UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

BRITTANY WADDELL, ROGER EWING, TONY SMITH, DANIEL HATTEN, DOUGLASS TRIPLETT, ERIK LEWIS, BOB HENDERSON, THOMAS HOLDER, and JAMARCUS DAVIS, individually and on behalf of a class of all others similarly situated, Plaintiffs, v. TOMMY TAYLOR, in his official capacity as Interim Commissioner of the Mississippi Department of Corrections; RON KING, in his official capacity as Superintendent of Central Mississippi Correctional Facility; and JOE ERRINGTON, in his official capacity as Superintendent of South Mississippi Correctional Institution, Defendants	**Civil Action No. 3:20-cv-340-TSL-RHW** **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION
FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Plaintiffs Brittany Waddell, Roger Ewing, Tony Smith, Daniel Hatten, Douglass Triplett, Erik Lewis, Bob Henderson, Thomas Holder, and Jamarcus Davis, on behalf of themselves and others similarly situated (Plaintiffs or Named Plaintiffs) respectfully submit this memorandum of law in support of their Motion for a Temporary Restraining Order and Preliminary Injunction (Motion). The Plaintiffs have brought this action under federal disability and constitutional law against defendants Tommy Taylor, in his official capacity as Interim Commissioner of the Mississippi Department of Corrections (MDOC); Ron King, in his official capacity as Superintendent of Central Mississippi Correctional Facility (CMCF); and Joe Errington, in his official capacity as Superintendent of South Mississippi Correctional Institution (SMCI) (collectively Defendants or MDOC). Pursuant to L. U. Civ. R. 7(b)(6)(A), Plaintiffs respectfully request oral argument on this Motion.

I. PRELIMINARY STATEMENT

Plaintiffs seek, as preliminary injunctive relief, a court order requiring that CMCF and SMCI implement COVID-19 protocols that comport with standards of care for infection control in order to protect medically vulnerable residents with disabilities and minimize preventable illness, hospitalization, and death of residents, staff, and community members.[1] As the state's two largest prisons, CMCF and SMCI are home to nearly 6,000 residents. Both are crowded facilities that operate half-staffed—at about double their operational capacities. Even in crowded double-bunked living units with 100 residents or more, there are not enough cleaning supplies.[2] Residents regularly run out of soap and cannot wash their hands.[3] Some use unlaundered

[1] The specific preliminary injunctive relief that Plaintiffs seek is listed in their Motion.
[2] *See* Ex. 3 ("Davis Decl.") at ¶ 17 (residents are to clean the common areas, but staff does not enforce this daily); Ex. 6 ("Henderson Decl.") at ¶ 12 (same); Ewing Decl. at ¶ 13 (same); Ex. 10 ("Lewis Decl.") at ¶ 25 (there are not enough cleaning supplies to clean common areas).
[3] *See* Ex. 13 ("Smith Decl.") at ¶ 34.

personal towels to try and clean common areas.[4] Individuals have reported having symptoms of coronavirus but were not isolated or tested.[5] Critically, both facilities lack a reliable means to be seen by medical staff upon onset of coronavirus symptoms.[6] MDOC has tested only 0.03% of its population for COVID-19—a few dozen individuals of the over 18,000 it holds in custody.

COVID-19 is aggressively contagious and can survive for multiple days outside of the human body.[7] The disease can cause severe lung damage, respiratory failure, and require a patient be mechanically ventilated to stay alive.[8] COVID-19 can also disable other organs, including the heart, blood vessels, kidneys, and brain.[9] Individuals with serious medical conditions are at a higher risk of severe illness from COVID-19, including those with asthma, heart conditions, immunocompromising diseases such as HIV or AIDS, diabetes, or kidney disease.[10]

MDOC's failure to implement baseline COVID-19 management measures, including those outlined by the Centers for Disease Control and Prevention (CDC) in its guidance to correctional facilities,[11] invites a statewide public safety and public health crisis. MDOC's failures may result in a "hot spot" of infection at CMCF or SMCI. This would cause a spike in coronavirus infection rates in surroundings communities due to the "revolving door" movement

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[4] *See* Lewis Decl. at ¶ 27.
[5] *See* Davis Decl. at ¶ 3, 5-10.
[6] *Id*.
[7] Tests Show New Virus Lives on Some Surfaces for Up to 3 Days, U.S. NEWS (Mar. 11, 2020) https://www.usnews.com/news/health-news/articles/2020-03-11/tests-show-new-virus-lives-on-some-surfaces-for-up-to-3-days (last visited Apr. 28, 2020).
[8] Bruce Y. Lee, *How Does the COVID-19 Coronavirus Kill? What Happens When You Get Infected*, Forbes (Mar. 21, 2020), *available at* https://www.forbes.com/sites/brucelee/2020/03/21/how-does-the-covid-19-coronavirus-kill-what-happens-when-you-get-infected/#3abaaff56146.
[9] M. Wadman, J, Couzin-Frankel, J. Kaiser, C. Matacic, *How Does Coronavirus Kill? Clinicians Trace a Ferocisou Rampage Through the Body, from Brain to Toes*, Science (Apr. 17, 2020), *available at* https://www.sciencemag.org/news/2020/04/how-does-coronavirus-kill-clinicians-trace-ferocious-rampage-through-body-brain-toes#.
[10] Ctrs. for Disease Control & Prev., *People Who Are at a Higher Risk for Severe Illness*, *supra*.
[11] CDC Guidance.

of staff between populations.[12] A coronavirus infection hot spot at CMCF or SMCI could quickly exceed area hospital capacity and impair our state's ability to provide adequate care to the sickest Mississippians over the course of the pandemic. Critically, MDOC is already unable to reliably staff even a single officer to guard units housing hundreds of residents at CMCF and SMCI. Rendering even a few staff members unavailable due to infection or quarantine could easily create a public safety crisis.

Taken together, these failures violate the federal rights of the proposed class of all people who live at CMCF and SMCI. Defendants are aware of the high risk to Plaintiffs' safety posed by COVID-19. By failing to implement baseline standards of care for infection control, they have violated the Eighth Amendment of the Constitution, which prohibits knowingly exposing imprisoned individuals to a substantial risk of serious harm to their health and safety.[13] Additionally, federal law entitles residents in the proposed Disability Subclass—whose disabilities make them more likely to succumb to rapid disease progression and death if infected—to the reasonable modifications to procedures sought in Plaintiffs' Motion.[14]

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[12] A. Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. Times (Mar. 16, 2020), *available at* https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html. *See, e.g.*, COVID-19 Cases at CCDOC (May 21, 2020), *available at* https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/ (last visited May 22, 2020) (as of 5pm on May 21, 2020, 91 detainees in the Cook County Jail were coronavirus-positive. 442 inmates are recovering after testing positive, and 7 have died from the virus. 58 correctional officers tested positive, as have 18 other Cook County Sheriff employees); Board of Correction Daily Covid-19 (May 14, 2020), *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/Board%20of%20Correction%20Daily%20Public%20Report_5_14_2020.pdf. (There were 362 currently incarcerated patients with confirmed cases of COVID-19 as of May 14, 2020, a number that does not include patients who have been released. Three have died, and over 1,300 DOC staff have tested positive); *At Louisiana Prison, 192 out of 195 Inmates Test Positive for COVID-19*, Market Watch (May 5, 2020), *available at* https://www.marketwatch.com/story/louisana-prison-unit-has-192-of-195-inmates-test-positive-for-covid-19-2020-05-05 (noting 192 of 195 incarcerated women in a Louisiana prison unit tested positive for coronavirus); N. Allison and M. Timms, *Tennessee to Test All Inmates, Prison Staff after Massive COVID-19 Outbreak at Trousdale Turner*, Tennessean (May 1, 2020), *available at* https://www.tennessean.com/story/news/politics/2020/05/01/tennessee-testing-all-inmates-prison-staff-after-multiple-outbreaks/3067388001/ ("Of the 2,725 total [COVID-19] tests given at the facility this week, at least 1,349 came back positive.").

[13] *See* U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment).

[14] *See* Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, which prohibits public entities from discriminating against qualified persons with disabilities in providing services. Similarly, Section 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794(a), prohibits recipients of federal funds from discriminating against

II. FACTUAL BACKGROUND

CMCF and SMCI are Mississippi's first and second-largest prisons. CMCF is home to approximately 3,400 women and men, and SMCI is home to approximately 2,500 men.[15] MDOC currently has more than 18,000 men and women in custody.[16] CMCF and SMCI are functionally very overcrowded: They operate at physical capacity but with about half of the staff.[17] Housing units at CMCF and SMCI are densely populated. It is not possible to stay six feet apart from others at either prison. Residents in open bay units spend most of their time in and between cramped rows of bunk beds placed about four feet apart.[18] Certain housing units at CMCF and SMCI hold concentrated chronic care populations—of elderly, ill, and disabled individuals at higher risk of hospitalization and death due to COVID-19 infection.[19]

Most of the Plaintiffs are housed in open bay units at CMCF and SMCI, which generally hold 100 or more individuals in rows of bunk beds spaced approximately four feet apart.[20] There is foot traffic on an ongoing basis between bunks, and residents are within inches or a couple of feet of each other day and night.[21] Other Plaintiffs are housed in cells designed to hold two people. In celled units, cellmates cannot maintain six feet of distance between one another because of the cells' dimensions and design, and the common areas are compressed.[22]

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qualified persons with disabilities. These laws require MDOC to make reasonable modifications to their policies, practices, and procedures to prevent unnecessary serious illness and death to qualified individuals with disabilities whose disabilities place them at substantially increased risk of serious illness and death due to COVID-19 infection.

[15] May 2020 Fact Sheet, MDOC, *available at* https://www.mdoc.ms.gov/Admin-Finance/MonthlyFacts/2020-5%20Fact%20Sheet.pdf.

[16] *Id*.

[17] Miss. Dept. of Corr., *SMCI Staffing Crisis Prompts Lockdown and Visitation Cancellation* (Jan. 25, 2019) *available at* https://www.mdoc.ms.gov/Pages/SMCI-Staffing-Crisis-Prompts-Lockdown-and-Visitation-Cancellation-.aspx (finding the staff vacancy rate at SMCI was at 48%).

[18] *See* Ex. 11 ("Triplett Decl.") at ¶ 4; Davis Decl. at ¶ 3, Smith Decl. at ¶ 11.

[19] *See* Ex. 7 ("Holder Decl.") at ¶¶ 3, 15.

[20] *See* Smith Decl. at ¶¶ 6; 10-11; Triplett Decl. at ¶ 2.

[21] *See* Smith Decl. at ¶ 11; Ex. 14 ("Waddell Decl.") at ¶ 13; Davis Decl. at ¶ 15; Triplett Decl. at ¶ 4.

[22] *See* Ex. 4 ("Ewing Decl.") at ¶ 26; Ex. 5 ("Hatten Decl.") at ¶ 9; Waddell Decl. at ¶¶ 16-18; Lewis Decl. at ¶¶ 3-4, 6.

Currently, there is no means by which a resident can access medical care during the frequent times that no guard is present to supervise entire housing units at CMCF and SMCI.[23] It is therefore not possible to immediately isolate symptomatic residents to prevent the unnecessary spread of infection.[24] MDOC claims that residents reporting respiratory symptoms are seen by medical staff within twenty-four hours.[25] In reality, the paper-and-pen sick call process at CMCF and SMCI typically takes days to result in an evaluation.[26] Sick call slips are not available at all if staff are not present;[27] they are not reliably provided when requested;[28] and staff not uncommonly run out of slips and do not get more.[29]

More importantly, allowing symptomatic patients to stay in crowded housing units even for twenty-four hours pending evaluation "can substantially increase the risk of preventable hospitalization for the patient, particularly if he or she is at-risk according to CDC guidance."[30] COVID-19-related deaths can occur mere hours after onset of symptoms,[31] particularly in medically vulnerable patients. An individual's emerging symptoms may ripen into respiratory

[23] *See* Smith Decl. at ¶ 18-21.
[24] CDC and other subject matter expert guidance make clear that as soon as an individual develops symptoms of COVID-19," authorities should ensure that he or she "wear[s] a face mask" and is "immediately placed under medical isolation[.]" CDC Guidance at p. 5 (emphasis added).
[25] COVID-19 Q&A, May 21, 2020.
[26] *See* Ewing Decl. at ¶ 27 ("Typically, if I fill out a sick call slip and submit it, it takes a few days to over a week to get seen by medical staff. We have not been told of any procedure for getting seen sooner if we have symptoms of coronavirus."); Waddell Decl. at ¶ 38 (same); Triplett Decl. at ¶ 30 (same). It took one inmate days to be seen after he submitted his sick slip. He was coughing uncontrollably, had a high fever, and his entire body ached. Davis Decl. at ¶¶ 4-5.
[27] *See* Ewing Decl. at ¶ 6; Henderson Decl. at ¶ 4.
[28] *See* Ewing Decl. at ¶ 7 (describing severe asthma attacks where he is not able to get medical help due to guard absences); Lewis Decl. at ¶¶ 15, 47; Triplett Decl. at ¶¶ 11, 13.
[29] Lewis Decl. at ¶ 46.
[30] Venters' Decl. at ¶ 33.
[31] *See, e.g.*, D. Grady, *U.S. Health Experts Say Stricter Measures Are Required to Limit Coronavirus's Spread*, N.Y. Times (March 8, 2020), *available at* https://www.nytimes.com/2020/03/08/health/coronavirus-spread-united-states.html; D. Williams, *'It's Serious:' Milwaukee Mane Died from COVID-19 Less Than 8 Hours after Hospital Admittance* (March 24, 2020), *available at* https://fox6now.com/2020/03/24/its-serious-milwaukee-man-died-from-covid-19-less-than-8-hours-after-hospital-admittance/.

failure and death in fewer than twenty-four hours.[32] Additionally, keeping a coughing patient for a day and a night in their housing unit would likely—in fewer than twenty-four hours—unnecessarily infect other residents and staff.[33]

Housing units at CMCF have been placed on quarantine with inconsistent monitoring of residents for infection. The CDC Guidance provides that prisons should "[i]mplement daily temperature checks in housing units where COVID-19 cases have been identified."[34] However, when an open bay housing unit holding over 100 women recently was placed on quarantine, temperature checks were conducted only three times during the fourteen-day quarantine period.[35]

Residents at CMCF and SMCI are often unable to practice baseline hand hygiene measures required to mitigate virus transmission. The CDC Guidance provides that prison authorities should "[p]rovide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing."[36] However, residents do not have enough soap for regular hand

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[32] J. Phua et. al., *Intensive Care Management of Coronavirus Disease 2019 (COVID-19): Challenges and Recommendations* at 508-09, Asian Critical Care Clinical Trials Group (May 2020), *available at* https://www.thelancet.com/pdfs/journals/lanres/PIIS2213-2600(20)30161-2.pdf (suggesting non-invasive ventilation and high-flow nasal cannula may reduce intubation and mortality in patients showing acute respiratory distress syndrome, or "ARDS", if implemented before ARDS worsens to become moderate or severe); *Surviving Sepsis Campaign: Guidelines on the Management of Critically Ill Adults with Coronavirus Disease 2019 (COVID-19)* at 8, Society of Critical Care Medicine (March 20, 2020), *available at* https://www.sccm.org/getattachment/SurvivingSepsisCampaign/Guidelines/COVID-19/SSC-COVID-19-Guidelines-Binder.pdf?lang=en-US ("In adults with COVID-19 receiving NIPPV or HFNC, we recommend close monitoring for worsening of respiratory status, and early intubation in a controlled setting if worsening occurs.").

[33] Ctrs. for Disease Control & Prev., *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (May 15, 2020), *supra*; *see also* Xi He et al., *Temporal Dynamics in Viral Shedding and Transmissibility of COVID-19*, Nature (April 15, 2020), *available at* https://www.nature.com/articles/s41591-020-0869-5 ("We observed the highest viral load in throat swabs at the time of symptom onset, and inferred that infectiousness peaked on or before symptom onset. We estimated that 44% (95% confidence interval, 25–69%) of secondary cases were infected during the index cases' presymptomatic stage, in settings with substantial household clustering, active case finding and quarantine outside the home."); E. Bromage, *The Risks – Know Them – Avoid Them* (May 6, 2020), *available at* https://www.erinbromage.com/post/the-risks-know-them-avoid-them (last visited May 17, 2020) (A sneeze has enough viral droplets to infect hundreds, if not thousands, of people); L. Geddes, *Does a High Viral Load or Infections Dose Make Covid-19 Worse?* New Scientist (March 27. 2020), *available at* https://www.newscientist.com/article/2238819-does-a-high-viral-load-or-infectious-dose-make-covid-19-worse/.

[34] CDC Guidance at 22.

[35] Waddell Decl. at ¶ 3-6.

[36] *Id*. at 8, 10.

washing.[37] The CDC Guidance provides that prison authorities should "[provide] [r]unning water, and hand drying machines or disposable paper towels for hand washing. . . . [and] [t]issues and no-touch trash receptacles for disposal."[38] However, there are no paper towels, hand drying machines, or facial tissues: Each resident only has a roll of toilet paper for all needs, and residents regularly run out.[39]

Residents at CMCF and SMCI are often unable clean and disinfect their common and living areas to the extent required to mitigate virus transmission. The CDC Guidance provides that frequent cleaning is key to preventing and managing COVID-19 in prisons.[40] However, the cleaning of common areas is haphazard, supplies are limited or run out, and no supplies are available to clean the living areas where people spend the most time.[41]

Defendants have also not adequately implemented basic social distancing strategies for correctional settings, and they have not shared mission-critical information with residents, including to facilitate prompt reporting of coronavirus symptoms.[42]

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[37] Ewing Decl. at ¶ 17; Hatten Decl. at ¶ 11; Smith Decl. at ¶¶ 33-35.
[38] CDC Guidance at 10.
[39] *See* Waddell Decl. at ¶ 13, 30; Smith Decl. at ¶ 11; Lewis Decl. at ¶ 3-4, 6; Davis Decl. at ¶ 26; Henderson Decl. at ¶ 25. Proper hand drying is vital in fighting the spread of coronavirus. *See* J. Hunt and J. Gammon, *Coronavirus and Handwashing: Research Shows Proper Hand Drying is also Vital* (Mar. 5, 2020), *available at* https://theconversation.com/coronavirus-and-handwashing-research-shows-proper-hand-drying-is-also-vital-132905 (citing J. Gammon and J. Hunt, *The Neglected Element of Hand Hygiene – Significance of Hand Drying, Efficiency of Different Methods and Clinical Implication: A Review*, J. of Infection Prevention (Dec. 5, 2018).
[40] CDC Guidance at 9.
[41] Davis Decl. at ¶ 17 (residents are to clean the common areas, but staff does not enforce this daily); Henderson Decl. at ¶ 12 (same); Ewing Decl. at ¶ 13 (residents are assigned to clear common areas, but often do not); Hatten Decl. at ¶ 9 ("Imprisoned people have a couple of times sprayed chemicals in the common areas and in the cells. We were told a couple of weeks ago this would not be happening anymore because the prison had run out of the disinfectant.").
[42] *See* Ewing Decl. at ¶ 26; Smith Decl. at ¶ 41; Lewis Decl. at ¶¶ 37-39; Ex. 8 ("Guzman Decl."). at ¶¶ 4-5. For example, the CDC Guidance calls for authorities to "consider suspending co-pays for incarcerated/detained persons asking medical evaluation for respiratory symptoms." CDC Guidance at 9. At CMCF and SMCI, residents have not been informed of any waiver of the six-dollar sick call fee for those seeking medical care for COVID-19 symptoms, which residents report will prolong the period that patients with COVID-19 remain symptomatic in crowded housing units. *See* Triplett Decl. at ¶ 31 (Residents have not been informed of the fee waiver, and people avoid medical visits because of the cost); Smith Decl. at ¶5 (same).

MDOC's failure to adequately implement minimally necessary measures is unsurprising. Prior to the COVID-19 pandemic, Mississippi's prisons were in a state of crisis—plagued by violence and death rates that far exceed the national average.[43] Audits at multiple MDOC facilities, including SMCI,[44] have found that chronic lack of staff prevents execution of most basic operations required to run prisons. Prisoner counts, for example, are performed incorrectly and inconsistently.[45] At CMCF, this is also true.[46] Because lack of staffing compromises the ability to operate a prison safely, two former MDOC Commissioners have called the systems' current staff-to-resident ratio "unconscionable" and unsafe,[47] and a "crisis."[48]

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[43] *See, e.g.*, R. Rojas, *After a Dozen Deaths, Justice Dept. Investigates Mississippi Prisons*, N.Y. TIMES (Feb. 5, 2020), *available at* https://www.nytimes.com/2020/02/05/us/parchman-mississippi-prisons.html (providing that multiple Mississippi prisons are under federal investigation by the United States Department of Justice); *Mississippi Prison System Faces Investigation, Lawsuits After Rash of Inmate Deaths*, NPR (Apr. 18, 2020), *available at* https://www.npr.org/2020/04/18/837855215/mississippi-prison-system-faces-investigation-lawsuits-after-rash-of-inmate-death; The number of deaths in state prison system has steadily increased from the mid-2010s, with 85 deaths in FY 2018, 80 deaths in FY 2019, and 30 deaths in 2020 as of April of this year. The national average death rate hovers just under 9 deaths per 1000 people. *See U.S. Death Rate 1950-2020*, Macro Trends, *available at* https://www.macrotrends.net/countries/USA/united-states/death-rate (last visited May 20, 2020).

[44] At SMCI, staff vacancy rate was almost 50%, prompting the facility to go on lockdown almost continuously since January 2019. Miss. Dept. of Corr., *SMCI Staffing Crisis Prompts Lockdown and Visitation Cancellation* (Jan. 25, 2019), https://www.mdoc.ms.gov/Pages/SMCI-Staffing-Crisis-Prompts-Lockdown-and-Visitation-Cancellation-.aspx; J. Mitchell, *Ticking Time Bomb: Violence Surges Among Guard Shortage, Lockdown at Mississippi Prison*, USA Today (Aug. 19, 2019), https://www.usatoday.com/story/news/investigations/2019/08/19/prison-violencesurges-mississippi-prison-amid-guard-shortage/205455400.

[45] *See* Letter from Mississippi community leaders to Eric S. Dreiband, Assistant Attorney General, Civil Rights Division, U.S. Dep't of Justice, *Re: Request for Immediate CRIPA Investigation into Conditions of Confinement in the Mississippi Department of Corrections*, at 1 (Jan. 7, 2020), *available at* https://int.nyt.com/data/documenthelper/6649-request-for-civil-rights-inves/30a322c66c43de9b7833/optimized/full.pdf ("CRIPA Letter"); *see also* Joseph Neff & Alysia Santo, *Corporate Confession: Gangs Ran This Private Prison*, The Marshall Project (Jun. 26, 2019), *available at* https://www.themarshallproject.org/2019/06/26/corporate-confession-gangs-ran-this-private-p; *Killings in Wilkinson County Correctional Facility in 2017 and 2018*, The Marshall Project (Jun. 25, 2019), *available at* https://www.themarshallproject.org/documents/6167953-Wilkinson-Killings-2017-to-20; J. Mitchell, *Inside the Prison Where Inmates Set Each Other On Fire and Gangs Have More Power Than Guards*, ProPublica (Aug.19, 2019), *available at* https://www.propublica.org/article/leakesville-south-mississippi-correctionalinstitution-prison-gangs.

[46] *See* Smith Decl. at ¶ 21 (noting prisoner counts sometimes take place only once every three days).

[47] See J. Mitchell, Inside the Prison Where Inmates Set Each Other On Fire and Gangs Have More Power Than *Guards*, ProPublica (Aug.19, 2019), *available at* https://www.propublica.org/article/leakesville-south-mississippi-correctionalinstitution-prison-gangs.

[48] Miss. Dept. of Corr., *SMCI Staffing Crisis Prompts Lockdown and Visitation Cancellation* (Jan. 25, 2019), *available at* https://www.mdoc.ms.gov/Pages/SMCI-Staffing-Crisis-Prompts-Lockdown-and-Visitation-Cancellation-.aspx.

Mississippi, which has the second-highest rate incarceration in the America,[49] has been operating a prison system in crisis mode—long before the onset of the pandemic. CMCF and SMCI are functionally overcrowded, operating at double their staffed capacities. As of June 2019, CMCF's staffing ratio was 16 residents per correctional officer, and SMCI's was 21 residents per correctional officer.[50] These rations are far worse than the ratios in Alabama's prison system. The United States Department of Justice found that Alabama's staffing ratio of 9.9 residents per correctional officer was "egregious" and "dangerous," and that it contributed to likely violations of the Eighth Amendment rights of Alabama prisoners even before the COVID-19 pandemic.[51] Since February 2020, MDOC has been under federal investigation for failure to adequately protect residents from harm at CMCF, SMCI, and two other prisons.[52]

MDOC is aware of the substantial risk of serious harm to residents posed by the COVID-19 pandemic.[53] MDOC is aware of the importance of implementing measures required to manage coronavirus, including with regards to disinfection, hygiene, prompt medical care access, testing,

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[49] *See Latest Data Shows Mississippi Now Ranked as Second Highest Imprisoner in the Nation*, FWD (March 2, 2020), *available at* https://www.fwd.us/news/latest-data-shows-mississippi-now-ranked-as-second-highest-imprisoner-in-the-nation/.

[50] *See* Miss. Dept. of Corr., *MDOC Annual Report: Fiscal Year 2019* at 16, *available at* https://www.mdoc.ms.gov/Admin-Finance/Documents/2019%20Annual%20Report.pdf (last accessed May 23, 2020). MDOC pays the lowest salaries for correctional staff of any state in the country. *See* Kendall Downing, *Low Pay Contributes to Staffing Problems at Mississippi Prisons*, WLOX (Aug. 22, 2019), *available at* https://www.wlox.com/2019/08/23/low-pay-contributes-staffing-problems-mississippi-prisons/; *see also, e.g.*, U.S. Bureau of Labor Statistics, *Occupational Employment and Wages* (May 2018), https://www.bls.gov/oes/2018/may/oes_nat.htm. From 2014 to 2019, state spending on its correctional facilities has declined by over $180 million. J. Mitchell, *We Reported on Troubled Prisons. Now, Officials and a Gang Have a Shared Goal: Reform*, ProPublica (Sept.6, 2019), *available at* https://www.propublica.org/article/we-reported-on-troubled-prisons-now-officials-anda-gang-have-a-shared-goal-reform.

[51] *See* Investigation of Alabama's State Prisons for Men 9–10, U.S. Dep't of Justice (Apr. 2, 2019), *available at* https://www.justice.gov/crt/case-document/file/1149971/download; J. Mitchell, *Violent, Ongoing Hell: Mississippi Prisons May Be Worse than Alabama's. Will DOJ Step in?*, CLARION LEDGER (Aug. 21, 2019), *available at* https://www.clarionledger.com/story/news/2019/08/21/mississippi-prisons-conditions-worse-than-alabama-doj-violence-cruel-unusual-punishment/2055478001/.

[52] *Justice Department Announces Investigation into Conditions in Four Mississippi Prisons*, U.S. Dep't of Justice (Feb. 5, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-announces-investigation-conditions-four-mississippi-prisons.

[53] *See* Miss. Dept. of Corr., *COVID-19 Information and Updates*, *available at* https://www.mdoc.ms.gov/Pages/COVID-19-Information-and-Updates.aspx (last visited May 22, 2020).

isolation, and quarantine.[54] MDOC's failure to adequately implement basic infection prevention measures has placed residents and staff at CMCF and SMCI, particularly those who are medically vulnerable due to disability, in unjustifiable and unnecessary peril.

III. LEGAL STANDARD

Courts should grant preliminary injunctive relief where the movant can show (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (quoting *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998)). The same standard applies to both a temporary restraining order and a preliminary injunction. *Clark v. Pritchard*, 812 F.2d 991, 993 (5th Cir. 1987). Courts should compel certain actions through granting mandatory injunctive relief where the movant shows a clear entitlement to the relief under the facts and the law. *Justin Indus., Inc. v. Choctaw Secur., Ltd. P'ship*, 920 F.2d 262, 264 (5th Cir. 1990).

IV. LEGAL ARGUMENT

Plaintiffs satisfy the standard for preliminary injunctive relief, and it should be granted.[55]

A. There is a Substantial Threat That Plaintiffs Will Suffer Irreparable Injury, Including Preventable Death, if MDOC is Not Required to Implement COVID-19 Protocols Consistent with Established Standards of Care for Infection Control and CDC Guidance.

In the absence of preliminary injunctive relief, there is a substantial threat that Plaintiffs will suffer irreparable harm in the form of unnecessary infections, hospitalizations, serious illnesses, and deaths. To grant preliminary injunctive relief, "[t]here must be more than a 'mere

[54] *See* Ex. 15, Miss. Dept. of Corr., *COVID-19 Questions and Answers* (updated May 21, 2020) (citing practices necessary to "ensure the well-being of staff and inmates") ("COVID-19 Q&A").
[55] MDOC, CMCF, and SMCI are public entities under Title II of the ADA and receive federal financial assistance within the meaning of the RA.

possibility' that the [real or immediate danger] will occur." *Cohen v. Coahoma County, Miss.*, 805 F. Supp. 398, 405 (N.D. Miss. 1992). "Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). However, a plaintiff need not show that the harm has *already* occurred. *See Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004). Indeed, "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993). Irreparable harm includes "a heightened risk of dying or suffering from serious illness and long-term health consequences," "bodily injury and loss of life." *City of Los Angeles v. Lyons*, 461 U.S. 95, 98 (1983); *Vazquez Barrera v. Wolf*, 4:20-CV-1241, 2020 WL 1904497, at *6 (S.D. Tex. Apr. 17, 2020) (granting motion for Temporary Restraining Order as a preliminary injunction to release plaintiff from detention due to substantial risk of irreparable harm from COVID-19); *Unknown Parties v. Johnson*, No. CV-15-00250-TUC (DCB), 2016 WL 8188563, at *15 (D. Ariz. No. 18, 2016), *aff'd sub nom Doe v. Kelly*, 878 F.3d 710 (9th Cir. 2017) (finding irreparable harm where evidence demonstrated "medical risks associated with . . . being exposed to communicable diseases").

Residents at CMFC and SMCI face a substantial threat of irreparable harm: MDOC's failure to implement COVID-19 protocols consistent with established standards of care for infection control has created a substantial risk that residents—particularly those who are more susceptible to rapid disease progression due to disability—will be unnecessarily infected, hospitalized, and die. COVID-19 can disable and kill with alarming speed.[56] In healthy

[56] Gonsalves Decl. at ¶ 8. S. Radcliffe, *Here's What Happens to the Body After Contracting the New Coronavirus*, Healthline (April 30, 2020), *available at* https://www.healthline.com/health-news/heres-what-happens-to-the-body-after-contracting-the-coronavirus#COVID-19-affects-lungs ("One recent study of 138 people hospitalized for

individuals who develop even initially mild symptoms, the symptoms can escalate into respiratory failure requiring hospitalization in less than a week.[57] Absent swift identification and clinical care of individuals whose symptoms swiftly ripen into respiratory failure, the infected individual's risk of coronavirus-related death or serious, prolonged illness and hospitalization dramatically increases.[58] In Milwaukee, a man died less than eight hours after being admitted to the hospital for symptoms he began experiencing that morning.[59] In Washington, nursing home caretakers witnessed infected individuals progress "from no symptoms to death in just a matter of a few hours."[60]

The already narrow window of opportunity to try and prevent death due to coronavirus-induced respiratory failure is much narrower for residents who have "[h]eart disease, hypertension, prior stroke, diabetes, chronic lung disease, and chronic kidney disease," which "all [have] been associated with increased illness severity and adverse outcomes."[61] Many such

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COVID-19 found that on average, people started having difficulty breathing 5 days after showing symptoms. ARDS ["acute respiratory distress syndrome"] developed on average 8 days after symptoms.")

[57] Gonsalves Dec. ¶ 8.; *see also* D. Wang, B. Hu, C. Hu, *Clinical Characteristics of 138 Hospitalized Patients with 2019 Novel Coronavirus-Infected Pneumonia in Wuhan, China*, JAMA (February 7, 2020), *available at* https://jamanetwork.com/journals/jama/fullarticle/2761044).

[58] *See, e.g.,* J. Phua et. al., *Intensive Care Management of Coronavirus Disease 2019 (COVID-19): Challenges and Recommendations* at 508-09, Asian Critical Care Clinical Trials Group (May 2020), *available at* https://www.thelancet.com/pdfs/journals/lanres/PIIS2213-2600(20)30161-2.pdf (suggesting non-invasive ventilation and high-flow nasal cannula may reduce intubation and mortality in patients showing acute respiratory distress syndrome, or "ARDS", if implemented before ARDS worsens to become moderate or severe); *Surviving Sepsis Campaign: Guidelines on the Management of Critically Ill Adults with Coronavirus Disease 2019 (COVID-19)* at 8, Society of Critical Care Medicine (March 20, 2020), *available at* https://www.sccm.org/getattachment/SurvivingSepsisCampaign/Guidelines/COVID-19/SSC-COVID-19-Guidelines-Binder.pdf?lang=en-US ("In adults with COVID-19 receiving NIPPV or HFNC, we recommend close monitoring for worsening of respiratory status, and early intubation in a controlled setting if worsening occurs.").

[59] *See* D. Williams, *'It's Serious:' Milwaukee Mane Died from COVID-19 Less Than 8 Hours after Hospital Admittance* (March 24, 2020), *available at* https://fox6now.com/2020/03/24/its-serious-milwaukee-man-died-from-covid-19-less-than-8-hours-after-hospital-admittance/.

[60] *See* D. Grady, *U.S. Health Experts Say Stricter Measures Are Required to Limit Coronavirus's Spread*, N.Y. Times (March 8, 2020), *available at* https://www.nytimes.com/2020/03/08/health/coronavirus-spread-united-states.html.

[61] Ctrs. for Disease Control & Prev., *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (May 15, 2020), *supra*. *See also, e.g.*, Ewing Decl. at ¶ 7-8 (describing kidney disease); Holder Decl. at ¶ 5 (describing diabetes).

residents are members of the proposed Disability Subclass,[62] and are more likely to succumb to rapid disease progression and death due to infection.

Defendants are frequently unable to adequately and promptly respond to medical emergencies at CMCF and SMCI.[63] There is often no staff member available to monitor residents for symptoms or receive reports of a residents' symptoms. Even when the paper-and-pen sick call slip process is successfully initiated, it can take up to a week to be seen by medical staff.[64] The sick call process, however, is frequently impossible to initiate. Tower officers are supposed to provide blank sick call forms for residents upon request. Residents are supposed to then fill them out by hand and submit them. Tower officers, however, are not reliably present or responsive.[65] Tower officers sometimes run out of slips and do not get more, particularly during cold and flu season.[66]

These sick call failures are systemic and dangerous, including because infected residents are most likely to infect others when they first begin to show symptoms, if not before.[67] A cough

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[62] Gonsalves Decl. at ¶ 42; Radliffe, *supra* ("Older people and those with chronic medical conditions appear to have a higher risk for developing severe illness."); W. Alhazzani et. al., *Surviving Sepsis Campaign: Guidelines on the Management of Critically Ill Adults with Coronavirus Disease 2019 (COVID-19)*, Waleed Alhazzani et. al., Surviving Sepsis Campaign: Guidelines on the Management of Critically Ill Adults with Coronavirus Disease 2019 (COVID-19), Springer (March 28, 2020), *available at* https://link.springer.com/article/10.1007/s00134-020-06022-5 ("Risk factors associated with respiratory failure requiring mechanical ventilation are not clearly described in published reports, although from the limited available data, risk factors associated with a critical illness/ICU admission included older age (> 60 years), male gender, and the presence of underlying comorbidities such as diabetes, malignancy, and immunocompromised state").

[63] *See* Waddell Decl. at ¶ 22 (describing the lack of medical response due to unavailable officers when a woman's water broke at CMFC); Lewis Decl. at ¶ 47 (residents at SMCI witnessed another inmate die of a stroke because officials took 40 minutes to respond); Triplett Decl. at ¶ 13 (no staff was present to get medical help when an inmate was experiencing heart attack symptoms).

[64] *See* Ewing Decl. at ¶ 27 ("Typically, if I fill out a sick call slip and submit it, it takes a few days to over a week to get seen by medical staff. We have not been told of any procedure for getting seen sooner if we have symptoms of coronavirus."); Waddell ¶ 38; Triplett Decl. at ¶ 30; *see also* Henderson Decl. at ¶ 35 (noting that inmates have had to wait until pill call to submit a sick call slip because the cafeteria where the submission box is, is closed); Davis Decl. at ¶ 29 (residents have not been informed of an expedited process to receive medical attention when exhibiting respiratory symptoms); Holder Decl. at ¶ 19 (same).

[65] Henderson Decl. at ¶ 35.

[66] Lewis Decl. at ¶ 46 (noting sick call slips often run out and noting that no slips were available on May 7, 2020).

[67] Viral shedding occurs when a virus replicates inside the body and is released into the environment. This process peaks on or before symptom onset. *See, e.g.,* Xi He et al., *Temporal Dynamics in Viral Shedding and*

can release about 3,000 viral droplets at a speed of 50mph; a single sneeze releases 30,000 droplets that can travel up to 200mph.[68] A few hundreds SARS-CoV2 infectious viral particles can infect another individual.[69] Viral droplets can easily travel across a room in a few seconds.[70] Because symptomatic infected individuals frequently experience severe coughing throughout their infection, MDOC's practice of leaving symptomatic patients in a crowded area for even a few hours poses a substantial risk of serious harm to the patient and co-residents and staff.[71]

In summary, the sick call process cannot be reliably initiated, and the delay to evaluation and isolation by medical staff is generally days-long.[72] This creates (1) a substantial risk that symptomatic patients will be hospitalized unnecessarily and die; and (2) a substantial risk that staff and residents housed with symptomatic patients will become infected, also unnecessarily.[73]

At CMCF and SMCI, basic infection prevention measures relating to cleaning and disinfection of housing units have yet to be sufficiently implemented. To reduce the high risk of a COVID-19 outbreak in a prison, facilities must implement "intensified cleaning and disinfecting procedures."[74] At CMCF and SMCI, the common areas of housing units—which comprise one-quarter to one-third of the unit—are cleaned about once a day; higher-traffic living

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Transmissibility of COVID-19, Nature (April 15, 2020), *available at* https://www.nature.com/articles/s41591-020-0869-5 ("We observed the highest viral load in throat swabs at the time of symptom onset, and inferred that infectiousness peaked on or before symptom onset. We estimated that 44% (95% confidence interval, 25–69%) of secondary cases were infected during the index cases' presymptomatic stage, in settings with substantial household clustering, active case finding and quarantine outside the home."); *see also* Gonsalves Decl. at ¶ 8.

[68] E. Bromage, *The Risks – Know Them – Avoid Them* (May 6, 2020), *available at* https://www.erinbromage.com/post/the-risks-know-them-avoid-them (last visited May 17, 2020).

[69] *See, e.g.,* L. Geddes, *Does a High Viral Load or Infections Dose Make Covid-19 Worse?*, New Scientist (March 27. 2020), *available at* https://www.newscientist.com/article/2238819-does-a-high-viral-load-or-infectious-dose-make-covid-19-worse/.

[70] *Id*.

[71] Ctrs. for Disease Control & Prev., *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)* (May 15, 2020), *supra*.

[72] *See* Davis Decl. at ¶ 29 (residents have not been informed of an expedited medical visit procedure for inmates exhibiting respiratory symptoms); Holder Decl. at ¶ 19 (same); Smith Decl. at ¶ 48 (same); *see also* Gonsalves Dec. ¶ 8.

[73] Venters' Decl. at ¶¶ 33-34.

[74] CDC Guidance at 9.

areas are generally not cleaned at all.[75] Residents assigned to clean common areas often do not do so, and "[t]here is no staff supervision to ensure the people assigned to clear are doing the cleaning."[76] One named Plaintiff—a 68-year old man in a wheelchair who cannot walk without falling—attempts to clean common areas at night because those assigned do not, but not enough chemicals are provided to do the job.[77] Another Plaintiff reports, "There are not enough staff to ensure that chemicals that do make it to the zone are used to clean the zone," and supplies are often diverted and sold.[78]

The risk of irreparable harm to residents attributable to inadequate staff being available to supervise implementation of basic infection prevention practices is substantial.[79] Defendants' chronic staffing shortage has the natural consequence of preventing the increased supervision required to ensure intensified cleaning and effective distribution of cleaning chemicals. MDOC's failures pose a substantial risk to residents of unnecessary COVID-19 infection. To members of the proposed Disability Subclass, MDOC's failures pose a substantial risk that unnecessary infections will lead to hospitalization and death.

The threat of contracting COVID-19 in prison is substantial. The crowded quarters of prisons make them more prone to infection outbreak.[80] As one court in the Fifth Circuit observed, the risk of coronavirus-caused harm to individuals in inadequately responsive facilities

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[75] Smith Decl. at ¶ 30; Davis Decl. at ¶ 17 ("We are not being provided with chemicals daily to clean common areas.").

[76] Ewing Decl. at ¶ 13; *see* Henderson Decl. at ¶ 12 (noting staff do not enforce daily common room cleaning); Davis Decl. at ¶ 17 (noting staff do not come by every day to see if residents are cleaning); Lewis Decl. at ¶ 26 (noting cleaning assignments are not enforced by staff).

[77] Ewing Decl. at ¶ 13.

[78] Davis Decl. at ¶ 18; *see* Waddell Decl. at ¶ 27.

[79] Venters' Decl. at ¶¶ 50-54.

[80] Gonsalves Decl. at ¶¶ 5-7 ("Prisons have even greater risk of infectious spread than other enclosed environments because of conditions of crowding, the proportion of vulnerable people detained, and often scant medical care resources."); Dylan Matthews, *America's Covid-19 Hot Spots Shed a Light on our Moral Failures*, Vox (May 1, 2020), https://www.vox.com/future-perfect/2020/5/1/21239396/covid-19-meatpacking-prison-jail-moral; German Lopez, *Why US Jails and Prisons Became Coronavirus Epicenters*, Vox (April 22, 2020), https://www.vox.com/2020/4/22/21228146/coronavirus-pandemic-jails-prisons-epicenters.

is "both imminent and irreparable." *Vazquez Barrera*, 2020 WL 1904497, at *6. That risk is even higher for individuals with "particularly medical vulnerabilities," such as the Plaintiffs in the Disability Subclass. *Id*. (referencing CDC guidance and information). Many of the risk-enhancing conditions described in *Vazquez Barrera* are identical to those in CMFC and SMCI: In each case, social distancing is impossible, residents sleep in close quarters in rooms of 90 to 100 individuals, residents share bathrooms and common spaces, and none of the facilities provide residents with hand sanitizer, tissues, or adequate soap and paper towels.[81]

The physical devastation coronavirus causes qualifies as "irreparable injury." *Russell v. Harris County, Tex.*, CV H-19-226, 2020 WL 1866835, at *11 (S.D. Tex. Apr. 14, 2020).

Plaintiffs have satisfied this element of the preliminary injunctive relief standard. *See Currier*, 760 F.3d at 452.

B. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

Plaintiffs' proposed class is composed of residents who are now or will be in the future incarcerated at CMCF or SMCI during the duration of the COVID-19 pandemic. Plaintiffs' proposed Disability Subclass is composed of residents who suffer from a disability that substantially limits one or more of their major life activities and 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.[82]

[81] *Compare Vazquez Barrera*, 2020 WL 1904497, at *2 *with* Waddell Decl. at ¶ 13, 30; Smith Decl. at ¶ 11; Lewis Decl. at ¶ 3-4, 6; Davis Decl. at ¶ 26; Henderson Decl. at ¶ 25.
[82] *See* Gonsalves Decl. at ¶ 45.

1. Class Claim: MDOC is Aware of the Substantial Risk of Serious Harm Posed by its Deficient COVID-19 Response, Including of Infection, Hospitalization, and Death.

Defendants are aware of the high risk of serious harm that their inactions entail, yet they have knowingly implemented deficient COVID-19 protocols that pose a substantial risk to Plaintiffs of infection, hospitalization, and death, in violation of the Eighth Amendment of the Constitution.

Corrections officials have a constitutional obligation to protect incarcerated people from a substantial risk of serious harm; they may be held liable under the Eighth Amendment if officials know that residents face a substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Under the Eighth Amendment, prison officials "must provide humane conditions of confinement; . . . must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates[.]" *Id.* at 832 (internal quotation marks omitted).

This obligation includes the requirement to address prisoners' serious medical needs, such as reasonable protection from infectious diseases like COVID-19. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Brown v. Plata*, 563 U.S. 493, 531-32 (2011); *Hinojosa v. Livingston*, 807 F.3d 657, 666 (5th Cir. 2015) (plaintiff stated an Eighth Amendment claim when Defendants subjected him to conditions "posing a substantial risk of serious harm" to his health).

Prison officials violate the affirmative obligation to protect inmates by showing "deliberate indifference" to a substantial risk of serious harm. *Farmer*, 511 U.S. at 828. Deliberate indifference exists when corrections officials "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," even when "the complaining inmate shows no serious current symptoms." *Helling*, 509 U.S. at 33, 35 (holding that the Eighth Amendment forbids deliberate indifference to conditions that "pose an

unreasonable risk of serious damage to . . . future health" and noting that "deliberate[] indifferen[ce] to the exposure of inmates to a serious communicable disease" could violate the Eighth Amendment even if a prisoner shows no serious symptoms); *see also Ball v. LeBlanc*, 792 F.3d 584, 594 (5th Cir. 2015) (court "may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious") (citing *Farmer*, 511 U.S. at 842); *Hinojosa*, 807 F.3d at 667 ("open and obvious nature" of dangerous prison conditions supported an inference of deliberate indifference); *Johnson v. Epps*, 499 F. App'x 583, 589-92 (5th Cir. 2012) (allegations that prisoner was exposed to "serious, communicable diseases" and that prison officials were aware of the risk and did nothing to prevent it were sufficient to state a claim for violation of Eighth Amendment rights); *Gates v. Collier*, 501 F.2d 1291, 1300-03 (5th Cir. 1974) (affirming district court's holding that allowing "[s]ome inmates with serious contagious diseases . . . to mingle with the general prison population," alongside maintaining a host of other unsanitary and inhumane conditions, "constitute[d] cruel and unusual punishment") (cited with approval in *Rhodes v. Chapman*, 452 U.S. 337, 352 n.17 (1981)).

In this case, COVID-19 poses a substantial risk of serious harm to residents.[83] COVID-19 is extremely infectious, and sufficient infection prevention measures are required to prevent an outbreak.[84] Infection of individual residents—particularly those in the Disability Subclass who are at higher risk of hospitalization and death due to infection—poses a substantial risk of harm to that individual's health and safety.[85] An outbreaks within a prison poses a substantial risk of additional serious harms. An outbreak could overwhelm our hospital system and prevent

[83] Venters' Decl. at ¶ 33.
[84] Gonsalves Decl. at ¶¶ 14-18 (describing highly infectious nature of COVID-19 and emphasizing need for protective measures); Venters' Decl. at ¶ 34 ("Waiting even 24 hours between reporting of symptoms and isolation can substantially increase the risk of unnecessarily infecting scores of individuals housed with the symptomatic person.").
[85] Venters' Decl. at ¶ 33 (explaining COVID-19 can rapidly result in "irreversible deterioration of health" and "organ failure").

residents, as well as staff and community members, from obtaining timely treatment, which increases the risk to residents of serious illness and death.[86]

A court need not wait for a confirmed outbreak of COVID-19 infections at CMCF or SMCI to find that a substantial risk of serious harm exists. *Helling*, 509 U.S. at 33-34 ("That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."); *Gates v. Cook*, 376 F.3d at 333 ("It is also important to note that [an] inmate need not show that death or serious illness has [already] occurred."); *see also Farmer*, 511 U.S. at 833 ("[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.").

Defendants know of the risk of harm to residents due to COVID-19. MDOC purports to have responded appropriately, including with regards to medical care access, disinfection and hygiene, social distancing, communication, testing, isolation and quarantine.[87] Yet Defendants have failed to comply with the very policies it claims to have implemented to "ensure staff and residents' safety."[88]

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[86] Venters' Decl. at ¶¶ 54-55.

[87] COVID-19 Q&A, May 21, 2020.

[88] For example, MDOC claims to have installed hand sanitizer stations for staff and residents' use, yet the Named Plaintiffs are housed in units across both facilities and are not being provided with hand sanitizer, nor have hand sanitizer stations been installed for their use. *Compare* COVID-19 Q&A ("Hand sanitizer stations are installed in strategic locations for both staff and inmates' use.") *with* Ewing Decl. at ¶ 23 (no hand sanitizer provided); Hatten Decl. at ¶ 12 (same); Waddell Decl. at ¶ 32 (same); Henderson Decl. at ¶ 25(same); Lewis Decl. at ¶ 36 (same); Triplett Decl. at ¶ 19 (same). MDOC claims a "face-to-face triage is completed with 24 hours of submission of the sick call request," yet residents wait multiple days before their slips are acknowledged. *Compare* COVID-19 Q&A *with* Ewing Decl. at ¶ 27 (it generally takes a few days to over a week to be seen by medical staff after submitting a sick call slip); Waddell Decl. at ¶ 38 (same); Triplett Decl. at ¶ 30 (same). Sick call slip processing usually takes multiple days to over a week, and many residents have not been informed of any expedited procedure for COVID-19 symptoms. *Id.*; Smith Decl. at ¶ 48. Oftentimes the there are no sick call slips available at all, especially during cold and flu season, making it impossible for residents to get medical attention. Lewis Decl. at ¶ 46 (noting no sick slips were available on May 7, 2020). The Defendants purports that "[q]uarantined inmates are monitored daily for symptoms of the coronavirus" and "receive enhanced screening." COVID-19 Q&A, May 21, 2020. However, when

Defendants' knowing failure to adequately implement baseline infection prevention protocols to address the substantial risk of harm to residents constitutes deliberate indifference. *See Helling*, 509 U.S. at 33, 35; *Johnson v. Epps*, 499 F. App'x at 589-92. As noted by the Supreme Court in *Helling*, ignoring conditions such as these which are "sure or very likely" to cause serious illness and suffering violates the Eight Amendment. Defendants have, among other failures, not provided prompt medical screenings for infectious disease, not provide sufficient soap, not provided adequate cleaning supplies, and not ensured cleaning is done.[89] MDOC has also failed to comply with CDC guidance, despite "recommending staff and inmates follow the health guidelines for the Centers for Disease Control (CDC) and Prevention."[90]

For example, the CDC and other public health agencies have universally prescribed social distancing and rigorous hygiene as the only ways to meaningfully mitigate the spread of this virus.[91] At CMCF and SMCI, however, cleaning is haphazard and has not been increased to

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an entire zone at CMFC was placed on quarantine for two weeks due to exposure, CMFC took residents' temperatures approximately three times, and no intensified cleaning or disinfecting measures were enacted. *See* Waddell Decl. at ¶ 3-6. MDOC also claims that its testing policy for residents is "the same for the general public." COVID-19 Q&A, May 21, 2020. However, individuals with symptoms of coughing and fever at MDOC who would have qualified as high priority or priority for testing in the community were seen and not tested for coronavirus by MDOC staff. Miss. Dept. Health, *Updated MSDH and CDC Community Based Testing Site Guidance* (Apr. 30, 2020) *available at* https://msdh.ms.gov/msdhsite/_static/resources/8502.pdf; Davis Decl. at ¶¶ 5-10; Ex. 12 ("Ryan Decl.") at ¶¶ (3-9); Ex. 9 ("Guyton Decl.") at ¶¶ 4-15, 19.

[89] *See* Gonsalves Decl., n. 68-69 (describing deficiencies and citing inmate declarations).

[90] COVID-19 Q&A, May 21, 2020.

[91] *See* Gonsalves Decl. at ¶¶ 43-44 (describing guidance of CDC). To properly practice social distancing, every person should remain at a distance of at least six feet from every other person. Ctrs. for Disease Control & Prev., *Coronavirus Disease 2019 (COVID-19): Social Distancing, Quarantine, and Isolation*, *available at* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html. Rigorous hygiene should include regular and thorough hand washing with soap and water, the use of alcohol-based hand sanitizer, proper sneeze and cough etiquette, and frequent cleaning of all surfaces. Ctrs. for Disease Control & Prev., *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself*, *available at* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Apr. 28, 2020). The CDC has issued guidance that people should strictly limit their contact with others and avoid gathering in groups of more than ten. Ctrs. for Disease Control & Prev., *Coronavirus Disease 2019 (COVID-19): Resources for Large Events and Mass Gatherings*, *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html (last visited Apr.28, 2020). *See* Gonsalves Decl. at ¶¶ 43-44 (describing guidance of CDC).

account for COVID-19's highly contagious nature.[92] The amount of soap given to inmates is insufficient, and residents are forced to choose between cleaning their clothes, their hands, their bodies and hair, or their personal space.[93] What little soap does exist irritates inmates' skin to the point of deterring hand washing.[94] Staff refuse to provide additional soap when inmates run out.[95] Social distancing is "physically impossible," and inmates have not been instructed to remain six feet apart or implement even the most basic distancing measures, such as sleeping "head to foot to increase the distance between them."[96] They crowd together in the common room, by their racks, during pill call, and during meal times.[97]

By failing to provide adequate hygiene supplies and chemicals for rudimentary cleaning, and by forbidding at least some inmates to wear protective masks, MDOC has also effectively prevented inmates from caring for their own health. This alone violates the Eight Amendment. *See Shepherd v. Dallas County*, 591 F.3d 445, 453–54 (5th Cir. 2009) ("When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.") (citations omitted).

Mississippians have made overwhelming sacrifices to protect the state's hospital infrastructure from being overwhelmed by COVID-19 cases. MDOC is aware of the importance of implementing practices to ensure prompt medical care access, adequate disinfection and

[92] Smith Decl. at ¶ 30; Davis Decl. at ¶ 17 ("We are not being provided with chemicals daily to clean common areas."); Henderson Decl. at ¶ 12 (noting staff do not enforce daily common room cleaning).
[93] Ewing Decl. at ¶ 17; Hatten Decl. at ¶ 11; Smith Decl. at ¶¶ 33-35.
[94] Ewing Decl. at ¶ 18.
[95] Davis Decl. at ¶ 23.
[96] *Compare* CDC Guidance at 11 ("Arrange bunks so that individuals sleep head to foot to increase the distance between them) *with* Smith Decl. ¶ at 12 (inmates have not been instructed to sleep head to foot); Triplett Decl. at ¶ 5; *see also* Lewis Decl. at ¶ 5, Ewing Decl. at ¶ 26; Smith Decl. at ¶ 11.
[97] *See* Hatten Decl. at ¶¶ 9, 16; Henderson Decl. at ¶ 32-34.

hygiene, testing, isolation, and quarantine during the pandemic, yet it continues to under-test,[98] under-staff,[99] under-supervise, and under-implement core infection prevention measures.[100] Between the lack of soap, the inability to social distance, [101] the prohibition on masks placed on at least some residents,[102] the shortage of cleaning chemicals,[103] the lack of supervision,[104] and the materially harmful delays in medical responses,[105] MDOC is knowingly exposing CMFC and SMCI residents to a substantial risk that they will suffer preventable infection, severe illness, and death from unnecessary COVID-19 exposure.[106] These failures are sufficient to establish that Plaintiffs are highly likely to succeed on the merits of their Eighth Amendment claim.

2. <u>Disability Subclass Claim</u>: MDOC Failed to Make Reasonable Modifications to Their Procedures to Protect Residents Whose Disabilities Make Them More Likely to Succumb to Rapid Disease Progression and Death Due to COVID-19 Infection.

MDOC has failed to make reasonable modifications to their COVID-19 procedures to protect individuals with disabilities that make them more likely to succumb to rapid disease progression and death due to COVID-19 exposure. This violates federal disability law. Plaintiffs' proposed Disability Subclass is composed of residents of CMCF and SMCI who suffer from a disability that substantially limits one or more of their major life activities and who are at

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[98] Venters' Decl. at ¶¶ 10-19 (concluding "MDOC testing practices are systematically deficient").

[99] Venters' Decl. at ¶¶ 50-53 (detailing chronic understaffing issues and the resulting threat to inmate and staff health and safety).

[100] Venters' Decl. at ¶¶ 20-27 (detailing failures including lack of infection screening; failure to timely see symptomatic persons; lack of access to cleaning and hygiene products; no social distancing measures; no special precautions for high-risk persons; failure to quarantine infected and exposed persons).

[101] *See* Waddell Decl. at ¶¶ 16-18; Lewis Decl. at ¶¶ 3-4, 6.

[102] *See* Smith Decl. at ¶ 44 (inmates received masks at the end of April but were instructed not to wear them); Hatten Decl. at ¶ 15 (less than half of guards wear masks, and residents generally do not); Lewis Decl. at ¶¶ 11-12, 42 (same).

[103] *See* Davis Decl. at ¶¶ 16-18; Ewing Decl. at ¶ 13.

[104] *See* Ewing Decl. at ¶ 13 (cleaning assignments are not enforced); Henderson Decl. at ¶ 12 (noting staff do not enforce daily common room cleaning); Davis Decl. at ¶ 17 (noting staff do not come by every day to see if residents are cleaning); Lewis Decl. at ¶ 26 (noting cleaning assignments are not enforced by staff).

[105] *See* Triplett Decl. at ¶ 30; Lewis Decl. at ¶ 15; Ewing Decl. at ¶ 27.

[106] Venters' Decl. at ¶¶ 54-55 (concluding MDOC "failed to enact basic CDC guidelines" to prevent spread of COVID-19 and to protect staff and detained people, which is "highly likely to result in preventable loss of life among staff and inmates" and "can swiftly overwhelm local hospitals.")

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.[107] Defendants' failure to "make reasonable modifications in policies, practices, or procedures"[108] to protect residents from preventable COVID-19-related serious illness and death—as well as their failure to place Disability Subclass members on furlough or home detention, where they could quarantine safely—is discrimination within the meaning of Title II of the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA).

Title II of the ADA imposes an affirmative obligation on the part of governmental entities to make such reasonable modifications, and the cause of any failure to do so is not relevant to the liability analysis. *See, e.g.*, *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454-455 (5th Cir. 2005) ("In addition to their respective prohibitions of disability-based discrimination, both the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals. Where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant.") (citing Title II of the ADA). While the same conduct that violates the Eighth Amendment may also violate Title II of the ADA, the Supreme Court has recognized that Title II prohibits "a somewhat broader swath of conduct" than the Constitution itself forbids. *See United States v. Georgia*, 546 U.S. 151, 157, 160 (2006); *Tennessee v. Lane*, 541 U.S. 509, 533 n. 24 (2004).

The Rehabilitation Act "is operationally identical to the ADA in that both statutes prohibit discrimination against disabled persons; however, the ADA applies only to public entities while the [Rehabilitation Act] applies to any federally funded programs or activities, whether public or private." *Borum v. Swisher County*, 2015 U.S. Dist. LEXIS 8628, *8 (N.D.

[107] *See* Gonsalves Decl. at ¶ 45.
[108] 28 C.F.R. § 35.130(b)(7).

Tex. Jan. 26, 2015) (citing *Kemp v. Holder*, 610 F.3d 231, 234 (5th Cir. 2010)).[109] Claims under the ADA and RA are both analyzed using the same legal standards. *See Cadena v. El Paso Cty.*, 946 F.3d 717, 723 (5th Cir. 2020) ("The remedies, procedures, and rights available under the Rehabilitation Act parallel those available under the ADA. . . . Thus, jurisprudence interpreting either section is applicable to both.") (citations and internal punctuation omitted). *See also Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011); *Borum*, 2015 U.S. Dist. LEXIS 8628, *8. Consequently, discussion of the legal standards of the ADA below applies to Plaintiffs' Rehabilitation Act claims as well.

The ADA prohibits public entities, including state prisons, from discriminating on the basis of disability. *See, e.g., Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998); *Cadena*, 946 F.3d at 723. Under Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Title II of the ADA imposes an affirmative obligation on public entities to make reasonable modifications of an entity's procedures to accommodate the needs of disabled individuals who utilize their services or programs. *See Lane*, 541 U.S. at 531-2; *Cadena*, 946 F.3d at 723; *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005); *Borum*, 2015 U.S. Dist. LEXIS 8628, *9. Such services, programs, or activities include the provision of medical care. *See, e.g.*, *Yeskey*, 524 U.S. at 210; *Georgia*, 546 U.S. at 157; *Borum*, 2015 U.S. Dist. LEXIS 8628, *11-12. Regulations implementing Title II of the ADA provide that public entities must "make reasonable modifications in policies, practices, or procedures when the

[109] MDOC receives federal funding. *See, e.g.,* J. Mitchell, *Broken Promises and Lost Funding: How Mississippi Reform Failed*, Guardian (May 9, 2019), *available at* https://www.theguardian.com/us-news/2019/may/09/mississippi-prison-reform-failed-first-step-act.

modifications are necessary to avoid discrimination on the basis of disability," and such discrimination occurs when an entity fails to make reasonable modifications that would allow a person with a disability to participate in a service, program or activity. 28 C.F.R. § 35.130(b)(7)(i).

The requested modifications must be reasonable, "meaning that [they do] not impose undue financial or administrative burdens or 'fundamentally alter the nature of the service, program, or activity.'[110] 28 C.F.R. § 35.130(b)(7); *see also Frame*, 657 F.3d at 232; *Cadena*, 946 F.3d at 724.

This Court has explained that the ADA and the RA apply to "all of the operations" of a public entity. *Frame*, 657 F.3d at 225. Other courts have similarly construed the "services, programs, or activities" language in the ADA to encompass "anything a public entity does." *See, e.g.*, *Bahl v. County of Ramsey*, 695 F.3d 778, 787 (8th Cir. 2012); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002); *Yeskey v. Pa. Dep't of Corr.*, 118 F.3d 168, 171 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998). Department of Justice regulations further confirm that "title II applies to anything a public entity does." *Seremeth v. Board of County Commissioners of Frederick County*, 673 F.3d 333, 338 (4th Cir. 2012), quoting 28 C.F.R. Pt. 35, App. B; *see also* H.R. Rep. No. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 367, 1990 WL 125563 (stating that Title II is intended to apply to "all actions of state and local governments.").

In the prison context, the "failure to make reasonable accommodations to the needs of a disabled prisoner may have the effect of discriminating against that prisoner because the lack of an accommodation may cause the disabled prisoner to suffer more pain and punishment than non-disabled prisoners." *McCoy v. Tex Dep't of Criminal Justice*, 2006 U.S. Dist. LEXIS

[110] MDOC has a constitutional obligation to provide for the medical care and reasonable safety of its inmates. *See Helling*, 509 U.S. at 32. Accordingly, these accommodations cannot constitute a fundamental alteration or undue burden for purposes of the ADA or Rehabilitation Act.

55403, *23-24 (S.D. Tex. Aug. 9, 2006); *see also Borum*, 2015 U.S. Dist. LEXIS 8628, *20; *McCollum v. Livingston*, 2017 U.S. Dist. LEXIS 76922, *10-12 (S.D. Tex. May 19, 2017) (citing numerous cases).

In this case, Plaintiffs in the Disability Subclass are qualified individuals with disabilities under the ADA, and they also suffer from serious medical conditions that put them at heightened risk contracting, becoming severely ill from, and dying from COVID-19.[111]

The ADA defines disability as having an impairment that substantially limits "major life activities." 42 U.S.C. § 12102(2). "Major life activities" include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id*.

Residents in the Disability Subclass have substantial physical and mental health impairments that constitute disabilities under the ADA. These Plaintiffs' status as members of the Disability Subclass is open and obvious; most are chronic care patients with substantial medical needs.[112] Where a defendant has knowledge of the need for accommodations but fails to make them, that defendant has failed to fulfill its obligations under the ADA and the

[111] *See* Gonsalves Decl. at ¶ 45.

[112] *See* Ewing Decl. (attesting to Mr. Ewing's multiple strokes, confinement to a wheelchair, severe chronic asthma, emphysema, cancer, burns covering nearly half his body, nerve pain, and substantial limitations to major life activities including, but not limited to, sleeping, walking, standing, breathing, and respiratory function);Triplett Decl. (attesting to Mr. Triplett's HIV and paranoid schizophrenia, his weakness, lethargy, and immobility, his lack of appetite and his terrible stomach pain, his inability to go outside frequently, and substantial limitations to major life activities including, but not limited to, eating, walking, standing, concentrating, thinking, communicating, immune system function, neurological function, and brain function); Henderson Decl. (attesting to Mr. Henderson's neurofibromatosis, tumors on his spine and nervous system, as well as both inside and outside his body, high blood pressure, altered vision, difficulty walking, problems with white blood cells, depression, and substantial limitations to major life activities including, but not limited to, sleeping, seeing, walking, standing, neurological function, and circulatory function);Lewis Decl. (attesting to Mr. Lewis's chronic asthma, severe migraines, and substantial limitations to major life activities including, but not limited to, walking, speaking, communicating, breathing, and respiratory function); Holder Decl. (attesting to Mr. Holder's cancer, diabetes, bipolar disorder, and substantial limitations to major life activities, including, but not limited to, sleeping, concentrating, thinking, and brain function).

Rehabilitation Act. *See, e.g.*, *U.S. v. Hialeah Housing Authority*, 418 Fed. Appx. 872, 876 (11th Cir. 2011); *McCoy*, 2006 U.S. Dist. LEXIS 55403, 25-28. Actual knowledge is not required. *See, e.g.*, *Cadena*, 946 F.3d at 724 ("For this type of claim, a plaintiff must show that the entity knew of the disability and its consequential limitations, either because the plaintiff requested an accommodation or because the nature of the limitation was open and obvious."); *Taylor v. Principal Fin. Group*, 93 F.3d 155, 165 (5th Cir. 1996) (noting that an entity's obligation to provide reasonable accommodations is triggered "[w]here the disability, resulting limitations, and necessary reasonable accommodations, are . . . open, obvious, and apparent[.]").

Without the preliminary injunctive relief these Plaintiffs seek, they face an unabated increased risk of severe illness and death.[113] Defendants therefore have an obligation under the ADA and RA to make reasonable modifications of their COVID-19-related practices as to those Disability Subclass members. The accommodations requested by Plaintiffs, as enumerated in their Motion, are reasonable on their face. As explained by Plaintiff's experts, they are necessary to ensure that—despite their increased risk of hospitalization and death due to COVID-19 exposure—Disability Subclass members are not unnecessarily bound over to hospitals and death.[114] Plaintiffs are therefore entitled to the reasonable modifications they seek through preliminary injunctive relief. That MDOC has failed to implement these modifications to date is sufficient to establish that Plaintiffs are highly likely to succeed on the merits of their federal disability claims.

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[113] Ex. 1 ("Gonsalves Decl.") at ¶ 42 ("Releasing older inmates, inmates with underlying medical conditions, and inmates with disabilities and 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 is even more critical. Such individuals are by definition at greater risk if they remain incarcerated under conditions necessarily present in any detention setting."); Venters' Decl. at ¶ 33 ("even 24 hours" wait can result in "preventable hospitalization," "rapid and irreversible deterioration of health," and "organ failure."), at ¶ 54 (MDOC's failure "are highly likely to result in preventable loss of life among staff and inmates).

[114] Gonsalves Decl. at ¶ 45; Venters' Decl. at ¶ 33 ("Patients with underlying conditions are at particular risk for organ failure."), at ¶ 54 (MDOC has failed "to identify and protect high-risk detainees from serious illness and death from COVID-19").

C. The Public Interest and Balance of Equities Weigh Heavily in Plaintiffs' Favor.

In this case, the threatened injury outweighs any damage that the injunction might cause Defendants, and an injunction will not disserve the public interest.[115]

Plaintiffs face a substantial and imminent risk of severe illness and possible death if infected with COVID-19. For members of the Disability Subclass, the risk and the consequences are heightened.[116] Defendants have a substantial interest in maintaining a safe environment, preserving order and security, and protecting both inmates and officers. *See, e.g.*, *Cohen*, 805 F. Supp. at 407. Granting preliminary injunctive relief will have no harmful effect on MDOC or its interests in these areas. *Currier*, 760 F.3d at 452. In fact, granting this Motion will *prevent* harm to MDOC. COVID-19 is a deadly, highly contagious disease. It does not discriminate between guards and residents, or between inside and outside prison walls, so the increased cleaning and hygiene measures will undoubtedly benefit MDOC staff and community members. Moreover, many of the practices requested in this Motion are practices MDOC already claims to provide in response to COVID-19, such as freely available soap and hand sanitizer, increased cleaning measures, prompt response to sick call slips, accessible information, and social distancing.[117] This clearly indicates that MDOC expects implementing these measures will reap more benefit than it will cost.

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[115] Whereas the legal standard's third prong (threatened injury to plaintiff outweighs threat and harm to defendant) and fourth prong (the injunction will not disserve the public interest) are normally considered as separate questions, when an "injunction is against public institutions and against public servants charged with the enforcement of the law, [courts] shall consider together the balancing of the equities required by test three and the question of whether the injunction would disserve the public interest." *Spiegel v. City of Houston*, 636 F.2d 997, 1002 (5th Cir.1981); *Cohen*, 805 F. Supp. at 407.

[116] Ctrs. for Disease Control & Prev., *People Who Need to Take Extra Precautions*, *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html (last visited May 19, 2020) (Older adults and people of any age with diabetes, kidney disease, immune-deficiencies, and people with HIV, among others, are at higher risk for severe illness); Gonsalves Dec. ¶ 45.

[117] *See* COVID-19 Q&A, May 21, 2020.

The injunction sought will also serve the public interest. The public has a substantial interest in preventing an outbreak of COVID-19. *Vazquez Barrera*, 2020 WL 1904497, at *7. An outbreak in the prisons is likely to spread into the surrounding communities.[118] An infection hot spot at CMCF or SMCI would, again, likely overwhelm the hospitals and medical facilities area hospitals, threatening Mississippians' ability to get adequate COVID-10 medical care at other locations across the state. Implementing measures to prevent a potentially deadly strain on statewide resources will serve the public interest.

In summary, Plaintiffs bear a substantial risk of severe illness or death. On the other side, MDOC has an interest in seeing its current policies implemented and in adopting measures to increase the safety and security of its facilities. It also has an interest in preventing an outbreak that would overwhelm area hospital capacity. Finally, MDOC has an interest in protecting its staff. CMCF and SMCI are already half-staffed. If any slight increase in staffing or resources are required to comply with the preliminary injunctive relief sought, implementation is unlikely to require substantially more resources than are already accounted for by MDOC's hiring vacancies. In all, the threatened injury to Plaintiffs far outweighs any potential damage to Defendants, and injunctive relief will not disserve to the public interest.

D. Other Courts Have Granted Relief to Address the High Risk of Irreparable Harm that COVID-19 Poses to People Held in Prisons and Detention Facilities.

Courts have granted similar preliminary injunctive relief in other cases. In *Wilson v. Williams,* plaintiffs, representing a class of inmates at Elkton Federal Correctional Institution in Ohio ("Elkton"), brought an emergency habeas action under 28 U.S.C. § 2241 seeking

[118] Gonsalves Decl. at ¶ 26 (describing risks to surrounding community); Sarah Volpenhein, *Marion Prison Coronavirus Outbreak Seeping into Larger Community*, Marion Star (April 25, 2020), *available at* https://www.marionstar.com/story/news/local/2020/04/25/marion-prison-ohio-coronavirus-outbreak-seeping-into-larger-community/3026133001/.

enlargement—the ability to serve their sentences from home confinement, parole, half-way houses, or other areas outside of the prison. No. 4:20-CV-00794, 2020 WL 1940882, (N.D. Ohio Apr. 22, 2020). The court granted a preliminary injunction, ordering Elkton to identify high-risk inmates and evaluate their eligibility to transfer out of Elkton "through any means", including compassionate release, parole, community supervision, or furlough. *Id.* at *20. The court found plaintiffs were likely to succeed on their Eighth Amendment claims, explaining that the prison's "dorm-style design" guaranteed inmates remained in close proximity, and that "Elkton has altogether failed to separate its inmates at least six feet apart, despite clear CDC guidance." *Id.* at *9, *16. The court also noted that the cost of treatment for inmates who must undergo intensive care are "likely multiples" of what it would cost Elkton to initiate sufficient testing protocols. *Id*. at *19. The Sixth Circuit Court of Appeals recently refused to stay the preliminary injunction. *See Wilson v. Williams*, No. 20-3447, slip op. (6th Cir. May 4, 2020).

Recently, the court in *Carranza v. Reams* ordered the Weld County Colorado Jail to take measures to improve conditions for medically vulnerable inmates. No. CV 20-00977 (D. Colo. May 11, 2020). The court ordered that the jail institute social distancing measures, place medically vulnerable inmates in single cells to the extent possible, improve sanitation procedures to ensure they are compliant with the CDC guidelines for cleaning and disinfecting, and obtain a sufficient number of masks so that residents do not need to wear masks longer than their intended duration. *Id.* at 37-39. In issuing its order, the court found that plaintiffs, a group of medically vulnerable pretrial and post-conviction detainees, were likely to succeed on their Eighth and Fourteenth Amendment claims. *Id*. at 17-26.

In *Banks v Booth*, the court issued a temporary restraining order requiring the D.C. Department of Corrections to take steps to protect inmates from the dangers associated with

COVID-19. No. CV 20-00849, 2020 WL 1914896 (D.D.C. Apr. 19, 2020). Plaintiffs, representing a class, brought Fifth Amendment due process claims on behalf of pre-trial detainees and Eighth Amendment claims on behalf of post-conviction detainees. *Id.* at *9. The court found that plaintiffs were likely to succeed on both their Fifth Amendment and Eighth Amendment claims, finding that social distancing measures were not being enforced and the inmates were subjected to a greater risk of infection than "that experienced by the general been exposed to an unreasonable risk of damage to their health." *Id.* at *15.

Specifically, the court ordered that the D.C. DOC enforce social distancing measures, ensure inmates are provided daily showers and clean clothing, and improve prison sanitation. *Id.* at *28-30. The order included a strong suggestion that the DOC contract for professional cleaning services and retain a registered sanitarian to oversee its health and safety program. *Id.* The court also ordered that DOC improve its medical triage process to reflect "the appropriate sensitivity to the wide variety of symptoms associated with COVID-19", improve its documentation and tracking process related to self-reporting of symptoms, and conduct additional staff training on the use of PPE and infrared thermometers. *Id.*

In *Cameron v. Bouchard*, the court recently granted plaintiff's request for a temporary restraining order and required the Oakland County Jail in Michigan to comply with measures aimed to increase sanitation and safety at the Jail. No. CV 20-10949, 2020 WL 1929876 (E.D. Mich. Apr. 17, 2020), modified in part on other grounds, No. CV 20-10949, 2020 (E.D. Mich. Apr. 23, 2020). The plaintiffs, representing a putative class of pretrial and convicted detainees, requested that the court release medically vulnerable inmates and undertake measures to improve hygiene and safety at the jail. *Id.* at *2. The court ordered that the jail must provide inmates soap, disinfectant wipes, and other sanitary products, ensure inmates have access to showers and clean

laundry, provide spacing of six feet or more between inmates whenever possible, establish a protocol for self-reporting and evaluation of COVID-19 symptoms, conduct immediate testing of anyone displaying symptoms, and ensure that inmates receive adequate medical care and are properly quarantined in a non-punitive setting when necessary. *Id* at *4-5. Additionally, the court ordered the jail to ensure that staff take proper precautions while at the jail, including washing hands regularly and wearing personal protective equipment when interacting with inmates or touching surfaces in cells and common areas. *Id.*

In granting the temporary restraining order, the court found that Plaintiffs were likely to succeed on the merits of their claims alleging the jail conditions violate their Eighth and Fourteenth Amendment rights, and that Plaintiffs were likely to suffer irreparable harm absent an injunction because 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." *Id.* at *3. The court went on to explain that "requiring Defendants to adopt the safety precautions . . . poses no harm to them other than potentially increased costs and energy, which are insufficient to justify a denial of Plaintiff's motion." *Id.* at *3-4. The court is currently considering whether to grant release to medically vulnerable inmates. *Id.* at *2-3.

In *McPherson v. Lamont*, the court recently denied defendants' motion to dismiss, holding that the court has subject matter jurisdiction to hear plaintiffs' claims brought under 28 U.S.C. § 2241 and 42 U.S.C. 1983. No. CV 20-00534, 2020 WL 2198279 (D. Conn. May 6, 2020) at *6-7. The court held that exhaustion in state court was not required because, given the quick spread of the virus and limited operations of state courts, plaintiffs would "suffer an irreparable injury without immediate juridical relief, and it would be futile to seek state relief." *Id.* at *11. Plaintiffs are a group of pre-trial and post-conviction inmates being held at various

Connecticut Department of Correction facilities. *Id* at *5. The court is currently considering plaintiffs request for a preliminary injunction. *Id.* at *26.

Additionally, courts across the country have ordered the release of ICE detainees in response to the dangers of COVID-19. *See, e.g.*, *Dada, et al. v. Witte, et al*., 1:20-cv-00458 (W.D. La.) (May 22, 2020) (district judge adopted the report and recommendation of the magistrate judge requiring release of thirteen medically vulnerable people detained by ICE in Louisiana); *Vazquez Barrera*, 2020 WL 1904497 (ordering release of one ICE detainee from a Texas facility); *Arriaga Reyes. v. Decker*, No. 2:20-cv-03600 (D.N.J. Apr. 12, 2020) (ordering five petitions for immediate release of ICE detainees from New Jersey facilities); *Basank v. Decker*, No. 1:20-cv-02518 (S.D.N.Y. Mar. 26, 2020) (ordering release of ten individuals detained by ICE housed in New Jersey county jails because of preexisting medical conditions).

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the Motion and require adequate implementation of measures required to mitigate and manage infection and the spread of COVID-19 at CMCF and SMCI.

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