supra* note 24.

30 Brief for the State of Louisiana et al. as Amici Curiae in Support of Appellants, Schwarzenegger v. Plata, No. 09-1233 (U.S. 2011), at 27-32, http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0037.pdf. The lawsuit that looms the largest in the legislative history of the PLRA's population order provisions was Harris v. City of Phila., No. 82-1847 (E.D. Pa. filed Apr. 1982); *see generally*Harris v. Pernsley, 654 F. Supp. 1042 (E.D. Pa. 1987); *Harris v. City of Phila., No. 82-1847 (E.D. Pa.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=231 (last visited June 26, 2016). For a summary of the role this case played in the PLRA's passage, *see* Brief for the State of Louisiana et al., *supra*, and sources cited.

31 Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321-66 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2006); 42 U.S.C. §§ 1997a-1997h).

32 REPUBLICAN NAT'L COMM., CONTRACT WITH AMERICA: THE BOLD PLAN BY REPRESENTATIVE NEWT GINGRICH, REPRESENTATIVE DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 53 (Ed Gillespie & Bob Schellhas eds., 1994).

33 *See* Part V, *infra*. The PLRA eliminated the authority of a single district judge to enter a population order, instead requiring convening of a three-judge district court. It expanded intervention rights to criminal justice stakeholders likely to object to an order. It disallowed population orders as a first-try remedy, allowing them only if a prior, less intrusive order "has failed to remedy the deprivation of the Federal right sought to be remedied." And it established as a prerequisite to a population order a finding, by clear and convincing evidence, that "crowding is the primary cause of the violation of a Federal right," and that "no other relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a).

34 *See* Brown v. Plata, 563 U.S. 493, 502 (2011).

35 *See U.S. v. Cook Cnty., No. 1:10-cv-02946 (N.D. Ill.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=13145 (last visited June 26, 2016); Final Order of Three-Judge District Court, U.S. v. Cook Cnty., No. 1:10-cv-02946 (N.D. Ill. Mar. 29, 2011), http://www.clearinghouse.net/chDocs/public/JC-IL-0048-0006.pdf; *Duran v. Apodaca, No. 77-721 (D.N.M)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=834 (last visited June 26, 2016).

36 *Roberts v. Cnty. of Mahoning, No. 4:03-cv-02329-DDD (N.D. Ohio)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=5507 (last visited June 26, 2016); Consent Judgment Entry with a Stipulated Population Order, Roberts v. Cty. of Mahoning, No. 4:03-cv-02329-DDD (N.D. Ohio May 17, 2007), at 9-11, http://www.clearinghouse.net/chDocs/public/JC-OH-0010-0007.pdf.

37 Brown v. Plata, 563 U.S. 493, 541(2011); *Inmates of Occoquan v. Barry, No. 86-2128 (D.D.C)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=624 (last visited June 10, 2016); Opinion, Inmates of Occoquan v. Barry, No. 86-2128 (D.D.C. Dec. 22, 1986), at 634-35, http://www.clearinghouse.net/chDocs/public/PC-DC-0003-0023.pdf.

38 For statistics, see Schlanger, *Plata v. Brown and Realignment, supra* note 24, at 198-99.

39 In Ruiz v. Estelle, a crucial (and huge) early prison case, Judge William Wayne Justice ordered Texas prison officials to use good time credits, parole, work release, and community corrections to relieve overcrowding. Amended Decree Granting Equitable Relief and Declaratory Judgment, Ruiz v. Estelle, No. H-78-987 (S.D. Tex. May 1, 1981), at I.A., reprinted as appendix to Ruiz v. Estelle, 666 F.2d 854, 862 (5th Cir. 1982). However, the Court of Appeals reversed the order, finding that it "unnecessarily invade[d] the management responsibility of state officials." Ruiz v. Estelle, 679 F.2d 1115, 1148 (5th Cir. 1982), although in an opinion issued after a petition for rehearing, it emphasized that if the state failed to comply with the population cap entered in the case, "our order shall not preclude the direction of specific remedies." Ruiz v. Estelle, 688 F.2d 266, 268 (5th Cir. 1982).

40 *Carruthers v. Cochran (Jonas v. Stack), No. 0:76-cv-06086-WMH (S.D. Fla.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=56 (last visited June 26, 2016).

41 *Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=979 (last visited June 26, 2016).

42 *McClendon v. City of Albuquerque, 6:95-cv-00024-JAP-KBM (D.N.M)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=196 (last visited June 26, 2016).

43 *Maynor v. Morgan Cnty., Ala., 5:01 -cv-00851-UWC (N.D. Ala.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=10041 (last visited June 26, 2016).

44 *Plata v. Brown, No. 3:01-cv-01351-TEH (N.D. Cal.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=589 (last visited June 26, 2016); *Plata v. Brown/Coleman v. Brown Three-Judge Court, No. 3:01-cv-1351 (N.D. Cal)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net'/detail.php?id=12280 (last visited June 26, 2016); *Coleman v. Brown, No. 2:90-cv-00520-LKK-JFM (E.D. Cal.)*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/detail.php?id=573 (last visited June 26, 2016).

45 Brown v. Plata, 563 U.S. 493, 545 (2011).

46 Settlement Agreement, Carty v. DeJongh, No. 3:94-cv-00078-SSB-GWB (D.V.I May 13, 2013), at 3-4, http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0026.pdf.

47 *Id.* at 17.

48 *Id.* at 3-4.

49 Consent Decree Applicable to the Plaintiff Class and the County Defendants, Maynor v. Morgan Cnty., Ala., 5:01-cv-00851-UWC (N.D. Ala. Sept. 25, 2001), http://www.clearinghouse.net/chDocs/public/JC-AL-0020-0002.pdf.

50 Status Report Regarding Activities of Task Force, Maynor v. Morgan Cty., Ala., 5:01-cv-00851-UWC (N.D. Ala. May 23, 2006), http://www.clearinghouse.net/chDocs/public/JC-AL-0020-0010.pdf; Affidavit of William E. Shinn Jr., Maynor v. Morgan Cty., Ala., 5:01-cv-00851-UWC (N.D. Ala. May 23, 2006), http://www.clearinghouse.net/chDocs/public/JC-AL-0020-0010.pdf.

51 *Community Corrections*, MORGAN CTY., ALA., http://www.co.morgan.al.us/communitycorrectionsindex.html# (last visited June 26, 2016).

52 Order, Carruthers v. Lamberti, No. 76-cv-06086-DMM (S.D. Fla. Sept. 30, 2010), http://www.clearinghouse.net/chDocs/public/JC-FL-0008-0016.pdf.

53 Under Florida law, persons arrested can be detained in jail for several weeks prior to being charged with a crime. Fla. R. Crim. P. 3.134.

54 James Austin, Ph.D., Evaluation of Broward County Jail Population: Current Trends and Recommended Options, Carruthers v. Lamberti, No. 76-cv-06086-DMM (S.D. Fla. Aug. 31, 2015), at 1 (finding population of 4,500 inmates), 26-30 (recommending and tallying population reduction measures), http://www.clearinghouse.net/chDocs/public/JCFL-0008-0018.pdf.

55 Stipulation for Entry of Consent Decree, Carruthers v. Lamberti, No. 76-cv-06086-DMM (S.D. Fla. July 27, 1994), at 12, http://www.clearinghouse.net/chDocs/public/JCFL0008-0002.pdf; Docket, Jonas v. Stack, No. 76-cv-06086-DMM, at #671 (July 28, 1995) ("By separate order, the Court will designate release authority and direct the use of same to ensure that no more than 3,656 inmates are retained in the Broward County jail system.").

56 *See* Plaintiffs' Motion for the Appointment of a Population Management Expert, Carruthers v. Lamberti, No. 76-cv-06086-DMM (S.D. Fla. Sept. 3, 2010), at 2, http://www.clearinghouse.net/chDocs/public/JC-FL-0008-0025.pdf ("This Court has entered a number of orders setting population caps or otherwise remedying conditions at the Broward County Jail that were caused or exacerbated by overcrowding.").

57 Order, Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I June 21, 2011), http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0033.pdf.

58 *See* Plaintiffs' Motion to Enforce the Court's Order Appointing Dr. James Austin to Conduct a Population Management Assessment, or in the Alternative to Re-Appoint Dr. Austin, Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I June 2, 2015), http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0031.pdf (seeking court enforcement of the 2011 requirement for a criminal justice assessment); Order, Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I Mar. 11, 2016), http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0037.pdf (granting the motion for enforcement); Defendants' Opposition To Plaintiffs' Expedited Motion For Court Order Accepting Agreed Upon Quarterly Goals, Carty v. Farrelly, No. 3:94-cv-00078-SSB (D.V.I Mar. 23, 2016), at 3, http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0038.pdf ("As their fourth quarterly goal, Defendants have chosen the following: launch criminal justice assessment.").

59 Brown v. Plata, 563 U.S. 493, 541(2011).

60 For a group of varied analyses of California's criminal justice Realignment, see *The Great Experiment: Realigning Criminal Justice in California and Beyond*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 221 (Charis Kubrin and Carroll Seron eds., Mar. 2016), http://ann.sagepub.com/content/664/1.toc.

61 *See* Order Granting in Part and Denying in Part Defs' Request for Extension of Dec. 31, 2013 Deadline, Coleman v. Brown/Plata v. Brown, Nos. 2:90-cv-0520-LKK-DAD (PC) and C01-1351-TEH (E.D. Cal and N.D. Cal, Feb. 10, 2014),

http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0105.pdf. For the background of this order, *see*Coleman v. Brown, 952 F. Supp. 2d 901, 935-36 (E.D. Cal. 2013); Defs.' Resp. to Apr. 11, 2013 Order Requiring List of Proposed Population Reduction Measures; Court-Ordered Plan, Coleman v. Brown/Plata v. Brown, Nos. 2:90-cv-0520 LKK JFM P and C01-1351 TEH (E.D. Cal and N.D. Cal, May 2, 2013), at 28, http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0117.pdf ("The following is the plan that has been compelled by the Court. Defendants do not believe that these measures are necessary or prudent at this time ..."); Stipulation and Order in Response to Nov. 14, 2014 Order, Coleman v. Brown/Plata v. Brown, Nos. 2:90-cv-0520 KJM DAD (PC) and C01-1351 TEH (E.D. Cal and N.D. Cal, Dec. 19, 2014), http://www.clearinghouse.net/chDocs/public/PC-CA-0057-0110.pdf.

62 *See* Order Granting in Part and Denying in Part Defs' Request for Extension, *supra* note 61, at 2.

63 Supplemental Order to Enforce Previously Ordered Population Limits at the BCDC Main Facility, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. June 27, 2001), at 2-3, http://www.clearinghouse.net/chDocs/public/JC-NM0002-0026.pdf; Amended Order Resolving Two Motions and Order to Show Cause, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Aug. 19, 2014), at 7, http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0036.pdf.

64 Order Certifying a Class, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Nov. 5, 1996), http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0025.pdf.

65 Order Regarding the Prison Litigation Reform Act, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Nov. 5, 1996), at 4, http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0015.pdf ("officials from the City of Albuquerque will meet with officials from Bernalillo County to develop solutions to the continuing resident population pressures at BCDC, ... [s]uch discussions will include at least possible expansion of the interim Westside facility, possible renovations to Montessa Park, and possible development of additional drug treatment and/ or mental health treatment facilities.").

66 Order, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Nov. 5, 1996), at 10-11, http://www.clearinghouse.net/chDocs/public/JC-NM-0002-0024.pdf.

67 Supplemental Order to Enforce Previously Ordered Population Limits at the BCDC Main Facility, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. June 27, 2001), at 2-3, http://www.clearinghouse.net/chDocs/public/JC-NM0002-0026.pdf.

68 *Id.* at 4-6.

69 *Id.* at 2-3.

70 *Id.* at 5.

71 Stipulated Agreement, McClendon v. City of Albuquerque, No. 6:95-cv-00024-MV/DJS (D.N.M. Jan. 31, 2002), at 2, http://www.clearinghouse.net/chDocs/public/JCNM-0002-0002.pdf.

72 Supplemental Order to Enforce Previously Ordered Population Limits at the BCDC Main Facility, *supra* note 67, Exhibit A at 2.

73 *Id.* at 10.

74 Settlement Agreement, McClendon v. City of Albuquerque, No. 6:95-cv-00024-JAP-KBM (D.N.M. Mar. 22, 2016), http://www.clearinghouse.net/chDocs/public/JCNM-0002-0035.pdf; *id.*, Exhibit D ("Check-Out Audit Agreement No. 3: The Conditions of Confinement at the Bernalillo County Metropolitan Detention Center"), ¶¶ 2-3.

75 Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 PUNISHMENT & SOC'Y 163 (1999); NAT'L INST. OF CORR., SUPERMAX HOUSING: A SURVEY OF CURRENT PRACTICE (March 1997), https://s3.amazonaws.com/static.nicic.gov/Library/013722.pdf.

76 Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethinksolitaryconfinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

77 *See* Davis v. Ayala, 135 S.Ct. 2187, 2208-2211 (2015) (KENNEDY, J., concurring) ("[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price."); Glossip v. Gross, 135 S.Ct. 2726, 2765 (2015) (BREYER, J. dissenting; joined by GINSBURG, J.) ("[I]t is well documented that such prolonged solitary confinement produces numerous deleterious harms.").

78 ARTHUR LIMAN PUB. INTEREST PROGRAM & ASS'N. OF STATE CORR. ADM'RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON i, iii (Aug. 2015), https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf.

79 For a timeline listing and linking to the key cases, and their settlements, *see* Amy Fettig & Margo Schlanger, *Milestones in Solitary Reform*, SOLITARY WATCH, http://solitarywatch.com/resources/timelines/milestones/ (last visited May 9, 2016).

80 889 F.Supp. 1146, 1265 (N.D. Cal. 1995).

81 *See* *id.* at 1267; Stipulation to Enter Into Private Settlement Agreement Following Notice to the Class and Fairness Hearing, Ind. Prot. and Advocacy Serv. Comm'n v. Comm'r, Ind. Dep't of Corr., No. 1:08-cv-01317 TWP-MJD (S.D. Ind. Jan. 27, 2016), at 10-13, http://www.clearinghouse.net/chDocs/public/MH-IN-0002-0013.pdf; Agreed Order, Rasho v. Baldwin, No. 1:07-CV-1298-MMM-JAG (C.D. Ill. May 8, 2013), at 4-5, http://www.clearinghouse.net/chDocs/public/PC-IL-0031-0008.pdf; Opinion and Order, Peoples v. Fischer, No. 1:11-cv-02694-SAS (S.D.N.Y. Mar. 31, 2016), at 12-13, http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0014.pdf; Stipulation, Parsons v. Ryan, No. 2:12-cv-00601 (D. Ariz. Oct. 14, 2014), at 8-9, http://www.clearinghouse.net/chDocs/public/PC-AZ-0018-0028.pdf; Settlement Agreement and General Release, Disability Rights Network of Pa. v. Wetzel, No. 1:13-cv-00635-JEJ (M.D. Pa. Jan. 9, 2015), at 12, http://www.clearinghouse.net/chDocs/public/PC-PA-0031-0003.pdf; Consent Decree, United States v. Virgin Islands, No. 88-265 (D.V.I. Dec. 1, 1986), http://www.clearinghouse.net/chDocs/public/PC-VI-0002-0002.pdf; Settlement Agreement, Disability Law Ctr. v. Mass. Dep't of Corr., No. 07-10463-MLW (D. Mass. Dec. 12, 2011), at 5, http://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf; Notice of Proposed Class Action Settlement, Presley v. Epps, No. 4:05-cv-00148-JAD (N.D. Miss. Apr. 28, 2006), at 3, http://www.clearinghouse.net/chDocs/public/PC-MS-0005-0005.pdf; Private Settlement Agreement, Disability Advocates v. N.Y. Office of Mental Health, No. 1:02-cv-04002-GEL (S.D.N.Y. Apr. 27, 2007), at 11-12, http://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf. For a compilation of extant settlements, see *Special Collection: Solitary Confinement*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/results.php?searchSpecialCollection=40 (last visited May 9, 2016).

82 Opinion and Order, Peoples v. Fischer, *supra* note 81, at 13-14.

83 *Id.*; Settlement Agreement, Ashker v. Brown, 4:09-cv-05796-CW (N.D. Cal. Sept. 1, 2015), http://www.clearinghouse.net/chDocs/public/PC-CA-0054-0024.pdf.

84 *See* Jones'El v. Berge, 164 F.Supp.2d 1096, 1126 (W.D. Wis. 2001) ("If the mental health professionals determine that any of these inmates are seriously mentally ill, they should not be housed at Supermax Correctional Institution.").

85 Settlement Agreement, Jones'El v. Berge, No. 00-C-421-C (W.D. Wis. Jan. 24, 2002), at 5, http://www.clearinghouse.net/chDocs/public/PC-WI-0001-0003.pdf ("No seriously mentally ill prisoners win be sent to SMCI nor will seriously mentally ill prisoners at the facility be permitted to remain there.").

86 Supplement Consent Decree on Mental Health Care, Use of Force and Classification, Presley v. Epps, 4:05-cv-00148-JAD (N.D. Miss. Feb. 15, 2006), at 1, http://www.clearinghouse.net/chDocs/public/PC-MS-0005-0008.pdf.

87 Consent Decree, DePriest ex rel. C.B. v. Walnut Grove Corr. Auth., 3:10-cv-00663-CWR-FKB (S.D. Miss. Mar. 26, 2012), at 9, http://www.clearinghouse.net/chDocs/public/JI-MS-0007-0004.pdf.

88 Stipulation to Enter Into Private Settlement Agreement Following Notice to the Class and Fairness Hearing, Ind. Prot. and Advocacy Serv. Comm'n v. Comm'r, Ind. Dep't of Corr., No. 1:08-cv-01317 TWP-MJD (S.D. Ind. Jan. 27, 2016), at 10, http://www.clearinghouse.net/chDocs/public/MH-IN-0002-0013.pdf.

89 I am not suggesting that these orders *constitute* population caps, subject to the PLRA's tight procedural rules. For reasons similar to the ones explored in Part V, *infra*, I think that the PLRA's population order provision does not cover them.

90 In most areas of law, settlements can extend well past what might permissibly be entered in litigated decrees. *See* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 389 (1992); Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, 478 U.S. 501, 525 (1986) ("A federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."). The terms of settlements are typically limited only by the mild constraints that they "spring from and serve to resolve a dispute within the court's subject matter jurisdiction ... [,] 'com[e] within the general scope of the case made by the pleadings,' ... further the objectives of the law upon which the complaint was based," and are not otherwise unlawful. *Id.* But the PLRA, 18 U.S.C. § 3626(a)(1)(A), somewhat restricts enforceable settlement terms in jail and prison cases. For discussion, *see* Margo Schlanger, *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519, 526-29 (2015).

91 *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); Milliken v. Bradley, 433 U.S. 267, 280 (1977) ("The remedy must therefore be related to the condition alleged to offend the Constitution ...") (internal quotation marks and citation omitted); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) ("[T]he nature of the violation determines the scope of the remedy.").

92 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 547 (1996) ("A remedial decree ... must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of

[discrimination].' ... A proper remedy for an unconstitutional exclusion ... aims to 'eliminate [so far as possible] the discriminatory effects of the past' and to 'bar like discrimination in the future."').

93 *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 712-14 (1978) (approving a prophylactic injunction that limited solitary confinement to 30 days in light of poor conditions); Louisiana v. United States, 380 U.S. 145, 154-56 (1965) (holding that "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the [unlawful] effects of the past as well as bar like [illegality] in the future"; and citing "[t]he need to eradicate past evil effects and to prevent the continuation or repetition in the future of the [unlawful] practices shown to be so deeply engrained in the laws, policies, and traditions").

94 *See, e.g.*, Louisiana v. United States, 380 U.S. at 155-56 (upholding reporting requirements adopted to inform the court about defendant activity); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 976 (1999).

95 Stipulation to Enter Into Private Settlement Agreement Following Notice to the Class and Fairness Hearing, Ind. Prot. and Advocacy Serv. Comm'n v. Comm'r, Ind. Dep't of Corr., No. 1:08-cv-01317 TWP-MJD (S.D. Ind. Jan. 27, 2016), at 14-15, http://www.clearinghouse.net/chDocs/public/MH-IN-0002-0013.pdf.

96 Settlement Agreement, Peoples v. Fischer, No. 1:11-cv-02694-SAS (S.D.N.Y. Dec. 16, 2015), at 11, 21, 23, http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0011.pdf.

97 Settlement Agreement, Ashker v. Brown, 4:09-cv-05796-CW (N.D. Cal. Sept. 1, 2015), at 10-11, http://www.clearinghouse.net/chDocs/public/PC-CA-0054-0024.pdf.

98 Settlement Agreement, United States v. Virgin Islands, No. 1:86-cv-00265-WALGWC (D.V.I. Aug. 31, 2012), at 11, http://www.clearinghouse.net/chDocs/public/PC-VI-0002-0020.pdf.

99 Consent Decree, DePriest ex rel. C.B. v. Walnut Grove Corr. Auth., 3:10-cv-00663-CWR-FKB (S.D. Miss. Mar. 26, 2012), at 12, http://www.clearinghouse.net/chDocs/public/JI-MS-0007-0004.pdf.

100 Settlement Agreement, Peoples v. Fischer, No. 1:11-cv-02694-SAS (S.D.N.Y. Dec. 16, 2016), at 42-44, http://www.clearinghouse.net/chDocs/public/PC-NY-0062-0011.pdf.

101 Supplement Consent Decree on Mental Health Care, Use of Force and Classification, Presley v. Epps, *supra* note 86, at 8.

102 *E.g.*, Settlement Agreement, Ashker v. Brown, *supra* note 83, at 8-10.

103 *Id.* at 11.

104 *E.g.*, Settlement Agreement, Peoples v. Fischer, *supra* note 96, at 10.

105 527 U.S. 581 (1999).

106 *Id.* at 600-01.

107 Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 39 (2012).

108 Sheryl A. Larson, *FY 2013 Residential Information Systems Project Highlights*, RESIDENTIAL INFORMATION SYSTEMS PROJECT, slide 20 (Feb. 11, 2016), https://risp.umn.edu/media/download/cms/media/risp/RISP_FY_2013_Highlights.pdf.

109 Data provided by Ted Lutterman, Senior Director, Government & Commercial Research, National Association of State Mental Health Program Directors Research Institute. Email on file with author (Mar. 24, 2016). Data for 2000 comes from NIMH and Substance Abuse and Mental Health Services Administration (SAMHSA), Additions and Resident Patients at End of Year, State and County Mental Hospitals, by Age and Diagnosis, by State, United States, which is reported, as well, in Ronald W. Manderscheid et al., *American Mental Health Services: Perspective Through Care Patterns for 100 Adults, with Aggregate Facility, Service, and Cost Estimates, in*PUBLIC MENTAL HEALTH 383 (William W. Eaton ed., 2012). Data for 2014 is from NASMHPD Research Institute (NRI) State Mental Health Agency Profiles System, 2015.

110 Bagenstos, *supra* note 107, at 34.

111 Settlement Agreement, U.S. v. Delaware, No. 11-cv-591 (D. Del. July 6, 2011), at 3, http://www.clearinghouse.net/chDocs/public/PB-DE-0003-0002.pdf.

112 *Id.* at 6.

113 *See* cases listed at *Special Collection: Olmstead Cases*, CIV. RIGHTS LITIG. CLEARINGHOUSE, http://www.clearinghouse.net/results.php?searchSpecialCollection=7 (last visited May 9, 2016).

114 *See supra* note 33 and accompanying text.

115 18 U.S.C. § 3626(a)(1).

116 18 U.S.C. § 3626(a)(3)(A)(i).

117 18 U.S.C. § 3626(a)(3)(E).

118 18 U.S.C. § 3626(a)(3).

119 18 U.S.C. § 3626(g)(4).

120 Plaintiffs' Motion to Enforce the Court's Order, Carty v. Farrelly, *supra* note 58, at 4-5, http://www.clearinghouse.net/chDocs/public/PC-VI-0001-0031.pdf.

121 Violent Criminal Incarceration Act of 1995, H.R. 667, 104th Cong. tit. IV (Enhancing Protection Against Incarcerated Criminals) (Jan. 25, 1995).

122 141 Cong. Rec. H1479 (daily ed. Feb. 9, 1995) (Statement of Rep. Bill McCollum).

123 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995) (Statement of Rep. Charles Canady).

124 141 Cong. Rec. H1485 (daily ed. Feb. 9, 1995) (Statement of Rep. Bill Young).

125 Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the S. Comm. on the Judiciary, 104th Cong. 3 (1995) (statement of Sen. Orrin G. Hatch).

126 *Id.* at 9 (statement of Sen. Bailey Hutchison).

127 *Id.* at 12.

128 *Id.* at 30 (statement of former Att'y Gen. William P. Barr).

129 *See*18 U.S.C. § 3626(a).

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EXHIBIT E

142 Cong.Rec. S10576-02
1996 WL 522797 (Cong.Rec.)
(Cite as: 142 Cong. Rec. S10576-02)

Congressional Record --- Senate
Proceedings and Debates of the 104th Congress, Second Session
Monday, September 16, 1996

***S10576** CRIME IN AMERICA

Mr. COVERDELL.

Mr. President, undoubtedly, Senator Dole's emphasis on taking crime head-on is an outgrowth of a circumstance over the last 3 years that has just turned sour on us. It has been alluded to, but I want to cite some of the facts that have developed in the last 36 months.

First of all, I want to make it clear that there can be no doubt about it that, in the last 36 months, the United States has found itself, once again, in a massive drug epidemic. It is fueling and will continue to fuel crime. Just to cite this, in the last 36 months, marijuana use is up 105 percent, LSD is up 130 percent, cocaine up 160 percent. Somebody in the administration suggested that, actually, drug use is down. I have no idea where that data is coming from, but it must be a single source, because every other source has documented that drugs were up in virtually every category. The sad thing, Mr. President, is that they are kids.

In the last epidemic, during the 1960's and 1970's, it was a target group from about 16 to 20. It has dropped, which is such a tragedy. Now the ensnarement is occurring at age 8 to 13. This country is going to feel the impact of that for a long, long time. One in every 10 kids is using drugs.

Drug prosecutions are down 12 percent. This administration cut 625 drug agents. Federal spending on drug interdiction has been cut by 25 percent. The drug czar's office was reduced by 83 percent. On the list of national security threats, compiled by the National Security Council, this administration moved illegal drugs from No. 3, as a threat, to No. 29 out of 29.

Now, Mr. President, can there be any wonder that our children are getting the wrong message, and that they no longer think drugs are a risk, and that, therefore, they are using them in record numbers, and that, therefore, we have an epidemic, and that, therefore, we are having the emergence of a new crime wave?

Mr. President, we have been joined by one of our colleagues that has been in the center of this controversy during his entire time, which is since 1994. The distinguished Senator from Michigan is already making an impact in this area of vital concern across our country.

I yield up to 15 minutes to the Senator from Michigan.

PRESIDENT CLINTON'S VETO BY LAWYERING

Mr. ABRAHAM.

Mr. President, I thank the Senator from Georgia, again, for his efforts to bring us together here to focus on various vital matters before the Senate and before the American people.

Mr. President, I have taken the floor on several previous occasions to discuss the problem of abusive prison litigation and this Congress' efforts to attack that problem.

The last time I did so was April 19, 1996. At that time, I expressed my disappointment that President Clinton had just vetoed the Commerce-Justice- State appropriations bill.

Contained in that bill was the Prison Litigation Reform Act, a carefully crafted set of provisions designed to stem the tide of prison litigation.

In my view, this was a very important piece of legislation. Lawsuits by prisoners and lawsuits over prison conditions were completely out of hand.

One figure captures the situation very well. In fiscal year 1995, prisoners- inmates in prison-filed 63,550 civil lawsuits in our Federal court system. That is a little over one-quarter of all the civil lawsuits filed in Federal courts that year. It's also far more than the 45,788 Federal criminal prosecutions initiated that fiscal year.

In short, Mr. President, we saw, in fiscal year 1995, prison lawsuits outnumber prosecutions under our Federal system and account for one-quarter of all the lawsuits brought in this country in the Federal system.

One prisoner sued because he had been served melted ice cream. For this he claimed $1 million in damages. Fortunately, the judge ruled that the right to eat frozen ice cream was not one of those the Framers of the Constitution had in mind.

Another sued because when his dinner tray arrived, the piece of cake on it was "hacked up."

A third sued demanding LA Gear or Reebok "Pumps" instead of Converse tennis shoes. This kind of abusive litigation is not only frivolous, it costs money and cost the taxpayers a lot of money.

The National Association of Attorneys General estimated that the States were spending about $81 million to battle cases of the sort I just described-this even though the States win 95 percent of these cases early in the litigation for reasons that are obvious.

We were determined to do something about this problem in the Congress, so as part of the Commerce-State-Justice appropriations bill in 1996 we passed the Prison Litigation Reform Act. This legislation charged prisoners a fee for filing any lawsuit, while making it possible for the prisoners to pay that fee in installments. If a prisoner filed more than three frivolous cases, however, the prisoner would no longer be able to pay the filing fee in installments. He or she would have to pay the full fee up front, unless a court found this would create imminent risk of bodily harm.

In addition, prisoners who filed frivolous lawsuits would lose their good time credits, thus making their stay in prison longer. And judges were given authority to screen out frivolous cases on their own.

The legislation was designed to put an end to another aspect of the prison litigation problem: Seizure by Federal judges of the power to run prison systems. These seizures have consequences that range from the ridiculous to the disastrous.

In my own State of Michigan, judicial orders resulting from Justice Department lawsuits have resulted in ***S10577** Federal courts monitoring our State prisons to determine how warm the food is, how bright the lights are, whether there are electrical outlets in each cell, whether the prisoners' hair is cut by licensed barbers-this despite the fact that no court has ever found that any of these conditions regarding which it is giving orders violate the Constitution.

The orders issued by a judge in Philadelphia were even worse. There a Federal judge had been overseeing what had become a program of wholesale releases of up to 600 criminal defendants per week. Why? To keep the prison population down to what the judge considered an appropriate level. Thousands of the released defendants were then rearrested for new crimes including in one 18-month period 79 murders, 90 rapes, 959 robberies, 2,215 drug dealing charges, 701 burglaries, 2,748 thefts, and 1,113 assaults.

In the interest of justice and public safety, we wanted to stop this, and the means were simple and fully in keeping with everyone's rights. We simply required in that same Prison Litigation Reform Act that no judge could take over a prison without first holding that it had violated the Constitution and explaining how the order was necessary to correct the violation. We also directed that the judge give due regard to public safety in deciding what kinds of remedies to require. And we established stringent limits on the power of the courts to order prisoners released. Existing orders would have to meet these new standards. If they did not, they would have to be dissolved immediately on motion of the prison authorities, unless the court found that the orders were necessary to correct an on-going violation of a Federal right.

Unfortunately, President Clinton vetoed that legislation. At the time, the President said his veto had nothing to do with our prison litigation proposals. Instead, he said, he was vetoing the bill over other matters.

We took the President at his word and included our proposals in a second piece of legislation. This time, the President signed the legislation. Unfortunately, the President's top ranking officials in the Department of Justice seem intent on inventing a new kind of veto, veto by lawyering.

This effort started almost as soon as the ink from the President's signing pen was dry. A mere 11 weeks after signing the bill, his Department of Justice was filing briefs all around the country that would undermine the clear intent of our legislation. The briefs claimed that, far from requiring the courts to stop running the prisons for the comfort of prisoners, that law authorized them to continue to do so indefinitely.

Thus, according to President Clinton's Justice Department, Federal judges should continue to tell Michigan how warm the food should be, how bright the lights have to be, and who should cut the prisoners' hair. And by the logic of their position, judges should also continue to dictate prison population size and order excess prisoners released-this even if the Constitution contains no such requirement and even if the release orders jeopardize public safety. At least they should do this while they are investigating whether the prison ever violated any provision of the Constitution, an investigation that can take quite a bit of time.

The Department of Justice has come up with a host of legal theories to explain why the reform act should be read to require indefinite judicial supervision of prisons for the benefit of prisoners. It is difficult to say which is more ludicrous, the original or the current theory. The original theory, now abandoned in the face of questions from Members of this body and the National Association of Attorneys General, was that the phrase "violation of a Federal right" includes violations of the very decrees the reform act was adopted to end.

The current theory stands on its head the reform act's requirement that existing decrees be automatically stayed 30 days after a motion to end one has been filed unless there has been a final ruling on the motion.

According to the current Justice Department theory, this requirement in fact means the decrees are not automatically stayed, and, indeed, that nothing should happen to them at

all until the court conducts its own exhaustive inquiry as to whether conditions at the prison have ever violated any constitutional provision.

These theories are unpersuasive, Mr. President. Even Judge Harold Baer, the subject of some attention for his theory that running away from the cops gave no grounds for reasonable suspicion, rejected these theories and ended judicial rule at Riker's Island. Judges there had been dictating such crucial matters as the brand and exact concentration of cleanser to be used in certain areas.

The theories are ludicrous but the end result is not. These interpretations make a mockery of this Congress, they make a mockery of the law, and they make a mockery of the American people's desire to have prisons run to promote the public order, not to promote the comfort of our prisoners.

Further, even if they desperately try to protect existing decrees, President Clinton's Department of Justice continues to threaten exactly the kinds of lawsuits the reform act was supposed to end.

For example, a mere 4 days after President Clinton signed the reform act, the Assistant Attorney General for Civil Rights threatened to sue Gov. Parris Glendening of Maryland over conditions in Maryland's supermaximum security prison. Supermaxes are reserved for the most dangerous prisoners, murderers and rapists who continue their violent behavior in prison.

What were the egregious unconstitutional conditions that led President Clinton's Assistant Attorney General for Civil Rights to threaten suit? The fact that supermax prisoners are not allowed to socialize enough and are not getting enough outdoor exercise. The Department calls these conditions unconstitutional because they are the "mental equivalent of putting an asthmatic in a place with little air to breathe."

Fortunately, this particular veto by lawyering will ultimately succeed only if President Clinton's Justice Department persuades the courts to go along with it. I do not expect that it will.

So far the results are not promising for the Justice Department. So far, the judges who have decided these issues, interestingly, all of them Democratic appointees who had either taken over the running of prisons themselves or had inherited them from a predecessor who retired, rejected half the arguments urging them to retain control.

Mr. President, other parts of the Reform Act, the ones designed to cut back on individual prisoner lawsuits, which President Clinton's Department of Justice has no role in enforcing, already are showing their effects. Prisoner filings since the bill's enactment have declined sharply. Nevertheless, the Department of Justice, through its attempted veto by lawyering, is delaying and undermining the effectiveness of critical portions of the Reform Act. The Judiciary Committee will be holding a hearing on this matter next week.

It is my intention to propose an amendment to whatever proves to be the most appropriate legislation, either this year's Commerce-State-Justice appropriations bill or perhaps another omnibus appropriations bill, that clarifies once and for all it is time for abusive prison litigation to end, whether it is brought by prisoners or by President Clinton's Department of Justice.

It is unfortunate we must clarify once again the clear intent of such recently enacted legislation. But public safety and the costs of our prison system are too important for us to allow this inappropriate veto by misinterpretation.

In short, I am here today to say that if we are truly serious about getting tough with crime, we ought to begin immediately to take the Prison Litigation Reform Act and administer it in the exact clear sense that Congress intended it to be administered.

That is not happening today. I am extraordinarily disappointed by it. I intend to be on the floor as often as necessary to bring about the correct interpretation of that legislation or to add new legislation that eliminates any possibility of misinterpretation in the future. Prisons should be tough time for prisoners and the rights of victims should take priority.

That is what I believe everybody in this Chamber is committed to doing, and if necessary we will have to enact more legislation to get the job done. But I am very disappointed in the actions of the Department of Justice to ***S10578** date because it is certainly inconsistent with what we demand and what the American people I believe want to see happen in the area of prison reform.

I thank the Senator from Georgia.

The PRESIDING OFFICER.

The Senator from Georgia.

Mr. COVERDELL.

I wonder if the Senator from Michigan would stay just a moment to see if I get the sequence of these events down. We had a condition of legal frivolity-if you froze an ice cream or not. I think any American who would hear this just would be dumbfounded. But your legislation put an end to that and put an end to judicial management of prisons. And the President vetoed that.

Mr. ABRAHAM.

That is correct.

Mr. COVERDELL.

Then you came back again, passed the essence of this legislation, and he signed it, but his Justice Department has subsequently been engaged in an overt attempt to undo it?

Mr. ABRAHAM.

That is accurate. I would say to the Senator from Georgia, we were told when the first veto occurred, because this legislation was included in a broader bill, that the legislation, the Prison Litigation Reform Act, was not the basis for the veto; that, in fact, it was supported.

When the second bill was signed, we assumed the Justice Department would seek to make sure the provisions of that Litigation Reform Act would be enacted and followed by the courts. Instead, what we have seen is the Department of Justice intervening in lawsuits in a way that would, in fact, preclude, rather than allow, States to extricate themselves from these various judicial circumstances where judges were running the prison systems with no clear evidence of a constitutional violation ever having occurred. Instead, we find the Justice Department finding ways to allow the judges to stay in charge and to allow for various things such as we have seen around the country, where these prisoner lawsuits are growing in number, where judges are requiring prisons and State authorities to expend millions of taxpayer dollars simply to ensure and improve the comfort of

prisoners. We think that is the wrong direction.

142 Cong. Rec. S10576-02, 1996 WL 522797 (Cong.Rec.)

END OF DOCUMENT

EXHIBIT F

Judicial Impact Statement

Violent Criminal Incarceration Act of 1995

H.R. 667

Prepared by:

The Judicial Impact Office

The Administrative Office of the U.S. Courts

June 21, 1995

JUDICIAL IMPACT STATEMENT
Violent Criminal Incarceration Act of 1995
H.R. 667

OVERVIEW

The Violent Criminal Incarceration Act of 1995 (H.R. 667) addresses federal court jurisdictional and administrative issues covering prisoners. These include: (1) requirements that prisoners must fully exhaust state administrative remedies prior to filing a federal lawsuit; (2) significant restrictions on federal court relief related to conditions in prisons, jails, and juvenile detention facilities; (3) expanded ability for certain individuals to oppose the imposition or continuation of remedial relief through new provisions on standing and intervention; (4) automatic time limits for specific forms of prospective relief; (5) mandated requirements and significant new roles for magistrate judges regarding oversight of prison condition cases; and (6) restrictions on attorneys' fees in such cases.

The total impact of the bill could not be quantified. For many provisions, this impact statement provides only an initial assessment or examples of the resource consequences to the judiciary if this bill were enacted. **However, the related costs could be extremely high. For example, the potential annual resource costs of title III, which covers court-ordered relief in prison condition cases, could be more than $239 million and 2,096 positions, of which at least 280 would be judicial officers (Article III judges and/or magistrate judges).** At least $95 million could be incurred if just 50 percent of the nearly 4,000 existing prison conditions consent decrees and court orders were refiled in federal court subsequent to their termination under this bill. More than $144 million in resource costs could be incurred by the judiciary if just 2,000 prisoners in each of the 100 prison condition cases with the largest numbers of named plaintiffs were required to testify individually as to how the alleged prison conditions affected them specifically.

Given the total nationwide prison population and all of the existing consent decrees and court orders that could be subject to court review and termination every two years, the actual and recurring costs could be much greater. Title III's requirements that only federal magistrate judges could perform fact-finding in such cases would also radically alter the role and workload of both magistrate judges and Article III judges, affecting allocation of costs and resources.

The impact of **title I** of the bill, which would give prison construction grants to states that enact "truth-in-sentencing" laws, could not be assessed, given the uncertainty of which states would qualify for these grants and their potential construction timetables. Additional prison facilities could result in additional prisoner litigation at the federal level. It could also have some effect on prisoner release and recidivism rates if more prisoners are incarcerated for longer periods and cannot commit federal crimes. **Title II** of the bill requires prisoners to fully exhaust state

administrative remedies before filing a section 1983 civil rights action in federal court. This requirement could affect the number of such filings. However, based on the conflicting experiences of several states, where similar requirements both increased and decreased filings, the impact of this provision was unclear.

As mentioned in the example above, **title III** could be enormously expensive. In addition, the title would impose strict limitations on the ability of federal courts to fashion, approve or impose remedies in prisoner civil rights cases.

No direct federal court impact would be expected from **title IV** (restrictions on federal prisoner use of strength training and related equipment), **title V** (potential restrictions relating to federal prison amenities), **title VI** (community service projects), or **title VII** (prison commissary administration). This statement provides an in-depth analysis of only **titles II and III,** because those titles would have the most significantly effect on the federal judiciary.

ANALYSIS OF TITLES II AND III

If the entire bill were enacted, several of the provisions within titles II and III would have significant interacting effects. The interrelated effects of these titles and other provisions prevent the development of precise estimates of the total resource impacts associated with this bill. The potential workload and resource projections presented herein generally assume full implementation of the legislation.

In order to develop better estimates of the potential caseload and resource effects of this bill, the Federal-State Jurisdiction Committee of the Judicial Conference of the United States requested that this office conduct an empirical survey of 15 federal court districts identified as processing considerable levels of prisoner civil rights litigation (Prisoner Litigation Survey). This survey requested specific data on various related issues, such as: the total number of major, systemic prison condition cases and the specific condition issues involved; estimates of the number of witnesses and total trial time in such cases; classification of how many cases were resolved by court order or consent decree; identification of background of individuals appointed as special masters or monitors; breakouts of how many consent orders included judicial findings of constitutional violations; and other appropriate questions. The data received was incorporated into the impact analysis of specific provisions of the bill or otherwise correlated with other available sources of information.

"Stopping Abusive Prisoner Lawsuits"
(Title II, Sections 201, 202, 204)

Title II of this bill contains several modifications and restrictions on the prisoner petition process. Section 201 would prohibit a section 1983 civil rights action (42 U.S.C. § 1983) if the petitioning prisoner had not completely exhausted all available administrative remedies, where the remedies had been approved or certified as provided for under current law.

In accordance with current law (42 U.S.C. § 1997e), several states have recently implemented institutional grievance procedures that would allow a district court to continue a prisoner civil rights case to allow for the exhaustion of such remedies. These programs, which are similar to those proposed in section 201, have had mixed results. Some states reported that by extending the administrative remedy process, some additional grievances were resolved at the state level or by the time the administrative process was over, some prisoners believed it was no longer necessary to file petitions in the federal courts. Other states contend that extending the administrative process had little effect on the number of prisoner petitions ultimately filed in the federal courts. As a result of this conflicting data, the change in the number of section 1983 prisoner petitions which would be filed in federal court under proposed section 201 could not be estimated.

Section 202 would direct federal courts to dismiss any frivolous or malicious section 1983 action, or such actions that fail to state a claim upon which relief may be granted, brought by an adult convicted of a crime and confined in any jail, prison or other correctional facility. Section 204 would require that any prisoner filing such a suit include a statement of all assets in his or her possession so the court can require a full or partial payment of filing fees based on the prisoner's ability to pay.

These provisions would not prevent the actions from being filed in federal court. They would only allow the court to dismiss the action at an earlier point in the process. A substantial portion of the judiciary's costs related to these types of cases is incurred in the initial filing and review stage prior to any dismissal (e.g., filing and noticing activities, docket preparation). Possibly, the requirement to pay a filing fee may affect a prisoner's decision to file the action.

During FY 1994, almost 39,100 federal and state prisoner petition civil rights cases[1] were filed in federal court at an estimated resource cost of $49.7 million and 508 judiciary positions. Although title II could reduce the number of petitions filed or reduce court review before the petition could be dismissed, any savings would be at

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[1] "Judicial Business of the U.S. Courts, 1994 Report of the Director," Table C-2.

least partially diminished by the increase in resources necessary to review the prisoner statements of assets and to process separate partial payments of filing fees. For this reason, the total resource savings could not be developed.

"Stop Turning Out Prisoners" Act
(Title III, Section 301)

This title would impose strict limitations on the ability of federal courts to fashion, approve or impose remedies in prisoner civil rights cases. There could also be dramatic and continuing increases in the number of proceedings related to requests for termination of court ordered relief in such cases. The judiciary costs and resources associated with these provisions could be enormous.

Section 301(a) of this title contains substantial amendments to section 3626 of title 18, United States Code,[2] relating to court remedies in prison conditions litigation. **Section 301(b)** would make these amendments retroactive to all orders, consent decrees and other relief, regardless of whether the relief was originally granted or approved before, on, or after the date of the enactment of this bill. A detailed summary of each significant proposed amendment or group of related amendments contained in this section and the related potential effect on the federal courts follows:

Subsection 3626(a)(1) - Limitations on Court-Ordered Relief in Prison Condition Cases - This subsection states that a court's ability to issue "[p]rospective relief in a civil action with respect to prison conditions shall extend no further than necessary to remove the conditions that are causing the deprivation of the Federal rights of individual plaintiffs in that civil action." (emphasis added) Furthermore, the court would not be able to grant or approve any prospective relief, "unless the court finds that such relief is narrowly drawn and the least intrusive means to remedy the violation of the Federal right." In determining the overall intrusiveness of any such relief, the court must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."

Subsection 3626(a)(2) - Restrictions on Court-Ordered Relief in Prison Overcrowding Cases - This subsection states that in any civil action with respect to prison conditions, "the court shall not grant or approve any relief whose purpose or effect is to reduce or limit the prison population, unless the

[2] Section 3626, enacted as part of last year's major crime legislation (Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322 (108 Stat. 1796, Sept. 13, 1994), concerned appropriate remedies with respect only to prison crowding litigation.

plaintiff proves that crowding is the primary cause of the deprivation of the Federal right and no other relief will remedy that deprivation." (emphasis added)

The overall effect of both of these provisions would be to restrict severely the ability of federal courts to fashion, approve or impose remedies in many prisoner civil rights class action cases. The potential impact on the federal courts could be substantial, incurring millions of dollars in annually recurring resource costs, depending on how the intent of Congress and these provisions are interpreted and implemented.

The most recent census of state and federal prisoner population indicated there are about 1.2 million inmates[3] located in approximately 3,270 jails,[4] 1,210 state prisons and 80 federal prisons.[5] As of January 1, 1994, thirty-nine states, the District of Columbia, Puerto Rico, and the Virgin Islands had one or more prisons operating under at least one consent decree or court order for an approximate total of 323 state prisons (at this time, no federal prisons are under a court order or consent decree).[6] Of the 3,270 jails nationwide, about 320 are operating under a court order or consent decree. Other data suggests that 131 of the country's largest 503 jails are also operating under at least one consent decree or court order.[7] Precise estimates are not available as to the overall number of court orders and consent decrees that have been issued. Best interpolation of available data suggests there

[3] Correlation of information contained in two documents: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, Jail Inmates 1992, Aug. 1993, p.2. (Jail Inmates Bulletin); and U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities 1990, May 1992, NCJ-137003, p.1 (Correctional Facilities Census). This analysis uses the Bureau of Justice Statistics' definition of a "jail": a locally operated correctional facility that confines persons before or after adjudication. Inmates sentenced to jail usually have a sentence of a year or less, but jails also incarcerate persons in a variety of other categories (e.g., transfers to prisons, probation and parole violators, temporary detention of juveniles). Jail Inmates Bulletin, p.2.

[4] Estimate provided by representative of the American Jail Association.

[5] Correctional Facilities Census, p. 1, Table 1.

[6] Data contained in report provided by the American Bar Association, Section of Criminal Justice, "An Analysis of the 'Stop Turning Out Prisoners Act'[sic]" (Feb. 17, 1995), p.3.

[7] Jail Inmates Bulletin, p.5.

are about 1,470 court orders[8] and approximately 2,500 consent decrees[9] covering prison and jail facilities. The best available information indicates that the majority of these court orders and consent decrees were imposed or approved by federal courts.[10] About 1,030 of these nearly 4,000 court orders and consent decrees specifically address crowding conditions in prisons and jails as the sole or primary issue.[11]

As discussed in further detail in the following section, it is likely that substantial numbers, if not the majority, of existing orders and consent decrees will be subject to termination, either soon after enactment (upon motion of a defendant or intervenor under subsection 3626(b)(2)) or over the two-year period following enactment of this Act (under subsection 3626(b)(1)). Most motions for termination will require at least an initial hearing and many will require substantial evidentiary hearings if the court is to determine whether the previously-ordered relief continues to be necessary. It is also likely that given the restrictions on availability of attorneys' fees set forth in section 3626(e), very few of the potentially many cases that would be filed following automatic termination will be settled out-of-court.

According to various judiciary studies on caseweight factors and current workload measurement formulas, major prison condition class action civil rights cases are most likely to involve appointed counsel, are often extremely time-consuming and require extensive use of judicial resources, even when taking into account that usually only a small percentage of the individual petitioners or members of the named class of prisoners actually testify.[12] Based on these caseweights and

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[8] Correlation of data obtained from Bureau of Justice Statistics, "Sourcebook of Criminal Statistics - 1991," Table 1.98 (BJS Sourcebook 1991) and from Jail Inmates Bulletin, p.5.

[9] Correctional Facilities Census, Table 10, applying ratios consistent with data received from footnote 7.

[10] See e.g., U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation, January 1995, NCJ-151652, p. 1, fn. 1 (Section 1983 Litigation Report). This information was also supported by discussions with representatives of the ACLU National Prisoner Project, the National Center for State Courts, the American Jail Association, and the Bureau of Prisons, as well as by data received in response to the Prisoner Litigation Survey.

[11] Correctional Facilities Census, p.7; and BJS Sourcebook 1991, Table 1.98.

[12] See e.g, Section 1983 Litigation Report, pp. 22-27 and accompanying reference list, pp. 45-46. Many of the findings of these studies were supported by the data received in response to the Prisoner Litigation Survey.

work formulas, the cost of just reopening, producing required findings and deciding whether to continue previously-ordered relief or issue new decrees in 100 such cases would be about $4.77 million and 45.3 positions.

However, the judiciary's costs would be significantly higher if the court must make individual findings and hear testimony from each affected plaintiff, as may be intended under this section. For example, if 2,000 members of a prisoner class action were required to individually testify, the total resource cost to the judiciary would be at least $1.44 million and 11.9 positions for just one case. Even if the court were able to hear from six witnesses per day (taking into account time for testimony and cross-examination), **it could take more than 330 days or more than 1.6 court years for a judge (district and/or magistrate judge, depending on the allocation of workload) to hear evidence from each member of the class action.**[13]

It is not known exactly how many such cases would be filed in federal court each year. Assuming, however, that such prisoner class actions (whether refiled after termination under subsection 3626 or newly initiated) were filed against just 100 of the largest correctional facilities or systems and 2,000 prisoners in each of these cases were required to testify individually as to how the alleged prison conditions affected them specifically (200,000 potential plaintiffs), **the total annual resource costs to the judiciary would be about $144 million and 1,190 positions. More than 160 of these positions would be judicial officers, working full-time on these cases each year.** These costs can be several times greater, considering the total nationwide prison population and the thousands of existing prison and jail consent decrees and court orders that could be subject to court review and termination within the first two years after enactment, as discussed herein.

As mentioned previously, the group of individuals covered by any court-ordered relief may be limited to the named prisoner litigants. Other prisoners not specifically part of the initial class action as well as new inmates might not receive any remedies or benefits from the resolution of these cases. This situation alone could generate thousands of additional suits seeking the same relief or outcome.

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[13] Based on current workload measurement formulas and confirmed by data received from the Prisoner Litigation Survey. These numbers assume that only one judge works full-time on each of these cases; the length of the trial could be reduced significantly if more than one judge is assigned to the case on more than a part-time basis.

Subsection 3626(b)(1) - Automatic Termination of Prospective Relief - This subsection provides that in any civil action on prison conditions, any prospective relief shall automatically terminate two years after the later of either: (1) the date the court found the violation of a federal right that was the basis for the relief; or (2) the date of enactment of this legislation.

Subsection 3626(b)(2) - Immediate Termination of Prospective Relief - This subsection provides that in any civil action on prison conditions, a defendant or intervenor shall be entitled to immediate termination of any prospective relief, if that relief was approved or granted in the absence of a finding by the court that prison conditions violated a Federal right." (emphasis added)

Subsection 3626(c) - Procedure for Motions Affecting Prospective Relief - Part 1 of this subsection requires courts to rule promptly on any motion to modify or terminate prospective relief with respect to prison conditions. Part 2 provides that any prospective relief subject to a pending motion would be automatically stayed during the period beginning either 30 to 180 days after the motion is filed (depending on the nature of the motion), ending when the court enters a final order ruling on the motion.

Subsection 3626(d) - Expansion of Provisions on Standing and Intervention - This subsection grants standing for the purpose of opposing any relief whose purpose or effect is to reduce or limit prison population to the following persons: any federal, state, or local official or unit of government, whose jurisdiction or function includes the prosecution or custody of persons in the prison at issue, or who may otherwise be affected by the population-limiting relief. Such persons are also authorized to intervene in any proceeding relating to such relief. Standing is to be "liberally conferred under this subsection so as to effectuate the remedial purposes of this section."

The net effect of these four provisions would be to increase dramatically the number of proceedings related to requests for termination of court ordered relief, whether immediately or within the first two years after enactment of this Act, regardless of whether remedies related to such orders were implemented.

This would especially be the case with respect to consent decrees. Such decrees are typically used as a means of settling prison litigation without an explicit finding by the court of a federal violation. The parties typically include in the

consent decree a statement to the effect that the defendants, by agreeing to settle the case, are not admitting that the conditions of confinement in the correctional facility are unconstitutional. This statement is included in the consent decree so that the decree is not used against correctional officials in other lawsuits contesting the conditions of confinement. Best available information indicates that the majority of such consent decrees do not contain a finding of a constitutional violation.[14] In several ways, this legislation creates various disincentives for the parties to enter into consent decrees.

Under these provisions, court orders and consent decrees covering conditions in correctional facilities that may or may not have been rectified are likely to be the target of motions seeking immediate termination. If termination occurs, the inmates at those facilities would probably bring additional lawsuits (either class actions or individual petitions) to resolve issues and conditions that have previously been the subject of remedial relief but have never been rectified, in the opinion of the affected prisoners.

As stated earlier, Bureau of Justice Statistics data indicate that there are at least 1,030 court orders and consent decrees affecting prisons and jails that are primarily related to crowding conditions. **Motions to stay prospective relief in a majority of these crowded condition cases could be filed very shortly after enactment of these provisions. Even if there were no immediate and specific motions, subsection 3626(b)(1) would automatically terminate all of the nearly 4,000 existing court orders and consent decrees within two years after enactment.**

Best available information indicates that the majority of existing court orders and consent decrees were imposed or approved by federal courts, but the actual percentage could not be determined. It is also unknown how many of these cases would be refiled and what percentage in state or federal court. In many instances, the main issues or problems may already be near full compliance or resolution and the only continuing oversight of the facility is minimal. For these situations, there might not be any apparent or urgent need for a new lawsuit to be filed. As mentioned previously, current caseweights and work measurement formulas indicate that the cost of reopening just 100 such cases, producing the required findings and issuing new court decrees would be about $4.77 million and 45.3 positions.

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[14] This supposition is based on background information received from representatives of various national correctional associations and summary reports issued by the ACLU's National Prison Project. The Prisoner Litigation Survey conducted by this office supported this supposition, indicating that fewer than 17% of all consent decrees contained findings of a constitutional violation.

In order to illustrate the potential effect of these provisions, if only 50 percent of the nearly 4,000 total number of consent decrees and court orders affecting prisons and jails were the subject of new litigation and filed in federal courts, **the cost to the judiciary would be more than $95.4 million and 906 positions. More than 126 of these positions would be judicial officers (district judges and/or magistrate judges).** If the judiciary were to re-adjudicate just 50 percent of the existing 1,030 orders and decrees related specifically to prison population conditions, **the cost would approach $24.6 million and 233.3 positions.** Given the available data, these may be conservative estimates of the total impact on the federal courts.

As mentioned previously, these costs are based on current caseweights and work measurement formulas. **The costs would be significantly higher if the court must make individual findings and hear testimony from each affected prisoner,** as set forth in the previous discussion of subsections 3626(a)(1) and (2). The costs also do not take into account the effects from the mandated role of magistrate judges set forth in subsection 3626(e), below.

> **Subsection 3626(e) - Mandated Use of Magistrate Judges As Special Master or Monitor -** This subsection requires that in any civil action in federal court with respect to prison conditions, if a special master or monitor is to be appointed, such individual must be a United States magistrate judge. In addition, the magistrate judge would be limited to making proposed findings on the record on complicated factual issues submitted by the court, and would be prohibited from any other function, even if the parties consented.

This provision would place great demands on magistrate judges in particular and by extension, the rest of the federal judicial system.[15] Magistrate judges would be responsible for these functions rather than the wardens, correctional superintendents, and other correctional experts who generally serve as court monitors at the present time. In time, especially given the likelihood that most existing court orders and consent decrees will be reopened (as discussed above),

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[15] This section also appears to contravene certain fundamental jurisdiction provisions of the Federal Magistrates Act (28 U.S.C. § 636). One interpretation of the section contends that magistrate judges would be prohibited from handling non-case-dispositive and case-dispositive motions, as well as pretrial conferences in prisoner cases. In addition, many magistrate judges currently handle prisoner cases with the consent of the parties and may act with full dispositive authority equal to a district court judge; this practice may be prohibited or restricted under this proposed section. This impact statement does not provide cost analyses of these potential effects of the legislation.

magistrate judges might be appointed as special masters or monitors in hundreds of prison condition cases, at a minimum.[16]

Under certain circumstances, magistrate judges could find that overseeing just one major correctional facility or a few prisons and jails could become a full-time occupation, leaving little or no time to devote to other duties.[17] This scenario is highly probable considering the approximately 660 largest state and local correctional facilities currently operating under court orders or consent decrees and the many thousands of prisoners in those institutions. Magistrate judges are an integral part of the judiciary, handling a significant part of the civil and criminal caseload. In response to the overall effects of this provision and the rest of **title III**, the judiciary would either be required to seek funding for substantially more magistrate judge positions, or else request additional district judgeships to assume the additional workload. The absence of additional resources may substantially delay other criminal and civil proceedings within the federal courts.

A precise estimate cannot be developed on the number of existing and future court orders and consent decrees that may use magistrate judges exclusively for fact-finding activities and monitoring of prison and jail conditions. Best available information indicates that a special master or monitor is appointed in at least 20% of all prison condition cases settled by a court order or consent decree.[18] For

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[16] Available statistical and other agency workload data indicates that very few magistrate judges are currently appointed as special masters or monitors in these cases. The Prisoner Litigation Survey indicated that magistrate judges comprised fewer than 10% of the total number of special master or monitor appointments in major prison condition cases.

[17] In one recently concluded major prison condition court action, for example, it is estimated that the court-appointed special master (an expert in prison management) and three assistants will have to spend approximately 3-6 months full-time on a plan to implement the court-ordered remedies. If instead, this work had to be done by one magistrate judge (without staff or assistants), it could take 2-4 years of his or her time working exclusively on this one case.

Relatedly, fees for the cost of special masters can be paid by the parties to the litigation, specifically the state or local government party to the case. Under this bill, however, if only magistrate judges can be special masters, the federal courts are in effect the sole entity paying for this function.

[18] This 20% estimate is based on responses to the Prisoner Litigation Survey. Additional research is being conducted to further substantiate and correlate this percentage estimate with similar information previously collected by the American Correctional Association (a summary of this information is presented as Table 1.92 of the Bureau of

illustrative purposes, approximately four magistrate judges (plus about 15.6 immediate support positions and about an additional five indirect administrative support positions), at an annual cost of about $2.47 million would be required to perform 100 such monitoring activities. **If magistrate judges were used to monitor about 20 percent (800) of the nearly 4,000 existing court orders and consent decrees on a full-time basis, as many as 32 magistrate judges, and about 125 immediate support staff positions and 40 indirect support positions would be required, at an annual cost of approximately $19.4 million.** If additional magistrate judges are not available to perform duties in criminal and other civil cases, additional district judges will be needed to take on this increased workload. The equivalent resource cost of 32 Article III judges (including about 173 immediate and indirect support staff positions) would be $22.3 million.

> **Subsection 3626(f) - Limitations on Attorneys' Fees -** This subsection would limit the availability of attorneys' fees under 42 U.S.C. § 1988 in prison condition cases, by allowing attorneys' fee awards only to the extent that the fees are directly and reasonably incurred in proving an actual violation of the plaintiff's federal rights and are proportionally related to the extent the plaintiff obtains court ordered relief for that violation. (emphasis added)

This provision could have several effects on the judiciary, none of which can be precisely quantified at this time. For example:

> 1) Fewer attorneys may agree to initially take on these cases. More prison condition cases may be filed without the assistance of counsel. Such pro se cases are usually more difficult and time consuming for the courts to process.
>
> 2) By limiting attorneys' fees to those costs incurred in "proving an actual violation," enforcement of remedies may become more difficult and time consuming for the courts. Obtaining a court order is often only the beginning phase of a prison condition suit, while monitoring and enforcement of the remedies may take several years. If plaintiffs are prohibited from collecting attorneys' fees for the often drawn-out enforcement phase of the lawsuits, attorneys may not remain with a case once relief is granted. This situation could also increase the workload of both Article III and magistrate judges, since oversight of

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Justice Statistics' "Sourcebook of Criminal Statistics - 1993").

the implementation of the order may become a court function under subsection (e).

3) If attorneys' fees are restricted for these specific cases, attorneys may attempt to recoup their time investments by bringing additional personal contingency fee lawsuits, on behalf of their clients, against the individuals (e.g., prison guards, wardens, doctors, etc.) who were responsible for the specific conditions found to be unconstitutional. The cost of 100 such lawsuits in federal court would be about $567,000 and 5.6 positions.

In any event, it is anticipated that these restrictions on the availability of attorneys' fees will reduce the incidence of settlement agreements being reached in most prison conditions cases. The effect of this provision as it interrelates with **sections 3626(a) and (b)** has already been discussed.

Analytical Assumptions

The cost estimates presented above reflect the full or partial resource costs to the judiciary of implementing specific provisions. These estimates include the resource cost of existing judicial officers, their direct staff and associated support activities that would contribute to handling the projected caseload (e.g., court security, automation and administrative support).[19] The bill does not consider creating new federal judgeships; therefore, the costs associated with appointing new judicial officers and hiring staff related to this new workload are not included.

[19] Some of these specific support costs could increase substantially due to the types of cases that may be generated under this bill, especially court security costs; these increases could not be quantified and were not included in the cost totals.

EXHIBIT G

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

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

MEMORANDUM AND ORDER

March 31, 2020

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

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

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

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

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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

Each Petitioner suffers from chronic medical conditions and faces an imminent risk of death or serious injury if exposed to COVID-19. Thakker is 65 years old and suffers from high blood pressure and cholesterol and has kidney failure. Further, he is currently suffering from symptoms similar to those of COVID-19. (Doc. 2, Ex. 3). Idowu, 57, had type II diabetes as well as high blood pressure and cholesterol. He is also currently sick. (Doc. 2, Ex. 4). Stubbs is 52 years old and is immunocompromised due to a kidney transplant he received 6 years ago. He has a heart stent and also suffers from type II diabetes and blood clots. (Doc. 2, Ex. 5). Hernandez, 52, suffers from diabetes, dental problems and an

ulcer. (Doc. 2, Ex. 7). Juarez, 21, suffers from diabetes and is currently sick with COVID-19 type symptoms, including trouble breathing. (Doc. 2, Ex. 8). Lin is 45 years old and suffers from chronic pain due to a forced sterilization, as well as chronic hepatitis B and liver disease. (Doc. 2, Ex. 9). Pratt, age 50, suffers from diabetes and high blood pressure. (Doc. 2, Ex. 10). Augustin, 34 years old, suffers from multiple conditions including diabetes, high blood pressure, nerve pain, limited mobility and pain from a prior bladder and intestine reconstruction, anemia, PTSD and depression. (Doc. 2, Ex. 11). Oyediran is a 40-year-old asthmatic suffering from high blood pressure and cholesterol. (Doc. 2, Ex. 12). Lopez, age 51, has contracted the flu four times while in ICE custody since November of 2018 and is concerned that he is especially susceptible to contracting COVID-19. (Doc. 2, Ex. 15). Finally, Hillocks, age 54, has been diagnosed with leukemia. He also suffers from diabetes, anemia, high blood pressure and cholesterol. (Doc. 2, Ex. 16).

Several Petitioners have reported symptoms similar to those of COVID-19. None have been quarantined, isolated, or treated. (Doc. 2 Exs. 3; 4; 8).

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

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

II. DISCUSSION

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

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

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

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

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

Respondents' standing challenge can also be easily resolved. Respondents essentially contend that because the Petitioners themselves do not have COVID-19 and their likelihood of contracting the illness is speculative, Petitioners cannot establish that they would suffer a concrete, non-hypothetical injury absent a temporary restraining order. However, as the Supreme Court observed in *Helling v. McKinney*, 509 U.S. 25, 33 (1993), "it would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." The COVID-19 pandemic is moving rapidly and expansively throughout Pennsylvania. Vast regions of the

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

B. Temporary Restraining Order

i. Legal Standard

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

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

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

ii. Irreparable Harm

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

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

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

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

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

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

a. Seriousness of the virus

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

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

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

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

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

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

b. Prevalence of the virus

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

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

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

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

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

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

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

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

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

c. Unique nature of detention facilities

Various public health officials have warned that the nature of ICE detention facilities makes them uniquely vulnerable to the rapid spread of highly contagious diseases like COVID-19. COVID-19 is transmitted primarily through "close contact via respiratory droplets produced when an infected person coughs or sneezes." (Doc. 12 at 18; Doc. 2, Ex. 1). Immigration detention facilities are particularly at risk for such close contact because they are considered "congregate settings, or places where people live or sleep in close proximity." (Doc. 2, Ex. 1). Such conditions provide "ideal incubation conditions" for COVID-19. (*Id.*).

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

> [a]s local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community. . .To be more explicit, a detention center with a rapid outbreak could result in multiple detainees — five, ten or more — being sent to the local community hospital where there may only be six or eight ventilators over a very short period. . .As [hospitals] fill up and overwhelm the ventilator resources, those ventilators are unavailable when the infection inevitably is carried by staff to the community and are also unavailable for all the usual critical illnesses (heart attacks, trauma, etc).[12]

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

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

Indeed, we have before us declarations stating that such high-risk conditions are present in the detention facilities at issue in this case. Both Petitioners and lawyers familiar with the ICE facilities at issue here have attested to overcrowding that makes social distancing impossible at all three facilities. At the York facility, for example, inmates are housed in dormitory-style conditions, in which 60 people reside in each housing block. (Doc. 2, Ex. 18). That space is used for both eating and sleeping. (*Id.*). Petitioners report that not even the medical staff wear gloves when in contact with inmates. (Doc. 2, Ex. 11). Detainees must eat their meals four-to-a-table, with approximately three feet of space between individuals. (*Id.*).

At Clinton, inmate bunks are often less than two feet apart, and inmate declarations show that it is difficult to keep more than a two feet distance between inmates, let alone the recommended six feet. (Doc. 2, Ex. 10). The laundry facilities at Clinton are also reported to be chronically broken, preventing detainees from keeping their clothes and bedding clean. (*Id.*). Indeed, for a total of 72 men, Clinton provides only four sets of sinks and showers. (*Id.*). The Facility is also reported to have bugs mice, and rats, which add to the unsanitary conditions experienced by detainees. (*Id.*).

At Pike, detainees share eight-by-ten or twelve foot cells with two other men. (Doc. 2, Ex. 13). Those cells also contain a sink and a shower. (*Id*). Some men at Pike report being forced to share cells with other individuals currently exhibiting

COVID-19 symptoms or report exhibiting symptoms themselves while housed with other inmates. (Doc. 2, Exs. 3; 4; 8). Inmates at Pike are also usually forced to remain within two feet of other individuals, even while in the common areas of the facility. (Doc. 2, Ex. 4). They are also required to buy their own soap, are not given hand sanitizer, and are forced to share cleaning supplies with an entire block of cells. (Doc. 2, Exs. 3; 13).

ICE guidance states that these types of risks are mitigated by quarantining detainees with symptoms and by housing those with a higher risk of exposure separately from the rest of the detainee population. (Doc. 2, Ex. 1). The Respondents further proffer that the Facilities are practicing "cohorting," an "infection prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but are asymptomatic." (Doc. 35 at 12). This practice is meant to last for fourteen days, the duration of the virus's incubation period. The Petitioner's declarations, however, show that these practices are not being followed. At least two Petitioners aver that they are experiencing symptoms and have not been isolated from other individuals. (Doc. 2, Exs. 3; 4; 8). Furthermore, all Petitioners have a higher risk of exposure, and none have been moved to separate housing. Indeed, it does not even seem that ICE is providing detainees with proper information on how they can combat the virus on their own. (Doc. 2, Ex. 3). Troublingly, some facilities seem to have shut off detainee access to news outlets,

thereby preventing the detention facility's population from informing themselves on best practices to prevent transmission. (Doc. 2, Ex. 5).

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

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

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

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

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

Mar. 23, 2020) ("[I]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers, the court *sua sponte* orders that Petitioner be immediately released from detention and that removal of Petitioner be stayed pending final disposition by this court."); *United States v. Stephens*, No. 15 Cr. 95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) ("[I]nmates may be at a heightened risk of contracting COVID-19 should an outbreak develop."); *United States v. Garlock*, 18 Cr. 418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) ("By now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations. Notably, the chaos has already begun inside federal prisons—inmates and prison employees are starting to test positive for the virus, quarantines are being instituted, visits from outsiders have been suspended, and inmate movement is being restricted even more than usual." (citations omitted)).

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

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

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

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

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

iii. Likelihood of Success on the Merits

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

process rights. (Doc. 2 at 27). We find that Petitioners are likely to succeed on the merits of their claim.[14]

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

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

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

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

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

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

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

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

We therefore find that Petitioners are likely to succeed on the merits of their due process claim that their conditions of confinement expose them "to serious risks associated with COVID-19." (Doc. 2 at 35).

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[15] Moreover, not only have Petitioners established a likelihood of success on the merits on their Fifth Amendment claim, but, in fact, they have also demonstrated that their claim is likely to be successful under the more exacting Eighth Amendment standards as well. To succeed in proving that conditions of confinement violate the Eighth Amendment, a plaintiff must show: (1) the deprivation alleged must objectively be "sufficiently serious," and (2) the "prison official must have a sufficiently culpable state of mind," such as deliberate indifference to the prisoner's health or safety. See Thomas v. Tice, 948 F.3d 133, 138 (3d Cir. 2020) (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)). COVID-19 has been shown to spread in the matter of a single day and would well prove deadly for Petitioners. Such a risk is objectively "sufficiently serious." Furthermore, the Supreme Court has recognized authorities can be "deliberately indifferent to an inmate's current health problems" where they "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," including "exposure of inmates to a serious, communicable disease," even when "the complaining inmate shows no serious current symptoms." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). There is no requirement that Petitioners show that "they actually suffered from serious injuries" to succeed on this claim. *See Helling*, 509 U.S. at 33. Instead, if Petitioners can show that the conditions "pose an unreasonable risk of serious damage to their future health," they may succeed on their claim. *Helling*, 509 U.S.at 35) (alteration omitted). The current measures undertaken by ICE, including "cohorting" detainees, are patently ineffective in preventing the spread of COVID-19. Indeed, we now have reports of a positive test amongst the employees at Pike County prison, thereby greatly increasing the likelihood that COVID-19 is present in the prison population.

iv. Balancing of the Equities and Public Interest

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

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

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

III. CONCLUSION

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

Respondents' Facilities are plainly not equipped to protect Petitioners from a potentially fatal exposure to COVID-19. While this deficiency is neither intentional nor malicious, should we fail to afford relief to Petitioners we will be a party to an unconscionable and possibly barbaric result. Our Constitution and laws apply equally to the most vulnerable among us, particularly when matters of public health are at issue. This is true even for those who have lost a measure of their freedom. If we are to remain the civilized society we hold ourselves out to be, it would be heartless and inhumane not to recognize Petitioners' plight. And so we will act.

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

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

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

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

s/ John E. Jones III

John E. Jones III
United States District Judge

EXHIBIT H

IN THE UNITED STATES DISTRICT COURTS
FOR THE EASTERN DISTRICT OF CALIFORNIA
AND THE NORTHERN DISTRICT OF CALIFORNIA
UNITED STATES DISTRICT COURT COMPOSED OF THREE JUDGES
PURSUANT TO SECTION 2284, TITLE 28 UNITED STATES CODE

RALPH COLEMAN, et al., Plaintiffs, v. GAVIN NEWSOM, et al., Defendants.	Case No. 2:90-cv-0520 KJM DB P **THREE-JUDGE COURT**
MARCIANO PLATA, et al., Plaintiff, v. GAVIN NEWSOM, et al., Defendants.	Case No. 01-cv-01351-JST **THREE-JUDGE COURT** **ORDER DENYING PLAINTIFFS' EMERGENCY MOTION TO MODIFY POPULATION REDUCTION ORDER**

Before: WARDLAW, Circuit Judge, MUELLER, Chief District Judge, and TIGAR, District Judge

We are living in unprecedented times. The spread of COVID-19 is a global crisis, a crisis that is heightened in the most vulnerable groups among us. One such group is before us today. Plaintiffs, two classes of inmates incarcerated in California state prisons, have filed a motion asking us to order the state to release an unspecified, but significant, number of prisoners so that the prison population can be reduced to a level sufficient to allow physical distancing to prevent the spread of COVID-19—which, in Plaintiffs' view, requires that prisoners who live in dorm-style environments be housed six feet apart from one another. ECF No. 3219/6522.[1]

While we cannot know with certainty due to the pathogenesis of the virus, it appears that

[1] All filings in this Three-Judge Court are included in the individual docket sheets of both *Plata v. Newsom*, No. 01-cv-01351-JST (N.D. Cal.), and *Coleman v. Newsom*, No. 2:90-cv-0520 KJM DB P (E.D. Cal.). The Court cites to the docket number of *Plata* first, then *Coleman*.

COVID-19 has not yet surged in California's prisons. Thus far, only thirteen inmates have confirmed cases of the disease. Cal. Dep't of Corr. & Rehab., *Population COVID-19 Tracking*, https://www.cdcr.ca.gov/covid19/population-status-tracking/ (last visited Apr. 4, 2020). And, to their credit, Defendants[2] have already taken steps to combat the virus, including taking measures to reduce the prison population. But given the undisputed risk of further contagion in a carceral environment,[3] Plaintiffs' desire to maximize the reduction in the state's prison population is understandable.

We conclude, however, that under Federal Rule of Civil Procedure 60(b)(5) and the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626, Plaintiffs' emergency motion for relief based on COVID-19 is not properly before us. This three-judge court was first convened in 2007 to consider a different issue: whether a release of prisoners was necessary to remedy California's structural failure to provide constitutionally adequate medical and mental health care services to inmates incarcerated in the state's prisons. We are therefore bound to deny Plaintiffs' motion. However, we do so without prejudice to Plaintiffs' seeking relief in a procedurally appropriate forum, including the individual *Coleman* and/or *Plata* courts.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

Given the exigency of the circumstances before us, we provide only a brief procedural history here.[4] The proceedings before this three-judge court began long ago as two separate cases: *Coleman*, filed in 1990 in the Eastern District of California, alleged that Defendants were failing to provide constitutionally adequate mental health care services to inmates with serious mental disorders. *Plata*, filed in 2001 in the Northern District of California, alleged that Defendants were

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[2] Defendants are various California state officials, including Governor Gavin Newsom.

[3] *See, e.g.*, *167 Inmates at Cook County Jail Confirmed Positive for COVID-19*, Chi. Sun Times (Apr. 1, 2020), https://chicago.suntimes.com/coronavirus/2020/4/1/21203767/cook-county-jail-coronavirus-positive-covid-19 (reporting that 167 pre-trial detainees housed at the Cook County, Ill. jail tested positive for COVID-19 over a ten-day span).

[4] The history of these proceedings is chronicled more thoroughly in a 2009 order of our court, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal./N.D. Cal. 2009), and the Supreme Court's decision in *Brown v. Plata*, 563 U.S. 493 (2011).

failing to provide constitutionally adequate medical care.

The individual *Coleman* and *Plata* courts entered numerous remedial orders, including appointing a Special Master to oversee remedial efforts in *Coleman* and a Receiver to take control of the medical care delivery system in *Plata*. These measures failed to cure the constitutional deficiencies, and in 2007, both courts concluded that, absent a reduction in the state prison population—which was then almost double the prison system's design capacity—Defendants would never be able to deliver constitutionally adequate medical and mental health care.

Because they were not individually empowered to order a release of prisoners from California's prisons, the *Plata* and *Coleman* courts granted Plaintiffs' separate motions to convene a three-judge court to consider the issue. *See* 18 U.S.C. § 3626(a)(3)(B) (providing that a prisoner release order can be entered only by a three-judge court). The Chief Judge of the United States Court of Appeals for the Ninth Circuit appointed this three-judge court in both cases to determine whether a release order was appropriate.[5] *See Brown v. Plata*, 563 U.S. 493, 500 (2011) ("Because the two cases are interrelated, their limited consolidation for this purpose has a certain utility in avoiding conflicting decrees and aiding judicial consideration and enforcement.").

After holding a fourteen-day trial, we concluded that a significant reduction in the state prison population was the only way to bring Defendants into compliance with their constitutional obligations to provide adequate medical and mental health care services. *See generally Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal./N.D. Cal. 2009) ("*Coleman I*"). We therefore ordered Defendants to reduce California's prison population to 137.5% design capacity within two years. *Id.* at 970.

Defendants appealed, and the Supreme Court affirmed.[6] *Plata*, 563 U.S. 493. The Court held that the PLRA's requirements for entering a prisoner release order were satisfied, *see* 18

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[5] The original members of the three-judge court, the Hon. Stephen Reinhardt, Circuit Judge; the Hon. Lawrence K. Karlton, District Judge; and the Hon. Thelton E. Henderson, District Judge, have since been replaced by its current members: the Hon. Kim McLane Wardlaw, Circuit Judge; the Hon. Kimberly J. Mueller, Chief District Judge; and the Hon. Jon S. Tigar, District Judge.

[6] By statute, a three-judge district court order granting a permanent injunction may be appealed directly to the Supreme Court. 28 U.S.C. § 1253.

U.S.C. § 3626, and that there was ample evidence supporting our conclusion that crowding was the primary cause of the constitutional violations in California's delivery of medical and mental health services in its prison system. *Plata*, 563 U.S. at 517–530. It also concluded that the 137.5% population cap we ordered was "narrowly drawn, extend[ed] no further than necessary to correct the violation of [the] federal right, and [was] the least intrusive means necessary to correct the violation," and that we gave appropriate "substantial weight" to public safety, as the PLRA requires. *Id.* at 530–41; *see* 18 U.S.C. § 3626(a). At the same time, the Supreme Court recognized our ability to modify our remedial order as necessary:

> The three-judge court, however, retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion. "The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible." *New York State Assn. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (C.A.2 1983) (Friendly, J.). A court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order. *Id.*, at 969–971. Experience may teach the necessity for modification or amendment of an earlier decree. To that end, the three-judge court must remain open to a showing or demonstration by either party that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection.

Plata, 563 U.S. at 542–43.

Two years after the Supreme Court affirmed our prison population reduction order, Defendants asked us to terminate that order even though they had not yet complied with it. *Coleman v. Brown*, 922 F. Supp. 2d 1004, 1008 (E.D. Cal./N.D. Cal. 2013) ("*Coleman II*"). Plaintiffs filed a cross-motion asking us to impose institution-specific population caps to supplement the system-wide 137.5% cap that we had already ordered. *Id.* We denied both requests. *Id.* We concluded, among other things, that Defendants had failed to demonstrate that they could provide constitutionally adequate medical and mental health care with a prison population that exceeded 137.5% design capacity. *Id.* at 1034–43. At the same time, we concluded that Plaintiffs' request for institution-specific caps was premature because, until Defendants met the systemwide 137.5% cap, it was difficult to determine whether additional relief was necessary. *Id.* at 1048.

In 2015, Defendants succeeded, for the first time, in reducing the statewide prison population to less than 137.5% design capacity. The population has remained below that benchmark ever since.[7] Since that time, we have largely stepped back as the individual *Coleman* and *Plata* courts have continued to work to ensure that California provides constitutionally adequate medical and mental health services to its inmates.

B. Plaintiffs' Emergency Motion Based on COVID-19

On March 25, 2020, Plaintiffs filed the motion currently before us, which they have styled as an "Emergency Motion to Modify Population Reduction Order." ECF No. 3219/6522. The motion asks us to order Defendants to release to parole or post-release community supervision certain categories of inmates, including those who are scheduled to parole within a year and are either (a) low risk, as determined by the California Department of Corrections and Rehabilitation's (CDCR) risk assessment tool or (b) serving time for a non-violent offense. *Id.* at 27. Plaintiffs also ask us to require Defendants to release or relocate inmates who, because of their age or other medical conditions, are at a high risk of developing a severe form of COVID-19. *Id.* at 27–28. While Plaintiffs have not put forth a specific number of inmates that they believe should be released, they argued at the April 2, 2020 telephonic hearing on this motion that Defendants must release as many inmates as would be required to allow all remaining inmates to practice physical distancing, especially those who reside in crowded dorm housing.

Although the current record is unclear as to when Defendants began planning a response to COVID-19, they started implementing preventive measures at least as of March 11, 2020, when normal visiting at CDCR institutions was canceled statewide, fact sheets and posters on the pandemic were delivered to the inmate population, and additional hand-sanitizing dispenser stations were ordered. ECF No. 3241-1/6553-1. CDCR has activated "a centrally-located command center where CDCR and CCHCS [California Correctional Health Care Services] experts monitor information, prepare for known and unknown events, and exchange information centrally

[7] As of the most recent status report filed with us on March 16, 2020, California's prison population is at 134.4% design capacity. ECF No. 3213/6502 at 2.

in order to make decisions and provide guidance quickly." ECF No. 3240/6553-2 ¶ 4 (Gipson Decl.). The center's "goal is to implement measures and strategies to protect inmates and staff during the COVID-19 pandemic and to enhance social distancing and housing options during this time." *Id.*

On March 24, 2020, California Governor Gavin Newsom issued an executive order directing CDCR to suspend admission of inmates to state custody for 30 days, with the possibility that the suspension would be extended for an additional 30 days. ECF No. 3241/6553 ¶ 4 (Diaz Decl.). On March 30, 2020, CDCR Secretary Ralph Diaz announced that release would be accelerated for inmates who have less than sixty days remaining on their sentence, are not serving a term of incarceration for a violent felony or a domestic violence offense, and are not required to register as a sex offender. *Id.* ¶ 5. These last two measures are expected to result in an approximately 6,500-person reduction in the prison population over the coming weeks.[8] *Id.* ¶¶ 4–7.

Defendants oppose Plaintiffs' motion, arguing both that their response to COVID-19 so far has been constitutionally sufficient, and that the motion is not properly before this three-judge court because the relief it seeks is, in substance, a *new* prisoner release order, rather than a modification of our 2009 order imposing the 137.5% population cap. ECF No. 3235/6552.

II. DISCUSSION

Whether Plaintiffs' motion is properly viewed as a modification request is a critical question. For one, it bears on whether the motion is properly before our three-judge court. But even if the motion were properly before us, the PLRA places significant restrictions on a federal court's authority to order the release of prisoners as a remedy for a constitutional violation. *See* 18 U.S.C. § 3626. For example, a prisoner release order may be entered only if "(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has

[8] Defendants have also taken additional steps to combat COVID-19, including but not limited to transferring approximately 500 inmates out of dorm housing, suspending transfers between facilities, and conducting temperature checks and symptom screenings of all individuals entering the prisons. *E.g.*, ECF No. 3240/6553-2 ¶¶ 6–11.

had a reasonable amount of time to comply with the previous court orders." *Id.* § 3626(a)(3)(A)(i)–(ii). Plaintiffs argue that our 2009 order imposing the 137.5% population cap satisfies the PLRA's requirement of a prior order for less intrusive relief. ECF No. 3219/6522 at 31–32. If, however, the relief they seek is not actually a modification of the 2009 order but rather *new* relief based on the *new* threat of harm posed by COVID-19, Plaintiffs likely cannot satisfy the prior order requirement at this point because there have not yet been any orders requiring Defendants to take measures short of release to address the threat of the virus; nor have Defendants had a reasonable time in which to comply.[9]

In arguing that their motion properly seeks to modify our 2009 order imposing the population cap, Plaintiffs rely on Federal Rule of Civil Procedure 60(b)(5), which grants courts authority to "relieve a party . . . from a final judgment" if "applying it prospectively is no longer equitable." We have previously recognized that Rule 60(b)(5) may provide us with authority to modify our 2009 order in appropriate circumstances. *Coleman II*, 922 F. Supp. 2d at 1025–27 (citing *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367 (1992)). But we may only modify the order to the extent necessary to ensure that the remedial structure remains tailored to cure the constitutional violations previously found by the *Coleman* and *Plata* courts. *See id.* at 1048 (refusing to modify the 2009 order because it was not yet clear whether the 137.5% design capacity cap would be sufficient to cure the constitutional defects in Defendants' prison health care system). Rule 60(b)(5) does not provide us with free-standing authority to remedy any harm Defendants may inflict upon Plaintiffs, regardless of whether it is tethered to the previous findings of structural constitutional shortcomings in the delivery of medical and mental health care. *Cf. Parsons v. Ryan*, 912 F.3d 486, 501 (9th Cir. 2018) (explaining that a modification of relief was appropriate because it was not issued "in response to new violations of federal rights").

Plaintiffs argue that the potential harm posed by COVID-19 is attributable to the constitutional violations that have been previously found in these cases because "[p]reventing the spread of a dangerous, contagious illness is plainly a requirement of an adequate medical care

[9] We recognize that what is reasonable in ordinary times may be quite different from what is reasonable in these extraordinary times.

system." ECF No. 3248/6558 at 3–4. As a general matter, we agree that the Eighth Amendment requires Defendants to take adequate steps to curb the spread of disease within the prison system. Indeed, disease control is one of the areas in which the *Plata* court previously concluded that Defendants fell short. *See Coleman I*, 922 F. Supp. 2d at 896. For example, the *Plata* court previously found that the prison intake process, "which was designed to allow medical staff to identify inmates' medical issues, including communicable diseases, . . . was woefully inadequate." *Id.* (describing a finding of the *Plata* court in *Plata v. Schwarzenegger*, No. 01-1351-TEH, 2005 WL 2932254, at *12 (N.D. Cal. Oct. 3, 2005)). It also found that exam tables and counter tops where prisoners with infectious diseases were treated "were not routinely disinfected or sanitized." *See id.* at 896 (quoting *Plata*, 2005 WL 2932253, at *14); *see also Plata*, 563 U.S. at 508 (citing this fact in affirming the population cap order). Still, Defendants' inability to control disease was only one symptom of an overall failure to provide inmates with access to constitutionally adequate health care services.

Here, however, the impetus for the release order Plaintiffs seek is different from the overarching structural violations underlying the 2009 population reduction order. The specific harm Plaintiffs allege is not caused by constitutional shortcomings in Defendants' ability to provide medical and mental health services. Indeed, Plaintiffs' own expert acknowledges that California's inmates would still face a substantial risk of harm from COVID-19 "even if the health care delivery system were constitutionally adequate." ECF No. 3219-4/6524 ¶ 19 (Stern Decl.). That the harm Plaintiffs face is not dependent on the existence of a constitutionally inadequate health care delivery system is strong evidence that it is rooted in a significantly different underlying cause than what was before us in the prior three-judge court proceedings.

While the threat posed by COVID-19 is undoubtedly medical, the particular risks the disease poses to prisoners are primarily a function of the contagiousness of the virus and the nature of incarceration. There is no vaccine for COVID-19. Thus far, the only way to stop its spread is through preventive measures—principal among them maintaining physical distancing sufficient to hinder airborne person-to-person transmission. *See* ECF No. 3221-1/6259-1 at 109 (CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*

Correctional and Detention Facilities) (describing physical distancing as a "cornerstone" of reducing transmission of COVID-19). Creating physical distancing is uniquely difficult in a congregate environment like a prison.[10] *Id.* But crucially, this is a problem shared by *all* prisons, not just those with foundering health care delivery systems. *See id.* at 107–10.

That is not to say that Defendants have no constitutional obligation to take steps to prevent the spread of COVID-19 within California's prisons. Defendants themselves acknowledge that the virus presents a "substantial risk of serious harm" and that the Eighth Amendment therefore requires them to take reasonable measures to abate that risk. ECF No. 3235/6552 at 17; *see Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (noting that prison officials may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year"). But we conclude that any constitutional violation in Defendants' current response to the COVID-19 crisis is different, in both nature and degree, from the violations underlying the 2009 population cap order. That order was never intended to prepare Defendants to confront this unprecedented pandemic. Nor could it have, given that the entire world was unprepared for the onslaught of the COVID-19 virus.

We therefore conclude that to the extent Plaintiffs can establish a constitutional violation based on the threat posed by COVID-19, it must be based on shortcomings in Defendants' response to the virus, not on the longstanding systemic constitutional deficiencies in California's prison health care delivery system. Because Plaintiffs' motion seeks a release order to redress a different constitutional injury than those previously found in the *Coleman* and *Plata* proceedings, that relief cannot be granted through a modification to our prior remedial order.

There is precedent within these proceedings for our conclusion that requests for disease-specific relief generally require a new Eighth Amendment analysis. In 2013, the *Plata* plaintiffs brought a motion asking the court to order the transfer of classes of inmates who were particularly at risk of developing a severe form of Valley Fever—an illness spread by airborne fungal spores—

[10] Because the merits of Plaintiffs' motion are not properly before us, we make no findings as to what level of physical distancing might be constitutionally required in a carceral environment.

out of the prisons where the disease was most prevalent. *Plata v. Brown*, No. 01-cv-1351-TEH, 2013 WL 3200587, at *1 (N.D. Cal. Jun. 24, 2013). The plaintiffs did not bring their motion under Rule 60(b)(5), nor did the *Plata* court treat it as a modification request. Instead, the court analyzed whether Defendants' specific responses to the threats posed by Valley Fever were sufficient to satisfy the Eighth Amendment. *Id.* at *10–12. After concluding that they were not, the *Plata* court granted the plaintiffs' transfer request, tailoring the scope of relief to the contours of the specific Eighth Amendment violation implicated by Defendants' inadequate Valley Fever response. *Id.* at *10–13.

The Supreme Court's discussion of our ability to modify the 2009 population cap order confirms our conclusion that the remedy Plaintiffs now seek goes to a different constitutional injury than what has been litigated previously. In describing the scope of our modification authority, the Court explained that it may be appropriate to grant Defendants more time in which to come into compliance with the 137.5% cap if it were necessary to allow the state to develop systems for identifying inmates whose release was least likely to jeopardize public safety. *Plata*, 563 U.S. at 544. It noted such an extension could be conditioned on Defendants' "ability to meet interim benchmarks for improvement in the provision of medical and mental health care." *Id.* The Court also explained that as Defendants made progress in reducing the prison population, it might become apparent "that further population reductions are not necessary or less urgent than previously believed." *Id.* In those circumstances, it could be appropriate to consider whether to extend or modify the requirements of the population cap order. *Id.*

In short, the Supreme Court contemplated that we could adjust our remedial order to ensure that it remained appropriately tailored to its original goal: reducing the prison population to a level sufficient, but no lower than necessary, to allow Defendants to deliver constitutionally adequate medical and mental health care services.[11] *See id.* at 530 (explaining that prospective relief with respect to prison conditions must be "narrowly drawn" and "extend[] no further than

[11] The Court's modification ruling also encompassed the situation where Defendants reached the 137.5% goal but were still unable to provide constitutionally adequate medical care. *Plata*, 563 U.S. at 543. We have no doubt that under that scenario, we would have the power to reduce the percentage of the design capacity cap further.

necessary to correct the violation”). We do not believe that the Court envisaged us “modifying” our judgment to require an additional reduction in the prison population to respond to a unique threat posed by a specific virus that could not have been foreseen only a few months ago, much less at the time of the 2009 population cap order. Our discretion to modify our prior orders is not boundless.

The cases relied on by Plaintiffs only reinforce our view that the motion before us is not an appropriate modification request. In *Parsons v. Ryan*, the plaintiff class entered into a settlement agreement with prison officials that required them to achieve at least 75 percent compliance with several “health care performance measures,” including that they provide inmates with health care services within twenty-four hours after a request was first made. 912 F.3d at 493–94, 499. The prison system’s compliance rate with this performance measure was abysmal—as low as 34 percent—and after failed efforts to improve compliance, the district court issued an order requiring the defendants to use community health services (i.e., services outside the prisons) to provide the required care. *Id.* at 499. On appeal, the defendants argued that the PLRA required the district court to “make *new* findings of a constitutional violation” before entering the new remedial order. *Id.* at 501. The Ninth Circuit rejected the argument. It concluded that the district court’s order merely implemented a new means of curing the same constitutional violation upon which the original settlement agreement had rested—failure to provide care within a reasonable time period—and that it was therefore a proper modification of the prior remedial order. *Id.*

Similarly, in *Armstrong v. Brown*, 768 F.3d 975 (9th Cir. 2014), the district court entered an injunction that required California prison officials to “track the record of each institution and the conduct of individual staff members” who were not complying with a remedial plan to cure systemic violations of the Americans with Disabilities Act and the Rehabilitation Act. *Id.* at 978. The vague language of the injunction created problems. The defendants contended that it required them to track only substantiated allegations of noncompliance whereas the plaintiffs argued that it required tracking and investigation of *all* alleged violations. *Id.* at 978–79. In response, the district court issued a new injunction that both clarified that the defendants were required to track all allegations—substantiated or not—and added dispute resolution procedures, including a

provision that allowed plaintiffs' counsel to review the state's investigations of allegations of noncompliance. *Id.* at 979. The defendants appealed the modified injunction, and the Ninth Circuit affirmed. While noting that the relief ordered by the district court might have been unduly intrusive had it been implemented as an initial remedy, the Ninth Circuit concluded that "the level of intrusiveness [was] acceptable based on the history and circumstances of the case"—namely that the district court "ha[d] attempted narrower, less intrusive alternatives—and those alternatives ha[d] failed." *Id.* at 986.

Plaintiffs argue that, as in *Parsons* and *Armstrong*, more intrusive measures are necessary here because the 137.5% population cap is insufficient to allow Defendants to implement the physical distancing measures they believe are necessary to prevent the spread of COVID-19. ECF No. 3248/6558 at 4–5. But this argument elides the fact that the population cap order *was never intended* to put Defendants in a position to confront the unique threat posed by this once-in-a-century virus. Thus, this is not a case like *Parsons* and *Armstrong* where a district court implemented progressively more intrusive measures to remedy the same, well-understood constitutional violation that formed the basis for the original remedial order. *See Parsons*, 912 F.3d at 499; *Armstrong*, 768 F.3d at 978–79, 986. Instead, Defendants ask us to alter a decade-old order to address a new alleged constitutional violation—an inadequate response to a specific virus—that our prior order was never designed to address. This request falls outside the scope of our equitable modification authority.

Our order today does not leave Plaintiffs without options for seeking relief. While we must deny their motion as currently procedurally improper, we do so without prejudice to their bringing their request for relief in an appropriate forum. As with the Valley Fever motion in *Plata*, and as was done in the original *Coleman* and *Plata* litigation, Plaintiffs may go before a single judge to press their claim that Defendants' response to the COVID-19 pandemic is constitutionally inadequate. For example, if they believe that the response violates Plaintiffs' right to adequate medical care, they may seek relief before the individual *Plata* court. Likewise, Plaintiffs may seek relief before the individual *Coleman* court if they believe that Defendants' response to COVID-19 is preventing the delivery of adequate mental health care. If a single-judge

court finds a constitutional violation, it may order Defendants to take steps short of release necessary to remedy that violation. And if that less intrusive relief proves inadequate, Plaintiffs may request, or the district court may order sua sponte, the convening of a three-judge court to determine whether a release order is appropriate. *See* 18 U.S.C. § 3626(a)(3).

III. CONCLUSION

We take no satisfaction in turning away Plaintiffs' motion without reaching the important question of whether Defendants have implemented constitutionally adequate measures to protect the inmates of California's prisons from the serious threat posed by this unparalleled pandemic. But we are bound by Federal Rule of Civil Procedure 60(b)(5) and the PLRA to reach this conclusion.

We emphasize that Defendants have broad authority to voluntarily take steps that may prevent the life-threatening spread of COVID-19 within their prisons, and we recognize the deference that is due to prison authorities to determine which additional measures must be taken to avoid catastrophic results. *See Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Defendants have represented to us that they are continuously evaluating what more they can do to protect the inmates within their prisons, and we urge them to leave no stone unturned. It is likely that only through significant effort will California's prisons be able to minimize the spread of COVID-19.

* * *

For the foregoing reasons, Plaintiffs' emergency motion for modification of our 2009 population reduction order is **DENIED** without prejudice to pursuing relief in a procedurally appropriate forum, including in the individual *Coleman* and/or *Plata* courts.

IT IS SO ORDERED.

Dated: April 4, 2020

MUELLER, Chief District Judge, concurring:

I join in the court's conclusion that Plaintiffs have not met their burden of demonstrating they qualify for the relief they seek under Federal Rule of Civil Procedure 60(b)(5), assuming without deciding that as the prevailing party previously they may rely on the rule for affirmative relief. *See, e.g.*, *In re Von Borstel*, No. 01-42235-elp7, 2011 WL 477817, at *4 (Bankr. D. Or. Feb. 3, 2011) ("The rule does not say that 'a losing' party may obtain relief; it says 'a' party." Thus, a prevailing party may use Fed. R. Civ. P. 60(b) to seek to set aside a judgment on the ground that the judgment should have provided additional relief." (citing *United States for Use & Benefit of Familian Nw., Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952 (9th Cir. 1994))); *but see Cano v. Baker*, 435 F.3d 1337, 1340 (11th Cir. 2006) ("The equitable purpose of Rule 60(b) cannot be to 'relieve' a party from her own lawsuit in which she had prevailed three decades earlier." (citation omitted)). The court's conclusion in this respect is sufficient to resolve the motion before us.

I respectfully do not join in the court's analysis or determination that Plaintiffs' motion arises out of an Eighth Amendment claim entirely distinct from the claims over which this court has continuing jurisdiction. This court previously found, after extended evidentiary proceedings, that "crowding generates unsanitary conditions, overwhelms the infrastructure of existing prisons, and increases the risk that infectious diseases will spread." *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 931 (E.D. Cal. 2009) ("*Coleman I*") (citing Nov. 9, 2007 Scott Report ¶¶ 17–24, ECF No. 1528/3058). In so finding, this court credited multiple experts who opined that prison crowding was a contributor to great vulnerability in the face of outbreak and spread of infectious disease. *Id.* (referencing opinions that "crowding 'contributes to the difficulties of healthcare delivery by virtue of the fact that it increases the incidence of illnesses, [and] infectious disease'"); *id.* (quoting Rep. Tr. at 257:15–22, ECF No. 1832/3541-2, for opinion of Dr. Jeffrey A. Beard that, while prisons may not always be incubators for disease, "they could be if your population densities get so intense," including "if you have a gymnasium that you triple bunk and put hundreds and hundreds of people in a closed dense area"); *id.* ("Until CDCR reduces its population, it will remain highly vulnerable to outbreaks of communicable diseases, including

staph infections, tuberculosis and influenza." (quoting Nov. 9, 2007 Shansky Report ¶ 135, ECF No. 1527/3057)).

Moreover, this court retained jurisdiction to determine whether the remedy it had ordered proved durable. *See Coleman v. Brown*, 952 F. Supp. 2d 901, 934 (E.D.Cal./N.D.Cal. 2013). Even though the prison population for some time has remained below the cap this court previously set, Defendants have not achieved the durability of remedy required for this court's role to cease. The current circumstances appear to expose, in stark terms, the potential need to revisit the current population cap. Even as I do not believe Plaintiffs' motion grounded in Rule 60(b)(5) can be granted, I am inclined to think this court retains broad equitable powers that might permit some reconsideration of the current cap in light of the unprecedented exigent circumstances here. Those circumstances, as is undisputed, present potentially grave risks to members of the Plaintiff classes, as well as to correctional staff and the communities in which they reside, as a result of the COVID-19 pandemic and its impact on the delivery of medical and mental health care in the state prisons. It is undisputed that the delivery of care, to date, remains below constitutional minima. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1987) ("As we explained in *Milliken v. Bradley*, 433 U.S. 267, 281 [ ], state and local authorities have primary responsibility for curing constitutional violations. If, however [those] authorities fail in their affirmative obligations . . . judicial authority may be invoked. Once invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." (internal quotation marks and citation omitted)).

At the same time, it is clear that a prisoner release order under the PLRA is a remedy of last resort and neither Plaintiff class has formally sought focused relief from their individual courts, a condition precedent to issuance of a prisoner release order. *See* 18 U.S.C. § 3626(a)(3)(A); *see also Coleman I*, 922 F. Supp. 2d at 918. Given the availability of expedited proceedings before those district courts to immediately exhaust the possibility of inmate transfers and relocations to secure facilities to achieve constitutionally acceptable conditions for the Plaintiff classes, those proceedings must be invoked first.

With these observations, I join in the decision to deny Plaintiffs' motion without prejudice.