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

**NICHOLAS FRAZIER, *et al.*** **PLAINTIFFS**

**v.** **Case No. 4:20-cv-00434 KGB**

**WENDY KELLEY, *et al.*** **DEFENDANTS**

# POST-HEARING MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

## INTRODUCTION

On March 11, 2020—when Governor Hutchinson announced a state of emergency in response to the worldwide, COVID-19 pandemic—Defendants were on high alert. As acknowledged in the Arkansas State Department of Health's ("ADH") own guidance, correctional facilities and detention centers . . . pose a high risk for transmission of COVID-19" due to their "congregate nature." *See* ADH COVID-19: Guidance for State Correctional Facilities and Local Detention Facilities, dated Mar. 27, 2020 ("3/27/20 ADH Guidance, Def. Ex. 10") (Dkt. No. 36-10). Thus, Defendants knew that, unless they fully prepared to take swift and systemwide action in the face of the greatest pandemic in modern history, it would only be a matter of time before COVID-19 would infect staff, incarcerated people, or both, with likely serious injury and possible death to follow. And the blueprint for this swift and systemwide action was laid out by the Centers for Disease Control and Prevention's ("CDC") guidance, which is specifically geared towards correctional facilities and identifies in detail the steps that Defendants should take in order to stem and mitigate the spread of COVID-19. *See* CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, dated Mar. 23, 2020 ("CDC Guidance, Def. Ex. 9") (Dkt. No. 36-9).

With full knowledge of the dangers involved with this lethal virus, and equipped with specific guidance from the CDC, Defendants turned a crisis situation into a greater catastrophe with their modest, uneven, and entirely inadequate measures. Six men (two more since our last submission to the Court) have already died from the Cummins Unit viral outbreak, which is the fourth largest in the nation with confirmed infections of 876 incarcerated people and 54 corrections staff. Andrew DeMillo, 6th inmate dies of coronavirus at Arkansas prison, Times Record, May 7, 2020, at

https://www.swtimes.com/news/20200507/6th-inmate-dies-of-coronavirus-at-arkansas-prison. It is no coincidence that this massive outbreak occurred in Cummins Unit, which also happens to be where Defendants allowed up to ten COVID-19-positive staff to work during their isolation period when they could still transmit the virus to others. Transcript of Preliminary Injunction Hearing, May 7, 2020 ("Hrg. Tr."), at 211-12.

Social distancing, which is the most significant tactic to mitigate the spread of the virus, is all but non-existent in Arkansas Department of Corrections ("DOC") facilities. Indeed, only on May 3, 2020 (almost two months after Governor Hutchinson declared a state of emergency) did Defendants make incarcerated people in the Ouachita River Unit, which houses the State's most vulnerable prisoners, alternate their sleeping positions head-to-toe—a specific recommendation in the March 23 CDC Guidance. Moreover, rather than enhanced cleaning and disinfecting of frequently used surfaces, as recommended by the CDC, Defendants' own documents—consistent with multiple accounts of incarcerated people in multiple facilities—confirm why unsanitary conditions continue unabated, with commonly used facilities like toilets and showers disinfected only a few times per week. And Defendants' most frequently used cleaning agent, Citrus Breeze III, is not included in the Environmental Protection Agency's ("EPA") list of 402 disinfectants found to be effective against the COVID-19 virus.

Finally, the appalling treatment of incarcerated people who exhibit symptoms of, or have tested positive with, COVID-19 in Cummins is a stark warning of the worst to come if this Court does not intervene right away. Incarcerated people who are sick from the virus are clustered into closed barracks with no medical attention—some so ill that they have defecated on themselves. And the extent of the virus spread in other facilities is

presently unknown, with only 49 incarcerated people tested outside of Cummins Unit as of April 29, 2020.

It is imperative for this Court to issue a preliminary injunction to stem the tide of this growing public health disaster. Plaintiffs have established deliberate indifference under the Eighth Amendment and a violation of the Americans With Disabilities Act ("ADA"). There are no procedural hurdles under the PLRA because Plaintiffs' grievances would not be resolved until June 11, 2020, far too late during this time-sensitive pandemic, which render administrative remedies unavailable. And given the impossibility of adequate social distancing, federal habeas relief is warranted and available for the High Risk and Disability Subclasses.

The balance of equities weighs heavily in favor of granting the requested preliminary injunction. And there is significant public interest in not only protecting Plaintiffs' constitutional and statutory rights, but also—importantly—preventing the highly contagious and lethal COVID-19 virus from spreading into the larger community and using valuable and limited health care resources. Accordingly, for the reasons set forth in this submission and all prior submissions to the Court, Plaintiffs respectfully request the entry of a preliminary injunction order.

## I. Likelihood of Success on the Merits of the Eighth Amendment Claim

The Eighth Amendment imposes duties on prison officials to "ensure that inmates receive adequate food, clothing, shelter, and medical care, and [to] take reasonable measures to guarantee the safety of the inmates . . . ." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal citations and quotation marks omitted). In order to prevail, an incarcerated person must satisfy a two-part test, which includes both an objective and subjective component. First, the plaintiff must demonstrate exposure to a substantial risk

of serious harm. *Id*. at 834. Second, the plaintiff "must show that the defendant has been deliberately indifferent to this risk. *Id*. "[A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id*. at 842.

**A. Objective Prong—Substantial Risk of Serious Harm to Plaintiffs' Health and Safety**

As this Court has already ruled, Plaintiffs "are likely to satisfy the objective prong of the deliberate indifference test for their Eighth Amendment claims." Temporary Restraining Order, dated May 5, 2020 ("TRO Order"), at 13 (Dkt. No. 42). That is because "it cannot be disputed that COVID-19 poses an objectively serious health risk to named plaintiffs and the putative classes given the nature of the disease and the congregate living environments of the ADC's facilities." *Id.*

**B. Subjective Prong—Deliberate Disregard of a Known Substantial Risk to Plaintiffs' Health and Safety**

Plaintiffs have also satisfied the subjective prong of the deliberate indifference standard because Defendants "had knowledge of the substantial risk" of illness or death created by the COVID-19 pandemic "but nevertheless disregarded it." TRO Order at 12 (quoting *Davis v. Oregon Cty*., 607 F.3d 543, 548 (8th Cir. 2010)). Whether Defendants knew of a substantial risk may be demonstrated by both direct and circumstantial evidence. *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 529 (8th Cir. 2009). And Plaintiffs need not show that Defendants actually knew of the substantial risk of harm. *Letterman v. Does*, 789 F.3d 856, 862 (8th Cir. 2015). The district court can infer that knowledge if the risk is obvious. *See id.*; *see also Schaub*, 638 F.3d at 915; *Gordon ex rel. Gordon v. Frank*, 454 F.3d 858, 862 (8th Cir. 2006); *Jackson*, 140 F.3d 1149, 1152 (8th Cir. 1998) (stating that

the question of knowledge turns on "whether an excessive risk to [Plaintiffs'] health or safety was known or *obvious*") (emphasis added)). In circumstances where the risk alone does not permit such an inference, Plaintiffs may establish actual knowledge if "the evidence shows that a substantial risk to the incarcerated individual's health was well-documented[,] and the circumstances suggest that the Defendant was exposed to information about the risk and thus must have known about it . . . ." *Schaub v. VonWald*, 638 F.3d 905, 916 (8th Cir. 2011) (citing *Farmer*, 511 U.S. at 842-43).

In addition to proving that Defendants knew of the risk, Plaintiffs must prove that Defendants deliberately disregarded it. *Jackson*, 140 F.3d at 1152. To make this showing, Plaintiffs must demonstrate that Defendants knew that conduct was inappropriate in light of the risk. *See Krout v. Goemmer*, 583 F.3d 557, 567 (8th Cir. 2009). Although the Defendants' level of culpability must rise above mere negligence, Plaintiffs need not show that prison officials acted with the intention to cause harm or with knowledge that harm would result. *Letterman v. Does*, 789 F.3d 856, 862 (8th Cir. 2015) (*citing Farmer*, 511 U.S. at 835).

Defendants cannot dispute the gravity of the risks posed by COVID-19. They knew that a highly contagious and possibly lethal virus was coming to Arkansas and was particularly dangerous for congregate settings like correctional facilities. *See* 3/27/20 ADH Guidance, Def. Ex. 10. In fact, Corrections Secretary Wendy Kelley, who is a defendant in this case, commented that "[o]nce it gets in, it will be disastrous." John Moritz, *CDC to aid response at Forrest City prison*, Arkansas Democrat-Gazette, Apr. 8, 2020 at https://www.arkansasonline.com/news/2020/apr/08/cdc-to-aid-response-at-forrest-city-pri/.

Defendants also had the benefit of a detailed blueprint that instructed them on how to prevent and manage a possible COVID-19 outbreak in their facilities. *See* CDC Guidance, Def. Ex. 9; Email from Prof. Nick Zaller, University of Arkansas for Medical Sciences to Sheriff Eric Higgins & Corrections Secretary Wendy Kelley, dated Mar. 23, 2020, Pff. Ex. 96 (forwarding CDC Guidance) (Dkt. No. 60-1). Arkansas Division of Correction Director, Dexter Payne, another named defendant, stated that "in order to save lives and halt the spread of the virus we must be obedient to the recommendations of the Centers for Disease Control (CDC) and the Arkansas Department of Health (ADH)." Email from Dexter Paine to Dona Gordon & Charles Allen, dated April 8, 2020, Def. Ex. 60 ("4/8/20 Payne Email, Def. Ex. 60") (Dkt. No. 49-18). As Plaintiffs' expert Eldon Vail explained, unlike a spontaneous flu epidemic that comes with no warning, Defendants were alerted to the COVID-19 pandemic months in advance and were provided with the CDC Guidance, but failed to use that time to prepare sufficiently for the possible arrival of a serious and deadly virus. Hrg. Tr. at 56-58, 149.

Instead, Defendants emphasize the limited measures they have taken in response to the COVID-19 pandemic and suggest that these meager, halting, and untimely steps are sufficient to reduce Plaintiffs' risk of contracting the disease. Def. Resp. at 56. Defendants, however, vastly overstate the measures they have taken and the speed with which they have acted. Indeed, many of their efforts did not begin until the last seven days, well after Plaintiffs initiated this lawsuit. *See, e.g., infra* (discussing minimal social distancing measures implemented 4 days ago). Furthermore, Defendants have not only failed to take the measures necessary to prevent and contain the spread of COVID-19, but their policies

have actually served to exacerbate the viral outbreak. That was true when this suit was filed, and it is true today.

Although there are numerous deficiencies in Defendants' preparation and response to the COVID-19 pandemic, Plaintiffs direct the Court to four general areas that demonstrate Defendants' deliberate indifference: (1) having infectious correctional officers work in the highly congregate prison setting during their isolation period; (2) failing to implement appropriate social distancing practices; (3) failing to enhance cleaning and sanitation to prevent community spread of COVID-19 within the facility; and (4) failing to test, appropriately quarantine, and provide adequate medical care and treatment to incarcerated people who are suspected or confirmed to have contracted COVID-19. Defendants were aware that each of these actions or inactions, separately and cumulatively, would create a substantial risk of COVID-19 infection, illness, or possibe death, but nevertheless disregarded that risk. We have seen the results of that deliberate indifference in the Cummins Unit outbreak—and the six deaths that followed—and will likely witness even greater harm without immediate intervention from this Court.

*1. Infectious Correctional Officers*

Defendants know that an individual infected with COVID-19 can carry and spread the disease even if the individual is asymptomatic. Hrg. Tr. at 61; Compl. ¶ 54 (Dkt. No. 1) (citing public health evidence)]. Yet, Defendants have a policy of instructing correctional officers who test positive for the virus, but are asymptomatic, to work in an Arkansas Department of Correction ("DOC") facility. As Plaintiffs' expert, Secretary Eldon Vail, testified, Defendants' policy is an "outlier and dangerous," and he has seen no such guidance from the CDC or other jurisdiction permitting infected correctional staff to report to work. Hrg. Tr. at 142.

In his declaration prior to the hearing, Defendant Payne unequivocally stated that "ADC continued to ensure staff and visitors were not bringing the virus within ADC facilities." Declaration of Dexter Payne, dated Apr. 29, 2020, Def. Ex. 1 ¶ 29 (Dkt. No. 36-1). But, in fact, Defendants do permit staff to bring the virus into ADC facilities. On April 24, 2020, Defendant Payne sent an email to prison officials throughout the State, directing them to have asymptomatic employees who tested positive for COVID-19 to report to the Cummins unit, where they would work in the positive barracks. Email from Dexter Payne, dated Apr. 24, 2020 ("4/24/20 Payne Email, Pff. Ex. 87") at 5 (Dkt. No. 57-5). At the hearing, Defendant Payne admitted that this policy is being implemented and followed, and numerous infected corrections officers have reported to work at Cummins. Hrg. Tr. 211-12.

Defendants' recklessness in carrying out this "outlier" policy is clear because they knew it was not safe for infected corrections officers to enter DOC facilities. As early as March 16, 2020, Defendant Kelley announced that employees "who have been exposed or exhibit the symptoms of COVID-19 (based on CDC guidance) shall not physically come to work and shall not report until the quarantined time has lapsed." Email from Wendy Kelley, dated Mar. 16, 2020, Def. Ex. 51 (Dkt. No. 49-9). Moreover, the CDC Guidance on March 23, 2020, indicates that "[i]f staff test positive for COVID-19: . . . do not return to work until a decision to discontinue home medical isolation precautions is made. Monitor CDC guidance on discontinuing home isolation regularly as circumstances evolve rapidly." CDC Guidance, Def. Ex. 9, at 12. The CDC Guidance further warned on March 23 that "[t]here are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including daily staff ingress and egress . . . ." *Id.* at 2. In

other words, allowing an infected correctional officer to report to work risks the transmission of COVID-19, even if the infected officer spends most of their time at a barracks with incarcerated people who have already tested positive.

Both Plaintiffs' experts Dr. Marc Stern and Secretary Eldon Vail stated that correctional officers who have tested positive should not return to DOC facilities to work. Hrg. Tr. at 71; Vail Decl., Pff. Ex 23 ¶ 58; Second Expert Declaration of Dr. Marc Stern, dated May 3, 2020, Pff. Ex. 24 ("Stern Decl. 2, Pff. Ex. 24") ¶ 5 (Dkt. No. 46-12). Secretary Vail specifically stated that allowing "asymptomatic individuals to work creates a further risk for the spread of the virus" because they can still transmit the virus. Vail Decl., Pff. Ex. 23 ¶ 58. This information is not new. COVID-19 is an airborne virus that can be spread by an asymptomatic person by simply breathing or touching contaminated surfaces. Compl. ¶ 54 (citing public health evidence). Indeed, Defendants' own witness, James Banks, the Deputy Director of Residential Services for Arkansas Community Correction, testified that staff who tested positive had "absolutely not" continued working at his facility during their quarantine period. Hrg. Tr. at 193. He later stated he would permit them to do so if ordered to, but he "just never even come close to having to think about" implementing that policy because of the risk of transmission. Hrg. Tr. at 195.

Defendants' policy of allowing infectious officers to work in barracks with infectious prisoners ignores the realities of working in a correctional facility. Further, correctional staff will often respond to the scene of a disturbance in order to maintain order in a prison, as they have been trained, which may require them to come into contact with individuals who are not COVID-19 positive. Vail Decl., Pff. Ex 23 ¶ 58**.** Nor can Defendants ensure that infected individuals will not unintentionally touch and contaminate

common areas. Corrections staff also must travel to their workplace and may encounter community members and co-workers who they will be putting at risk. *Id.*; *see also* Hrg. Tr. at 235.

Defendants' recklessness in having infectious corrections officers report to work is particularly clear because they were on notice since at least April 9, 2020, that employees regularly "refused" to wear their masks. COVID-19 Pandemic Physicians' Group Morning Notes, dated Apr. 9, 2020, Pff. Ex. 80 (Dkt. Nos. 48-7 and 51-9). On April 21, 2020, Defendant Payne told wardens in the Arkansas Division of Correction ("ADC") to ensure officers were wearing masks because hospitals reported that officers continued to refuse to wear masks when transporting incarcerated people who were ill. Email from Dexter Payne dated Apr. 21, 2020, Pff. Ex. 90 (Dkt. No. 57-5). If correctional officers were refusing to wear their masks while knowingly transporting sick prisoners, there is no reason to believe that they were not similarly ignoring that directive behind the closed doors of DOC facilities. Indeed, that is exactly what is reported by Plaintiffs. Second Declaration of Nicholas Frazier, dated Apr. 29, 2020 ("Frazier Decl. 2, Pff. Ex. 13") ¶ 10 (Dkt. No. 46-1); Second Declaration of Jonathan Neeley, dated Apr. 29, 2020 ("Neeley Decl. 2, Pff. Ex. 17") ¶ 11 (Dkt. No. 46-5); Second Declaration of Robert Stiggers, dated Apr. 29, 2020 ("Stiggers Decl. 2, Pff. Ex. 21") ¶ 6 (Dkt. No. 46-9); Second Declaration of Victor Williams, dated Apr. 29, 2020 ("Williams Decl. 2, Pff. Ex. 22") ¶ 7 (Dkt. No. 46-10).

Defendants nonetheless insist they cannot be liable under the deliberate indifference standard because, according to Defendants, ADH guidance permitted them to have infected corrections officers report to work. Hrg. Tr. at 211; Second Declaration of Dexter Payne, dated May 4, 2020 ("Payne Decl. 2, Def. Ex. 56") ¶¶ 6-7 (Dkt. No. 49-14);

*see also* ADH Guidance for Reducing Spread on COVID-19 in Correctional Facilities, dated Apr. 15, 2020 ("4/15/20 ADH Guidance, Def. Ex. 20") (Dkt. No. 36-20). This argument is without merit. As another court recently stated in rejecting its premise:

> Defendants' argument misses the point. Plaintiff's case is premised on the proposition that [the health-related] policy at the time of the complaint was deliberately indifferent to his serious medical needs. By carrying out that policy, plaintiff argues that defendants . . . were deliberately indifferent. Defendants cite no authority for the proposition that "following policy" is an absolute defense to a deliberate indifference claim.

*Baca v. Biter*, Case No. 1:15-cv-01916-DAD-JDP, 2019 WL 316815, at *2 (E.D. Cal. Jan. 24, 2019) (Peterson, M.J.), *adopted* 2019 WL 1353707, at *1 (Drozd, J.) ("The court finds this argument unpersuasive because, as noted by the assigned magistrate judge, '[d]efendants cite no authority for the proposition that "following policy" is an absolute defense to a deliberate indifference claim.'").

Moreover, the ADH guidance at issue does not indicate that it is safe for infected corrections officers to return to work. That guidance instead states that asymptomatic infected employees may return to work only "after approval is received from the Secretary of Corrections and appropriate Division Director" and only if certain circumstances are satisfied, including that there "is a critical shortage of workers and critical activities cannot occur without the use of these workers." 4/15/20 ADH Guidance, Def. Ex. 20. The ADH guidance plainly does not represent a health judgment that it is safe for infected corrections officers to report to work; it allows DOC to have infected corrections officers report to work notwithstanding the safety risks on the condition that Defendant Kelley, Defendant Payne, and/or Defendant Bradshaw determine there are exigent circumstances. This is also clear from the bottom of the ADH guidance, which states, in bolded language: " **NOTE:**

**Positive staff who continue to work should avoid contact with other staff, isolate at home and avoid contact with others when commuting (e.g. no shared rides, no shopping).”** *Id.* This bolded admonition confirms ADH’s recognition that it is not safe for anyone infected with COVID to have contact with other people.

Defendants have proffered no evidence that infected corrections officers were permitted to work at Cummins only after Defendants Kelley and Payne determined there were exigent circumstances that required it. On the contrary, in his April 30, 2020 email, Director Payne simply instructed that infected but asymptomatic employees should be temporarily re-assigned to Cummins, where they could work in the positive barracks. 4/24/20 Payne Email, Pff. Ex. 87 at 5.

In sum, under ADH guidance, the decision of whether it is necessary for a COVID-19 positive worker to be in DOC facilities lies with Defendants, not ADH. 4/15/20 ADH Guidance, Ex. 20. It is Defendants who have the relevant knowledge of staff shortages in DOC facilities and how to address such shortages. And as Plaintiffs’ expert Secretary Vail testified, there are alternative steps to addressing staff shortages, such as contracting with local law enforcement or the national guard to supplement staffing. Hrg. Tr. at 77; Vail Decl., Pff. Ex 23 ¶ 58.

Nor does Defendant Payne’s April 24 email address the additional requirements that the ADH guidance states are necessary for an infected employee to report to work even in exigent circumstances. 4/15/20 ADH Guidance, Def. Ex ¶ 20. It does not provide any information concerning screening procedures at the facility entrance, infected officers monitoring their symptoms throughout their shift, and steps if a positive employee becomes symptomatic at work. *See* 4/24/20 Payne Email, Ex. 87 at 5.

Finally, the same ADH guidance, upon which Defendants rely to implement this reckless policy, also directs ADC to "provide available N95 masks for all staff transporting inmates to hospitals and clinics . . ." 4/15/20 ADH Guidance, Def. Ex. 20. There is no indication that Defendants have taken any steps to follow this part of the ADH guidance. Defendants cannot simultaneously insist that they cannot be liable to the degree they adhere to one part of an ADH guidance while violating another part of that same guidance.

*2. Lack of Social Distancing*

Defendants knew that social distancing would be critical to prevent the outbreak of COVID-19 in its facilities. CDC Guidance, Def. Ex. 9, at 4. Medical experts have determined that the chance of contracting COVID-19 is reduced if people can stay six feet or more away from each other. Hrg. Tr. at 62. The CDC Guidance is clear: "although social distancing is challenging to practice in correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19." CDC Guidance, Def. Ex. 9. This is the guidance that Defendant Payne told his employees had to be followed to save lives and reduce the risk of COVID-19 transmission. 4/8/20 Payne Email, Def. Ex. 60 at 1. Indeed, at the hearing, Defendant Payne testified as to the importance of social distancing during this pandemic. Hrg. Tr. at 210.

Yet, before April 30, 2020, social distancing was all but non-existent in DOC facilities. This was the case even though Plaintiffs and putative class members filed a number of grievances explaining their inability to social distance in their living areas. *See e.g.*, Harold Otwell Grievances, Apr. 2020, Pff. Ex. 50 (Dkt. No. 46-37) (describing beds less than three feet apart and encountering 150-200 inmates and 30 guards daily despite underlying medical conditions); Declaration of Alvin Hampton, dated Apr. 26, 2020 ("Hampton Decl., Pff. Ex. 64") (Dkt. No. 46-51) (describing beds 2.5 feet apart);

Declaration of Trinidad Serrato, dated Apr. 26, 2020 ("Serrato Decl., Pff. Ex. 64") (Dkt. No. 46-51) (same); Declaration of Michael Kouri, dated Apr. 26, 2020 ("Kouri Decl., Pff. Ex. 64") (Dkt. No. 46-51) (describing gatherings of more than 10 inmates).

But, in the words of Plaintiffs' corrections expert, Defendants were "asleep at the wheel" and did not have a plan to deal with this deadly pandemic despite having warning of its seriousness. Hrg. Tr. at 163. For example, surprisingly, Defendants did not address inmates sleeping arrangements to increase social distancing when CDC made specific social distancing recommendations on March 23, 2020. Hrg. Tr. at 62; CDC Guidance, Def. Ex. 9. Defendants did not even take the obvious and important step—specifically recommended by the CDC—of rearranging the direction in which inmates sleep to reduce the risk of COVID 19 transmission until this week, two months after Governor Hutchinson declared a state of emergency, six weeks after the CDC issued its guidance, and two weeks after this suit was filed. Hrg. Tr. at 67.

Specifically, it was not until April 30, 2020, that Defendant Kelley recognized that the "biggest threat [of COVID-19 transmission] is face to face exposure" and thus the facilities should have inmates "sleep with their heads of every bed on one end, and every alternate bed the other." 4/30/20 Craig Email, Def. Ex. 90. Even then, it took several more days for this to happen. On May 3, 2020, Defendant Payne directed wardens to have inmates sleep in a way to maximize social distancing. 4/30/20 Emails, Pff. Ex. 88. The next day, DOC employees went into barracks and told inmates they had to change the way they sleep and suggested trying to move beds further apart if possible. Third Declaration of Harold Otwell, dated May 5, 2020 ("Otwell Decl 3, Pff. Ex. 85) ¶ 7 (Dkt. No. 57-3); *see also* Third Declaration of Jonathan Neeley, dated May 5, 2020 ("Neeley Decl. 3, Pff. Ex.

86) (Dkt. No. 578-4) (same). Corrections officers also told inmates to hang sheets up between their beds with hammer and nails if the beds were not six feet apart. Neely Decl. 3, Pff. Ex. 86 ¶ 7. However, the necessary tools were not provided. Neely Decl. 3, Pff. Ex. 86 ¶ 8. This was the first time since the outbreak of the pandemic that any staff member tried to address inmate sleeping arrangements. Otwell Dec. 3, Pff. 85 Ex. ¶ 7.

That Defendants failed to implement this simple step even in the Ouachita River Unit, which houses the State's most vulnerable prisoners, for six weeks after CDC made the recommendation demonstrates Defendants' deliberate indifference. Defendants failed to implement a sleeping arrangement to reduce the spread of COVID-19, even among their most vulnerable inmates Furthermore, there is no evidence the Defendants have intensified social distancing for high risk individuals as called for by CDC Guidance. *See* Payne Decl., Pff. Ex. 71. Even though Defendants have taken the first step to finally address sleeping arrangements, they have done nothing more. For example, Defendants continue to serve inmate meals in dining halls of some facilities, requiring individuals to unnecessarily congregate. Hrg. Tr. at 177; Payne Decl., Pff. Ex. 71 ¶ 63.

Further, there is no evidence that Defendants have implemented a policy to utilize non-living areas in its facilities as temporary housing to facilitate social distancing. Hrg. Tr. at 68-69. In his declaration, Defedant Payne stated that usage of other units, like trailers. was not possible, but did not provide any reasoning or justification for that determination, especially weighed against the serious risk of illness and death of Plaintiffs. Hrg. Tr. at 66. And, at the hearing, Defendant Payne made clear that was no longer Defendants' position. Hrg. Tr. at 210. He testified that in Cummins Unit, DOC has in fact started using non-living quarters such as the visitation area to provide temporary housing and provide for additional

social distancing. Hrg. Tr. at 210. Despite providing 104 exhibits, Defendants have provided no documentation of this change, so it is not clear when it occurred or how many inmates have been moved to other parts of Cummins. But it is clear that Defendants' sole justification for not having implemented this measure earlier (Defendant Payne's conclusory assertion in his declaration that it would be impossible to do so) is not correct. In sum, failing to implement the important strategy of using additional space in prison facilities for housing outside of Cummins Unit—when Defendants unquestionably knew of the importance of social distancing to reduce the risk of COVID 19 transmission and the impossibility of adequate social distancing in existing dorms—demonstrates Defendants' indifference to this known risk. Def. Resp. at 12 (Dkt. No. 36).

Moreover, reducing the prison population is critically important to increasing the ability of inmates to social distance within Defendants' facilities. Hrg. Tr. at 63-64. The dorm style structures in a number of DOC facilities render it impossible for Defendants to sufficiently implement or enforce social distancing, as Defendants have themselves recognized. Def. Resp. at 12 . Given this reality, and given the degree to which COVID-19 has already spread through DOC facilities, release from confinement is the only constitutionally sufficient for the most medically vulnerable prisoners.

Ultimately, Defendants have wholly failed to consider or implement timely and adequate social distancing measures to reduce the known risk of harm to their own correctional staff or individuals in their custody. The minimal steps they have taken since Plaintiffs filed this lawsuit does not negate the need for injunctive relief. *See Farmer v. Brennan*, 511 U.S. 825, 846–47 (1994). Plaintiffs have demonstrated Defendants were deliberately indifferent, and remain deliberately indifferent, and there is a likelihood of

ongoing harm given inadequacy and inconsistency of Defendants' actions. *See id; see also Young v. Hayes*, 218 F.3d 850, 852 (8th Cir. 2000) (Defendant who voluntarily cease constitutional violation have burden of demonstrating mootness of Plaintiffs' requested relief).

*3. Unsanitary Conditions*

As discussed above, a month ago today, Defendant Payne told all ADC staff that "in order to save lives and halt the spread of the virus, we must be obedient to the recommendations of the Centers for Disease Control (CDC) and the Arkansas Department of Health." 4/8/20 Payne Email, Def. Ex. 60. And the CDC Guidance makes is clear in recommending that "[e]ven if COVID-19 cases have not yet been identified inside the facility or in the surrounding community," correctional facilities should "begin implementing intensified cleaning and disinfecting procedures . . . . These measures may prevent spread of COVID-19 if introduced." CDC Guidance, Def. Ex. 9, at 9. Two of the CDC's recommendations are particularly noteworthy in this case:

> (1) "Several times per day, clean and disinfect surfaces and objects that are frequently touched, especially in common areas. Such surfaces may include objects/surfaces not ordinarily cleaned daily (e.g., doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, and telephones)."
>
> (2) "Use household cleaners and **EPA-registered disinfectants effective against the virus** that causes COVID-19 as appropriate for the surface . . . ."

*Id*. (emphasis added).

Despite knowing that cleaning and disinfecting frequently touched surfaces and objects several times per day with an EPA-registered disinfectant was essential to minimizing and hopefully preventing the spread of COVID-19, Defendants failed to ensure

that these basic measures of protection would be uniformly implemented across the facilities within DOC.

First, Defendants are *not* using an "EPA-registered disinfectants effective against the virus that causes COVID-19," in DOC facilities. By their own account, Defendants have distributed Razor Chemical Company's Citrus Breeze III for cleaning and sanitation of DOC facilities. *See* Payne Decl., Def. Ex. 1 ¶ 54. This product, however, is not one of the 402 disinfectants recognized by the EPA as being effective against SARS-CoV-2, the virus that causes COVID-19. *See* Search Results for Citrus Breeze on EPA List of Disinfectants for Use Against SARS-CoV-2, Pff. Ex. 53 (Dkt. No. 46-40). While Razor Chemical Company may claim that Citrus Breeze III is effective for *some* "SARS Associated Corona Virus," *see* Razor Citrus Breeze III Information Page, Def. Ex. 75 (Dkt. No. 49-33), COVID-19 is a "novel coronavirus," which means that it "has not been previously identified," *Coronavirus Disease 2019 Basics*, at https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics. That is why the CDC Guidance specifically recommends using "EPA-registered disinfectants effective against the *virus that causes COVID-19*" and provides a direct link to the EPA registration website to identify those disinfectants. CDC Guidance, Def. Ex. 9, at 9 (emphasis added).

Because Citrus Breeze III is not registered with the EPA as effective against the virus that caused COVID-19, "the EPA has not reviewed any data on whether the product will kill public health pathogens such as viruses," which means that the EPA "has no data showing they will work and can be used safely." Related Topics: Pesticide Registration, Coronavirus, Environmental Protection Agency, at https://www.epa.gov/coronavirus/i-

want-use-product-kill-sars-cov-2-it-isnt-list-n-it-effective-against-sars-cov-2. Thus, in direct disregard of the CDC Guidance—which Defendant Payne acknowledged DOC "must be obedient to" in order "to save lives and halt the spread of the virus," 4/8/20 Payne Email, Ex. 60 at 1—Defendants are utilizing a product that has not been proven to be effective against COVID-19, rather than one of the 402 disinfectants registered with EPA.

Further, regardless of whether a disinfectant has been registered with the EPA, nowhere does the CDC Guidance recommended using chemicals like Citrus Breeze III to disinfect face masks. But, this is what Defendants are directing employees to do. *See* Memo from Corporal Doris Greer to Deputy Warden John Craig, dated May 4, 2020, re COVid 19 updated precautions, Def. Ex. 89 (Dkt. No. 57-7). In fact, there may be a serious risk of poisoning from the inhalation of the chemicals' fumes. *See*, *e.g.*, Jeffrey Kluger, *As Disinfectant Use Soars to Fight Coronavirus, So Do Accidental Poisonings*, Time.com, Apr. 20, 2020, at https://time.com/5824316/coronavirus-disinfectant-poisoning/ ("Of all means of ingestion, inhalation of fumes represented the largest increase in exposure routes, jumping 35.3% for all forms of cleaners and a whopping 108.8% for disinfectants specifically.")

In addition to these clear examples of deliberate indifference with respect to disinfectants, Plaintiffs have been deliberately indifferent by failing to provide Plaintiffs with access to supplies to clean and disinfectant their frequently touched areas. The evidence from Plaintiffs on this point is consistent and overwhelming. *See* Declaration of Janice Nicholson, dated May 3, 2020 ("Nicholson Decl., Pff. Ex. 38") ¶ 15 (Dkt. No. 46-25); Declaration of Tonya Williams, dated May 3, 2020 ("Williams Decl., Pff. Ex. 43") ¶ 3 (Dkt. No. 46-30); Declaration of Rocxena Smith, dated May 1, 2020 ("Smith Decl., Pff.

Ex. 41") ¶ 3 (Dkt. 46-28); Amended Declaration of Susie Anita Daniels, dated May 4, 2020 ("Daniels Decl., Pff. Ex. 75") ¶ 8 (Dkt. No. 51-4); Declaration of Nicole Cleveland, dated May 3, 2020 ("Cleveland Decl., Pff. Ex. 28") ¶ 12 (Dkt. No. 46-16).

Moreover, shared facilities, like toilets, showers, and sinks, are only disinfected one to two times per week. *See* Second Declaration of Alvin Hampton, dated Apr. 29, 2020 ("Hampton Decl. 2, Pff. Ex. 14") ¶ 6 (Dkt. No. 46-2); Second Declaration of Michael Kouri, dated Apr. 26, 2020 ("Kouri Decl. 2, Pff. Ex. 97") ¶ 13 (Dkt. No. 60-2); Second Declaration of Harold Otwell, dated Apr. 29, 2929 ("Otwell Decl. 2, Pff. Ex. 19") ¶ 14 (Dkt. No. 46-7); Second Declaration of Trinidad Serrato, dated Apr. 29, 2020 ("Serrato Decl. 2, Pff. Ex. 20") ¶ 13 (Dkt. No. 46-8); Second Declaration of Victor Williams, dated Apr. 29, 2020 ("Williams Decl. 2, Pff. Ex. 22") ¶ ¶ 4, 11 (Dkt. No. 46-10).

And porters assigned to clean open barracks in general population are provided access to disinfectant chemicals only once or twice per day at most. Hampton Decl. 2, Pff. Ex. 14") ¶ 6; Otwell Decl. 2, Pff. Ex. 19 ¶ 14; Second Declaration of Marvin Kent, dated Apr. 29, 2019 ("Kent Decl. 2, Pff. Ex. 15") ¶ 13 (Dkt. No. 46-3); Second Declaration of Jonathan Neeley, dated Apr. 29, 2020 ("Neeley Decl. 2, Pff. Ex. 17") ¶ 6 (Dkt. No. 46-5); Serrato Decl. 2, Pff . Ex. 20 ¶ 13.

Defendants attempt to discredit this evidence by relying on descriptions of Cummins Unit from Kelley Garner, an Epidemiology Supervisor with the Arkansas Department of Health, on a single pre-planned visit. Declaration of Kelley Garner, dated Apr. 29, 2020 ¶ 11, Def. Ex. 11 (Dkt. No. 36-11); Hrg. Tr. at 102-03, 158. However, Plaintiffs, most of whom do not know each other, provide remarkably similar accounts from multiple correctional facilities across the State based on their everyday experiences.

*See* Nicholson Decl., Pff. Ex. 38, Williams Decl., Pff. Ex. 43, Smith Decl., Pff. Ex. 41 (discussing Cummins Unit); Daniels Decl., Pff. Ex. 75 (discussing Central Arkansas Community Correction); Cleveland Decl., Pff. Ex. 28 (discussing Grimes Unit); Hampton Decl. 2, Pff. Ex. 14, Neeley Decl. 2, Pff. Ex. 17, Otwell Decl. 2, Pff. Ex. 19, Serrato Decl. 2, Pff. Ex. 20, Williams Decl. 2, Pff. Ex. 22 (discussing Ouachita River Unit); Kent Decl. 2, Pff. Ex. 15 (discussing Varner Unit). And it is the Plaintiffs, rather than Ms. Garner, who have first-hand knowledge of these conditions on a daily basis.

Moreover, Defendants' own documents corroborate the infrequent cleaning and disinfecting occurring in DOC facilities described by Plaintiffs. For example, a memo to the superintendent of Ouachita River Unit, dated April 13, 2020, states that "[d]ue to the current COVID-19 Pandemic, . . . [t]he Sanitation Department bleaches showers/common areas *2x a week* and cells in Housing 1-3 *once a week* . . . ." Memo from Lt. D. Edwards, FSSH to Superintendent D. Earl, dated Apr. 13, 2020 re: Covid-19 Sanitation Practices, Pff. Ex. 83, at 45 (Dkt. No. 57-1) (emphasis added). The sanitation logs of Barbara Ester Unit from March 11, 2020, to April 30, 2020, show that, even during the height of the Cummins Unit viral outbreak, the sanitation and disinfecting of barracks, sinks, toilets, and showers rarely occurred three times per day as contemplated in the logs. Barbara Ester Unit, Sanitation Issuance Logs, Pff Ex. 83, at 9-42 (Dkt. No. 57-1). During the approximately 1.5 month period represented in these sanitation logs, Barbara Ester Unit's infirmary—which would be a high risk area for COVID-19 infection—was sanitized only once per day on 18 days and not all for 10 days. *Id.* The sanitation logs for March 16, 2020,

to April 30, 2020, for Pine Bluff Unit make clear that cleaning and sanitation are expected, at most, once per day in the barracks, and often occurred only a few days per week.[1]

In addition, the CDC Guidance recommends that correctional facilities "consider relaxing restrictions on allowing alcohol-based hand sanitizer in the secure setting where security concerns allow. If soap and water are not available, CDC recommends cleaning hands with an alcohol-based hand sanitizer that contains at least 60% alcohol." CDC Guidance, at 8, Def. Ex. 9. As explained by Plaintiffs' expert:

> [I]t is not realistic to expect all prisoners at all times will have access to hot water and soap. . . . It is highly likely there are prisoners in the ADC who do not have ready access to hot water and soap. In my opinion, the risks of alcohol based hand sanitizer in prisons are far outweighed by the benefits.

Expert Declaration of Eldon Vail, dated May 3, 2020, Pff. Ex. 23 ("Vail Decl., Pff Ex. 23") ¶ 33 (Dkt. No. 46-11); *see also* Hrg. Tr. at 73, 78-79, 118, 123-26. That is why states like New York, California, and Washington, which have prison populations comparable to—or far exceeding—the number of state prisoners in Arkansas have permitted the supervised use of hand sanitizer by incarcerated people during this pandemic. *See id.* ¶ 34; *see also* California COVID-19 Response Efforts, Pff. Ex. 72 (Dkt. No. 48-6); Washington Department of Corrections Memo, dated Apr. 18, 2020, re Appropriate Use of Hand Sanitizer, Pff. Ex. 73 (Dkt. No. 48-8); New York State Department of Corrections and

[1] Some of the dates are for 2019, which is likely a typographical error that is supposed to be 2020. Moreover, as these are documents received from DOC from a public information request, Plaintiffs assume that they are complete, which would indicate that missing days reflect days when no cleaning and sanitation occurred. Even if DOC failed to produce all of the requested documents, these logs clearly show that cleaning and sanitation occurred only once per day, at most.

Community Supervision, DOCS COVID-19 Report, Daily Update, dated May 4, 2020, at 13, Pff. Ex. 74 (Dkt. No. 48-4). By contrast, Defendants have not done so.

The only reason offered by Defendants not to provide the supervised use of hand sanitizer is the conclusory assertion of Defendant Payne that "[p]roviding inmates with unrestricted access to alcohol-based hand sanitizer and chemicals such as bleach would provide security risks to other inmates and staff" without any evidence to substantiate this claim. Payne Decl. ¶ 56, Def. Ex. 1. Defendants offer no evidence that they meaningfully studied this possibility or explored options that could have addressed any security concerns, such as making hand sanitizer available in specific locations under the supervision of corrections staff. Indeed, Central Arkansas Community Corrections previously provided non-alcohol-based hand sanitizer, but later made alcohol-based hand sanitizer available in the chow hall, and from individual corrections staff, due to the COVID-19 pandemic. Hrg. Tr. at 181. Once again, Defendants' failure to implement this protective measure in all DOC facilities is inconsistent with the CDC Guidance they recognize as essential to reduce the spread of COVID-19 transmission, thereby demonstrating Defendants' knowing disregard of the substantial risk of COVID-19 spread. *See* Vail Decl., Pff Ex. 23 ¶ 33; *see also* Hrg. Tr. at 73, 78-79, 118, 123-26.

Contrary to Defendants' contention, Plaintiffs are not merely quibbling about a few instances of corrections staff and porters failing to do their jobs. Nor are Plaintiffs asking Defendants to merely improve upon the cleaning and sanitation procedures they already have in place. Rather, Plaintiffs have demonstrated Defendants' wholesale failure to take seriously the CDC's Guidance to "begin implementing intensified cleaning and disinfecting procedures" "[e]ven if COVID-19 cases have not yet been identified inside the

facility or in the surrounding community" and to "prevent spread of COVID-19 if introduced." CDC Guidance, Def. Ex. 9, at 9. Defendants, with full access to all DOC policies and procedures, have not proffered any evidence of a uniform, department-wide, emergency preparedness plan that would ensure the constant cleaning and disinfecting of frequently touched surfaces in the extremely congregate prison environment in the face of—and now in the midst of—an unprecedented and lethal pandemic. As represented by Defendant Payne, his declaration encompassed the universe of the Defendants' cleaning and disinfecting measures. Hrg. at 215. And those measures consisted of piecemeal emails, a few memos, some flyers, ADH guidances, and Defendant Payne's own words. Coupled with the failure to purchase EPA-registered disinfectants, which were readily identifiable, and the failure to provide much-needed hand sanitizer on a supervised basis, these piecemeal measures are precisely the late-coming, reactive, and ill-prepared approach to the pandemic that has facilitated and produced the viral outbreak in Cummins Unit and likely future outbreaks to come.

*4. Treatment of Suspected or Confirmed COVID-19 Infection*

Plaintiffs have presented compelling, and essentially undisputed, evidence regarding the systemically inadequate provision of medical care prisoners have received in terms of: (1) lack of testing; (2) failure to isolate infected inmates; and (3) inadequate care of prisoners infected with COVID-19. With regard to inadequate testing, Plaintiff Hampton in Ouachita River Unit, who suffers from seizures and Bell's Palsy, was never tested for COVID-19 despite constant coughing and congestion. Declaration of Alvin Hampton, April 26, 2020, ¶¶ 3-4 ("Hampton Decl., Pff. Ex. 64) (Dkt. # 46-51). Plaintiff Kouri in Ouachita River Unit, who has a degenerative heart condition, was not tested despite shortness of breath, headaches, chills, coughing, and productive pink eye; a nurse

said that there was no coronavirus in the facility and no need to worry about it since there was no way he could have been exposed to it. Declaration of Michael Kouri, April 26, 2020 ("Kouri Decl., Pff. Ex. 64") ¶¶ 3-4 (Dkt. # 46-51). As Ms. Daniels testified, her grandson at Central Arkansas Community Correctional Center ("CAC"), who suffers from asthma and previously tested positive for COVID-19, began to have difficulty breathing again and was not tested or treated for his symptoms. Hr'g Trans. at 32:12-17. With the exceptions of Cummins Unit, CAC and Ester Unit, other facilities have tested only one or two prisoners/residents total. *See* AR Inmate / Resident Testing, Pff. Ex. 77 (Dkt. # 48-9). This, despite the fact that positive COVID-19 results have been found among staff at several facilities and among Wellpath employees. *See* AR Inmate / Resident Testing, Pff. Ex. 77 (Dkt. # 48-9). Even at CAC, the site of the second largest outbreak in the DOC facilities, where 42% of the residents were infected with COVID-19, testing stopped after the initial testing on April 13, 2020. Hr'g Trans. at 187:19 - 188:11.

In part because of this inadequate testing, Defendants lack any mechanism for isolating infected prisoners. In other words, the lack of testing risks the health and safety not only for the infected prisoners experiencing potentially life-threatening symptoms of COVID-19 but who are not diagnosed early, but for those sleeping, working, and eating next to them. Without testing, prisoners who have COVID-19 are not isolated and remain in an open barracks setting with others where the virus can easily be spread. *See* Declaration of Janice Nicholson, May 3, 2020 ("Nicholson Decl., Pff. Ex. 38") ¶¶ 3-4 (Dkt. # 46-25) (indicating that 14 out of 15 people in her son's barracks in Cummins, including her son, tested positive for COVID-19). Ms. Lewis's son, also incarcerated at Cummins, observed another prisoner in the barracks in bed with a fever for three days, who could not

get up or "go to chow"; by the time the man was tested and removed from the barracks he was "shaking, sweating, convulsing and no longer coherent." *See* Declaration of Kenna Lewis, May 3, 2020 ("Lewis Decl., Pff. 37") (Dkt. # 46-24), ¶ 7. Far from being isolated, COVID-19 symptomatic prisoners are having to report to work to make masks intended to deter the spread of the virus, while they themselves were potentially infectious. See, e.g., Coleman Decl., Pff. Ex. 27 ¶ 4 (Carrie Coleman's son was forced to him to work and make masks at Cummins Unit despite being sick from COVID-19); White Decl., Ex. 42 ¶¶ 6-8 (noting that infected prisoners at Cummins Unit have been compelled to continue to work in the kitchen).

Defendants' failures in these respects are flatly inconsistent with state and federal health guidance. The ADH Guidance for the Department of Corrections recommends that state Corrections facilities "screen inmates daily" for symptoms and fever and "immediately isolate and inform onsite medical personnel" of those inmates who screen positive for symptoms and/or fever, who will inform ADH for priority testing. *See* Arkansas Dep't of Health COVID-19: Guidance for State Correctional Facilities and Local Detention Facilities, dated April 13, 2020 ("3/27/20 ADH Guidance, Def. Ex. 19") (Dkt. #. 36-19); Arkansas Dep't of Health COVID-19: Guidance for State Correctional Facilities and Local Detention Facilities, dated April 13, 2020 ("3/27/20 ADH Guidance, Def. Ex. 20") (Dkt. # 36-20). Instead, however, prisoners have been left to seek medical services from a third-party contractor if they are experiencing symptoms, where they are often turned away without testing or treatment. *See supra.* The CDC Guidance recommends "immediate medical isolation in a separate environment from other individuals" once an individual starts exhibiting COVID-19 symptoms, *see* Def. Ex. 9, at 15. Yet, as described above, prisoners who are experiencing severe symptoms are left in an open barracks within

3 feet of other prisoners, and DOC has simply stopped testing prisoners. According to the CDC, "[f]acilities should ensure that incarcerated/detained individuals receive medical evaluation and treatment at the first signs of COVID-19 symptoms" and an initial medical evaluation should determine whether a "symptomatic individual is at a higher risk for severe illness from COVID-19" due to an serious underlying medical condition "such as lung disease, heart disease or diabetes"—as are individuals within the plaintiff subclass and all of the Named Plaintiffs who have been denied medical evaluation. *See id.*at 23. An avalanche of medical grievances have been filed by prisoners recently – 2899 during the first quarter of year; many presumably related to the COVID-19 outbreak within DOC facilities. ADC Total of Medical Grievances, Jan 1 – April 1, 2020, Pff. Ex. 54 (Dkt # 46-41). Defendants unacceptable response is that decisions as to who to test, treat, and even evaluate are left up to its medical contractor, Wellpath, and they are not responsible for those decisions. *See, e.g.,* Hr'g Tr. at 199: 5-15 (Mr. Banks indicating that he plays no role in deciding who gets testing and they "would simply pass [the resident] on to the medical provider"); 199:17-200:8 (indicating that the guidelines from the medical provider, Wellpath, decides who gets testing and that the DOC or the division of community corrections "has never and will never decide who gets tested"); 237:23-25 (indicating that the ADH and Wellpath makes the decision as to who gets tested for COVID-19 and who does not).

The CDC further recommends quarantining of anyone who is considered a close contact of a confirmed *or suspected* case of COVID-19—defined as anyone within 6 feet of the individual for a prolonged period of time. *See* CDC Guidance, Ex. 9, at 19. Defendants have produced no evidence of quarantining close contacts or conducting any

contact tracing. *See* Hr'g Tr. at 216:18-217:1 (Defendant Payne expressing no opinion as to whether contract tracing is even advisable and indicating that the ADH and the prison medical advisors would make that decision). Plaintiffs' evidence, some of which is described above, that there is no such quarantining is undisputed.

For those prisoners who have tested positive and been quarantined, the care provided by the prison's medical contractor is grossly inadequate. As Ms. Nicholson described: her son, Quintionus Parker, was quarantined at Cummins for days and could barely speak or catch his breath, had chills and every part of his body hurt, but he was not seen by medical staff. Nicholson Decl. ¶¶ 4-6, Pff. Ex. 38. Only when he passed out six days later was he finally taken to the infirmary. *See id.* ¶ 9. Medical staff checked on quarantined prisoners infrequently and when they did, they called out at the gate and yelled the prisoner name's; if he did not respond because he was too weak or unable to walk, he was not seen. *See id.* ¶ 14. Mr. Parker's attorney made repeated attempts to have the Warden transfer Mr. Parker to the hospital, only to be told that the "Warden has no control over that" and that Mr. Gillispie should contact medical services. *See* Pl. Ex. 30-31, 33, Declaration of Joshua Gillispie, May 3, 2020 (Dkt 46-18); Letters to Warden Culclager (Dkt 46-19, 46-20). Ms. Daniels also explained that her son Austin at CAC was only given Tylenol after he tested positive for COVID-19; despite having trouble breathing and having asthma, he was not given an inhaler. *See* Pl. Ex. 75, Am. Decl. of Susie Anita Daniels, ¶ 16. Defendants' systematic failures to provide minimally adequate care to infected prisoners and CAC residents constitutes deliberate indifference. *See, e.g., Langford v. Norris,* 614 F.3d 445, 460, (8th Cir. 2010) (recognizing that "[g]rossly incompetent or inadequate care can constitute deliberate indifference, as can a doctor's decision to take an

easier and less efficacious course of treatment," and that a total deprivation of care is not a necessary condition for finding a constitutional violation).

For the most part, Defendants do not refute the evidence describe above. Instead, Defendants seek to shift their constitutional obligations to a third party private medical provider to whom the ADC has outsourced its medical services for prisoners. *See supra*. But, as Plaintiffs' corrections expert opined, based on his experience, he understood that it was the prison's responsibility to ensure the constitutional standard of medical care is met regardless of any third-party contracting arrangement. *See* Hr'g Tr. 103: 18-25. And the law on this point is clear. *See West v. Atkins*, 487 U.S. 42, 56 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights."). "Where a prisoner needs medical treatment prison officials are under a constitutional duty to see that it is furnished." *Crooks v. Nix*, 872 F.2d 800, 804 (8th Cir. 1989) (remanding plaintiff's claim of deliberate indifference to serious medical needs based on failure to provide adequate or proper pain medication); *accord Langford v. Norris*, 614 F.3d 445, 460, (8th Cir. 2010). Accordingly, Defendants "remains liable for any constitutional deprivations caused by the policies or customs of the [private medical contractor]." *Ancata v. Prison Health Servs., Inc*., 769 F.2d 700, 705 (11th Cir. 1985); *accord King v. Kramer*, 680 F.3d 1013, 1020 (7th Cir. 2012).

**II. Likelihood of Success on the Merits of the ADA Claim**

Members of the Disability Subclass are individuals who, due to their disabilities, are particularly vulnerable to contracting COVID-19 and suffering serious illness or death if they contract the virus. As explained above, Defendants failed to adequately prepare for

the threat posed by COVID-19, and continue to fail to take the reasonable steps necessary to ensure that members of the Disability Subclass are able to safely access living spaces.

"'[D]eliberate refusal of prison officials to accommodate [an inmate's] disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs' may constitute a violation of Title II." *Brown v. Houston*, No. 8:16CV217, 2018 WL 1309833, at *7 (D. Neb. Mar. 13, 2018) (citing *United States v. Georgia*, 546 U.S. 151, 157, (2006)); *see also Allen v. Morris*, No. 4:93CV00398 BSMJWC, 2010 WL 1382112, at *8 (E.D. Ark. Jan. 6, 2010), *report and recommendation adopted*, No. 493CV00398BSM-JWC, 2010 WL 1382116 (E.D. Ark. Apr. 2, 2010) (considering, and allowing to go forward, claim that prison's failure to make reasonable accommodations that would enable obviously disabled plaintiff to safely shower violated Title II); *Phipps v. Sheriff of Cook Cnty.*, 681 F.Supp. 2d 899, 916 (N.D. Ill. 2009) (collecting cases holding that "showering, toileting, and lavatory use [are] regarded as programs and/or services under the ADA.").

Defendants' refusal to accommodate the Disability Subclass's disability-related needs include, but are not limited to, Defendants' failure to ensure that subclass members are not working with staff who are not infected with the virus, *see* 4/21/2020 Payne Email, Pff. Ex. 87, at 6 (ordering asymptomatic prisoners to return to work), ensure that staff use protective equipment, COVID-19 PPG Morning Notes, Pff. Ex. 80, at 1 (noting that guards are refusing to wear masks), ensure that common areas in prisoners' living units are regularly cleaned, Sanitation Issuance Logs, Ester Unit, Pff. Ex. 83, at 20-31 (recording cleaning only on weekdays and then often only once per day). In addition, Defendants have failed to ensure that members of the Disability Subclass, all of whom are especially

vulnerable to COVID-19, are provided with housing options other than crowded barracks and cells where social distancing is impossible. Vail Decl., Pff. Ex. 23 ¶ 56 ("It is an excellent suggestion to review all available space and repurpose it . . . . I have seen no indication that the Arkansas prison authorities have undertaken such an assessment of what could be done to increase social distancing."). As explained during the hearing by Secretary Vail, each of these are basic steps that all correctional facilities, in line with the CDC Guidance, should be taking, and are necessary to preventing a repeat of what occurred at Cummins Unit—the infection of over 850 individuals, which Defendants continue to fail to acknowledge, explain, or accept responsibility for.

**III. Irreparable Harm to Plaintiffs**

This Court has already found that "plaintiffs have properly alleged irreparable harm" because "the alleged harm is a high likelihood of serious illness or death." TRO Order at 20 (Dkt. No. 42). Further, this Court noted that "Plaintiffs' alleged harm is both imminent and irreparable, as plaintiffs face a risk of severe illness or possible death in the light of COVID-19. . . . Plaintiffs face the progression of the COVID-19 pandemic in a congregate environment. The irreparability of this harm is magnified by the fact that no known vaccine or cure for COVID-19 exists at the time." *Id.* (citations omitted).

**IV. Balance of Equities in Favor of Relief**

In the TRO Order, the Court considered the "balance of the equities at [the TRO] stage [to be] a neutral factor" when weighing the "irreparable harm to [Plaintiffs'] constitutional rights and their health, including severe illness, long-term health effects, and possible death" against Defendants' representations that they had already taken steps to provide basic protective measures and that requiring them to do more "would impose undue

costs, harms, burdens, and disruptions in running the ADC facilities." TRO Order at 21 (Dkt. No. 42).

However, Plaintiffs have presented significant evidence that Defendants have not taken the basic steps required to protect both incarcerated people and corrections staff from the spread of COVID-19, including substantial evidence adduced since the Court issued the TRO Order. Among other things, Defendants have instructed infected corrections officers to report to work; ordered infected prisoners to cook and make masks for the uninfected and otherwise intermingled the sick and not-yet-sick; failed to take basic social distancing measures that were available within the prison; directed the use of a disinfectant not approved by the EPA for destroying COVID-19; and otherwise failed to implement sanitation measures necessary to reduce the risk of transmission. *See* First Declaration of Michael Kouri, Pff. Ex. 3, dated April 26, 2020 ("Kouri Decl. 1, Pff. Ex. 3") ¶¶ 4, 5, 14 (Dkt. No. 3-3); First Declaration of Alvin Hampton, Pff. Ex. 10, dated April 26, 2020 ("Hampton Decl. 1, Pff. Ex 10") ¶5 (Dkt. No. 3-10); Second Declaration of Trinidad Serrato, Pff. Ex. 20, dated April 29, 2020 ("Serrato Decl. 2, Pff. Ex. 20") ¶¶ 12, 13, 14, 15 (Dkt. No. 46-8); Second Declaration of Marvin Kent, Pff. Ex. 15, dated April 29, 2020 ("Kent Decl. 2, Pff. Ex. 15") ¶¶ 4,8 (Dkt. No. 46-3); Second Declaration of Robert Stiggers, Pff. Ex. 21, dated April 29, 2020 ("Stiggers Decl. 2, Pff. Ex. 21") ¶ 4 (Dkt. No. 46-9); Second Declaration of Harold Scott Otwell, Pff. Ex. 19, dated April 29, 2020 ("Otwell Decl. 2, Pff. Ex. 19") ¶ 14,15 (Dkt. No. 46-7); Second Declaration of Johnathan Neeley, Pff. Ex. 17, dated April 29, 2020 ("Neeley Decl. 2, Pff. Ex. 17") ¶¶ 5,6 (Dkt. No. 47-5); Second Declaration of Alfred Nickson, Pff. Ex. 18, dated April 29, 2020 ("Nickson Decl. 2, Pff. Ex. 18") ¶¶ 4,10 (Dkt. No. 46-6); Declaration of Carrie Coleman, Pff. Ex. 27, dated

May 2, 2020 ("Coleman Decl., Pff. Ex. 27") ¶ 4 (Dkt. No. 46-15); Declaration of Susie Anita Daniels, Pff. Ex. 29, dated May 3, 2020 ("Daniels Decl., Pff Ex. 29") ¶¶ 14, 15 (Dkt. No. 46-17); Declaration of Kenna Lewis, Pff. Ex. 37, dated May 3, 2020 ("Lewis Decl., Pff. Ex. 37") ¶¶ 5,7 (Dkt. No. 46-24); Declaration of Juanita Singleton, Pff. Ex. 40, dated May 3, 2020 ("Singleton Decl., Pff. Ex. 40") ¶¶ 3,6 (Dkt. No. 46-27); Declaration of Roxcena Smith, Pff. Ex. 41, dated May 1, 2020 ("Smith Decl., Pff. Ex. 41") ¶ 5 (Dkt. No. 46-28); Declaration of Valencia White, Pff. Ex. 42, dated May 1, 2020 ("White Decl., Pff. Ex. 42") ¶¶ 3,4,6,9 (Dkt. No. 46-29); Hrg. Tr. at 226-228.

At the hearing before this Court yesterday, Defendants heralded several recent changes, such as finally changing bed alignment within dorms. *See, e.g.*, 4/30/20 Craig Emails, Def. Ex. 90 (Dkt. No. 50-10); 5/3/20 Payne Email, Def Ex. 96. In assessing the balance of the equities, this Court should consider that even these changes were put in place *this week*, nearly two months after the President declared a national emergency, https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ (March 13, 2020), a month and a half after the CDC Guidance, and 2.5 weeks after the lawsuit in this case was filed. But Defendants have still failed to take more meaningful changes that they could implement, such as using space outside of dormitories to house some inmates and thereby reduce the number of people sharing space in the dorms. *See, e.g.*, Hrg. Tr. at 67-68.

Defendants' decision to delay making even straightforward changes—taken together with their failure to make meaningful reforms, and their decision to instead implement "outlier" policy innovations like permitting the infected to work in their

prisons—have resulted in a uniquely grave public health crisis, one which promises to reverberate out into the broader community in ways that are difficult to completely predict.

Finally, it bears emphasis that the present record strongly supports the need for an injunction. Plaintiffs have been afforded only partial public records returns that skew heavily toward Defendants' version of events (*e.g.*, several Ouachita River Unit records disclosed, but almost no Cummins Unit records disclosed); had limited access to class members; and no access whatsoever to putative class members.[2] The undated photos of the Ouachita River Correctional Unit contained in Defendants' Exhibit 74, for instance, bear no resemblance to the reports of people actually living there.[3]

Given the evidence developed since the Court's TRO order, it is clear that the balance of the equities heavily favors Plaintiffs. Plaintiffs "are likely to suffer irreparable harm absent an injunction, as they face a heightened risk of contracting this life-threatening virus simply as incarcerated individuals and even more so without the imposition of these cautionary measures." *Cameron v. Bouchard*, No. CV 20-10949, 2020 WL 1929876, at *2 (E.D. Mich. Apr. 17, 2020), *modified in part on other grounds*, No. CV 20-10949, 2020 WL 1952836 (E.D. Mich. Apr. 23, 2020). Defendants' actions—and inaction— have not only placed incarcerated persons in danger of succumbing to the virus, but have led to

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[2] Plaintiffs' counsel specifically asked Defendants' counsel to ensure confidential phone privileges with putative class members, but this request was denied on the grounds that the class had not yet been certified.

[3] *See, e.g.*, Kouri Decl. 1, Pff. Ex. 3 ¶¶ 8, 10 ("At chow, seating is four to a table, so we are all within a couple of feet of one another." "No one wears masks in the barracks or in the chow hall."); Hampton Decl. 1, Pff. Ex 10 ¶ 6, 7 ("Inmates are supposed to wear masks whenever we leave the barracks or we could get a disciplinary, but the rule is not really enforced. I closely interact with inmates during meal service, recreation, and in the line to receive my medicine. My current living situation makes social distancing impossible.")

serious security concerns resulting from severe staffing shortages. The irreparable harm to Plaintiffs in the absence of preliminary injunctive relief far outweighs any harm to Defendants if preliminary injunctive relief is granted, and therefore the balance of equities and public interest weighs in favor of granting injunctive relief.

## V. Public Interest in Protecting Plaintiffs, Corrections Staff, and Neighboring Communities

This Court has recognized the important public interests in "preservation of constitutional rights," "protecting plaintiffs and the putative class members from COVID-19 and its possible consequences," "minimizing the spread of COVID-19 both within ADC facilities and among communities surrounding and interacting with those facilities," and "efforts to stop the spread of COVID-19 and promote public health." TRO Order at 21-22. While it is certainly true that this Court "should approach intrusion into the core activities of the state's prison system with caution," *id.* at 22, it is apparent that court intervention is necessary in this case because Defendants have abandoned their constitutional and statutory responsibilities to provide a safe and secure living environment for Plaintiffs. The evidence presented to the Court demonstrates that Defendants cannot be trusted to operate the state's prison system during the COVID-19 pandemic and that such failures will directly harm not only the incarcerated people in Defendants' care, but also their employees and the surrounding communities. If ever "federalism and comity" should give way to federal court intervention, *see id.* at 22, this should be that case.

## VI. Inapplicability of PLRA Exhaustion

"Under the PLRA, a prisoner need exhaust only 'available' administrative remedies." *Ross v. Blake*, 136 S.Ct. 1850, 1856 (2016). An administrative remedy is not "available" for purposes of the PLRA unless it is "capable of use for the accomplishment

of a purpose," *id*., which requires that the remedy be "immediately utilizable." *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001); *see also Ross*, 136 S.Ct. at 1856 (defining "available" as "present or ready for immediate use"). In *Ross*, the Supreme Court provided three common examples of situations in which a remedial process is unavailable. *See id.* at 1859-60. Two of those circumstances apply here. First, Defendants' remedial process was unavailable because prison staff "thwart[ed] inmates from taking advantage of the grievance" process by refusing to sign or take their grievances and by otherwise impeding the grievance process. *See id.* at 1860. Second, the grievance process functioned as "a simple dead end" that was "unable to provide relief to aggrieved inmates," *see id.* at 1859, both because the process moved too slowly to provide emergency relief in the context of a fast-moving pandemic, and because prison administrators disavowed their ability to take any corrective action for Petitioners' legitimate grievances.

For several Plaintiffs, the grievance process was not "immediately utilizable," *see Miller* 247 F.3d at 740, because prison staff impeded Plaintiffs' ability to initiate or pursue the grievance process. For instance, Mr. Stiggers attempted to file an emergency grievance that entitled him to a response within 24 hours under the Defendants' regulations. *See* Declaration of Terry Grigsby, filed on April 30, 2020, (ECF No. 36-37) (attaching AD 19-34, definition of "emergency" available at § III(F)). Instead, prison staff refused to accept his emergency grievance for nine days, ensuring that it was functionally unavailable. *See* Second Declaration of Robert Stiggers, dated April 29, 2020 ("Stiggers 2 Decl., Pff. Ex. 21") ¶ 8 (Dkt. No. 46-9). Mr. Nickson had a similar experience. He asked the same sergeant to sign and accept his grievance on three consecutive days and was denied each time. As he explained, "[a] lot of sergeants have stopped picking up and signing grievances." *See*

Second Declaration of Alfred Nickson, Dated April 29, 2020 ("Nickson 2 Decl., Pff. Ex. 18") ¶ 8 (Dkt. No. 46-6). Prison staff repeatedly denied Mr. Nickson's efforts to file a grievance even though he lives in Cummins Unit—the epicenter of Arkansas' COVID-19 pandemic—and he suffers from diabetes and hypertension, *see id.* at ¶¶ 1, 3, which are conditions that puts him at high risk of suffering serious consequences from a COVID-19 infection. Declaration of Marc Stern, Dated Apr. 21, 2020 ("Stern Decl., Pff. Ex. 2") ¶ 7 (Dkt. No. 3-2). When guards refuse to accept prisoners' emergency grievances in the midst of a pandemic, the grievance process is not "present or ready for immediate use." *Ross*, 136 S. Ct. at 1856.

Mr. Kent and Mr. Frazier were similarly prevented from pursuing their emergency grievances. Mr. Kent filed an emergency grievance seeking access to a mask because he knew that his underlying heart condition left him vulnerable to COVID-19. *See* Second Declaration of Marvin Kent, Dated April 29, 2020 ("Kent 2 Decl., Pff Ex. 15") ¶ 6 (Dkt. No. 46-3). The prison not only denied his grievance but sent the response back through the mail so that Mr. Kent received it too late to file an appeal. *See id.* By providing a grievance response on a timetable that made further appeals impossible, the Defendants made the grievance process unavailable to Mr. Kent. *See Foulk v. Charrier,* 262 F.3d 687, 698 (8th Cir. 2001) (finding grievance process unavailable where prison's failure to respond made appeal of initial decision impossible). Similarly, Mr. Frazier attempted to file an emergency grievance requesting cleaning supplies and ADA accommodations because his pre-existing conditions left him vulnerable to COVID-19. *See* Nicholas Frazier Grievances, Dated April 18, 2020 ("Frazier Grievances, Pff. 46") 3 (Dkt. No. 46-33). The guard who took his grievance refused to classify it as an emergency and then lost or discarded it. The

Defendants have no record that the grievance exists (Def. Resp. 29), but Mr. Frazier retained a copy, complete with the staff signature. *See* Frazier Grievances 4, Pff. 46.

The Defendants' grievance process is also unavailable for emergency COVID-19 grievances because it functioned as a "simple dead end." *Ross*, 139 S. Ct. at 1859. It did so in two respects. First, it moved too slowly. "[B]ecause of the immediacy of the COVID-19 medical emergency," if "prisoners' grievances may not be addressed promptly," "prison administrative remedies 'operate[] as a simple dead end.'" *Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *8 (5th Cir. Apr. 22, 2020) (Higginson, J. concurring) (quoting *Ross*, 136 S.Ct. at 1859). *See also Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010) ("If a prisoner has been placed in imminent danger of serious physical injury by an act that violates his constitutional rights, administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available.").

To date, Plaintiffs have filed 16 grievances. These grievances set out Plaintiffs' serious underlying health issues, enumerated specific reasons that their daily lives in prison left them exposed to infection, classified their grievances as emergencies, and requested accommodations that would keep them safe. *See* Pff. Ex. 46-52. Yet, all 16 of Plaintiffs' grievances have been dismissed or ignored. Michael Kouri, the only Plaintiff to successfully make it to step 3 of the grievance process, was recently informed that he could expect a response by June 11—nearly *two months* after he filed his emergency grievance. *See* Second Declaration of Michael Kouri, Dated May 6, 2020 ("Kouri 2 Decl., Pff. Ex. 97") ¶ 16 (Dkt No. 60-2). Mr. Kouri's appeal was not even received by prison officials until nine days after he mailed it. *See id.* Plaintiffs are in "immedia[te]" need of a remedy,

but the Defendants have made it abundantly clear that they cannot—or will not—"promptly" address their grievances. *See Valentine*, 2020 WL 1934431, at *8 (Higginson, J., concurring). Given the "immediacy of the COVID-19 medical emergency," *see id.*, that means the Defendants' grievance process is a functional dead end for Plaintiffs' COVID-19 emergency grievances, and not an "available" remedy that must be exhausted. *See Ross*, 159 S. Ct. at 1858.

During argument at the preliminary injunction hearing, the Defendants contended that their remedies must be deemed available because the pandemic is "a continuing emergency" rather than a time-limited emergency. *See* Hr'g Tr. at 253. The Defendants' argument misses the point of the availability inquiry, which asks whether the grievance process is in fact available to remedy the plaintiffs' injuries before it is too late. Regardless of how long the pandemic persists, it is an emergency for Plaintiffs who need a remedy before *they* become infected with COVID-19 and risk serious illness. COVID-19 moves too quickly and kills too frequently to count a remedy that might (but realistically will not) appear at some point within 60 days from when a grievance is first filed as "available" under the "ordinary meaning of the word." *Ross*, 159 S. Ct. at 1858; *Fletcher*, 623 F.3d at 1173-74.

The unavailability of the Defendants' grievance process is also demonstrated by the form letter that Plaintiffs each received in response to their emergency grievances seeking ADA accommodations sufficient to keep them safe. Plaintiffs received a grievance response that simply "said 'see attachment'" and included a "typed statement from the deputy warden that stated they were doing everything they could and asked for patience." Second Declaration of Alvin Hampton, Dated April 29, 2020 ("Hampton 2 Decl., Pff. Ex.

14) ¶ 15 (Dkt. No. 46-2); *see also* Second Declaration of Jonathan Neeley, Dated April 29, 2020 ("Neeley 2 Decl., Pff. Ex. 17") ¶ 15 (Dkt. No 46-5); Second Declaration of Harold Otwell, Dated April 29, 2020 ("Otwell 2 Decl., Pff. Ex. 19") ¶ 21 (Dkt. No. 46-7); Second Declaration of Victor Williams, Dated April 29, 2020 "Williams 2 Decl., Pff. Ex. 22) ¶ 16 (Dkt. No. 46-10). During argument at the preliminary injunction hearing, the Defendants classified these responses as polite denials from which Plaintiffs should have appealed. *See* Hr'g Tr. at 254. But Plaintiffs received a form letter from upper management counseling "patience" because the prison was already doing "everything they could." If Plaintiffs are told they can do nothing but wait because the prison is powerless to meet their requests—and they are told this in a form letter that is distributed broadly and has the imprimatur of the management—the obvious interpretation is that *no* relief is available. After all, if the prison is already doing "everything" that they can, by definition they are saying that they can do no more, and the Petitioners' request for more is not available.

Whatever the general availability of the Defendants' grievance process may be, that remedial process was unavailable for Plaintiffs seeking emergency relief during the COVID-19 pandemic. Consequently, the PLRA did not require Plaintiffs to exhaust their unavailable administrative remedies before bringing this action in court.

## VII. Petitioners' Claim for Release Is Cognizable in Habeas Corpus and Is Not Procedurally Barred

In Count II of Petitioners' Class Action Complaint and Petition for Writ of Habeas Corpus, Petitioners in the medically vulnerable and disabled subclasses requested their release because their continuing confinement in prison violates federal law for the duration of the pandemic. *See* Compl. 43. The pandemic has already spread to DOC facilities as a result of Respondents' deliberate indifference to known risks of transmission. At this point,

due to the highly contagious nature of COVID-19 and the debilitating threat it poses to the most vulnerable prisoners, Respondents cannot mitigate the risks sufficient to satisfy the Eighth Amendment and ADA by any means short of release.

The State raises various procedural objections to Petitioners' habeas claim. Those objections lack merit. Petitioners' claim is cognizable in habeas because it challenges the fact or duration of confinement. For the same reason, it is not barred by the PLRA's limitation on prisoner release orders. Finally, the claim is not barred on exhaustion grounds because there were no state remedies for Petitioners' to exhaust.

**A. Plaintiff's Claim is Cognizable in Habeas Corpus.**

Petitioners' claim properly sounds in habeas because Petitioners are seeking release from confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973), holds that when a petitioner "challenges the fact or duration of his physical confinement" and "seeks immediate release or a speedier release from that confinement,"[4] *see id.*, his claim lies in habeas. Here, Petitioners are challenging the fact of their physical confinement and seeking immediate release so *Preiser* applies. Indeed, *Preiser* not only holds that Petitioners may bring their claim for release under habeas, it holds that they must. *Id.* at 500. Section 1983 is not an option. *Id.*

[4] The State's argument also relies on a conflation of the term "confinement" with "custody." *Preiser* does not state that habeas Petitioners seek a release from "custody"; it states that they seek release from "physical confinement." *Preiser*, 411 U.S. at 498. And *Preiser* confirms the intentional nature of its word choice by later repeating the same rule while substituting the phrase "physical confinement" with "physical detention." *See id.* at 500. Thus, the fact that Petitioners may still legally be under state custody even if they are released from "physical confinement" is irrelevant. To illustrate the error of the State's position, it is worth noting that petitions for writs of habeas corpus could not challenge sentences of death if habeas permitted only challenges to custody. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003) (reversing petitioner's death sentence in habeas based on ineffective assistance of counsel claim).

The State contends that Petitioners' claim must be pursued under § 1983 because it bears in some way on the conditions of Petitioners' confinement. But that is not the line drawn by *Preiser* between habeas and § 1983. Instead, *Preiser* unequivocally held that so long as the relief requested by a prisoner is release from confinement, the claim is properly brought in habeas. *See id.*

The overwhelming weight of recent federal authority recognizes that claims like Petitioners' are properly brought in habeas because Petitioners are challenging the fact of their confinement. Thus, a Sixth Circuit panel just unanimously ruled that a similar challenge should be brought in habeas: "Where a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of the confinement." *Wilson v. Williams*, No. 20-3447, slip op. (6th Cir. May 4, 2020).[5] The Court in *Wilson* refused to stay a district court order granting a preliminary injunction under habeas that required a prison to develop a plan for releasing prisoners based on the district court's findings: that the prison's "dorm-style structure rendered it unable to implement or enforce social distancing," that "infections [were] rampant among inmates and staff, and numerous inmates have passed away," that that the prison had especially high infection rates, and lacked adequate testing. *See id*. at 4. Those same facts support release in the case.

As another district court recently explained: *"*Although Respondents are correct that 'prisoners may not challenge mere conditions of confinement in habeas corpus,' '[c]hallenges to the validity of any confinement or to particulars affecting its duration are

[5] The Sixth Circuit's order in *Wilson* is attached to Petitioners' Notice of Additional Authority. *See* Dkt. No. 54-1.

the province of habeas corpus.'" *See Bent v. Barr*, No. 19-CV-06123-DMR, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020) (quoting *Nettles v. Grounds*, 830 F.3d 922, 933 (9th Cir. 2016) (en banc) (emphasis removed) and *Muhammad v. Close*, 540 U.S. 749, 750 (2004)); *accord Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *7 (E.D. Mich. Apr. 5, 2020); *Wilson v. Williams*, No. 4:20-cv-00794, —– F.Supp.3d ——, ——, 2020 WL 1940882, at *2 (N.D. Ohio Apr. 22, 2020); *Money v. Pritzker*, __ F.3d __, 2020 WL 1820660, at *21 (N.D. Ill. Apr. 10, 2020).[6]

The State's position also finds no support in the Eighth Circuit, and its attempted reliance on *Kruger v. Erickson*, 77 F.3d 1071, 1073 (8th Cir. 1996) (per curiam), and *Spencer v. Haynes*, 774 F.3d 467, 470-72 (8th Cir. 2014), is unavailing. The State's argument hinges on the assertion that *Kruger* and *Spencer* require that Petitioners' claim be classified as a § 1983 conditions-of-confinement claim. But *Kruger* and *Spencer* simply repeat the same distinction set forth in *Preiser* between habeas claims that seek release from confinement and section 1983 claims that do not—and they do so in explicit reliance on *Preiser*. *See Kruger*, 77 F.3d at 1073 (relying on *Preiser*); *Spencer*, 774 F.3d at 469-70 (same). Both cases ruled that claims challenging a prisoner's conditions of

[6] The State does cite one district court position that supports its position. *See* Def. Resp. 38 (citing *Livas v. Myers*, — F. Supp. 3d —, 2020 WL 1939583, at *8 (W.D. La. Apr. 22, 2020)). But *Livas* cited multiple decisions that reach the opposite conclusion from its own on this point, and zero decisions that reached the same conclusion. *See Livas*, 2020 WL 1939583 at *8 n.10 & n.12; *see also* Pet. Repl. At 63 n.17. The *Livas* court nonetheless concluded that habeas was not an appropriate remedy because Petitioners were not seeking release from "custody." *See id.*at *8. As discussed above, *Preiser* makes clear any request from confinement properly sounds in habeas even if a prisoner remains in custody. This Court should therefore reject the State's invitation to follow *Livas*.

confinement that did not challenge the fact of that confinement or seek release should be raised under § 1983. *See id.* Those decisions have no bearing on Petitioners' claim.

The State's cognizability argument is without merit.

**B. Petitioners Need Not Exhaust their Nonexistent State Court Remedies.**

Petitioners are not required to exhaust their state court remedies because Petitioners cannot obtain release for their Eighth Amendment claim in state court. Under Arkansas state law, postconviction challenges that seek relief from a sentence imposed by a circuit court may only be pursued under Rule 37, which governs state postconviction remedies in Arkansas. *See* Ark. R. Crim. P. 37.2. However, state postconviction relief is not available to Petitioners because they fall outside the jurisdictional time limits imposed by Rule 37.2 and because Petitioners' claims are not cognizable under Rule 37. *See, e.g.*, *Whitmore v. State*, 771 S.W.2d 266, 272 (Ark. 1989) (holding that "Rule 37 does not apply to the execution of a sentence"). Consequently, Arkansas law does not provide Petitioners with an "available state corrective process," and their federal claim is not barred by 28 U.S.C. § 2254.

**C. The PLRA Does Not Apply to Petitioners' Habeas Claim.**

The State contends that Petitioners' habeas claim is barred by the PLRA's limitations on prisoner release orders. But the PLRA provisions cited by Respondents do not apply where, as here, Petitioners seek release under habeas. The PLRA is unambiguous on this point. Its requirements for release orders apply only to "any civil action with respect to prison conditions." 18 U.S.C. § 3626(a)(3). And it expressly states that "the term 'civil action with respect to prison conditions' . . . does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id.* § 3626(g)(2). The Sixth Circuit recently addressed and rejected an identical argument in

*Wilson*. *See Wilson v. Williams*, No. 20-3447, slip op. (6th Cir. May 4, 2020) (recognizing the PLRA is inapplicable to a habeas claim contending that "no set of conditions would be constitutionally sufficient" for vulnerable prisoners in light of the COVID-19 pandemic, "given [the PLRA's] express exclusion of 'habeas corpus proceedings challenging the fact or duration of confinement in prison' from its ambit. 18 U.S.C. § 3626(g)(2)").

In sum, the State's procedural objection to Petitioners' habeas claim pose no obstacle to the resolution of petitioners' substantive claims.

## VIII. Class Certification

Plaintiffs refer the Court to the arguments regarding class certification in Plaintiffs Reply Memorandum of Law in Support of Emergency Motion for Temporary Restraining Order and Preliminary Injunction, dated May 4, 2020 ("Reply Brief"), at 80-87. Furthermore, Plaintiffs continue to maintain that the putative class includes residents of facilities within the Division of Community Corrections, a subdivision of the Arkansas Department of Corrections.

## IX. Plaintiffs' Alternative Proposed Preliminary Injunction

In addition to the proposed preliminary injunction that Plaintiffs provided to the Court in its Reply Brief, Plaintiffs respectfully propose the following alternative preliminary injunction for the Court's consideration.

Plaintiffs respectfully request that the Court appoint a special master or an expert under Federal Rule of Evidence 706 to make recommendations to the Court regarding:

1. A comprehensive plan to ensure adequate spacing of six feet or more between incarcerated people, to the maximum extent possible, so that social distancing can be accomplished;

2. The number of incarcerated people that each Arkansas Department of Corrections facility can house in order to ensure adequate spacing of six feet or more between incarcerated people, to the maximum extent possible, so that social distancing can be accomplished;

3. The identification of people in the custody of the Arkansas Department of Corrections (a) who are older than 50 years old; (b) who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19; and/or (c) who are at increased risk of contracting, becoming severely ill from, and/or dying from COVID-19 due to their disability or any medical treatment necessary to treat their disability, and who should be released from their facility or transferred to home confinement due to their age, serious underlying medical condition(s), and/or disability, in a manner that is consistent with public safety.

Plaintiffs further request that the Court order Defendants to:

1. Ensure that each incarcerated individual receives EPA-registered disinfectants that are effective against COVID-19 infection, without costs;

2. Ensure that all incarcerated individuals have access to hand sanitizer containing at least 60% alcohol in specific locations or under the appropriate supervision of Arkansas Department of Corrections staff;

3. Clean and disinfect frequently touched surfaces, including but not limited to doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, and telephones, at least three times a day with EPA-registered disinfectants that are effective against the virus that causes COVID-19, as appropriate for the surface;

4. Conduct immediate testing for anyone displaying known symptoms of COVID-19 or upon request;

5. Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 are properly quarantined in a non-punitive setting, with continued access to showers, recreation, mental health services, hot meals during appropriate times, reading materials, commissary, phone and video visitation with loved ones, communication with counsel, and personal property;

6. Prohibit Arkansas Department of Corrections employees from entering Arkansas Department of Corrections facilities if they test positive for COVID-19 and/or exhibit symptoms of having contracted COVID-19;

7. Substantially comply with CDC guidance in all other respects, unless Defendants identify a specific reason why circumstances in one or more Arkansas Department of Corrections facilities render such substantial compliance unreasonable; and

8. Permit any Court-appointed special master or expert to freely visit Arkansas Department of Corrections facilities without advanced notice; to freely access relevant records maintained by the Arkansas Department of Corrections, including medical records of persons in custody provided the person whose medical records are accessed authorizes such access and inspection; and to freely contact, call, visit, and/or interview any person in the custody of the Arkansas Department of Correction facility within 24-hour notice.

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Respectfully submitted,

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