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

JAMES MONEY, *et al.*,

Plaintiffs,

v.

J.B. PRITZKER, *et al.*,

Defendants.

No. 20-C-2093

Honorable Steven C. Seeger

**DEFENDANTS' MEMORANDUM IN SUPPORT OF**
**MOTION TO DISMISS WITH PREJUDICE**

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## Introduction

In denying plaintiffs' motion for emergency relief seeking expedited transfers or furloughs of Illinois prisoners to their homes, Judge Dow ruled that plaintiffs "have no chance of success" on their Eighth Amendment deliberate indifference claim in Count I. Dkt. 38 at 38. Judge Dow similarly rejected plaintiffs' ADA claim in Count III, concluding that "Plaintiffs do not have a reasonable likelihood of success under any of the three ways of establishing an ADA discrimination claim." *Id.* at 41. Plaintiffs (as habeas petitioners) raised their procedural due process claim in Count II as a basis for habeas relief in case 2094, but not for emergency relief in this case. In any event, that claim is fatally deficient because plaintiffs do not have a cognizable liberty or property interest needed to sustain a due process claim.

Defendants now ask the Court to dismiss this action with prejudice because the pleadings, exhibits, and matters subject to judicial notice show that plaintiffs do not and cannot state a plausible claim for their request for a mandatory injunction to require immediate home furlough, home detention, or outright release of thousands of Illinois prisoners.

As noted in defendants' opposition to plaintiffs' emergency motion, Dkt. 26, the Court and the public need only watch Governor Pritzker's daily press briefing, or review the websites of the Illinois Department of Corrections, the Illinois Department of Public Health, and any number of other state offices and agencies, to see that the Governor, the Department, and the State have implemented immediate and drastic steps to address the COVID-19 public health emergency to protect all Illinois citizens, including those incarcerated in state prisons.[1] Plaintiffs have no

[1] A court may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also Hill v. Capital One Bank (USA), N.A.*, No. 14-CV-6236, 2015 WL 468878, at *5 (N.D. Ill. Feb. 3,

plausible basis for their claims asserting deliberate indifference, a lack of due process, or discrimination in violation of the ADA.

## Background

### Procedural Posture

In the face of the COVID-19 public health emergency, plaintiffs initiated this action on April 2, 2020, as part of a multi-pronged effort to compel the State to expedite the releases of thousands of Illinois prisoners through various methods provided under Illinois law. Along with their complaint in this action, Dkt. 1, plaintiffs filed an emergency motion seeking expedited home furloughs for two proposed subclasses of prisoners based on their age or underlying medical condition. Dkt. 9. The same day, plaintiffs (as petitioners) filed an emergency habeas petition in case 20-C-2094. Both cases were added to the emergency docket (case 20-C-1792) and assigned to Judge Dow as the emergency judge. On April 2, 2020, plaintiffs also filed in the Illinois Supreme Court a motion for leave to file an "Original Petition for a Writ of Mandamus" seeking essentially the same relief they seek in their complaint here. Ill. S. Ct. No. 125912.

After expedited briefing on plaintiffs' emergency motion and habeas petition, Judge Dow issued a memorandum opinion and order on April 10, 2020. Dkt. 38 in case 2093. Judge Dow denied plaintiffs' motion for emergency relief in this case, and denied petitioners' request for expedited release in case 2094. *Id*. On April 14, 2020, the Illinois Supreme Court denied plaintiffs' request to file a mandamus petition. Ill. S. Ct. No. 125912.

2015) (citing *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (noting that contents of government websites are subject to judicial notice)).

**The Named Plaintiffs**

Plaintiffs are ten individuals serving sentences in various Illinois state prisons for convictions ranging from drug crimes to first-degree murder.[2] Two of them, James Money and Carl Reed, have been released from prison after the Governor commuted their sentences, rendering their claims moot.[3]

Although the complaint emphasizes conditions at Stateville Correctional Center, *e.g.*, Dkt. 1 ¶¶ 2, 3, 43, 44, 71, 72, 91, no plaintiff is housed at Stateville. Also, no plaintiff claims to have COVID-19. Six plaintiffs (Tate, Richard, Daniels, Labosette, Watters, and Green) are at facilities (Danville, Dixon, Joliet Treatment Center, Robinson, and Logan) where, as of this filing, no prisoner has a confirmed case of COVID-19.[4] Two plaintiffs (G. Reed and Rodesky) are at facilities (the Northern Reception and Classification Center (NRC), and Pontiac) where each facility has just one confirmed case among prisoners. *Id.*; *see also* Dkt. 1 ¶¶ 8–17, 93–102.

**Plaintiffs' Proposed Class, Subclasses, and Relief**

Plaintiffs seek to certify a class consisting of all prisoners housed in the Illinois Department of Corrections during the COVID-19 pandemic. Dkt. 1 ¶ 103. They then seek an order requiring the immediate "release from physical custody" (*id.*) of all individuals in the following six subclasses:

- Subclasses 1 and 2, seeking furloughs under 730 ILCS 5/3-11-1 based on medical condition (subclass 1) or age (over 55) (subclass 2). Dkt. 1 ¶ 103(a) and (b). Five remaining plaintiffs (Richard, G. Reed, Green, Labosette, and Tate) claim to be in

[2] Offender sentencing information is available on IDOC's website at https://www.idoc.state.il.us/subsections/search/ISdefault2.asp.

[3] Governor Pritzker commuted the sentences of James Money and Carl Reed on April 8 and 10, 2020, respectfully. See https://www2.illinois.gov/idoc/Offender/pages/inmatesearch.aspx; A party's claim becomes moot when "a party with standing at the inception of the litigation loses it due to intervening events." *Pavarti Corp. v. City of Oak Forest*, 630 F.3d 512, 516 (7th Cir. 2010) (citing *Friends of the Earth, Inc. v Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)).

[4] https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx.

subclasses 1 or 2 based on their age or medical condition (or both). *Id*. ¶¶ 94, 95, 97, 98, 100.

- Subclasses 3–5, seeking transfers to home detention under 730 ILCS 5/5-8A-4(A). Dkt. 1 ¶ 103(c)–(e). Three named plaintiffs (Richard, Green, and Labosette) claim to be in one or more of these subclasses. *Id*. ¶¶ 94, 97, 98.

- Subclass 6, seeking up to 180 days of good conduct credit to shorten their sentences and trigger releases from prison. Dkt. 1 ¶ 103(f). One remaining plaintiff (Richard) claims to be in this subclass (as well as subclasses 1, 2, and 3). Dkt. 1 ¶ 94.

Two of the named plaintiffs (Daniels and Rodesky) seek to be part of the overall class of all prisoners incarcerated during the COVID-19 public health emergency, but not part of any subclass seeking an immediate release, transfer, or furlough. Dkt. 1 ¶¶ 101, 102.

Of the more than 36,000 prisoners in the proposed overall class, plaintiffs estimate there are approximately 12,000 prisoners in subclass 1; 4,807 prisoners in subclass 2; 700 in subclass 3; 9,000 in subclass 4; 2,401 in subclass 5; and 5,308 in subclass 6, with some prisoners overlapping more than one subclass. Dkt. 1 ¶ 105.

In short, plaintiffs are asking this Court to issue a mandatory injunction to require the Department of Corrections to immediately furlough to their homes, transfer to home detention, or issue sentencing credit to obtain releases of several thousand prisoners. Dkt. 1 at 46–47.

**Defendants' Response to COVID-19**

This memorandum details the fundamental legal flaws with plaintiffs' claims and why they do not—and cannot—support the immediate home furloughs, transfers, and releases plaintiffs seek. But first we summarize the actions taken by the defendants, the Governor and the Department's Acting Director (the "Director") to ensure the safety of those incarcerated in the Department of Corrections (the "Department"). These actions are subject to judicial notice, and many of them are acknowledged in plaintiffs' complaint.

The Governor issued a disaster proclamation on March 9, 2020, four days before the federal government announced a national emergency.[5] The Department followed immediately by enacting strict measures, consistent with CDC guidelines,[6] to protect those who are housed and work in Illinois prisons. The Department adopted a pandemic response plan consistent with CDC guidance, enhanced screening and testing for COVID-19, increased hygiene and sanitation measures, new limits (and now a prohibition) on outside visitors, and increased separation of prisoners through an administrative quarantine[7]. *See* Dkt. 2-9.[8]

Although the Court need not look beyond plaintiffs' pleading to reject their request for relief, the Court can take judicial notice that over the past several weeks, including well before plaintiffs filed their complaint, defendants were already taking unprecedented and extraordinary measures to mitigate the risk of COVID-19 in Illinois prisons, including by systematically reviewing prisoners, including the groups identified in the complaint, to determine who could be released safely under Illinois law. These actions include the following:

- As plaintiffs admit (Dkt. 1 ¶ 73; Dkt. 9 at 27), the Governor has suspended admissions of new prisoners from all Illinois county jails, with limited exceptions at the sole

[5] Dkt. 1 ¶ 20, citing Gubernatorial Disaster Declaration.

[6] CDC, Coronavirus Disease 2019 (COVID-19): Guidance Documents, CDC, https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc.

[7] *See* IDOC, COVID-19 Response, https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx.

[8] COVID-19 Response, Illinois Department of Corrections, https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx (last visited Apr. 5, 2020); *see also* CDC, Coronavirus Disease 2019 (COVID-19): Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

discretion of the Director. Executive Order 2020-13;[9] *see also* Executive Order 2020-18 (extending Executive Order 2020-13 through April 30, 2020).[10]

- Plaintiffs also admit the Governor has activated the Illinois National Guard to provide additional medical support at Stateville. Dkt. 1 ¶¶ 91; Dkt. 9 at 48.

- The Governor is continuing to review and grant commutation petitions, including those of named plaintiffs James Money and Carl Reed, who were released from custody on April 8 and 10, 2020, respectively[11]. The governor has commuted the sentences of 17 inmates since March 11, 2020.[12]

- Plaintiffs admit the Department had already released (as of April 2, 2020) 300 prisoners. Dkt. 1 ¶ 38. As of April 29, 2020, the Department has released over 900 prisoners through various methods, including commutations, sentence credits, restoration of credit, and electronic detention.[13] This does not count over 150 additional prisoners who have been furloughed from Adult Transition Centers.

- Between March 2 and April 29, 2020, the Department reduced its population by more than 3,900 prisoners.[14]

- The Department is continuing to award up to 180 days of Earned Discretionary Sentencing Credit (EDSC) for eligible offenders pursuant to 730 ILCS 5/3-6-3(a)(3).[15] The sentencing credit is within the sole discretion of the Director, but must be based on

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[9] Pritzker, Governor J.B., Executive Order 2020-13 (Mar. 26, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-13.pdf.

[10] Pritzker, Governor J.B., Executive Order 2020-18 (Apr. 1, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-18.pdf.

[11] *See* https://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx; https://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx.

[12] *See* n. 3 above; *see also* https://www2.illinois.gov/idoc/Offender/pages/inmatesearch.aspx; https://www2.illinois.gov/idoc/Offender/pages/inmatesearch.aspx. https://www.chicagotribune.com/coronavirus/ct-coronavirus-pritzker-inmate-commutations-20200409-ql323nt4azfitagdeon5gswn2q-story.html.

[13] *See* https://www2.illinois.gov/idoc/Offender/Pages/CommunityNotificationofInmateEarlyRelease.aspx.

[14] *See Id*. (providing that a total of 3,957 inmates have exited all IDOC facilities between March 1, 2020 and April 27, 2020, and 923 of those offenders were released after receiving Earned Discretionary Sentencing Credit pursuant to 730 ILCS 5/3-6-3(a)(3) or being placed on electronic detention pursuant to 730 ILCS 5/5-8A-3). *See also* Dkt. 36. This number was 1,069 (since February 1, 2020) as of Governor Pritzker's March 31, 2020 press briefing. *See* Pritzker, Governor J.B., IDPH, *COVID-19 Press Update Video*, at 5:34-6:07 (Mar. 31, 2020), *available at* http://www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus/media-publications/daily-press-briefings; https://www.chicagotribune.com/coronavirus/ct-coronavirus-pritzker-inmate-commutations-20200409-ql323nt4azfitagdeon5gswn2q-story.html.

[15] *See* https://www2.illinois.gov/idoc/Offender/Pages/CommunityNotificationofInmateEarlyRelease.aspx.

the results of a risk or needs assessment, circumstances of the crime, any history of conviction for a forcible felony, the offender's behavior and disciplinary history, and the inmate's commitment to rehabilitation, including participation in programming. *Id*. The Director is prohibited from awarding discretionary sentencing credit to any inmate unless the inmate has served a minimum of 60 days. *Id*.

- On April 6, 2020, the Department filed an emergency rule change to amend the Administrative Code, 20 Ill. Admin. Code § 107.20, to relax the award of Earned Disciplinary Sentence Credit (EDSC) for those with 100-level disciplinary tickets.

- Pursuant to at 730 ILCS 5/3-6-3(a)(3) and 20 Ill Adm. Code 107.142, the Department identifies offenders who are within nine months of their release date and conducts individualized reviews to determine whether they are eligible for early release. The review requires staff to examine an offender's file for disciplinary history, commitment to rehabilitation, and criminal history. Offenders with forcible felonies, violent criminal histories, significant disciplinary issues, and outstanding warrants are not approved for the sentencing credit.

- The Department is continuing to place offenders on electronic monitoring or home detention pursuant to 730 ILCS 5/5-8A-3.[16] The Department has already placed 16 of 21 pregnant and postpartum offenders on home detention, and is now concentrating its efforts on those who are 55 years or older, have served at least 25% of the sentence and are within 12 months of release.[17] Although this category is permitted under 730 ILCS 5/5-8A-3(d), the Department must conduct individual assessments to ensure placement outside of a secure facility is appropriate.[18]

- To allow for faster releases of prisoners, the Governor has suspended the required 14-day notification to State's Attorneys for inmates released early as a result of earned sentence credit for good conduct. Executive Order 2020-11;[19] *see also* Executive Order 2020-18 (extending Executive Order 2020-11 through April 30, 2020).[20]

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[16] *Id*.

[17] IDPH, *COVID-19 Press Update Video*, at 6:54-8:38 (Mar. 31, 2020), *available at* http://www.dph.illinois.gov/topics-services/diseases-and-conditions/diseases-a-z-list/coronavirus/media-publications/daily-press-briefings.

[18] *Id*.

[19] Pritzker, Governor J.B., Executive Order 2020-11 (Mar. 23, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-11.pdf.

[20] Pritzker, Governor J.B., Executive Order 2020-18 (Apr. 1, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-18.pdf.

- On April 6, 2020, the Governor filed an additional Executive Order (EO 2020-21) to suspend the 14-day limit for furloughs and allow furloughs at the Director's discretion consistent with guidance from the Department's medical director.[21]

- The PRB continues to conduct release revocation hearings.[22] As always, each case is reviewed on an individual basis, with consideration of the facts and circumstances of each alleged violation or set of violations, including the protection of victims, the safety of those in the State's custody, and the overall public health concerns currently facing the State. The PRB is also taking into account the nature of the current extraordinary circumstances in all cases as a result of COVID-19, while recognizing that each decision must be made with the goals of protecting public safety and safely and restoring releasees to productive lives.

- The Governor and the Director continue to monitor these and other efforts, and the Department continues to make necessary changes as the situation evolves.[23]

These are the actions of officials who are responding quickly and aggressively to combat COVID-19—actions that are the opposite of deliberate indifference. Plaintiffs nevertheless assert the bald conclusion that the Governor and Director have not acted with sufficient "urgency or decisiveness" and have "failed to take reasonable measures" to reduce the prison population "substantially" to their satisfaction. Dkt. 1 ¶¶ 74, 111. Plaintiffs' allegations do not present a plausible claim for deliberate indifference, a failure of due process, or discrimination in violation of the ADA.

**Legal Standard**

As discussed below, the Court should dismiss plaintiffs' claims based on procedural bars imposed by the Prison Litigation Reform Act (barring prisoners from using § 1983 and the ADA

[21] Pritzker, Governor J.B., Executive Order 2020-21 (Apr. 6, 2020), https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-21.pdf.

[22] PRB, Operations and Hearing Information, Prisoner Review Board, https://www2.illinois.gov/sites/prb/Event%20Documents/2020%20Interviews/4.2020%20Institutional%20hearings%20PUBLIC.pdf.

[23] IDOC, Visitation Rules & Information, Illinois Department of Corrections, https://www2.illinois.gov/idoc/facilities/Pages/VisitationRules.aspx; see also State of Illinois Coronavirus (COVID-19) Response, Coronavirus Disease 2019 (COVID-19) What Illinois is Doing, https://coronavirus.illinois.gov/s/.

to obtain a prisoner release order except in limited circumstances not present here) and the *Heck* line of cases that prevents prisoners from using claims like those asserted here to seek a "quantum change" in their level of confinement.

If the Court decides to consider the merits of plaintiffs' claims, it should dismiss them with prejudice because plaintiffs do not and cannot state a plausible claim as required under *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 (2007). Courts deciding motions to dismiss may consider "documents that are attached to the complaint, documents that are central to the complaint and are referred to in it, and information that is properly subject to judicial notice." *O'Brien v. Vill. of Lincolnshire*, No. 19-1349, 2020 WL 1684076, *3 (7th Cir. Apr. 7, 2020) (quoting *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013). Courts must accept as true all well-pleaded facts and draw all reasonable inferences in favor of the non-moving party, *O'Brien*, 2020 WL 1684076, *3, but legal conclusions and "conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

And while courts generally will allow a plaintiff to amend a complaint that is dismissed for failure to state a claim, *Bogie v. Rosenberg*, 705 F.3d 603, 608 (7th Cir. 2013), leave to amend "need not be granted, however, if it is clear that any amendment would be futile." *Id.* (affirming dismissal with prejudice because plaintiffs could not avoid legal deficiencies that doomed invasion of privacy and misappropriation of image claims). That is the case here. None of plaintiffs' claims—all based heavily on conclusory and ultimately hearsay opinions in various expert reports incorporated into the complaint—meets the required plausibility standard.

## Argument

Plaintiffs have no legitimate basis for the extraordinary relief they seek: a mandatory injunction directing the State to immediately release thousands of Illinois prisoners "to their homes." *See* Dkt. 1 ¶ 105. That relief is particularly inappropriate here, where the Governor and the Director have responded to the COVID-19 public health emergency by taking multiple actions to protect Illinois prisoners from the risks posed by the virus. Plaintiffs' requested relief is procedurally barred, not justified by any viable legal claim, and against the public interest. Because these defects cannot be cured, the complaint should be dismissed with prejudice.

### I. The Court Should Dismiss Plaintiffs' Claims with Prejudice Because the Requested Relief is Barred by the PLRA and *Heck*.

The Court should dismiss the complaint at the outset because plaintiffs' requested relief is barred by the Prison Litigation Reform Act and by *Heck v. Humphrey*, 512 U.S. 477 (1994), and its progeny. The PLRA and the "*Heck* bar" prevent plaintiffs from obtaining their requested releases, transfers, and furloughs to their homes.

#### A. Plaintiffs seek what amounts to a prisoner release order that is not allowed under the PLRA.

The PLRA is principally codified at 42 U.S.C. § 1997e, but it also encompasses the provisions of 18 U.S.C. § 3626 concerning appropriate prison condition remedies. *Davis v. Streekstra*, 227 F.3d 759, 761 (7th Cir. 2000); *Berwanger v. Cottey*, 178 F.3d 834, 836 (7th Cir 1999). Although § 3626 of the PLRA allows federal courts in limited instances to issue a "prisoner release order," § 3626(a)(3)(A) unequivocally provides that "no court shall enter a prisoner release order 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." 18 U.S.C. § 3626(a)(3)(A); *see also U.S. v. Cook County, Illinois*, 761 F. Supp. 2d 794, 796 (N.D. Ill. 2011). Section 3626 also mandates that a prisoner release order may be entered "only by a three-judge court," and "only if the court finds 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. §§ 3626(a)(3)(B), (E); *see also Cook County*, 761 F. Supp. 2d at 796 (three-judge panel reviewing request for prisoner release order).

These PLRA requirements apply to each legal claim in plaintiffs' complaint. Section 3626(g)(2) expressly applies to any "civil action with respect to prison conditions," defined as "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[.]" 18 U.S.C. § 3626(g)(2). Thus, plaintiffs must satisfy § 3626 not only for their § 1983 claims in Counts I and II, but also for their ADA claim in Count III. *See Gillette v Prosper*, 858 F.3d 833, 837 (3rd Cir. 2017) (reviewing district court's denial of request for three-judge panel for both § 1983 and ADA claims).

These requirements also govern the substantive relief plaintiffs seek in their complaint. On behalf of various subclasses, plaintiffs seek medical furloughs to their homes, home detention transfers, and mandatory awards of sentencing credits to obtain early releases. Dkt. 1 at 46–47. By trying to abandon the complaint's relief and instead propose (at least for the two subclasses at issue in their motion for emergency relief) only a "process" where the subclasses would be evaluated for a furlough or home detention, plaintiffs have already implicitly acknowledged that the relief requested in the complaint would constitute a "prisoner release order." Dkt. 24 at 5. Judge Dow determined that this attempted reframing could not avoid § 3626 because plaintiffs continue to

seek an order resulting in the physical removal of a large number of prisoners from their facilities to their homes. Dkt. 38 at 28–29.

Judge Dow also rejected plaintiffs' assertion that their requested relief does not qualify as a "prisoner release order" as defined in the PLRA, 18 U.S.C. § 3626(g)(4), because anyone released pursuant to the order would remain under some state control. Judge Dow recognized that under the plain language of § 3626(g)(4), the relevant inquiry is whether the requested order would direct the release of prisoners or have the purpose or effect of reducing the prison population. Dkt. 38 at 26. That is what plaintiffs are seeking here. The three-judge panel overseeing California prison crowding reached the same conclusion in ruling that release orders that require supervision must comply with the PLRA. *Plata v. Newsom*, No. 01 C 1351, Dkt. 361 at 5 (denying prisoner release order even though the class requested parole and community supervision).

Plaintiffs also argued that § 3626 is limited to cases where prisoners need to be released so that pre-existing prison population caps are not exceeded, *see* Dkt. 24 at 10, but Judge Dow rejected this argument as well, finding no such limitation in the text of the PLRA. Dkt. 38 at 25–26. To the contrary § 3626's plain language applies to any order that directs the release of prisoners or that has the purpose or effect of reducing a prison population. *Id.* at 26. Judge Dow noted that the specific reference to "crowding" in § 3626(a)(3)(E) serves to remove individual cases (*e.g.*, case-specific hospitalizations) from the scope of this provision. *Id.* at 26, n. 11.

It strains credulity for plaintiffs to argue, as they did in their reply brief, that their case is not about crowding and a desire for relief that would reduce the prison population. Dkt. 28 at 12. As Judge Dow recognized, Dkt. 38 at 25, 27–28, a central theme of plaintiffs' complaint is that the Department must reduce the prison population throughout the IDOC system to meaningfully address the risk posed by COVID-19. *See, e.g.*, Dkt. 1 at 16 (section heading, "Reducing the Prison

Population is the Only Meaningful Means to Prevent the Harm Caused by COVID-19"); *id*. ¶ 36 (noting "[c]orrectional facilities are inherently congregate environments"); *id.* ¶ 37 (asserting sanitation problems exacerbated by prisoners congregated together); *id*. ¶¶ 42–43 (citing IDPH director comments about the congregate nature of prison population); *id.* ¶¶ 46–52 (citing experts advocating for reduced prison population); *id*. ¶ 54 (noting federal COVID-19 relief law includes measures to reduce federal prison population); *id*. ¶ 55 (noting recommendation by congressional committee to reduce prison population); *id*. ¶¶ 57 64, 67 (noting actions by various state prison systems, county jails, and state supreme courts to reduce prison populations); *id.* ¶ 75 (discussing activists and lawyers advocating for prison population reduction).

Plaintiffs will be unable to meet § 3626's requirements at any stage of this lawsuit because, as discussed above and as Judge Dow correctly ruled, Dkt. 38 at 22–23, their requested substantive relief—home furloughs, home detention transfers, and mandatory sentencing credits that lead to releases[24]—amounts to a request for a prisoner release order that cannot be issued except by a three-judge panel, and then only after a less intrusive order has failed to resolve a crowding-based violation. Plaintiffs cannot satisfy those requirements here.

This lawsuit stands in stark contrast to the *Plata* and *Coleman* cases that Judge Dow analyzed. Dkt. 38 at 21–24. *Plata* and *Coleman* involved challenges to the sufficiency of medical and mental health services to California prisoners. The three-judge panel issued a prisoner release order only after other forms of relief did not, after 12 years, address the constitutional inadequacy of these services that overcrowding caused. *Brown v. Plata*, 563 U.S. 493, 514–15 (2011). Notably, the *Plata-Coleman* panel recently denied a request for additional releases of prisoners because

[24] The only other forms of requested relief are (1) the appointment of a special master to assist with processing the prisoner release order, and (2) an award of fees and costs for obtaining the prisoner release order. Dkt. 1 at 47–48.

California had not been afforded a reasonable amount of time to address any shortcomings in how it addresses the recent COVID-19 crisis. *Plata v. Newsom*, No. 01 C 1351, Dkt. 361, at 9. The goal in *Plata* and *Coleman* was to correct deficiencies in providing necessary services, and eventually a prisoner release order was deemed the only way to address those deficiencies after other efforts failed. Here, plaintiffs do not and cannot allege that defendants caused COVID-19, failed to deliver required services, or failed to comply with a prior order. As a first and last step, they simply want prisoners sent home. Because the PLRA does not permit what plaintiffs seek, this case should be dismissed with prejudice.

**B. Plaintiffs' requested relief is *Heck*-barred.**

Plaintiffs' Eighth Amendment, procedural due process, and ADA claims are also barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because it is apparent from their requested relief that plaintiffs are challenging the *fact* of their current confinement in Illinois prisons, rather than any conditions at plaintiffs' facilities (where there are no COVID-19 cases among prisoners, except for the one case each at Pontiac and NRC, as noted above).

As noted, plaintiffs suggested in supplemental briefing on their motion for a temporary restraining order or preliminary injunction that they were really only seeking a "process" whereby the Department would determine who is eligible to be released, Dkt. 24 at 4. But as Judge Dow recognized, Dkt. 38 at 18, that is not the relief requested in the complaint. Defendants have acknowledged that a complaint truly limited to "process" would not be *Heck*-barred. Dkt. 34 at 6 (discussing *Murphy v. Raoul*, 380 F. Supp. 3d 731, 750-52 (N.D. Ill. 2019), and *Richmond v. Scibana*, 387 F.3d 602 (7th Cir. 2004)). But even as modified in their briefing, plaintiffs' requested relief remains *Heck*-barred because plaintiffs are still seeking an order requiring the Department

to execute the requested furloughs and home detentions resulting in a quantum change in their level of confinement.

In *Heck*, the Supreme Court drew a line between claims that must proceed under the federal habeas statute and claims that are cognizable under § 1983. Specifically, the Court held that a § 1983 claim that necessarily requires a prisoner to establish the invalidity of his conviction or sentence does not accrue until the prisoner has obtained the favorable termination of that conviction or sentence through federal habeas or similar state remedies. *Id.* at 486–87. Later decisions refined that doctrine and clarified that any § 1983 action that, if successful, would necessarily imply the invalidity of the fact or duration of a prisoner's confinement is barred. *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005). *Heck* thus bars actions challenging the fact or duration of a prisoner's confinement, but it does not prohibit § 1983 claims challenging the conditions of that confinement. *Savory v. Cannon*, 947 F.3d 409, 422–34 (7th Cir. 2020) (en banc); *see also Muhammad v. Close*, 540 U.S. 749, 754–55 (2004). The relevant question for purposes of deciding if a claim must be brought under habeas or § 1983 is whether the prisoner is challenging the fact or duration of his confinement, or merely its conditions.

In *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991), the Seventh Circuit noted that it can sometimes be difficult to determine whether a prisoner is challenging the fact of confinement or its conditions, especially when "the prisoner is seeking not earlier freedom, but transfer from a more to a less restrictive form of custody." In that circumstance, courts should ask if the prisoner is seeking "a quantum change in the level of custody," in which case habeas is the proper remedy, or if the prisoner is just seeking transfer to a different program, location, or environment, in which case § 1983 is appropriate. *Id.* A prisoner seeks a quantum change in custody when, for example,

he requests "freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to . . . disciplinary segregation." *Id.*

Applying *Graham*, the First Circuit has held that an action by prisoners challenging their re-incarceration after having been on electronic supervision fell on the habeas side of the line because the difference between incarceration and electronic supervision "can fairly be described as a quantum change in the level of custody." *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873 (1st Cir. 2010). The court noted that, unlike incarcerated prisoners, those on electronic supervision could "live with family members, work daily jobs, attend church, and reside in their own homes." *Id.* at 873–74. By contrast, claims challenging a transfer to a different location within the prison system do not seek a quantum change in the level of custody. *See Johnson v. Litscher*, 260 F.3d 826, 831 (7th Cir. 2001); *Pischke v. Litscher*, 178 F.3d 497, 499 (7th Cir. 1999); *Falcon v. U.S. Bureau of Prisons*, 52 F.3d 137, 139 (7th Cir. 1995).

In this case, plaintiffs are seeking three types of relief: immediate furloughs for subclasses 1 and 2; immediate transfers to home detention for subclasses 3–5; and immediate awards of 180 days of sentencing credit for subclass 6. Dkt. 1 at 46–47. Each of these requests for relief seeks a quantum change in the level of the relevant class members' custody.

Plaintiffs' request for those in subclass 6 to receive 180 days of sentencing credit is barred under a basic *Heck* analysis because awarding that credit would shorten the length of those prisoners' sentences. *See Edwards v. Balisok*, 520 U.S. 641, 646–47 (1997) (claim seeking reinstatement of good-time credits is barred). That claim directly challenges the duration of the prisoners' confinement.

Plaintiffs' request for transfers to home detention (subclasses 3–5) is also barred because the differences between incarceration and home detention "can fairly be described as a quantum

change in the level of custody." *Gonzalez-Fuentes*, 607 F.3d at 873. Unlike an incarcerated prisoner, those on home detention can live with family members in their own homes and may leave their homes to, among other things, go to work or school and attend religious services. 730 ILCS 5/5-8A-4(A). Relief for those in subclasses 3–5 is barred because plaintiffs in those groups are seeking freedom subject to limited reporting and constraints. *See Graham*, 922 F.2d at 381.

The request for furloughs for those in subclasses 1 and 2 is barred because those plaintiffs seek freedom from a prison facility to live "at home" in various locations (one in Florida) with limited oversight and reporting. *See* Dkt. 1 at 36–39. Medical furlough may be an even greater change in the level of custody than home detention because it does not impose the same limits on the ability to leave the home. *Compare* 730 ILCS 5/3-11-1 (furloughs) *with* 730 ILCS 5/5-8A-4 (home detention). Consequently, all three types of relief that plaintiffs request cannot be obtained under § 1983 without violating *Heck*.

Although plaintiffs claim their rights have been violated because they have been deprived of "reasonably safe living conditions," Dkt. 1 at 43–46, they fail to seek any relief that would improve those allegedly unsafe conditions. Instead, they seek immediate release from prison, whether through medical furlough, home detention, or a shortening of their sentences. *Id.* at 46–47. And while a claim that, if successful, might lead to a speedier release does not necessarily render it *Heck*-barred, *see Wilkinson*, 544 U.S. at 82; *Richmond v. Scibana*, 387 F.3d 602, 605 (7th Cir. 2004), plaintiffs here are directly seeking immediate release from prison. Plaintiffs are therefore challenging the fact of their confinement, rather than any conditions that have been imposed, and such claims are not cognizable under § 1983.

The potential availability of a prisoner release order, entered by a three-judge court after other less intrusive relief has proved unsuccessful, under the PLRA, 18 U.S.C. § 3626(a)(3), does

not alter the *Heck* analysis. In *Brown v. Plata*, 563 U.S. 493, 517–522 (2011), the Supreme Court upheld prisoner release orders based on the finding that overcrowding had caused a shortfall in prison resources that in turn led to unsafe living conditions and ineffective medical care. The release order thus served the purpose of improving prison conditions by reducing the demand for existing services and thereby increasing the proportional availability of those resources. Here, by contrast, plaintiffs are not seeking the release of other prisoners to improve the conditions that they encounter in prison but are instead seeking their own release. Consequently, they are challenging the fact of their confinement and their § 1983 action is barred under *Heck*.

Because plaintiffs continue to seek a "quantum change in [their] level of custody" (*Gonzalez-Fuentes v. Molina*, 607 F.3d 866, 873 (1st Cir. 2010)) through court-ordered furloughs or home detentions, their claims remain *Heck*-barred.

**C. Plaintiffs should have to exhaust their administrative remedies.**

As a final note on procedural bars to plaintiffs' claims, defendants note that plaintiffs do not allege that any of them filed a grievance over COVID-19 or that the Department's grievance procedure is unavailable to them. Defendants recognize that prisoners need not plead they have met the exhaustion requirement (an affirmative defense) to bring a claim, *see Jones v. Bock*, 549 U.S. 199, 216 (2007), but to the extent any part of this case survives, plaintiffs should be required to exhaust their administrative remedies before obtaining any relief before this Court. *See Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008) (exhaustion issue should be decided at early stage of lawsuit).

The PLRA requires an inmate to exhaust "such administrative remedies as are available" before bringing suit to challenge prison conditions. *Ross v. Blake*, 136 S. Ct. 1850, 1854–55 (2016) (citing 42 U.S.C. § 1997e(a)). The unavailability of remedies is the only exception to the

exhaustion requirement. *Id*. at 1856–57. Plaintiffs do not suggest that administrative remedies are not available to them. IDOC regulations provide the grievance procedures committed persons must follow. *See* 20 Ill. Adm. Code § 504.800 *et seq*. A prisoner may submit an emergency grievance directly to the warden, and the warden may determine that the grievance should be handled on an emergency basis. *Id*. §§ 504.840(a), (b). Plaintiffs should be required to follow the available grievance procedures before seeking relief here.

## II. Plaintiffs Do Not Allege Plausible Eighth Amendment, Due Process, or ADA Claims.

Turning to the merits, the Court should dismiss the complaint with prejudice because plaintiffs do not and cannot allege plausible Eighth Amendment, due process, or ADA Claims.

### A. Count I fails because plaintiffs do not and cannot allege the Governor or Director recklessly disregarded a recognized risk to plaintiffs' health or safety.

In Count I, plaintiffs seek to bring an Eighth Amendment claim on behalf of all Illinois prisoners, alleging the Governor and Director are being deliberately indifferent to the risks posed by COVID-19 by failing to take "reasonable" and "appropriate" measures to furlough, transfer, or release prisoners to their homes. Dkt. 1 ¶ 111–114. As Judge Dow correctly ruled, plaintiffs have "no chance" of prevailing on this claim. Dkt. 38 at 38.

The Eighth Amendment prohibits cruel and unusual punishments. U.S. Const. amend. VIII. Among the punishments the amendment forbids is the "unnecessary and wanton" infliction of suffering caused by an official's deliberate indifference to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). To establish deliberate indifference, prisoners must prove that the prison official both knew of and disregarded an excessive risk to their health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Courts therefore perform a two-step analysis: "first examining whether a plaintiff suffered from an objectively serious medical

condition, and then determining whether the individual defendant was deliberately indifferent to that condition." *Petties v. Carter*, 836 F.3d 722, 727–28 (7th Cir. 2016) (en banc).

Although defendants do not dispute their awareness that COVID-19 poses serious risks to prisoners and prison staff, they absolutely dispute that plaintiffs have plausibly alleged that the Governor (even assuming he is a proper defendant) or the Department's Director was deliberately indifferent to that risk generally, let alone indifferent to any specific risk to any particular plaintiff. Plaintiffs do not allege that any of them has COVID-19 or has been deprived of any necessary care based on any of their particular medical conditions.

Deliberate indifference "describes a state of mind more blameworthy than negligence." *Farmer*, 511 U.S. at 835; *accord Whiting v. Wexford Health Sources, Inc.*, 839 F.3d 658, 662 (7th Cir. 2016) ("evidence of medical negligence is not enough to prove deliberate indifference"). To establish a constitutional violation, the prisoner must show that the response was so deficient that it constituted criminal recklessness. *Farmer*, 511 U.S. at 839-40; *see also Lee v. Young*, 533 F.3d 505, 509 (7th Cir. 2008) (providing that "negligence or even gross negligence is not enough; the conduct must be reckless in the criminal sense"). The deliberate indifference standard imposes a "high hurdle" and requires a showing "approaching a total unconcern for the prisoner's welfare." *Rosario v. Brawn*, 670 F.3d 816, 821 (7th Cir. 2012) (internal quotations and citation omitted).

An official's response to a risk of harm can defeat an allegation of deliberate indifference even if the risk is not ultimately averted. *Farmer*, 511 U.S. at 844. Accordingly, a defendant is "not required to take perfect action or even reasonable action." *Cavalieri v. Shepard*, 321 F.3d 616, 622 (7th Cir. 2003). This standard ensures that "the mere failure . . . to choose the best course of action does not amount to a constitutional violation." *Peate v. McCann*, 294 F.3d 879, 882 (7th Cir. 2002).

Ignoring these established holdings, plaintiffs predicate their case on a disagreement about what they believe to be the best course of action to protect them and other prisoners from possible exposure to COVID-19. Plaintiffs acknowledge the Department has released at least 300 prisoners (as of April 2, 2020), Dkt. 1 ¶ 83, but they complain the Governor and Director have not acted with more "urgency or decisiveness" to release "substantially" more. *Id*. ¶¶ 73–74. Plaintiffs plainly base their case on what they believe is reasonable, asserting that defendants have "failed to take reasonable measures" to secure more early releases through various means. *Id*. ¶ 111. By basing their claim on what they believe to be a reasonable course of conduct, plaintiffs improperly seek to equate their Eighth Amendment claim with malpractice, contrary to the Court's directive in *Estelle*, 429 U.S. at 106 ("malpractice does not become a constitutional violation merely because the victim is a prisoner").

In short, plaintiffs' focus on the reasonableness of defendants' actions is legally insufficient to make a plausible showing that defendants were and continue to be subjectively and recklessly indifferent. Although the Court can dismiss plaintiffs' complaint based solely on the legal defects in plaintiffs' pleading, the Court can also take judicial notice of the public actions taken by the Governor and the Department of Corrections to combat COVID-19 within the Department of Corrections. Those actions, summarized above, refute any notion that defendants' responses to COVID-19 may be fairly or plausibly characterized as recklessly indifferent.

**B. Plaintiffs cannot sustain a due process claim because they lack a cognizable liberty or property interest.**

In Count II, plaintiffs Richard, Watters, and Labosette seek to bring a procedural due process claim on behalf of all prisoners in subclasses 3, 4, and 5 seeking transfers to home

detention under various state laws. Dkt. 1 ¶ 116.[25] They allege defendants are failing to provide a sufficiently efficient system-wide process to evaluate "with all deliberate speed" each individual who may be eligible for transfer to home detention. *Id*. The Court should dismiss Count II with prejudice because plaintiffs do not and cannot sustain a plausible procedural due process claim for the fundamental reason that plaintiffs lack a cognizable liberty or property interest in being granted home detention.

Courts have consistently held that a statute providing for release from prison to a less restrictive form of custody (such as parole or, here, home detention) does not create a liberty or property interest unless the statute contains "'*explicitly mandatory language*,' *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. at 463 (emphasis added); *see also Grennier v. Frank*, 453 F.3d 442, 444 (7th Cir. 2006) ("It takes mandatory language (and thus an entitlement contingent on facts that could be established at a hearing) to create a liberty or property interest in an opportunity to be released on parole."). For example, the statute at issue in *Grennier* provided that the parole board "*may* parole an inmate serving a life term when he or she has served 20 years." Wis. Stat. § 304.06(1)(b) (2014) (emphasis added). As the Seventh Circuit observed, prisoners with life sentences were "not even eligible [for parole] until they ha[d] served 20 years, and from that point forward the system [wa]s wholly discretionary." *Grennier*, 453 F.3d at 444. The Court thus concluded that it was "straightforward," given this discretionary scheme, that the plaintiff lacked a liberty or property interest in release on parole. *Id*.

[25] James Money was also a plaintiff in Count II before he was released.

Similarly, the Illinois home detention statute is discretionary, as it provides that a prisoner "may" be placed on home detention at IDOC's discretion. 730 ILCS 5/5-8A-3. Because the Count II plaintiffs here have no liberty or property interest in home detention, Count II is meritless under *Thompson*, 490 U.S. at 463 and *Grennier*, 453 F.3d at 444.

Plaintiffs (as petitioners in their habeas petition) argued that "[i]f the language and structure of the statutes in question create an expectancy of release, they create a liberty interest." Dkt. 1 at 52 in case 2094 (citing *Montgomery v. Anderson*, 262 F.3d 641, 644 (7th Cir. 2001), and *Taylor v. Edgar*, 52 F. App'x 825, 826–27 (7th Cir. 2002)). Those cases do not help plaintiffs here. *Montgomery* holds that opportunities for release from prison constitute a liberty interest "only if the state has made a promise. Unilateral expectations and hopes for early release" are insufficient and "[g]ood-time credits are statutory liberty interests once they have been awarded, just as parole is a form of statutory liberty once the prisoner has been released." 262 F.3d at 644. *Taylor* similarly holds that it "is well established that in the absence of a state rule creating a specific entitlement, prisoners have no liberty interest" in release to less restrictive forms of custody; thus, the petitioner lacked a liberty interest in release to less restrictive custody where state laws "establish[ed] no more than eligibility for such placement." 52 F. App'x at 826.

There likewise is no authority for plaintiffs' argument (advanced as habeas petitioners) that the Illinois legislature "created an enforceable liberty interest in the Home Detention Law" by directing the Department to create a mechanism to evaluate requests for home detention. Dkt. 1 at 53 in case 2094. That argument fails as a matter of law because it is settled that "[p]rocess is not an end in itself"; thus, "[t]he State may choose to require procedures for reasons other than protection against deprivation of substantive rights, . . . but in making that choice the State does not create an independent substantive right." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (that

prison was required by state rules to conduct hearing before transferring prisoners out of state did not create protected liberty interest); *see also Sung Park v. Indiana Univ. Sch. of Dentistry*, 692 F.3d 828, 832 (7th Cir. 2012) ("The Supreme Court has emphasized that the federal Constitution's due process clause does not protect an interest in other process''; plaintiff's claim failed because "she is not asserting an interest in continuing her graduate education. Instead, she asserts an interest in her allegedly contractually-guaranteed rights to university process prior to being dismissed[.]").

Because plaintiffs have no liberty or property interest in home furloughs, home detentions, or sentence credits, Count II fails as a matter of law and should be dismissed with prejudice.[26]

Finally, although Count II appears to be limited to procedural due process, plaintiffs insert the word "substantive" in paragraph 116, alleging that, as a result of a purported failure to establish process, plaintiffs are forced to be exposed to the threat of serious illness or death, in violation of procedural and "substantive" due process**.** Dkt. 1 ¶ 116. Any claim based on substantive due process fails for the same reason discussed above. In addition, the Supreme Court and the Seventh Circuit have cautioned that the scope of substantive due process is very limited. *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998); *Belcher v. Norton*, 497 F.3d 742, 753 (7th Cir 2007). "Where a particular Amendment provides an explicit source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Lewis*, 523 U.S. at 842;

[26] To the extent plaintiffs' request for discretionary good conduct credit could be construed as alleging a procedural due process claim, it fails for the same reasons: petitioners have no liberty or property interest in discretionary good conduct credit. *See Hadley v. Holmes*, 341 F.3d 661, 665 (7th Cir. 2003) (no protected interest in discretionary good conduct credit under 730 ILCS 5/3-6-3(a)(3), and "the [S]tate need not afford [petitioner] due process before declining to award him the credit"); 20 Ill. Admin. Code 107.210 (regulations for awarding discretionary good conduct credit under 730 ILCS 5/3-6-3(a)(3)).

*see also United States v. Lanier*, 520 U.S. 259, 272 n. 7 (1997) (noting that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process") (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)). Thus, when, as here, the Eighth Amendment provides the standard for evaluating plaintiffs' substantive claims, a court should employ that standard, not the Fourteenth Amendment. To the extent plaintiffs are attempting to use substantive due process to go beyond the protections offered by the Eighth Amendment, that effort must be rejected as contrary to Supreme Court and Seventh Circuit authority.

**C. Plaintiffs' ADA claim fails because plaintiffs do not plausibly allege they are being denied services because of their alleged disabilities.**

In Count III, plaintiffs Richard, Gerald Reed, Green, Labosette, and Tate seek to bring a claim for discrimination in violation of Title II of the Americans with Disabilities Act on behalf of individuals in proposed subclass 1—those seeking medical furloughs under 730 ILCS 5/3-11-1 because of their underlying medical conditions. Dkt. 1 ¶¶ 120–25.[27]

Title II of the ADA prohibits public entities from discriminating against qualified individuals with disabilities by depriving them of opportunity to participate in the services, programs, or activities of the public entity because of their disabilities. 42 U.S.C. § 12132. Title II of the ADA applies to prisons, *see Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998), and prisoners may sue state officials in their official capacity for prospective injunctive relief under Title II. *Brueggeman ex rel. Brueggeman v. Blagojevich*, 324 F.3d 906, 912 (7th Cir. 2003). But to assert a valid claim under Title II, plaintiffs must have a "qualifying disability" and

[27] James Money and Carl Reed were included in Count III before they were released.

must show a denial of benefits of services, programs, or activities through discrimination "by reason of" their disability. *Culvahouse v. City of LaPorte,* 679 F. Supp. 2d 931, 937 (N.D. Ind. 2009) (quoting *Frame v. City of Arlington*, 575 F.3d 432, 435 (5th Cir. 2009)); *see also Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996).

A plaintiff "may establish discrimination by presenting evidence that the defendant intentionally acted on the basis of the disability, the defendant refused to provide a reasonable modification, or the defendant's denial of benefits disproportionately impacts disabled people." *Culvahouse,* 679 F. Supp. 2d at 937 (relying on *Washington v. Ind. High Sch. Athletic Assn., Inc.*, 181 F.3d 840, 847 (7th Cir. 1999)).

Plaintiffs do not allege intentional discrimination because of their medical conditions. They instead base their ADA claim on conclusory assertions that defendants are placing them at disproportionate risk because of their disability, Dkt. 1 ¶ 123, and are failing to provide them with reasonable accommodations by not allowing them to quarantine at their homes, *id.* ¶ 124. These allegations do not and cannot sustain a plausible ADA claim.

**1. Plaintiffs' disparate impact theory fails.**

Plaintiffs provide no basis to establish a plausible claim that defendants' current practices related to releases and transfers disparately affect them.

Although "a claim for disparate impact doesn't require proof of intentional discrimination," *J.V. v. Albuquerque Pub. Sch.*, 813 F.3d 1289, 1298 (10th Cir. 2016) (internal quotation marks and citations omitted), to "prove a case of disparate impact discrimination, the plaintiff must show that a specific policy caused a significant disparate effect on a protected group." *Id.* (internal quotation marks and citation omitted). "This is generally shown by statistical evidence involving the appropriate comparables necessary to create a reasonable inference that any disparate effect

identified was caused by the challenged policy and not other causal factors." *Id.* (internal quotation marks and citation omitted). "Moreover, a disparate impact claim must allege a pattern or practice of discrimination, not merely an isolated instance of it." *Id.* (citation omitted).

Plaintiffs fail to allege any appropriate comparables to create a plausible inference that defendants are engaged in any actions that have a disparate effect on them. Instead, plaintiffs rely entirely on conclusory claims about the unprecedented impact of COVID-19. In doing so, plaintiffs admit that any disparate effect is caused by COVID-19, not defendants' policies. As Judge Dow pointed out when denying plaintiffs' motion for emergency relief, there is no "basis for concluding that the discretionary decisions on whom to release (and not to release) have a disproportionate impact on disabled inmates, especially when one considers the large number of non-disabled inmates who also may have strong claims to priority for release on account of their susceptibility to COVID-19, such as elderly inmates." Dkt. 38 at 40. Plaintiffs' bald assertions are facially insufficient to establish a plausible disparate impact claim.

**2. Plaintiffs' reasonable accommodation theory fails.**

Plaintiffs also provide no basis to sustain a plausible claim that defendants have failed to give them required accommodations.

The ADA requires state and local entities to make "reasonable modifications" to policies, rules, and practices so that people with disabilities can participate in public programs and services. 42 U.S.C. § 12131(2). Whether a modification is reasonable depends on the specific circumstances and modifications sought. To decide what constitutes a "reasonable modification" for a prisoner, courts weigh the needs of prisoners with disabilities against the structural, financial, and administrative concerns of the prison. In particular, courts consider (1) whether the modification will "fundamentally alter" a program or activity, (2) the cost of the modification, and (3) the burden

the modification would have on administration of the prison. 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(3), 35.164. Courts also may consider concerns relating to prison management, prisoner rehabilitation, and safety. *See, e.g.*, *Randolph v. Rodgers*, 170 F.3d 850, 859 (8th Cir. 1999) (prison could present evidence that providing an interpreter for a deaf prisoner at disciplinary hearings created safety and security concerns); *Love*, 103 F.3d at 561 (prison could justify its refusal to make reasonable accommodations because of the overall demands of running a prison).

Furthermore, "[i]t is the employer's prerogative to choose a reasonable accommodation; an employer is not required to provide the particular accommodation that an employee requests." *See Rehling v. City of Chicago*, 207 F.3d 1009, 1014 (7th Cir. 2000) (noting the established rule that "an employer is obligated to provide a qualified individual with a reasonable accommodation, not the accommodation he would prefer."). Likewise, a "failure to immediately provide [plaintiff] with the reasonable accommodation that she sought does not constitute refusal to provide a reasonable accommodation. . . ." *Ungerleider v. Fleet Mortg. Grp. of Fleet Bank*, 329 F. Supp. 2d 343, 355 (D. Conn. 2004).

Count III is limited to plaintiffs in proposed subclass 1 seeking a furlough under 730 ILCS 5/3-11-1 to allow them to quarantine at their homes. Dkt. 1 ¶ 124. This statute gives the Department discretion to release prisoners on a furlough for various reasons, including to obtain medical services that are not otherwise available. 730 ILCS 5/3-11-1(a)(2). The Governor's April 6, 2020 Executive Order removed the "not otherwise available" requirement and allows the Director broader discretion to grant furloughs.[28] But even with that change, which post-dated the complaint,

[28] Pritzker, Governor J.B., Executive Order 2020-21 (April 6, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-21.pdf.

plaintiffs make no allegations suggesting that any one of them, let alone others in proposed subclass 1, qualify for a furlough under the statute even as modified by the Executive Order. To the contrary, plaintiffs admit they are seeking furloughs—not to obtain medical, psychiatric or psychological services—but so they can leave prison to quarantine at their homes. Dkt. 1 ¶¶ 93–100, 124. The bottom line remains: no plaintiff alleges any instance of being refused a reasonable accommodation.

As noted above, since filing their complaint, plaintiffs have tried to change course by claiming they are merely seeking "a process through which subclass members eligible for medical furlough will be identified and evaluated based on a balancing of public safety and public health needs, and transferred accordingly." Dkt. 24 at 6. Leaving aside that defendants are providing that very process, plaintiffs admit, as Judge Dow recognized, that these decisions are, and must be, made on an individualized and discretionary basis. Dkt. 24 at 5; Dkt. 38 at 40. This admission necessarily defeats any ADA claim based on alleged failure to give plaintiffs in subclass 1 reasonable accommodations.

Judge Dow refused to grant plaintiffs' requested relief based on Count III, concluding that "Plaintiffs do not have a reasonable likelihood of success under any of the three ways of establishing an ADA discrimination claim." Dkt. 38 at 41. This Court should reach the same conclusion and dismiss plaintiffs' ADA claim in Count III with prejudice.

## III. Plaintiffs' Proposed Relief Violates Federalism, Comity, and Abstention Principles.

Given the extraordinary nature of the injunctive relief that plaintiffs seek, the Court should abstain pursuant to *Rizzo v. Goode*, 423 U.S. 362 (1976), where the Supreme Court instructed that to obtain injunctive relief on a matter traditionally reserved to the discretion of a state or local government agency, a plaintiff must overcome the steep hurdle set by "the well-established rule

that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'" *Id*. at 378–79 (quotations omitted). In such cases, federal courts are to issue injunctions "sparingly, and only in a clear and plain case." *Id*. at 378. This strong preference against intrusive injunctive relief is primarily founded on "delicate issues of federal state relationships" (*Id*. at 380 (quotation omitted)), which are premised on "the principles of equity, comity, and federalism." *Id*. at 379 (quotation omitted).

The Seventh Circuit recently affirmed the continuing relevance of *Rizzo* as an extension of the *Younger* abstention doctrine, which "limit[s] federal court review of local executive actions." *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1071 (7th Cir. 2018). The plaintiffs in *Courthouse News* sought a preliminary injunction compelling the Cook County Clerk to immediately make all complaints filed available to the press, rather than waiting for a period until the complaints were processed. The Seventh Circuit rejected the injunction, observing that "federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Id*. at 1073 (quoting *Rizzo*, 423 U.S. at 378).

Courts in this circuit have relied on *Rizzo* when declining to interfere in decisions affecting the administration of state prisons. As Judge Durkin recently explained, "the courts do not generally second-guess inmate housing decisions" because it is "not 'the task of federal courts to oversee discretionary housing decisions made by state prison officials.'" *Boykin v. Fischer*, No. 16-CV-50160, 2019 WL 6117580, at *14 (N.D. Ill. Nov. 18, 2019) (quoting *Del Rio v. Schwarzenegger*, No. 09-CV-0214, 2010 WL 347888, at *5 (C.D. Cal. Jan. 20, 2010)). "Where a plaintiff requests an award of remedial relief that would require a federal court to interfere with the administration of a state prison, 'appropriate consideration must be given to principles of

federalism in determining the availability and scope of [such] relief.'" *Id*. (quoting *Rizzo*, 423 U.S. at 379); *see also Cornille v. Lashbrook*, No. 19-CV-002, 2019 WL 366562, at *6 (S.D. Ill. Jan. 30, 2019) (denying TRO seeking a transfer to another prison); *Conway v. Wagnor*, No. 19-CV-036, 2019 WL 183903, at *1–2 (S.D. Ill. Jan. 14, 2019) (denying TRO seeking immediate medical treatment with a specialist and a transfer); *Boykin v. Dixon Mental Health Servs*., No. 16-CV-50160, 2018 WL 8806095, at *3 (N.D. Ill. Oct. 15, 2018) ("the courts are not engaged in the business of supervising inmate housing decisions").

The mandatory injunctive relief plaintiffs seek in this case is far more intrusive than in any of the cases cited above. Rather than seeking a transfer for a single prisoner, plaintiffs seek to compel the Department to release thousands of prisoners immediately, with no consideration of the Department's administrative, safety, and security concerns for the prisoners themselves and the public at large. The Department is best positioned to manage its own prison system and determine who should receive a sentence credit, and who may safely be released on home detention or furlough and who may not. In these circumstances, the Court should "afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Rowe v. Finnan*, No. 11-CV-524, 2013 WL 74609, at *2 (S.D. Ind. Jan. 4, 2013) (quoting *Sandin v. Conner*, 515 U.S. 472, 483 (1995)). Judge Dow recognized this in denying plaintiffs' requested "preliminary" relief (the same as the requested ultimate relief), noting that "the judiciary is ill-equipped to manage decisions about how best to manage any inmate population—let alone a statewide population of tens of thousands of people scattered across more than a dozen facilities." Dkt. 38 at 34.

The considerations of federalism and comity weigh especially heavily when considering the administration of a state prison system, where the Supreme Court has noted that "[i]t is difficult

to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. . . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems." *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973); *accord Turner v. Safley*, 482 U.S. 78, 85 (1987) ("where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities"'); *Meachum v. Fano*, 427 U.S. 215, 229 (1976) ("Federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States."). Courts not only are "ill-equipped" to deal with the "complex and intractable" problems of prisons, *Rhodes v. Chapman*, 452 U.S. 337, 351 n.16 (1981), but "respect for federalism and comity . . . means that courts must approach the entire enterprise of federal judicial intrusion into the core activities of the state cautiously and with humility." Dkt. 38 at 42.

Although plaintiffs may insist, as they did before, that they "do not seek to place IDOC under the supervision of this Court," Dkt. 24 at 12, Judge Dow correctly recognized that their requested relief would "place the Court squarely in the middle of refereeing whose plan can best ensure release of inmates and on what conditions." Dkt. 38 at 35. This Court should decline that invitation and dismiss this action.

## CONCLUSION

Defendants have moved quickly and aggressively to take concrete actions to protect the health and safety of prisoners, prison staff, and the public from the risks posed by COVID-19. Plaintiffs no doubt have legitimate concerns, but they do not and cannot provide any legal basis to allow the Court to compel defendants to furlough or otherwise release thousands of prisoners based on the possible risk of contracting COVID-19. Plaintiffs do not and cannot state a plausible legal

claim, their requested relief is against the public interest, and it is prohibited by the PLRA and binding case law. For all of these reasons, defendants respectfully request the Court to grant their motion to dismiss this action with prejudice.

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Respectfully Submitted,

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