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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

PAUL MANEY; GARY CLIFT; GEORGE
NULPH; THERON HALL; DAVID HART;
MICAH RHODES; and SHERYL LYNN
SUBLET, individually, on behalf of a class of
other similarly situated,
Plaintiffs,
v.
KATE BROWN, COLETTE PETERS; HEIDI
STEWART; MIKE GOWER; MARK NOOTH;
ROB PERSSON; and KEN JESKE,
Defendants.

Case No. 6:20-cv-00570-SB

PLAINTIFFS' AND PROPOSED CLASS
MEMBERS' MOTION AND
MEMORANDUM FOR ENTRY OF A
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

EXPEDITED HEARING REQUESTED

MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Fed. R. Civ. Pro. 65(a) and (b)(1), Plaintiffs request issuance of a Temporary Restraining Order and Preliminary Injunction. The application shows that “immediate and irreparable injury, loss, or damage will result to the movant[s] before the adverse party can be heard in opposition.” Fed. R. Civ. Pro. 65(b)(1)(A). Plaintiffs support this application for relief with the below Memorandum of Law, Declarations of 45 ODOC prisoners, Declaration of Dr. Marc Stern, Declaration of Jeffrey Schwartz, Ph.D., Declaration of former ODOC Corrections Officer Jeffrey Parnell, and Declaration of Investigator Althea Selover.

If the Court elects to grant Plaintiffs' Temporary Restraining Order, Plaintiffs request an expedited hearing in accordance with Fed. R. Civ. Pro. 65(b)(3).

PLAINTIFFS AND PROPOSED CLASS MEMBERS' MOTION AND MEMORANDUM FOR
ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

As prisoners, Plaintiffs have a Constitutional right under the Eighth Amendment to reasonable protection from severe illness or death from COVID-19. Plaintiffs request this court to issue a temporary restraining order and preliminary injunction to ensure that their constitutional rights are not violated by Defendants' unreasonable actions that both fail to provide Plaintiffs with reasonable safety from COVID-19. Plaintiffs seek issuance of a temporary restraining order to preliminarily enjoin Defendants, directing them to take every action within their power to reduce the risk of COVID-19 from further ravaging Oregon Department of Corrections (“ODOC”) prisoner populations. Plaintiffs ask the Court to require Defendants to reduce prisoner populations to levels at each facility that would enable Plaintiffs the protection of being able to socially distance themselves to prevent their infection with COVID-19 and reduce transmission to others;¹ appoint an expert to effectuate the rapid downsizing of those facilities; require Defendants to provide safe and non-punitive housing separation of prisoners in each ODOC facility based on their COVID-19 infection status; and require Defendants to create and enforce procedures to reduce the risk of COVID-19 transmission in ODOC facilities consistent with CDC and OHA guidance. Plaintiffs further ask the Court to require Defendants to immediately implement new procedures that will bring ODOC in compliance with expert guidance and to appoint an independent monitor to ensure such compliance. For the reasons argued in Plaintiffs’ Memorandum of Law, *infra*, the Court should enter that order.

¹ Defendants can comply through a number of mechanisms, including: reprieve; early release to supervision of the Board of Parole and Post-Prison Supervision; advancing release dates of prisoners with severe medical conditions or who are elderly and permanently incapacitated pursuant to ORS 144.126; compassionate release; clemency; temporary furlough; and temporary release to house arrest. *See* Declaration of Jeffrey Schwartz at 6-7.

MEMORANDUM OF LAW

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I. INTRODUCTION

The COVID-19 pandemic has changed the world. The virus quickly spread across the globe, posing a risk to every person's health. In response to an extraordinary event, governments and communities have taken extraordinary action. We now have social expectations and legal regulations requiring social distancing—the act of keeping at least six feet from others to prevent and slow the spread of COVID-19. Despite the impact of these measures on civic and economic life, this is the new normal. But some members of our community face greater risk of contracting this new and terrifying disease than others.

The Eighth Amendment to the United States Constitution demands that prisons and jails adhere to the “evolving standards of decency” of a “maturing society” in their treatment of prisoners. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Defendants must afford Plaintiffs and proposed class members² with the abilities to protect themselves that the rest of our society has clearly articulated as necessary, proper, and humane.

Defendants have violated and continue to violate Plaintiffs' Eighth Amendment rights by housing them in conditions where they are exposed to an unreasonable risk of exposure to COVID-19 from which they have an enhanced risk of serious injury and death. Defendants have failed to provide the care that the Constitution demands to prevent the risk of harm. Given that prisons are congregate living environments, the greatest risk to Plaintiffs exists because they cannot have what everyone in our society expects at this time—the ability to safely distance themselves away from others so that they can prevent themselves from being infected with COVID-19. Plaintiffs do not control the spaces they inhabit. They have no control over when

² Hereafter, “Plaintiffs” represents both the named Plaintiffs and the proposed class members. The proposed class is defined as all prisoners currently or who will in the future be held in ODOC custody who, according to the Centers for Disease Control and Prevention, the World Health Organization, and the Oregon Health Authority, are most at risk of dying or suffering from severe illness from COVID-19.

they eat, with whom they eat, where they sleep, who they sleep next to, where they go, or even on what side of the facility hallway on which to walk. Defendants control all these aspects of their lives.

In this case, Defendants have failed and refused to provide Plaintiffs with the ability to safely space themselves from others to prevent the extreme harm they face from contracting COVID-19. Furthermore, Defendants have failed to provide many other means of mitigating the risk of COVID-19 transmission. The Centers for Disease Control and Prevention (“CDC”) and the Oregon Health Authority (“OHA”) have issued guidelines for preventing the spread of COVID-19 in correctional facilities. Those guidelines provide harm reduction practices—nothing more. Even so, these practices still center social distancing as the “cornerstone” of combatting COVID-19.

The Constitution does not demand that prison administrators provide merely the most “possible” solution available, as determined by Defendants. It demands that prison administrators provide for the serious medical needs of those in their custody. Defendants have failed to provide Plaintiffs with care that meets the constitutional standard. It is the judicial system’s “role in safeguarding inmates from serious civil rights abuses” that prevents an utter deference to prison officials “returning us to the passivity of several decades ago, when the then-prevailing barbarism and squalor of many prisons were met with a judicial blind eye and a ‘hands off’ approach.” *Shorter v. Baca*, 895 F.3d 1176, 1191 (9th Cir. 2018) (quoting *Block v. Rutherford*, 468 U.S. 576, 594 (1984)).

II. PROCEDURAL HISTORY

Plaintiffs filed their Complaint on April 6, 2020. Dkt. 1. In their Complaint, Plaintiffs announced that they represent a putative class of similarly situated persons, Comp. ¶¶ 17-35, and that they seek an order enjoining Defendants’ unconstitutional conduct, *Id.* at ¶¶145-146.

The day after filing their Complaint, the parties began an expedited mediation process. The parties engaged in mediated discussions but could not agree on settlement terms.

III. STANDARD OF LAW

The court may grant a temporary restraining order or preliminary injunction by finding one of two sets of criteria are satisfied. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008). The “traditional” criteria consider four factors: (1) the likelihood of success on the merits, (2) the likelihood of irreparable harm in the absence of preliminary relief, (3) the balance of equities, and in some cases, (4) the public interest. *Id.*; *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); and *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135-38 (9thCir. 2011).

In the Ninth Circuit, among others, courts use a “sliding scale” to evaluate these equitable factors. A strong showing on one of the factors may offset a weak showing on another. *Cottrell*, 632 F.3d at 1131-32. Thus, for example, “a preliminary injunction is appropriate when plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.”³ *Id.* at 1134-35 (internal quotations and citations omitted).

Alternatively, a court may grant the request for a Temporary Restraining Order if the plaintiff demonstrates either (1) a combination of probable success on the merits and the

³ The Supreme Court held in *Winter* that a preliminary injunction should not issue if a plaintiff shows only a possibility of harm rather than a likelihood of harm. *Winter*, 555 U.S. at 21; *see also* 632 F.3d at 1135. However, it did not reject the sliding scale or “serious question” frameworks. 632 F.3d at 1132-34.

possibility of irreparable injury, or (2) that serious questions are raised, and the balance of hardships tips sharply in the plaintiff's favor. *Natural Res. Def. Council, Inc.*, 518 F.3d 658 at 677 (9th Cir. 2008). To succeed under the "serious question" test, plaintiffs must show that they are likely to suffer irreparable injury and that an injunction is in the public's interest. *Cottrell*, 632 F.3d at 1132. Plaintiffs satisfy both criteria, and this court should issue a Temporary Restraining Order for Plaintiffs' Putative Class.

Plaintiffs are likely to win on the merits of their Eighth Amendment claim. The circumstances giving rise to that claim, if left unaddressed, would lead to the irreparable harms of potential permanent injuries, like lung scarring, heart damage, or death. That risk to Plaintiffs, along with the cost of their medical care, far outweighs the Defendants' interest in maintaining complete decision-making authority over ODOC prison policies and procedures.

Constitutionally, the public interest is not served by allowing ODOC to continue needlessly placing prisoners at risk of serious harm within ODOC facilities. ODOC's practices put its prisons' surrounding population at risk, from the state's largest city to its easternmost rural communities. Prisons are not closed ecosystems like ships that remain at sea. Workers and deliveries enter and exit the buildings daily. Workers return to their families and loved ones. No public interest is served by creating "petri dishes" full of a highly communicable disease and allowing it to infect massive numbers of prisoners, staff, and the surrounding communities.

IV. FACTUAL ALLEGATIONS

A. COVID-19 Poses A Significant Risk Of Illness, Injury, Or Death.

Since 2019, the Novel Coronavirus ("COVID-19") has ravaged the world. The extensive body of evidence demonstrates that COVID-19 is a highly communicable virus that spreads through droplets dispersed through close personal contact or contact with droplet-infected

surfaces. There is no vaccine or cure for COVID-19. It has been declared a pandemic and state and national emergencies.⁴ Governments throughout the world, including Oregon, understand the severity of the pandemic and have implemented extreme responses necessary to lessen the devastation.⁵ Those responses are primarily focused on preventing contact between people by reducing the number of people in close quarters because that has been recognized and accepted as the best tool to prevent transmission of the virus. Major events have been cancelled,⁶ sports leagues have been suspended,⁷ international travel has been restricted,⁸ bars and restaurants have been shut down,⁹ schools are closed,¹⁰ states have ordered residents to shelter in place,¹¹ and the litigation pertaining to this order will be conducted remotely.¹²

⁴ Dr. Tedros Adhanom Ghebreyesus, *WHO Director-General's opening remarks at the media briefing on COVID-19*, World Health Organization (March 11, 2020), available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>; WhiteHouse.gov, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, (Mar 13, 2020), available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>; State of Oregon, Governor's Office, *Governor Kate Brown Declares State of Emergency to Address Coronavirus* (Mar 8, 2020), <https://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=36109>.

⁵ See Office of the Governor, Executive Order No. 20-12 (Mar. 23, 2020), available at https://www.oregon.gov/gov/Documents/executive_orders/eo_20-12.pdf.

⁶ Ahiza Garcia-Hodges, *SXSW conference canceled amid heightened coronavirus concerns*, NBC News (Mar. 6, 2020), available at <https://www.nbcnews.com/tech/technews/sxsw-conference-canceled-amid-heightened-coronavirus-concerns-n1151911>

⁷ FOX Sports, *NBA suspends its season after Gobert, Mitchell test positive for COVID-19; Silver speaks on suspension*, (Mar. 14, 2020), available at <https://www.foxsports.com/nba/story/rudy-gobert-season-suspended-adam-silverdonovan-mitchell-coronavirus-covid-19-031120>.

⁸ Dareh Gregorian, *Coronavirus: Trump adds travel restrictions on Iran, advisories for Italy and South Korea*, NBC News (Feb. 29, 2020), available at <https://www.nbcnews.com/politics/donald-trump/coronavirus-trump-give-update-white-house-saturday-n1145921>; Bill Chappell, *Coronavirus: Chaos Follows Trump's European Travel Ban; EU Says It Wasn't Warned*, National Public Radio (Mar. 12, 2020), available at <https://www.npr.org/sections/goatsandsoda/2020/03/12/814876173/coronavirustrump-speech-creates-chaos-eu-says-it-wasnt-warned-of-travel-ban>.

⁹ See Office of the Governor, Executive Order No. 20-12, Mar. 23, 2020, available at https://www.oregon.gov/gov/Documents/executive_orders/eo_20-12.pdf

¹⁰ UNESCO, *COVID-19 Educational Disruption and Response*, (last visited Apr. 13, 2020), available at <https://en.unesco.org/covid19/educationresponse>.

¹¹ Paris Martineau, *What's a 'Shelter in Place' Order, and Who's Affected?*, WIRED (Mar. 28, 2020), available at <https://www.wired.com/story/whats-shelter-place-order-whos-affected/>

¹² See Chief Judge Marco Hernandez, In Re: Court Operations in Response to COVID-19, Standing Order 2020-4, Mar. 13, 2020, available at <https://www.ord.uscourts.gov/phocadownload/userupload/StandingOrders/Standing%20Orders/Court%20Operations/2020-4%20In%20Re%20Court%20Operations%20In%20Response%20to%20COVID-19.pdf>

The medical understanding of COVID-19 is still evolving. However, it is clear that the virus may be transmitted by people who are asymptomatic, and there are many people who are infected who do not show symptoms. Indeed, a large number of transmissions may be from people who are asymptomatic or pre-symptomatic.¹³ For those who do become symptomatic, those symptoms may not appear for weeks after the person becomes infected and contagious. Those symptoms and the signs that a person will need urgent medical care can appear rapidly and unexpectedly.¹⁴ Further, those who contract the disease and do have symptoms can suffer from severe damage to lung tissue, including a permanent loss of respiratory capacity, and damage to tissues in other vital organs including the heart and liver.¹⁵

Since filing Plaintiffs' Complaint, Dkt. 1, the worldwide infection rate has risen from 1,341,907 to 4,201,921, with 286,835 deaths.¹⁶ There have been 1,347,936 infections and 80,684 deaths in the United States.¹⁷ There have been 3,286 cases and 130 deaths in Oregon.¹⁸ Though these numbers continue to grow each day, they are likely underreported, due in part to a lack of access to COVID-19 tests. For example, in Oregon, until recently state regulators maintained restrictive criteria for testing, "even as tests sit unused."¹⁹ This restriction on testing

¹³ Declaration of Mark Stern at para. 8. *See also* Occupational Health and Safety, *Experts Suggest Nearly Half of Those with Coronavirus Could be Asymptomatic*, (Apr. 9, 2020), <https://ohsonline.com/articles/2020/04/09/experts-suggest-nearly-half-of-those-with-coronavirus-could-be-asymptomatic.aspx>.

¹⁴ *See* Declaration of Marc Stern at 3.

¹⁵ Centers for Disease Control and Prevention, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, (Revised Apr. 3, 2020), <https://cutt.ly/etRPVRI>; Melissa Healy, *Coronavirus infection may cause lasting damage throughout the body, doctors fear*, LA TIMES (Apr. 10, 2020), available at <https://cutt.ly/htNrJ77>; *see also* Di Wu et al., *Plasma Metabolomic and Lipidomic Alterations Associated with COVID-19*, MedRxIV (Apr. 26, 2020), available at <https://www.medrxiv.org/content/10.1101/2020.04.05.20053819v3.full.pdf>.

¹⁶ *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)* (last visited May 12, 2020) available at <https://coronavirus.jhu.edu/map.html>.

¹⁷ *Id.*

¹⁸ Oregon Health Authority, *COVID-19 Cases in Oregon* (last visited May 12, 2020), available at <https://govstatus.egov.com/OR-OHA-COVID-19>.

¹⁹ Brad Schmidt, *Coronavirus testing could expand in Oregon right now. Instead, tests sit idle amid restrictive guidelines*, The Oregonian (April 18, 2020), available at <https://www.oregonlive.com/coronavirus/2020/04/coronavirus-testing-could-expand-in-oregon-right-now-instead>

likewise extended to counting the number of Oregon deaths from COVID-19.²⁰ This likely had the effect of depressing numbers of positive tests.²¹ The State has since announced a program to increase contact tracing.²²

People who are older and people with certain pre-existing medical conditions, as described by the CDC, are at a greater risk of serious illness or death from COVID-19.²³ As of May 6, 2020, 2,262 people between 45 and 54 years old, 5,422 people between 55 and 64 years old, 9,359 people between 65 and 74 years old, and 25,802 people 75 years and older have died from COVID-19 in the United States.²⁴ Early reports estimate the mortality rate for those with cardiovascular disease was 13.2%, 9.2% for people with diabetes, 8.4% for people with hypertension, 8.0% for people with chronic respiratory disease, and 7.6% for people with cancer.²⁵ As of April 30, of the 73 out of the 101 people who were documented as having died from COVID-19 in Oregon, nearly 60% suffered from heart disease, nearly 33% had diabetes, and almost 25% were former smokers.²⁶ There are also hundreds more who have died in Oregon

tests-sit-idle-amid-restrictive-guidelines.html.

²⁰ Nigel Jaquiss, *Oregon Has Hundreds of Excess Deaths, Suggesting a Hidden COVID-19 Toll*, Willamette Week (Apr. 29, 2020), available at <https://www.wweek.com/news/2020/04/29/oregon-has-hundreds-of-excess-deaths-suggesting-a-hidden-covid-19-toll/>.

²¹ *Id.*

²² Brad Schmidt, *How can Oregon reopen amid coronavirus? It may start with 600 new contact tracers*, The Oregonian (April 24, 2020), available at <https://www.oregonlive.com/coronavirus/2020/04/how-can-oregon-reopen-amid-coronavirus-it-may-start-with-600-new-contact-tracers.html>

²³ Centers For Disease Control and Prevention, *People Who Are at Higher Risk for Severe Illness*, (April 15, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>; *See also* Declaration of Marc Stern para. 11.

²⁴ Centers for Disease Control and Prevention, *Provisional Death Counts for Coronavirus Disease (COVID-19)*, (May 6, 2020), <https://data.cdc.gov/NCHS/Provisional-COVID-19-Death-Counts-by-Sex-Age-and-S/9bhg-hcku>.

²⁵ World Health Organization, *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, (Feb. 28, 2020), available at <https://cutt.ly/KtD3ALr> (finding fatality rates for patients with COVID-19 and comorbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”).

²⁶ Tess Riski, *Nearly 6 in 10 Oregonians Who Died of COVID-19 Had Heart Disease, State Says*, Willamette Week (April 29, 2020), available at <https://www.wweek.com/news/2020/04/29/nearly-6-in-10-oregonians-who-died-of-covid-19-had-heart-disease-state-says/>

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in 2020 than is typical for the same period in other years, which may indicate that there are many unaccounted-for COVID-19 deaths.²⁷ The same is true all over the country.²⁸

B. The Dangers Of COVID-19 Are Heightened In Prisons.

While much of the world, including the State of Oregon, has taken the extraordinary but necessary measures to inhibit transmission of the coronavirus by preventing close contact and requiring social distancing, one exception remains—equally extraordinary measures have not been taken to protect the health of vulnerable prisoners.

In ordinary circumstances, each person who contracts COVID-19 can be expected to infect three others on average, but that number may likely be between five and six.²⁹ Crowded prisons amplify this threat.³⁰ Prisons have been termed “epidemiological pumps”³¹ and “tinderboxes of infectious disease.”³² Hundreds, sometimes thousands, of prisoners and staff are stacked on top of one another, unable to move without rubbing shoulders while eating, getting into bed, washing their hands, working, or waiting in line for medication. Studies show that COVID-19 can survive up to “four hours on copper, up to 24 hours on cardboard, and up to two

²⁷ *Id.*

²⁸ Charles Davis, *The US experienced 15,400 ‘excess deaths’ from March to April 4 compared with last year, suggesting coronavirus death toll is higher than known*, Business Insider, (Apr 28, 2020), available at <https://www.businessinsider.com/yale-study-excess-deaths-nearly-twice-official-covid-19-count-2020-4>; Soo Kim, *U.S. COVID-19 Death Toll May Only Be ‘Tip of the Iceberg,’ Says CDC Adviser*, Newsweek (Apr. 16, 2020), available at <https://www.msn.com/en-us/health/medical/us-covid-19-death-toll-may-only-be-tip-of-the-iceberg-says-cdc-adviser/ar-BB12JxeU>.

²⁹ Tara Haelle, *The COVID-19 Coronavirus Disease May Be Twice As Contagious As We Thought*, Forbes (Apr. 7, 2020), <https://www.forbes.com/sites/tarahaelle/2020/04/07/the-covid19-coronavirus-disease-may-be-twice-as-contagious-as-we-thought/#2430b04e29a6> (citing Steven Sanche et al., *High Contagiousness and Rapid Spread of Severe Acute Respiratory Syndrome Coronavirus 2*, 26 *Emerging Infectious Diseases* 7 (July 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-0282_article?deliveryName=USCDC_333-DM25287).

³⁰ *See generally* Complaint, Dkt. 1.

³¹ John Jacobi, *Prison Health Public Health: Obligations and Opportunities*, 31 *Am J L and Med* 447 (2005), available at <https://journals.sagepub.com/doi/abs/10.1177/009885880503100403?journalCode=jlma>.

³² *United States v. Rodriguez*, No. 2:03-cr-271-AB, Doc. No. 135 (E.D. PA. Apr. 1, 2020) (granting release after finding risk factors for COVID-19 constitute extraordinary and compelling reason).

to three days on plastic and stainless steel.”³³ Studies also show that the “virus can hang out as droplets in the air for up to three hours before they fall.”³⁴

“To the extent that prisoners are housed in close quarters, unable to maintain a six-foot distance from others, and sharing or touching objects used by others, infectious diseases that are transmitted via the air or touch are more likely to spread, placing people at risk. This is especially true when the number of prisoners is high . . .

Prisons can be viewed as ‘landlocked cruise ships[.]’ In such settings, no realistic amount of social distancing, disinfection, and other preventive measures renders the level of risk equal to that in an individual’s home . . .

Unlike cruise ships, [prisons] are not closed systems. Staff, new residents, and inanimate object—all potential vectors for the virus—are introduced into the system every day.”³⁵

In addition to environmental challenges, it is well documented that prisoners are far more vulnerable to severe COVID-19 infection than the general public. About forty percent of prisoners suffer from chronic health conditions, including diabetes and hypertension.³⁶ The age of prison populations also increases their vulnerability to COVID-19. Additionally, prison conditions “often accelerate the onset and progression of many chronic conditions associated with aging,” meaning, “old age in prison typically commences at ages 50 or 55 years.”³⁷

Prisons throughout the country, including those in Oregon, have implemented some prevention measures, such as suspending visitation, passing out masks, and putting marks on the walls six feet apart for lines. However, public health and other medical professionals have

³³ Harvard Medical School, *COVID-19 basics: Symptoms, spread and other essential information about the new coronavirus and COVID-19*, Harvard Health Publishing (May 5, 2020), available at <https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics>

³⁴ *Id.*

³⁵ Declaration of Marc Stern at para. 15-17; *see also* Declaration of Jeffrey Schwartz at 2.

³⁶ Glenn Ellis, *Examining health care in U.S. prisons*, The Philadelphia Tribune (Mar. 25, 2017), https://www.phillytrib.com/news/examining-health-care-in-u-s-prisons/article_43520055-789e-52a9-aed5-eaf1c75c7c36.html.

³⁷ Kimberly A. Skarupski et al., *The Health of America’s Aging Prison Population*, *Epidemiological Reviews* 40:157–165 (2018). *See also* Declaration of Marc Stern at 4.

identified crowded prisons’ limitations in implementing the strategy most likely to “flatten the curve”: social distancing.³⁸ There is no question among those public health and medical experts that social distancing is the cornerstone to preventing the spread of COVID-19 and that all other measures taken merely supplement social distancing to make that primary method more successful.³⁹ In amicus briefs and public declarations, experts have called for:

“‘decarcerating,’ or releasing, as many people as possible, focusing on those who are least likely to commit additional crimes, but also on the elderly and infirm; urging police and courts to immediately suspend arresting and sentencing people, as much as possible, for low-level crimes and misdemeanors; isolating and separating incarcerated persons who are infected and those who are under investigation for possible infection from the general prison population; hospitalizing those who are seriously ill; and identifying correctional staff and health care providers who became infected early and have recovered, who can help with custodial and care efforts once they have been cleared, since they may have some degree of immunity and severe staff shortages are likely.”⁴⁰

Staggering infection rates in United States jails and prisons have further proven that the half-measures meant to supplement social distancing are not enough to prevent the virus from entry into these facilities or to stop it from spreading. On April 8, 2020, Chicago’s Cook County

³⁸ Matthew J. Akiyama, M.D., Anne C. Spaulding, M.D., and Josiah D. Rich, M.D., *Flattening the Curve for Incarcerated Populations — Covid-19 in Jails and Prisons*, *The New England Journal of Medicine* (April 2, 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMp2005687>

³⁹ Letter from Johns Hopkins Faculty at 1, <https://cutt.ly/DtB6tkA> (“The close quarters of jails and prisons, the inability to employ effective social distancing measures, and the many high-contact surfaces within facilities, make transmission of COVID-19 more likely. Soap and hand sanitizers are not freely available in some facilities.”).

⁴⁰ *Id.*; See also Kelan Lyons, *Elderly Prison Population Vulnerable to Potential Coronavirus Outbreak*, *CONNECTICUT MIRROR* (Mar. 11, 2020), <https://cutt.ly/BtRSxCF>; Oluwadamilola T. Oladeru, et al., *What COVID-19 Means for America’s Incarcerated Population – and How to Ensure It’s Not Left Behind*, *HEALTH AFFAIRS* (Mar. 10, 2020), <https://cutt.ly/QtRSYNA>; Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, *MOTHER JONES* (Mar. 12, 2020), <https://cutt.ly/jtRSPnk>; JHU Faculty Express Urgent Concern about Covid-19 Spread in Prison, *Johns Hopkins Berman Institute of Bioethics*, (Mar. 25, 2020) <https://bioethics.jhu.edu/news-events/news/jhufaculty-express-urgent-concern-about-covid-19-spread-in-prison/>; Amanda Holpuch, *Calls Mount to Free Low-risk US Inmates to Curb Coronavirus Impact on Prisons*, *THE GUARDIAN* (Mar. 13, 2020) <https://cutt.ly/itRSDNH>.

Jail was deemed “the nation’s largest-known source of coronavirus infections.”⁴¹ The COVID-19 infection rate at New York’s Riker’s Island is more than seven times the rate of the population of New York state.⁴² After one positive COVID-19 test of a prisoner at Arkansas’s Cummins Unit prison, it tested 46 prisoners, 43 of whom tested positive.⁴³ After conducting mass testing throughout the prison, more than 680 of the nearly 1,700 prisoners have the virus.⁴⁴ FCI Oakdale in Louisiana has one of the worst outbreaks in the federal prison system where COVID-19 has killed 11 people.⁴⁵ Six of the ten largest clusters of outbreaks have occurred in correctional facilities.⁴⁶ Some prisons have decided to test all or a large number of prisoners to better understand the problem they face in dealing with COVID-19 in prisons. For example, at one Colorado prison, 473 inmates were tested after eight had tested positive, shining light on the site of the largest outbreak in Colorado.⁴⁷ Other prisons have refused to test to understand the risk as it exists. “Federal officials have largely given up testing at a half dozen prisons where serious outbreaks have erupted saying they assume that all staff and prisoners have been exposed: What’s the point of testing? Why waste the limited swabs?”⁴⁸ As long as the health of

⁴¹ Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, The New York Times (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-injails.html#click=https://t.co/f8FsDcM5r4>.

⁴² These numbers likely underestimate the infection rate on Rikers Island, as they cannot account for those who contracted COVID-19 while on Rikers Island who had subsequently been released or transferred. See The Legal Aid Society, *COVID-19 Infection Tracking in NYC Jails*, (last updated April 12, 2020), available at <https://legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails/> (Riker’s Island is currently experiencing 77 positive COVID-19 cases per 1000 people, while New York City only has 12.77 positives per 1000 people, and the greater state of New York is at only 9.71 per 1000 people).

⁴³ Samantha Michaels, *Want to Know How Fast Coronavirus Can Spread in Prison? Look at Arkansas*, MOTHER JONES (Apr. 13, 2020), <https://www.motherjones.com/coronavirus-updates/2020/04/cummins-unit-prisonarkansas-coronavirus-spread/>.

⁴⁴ Cary Aspinwall and Joseph Neff, *These Prisons are Doing Mass Testing for COVID-19 – and Finding Mass Infections*, THE MARSHALL PROJECT (Apr. 24, 2020), <https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections>

⁴⁵ *Id.*

⁴⁶ The New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*, (updated regularly, last accessed May 6, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

⁴⁷ Tara C. Mahadevan, *138 Inmates Test Positive for COVID-19 at Colorado’s Largest Prison*, (Apr 25, 2020), <https://www.complex.com/life/2020/04/inmates-test-positive-colorado-largest-prison>.

⁴⁸ *Id.*

prisoners and those they are likely to infect are not provided the level of care and attention that is demanded by the Constitution, that we as a “maturing society” acknowledge that our “evolving standards of decency” must extend to our treatment of prisoners, *Trop, supra* at 101, we will continue to see these patterns.

C. Existing Protocols And Practices In ODOC Institutions Expose Plaintiffs, Staff, And The General Public To An Unacceptable Risk Of Infection, Suffering, And Death.

ODOC has not been able to prevent COVID-19 from entering its facilities, nor has it been able to prevent it from spreading once it enters. As of May 12, 2020 at 7:30am, ODOC reports 23 staff and 69 prisoners have been infected with COVID-19 at four of its 14 institutions.⁴⁹ ODOC has only tested 331 of its more than 14,000 prisoners.⁵⁰ ODOC’s public assurances that it is following the OHA and CDC prison guidelines ring hollow given that they have already failed to prevent entrance into and spread of the disease in its prisons. Even so, health agency guidelines cannot mandate release of prisoners. They can only aim to reduce harm where states have refused to find ways to reduce prison populations to allow for social distancing.⁵¹ The Eighth Amendment demands Defendants do more.

Additionally, Plaintiffs submit declarations in support of this memorandum that convey that ODOC’s public statements and loose policies are not consistent with actions being taken within the facilities. What’s more, there is a disconnect between high-ranking officials and the staff operating the facilities each day. Even when the information is properly trickling down, institutional culture is preventing proper implementation. As evidenced by the Declaration of

⁴⁹Oregon Department of Corrections, *COVID-19 Tracking* (last visited May 12, 2020), available at <https://www.oregon.gov/doc/covid19/Pages/covid19-tracking.aspx>.

⁵⁰ *Id.* ODOC does not know the number of employees who have been tested for COVID-19. Oregon Department of Corrections, *COVID-19 Response Frequently Asked Questions* (last visited May 12, 2020), available at <https://www.oregon.gov/doc/covid19/Pages/faq.aspx>.

⁵¹ See Declaration of Marc Stern, ¶¶19-21.

Jeffrey Parnell, a correctional officer at OSP until April 28, 2020, 46 prisoner declarations, and 24 out of a total of 272 COVID-19 survey responses submitted in support of Plaintiffs' motion, for even small alterations in daily operations, there are stark inconsistencies between what decisionmakers are saying and prisoners and staff are experiencing.

1. Oregon's Aging Prison Population Creates A Greater Risk For COVID-19 Devastation.

When evaluating who in our society would fare the worst in a COVID-19 pandemic, the elderly and those with preexisting medical conditions like asthma, diabetes, and heart disease rank highest. As of May 1, 2020, ODOC holds 1,128 prisoners over the age of 60 and 3,440 prisoners between the ages of 46 and 60.⁵² This accounts for more than 31% of the entire prison population. A 2012 ACLU study found that Oregon had the ninth largest population of elderly prisoners in the United States, despite being the 27th largest state by population.⁵³ Just three years later, Pew Charitable Trusts listed Oregon as having the fourth largest elderly prisoner population.⁵⁴ On or about April 15, 2020, the Oregonian, via public records request, received "DOC Response to COVID-19: AIC Population Management Scenarios."⁵⁵ The Response counted 1,624 "most vulnerable," "other vulnerable," and "60+" prisoners.⁵⁶ This number does not include those who may be vulnerable or elderly and are set to be released within the next 12 months, which accounts for another 4,338 prisoners.⁵⁷

⁵² Oregon Department of Corrections, Inmate Population Profile for 05/01/2020, available at: <https://www.oregon.gov/doc/Documents/inmate-profile.pdf>

⁵³ American Civil Liberties Union, *At America's Expense: The Mass Incarceration of the Elderly* (June 2012), <https://www.aclu.org/report/americasexpense-mass-incarceration-elderly>.

⁵⁴ Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs: Older individuals have more chronic illnesses and other ailments that necessitate greater spending*, PEW Charitable Trusts (Feb. 20, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/agingprison-populations-drive-up-costs>.

⁵⁵ Noelle Crombie, *State said up to 6,000 Oregon inmates would face release to allow social distancing; Gov. Kate Brown said no*, the Oregonian (April 15, 2020), available at <https://www.oregonlive.com/coronavirus/2020/04/state-said-up-to-6000-state-inmates-would-face-release-to-allow-social-distancing-gov-kate-brown-said-no.html>

⁵⁶ *Id.*

⁵⁷ *Id.*

2. Without Reducing Prison Populations, Defendants Are Unable To Provide Constitutionally-Adequate Protection For Their Prisoners From COVID-19.

Defendants have made a number of changes in an effort to mitigate the inevitable risk of COVID-19 entering and spreading throughout ODOC facilities. What Defendants fail to understand, however, is that the congregate and retributive nature of its facilities is what causes such a grave risk to prisoners, staff, and the general public:

“Following the recommendations of CDC and other public health authorities with regard to preventive measures only decreases, but does not eliminate, the risk of introduction and spread of coronavirus in a detention facility. Again, in such settings, no realistic amount of social distancing, disinfection, and other preventive measures renders the level of risk equal to that in an individual’s home. Thus, even if ODOC is executing all the steps outlines in the guidelines, and is doing so effectively, without flaw or occasional lapse, incarcerated individuals, especially those who are medically at-risk, remain at heightened risk of infection and serious outcome.”⁵⁸

Without altering the nature of the facilities, Defendants are putting a bandage on a deep wound.

a.ODOC Reports That It Is Following The CDC’s Interim Guidance Of Management On COVID-19 In Correctional And Detention Facilities.

ODOC’s COVID-19 Response page states that it “is modifying operations in accordance with the Interim Guidance on Management on Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities provided by the CDC.”⁵⁹ It states that it has a confidential Continuity of Operations Plan for each institution.⁶⁰ ODOC’s Response page lists the following changes to its operations:

⁵⁸ Declaration of Marc Stern, ¶ 21.

⁵⁹ Oregon Department of Corrections, *COVID-19 Response* (last visited May 11, 2020), available at <https://www.oregon.gov/doc/covid19/Pages/default.aspx>.

⁶⁰ Oregon Department of Corrections, *COVID19 Response Frequently Asked Questions* (last visited May 11, 2020), available at <https://www.oregon.gov/doc/covid19/Pages/faq.aspx>.

- For cleaning, ODOC states that they are “cleaning numerous times a day, including disinfecting housing units, bathrooms, eating areas, doors, stairwells, countertops, etc. At all out institutions and worksites, we use Waxie 710 to clean and disinfect.”⁶¹
- For prisoner education, “[p]osters have been placed in all DOC institutions encouraging adults in custody to wash hands frequently for at least 20 seconds, to cough and sneeze into their elbow, and to avoid touching their face. These are the most effective methods to prevent the spread of illness.”⁶²
- For social distancing, Defendants have not released any prisoners to accommodate social distancing practices.⁶³ ODOC relies on the language in Governor Brown’s Executive Order No. 20-12 that “directs government buildings to implement social distancing measures to the maximum extent possible.” It states that “[w]hile DOC facilities were not designed to keep people six feet away from one another, Oregon’s 14 prisons have implemented several social distancing measures:
 - All DOC prisons are closed to visitors, volunteers and the majority of contract employees . . .
 - We have modified line movements to limit the number of AICs in common areas.
 - Chapel seating is measured to maintain social distancing and attendance limited.
 - AICs are staying together by unit.
 - Staff have placed blue tape on the ground six feet apart, indicating where people should stand in line.
 - We have limited the number of AICs that can sit at dayroom tables
 - We have eliminated group activities in the yards.

Regarding housing, AICs live in either dorm or a celled housing unit. We are limited in using other areas of the institutions, like classrooms and corridors, for housing space because AICs must be supervised by DOC employees.”⁶⁴

- For personal protective equipment, OCE has a goal of producing 60,000 50/50 poly cotton blend masks “for voluntary use by DOC employees and adults in custody.”⁶⁵
- For hygiene, prisoners “have access to soap and water, sinks, and handwashing stations.” ODOC encourages “all AICs to wash their hands frequently for at least 20 seconds.”⁶⁶

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Conrad Wilson, *Oregon Gov. Kate Brown Won't Release Prisoners Over COVID Risks*, Oregon Public Broadcasting (April 14, 2020), available at <https://www.opb.org/news/article/oregon-gov-wont-release-prisoners-over-covid-risks/>

⁶⁴ Oregon Department of Corrections, *COVID19 Response Frequently Asked Questions* (last visited May 11, 2020), available at <https://www.oregon.gov/doc/covid19/Pages/faq.aspx>

⁶⁵ *Id.*

⁶⁶ *Id.*

- For vulnerable prisoners, ODOC is “intensifying the efforts to reduce potential exposure and transmission. If an adult in custody (AIC) becomes ill and exhibits flu like symptoms, then we follow CDC and OHA guidance for supportive care.”⁶⁷
- For facility transfers, “essential transfers between institutions, and to and from jails for intake and court are occurring as usual.”⁶⁸
- For OCE commercial laundry services, “OCE will continue to utilize standard/universal precautions in the handling and processing of all contaminated materials for staff and adult in custody workers. As a precaution, OCR had increased the frequency of cleaning and disinfecting of our laundry facilities.”⁶⁹
- For testing, “If an adult in custody is showing signs and symptoms of flu/COVID-19, including fever, cough, and shortness of breath, they will be tested as healthcare providers direct. DOC uses CDC/PHA guidance on appropriate criteria for testing. Those being tested and/or awaiting results are on respiratory isolation.”⁷⁰
- For prisoners with COVID-19, “DOC will be following CDC/OHA guidance on social distancing, masking, and isolating patients with COVID-19 disease who can receive supportive care within the institutions. Patients who are too sick to remain within the institution will be sent to local hospitals for further evaluation and treatment.”⁷¹

ODOC is currently holding 112 prisoners in medical isolation and 2,726 people in quarantine.⁷² ODOC defines medical isolation as “confining a confirmed or suspected COVID-19 case. Ideally, to a single cell with solid walls and a solid door that closes, to prevent contact with others and to reduce the risk of transmission. Medical isolation ends when the individual meets pre-established clinical and/or testing criteria for release from isolation, in consultation with clinical providers and public health officials. In this context, isolation does NOT refer to punitive isolation for behavioral infractions within the custodial setting.”⁷³ ODOC defines quarantine as “confining individuals who have had close contact with a COVID-19 case to

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Oregon Department of Corrections, *COVID-19 Tracking* (last visited May 12, 2020), available at <https://www.oregon.gov/doc/covid19/Pages/covid19-tracking.aspx>.

⁷³ *Id.*

determine whether they develop symptoms of the disease. Quarantine for COVID-19 lasts for a period of 14 days. Ideally, each quarantined individual would be quarantined in a single cell with solid walls and a solid door that closes. If symptoms develop during the 14-day period, the AIC will be placed under medical isolation and evaluated for COVID-19. If symptoms do not develop, movement restrictions can be lifted, and the individual can return to their previous residency status within the facility.”⁷⁴

ODOC has created a “tiers” system to classify the procedures that it is taking at each facility, depending on the entry and spread of the virus:

“**Tier 1** – Institutions without known COVID-19

Tier 2 – Institutions with confirmed COVID-19 (AIC and/or Employee) originating from the institution

Tier 3 – Institutions with confirmed COVID-19 and expanded testing of those with direct contact & all symptomatic AICs

Tier 4 – Entire institution quarantined for 14 days – Only AIC transfers for life saving measures

Tier 5 – Consider multiple institutions quarantined for 14 days – All AIC transfers coordinated through AOC”

There are currently 10 Tier 1 and four Tier 4 institutions.⁷⁵

b. Plaintiffs Cannot Avoid Close Contact With Other Prisoners And Staff.

“The CDC Guidelines unequivocally recommend social distancing between all prisoners at all times . . . the [qualifying] language in the CDC Guidelines should not be viewed as sanctioning programmatic, long term violation of six-foot distancing.”⁷⁶ Regardless of the presence of symptoms, prisons should create strategies tailored to their individual facilities to

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Declaration of Jeffrey Schwartz, ¶ 4.

increase physical space between prisoners.⁷⁷ As of May 1, 2020, ODOC facilities were holding 14,351 prisoners⁷⁸ at 96.5 to 98.7% prisoner capacity.⁷⁹ “DOC estimates that 5,800 AICs (40%) would have to be released to accomplish social distancing for the remaining AICs.”⁸⁰ The parties agree that Oregon prisons are fundamentally incompatible with medically-recommended social distancing.⁸¹ Prisoner and guard declarations convey the impossibility of distancing in some settings and the inability of Defendants to enforce distancing in others.

“It is impossible to feel safe from infection. It is dirty and impossible to practice safe spacing here. At almost every moment, I am within arm’s reach of another AIC.”⁸²

“In the day room of our unit, if an AIC violate[sic] social distancing rules . . . you get sent to your bunk where you’re three and half feet away from the person above/below you and the people on either side of you who you can reach out and touch.”⁸³

“In my estimation, inmates in line movements are a few inches to one foot apart.”⁸⁴

Most of ODOC’s 14 facilities have dormitory-style housing. This means that groups of people are residing in crowded living quarters. Beds are within a few feet of each other, no more than arm’s length.⁸⁵ ODOC has not taken any measures to attempt distancing in dormitory units.

⁷⁷ Center for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, at Pg. 5 (March 23, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

⁷⁸ Oregon Department of Corrections, *Inmate Population Profile for 5/01/2020*, available at <https://www.oregon.gov/doc/Documents/inmate-profile.pdf>

⁷⁹ Lauren Dake and Conrad Wilson, *Inmates Brace For Virus Outbreak, While Oregon Considers Early Release*, OREGON PUBLIC BROADCASTING (Apr. 8, 2020), <https://www.opb.org/news/article/coronavirus-covid-19-prison-oregon-inmates/>.

⁸⁰ Noelle Crombe, *State said up to 6,000 Oregon inmates would face release to allow social distancing; Gov. Kate Brown said no*, The Oregonian (Apr. 15, 2020), <https://www.oregonlive.com/coronavirus/2020/04/state-said-up-to-6000-state-inmates-would-face-release-to-allow-social-distancing-gov-kate-brown-said-no.html>.

⁸¹ Defendant’s Answer, ¶ 2.

⁸² Declaration of Nathan Adams, ¶ 19.

⁸³ Declaration of Michaela Taylor, ¶ 4(f).

⁸⁴ Declaration of Jeffrey Parnell, ¶ 5; *See also* ¶¶ 6-7.

⁸⁵ *See e.g.*, Declaration of Mari-Teresa Gillespie; Declaration of Joshua Brown; Declaration of John Preston; Declaration of Stephen Meeks; Declaration of Lisandro Sanchez; Declaration of Mickey Weis; Declaration of Patrick Kirk; Declaration of Althea Selover, ¶¶ 6(c), 8(a).

Declarant Ronald Cantrell, for example, is “not able to achieve a social distance of more than 6 feet from others because the beds in the unit are only about 30 inches apart.”⁸⁶ Prisoners not housed in dorms are rarely celled alone. Units contain very few sinks, showers, and drinking fountains to be shared among many dozens of prisoners.⁸⁷ Units also share other items, like tablets and telephones.

“Because the day room is so crowded, I stay in my cell. The phone in the day room are approximately 18 inches apart, and inmates using the phones are shoulder to shoulder . . . As a result, I have avoided using the phone to communicate with loved ones.”⁸⁸

When prisoners go to eat, they are sent with other units and are forced to sit very close to one another, almost always elbow to elbow.⁸⁹

“I have not continued to go to the institution cafeteria as normal. I now go only once or twice a day, and the rest of the time I either go hungry or make food in the common area of the dorm . . . There are still 140 people in the cafeteria at a time. The units still pass close by each other in the hallways between meal service.”⁹⁰

Measures taken to attempt distancing during chow have been inadequate. ODOC has begun staggering meals at some facilities, but even then, units often remain mixed and/or prisoners are still sitting within two feet of one another. When units are segregated during chow, those who work in the cafeteria are from mixed units.⁹¹ Few facilities enforce mask-wearing

⁸⁶ Declaration of Ronald Cantrell, ¶ 10.

⁸⁷ See e.g., Declaration of Ronald Cantrell; Declaration of Leland Benson; Declaration of Nathan Adams.

⁸⁸ Declaration of Leland Benson, ¶ 7; See also Declaration of Aaron Delicino; Declaration of Francis Weaver; Declaration of Jesse Patterson.

⁸⁹ See e.g., Declaration of Jeffrey Parnell; Declaration of Ronald Cantrell; Declaration of Luis Polanco; Declaration of Paula Prosch; Declaration of Steve Jamison; Declaration of Mari-Teresa Gillespie; Declaration of Tyrone Lee; Declaration of Mylo Lupoli; Declaration of Micah Rhodes; Declaration of Leland Benson; Declaration of Stephen Meeks; Declaration of Kevin McCormack; Declaration of Christopher Mitchell; Declaration of Patrick Kirk; Declaration of Rian Smith.

⁹⁰ Declaration of Luis Polanco, ¶ 16.

⁹¹ See e.g., Declaration of Jesse Patterson; Declaration of Christopher Mitchell; Declaration of Rian Smith; Declaration of Micah Rhodes.

while serving or being served food.⁹² In fact, Frankie White reports that "[o]n or about April 15, 2020, I saw someone taken to the hole for refusing to work in the chow hall because everyone is bunched together in there, and because inmates serving food do not wear masks."⁹³ Some facilities are not properly cleaning or cleaning at all between cafeteria servings.⁹⁴ Many facilities are not enforcing distancing in cafeteria lines. At Mill Creek Correctional Facility, for example,

“There were precautionary measures taken during chow for about one week in early April. We were sitting two people to a table, and they were making sure there was distancing between AICs who were getting served. Now, we are back to eating as normal . . . You are close to people in front and behind you, and you pass other AICs in the narrow stairwell to get to chow. Four people sit at each table, shoulder to shoulder.”⁹⁵

Yard time is also often spent with multiple units at once and continued crowding.⁹⁶

When prisoners walk in a line through the halls of the facilities, they can reach out and touch the person in front of them and the people in other units walking close by. They are patted down, talked to, and fed by people consistently throughout each day who are not wearing protective gear. Prisoners who go to work rub elbows with staff and their colleagues from other units.

It is reported that some facilities hear regular announcements recommending that prisoners engage in social distancing.⁹⁷ It is clear that ODOC recognizes the public health benefit of social distancing, but, because of the constant and unavoidable proximity inherent in life in ODOC, because of the lack of compliance by guards,⁹⁸ and because of the failure to

⁹² See e.g., Declaration of Kelly Ferreira.

⁹³ Declaration of Frankie White, ¶ 29.

⁹⁴ See e.g., Declaration of Gavin Pritchett; Declaration of Mylo Lupoli; Declaration of Paula Prosch.

⁹⁵ Declaration of Stephen Meeks, ¶ 10.

⁹⁶ See e.g., Declaration of Luis Polanco, Declaration of Michaela Taylor; Declaration of Kerry Crockett; Declaration of David Hart; Declaration of Kevin McCormack.

⁹⁷ Declaration of Althea Seloover at 8(b).

⁹⁸ *Id.*

implement social distancing when possible,⁹⁹ it is impossible for all prisoners to protect themselves.

c. Defendants Do Not Consistently Follow Hygiene, Cleaning, And Disinfection Guidance.

Although social distancing is the keystone of transmission prevention, the CDC Guidelines also recommended that prisons reinforce good hygiene practices and intensify cleaning and disinfecting practices to prevent the introduction or reduce the spread of COVID-19.¹⁰⁰ Recommended hygiene-related steps include providing no-cost access to soap, “running water, and hand drying machines or disposable paper towels for hand washing[,] tissues and no-touch trash receptacles for disposal.”¹⁰¹ Cleaning and disinfecting includes cleaning frequently touched surfaces several times per day with EPA-registered disinfectants effective against the virus following the label instructions.¹⁰² Hygiene and cleaning guidance is not consistently followed in ODOC facilities. Reports from prisoners in ODOC facilities state that cleaning practices remain nearly the same as they did before COVID-19.¹⁰³ Reports also include:

- Prisoners run out of paper towels and cleaning supplies regularly.¹⁰⁴
- There is one spray bottle of disinfectant to be shared among units as large as 160 people.¹⁰⁵
- Few tablets and phones shared among 60 or more prisoners are not being cleaned between uses.¹⁰⁶

⁹⁹ *Id.*

¹⁰⁰ Center for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, at Pg. 8 (March 23, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>

¹⁰¹ *Id.* at Pg. 10.

¹⁰² *Id.* at Pg. 9.

¹⁰³ See e.g., Exhibit 1 SURVEY RESPONSES; Declaration of Stephen Meeks; Declaration of Jesse Patterson.

¹⁰⁴ See e.g., Declaration of Ronald Cantrell; Declaration of Luis Polanco; Declaration of Jamahl Maner; Declaration of Kerry Crockett; Declaration of Wayne Houff; Declaration of Brandon Borba; Declaration of Althea Selover, ¶ 8(c).

¹⁰⁵ See e.g., Exhibit 1 SURVEYS from OSP.

¹⁰⁶ See e.g., Declaration of Wayne Houff; Declaration of Aaron Delicino.

- Cafeterias are not being cleaned properly or at all between servings.¹⁰⁷
- Thoroughness of cleaning depends on the will of the orderly or the time available to clean.¹⁰⁸

Without adequate cleaning of all frequently touched, shared surfaces, any measures taken to attempt to distance or keep units or people separate are futile.

d. Defendants Do Not Provide Adequate Testing.

Testing to identify who has COVID-19 and who does not provides a basis to better apply interventions.¹⁰⁹ Mass testing is one of the many reasons South Korea is considered to have been so successful in handling the virus.¹¹⁰ By not testing or by undertesting, prisons “are basically saying, ‘We’ll just deal with the carnage. Prisoners are consigned to oblivion.’”¹¹¹

On March 19, 2020 while Oregon was struggling to test people, state officials outlined a prioritization plan for how it would use 5,000 tests that it was about to receive; it would prioritize the testing of health care workers with symptoms, and its second priority would be testing anyone with symptoms in hospitals and congregate living facilities, including correctional facilities.¹¹² By April 1, roughly one per day since announcing that prisoners with symptoms would be the states number two priority for testing, ODOC had only tested 13 prisoners out of

¹⁰⁷ Declaration of Mylo Lupoli, ¶ 14; *see also* Declaration of Paula Prosch.

¹⁰⁸ *See e.g.*, Declaration of Ronald Cantrell; Declaration of Michaela Taylor; Declaration of Chris Mitchell; Declaration of Patrick Kirk.

¹⁰⁹ Cary Aspinwall, Joseph Neff, *These Prisons Are Doing Mass Testing For COVID-19—And Finding Mass Infections*, The Marshall Project (April 24, 2020) available at <https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections>

¹¹⁰ Kanga Kong, *Seoul’s Full Cafes, Apple Store Lines Show Mass Testing Success*, Bloomberg News (April 18, 2020), available at <https://www.bloomberg.com/news/articles/2020-04-18/seoul-s-full-cafes-apple-store-lines-show-mass-testing-success>

¹¹¹ *See* Fn. 87.

¹¹² Brad Schmidt, *Oregon prioritizes who can be tested for coronavirus – with the tests it doesn’t have*, The Oregonian (March 19, 2020) <https://www.oregonlive.com/coronavirus/2020/03/oregon-prioritizes-who-can-be-tested-for-coronavirus-with-the-tests-it-doesnt-have.html>.

nearly 14,500 prisoners in 14 correctional facilities.¹¹³ The declarations filed with this motion make it clear, however, that there have been no lack of prisoners with COVID-19 symptoms in March. Rather, what has been lacking is the will and action by Defendants to do what they can and must to keep prisoners safe.

On April 1, after the first confirmed COVID-19 case of an OSP staff member, Chief of Medicine for ODOC, Dr. DiGiulio, announced that ODOC would ramp up testing of prisoners.¹¹⁴ On May 1, 2020, Governor Brown announced a new “Contact Tracing Strategy, which includes a testing turnaround time of 48-72 hours for people who are symptomatic.”¹¹⁵ The OHA’s May 1, 2020 “Criteria for COVID-19 testing at OSPHL” states that it will test people in correctional settings with acute symptoms.¹¹⁶

But even now, despite repeated public promises to do more, and with the entrance and spread of COVID-19 within ODOC facilities infecting at least 23 staff and 69 prisoners, ODOC has conducted 331 COVID-19 tests for prisoners, a 2.3% test rate,¹¹⁷ still falling within the category of undertesting. Thus, the number of prisoners with COVID-19 in ODOC is sure to be wildly underreported and the response lacking.

¹¹³ Alex Zielinski, *Q&A: Department of Corrections' Chief Medical Officer on Treating COVID-19 in Oregon Prisons*, The Portland Mercury (April 1, 2020), available at <https://www.portlandmercury.com/blogtown/2020/04/01/28231039/qanda-department-of-corrections-chief-medical-officer-on-treating-covid-19-in-oregon-prisons>

¹¹⁴ Noelle Crombie, *Prison employee is first confirmed coronavirus case in Oregon Department of Corrections*, The Oregonian (April 1, 2020), available at <https://www.oregonlive.com/coronavirus/2020/04/prison-employee-is-first-confirmed-case-of-covid-19-in-oregon-department-of-corrections.html>

¹¹⁵ Oregon COVID-19 Testing and Contact Tracing Strategy, Oregon Health Authority (May 2020), available at <https://sharesystems.dhsoha.state.or.us/DHSForms/Served/1e2327.pdf>; KGW Staff, Morgan Romero, *Gov. Brown announces Oregon's COVID-19 testing, contact tracing plans*, KGW8 News (May 2, 2020), available at <https://www.kgw.com/article/news/health/coronavirus/oregon-governor-kate-brown-press-conference-contact-tracing-testing/283-668f3b95-8c21-41f2-83ac-a15268bfa27f>

¹¹⁶ *Criteria for COVID-19 testing at OSPHL*, Oregon Health Authority (May 1, 2020), available at <https://sharesystems.dhsoha.state.or.us/DHSForms/Served/1e2342.pdf>

¹¹⁷ *COVID-19 Status at Oregon Department of Corrections Facilities*, Oregon Department of Corrections, (last visited May 12, 2020) available at <https://www.oregon.gov/doc/covid19/Pages/covid19-tracking.aspx>.

“From California to North Carolina, prisons that do aggressive testing are finding that infection is spreading quickly.”¹¹⁸ In Ohio, for example, which started mass testing in its most affected facilities, “Marion Correctional Institution, an hour north of Columbus, has reported four deaths, but has more than 2,000 prisoners and at least 160 staffers who tested positive for the virus. At Pickaway Correctional Institution an hour away, at least nine prisoners have died, while more than 1,500 prisoners and 79 staffers have tested positive.”¹¹⁹ In federal prisons, over 70% of those tested for COVID-19 have tested positive.¹²⁰ Within the Michigan Department of Corrections, 2,139 prisoners have contracted the virus and 54 prisoners have died after contracting COVID-19.¹²¹ Michigan’s Governor Whitmer announced that Michigan has tested more than 12,200 prisoners as of May 11, enlisting the help of the National Guard to do so.¹²² In just two weeks, Michigan went from being able to conduct 4,000 tests per day to being able to conduct 14,000 per day.¹²³

OHA’s COVID-19 Prison Guidelines states that “[f]acilities should ensure that incarcerated/detained individuals receive medical evaluation and treatment at the first signs of COVID-19.”¹²⁴ However, declarants paint a very different picture of what is happening within ODOC facilities. ODOC prisoners are and have been facing a number of hurdles in addition to

¹¹⁸ *Supra*, fn. 87.

¹¹⁹ *Id.*

¹²⁰ Michael Balsamo, *Over 70% of tested inmates in federal prisons have COVID-19*, AP News (April 29, 2020), available at <https://apnews.com/fb43e3ebc447355a4f71e3563dbdca4f>

¹²¹ WOODTV.com News Staff, *Testing ramps up as Michigan coronavirus cases, deaths decline*, WOODTV News (May 11, 2020), <https://www.woodtv.com/health/coronavirus/may-11-2020-michigan-cornavirus-case-numbers/>.

¹²² *Id.*

¹²³ *Id.* As a result, Michigan is working to limit its prison population to slow the spread of the virus by paroling nonviolent offenders more quickly. Last week, 225 people were paroled, 273 this week, 252 will be paroled next week, and 303 the following.

¹²⁴ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, at pg. 23, Oregon Health Authority (April 5, 2020), available at <https://shredsystems.dhsoha.state.or.us/DHSForms/Served/1e2288s.pdf>

those the Oregon general public has and had been facing in getting access to COVID-19 testing.

Prisoners who are symptomatic and want to be tested have consistently been denied tests.

“On or about March 14, 2020, I became seriously ill. My entire body ached, and I had no appetite. At times, I coughed up blood, and I could not breathe. I experienced fatigue and dizziness. I went to Medical on March 14, 15, 16, and 17th before I was seen by a doctor or a nurse. On each occasion I was told that I just had a cold and was sent away with Tylenol and a 2-day lay-in . . . On or about March 22, 2020, I was having a hard time breathing . . . I told [Nurse Mary] my symptoms; difficulty breathing, coughing badly, my eyes hurt and my body was weak. She told me there was nothing she could do for me and that she needed to attend to other people rather than deal with my problem and walked away . . . On or about March 30, 2020, I returned to Medical. The nurse I spoke with told me that I did not have symptoms of COVID-19, and there was nothing she could do for me. On or about March 30, 2020, I filed a grievance about the inadequate medical treatment I had received. On or about April 7, 2020, . . . [Nurse Bailey] gave me a test for COVID-19.”¹²⁵

“When I got sick in March a bunch of other people on my unit also got really sick. I self-quarantined because medical wasn’t doing anything for us. After 9 days of being sick a nurse came and checked my temperature – it came back 103 degrees and then later that day 104 degrees. The nurse I saw gave me salt packets and told me to gargle salt water. That’s the only ‘care’ I got. Ultimately I was in my cell for 14 or 15 days before the fever kicked. I still felt really bad for a couple weeks after that. Today I still have a dry cough.”¹²⁶

“I had a 104 degree temperature, cough, and my whole body hurt. I almost went to the hole trying to get medical treatment because I had to insist on getting treatment . . . I requested a sack lunch to my cell so I didn’t have to go to chow hall. They denied that request so I didn’t go to chow hall or eat for four days . . . Since being sick I’ve been experiencing a strange heart palpitation issue when I work out.”¹²⁷

¹²⁵ Declaration of Frankie White, ¶¶ 8-15.

¹²⁶ Declaration of Aaron Delicino, ¶ 5(b).

¹²⁷ Declaration of Matthew Maddox, ¶ 5(a)-(e).

Save for recent, limited testing of prisoners at Oregon State Penitentiary and Shutter Creek Correctional Facility, facilities with high infection rates,¹²⁸ only some prisoners who have high temperatures and voices loud enough to get medical assistance or officers who are willing to advocate for them are considered for testing.¹²⁹ Many prisoners who have been tested tell stories consistent with reported false-negatives:¹³⁰ some prisoners who were symptomatic were tested late and/or after symptoms subsided;¹³¹ some prisoners who were tested were told there were mistakes in the testing process;¹³² and some prisoners report that the test swab was not put far enough up their noses to have actually produced a proper test sample.¹³³ Some prisoners have not been given their results or told what test they were given.¹³⁴

Besides lacking access to testing, what is also clear is that declarants report that the actions and culture in ODOC facilities create an environment where they and other prisoners have been sick with symptoms such as coughing throughout the night and difficulty breathing, but they would rather keep to themselves than report their illnesses.¹³⁵

“People are afraid of being put in segregation. Other prisoners have told me they ice down their foreheads so they do not register a high temperature and get thrown in the hole.”¹³⁶

¹²⁸ See *COVID-19 Status at Oregon Department of Corrections Facilities*, Oregon Department of Corrections, (last visited May 12, 2020) available at <https://www.oregon.gov/doc/covid19/Pages/covid19-tracking.aspx>.

¹²⁹ See e.g., Declaration of Skyler Floro; Declaration of Kerry Crockett; Declaration of Theron Hall, ¶ 11(e); Declaration of Mylo Lupoli; Declaration of Althea Selover, ¶¶ 7(d)-(f), 8(d)-(g), 9(c)-(e), 11(b)-(d), 12(d).

¹³⁰ See Eleanor Cummins, *Why the Coronavirus Test Gives So Many False Negatives*, Slate Magazine (April 6, 2020), available at <https://slate.com/technology/2020/04/coronavirus-testing-false-negatives.html>

¹³¹ “I was sick for two weeks in March, but I did not go to medical for the symptoms, because the standard procedure in medical is that they won’t examine you unless you’ve been sick for two weeks, then they will reevaluate you. Because of this, ninety percent of people don’t report symptoms to medical.” Declaration of Ronald Cantrell, ¶ 21; See also Declaration of Kelly Ferreira.

¹³² Declaration of Althea Selover, ¶ 13(b)-(d).

¹³³ *Id.* at 10(g).

¹³⁴ See e.g., Declaration of Tyrone Lee; Declaration of Erik Larson.

¹³⁵ See e.g., Declaration of Ronald Cantrell; Declaration of Skyler Floro; Declaration of Corey Constantin; Declaration of Michael Garrett; Declaration of John Preston; Declaration of Wayne Houff; Declaration of Gavin Pritchett; Declaration of Rian Smith; Declaration of Theron Hall.

¹³⁶ Declaration of Francis Weaver, ¶ 9.

ODOC reports quarantine and isolation are not punitive,¹³⁷ but declarants understand that those who return from either have reported it is no different from being sent to the hole. “A cornerstone of reliable self-reporting is that medical isolation not be viewed as punitive, frightening, or dangerous.”¹³⁸

“I was quarantined in the Disciplinary Segregation Unit (DSU) from April 7 to April 9, 2020 . . . My DSU cell was dirty. The toilet was filthy. There was food and biological stains on the floor. The sink was crusted with old soap and hair on it. There was no soap or toothbrush provided. When I asked an officer on the unit for soap and reading material, he replied, ‘Go fuck yourself.’ While I was in quarantine, there were no cleaning supplies provided . . . staff did not allow me access to my inhaler, an officer in the unit told me, ‘Go fuck yourself.’ While I was in quarantine, I was not allowed access to my property.”¹³⁹

And as Mr. Parnell noted:

“[T]hirty or forty prisoners from Santiam, Coffee Creek, and other facilities were moved into the dorm for isolation, include two immunocompromised inmates I have escorted to the hospital for chemotherapy. Those same inmates were made to clean the dorm, including the floors and bathrooms. The bathroom was filthy. Mold was visible in the corners. Tiles were coming up from the floor and falling off the wall. At least one of the toilets was broken, and a urinal was wrapped in a plastic bag.”¹⁴⁰

Furthermore, because ODOC has not provided prisoners with information about where they will go if they are sick or test positive, rumors and fears of what ODOC will do to them keep people from seeking treatment.¹⁴¹ They must choose between protecting the health of themselves and those around them and severe punishment.

¹³⁷ See *COVID-19 Status at Oregon Department of Corrections Facilities*, Oregon Department of Corrections, (last visited May 12, 2020) available at <https://www.oregon.gov/doc/covid19/Pages/covid19-tracking.aspx>.

¹³⁸ Declaration of Jeffrey Schwartz, ¶ 8.

¹³⁹ Declaration of Frankie White, ¶¶ 16-19.

¹⁴⁰ Declaration of Jeffrey Parnell, ¶ 28.

¹⁴¹ See *e.g.*, Declaration of Christopher Mitchell; Declaration of Stephen Richardson.

e. Defendants Do Not Provide Adequate Quarantine And Medical Isolation Conditions.

The CDC Guidelines state that while waiting on COVID-19 test results, prisons should “plac[e] individuals with symptoms under medical isolation, quarantin[e] their close contacts, [and facilitate] necessary medical care.”¹⁴² Prisoners and staff who came into close contact with COVID-19 cases should be quarantined for 14 days.¹⁴³ Best practice is to quarantine people individually. Prisoners’ symptoms should be monitored closely, twice per day, including temperature checks, and those with symptoms should be placed in medical isolation immediately.¹⁴⁴ If prisoners must be quarantined together, they should wear masks at all times.¹⁴⁵

The implementation of these quarantine and isolation practices throughout ODOC facilities has been scattered at best and absent at worst. This comes as no surprise, as “a prison system at or near full capacity simply cannot medically segregate populations to control the spread of infection.”¹⁴⁶ For example, when a staff person at OSP was the first to test positive with COVID-19 in all of ODOC, the unit that person worked was put on lockdown for just 48 hours.¹⁴⁷ Other quarantine and isolation failings include:

- When entire units are locked down, there is still contact with people making deliveries, guards who travel between units, orderlies, servers at the cafeteria, and through shared phones.¹⁴⁸

¹⁴² Center for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, at Pg. 14 (March 23, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>

¹⁴³ *Id.* at ¶ 4.

¹⁴⁴ *Id.* at ¶ 21.

¹⁴⁵ *Id.* at ¶ 15.

¹⁴⁶ Declaration of Jeffrey Schwartz, ¶ 5.

¹⁴⁷ Declaration of Frankie White; Declaration of Jeffrey Parnell, ¶ 16.

¹⁴⁸ Declaration of Norman Hoag; Declaration of Tyrone Lee; Declaration of Erik Larson; Declaration of Wayne Houff; Declaration of Steven Richardson; Declaration of Brandon Borba; Declaration of Francis Weaver; Declaration of Norman Hoag.

- Prisoners with symptoms have been left in their assigned housing without being seen by medical or tested for days or weeks.¹⁴⁹
- Prison transfers are happening regularly, including from those ODOC facilities with high infection rates. There are reports that people being transferred are not being properly quarantined before being released into general population or in shared spaces.¹⁵⁰
- Prisoners who are considered vulnerable have been housed in dorms with up to 100 other non-vulnerable prisoners.¹⁵¹
- Prisoners who have been recently tested have been given medical masks and told to return to their housing units.¹⁵²
- Prisoners who have symptoms and have been put into quarantine have been placed with other people also showing symptoms, increasing the likelihood that they will ultimately become infected if they are not already.¹⁵³
- Prisoners not in quarantine clean the quarantine cells and rooms.¹⁵⁴
- Finally, prisoners who have been put into quarantine have described its brutality.¹⁵⁵

Even if ODOC were providing effective quarantine for its prisoners with symptoms, it does not account for, test, or properly manage the unknown numbers of infected but asymptomatic people who can spread the disease and who remain in close contact with one another.

¹⁴⁹ Declaration of Frankie White; Declaration of Gavin Pritchett; Declaration of Matthew Maddox; Declaration of Mylo Lupoli; Declaration of Kelly Ferreira; Declaration of Theron Hall, ¶ 11(h); Declaration of Althea Selover, ¶¶ 6(e)-(f), 7(c)-(d), 10(b)-(d).

¹⁵⁰ Declaration of Joshua Hedrick; Declaration of Ronald Cantrell; Declaration of Micah Rhodes; Declaration of Lisandro Sanchez; Declaration of Jesse Patterson; Declaration of Mickey Weis; Declaration of Aaron Delicino; Declaration of Brandon Borba; Declaration of Patrick Kirk; Declaration of Garry Braunberger; Declaration of Jeffrey Parnell.

¹⁵¹ Declaration of Mari-Teresa Gillespie; Declaration of Paula Prosch; Declaration of Kevin McCormack.

¹⁵² See e.g., Declaration of Daniel Nielson.

¹⁵³ See e.g., Declaration of Daniel White; Declaration of Althea Selover, ¶13(e).

¹⁵⁴ See e.g., Declaration of Joshua Brown.

¹⁵⁵ See § IV.C.2.e.

f. Prisoners Working Within ODOC And At Oregon Correctional Enterprises Face Unsafe Working Conditions.

Multiple prisoner workers have reported working conditions that do not allow them to be socially distant in some respect during their work days. For many prisoners, this begins at the start of the work day:

“Other AICs and I [at CCCF] pull canteen orders for 11 ODOC institutions. I get on a bus to go to work. Today, for example, we were put in what I call the cattle truck, which is a truck with a trailer attached. 13 of us were put in the truck. We sit in the trailer and were split into section. Today, I sat shoulder to shoulder with about 5 people. We don’t wear masks in the bus.”¹⁵⁶

Other inmates also report being placed in close quarters at the start of work.¹⁵⁷

Prisoners who work in cell sanitation are not given adequate personal protective equipment.¹⁵⁸ While at work, social distancing cannot be accomplished given the amount of workers present.¹⁵⁹ When prisoners raise concerns about this, they are told they may be fired,¹⁶⁰ or even be disciplined if they do not continue to work.¹⁶¹

Laundry workers face acute challenges from COVID-19. OCE services regional hospitals for linen and scrub cleaning work. Prisoners report that their clothing and sanitation are inadequate.¹⁶²

¹⁵⁶ Declaration of Kelly Ferreira, ¶ 5.

¹⁵⁷ Declaration of Daniel White, ¶ 6; Declaration of Mylo Lupoli, ¶ 10;

¹⁵⁸ Declaration of Joshua Brown, ¶ 7.

¹⁵⁹ *See generally* Declaration of Joshua Brown, Kevin McCormack, Daniel White, Nathan Adams, Norman Hoag, and Mylo Lupoli.

¹⁶⁰ Declaration of Kevin McCormack, ¶ 14.

¹⁶¹ Declaration of Joshua Brown, ¶ 7.

¹⁶² Declaration of Daniel White, ¶ 7; Declaration of Nathan Adams, ¶ 14;

Declarant Daniel White worked at TRCI's laundry facility.¹⁶³ His cellmate, who worked the same job as him but at a different time of day, caught COVID-19.¹⁶⁴ As he describes the situation:

“In the weeks preceding [my cellie becoming infected], I worked from 7:30 am to 4:30 pm at the OCE laundry facility. When we arrived, us OCE workers put our finger in a counter and get beard nets, not face masks. When working, we were nearly always within six feet of one another. We had a count at 10:30 am where everyone groups together shoulder to shoulder. When we go to lunch, or “chow,” there was no social distancing. We were 6 to a table, elbow to elbow. Only one day did they ever tell us to scatter and keep a distance.”¹⁶⁵

“The workers from the “soiled” [linens] room ate and congregated in all the same areas as us. The soil room workers used our bathroom and drank from our water jug. There was a sliding door between our two work areas, and the soil room workers walked through our room to get to other areas. Hand washing was not enforced, as there was little oversight. At the time, the soil room workers did not even have to take showers before returning to the housing unit.”¹⁶⁶

Even if some prisoners are quarantined in with their own unit, they still interact with people from other units during work.¹⁶⁷ Prisoners who are in their first 6 months of work cannot take a sick day.¹⁶⁸

g. ODOC's Punitive Nature Increases The Risk Of Infection In Its Facilities.

Plaintiffs recognize Defendants' difficult position of balancing prisoner safety with “public safety” and “justice.”¹⁶⁹ However, the overly punitive and sometimes vengeful

¹⁶³ Declaration of Daniel White, ¶ 3.

¹⁶⁴ *Id.* at ¶ 4.

¹⁶⁵ *Id.* at ¶ 6.

¹⁶⁶ *Id.* at ¶ 7.

¹⁶⁷ Declaration of Norman Hoag, ¶ 13; Declaration of Mylo Lupoli, ¶ 10;

¹⁶⁸ Declaration of Frankie White, ¶ 10.

¹⁶⁹ *DOC Response to COVID-19: AIC Population Management Scenarios* at 2, available at <https://drive.google.com/file/d/1zyEKRHT8Ub8Dj2xzOFjLr-gRMO-jXrui/view>.

environments Defendants have sustained within ODOC facilities creates a greater risk of COVID-19 for prisoners and staff.

Prisoners are meant to trust that ODOC staff will keep them healthy throughout this pandemic because their health is wholly dictated by ODOC; prisoners can do nothing, or very little, themselves to change their circumstances regarding their risk for COVID-19 infection and severity. However, most officers are not taking the threat seriously or are unconcerned with the health of the prisoners they manage, choosing not to socially distance when possible or wear the masks when provided.¹⁷⁰ Worse, it has been reported that officers have been mocking prisoners or downplaying the threat of COVID-19.¹⁷¹

- “They were joking that we AICs had [coronavirus, calling it] ‘the butt virus’ and calling AICs ‘sperm guzzlers.’”¹⁷²
- Plaintiff Micah Rhodes, who is housed in a medical unit, stated that since the COVID-19 crisis began, officers have deemed it the “death unit.”¹⁷³
- “[T]wo officers made fun of an inmate for wearing a mask. They were joking about how inmates don’t care about their health on the outside . . . but that they were so concerned about catching ‘the flu’ in prison.”¹⁷⁴

Some prisoners have shown concern about their medical conditions and have asked about the need for them to work in places like laundry, for example, where prisoners working for OCE have been contracted to clean the laundry coming from Oregon hospitals, including laundry labeled “COVID-19.”¹⁷⁵ Prisoners who have expressed this concern have been told that if they

¹⁷⁰ See e.g., Declaration of Frankie White; Declaration of Steve Jamison; Declaration of Nathan Adams; Declaration of David Hart; Declaration of Kevin McCormack; Declaration of Gavin Pritchett; Declaration of Daniel Nielson; Declaration of Aaron Delicino; Declaration of Brandon Borba; Declaration of Francis Weaver.

¹⁷¹ Declaration of Steve Jamison; Declaration of Matthew Maddox; Declaration of Jamahl Maner.

¹⁷² Declaration of Daniel Nielson, ¶ 8.

¹⁷³ Declaration of Micah Rhodes, ¶ 12.

¹⁷⁴ Declaration of Steve Jamison, ¶ 10.

¹⁷⁵ Declaration of Daniel White, ¶ 3.

do not show up to work, they risk losing their job and facing disciplinary action¹⁷⁶ and that if they continue to advocate for their safety, they will be disciplined.¹⁷⁷ Often, disciplinary actions result in prisoners losing “good time” credit or their ability to be released on Short Term Trans Leave.

The CDC prison guidelines “do not seem to have given any weight to the extraordinary risk of riot and disturbance in prisons . . . [they] do not mention the anger, fear, and unrest that can propagate in prisons during a pandemic. Nor do they mention the risk that forcing prisoners to violate the six foot distancing that is required of the general public can stoke this anger, fear, and unrest. Nor do they mention the heavy toll on stability and security in prisons created by long term lockdown or near-lockdown conditions.”¹⁷⁸ Defendants, in following some of the CDC guidelines and in continuing to allow the previously reported behavior, have stoked now two major incidents within ODOC.¹⁷⁹

Finally, as discussed in § IV.C.2.e., prisoners’ dark experiences in disciplinary segregation are eerily similar to reports from those who have been put in medical quarantine and isolation. Prisoners report that when guards do ask about symptoms, it feels like a threat.¹⁸⁰ Word about that type of treatment spreads among prisoners, while ODOC has done little to ease fears by providing prisoners with no information about how COVID-19 cases would be handled.¹⁸¹ Prisoners have been forced to choose between two modes of suffering and are too-

¹⁷⁶ Declaration of Joshua Brown, ¶ 7.

¹⁷⁷ Declaration of Althea Selover, ¶ 11(f).

¹⁷⁸ Declaration of Jeffrey Schwartz, ¶ 4.

¹⁷⁹ Alex Zielinski, *Inmate Protest Over COVID-19 Response Forces North Portland Prison Into Lockdown*, The Portland Mercury (April 8, 2020), available at <https://www.portlandmercury.com/blogtown/2020/04/08/28262478/inmate-protest-over-covid-19-response-forces-north-portland-prison-into-lockdown>; Kristi Turnquist, *Oregon State Penitentiary on lockdown after inmate fight breaks out*, The Oregonian (May 10, 2020), available at <https://www.oregonlive.com/crime/2020/05/oregon-state-penitentiary-on-lockdown-after-inmate-fight-breaks-out.html>

¹⁸⁰ See e.g., Declaration of Francis Weaver, ¶ 11.

¹⁸¹ See Declaration of Jeffrey Schwartz, ¶¶ 13-14.

often having to choose to seek no help at all because they fear what will happen to them, risking the health and lives of the people with whom they come into constant contact.

While some prison policies and practices are meant to protect prisoners and staff, others are only meant to dehumanize. In a time when we all, including prisoners, need to be able to trust that the state and the people around us will do what must be done to keep everyone safe, the environment in ODOC facilities is proving it will only deepen the wreckage.

3. Defendants' Inabilities To Protect Their Prisoners Puts ODOC Staff And The General Public At Risk.

ODOC Reports that 23 of its staff at four facilities have contracted COVID-19. The accuracy of this number is not known. ODOC shares that it hopes that “employees share results with us so we can assist them with pay and protected leave time.”¹⁸² It is further unknown how many family and other community members have been infected by the 23 staff members. In Defendants’ deliberate indifference to Plaintiffs’ serious health risks, Defendants have also failed to recognize the greater impact of their actions: “[t]o respond to this global crisis, we need to consider prisons and jails as reservoirs that could lead to epidemic resurgence if the epidemic is not adequately addressed in these facilities everywhere.”¹⁸³

With ODOC’s current visiting restrictions, prison staff and deliveries are the only people who can bring the virus into a facility or take it home with them. Declarant Jeffrey Parnell states that when he was working at Oregon State Penitentiary, it was hard to know how many staff exhibited COVID-19 symptoms because a lot of the staff were “fatigued” from having to work

¹⁸² Oregon Department of Corrections, *COVID19 Response Frequently Asked Questions* (last visited May 11, 2020), available at <https://www.oregon.gov/doc/covid19/Pages/faq.aspx>

¹⁸³ Matthew J. Akiyama, M.D., Anne C. Spaulding, M.D., and Josiah D. Rich, M.D., *Flattening the Curve for Incarcerated Populations — Covid-19 in Jails and Prisons*, *The New England Journal of Medicine* (April 2, 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMp2005687>

“mandatory overtime.”¹⁸⁴ He states that staff will only be sent home if their temperature twice tests above 100 degrees on a thermometer that he and a Captain believe to be “so way off.”¹⁸⁵ It has been reported that staff at Mill Creek Correctional Facility are not receiving temperature checks because the thermometers they were provided do not work properly.¹⁸⁶

Mr. Parnell expressed his and other staff frustrations with ODOC’s handling of COVID-19. He believes they are not being transparent with staff,¹⁸⁷ nor are they doing enough to protect them.¹⁸⁸ The only way to get administrative or sick pay is with a positive COVID-19 tests. “Unless you fully had COVID, taking any sick time would be taken out of sick time that you earned in the future . . . This made people [including many staff over the age of 60] choose between risking their health and being able to pay their bills.”¹⁸⁹

With staff and essential contractors entering and exiting ODOC facilities each day, coming home to their families, or coming into contact with others in their communities, it is inevitable that any outbreak within ODOC facilities will spread to corrections workers and then to the communities in which they are situated. In fact, when one prisoner was trying to get access to a COVID-19 test and complained that one of his symptoms was a loss of taste and smell, an officer responded that “his wife was complaining of the same symptoms but it was better off because he was doing the cooking at home.”¹⁹⁰

¹⁸⁴ Declaration of Jeffrey Parnell, ¶ 31.

¹⁸⁵ *Id.* at ¶¶ 13-15.

¹⁸⁶ Declaration of Nathan Adams, ¶ 15.

¹⁸⁷ *See* Declaration of Jeffrey Schwartz, ¶ 11-13.

¹⁸⁸ *Id.* at ¶ 34.

¹⁸⁹ *Id.* *See also* Declaration of Mylo Lupoli.

¹⁹⁰ Declaration of Althea Seloover, ¶ 8(f).

The smaller and more rural communities around many of Oregon’s prisons are at even greater risk because often those are the counties that are least likely to be able to provide for large numbers of intensive care patients that could accompany outbreaks at ODOC prisons.¹⁹¹

4. The Risk To Plaintiffs Of COVID-19 Is Unlikely To End Anytime Soon.

As of May 6, 2020, 295 people incarcerated in the United States have been confirmed to have died from COVID-19.¹⁹² Thirty four corrections staff have died from COVID-19.¹⁹³ Furthermore, at least 21,007 incarcerated persons and at least 8,754 corrections staff have confirmed cases of COVID-19.¹⁹⁴

Oregon has, in the last week, seen some of the largest numbers of new positive COVID-19 cases.¹⁹⁵ Furthermore, public health experts are warning about the risk of a “second wave” of infections in Oregon.¹⁹⁶ The same is true worldwide; the World Health Organization has warned that countries must be prepared for a second and third wave of COVID-19.¹⁹⁷ China, South Korea,¹⁹⁸ Senegal,¹⁹⁹ and other countries are again imposing lockdowns after seeing spikes in

¹⁹¹ Aaron Littman, Lauren Sudeall, Jessica Pishko, *Protecting Rural Jails From Corononavirus*, DATA FOR PROGRESS, (Apr 2020), available at <http://filesforprogress.org/memos/rural-jails-coronavirus.pdf> (“More than half of all counties— home to about 30 million Americans—don’t have any ICU beds at all, and most of those are rural. Counties that do have ICU units are overwhelmingly found in urban areas: over 80% of urban hospitals have an ICU, but only about a third, in small rural areas.”)

¹⁹² Alice Speri, *Mass Incarceration Poses a Uniquely American Risk in the Coronavirus Pandemic*, THE INTERCEPT, (May 6, 2020), <https://theintercept.com/2020/05/06/coronavirus-prison-jail-mass-incarceration/>

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Oregon Health Authority, *OHA COVID-19 News*, (updated daily, last visited May 12, 2020), <https://www.oregon.gov/oha/erd/pages/covid-19-news.aspx?wp8888=l:100>.

¹⁹⁶ Tracy Brawley and Amanda Gibbs, *Gov. Brown, OHSU partner on research study to inform approach for reopening Oregon*, OHSU News, (May 01, 2020), <https://news.ohsu.edu/2020/05/01/gov-brown-ohsu-partner-on-research-study-to-inform-approach-for-re-opening-oregon>.

¹⁹⁷ Samuel Osborne, *Coronavirus: World must prepare for second and third wave of Covid-19, WHO warns*, The Independent (Apr. 30, 2020), <https://www.independent.co.uk/news/health/coronavirus-come-back-second-wave-who-europe-hans-kluge-a9493286.html>.

¹⁹⁸ Linda Givetash, Vivi Wu, and Stella Kim, *New COVID-19 infections in China, South Korea raise alarm over second wave*, NBC News (May 11, 2020), <https://www.nbcnews.com/news/world/new-covid-19-infections-china-south-korea-raises-alarm-over-n1204171>.

¹⁹⁹ Christophe Van Der Perre, *Second wave of COVID-19 cases sweeps Senegal's holy city*, Reuters (May 11, 2020), <https://www.reuters.com/article/us-health-coronavirus-touba-idUSKBN22N1CS>.

new transmissions that raise concerns about a second wave of the pandemic after easing social distancing restrictions. No vaccine exists for COVID-19 despite the frantic research being done to create one, and a vaccine is very unlikely to be available before January 2021 at the absolute earliest, if ever.²⁰⁰ Regardless of the talk of “opening back up,” the risk to Plaintiffs from COVID-19 is not going to end anytime soon. Indeed, the risk to Plaintiffs is increased by a relaxing of social distancing in the community. In light of the facts above, Plaintiffs require this court to provide immediate relief to prevent further harm from the ongoing violation of their Eighth Amendment rights.

V. ARGUMENT

Defendants have an affirmative duty to provide conditions of reasonable health and safety to the people it holds in its custody. As the Supreme Court has made clear,

“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . The rationale for this principle is simple enough: 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 . . .”

DeShaney v. Winnebago County Dep’t. Soc. Servs., 489 U.S. 189, 199-200 (1989).

“Contemporary standards of decency require no less.” *Helling v. McKinney*, 509 U.S. 25, 32

(1993) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976)). Conditions that pose an

unreasonable risk of future harm violate the Eighth Amendment’s prohibition against cruel and unusual punishment, even if that harm has not yet come to pass.

²⁰⁰ Lauran Neergaard, *COVID-19 vaccine hunt heats up globally, still no guarantee*, Associated Press (May 3, 2020), <https://apnews.com/d3d4c6e4bc06fe178c96186377ccf644>.

A. Plaintiffs Are Likely To Prevail On The Merits Of Their Eighth Amendment Claim.

The Eighth Amendment imposes certain duties on prison or jail officials holding persons pursuant to a sentence: (1) to provide humane conditions of confinement; (2) to ensure that inmates receive adequate food, clothing, shelter and medical care; and (3) to "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). An Eighth Amendment claim must satisfy both an objective and a subjective component. *Id.* at 834.

1. Plaintiffs' Conditions Pose A Substantial Risk Of Serious Harm To Their Health, Satisfying The Objective Prong Of The Eighth Amendment.

A prisoner satisfies the objective prong of an Eighth Amendment claim if he has a "serious medical need." *Estelle*, 429 U.S. at 104. A serious medical need is present when, for example, the "failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002). That prong may also be proved by showing that the plaintiff's conditions puts him at substantial risk of serious harm. *Helling*, 509 U.S. at 33 (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)). The objective component draws from the "contemporary standards of decency" standard embedded in the Eighth Amendment and asks whether the condition is "sufficiently serious." *Hines v. Youseff*, 914 F.3d 1218, 1228-29 (9th Cir. 2019); *Clement*, 298 F.3d at 904 (citations omitted).

The Eighth Amendment includes the protection of prisoners from future harm to their health:

"That the Eighth Amendment protects against future harm to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety.' . . . 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 has happened.”

Helling, 509 U.S. at 33 (quoting *DeShaney*, 489 U.S. at 200). More specifically, a risk of being infected with a life-threatening communicable disease could constitute such an “unsafe, life-threatening condition”:

“In *Hutto v. Finney*, 437 U.S. 678, 682 [] (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.”

Id. at 33; *see also id.* at 34 (citing with approval *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), holding that prisoners were entitled to relief under the Eighth Amendment when they showed, among other things, “the mingling of inmates with serious contagious diseases with other prison inmates”). The Supreme Court has also acknowledged that the “increased, substantial risk for transmission of infectious illness” as a result of prison overcrowding could justify the reduction of prison populations. *Brown v. Plata*, 563 U.S. 493, 503 (2011).

An increased risk of infection amounts to a serious medical need. *Hunter v. Yates*, 2009 WL 233791, *3 (E.D.Cal. Jan. 30, 2009) (failure to transfer California prisoners susceptible to Valley Fever fungal infections out of prisons located in high risk areas amounted to “deliberate indifference”); *but see Hines v. Youseff*, 914 F.3d 1218, 1232 (9th Cir 2012) (finding exposure to Valley Fever fungal infections not “clearly established” as a violation of the 8th Amendment in the qualified immunity context because millions of free individuals choose to live with the risk of infection and reasonable officials could infer that the risk of exposure is one that society

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tolerates). The Supreme Court in *Helling* addressed exposure to secondhand smoke, but it recognized that “deliberate indifference to the exposure of inmates to a serious, communicable disease” would similarly violate the Eighth Amendment, even if a prisoner *currently* shows no serious symptoms. 509 U.S. 25, 33 (1993) (emphasis added). Courts must ask “whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk,” meaning that the risk “is not one that today’s society chooses to tolerate.” *Id.* at 36.

2. Plaintiffs Have Serious Medical Needs.

Because of Plaintiffs’ health conditions, Plaintiffs are at serious risk for severe illness or death from COVID-19. The serious impact COVID-19 would have on their pre-existing health conditions would satisfy the “objective” prong of the Eighth Amendment analysis.

Nigh all governmental, civic, faith, and commercial institutions recognize the threat COVID-19 places on the populace. Defendants’ attorneys even threatened to sue the City of Oregon City for signaling a lift of Defendant Brown’s Stay at Home Executive Order.²⁰¹ To prevent the risk of exposure to people and to prevent the spread of COVID-19, governments all over the world have issued orders to shut down civil society in ways that few, if any, could imagine only months ago.

The risks of exposure to COVID-19 and serious illness from COVID-19 are not risks that today’s society has chosen to tolerate. Defendants have been unable to prevent prisoners from becoming infected or prevent the spread inside ODOC prisons. Plaintiffs’ conditions as prisoners mean that they are more likely than a non-imprisoned person to contract COVID-19 once it

²⁰¹ Tess Riski, *State Attorney General Threatens Oregon City Mayor With Legal Action If He Violates Governor’s Stay-Home Order*, WILLAMETTE WEEK (April 26, 2020), available at <https://www.wweek.com/news/2020/04/26/state-attorney-general-threatens-oregon-city-mayor-with-legal-action-if-he-violates-governors-stay-home-order/>

enters their community. Health experts expect it to be a certainty that it will enter all prisons because of the highly transmissibility of COVID-19 and the fact that it is not a totally closed system, with staff coming in and going out all day, every day.

It is also clear that Plaintiffs are more likely than others to contract a severe COVID-19 infection, making them more likely, for example, to get pneumonia, have diminished oxygen absorption, and have complications that lead to organ failure and death. Plaintiffs are likely to be able to show that they have a serious medical need, and therefore are likely to show satisfy the objective prong. The Constitution “require[s] a remedy” that ensures that protection of Plaintiffs’ safety. *Helling*, 509 U.S. at 33.

Moreover, as discussed in the section below, Defendants actions and failures to act knowingly place Plaintiffs at even greater risk for serious illness or death. Plaintiffs are likely able to satisfy the objective prong.

B. Plaintiffs Are Likely To Be Able To Show That Defendants’ Deliberate Indifference To Plaintiffs’ High Risk Of Serious Infection Violates Their Rights To Be Free From Cruel And Unusual Punishment, Satisfying The Subjective Prong.

The Eighth Amendment’s subjective component requires a showing that in denying a prisoner humane conditions of confinement the official “knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer*, 511 U.S. 325, 835 (1994). A prison official’s deliberate indifference to serious medical needs or serious risk of harm violates the Eighth Amendment. *Estelle*, 429 U.S. at 106 (1976). The Eighth Amendment forbids deliberate indifference to conditions that “pose an unreasonable risk of serious damage to . . . future health.” *Id.* at 35. In systemic cases, such as this, deliberate indifference can be shown by evidence of “systematic or gross deficiencies in

staffing, facilities, equipment, or procedures.” *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 152–53, 155 n. 138 (N.D. Cal. 2015) (quoting *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980)). The key question in such cases is whether systemic deficiencies “taken as a whole” subject people to a “substantial risk of serious harm.” See *Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011).

The “deliberate indifference” standard “is less stringent in cases involving a prisoner’s medical needs than in other cases involving harm to incarcerated individuals because ‘the State’s responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.’” *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992) (quoting *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)). Deliberate indifference may occur when prison officials deny, delay, or intentionally interfere with medical treatment, or it may be demonstrated by the way in which prison officials provide medical care. *Id.* at 1059–60.

COVID-19 presents a unique threat to public health and safety of Oregon and has resulted in unprecedented governmental measures to limit transmission—except in regard to its prisons. Guidelines formulated for prisons by both the CDC and the Oregon Health Authority (“OHA”) differ from the community standard set by both of those organizations for the general public. The reason for that difference is because the CDC does not have the authority to command prisons to reduce the prisoners they hold. Instead, the CDC and OHA Guidelines are examples of harm reduction within a political framework. They provide guidance for prisons absent their true recommendation: to maintain social distancing until there is a vaccine.²⁰²

²⁰² See Declaration of Marc Stern.

The OHA guidelines were likely written in conjunction with ODOC, so that ODOC could address their constraints and make best practice recommendations based on those constraints. Notwithstanding this, both the OHA and CDC guidelines for prisons expressly state that social distancing is the cornerstone measure to prevent the spread of COVID-19.²⁰³ The Guidelines make clear that prisons should, wherever possible, *make sure* that prisoners could be six feet from other prisoners at a time. But ODOC is not reducing this threat of serious harm.

Defendants know that social distancing is key to preventing the spread of COVID-19. Defendant Brown's executive orders requiring social distancing as the center point of preventing the spread of COVID-19 makes that clear. Both CDC and OHA guidelines for the general public and for corrections facilities make that clear. News outlets all over the world reporting the recommendations of health experts make that clear. Additionally, ODOC facilities that are constantly telling prisoners to keep a safe distance from one another make that clear. But it is not up to, or even possible for, prisoners to make personal decisions to social distance. It is impossible for most, if not all, to do so.

"As it pertains to 6 feet, there's not an actual mathematical way where you could have everyone 6 feet apart," said Sgt. Clyde Skipper, who works at Santiam and has worked for ODOC for 25 years.²⁰⁴ But, by reducing the populations in each facility, there is a mathematical way to accomplish that. The Constitution does not permit prison policies that create unreasonable risk to prisoners as long as the policy seems like one that the prison can achieve at

²⁰³ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, at pg. 23, Oregon Health Authority (April 5, 2020), available at <https://sharesystems.dhsoha.state.or.us/DHSForms/Served/1e2288s.pdf>

²⁰⁴ Lauren Dake and Conrad Wilson, *Inmates Brace For Virus Outbreak, While Oregon Considers Early Release*, OREGON PUBLIC BROADCASTING (Apr 7, 2020; updated Apr 8), <https://www.opb.org/news/article/coronavirus-covid-19-prison-oregon-inmates/>.

the time. So too, the Constitution does not permit prisons to engage in procedures that place prisoners at unreasonable risk of harm merely because the prison appears to be limited to providing only that level of care at the time. Rather, Defendants are responsible for ensuring that prisoners, including members of the proposed Plaintiff class, are provided safe housing and medical care.

Even to the extent that OHA and CDC's prison guidelines are in any respect helpful in reducing the risk within the constraint of ODOC doing nothing structurally different or releasing prisoners, declarants attest to both the inadequacy of the social distancing policies and the consistent indifference or willful flouting of these rules in many different ways in ODOC facilities. Without the Court's intervention, ODOC will continue to flout what little protections are already recommended.

At the very least, ODOC should be able to accomplish social distancing at meal times, during line movements, and during both physical and non-physical recreation time. At meals, for example, spacing in lines making simple changes as recommended by the guidelines of spacing and only using one side of the table so that declarants are not eating shoulder to shoulder and directly two feet across from another prisoner. Additionally, the cleaning of common surfaces must be done more and consistently throughout the ODOC facilities.

Prisons have an obligation to prevent the needless, inhumane conditions described in Plaintiffs' Complaint. *Clement*, 298 at 904. Knowledge of these risks cannot be more apparent to Defendants. Every court in Oregon and every jurisdiction has announced some response to this grave threat to public well-being. The means to combat this virus is also apparent: every public health authority in the United States has announced standards consistent with the CDC's recommendations. Nevertheless, Defendants continue to operate their prisons in contradiction to

these standards. Unless this Court issues this temporary restraining order, Defendants place Plaintiffs at unreasonable risk of contracting this infectious disease and being seriously or fatally harmed.

The virus is thought to spread mainly from person-to-person “between people who are in close contact with one another (within about 6 feet) . . . [t]hrough respiratory droplets produced when an infected person coughs or sneezes.”²⁰⁵ By all available accounts and studies, COVID-19 “spread[s] easily.”²⁰⁶ Defendants’ prison operations prevent reasonable measures to mitigate contraction of COVID-19, like through adequate, accessible sanitation, and space between persons in their cell. As Plaintiffs allege, and as Defendants admit, no one could maintain a safe distance of six feet throughout ODOC’s facilities.

In their Answer to Plaintiffs’ Complaint, Defendants admit that, at the status quo, “some meals, recreational activities, clothing exchanges, showering, and line movements continue in groups and within and within spaces that require less than six feet of interaction with other inmates and staff.” ¶ 11, *Answer*, Dkt. 9. Defendants further admit to Paragraph 73 of Plaintiffs’ Complaint, which states: “While ODOC has implemented some policies in response to the pandemic, they are woefully inadequate and do not even comport with the CDC’s relaxed recommendations for correctional facilities compared to the CDC recommendations for people in the general public.” When posed with the solution to this problem—to release ODOC prisoners to allow for social distancing—knowing the risks, Defendant Brown said no.²⁰⁷ Since then, the

²⁰⁵ Center for Disease Control, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>.

²⁰⁶ *Id.*

²⁰⁷ Noelle Crombie, *State said up to 6,000 Oregon inmates would face release to allow social distancing; Gov. Kate Brown said no*, *The Oregonian* (April 15, 2020), available at <https://www.oregonlive.com/coronavirus/2020/04/state-said-up-to-6000-state-inmates-would-face-release-to-allow-social-distancing-gov-kate-brown-said-no.html>

number of COVID-19 infections among ODOC staff and prisoners has grown sixfold and continues to increase.

ODOC's constant changing of procedures also demonstrates that the department knows that it must do things differently to provide reasonable care and that it has not yet done enough. Some procedures have been changed to reduce risk to Plaintiffs, such as a very recent shift to serving meals to only one unit or partial unit at a time at OSP, though it is unclear whether there is proper cleaning between each unit being served.

There is a disconnect between what ODOC claims it is doing and what it is actually happening in the facility. For example, March 19, the state outlined a testing prioritization plan that included testing symptomatic persons in correctional facilities and other congregate living as second in priority only to symptomatic health care workers. By April 1, when a staff member was the first ODOC person to test positive, ODOC had only tested 13 prisoners out of nearly 14,500. On that date, Dr. DiGiulio announced that the state's testing procedures had "evolved," more tests were becoming available, and testing activity is "changing very quickly" in the prisons due to greater testing capacity.²⁰⁸ He said that there were "no limitations or restrictions anymore on our ability to test our own patients," that medical staff members at each prison assess a patient's symptoms and registered nurses carry out the tests, and an ODOC spokesperson added that if a prisoner showed signs and symptoms of flu or COVID-19, including fever, cough and shortness of breath, "they will be tested as healthcare providers direct."²⁰⁹ But by May 5, as the numbers of infected prisoners grew rapidly despite only limited testing, ODOC had tested only 166 prisoners. The declarations of prisoners provide many

²⁰⁸ Noelle Crombie, *Prison employee is first confirmed coronavirus case in Oregon Department of Corrections*, *The Oregonian* (Apr. 1, 2020), <https://www.oregonlive.com/coronavirus/2020/04/prison-employee-is-first-confirmed-case-of-covid-19-in-oregon-department-of-corrections.html>.

²⁰⁹ *Id.*

accounts where symptomatic prisoners were denied tests, repeatedly in some cases, and also where tests were performed only weeks after prisoners had been ill with COVID-19-like symptoms.

ODOC, through Dr. DiGiulio, has made other statements about the care and procedures that they are providing to prisoners but are not in line with the facts as they have been presented in many of the declarations and questionnaires from prisoners. For example, on April 1, Dr. DiGiulio announced that medical staff had identified the ODOC's most medically vulnerable inmates and placed them in single cells "if at all possible."²¹⁰ As of April 1, Dr. DiGiulio claimed that each prison has a respiratory triage clinic for people with symptoms.²¹¹ He has also stated that, if someone in custody develops the virus, the person will be isolated and that prisoners awaiting test results are held in "respiratory isolation conditions."²¹² "We have been preparing for weeks to separate the vulnerable, the ill, from everyone else," he said.²¹³ Those statements are not supported by the declarations and questionnaires of ODOC prisoners.

Testing for COVID-19 could help eliminate some of the ambiguity of whether or not an inmate has the virus, but so long as persons enter and exit the prison, a new vector of disease is created. To date, only a single digit percentage of ODOC prisoners have been tested. Even if testing is "available," ODOC has not demonstrated it is capable to adequately test the population to reach a workable "South Korean model" of quarantine and contact tracing. To the contrary, declarants attest to having witnessed many people in their units exhibit symptoms for weeks without being seen by ODOC medical staff, let alone be tested. Delays in testing and deliberate indifference towards persons with symptoms who want to be tested creates a risk to Plaintiffs

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

and proposed class members. If ODOC continues not to provide adequate social distancing or testing, any other measures still place Plaintiffs at too serious of risk.

Plaintiffs are medically vulnerable to severe infection to this disease. There is no doubt that Defendants understand the risk COVID-19 poses to all prisoners and the greater risk that it poses to the health and safety of the Plaintiffs. The Defendants' actions in the face of that clear risk, however, are unreasonable. Defendants' actions and failures to act likely show deliberate indifference through systematic or gross deficiencies in failing to provide the ability for Plaintiffs to socially distance and through their failure to ensure that the harm-reduction procedures in the CDC and OHA guidelines such that, taken as a whole, Defendants have subjected Plaintiffs and proposed class members to a substantial risk of harm. Furthermore, even at this early point in litigation, Plaintiffs can likely show that Defendants know that their actions are unreasonable and yet they continue. The high risk of contracting such a disease combined with the clear direction from public health experts and community standards of decency to prevent contraction that are not being followed by Defendants more than satisfies the "deliberate indifference" standard set in *Estelle and Farmer*. Thus, Plaintiffs succeed on either metric for issuance of a temporary restraining order announced by *NRDC v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008).

In sum, Plaintiffs are likely to be able to show that at least some conditions pose an unreasonable risk to their future health and Defendants are deliberately indifferent to that risk. They are likely to win on the merits of their Eighth Amendment claim.

C. Without This Court's Intervention, Plaintiffs Are Likely To Suffer Irreparable Harm.

Plaintiffs require immediate injunctive relief from this court to prevent ongoing and likely future harm to members of the proposed Plaintiff class. Plaintiffs seeking a TRO or preliminary injunction must establish that they are "likely to suffer irreparable harm in the

absence of preliminary relief.” *NRDC v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008). COVID-19 is a serious, and possibly fatal, disease, that is rapidly spreading throughout Defendants’ facilities. There are few situations that to which this or any other court will be asked to respond that pose a clearer risk of irreparable harm than vulnerable people being held in prison in conditions created and maintained by Defendants that cause, increase, and exacerbate the likelihood that Plaintiffs will suffer severe illness, suffer long-term or permanent bodily injury, or be killed.

What Plaintiffs face is not merely a possibility of some future harm. *See, e.g., In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007) (“Speculative injury cannot be the basis for a finding of irreparable harm.”). COVID-19 has entered into and spread within ODOC prisons. Given ODOC’s ineffective, dangerous, and ever shifting procedures, it is also almost certain that it will enter into all facilities. It is also likely to spread to a large percentage of prisoners, as we have seen in nursing homes, ships, jails, and other prisons where all or a large proportion of residents have been tested and as we are beginning to see in Oregon State Penitentiary.²¹⁴ At this time, at least one of the named Plaintiffs is in quarantine with their entire unit because of the spread of infection in that unit, and another named Plaintiff is ill with COVID-19-like symptoms.²¹⁵

The rate and risk of how COVID-19 spreads within ODOC facilities and how great the risk it poses to Plaintiffs, however, depends on the ODOC response and procedures to combat the spread. As the matter stands now—with the failure to test, the improper quarantining and movement of prisoners, the unsafe mixing of units at meals and line movements, the forced

²¹⁴ Oregon Department of Corrections, *COVID-19 Tracking* (last visited May 12, 2020), available at <https://www.oregon.gov/doc/covid19/Pages/covid19-tracking.aspx>.

²¹⁵ *See* Declaration of Theron Hall; *see also* Declaration of David Hart.

mixing of units at OCE work facilities, and the simple fact that Plaintiffs are unable to safely socially distance—ODOC procedures make it likely that some Plaintiffs have been infected and that many others will be infected. It is also likely that because of their vulnerability to serious infection and death, Plaintiffs will suffer severe illness, permanent bodily injury, or death. The court need not wait until the harm has already occurred and members of the proposed Plaintiff class are all infected, suffering, or dying, as envisioned by *Helling* and its progeny. 509 U.S. 25, 33 (1993). The Plaintiffs ask for this court to provide them with the protection against a harm we, as a decent society, have determined as necessary to protect our own health, and that the Constitution requires.

Ordering Defendants to take actions to enable all prisoners, including members of the proposed Plaintiff class, to safely socially distance provides the greatest opportunity to avoid outbreaks and severe illness and death for the members of the proposed Plaintiff class. Ordering proper division between the symptomatic, the confirmed infected, and the general population provides protection that Plaintiffs are not being provided by Defendants. Ordering Defendants to provide adequate cleaning and cleaning products helps to lower the risk to Plaintiffs. Ordering proper testing can allow for proper division and can assure prompt and adequate medical care and supervision Plaintiffs. As Dr. Stern, other health experts, and research has shown, persons infected can take rapid, sharp, dangerous turns for the worse. Having testing, proper divisions, and close medical supervision can help to lessen the risk when that occurs.²¹⁶

Plaintiffs require this Court to intervene and protect them from imminent irreparable harm that is likely to occur absent that intervention.

²¹⁶ See Declaration of Marc Stern.

D. The Public Interest Weighs In Favor Of Granting This Temporary Restraining Order, And The Balance Of Equities Is In Plaintiffs' Favor, Because Slowing The Spread And Infection Rate Of COVID-19 Protects The Wider Population And Will Cause Defendants Only An Administrative Burden.

The balance of equities falls overwhelmingly in favor of granting a temporary restraining order in this case. Plaintiffs have demonstrated that their constitutional rights have been violated and that they face the high likelihood of irreparable harm. Furthermore, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). The public has no interest in Defendants continuing to place members of the proposed Plaintiff class at risk of serious harm.

The public, outside the prison walls, does have an interest in remaining healthy and minimizing their own exposure to the virus. As discussed above, the virus does not recognize a boundary at the prison walls. Thousands of correctional staff enter and leave Defendants’ prison every day, serving long and tiring shifts in conditions where they cannot adequately protect themselves from the risk of contracting COVID-19. Being present among multiple infected people in an enclosed space increases the likelihood that a staff member will contract the disease and carry it home. What benefits adults in custody benefits the communities that surround their prisons. Public health is public health.

Plaintiffs’ proposed orders harm neither Defendants nor the public. In fact, Plaintiffs, Dr. Schwartz, and Dr. Stern have provided recommendations that enhance the health and safety of Plaintiffs, other prisoners, ODOC staff, and the community. Public health officials and medical professionals have concluded that the crucial step to minimize the spread of COVID-19 is to downsize prison populations. And orders to provide safer procedures within ODOC aid that step. While Plaintiffs face severe illness and death, Defendants, on the other hand, face the “harm” of having to temporarily create or implement court-ordered policies and allocate resources to

provide constitutionally-required care in Oregon prisons. Defendants should already be doing so. Any court orders will be changes to ODOC procedures to prevent constitutional violations. Those small administrative burdens do not outweigh the health and safety benefits to proposed class members and many, many others.

Plaintiffs do not ask this Court to throw open the gates of all ODOC facilities. Indeed, as referenced in Plaintiffs' Complaint, a procedure exists in law that explains the process for that type of relief. But, Defendants need not wait for a three-judge panel to follow the Constitution, nor to be told that they are *not* following the Constitution. That is the animating principle of this motion.

Plaintiffs do clearly have an interest in the release of a significant enough number of ODOC prisoners to allow for adequate social distancing. That is both what the medical science implores and the Constitution demands. Releasing prisoners is a more manageable and medically-advisable solution than continuing down the failed path Defendants have chosen. Plaintiffs seek "release" that consists of moving vulnerable prisoners to various other types of confinement so that they are no longer at risk of being killed or seriously injured by COVID-19. Plaintiffs do not ask for prisoners to be released without proper quarantine and without other reasonable procedures to ensure the safety of those who are released and the community. Additionally, the costs to Defendants, if any, to provide adequate care, is likely more than offset by the reduced cost to house prisoners and to provide intensive health care to proposed class members who become severely ill with COVID-19.

Plaintiffs fear for their lives; Defendants fear the administrative cost of instituting greater protections for the population under their care. In sum, the balance of the equities and public harms tip greatly in favor of Plaintiffs, who face irreparable harm to their constitutional rights

and health. For Defendants, there is no harm when a court merely prevents state officials from engaging in unconstitutional practices. Given the nature of COVID-19, not issuing preliminary relief in this case would also cause injury to parties beyond members of the proposed Plaintiff class, such as ODOC staff, their families, and the public. Any burden on Defendants is far outweighed.

E. The Prison Litigation Reform Act Is Not A Bar To Plaintiff's Proposed Terms Of A Temporary Restraining Order.

a. There Is No Available Remedy In A Pandemic.

A prisoner facing novel coronavirus cannot grieve fast enough to satisfy both their serious health needs and the Prison Litigation Reform Act. 42 U.S.C. § 1997e. In debating the PLRA, Congress had concerns about what they deemed “frivolous” lawsuits by prisoners on matters ranging from the availability of legal materials and staff at the prison law library²¹⁷ to the infamous, and exaggerated, case involving an inmate receiving chunky peanut butter instead of creamy peanut butter from the canteen.²¹⁸ While clearly Congress did not have a disease like COVID-19 specifically in mind when it drafted the PLRA, it did leave a pressure valve in the law to alleviate matters un-addressable by a grievance.

42 U.S.C. § 1997e(a) provides the following:

“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies *as are available* are exhausted.”

Emphasis added.

²¹⁷ Eugene Novikov, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. Pa. L. Rev. 817, 817 (Jan. 2008).

²¹⁸ Notably, the inmate lost \$2.50 over the misplaced order, which was and still is a considerable amount of money for a prisoner. Chief Judge Jon O. Newman, *Not All Prisoner Lawsuits Are Frivolous*, Prison Legal News (April 15, 1996) available at <https://www.prisonlegalnews.org/news/1996/apr/15/not-all-prisoner-lawsuits-are-frivolous/>

This exhaustion requirement extends to lawsuits for injunctive relief, arguably even when irreparable harm may occur. *Hoffman v. Palagummi*, 2019 WL 582353, *3 (E.D.Cal., Feb. 13, 2019) (holding refusal to process plaintiff’s grievance as an emergency did not mean he could file suit before the ordinary process was completed), *report and recommendation adopted*, 2019 WL 2464599 (E.D.Cal, June 13, 2019), *appeal filed*, No. 19-16326 (9th Cir., July 3, 2019); *Williams v. Bal*, 2012 WL 2065051, *2 (E.D. Cal., June 7, 2012) (holding there is no imminent danger exception to the exhaustion requirement). However, courts have found that inherent equitable discretion exists to grant temporary relief pending exhaustion. *See Thornberry v. Baughman*, 2018 WL 4039976, *3-4 (E.D.Cal., Aug. 22, 2018) *report and recommendation adopted*, 2018 WL 9840953 (E.D.Cal., Oct. 23, 2018); *Jackson v. District of Columbia*, 254 F.3d 262, 267–68 (D.C. Cir. 2001); *accord, Simmons v. Stokes*, 2010 WL 2165358, *4 (D.S.C., May 26, 2010).

Other courts have found that, even absent traditional equitable discretion, prisoners may request and be granted temporary restraining orders prior to full completion of administrative exhaustion. Here, the question becomes one of “available remedies”:

“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.”

Fletcher v. Menard Correctional Center, 623 F.3d 1171, 1173 (7th Cir. 2010). Put another way:

“If it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no ‘possibility of some relief’ and so nothing for the prisoner to exhaust.” *Id.*

Grieving in ODOC requires a lengthy administrative and one fraught with peril for Oregon inmates. The timeline to grieve in ODOC is as follows:

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“(1) Grievances must be *received* by the institution grievance coordinator or designee within **14 calendar days** from the date of the incident or issue being grieved, unless the AIC can satisfactorily demonstrate why the grievance could not be timely filed... (Emphasis added)

(2) A grievance response will be *sent* to the AIC within **35 calendar days from the date the grievance was accepted** by the institution grievance coordinator, unless further review is necessary to fully respond to the AIC’s grievance, in which case the AIC will be notified that the department will respond within an additional 14 calendar days. (Emphasis added.)

(3) Initial appeals must be *received* by the institution grievance coordinator or designee within **14 calendar days from the date the initial grievance response was sent** to the AIC unless the AIC can satisfactorily demonstrate why the initial appeal could not be timely filed... (Emphasis added.)

(4) A response to the initial appeal will be sent to the AIC within **35 calendar days from the date the initial appeal was accepted**, unless further review is necessary to fully respond to the AIC’s initial appeal, in which case the AIC will be notified that the department will respond within an additional 14 calendar days. (Emphasis added.)

(5) Final appeals must be *received* by the institution grievance coordinator or designee within **14 calendar days from the date the initial appeal response was sent** to the AIC unless the AIC can satisfactorily demonstrate why the final appeal could not be timely filed... (Emphasis added.)

(6) A response to the final appeal will be sent to the AIC within **35 calendar days from the date the final appeal was accepted**, unless further review is necessary to fully respond to the AIC’s final appeal, in which case the AIC will be notified that the department will respond within an additional 14 calendar days.”

OAR 291-109-0205 (Emphasis added).

Assuming that a grievance response does not necessitate “further review,” to complete the administrative grievance system, a prisoner may not receive word of the resolution of their grievance for 147 days—a full 107 days after COVID-19 may have killed them.

The grievance system in application places multiple obstacles in front of a grieving prisoner. As emphasized from the OAR text above, the dates and times a plaintiff would need to ensure that the grievance is not just filed but in the hands of the grievance coordinator within 14

days. Prisoners have reported that grievances conveniently disappear or take longer than a piece of postage mail to be received by the grievance coordinator. Then, when a prisoner receives their grievance response, a prisoner must return the grievance for appeal not 14 days from receipt, but from the date of mailing by the grievance coordinator. Functionally, this serves to provide the prisoner less and less time to submit a grievance, placing the thumb on the scale for the institution.

To date, people who have filed grievances with ODOC have received responses that the subject of COVID-19 and ODOC's adherence to CDC standards is not grievable.²¹⁹ Further submissions of grievances on the topic, the grievance response tells the prisoner, would be considered punishable conduct. *Id.* Functionally, both in the time it would take ODOC to process an inmate's grievance, and in the responses already furnished, Plaintiffs have no "available" administrative remedy, and should be excused from the exhaustion requirement. *Brown v. Valoff*, 422 F.3d 926 (9th Cir. 2004) ("[T]he statutory language [of 42 USC §1997e] does not require exhaustion when *no* pertinent relief can be obtained through the internal process.")

b. The PLRA Is A Legally Impermissible Defense.

Plaintiffs respectfully submit that these restrictions on plaintiff suits prisoners is, and should be held to be, a legally impermissible defense. According to a study by legal academic Margo Schlanger, the rate of lawsuits filed by prisoners in Oregon was cut nearly in half through the creation and enforcement of the Prison Litigation Reform Act (PLRA) in 1996. *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, U.C. Law Review Vol. 5:153 at Pg. 160 (2015). Oregon prisons reported rates of 15.8% of prisoners filing lawsuits in 1995, but in 2012, after the PLRA had been in effect for 16 years, the rate dropped to 7.8%. *Id.*

²¹⁹ See e.g., Declaration of Althea Selover, Att. 1.

A considerable amount of legal scholarship has been written about the grievance provision in the PLRA. *See, e.g.*, Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139 (2008); *see also, e.g.*, Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573 (2014); Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771 (2003); Giovanna Shay, *Exhausted*, 24 FED. SENT'G REP. 287 (2012); Eugene Novikov, Comment, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817 (2008). The academic consensus is not that the federal judiciary has been spared a slate of disruptive, frivolous lawsuits by prisoners; but that otherwise meritorious cases spend less time being adjudicated, and more time being dismissed by Kafkaesque grievance systems. Roosevelt III, *supra* at 1775. (“The uncounseled prisoner who makes it through the administrative process without some mistake is rare indeed...”) (Internal quotation omitted.)

In fiscal year 2012, 84.9% of prisoner civil rights complaints were disposed of in the Defendant's favor in pre-trial litigation. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, U.C. Law Review Vol. 5:153 at Pg. 165 (2015). Not only were these cases disposed of long before trial, they spent on average less time in the court system at all: often under half the time of the average, non-prisoner civil rights case. *Id.* at p. 166.

In just the last year, a search of cases that relied on *Woodford v. Ngo*, 548 U.S. 81 (2006), the seminal case on administrative exhaustion and the PLRA, yielded 13 cases related to the Oregon Department of Corrections—all but two dismissed in whole or in part. *Bursell v. Peters*, 2020 WL 1812830, *5+, (D. Or. 2020); *Uribe v. Gulick*, 2020 WL 797850, *1+ (D. Or. 2020);

Lepesh v. Peters, 2019 WL 4674491, *3+ (D. Or. 2019); *Hentz v. Gruenwald*, 2019 WL 4261114, *1 (D. Or. 2019); *Harbert v. Patton*, 2019 WL 4145229, *2+ (D. Or. 2019) (Some issues were grieved, others were not, thus a partial grant of summary judgment on Defendants’ motion); *Dawson v. Wells*, 2019 WL 2648802, *4 (D. Or. 2019); *Fish v. Peters*, 2019 WL 2648803, *2+ (D. Or. 2019); *Hernandez v. Cloutier*, 2019 WL 2583484, *1 (D. Or. 2019); *Pruitt v. Santiam Correctional Institution*, 2019 WL 3228576, *3 (D. Or. 2019) (Plaintiff noted that the grievance system was “inefficient” or “poorly in place”); *Torres v. Snider*, 2019 WL 1783045, *3 (D. Or. 2019); *Lee v. Taylor*, 2019 WL 2017564, *3+ (D. Or. 2019) (Partial grant on the issue of exhaustion).

Plaintiffs recognize that this court may consider itself bound by law assuming and adjudicating the availability of this defense as provided by the PLRA. Nevertheless, they present these objections in support of an effort to modify existing law, thereby preserving their opposition to a presumed invocation of this defense by the Defendants, which opposition may be subject to further adjudication within the federal judiciary. As a co-equal branch with the legislature, this Court must consider that the access to the courts, a protected constitutional right even for prisoners, has been gravely impinged by the PLRA.

c. Plaintiffs’ Proposed Remedy Is As Narrowly Drawn As Can Be To Correct This Violation Of Federal Law.

The Prison Litigation Reform Act placed a “limit” on the expanse of injunctive relief an incarcerated person can seek and receive from the Federal courts.²²⁰ 18 U.S. Code

§ 3626(a)(1)(A) provides:

“Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the

²²⁰ Plaintiffs raise here and wish to preserve the opportunity to argue that this restriction on the traditionally broad authority of the Federal courts to grant equitable remedies as both a violation of Plaintiffs’ due process rights, and is violative of the separation of powers.

violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”

Even given this restriction, the scope of the harm suffered by Plaintiffs should overcome any concern that the remedies sought by them are too broad. Indeed, Plaintiffs’ request is simple: ODOC must comply with the CDC’s guidelines for the prevention of community spread of COVID-19. To comply with those guidelines, ODOC must allow for adequate social distancing.

The risk is undeniable. Oregon has come to a standstill. At the time of this filing, the United States District Court for the District of Oregon has ordered the continuance of all in-person appearances in civil and criminal law matters until June 1, 2020.²²¹ The Oregon Courts have similar ordered restrictions to in-person court appearances until at least June 1.²²² Other public institutions, like Oregon’s public schools, are closed for the same period.²²³

Jails across the state have released people to accommodate health and safety requirements. Polk County Jail “slashed” its population by 75%.²²⁴ Marion County Jail reduced its population by nearly a third.²²⁵ The Washington County Sheriff’s Office has announced that it

²²¹ *In re: Court Operations in Response to COVID-19*, Standing Order 2020-9 (April 7, 2020), <https://ord.uscourts.gov/phocadownload/userupload/StandingOrders/Standing%20Orders/Court%20Operations/2020-9%20In%20Re%20Court%20Operations%20in%20Response%20to%20COVID-19.pdf>

²²² Oregon Judicial Department, *Amended Oregon Chief Justice Order modifies and extends actions to minimize in-person court business, preserve access to court, maintain community health and safety* (Mar. 27, 2020), <https://www.courts.oregon.gov/news/Lists/ArticleNews/Attachments/1321/1ff91edf3d37ee489b78289309e59b45-3-27-20-COVID-Press-Release.pdf>.

²²³ Dirk Vanderhart, *Oregon Governor Announces Closure Of Public Schools For Rest Of School Year*, OREGON PUBLIC BROADCASTING (Apr. 8, 2020), <https://www.opb.org/news/article/oregon-public-schools-2020-year-closure-covid-19-coronavirus/>

²²⁴ Whitney Woodworth and Virginia Barreda, *Marion, Polk county jails slash inmate populations by 30 to 75% in response to COVID-19*, SALEM STATESMAN JOURNAL (May 3, 2020), <https://www.statesmanjournal.com/story/news/crime/2020/05/03/marion-polk-county-jail-inmate-release-oregon-coronavirus-update/3049563001/>.

²²⁵ *Id.*

has released 60 inmates from its jail, bringing its jail population to 386 out of 572 available beds, or 23% reduction of its population.²²⁶ This has allowed the Washington County Jail to allow one inmate per cell as to maintain social distancing requirements.

The question of change of dormitory structure has not been broached by many Courts. The Second Circuit did review one such order, and ultimately reversed it. *Benjamin v. Fraser*, 343 F.3d 35, 53 (2nd Cir. 2003), *overruled on other grounds, Caiozzo v. Koreman*, 581 F.3d 63, 70 (2nd Cir. 2009). The District Court had held “that beds should be placed such that prisoners' heads are 6 feet apart because droplets emanating from one person's mouth remain airborne for at least three feet but generally not as far as 6 feet.” *Benjamin v. Fraser*, 156 F. Supp. 2d 333, 349 (S.D. NY 2001). However, the Second Circuit reversed, noting that the lack of evidence of “actual or imminent substantial harm” of placing inmates within 6 feet of one another. *Benjamin*, 343 F.3d at 53 (2nd Cir. 2003).

Here, Plaintiffs have provided what the Second Circuit could not find: evidence of imminent, substantial harm. Federal courts across the country have granted temporary restraining orders brought on behalf of vulnerable individuals in custody because of the threat of COVID-19. *See, e.g., Thaker, et al. v. Doll, et al.*, No. 20 C 0480, Dkt. 47 (M.D. Pa. Mar. 31, 2020); *Coronel, et al. v. Decker, et al.*, No. 20 C 2472, Dkt. 26 (S.D.N.Y. Mar. 27, 2020); *Basank, et al. v. Decker, et al.*, No. 20 C 2518, Dkt. 11 (S.D.N.Y. Mar. 26, 2020); *Flores, et al. v. Barr, et al.*, No. 85 C 4544, Dkt. 740 (Mar. 28, 2020). Neither too is the District of Oregon immune to COVID-19.

²²⁶ Noelle Crombie, *Oregon courts, jails respond to coronavirus: Washington County jail to release 60 inmates; court hearings see widespread delays*, The Oregonian (March 16, 2020), <https://www.oregonlive.com/coronavirus/2020/03/oregon-courts-jails-respond-to-coronavirus-washington-county-jail-to-release-60-inmates-court-hearings-see-widespread-delays.html>

CONCLUSION

The Plaintiff humbly prays that the Defendants and all persons acting on their behalf be enjoined in the manner described in his Motion, pending entry by the Court of a final judgment in this action. As Justice Marshall wrote: “While we have recognized that judicial restraint is often appropriate in prisoners' rights cases, we have also repeatedly held that this policy cannot encompass any failure to take cognizance of valid constitutional claims.” *Bounds v. Smith*, 430 U.S. 817, 832 (1977). Plaintiffs' lives, dependent on this Court's recognition of their constitutional rights, hang in the balance unless this Court intervenes.

DATE: May 12, 2020.

/s/ Juan C. Chavez
Juan C. Chavez, OSB #136428
Attorney for Plaintiff

LR 7-1(g) CERTIFICATION

Pursuant to LR 7-1(g), the parties conferred regarding the need for an expedited hearing regarding Plaintiffs' Motion for Preliminary Injunction. Defendants' Counsel, Andrew Hallman, agreed in essence that an expedited hearing could be accomplished, but wished to know more about the order being sought. After consulting with the Court, Parties set a hearing for May 29, 2020.

CERTIFICATE OF COMPLIANCE

This brief does not comply with the applicable word-count limitation under LR 7-2(b). However, counsel believes in good faith that it will comply with the rule based on leave from the Court to exceed the length limit. Counsel moved for leave to file a brief that exceeds the length limit on May 12, 2020. The brief contains 20,072 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.