No. 20-11622

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ANTHONY SWAIN, ALEN BLANCO, BAYARDO CRUZ, RONNIEL MARTINEZ-FLORES, and DEONDRE WILLIS,
Plaintiffs-Appellees,

PETER BERNAL and WINFRED HILL,
Plaintiffs,

vs.

DANIEL JUNIOR, in his official capacity as Director of the Miami-Dade Corrections and Rehabilitation Department, and MIAMI-DADE COUNTY,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

REPLY BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellants Daniel Junior and Miami-Dade County certify that the following persons and entities may have an interest in the outcome of this case:

1. Advancement Project, *Counsel for Plaintiffs-Appellees*
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3. Bernal, Peter, *Plaintiff*[*]
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8. Community Justice Project, *Counsel for Plaintiffs-Appellees*
9. Cruz, Bayardo, *Plaintiff-Appellee*[†]
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[*] Peter Bernal was released from custody on April 29, 2020, via state-court order.
[†] Bayardo Cruz was released from custody on May 20 via state-court order.

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[‡] Winfred Hill was released from custody on April 21 via state-court order.

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This appeal involves a governmental defendant, Miami-Dade County, which is a political subdivision of the State of Florida. There are no parent companies, subsidiaries, or affiliate companies that have issued shares to the public.

/s/ Ezra S. Greenberg
Ezra S. Greenberg
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REPLY BRIEF FOR APPELLANTS

I. The District Court Abused Its Discretion by Concluding that Plaintiffs Were Likely to Show Defendants Acted with Deliberate Indifference.

Rather than defend the order under review, Plaintiffs mischaracterize it, asking the Court to adopt their new version of the district court's holdings in lieu of the defective order they now abandon. In doing so, Plaintiffs posit two *alternative* holdings for finding Defendants deliberately indifferent that the district court never made: First, Defendants are deliberately indifferent for failing to implement feasible social distancing measures; and second, astoundingly, Defendants are deliberately indifferent for *refusing* to depopulate Metro West Detention Center, which Plaintiffs acknowledge would itself violate state law and state court orders. Plaintiffs cannot cure the district court's legal errors by improperly asking this Court to effectively rewrite the injunction and adopt alternative theories of liability based on factual findings and legal conclusions that the district court never made.

The district court's order *twice* makes clear that its deliberate indifference finding was not based on resolving any factual disputes against Defendants. R.100 at 35 ("[E]ven if the Court were to credit all of Defendants' evidence at this stage *and discount the factual disputes about implementation of Defendants' policies and procedures*, Plaintiffs have nonetheless made a clear showing as to each of the four factors required for injunctive relief." (emphasis added)); *id.* at 37 ("[E]ven considering the measures Defendants have adopted—*and setting aside the numerous factual disputes as to the consistency and efficacy of those measures*—the record nonetheless can be seen to

demonstrate deliberate indifference." (emphasis added)). There is only one way to read these passages: "The district court accepted as true that the defendants implemented [numerous safety] measures for purposes of issuing the preliminary injunction and did not resolve any factual disputes in favor of the plaintiffs." *Swain v. Junior*, 958 F.3d 1081, 1086 (11th Cir. 2020).

The Court should reject Plaintiffs' attempt to create their own order, replete with new factual findings and new legal conclusions, and instead vacate the preliminary injunction.

A. The district court's findings on social distancing do not support a conclusion that Defendants were deliberately indifferent.

A response to the initial brief's principal argument—that the district court abused its discretion by misapplying the subjective prong of deliberate indifference under *Farmer v. Brennan*, 511 U.S. 825, 844 (1994), *see* Initial Br. 25-35—is nowhere to be found in Plaintiffs' answer brief. Plaintiffs ignore the district court's central holding that deliberate indifference was evident from the spread of COVID-19 at Metro West. They have essentially abandoned most of the original reasons for seeking a preliminary injunction—that Defendants did not provide toilet paper, soap, basic hygiene, or sanitization—in favor of an ever-changing complaint that in its newest iteration is articulated as a failure to achieve some amorphous level of additional social distancing that, while feasible, is not being done.

The district court's actual reason for finding deliberate indifference was that the measures Defendants implemented were not constitutionally sufficient in light of the

"exponential rate of infection" at Metro West. R.100 at 37-38. The court, citing to another district court decision finding deliberate indifference because the virus was spreading inside that jail, concluded that the subjective intent prong was satisfied. *Id.* at 38-39. The court found that Plaintiffs had met their burden on that prong, not based on the reasonableness of their response (a response already implemented before the court's order), but because the implemented measures were inadequate to stem the spread of the virus to the court's satisfaction. *Id.* at 40-41.

Plaintiffs don't defend this analysis. They conjure a new deliberate indifference finding based on a "failure to implement distancing measures feasible with the jail's current population." Answer Br. 26. In framing the issue this way, Plaintiffs misstate the district court's actual determination regarding Defendants' efforts to implement social distancing at Metro West. Plaintiffs argued below that social distancing "continues to be *impossible*" but that "the failure to achieve social distancing alone is sufficient to establish deliberate indifference, *even if there is no evidence that social distancing* [*is*] *possible within the facility*." R.85 at 34 (emphases added). The district court adopted that argument, finding Plaintiffs had proven deliberate indifference because social distancing "has not and cannot be achieved" at Metro West's current population level. R.100 at 35.

Plaintiffs' new argument—which they audaciously claim was a holding below—cannot be gleaned from the district court's order. Plaintiffs erroneously contend that the district court found that Defendants "neither adopted nor implemented feasible social-distancing measures." Answer Br. 27-28. This concept of "*feasible*" social

distancing measures appears nowhere in the district court's order, but Plaintiffs' brief references it no fewer than fourteen times. Most egregiously, Plaintiffs advance the novel claim that "*medically required*" social distancing (another new construct created on appeal) is still impossible, thereby requiring prison reduction, but that "*feasible social distancing*" has not occurred, thereby establishing deliberate indifference. *Id.* at 1, 4, 16, 27-29, 41 (emphases added). Plaintiffs expect this Court to buy this freshly baked social distancing dichotomy—entirely absent from the record—to save a deficient preliminary injunction order.

The district court did not analyze deliberate indifference the way Plaintiffs now wish it had. Instead, it accepted as true that Defendants adopted social distancing measures. It "set[] aside the numerous factual disputes as to the consistency and efficacy" of those measures. *Id.* at 37. And it *still* found deliberate indifference on account of a lack of social distancing, just as Plaintiffs asked it to, because social distancing "*cannot* be achieved absent an additional reduction in Metro West's population" or some other undefined measure. *Id.* at 35, 37 (emphasis added). Plaintiffs characterize what the district court did as "reserving judgment" on the factual disputes, Answer Br. 29, but, however characterized, the district court "accepted as true that the defendants implemented [numerous safety] measures for purposes of issuing the preliminary injunction and did not resolve any factual disputes in favor of the plaintiffs," *Swain*, 958 F.3d at 1086. And it found that social distancing *cannot* be achieved at current population levels, not that Defendants deliberately failed to achieve it.

It is understandable that the district court failed to credit much of the "evidence" that Plaintiffs now improperly ask this Court to credit in the first instance. Deviating from our legal system's ordinary course of proof, Plaintiffs submitted the bulk of their evidentiary support for their motion for preliminary injunction in connection with their reply, filed just two days before the preliminary injunction hearing. R.80; R.81; R.85.

Plaintiffs proffered declarations from twenty Metro West inmates that contain largely irrelevant, speculative, and inadmissible hearsay statements (almost exclusively from unnamed speakers) that cannot be verified or falsified. *E.g.*, R.81-1 at 4 ¶ 12, 58 ¶ 41 (claiming "high-up officers" stated that social distancing is impossible); *id.* at 15-16 ¶ 6 (claiming that an unnamed officer said he is "scared of going in" to a cell); *id.* at 66-67 ¶ 11 (stating that unnamed nurses and officers are thankful for this lawsuit and do not speak out themselves for fear of losing their jobs); *id.* at 24 ¶ 22, 35 ¶ 17, 55 ¶ 13 (assuming dormitories are not actually being disinfected while inmates are at recreation because it "only takes 30 minutes" and they don't smell like bleach afterwards); id. at 31-32 ¶¶ 15-17 (submitting, without personal knowledge, that two other inmates were ill and received delayed medical care). Several declarations were submitted by *former* Metro West inmates; their releases render their testimony irrelevant and stale, especially considering MDCR's rapidly evolving response to the pandemic. *E.g.*, *id.* at 9 ¶ 2 (released "three weeks to a month" before April 23), 19 ¶ 2 (released April 23), 23 ¶ 2 (released April 10), 31 ¶ 3 (released "around two weeks" before April 24), 45 ¶ 2 (released April 3).

Despite these obvious failings, the declarations largely, if unwittingly, *corroborate*

the extensive remedial efforts undertaken by Defendants to prevent the spread of COVID-19 within Metro West. For example, Kellen Stuhlmiller, an inmate worker, explained his daily cleaning routine and verified that units are disinfected weekly with an industrial fogger. R.81-5 ¶¶ 22, 25. He stated that tables in the common area were reconfigured and marking tape was placed on the floor in certain areas to designate a distance of six feet to encourage social distancing. *Id.* ¶¶ 11, 13. He verified that units contain liquid hand soap and paper towels in addition to the individual bar soap each inmate receives. *Id.* ¶ 27; *see also* R.81-1 at 5-6 ¶¶ 26, 32, 36 (*tape marking on floor for social distancing*; liquid hand soap and paper towels available; signage posted in dorm listing symptoms of COVID-19; *frequent intercom announcements reminding inmates to wash their hands and practice social distancing*); *id.* at 12 ¶¶ 4, 7, 11-12 (inmates have masks; bunks are staggered to effect social distancing; inmates receive new uniforms and sheets once a week; there is a washer and dryer in the unit; inmate temperatures are checked twice daily); *id.* at 23-24 ¶¶ 11-12, 16 (officers wear masks, clean their areas, and attempt to minimize contact with inmates; inmate workers wear gloves to pass out food); *id.* at 60¶ 2 (confirming a decrease in inmate population); *id.* at 69 ¶¶ 3, 9-11 (*bunks removed from the unit to create more space*; receives clean uniforms and sheets every week; has access to laundry facility); R.81-3 ¶¶ 5-7, 11, 14-17 (tested for COVID-19 upon displaying symptoms and medically isolated at another facility where he was monitored daily by medical providers).

It is beyond dispute that Defendants voluntarily adopted numerous policies to reduce the risk of COVID-19 before the lawsuit—some of which, ironically, appeared

in the expanded requirements of the injunction. In the end, the district court failed to identify a single policy measure which Defendants knew would reduce the potential harm of COVID-19 but knowingly or recklessly declined to adopt. *Swain*, 958 F.3d at 1089; *see Marbury v. Warden*, 936 F.3d 1227, 1233 (11th Cir. 2019); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583-85 (11th Cir. 1995).

The entire answer brief appears to hinge on the district court's observation that several inmates indicated that social distancing "is not uniformly enforced." R.100 at 37-38. But the district court never linked this observation to Defendants' subjective knowledge, "so these lapses in enforcement do little to establish that the defendants were deliberately indifferent." *Swain*, 958 F.3d at 1089. It also never explained why it would credit these inmate declarations over (1) the independent inspection report—commissioned at its own insistence—that found that Defendants were "doing their best balancing social distancing and regulation applicable to the facility," R.70-1, (2) Defendants' numerous declarations showing that social distancing enforcement is an ongoing priority, R.65-1 ¶¶ 71, 100; R.65-5 ¶ 5; R.65-9 ¶ 10; R.65-25, and (3) other portions of inmate declarations which corroborate that social distancing is routinely enforced, *see supra* at 6. Given this factual record and the district court's multiple statements that it arrived at its deliberate indifference finding after setting aside the factual disputes about the "implementation" and "consistency" of Defendants' policies, R.100 at 35, 37, it is not plausible to read the district court's remark about intermittent enforcement as a factual finding that supports deliberate indifference by Defendants. *See Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940)

(requiring that factual findings supporting a preliminary injunction be specifically set out under Rule 52(a)).[1]

At any rate, inmates' and staff members' isolated failures to perfectly carry out Defendants' policies, even if true, could not satisfy Plaintiffs' burden. *See Amos v. Taylor*, No. 20-0007, 2020 WL 1978382, at *11 (N.D. Miss. Apr. 24, 2020) (denying preliminary injunction where plaintiff showed sporadic failures to implement policies). Grasping from the factual record, Plaintiffs cite Director Junior's pre-suit directives to implement social distancing policy as evidence of his knowledge that social distancing is critical to support a finding of deliberate indifference. Answer Br. 27 (citing R.65-25). But the directive that *everyone practice strict social distancing* shows the opposite of deliberate indifference: a conscientious, positive action that demonstrates Director Junior's conscious attempt to abate the risk of COVID-19. In furtherance of this directive, on April 16, Director Junior instituted ten *additional* policies to protect inmates from COVID-19, nearly all of which relate to social distancing. R.65-1 ¶ 102. Director Junior is not aware of systemic failures to carry out his social distancing directives. R.92-2 ¶ 14.

What Plaintiffs needed to show was that Defendants knew social distancing measures were lacking and still declined to act. *Marbury*, 936 F.3d at 1233; *Hale*, 50

[1] Even if the Court accepted Plaintiffs' improper invitation to reinvent the factual basis of the deliberate indifference finding, it would have been an abuse of discretion for the district court to make such a finding without some explanation for its resolution of disputed factual issues. *Cf. Cox Enters., Inc. v. News-Journal Corp.*, 510 F.3d 1350, 1360 (11th Cir. 2007).

F.3d at 1583. The district court did not and could not make this finding.[2] *See Wragg v. Ortiz*, No. 20-5496, 2020 WL 2745247, at *22 (D.N.J. May 27, 2020) (failing to achieve full social distancing insufficient to establish likelihood of success on Eighth Amendment claim); *Frazier v. Kelley*, No. 20-0434, 2020 WL 2561956, at *30 (E.D. Ark. May 19, 2020) (defendants' adoption of reasonable policies based on CDC guidance precluded deliberate indifference claim).

In this respect, the answer brief picks up where the district court leaves off, collapsing the objective and subjective portions of the deliberate indifference inquiry. In arguing only that Defendants are aware of the dangers posed by COVID-19 and the importance of social distancing, Plaintiffs sidestep their obligation to identify evidence supporting a conclusion that Defendants subjectively disregarded a risk of harm. And by avoiding any real analysis of the subjective intent prong, Plaintiffs scrupulously downplay all the steps Defendants have taken to minimize the risk of COVID-19 at Metro West. It is understandable that they do so, since the adoption of reasonable

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[2] The stay orders in this case, and in *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020), *application to vacate stay denied*, 590 U.S. —, 2020 WL 2497541 (May 14, 2020), and *Marlowe v. LeBlanc*, No. 20-30276, 2020 WL 2043425 (5th Cir. Apr. 27, 2020), *application to vacate stay denied*, 590 U.S. —, No. 19A1039 (May 29, 2020), as well as this Court's opinion in *Truss v. Warden*, 684 F. App'x 794 (11th Cir. 2017), provide the proper lens for analyzing a case where the potential harm to inmates comes from an outside contagion. The Court in *Truss* reasoned that a jail's adoption of various policies to mitigate the risk of tuberculosis in an over-crowded prison defeated a deliberate indifference claim based on the failure to satisfy the subjective prong of the analysis. *Id.* at 796-97. And, like the motions panel did here, it found that factual disputes regarding whether Defendants' policies were uniformly implemented could not alone establish deliberate indifference. *Id.* at 798; *Swain*, 958 F.3d at 1089-90.

measures and policies to address a substantial risk defeats a deliberate indifference claim, even if those efforts are insufficient to fully mitigate the risk. *See Farmer*, 511 U.S. at 844; *Rodriguez v. Sec'y, Dep't of Corr.*, 508 F.3d 611, 619-20 (11th Cir. 2007); *Chandler v. Crosby*, 379 F.3d 1278, 1290 (11th Cir. 2004).

Plaintiffs' last resort is the argument that Defendants' references to their myriad mitigation efforts amounts to a we've-done-enough-on-other-fronts basis for avoiding liability. Answer Br. 29. That has never been Defendants' approach to the threat posed by COVID-19 at Metro West. Nevertheless, reasonable measures in a congregate setting will surely differ from those that would be taken if Defendants could wave a magic wand and redesign the entire layout of the facility.

Another tactic Plaintiffs employ to downplay Defendants' substantial mitigation efforts is an overreliance on outlandish hypotheticals. They posit that Defendants would forgo an available, low-cost vaccine in lieu of other, easier measures. Answer Br. 39. But Defendants began responding to this pandemic before this lawsuit was filed and, mid-suit, undertook contact tracing that was not required by the CDC or TRO—and was destined to produce more positive test results—in the days leading up to the injunction hearing. Initial Br. 12-13, 29. So it is beyond disingenuous for Plaintiffs to introduce the specter that Defendants will one day rest on their ongoing mitigation tactics as a basis to refuse to administer a low-cost vaccine to the inmate population.

In the end, the district court found that social distancing "cannot be achieved" at Metro West, not because Defendants ignored the issue, but because it found that the

number of COVID-positive inmates belied their efforts. R.100 at 35, 37. *Farmer* precludes this sort of ends-driven reasoning. The district court erred in allowing the increase in positive cases to serve as the *sine qua non* of deliberate indifference. Pejorative references to rushed decision-making aside, the motions panel correctly found that the district court abused its discretion by failing to properly apply the law in the subjective portion of the deliberate indifference inquiry. The Court should reject Plaintiffs' offer to paper over those errors by substituting a new rationale for deliberate indifference predicated on factual findings that the district court never made and legal analysis that *still* does not satisfy controlling precedent requiring evidence that Defendants knew how to reduce the risk of harm and recklessly refused to do so. Because Defendants have demonstrated an abuse of discretion in the district court's deliberate indifference analysis, the injunction cannot stand.

B. Director Junior lacks legal authority to release MDCR inmates, so his failure to do so is not evidence of deliberate indifference.

The second finding Plaintiffs conjure on appeal is that Director Junior is deliberately indifferent for failing to release inmates even though doing so would violate state law. Plaintiffs' arguments on Defendants' authority to release inmates are downright schizophrenic. On the one hand, they claim that "Junior's enforcement of pretrial detention orders when jail population size precludes adequate distancing" is a basis for a finding deliberate indifference. Answer Br. 26. Simultaneously, they concede that Director Junior is precluded from ordering release under state law and that inmates

cannot be released from prison except by a three-judge panel. Answer Br. 22-23.[3] But, as the unrebutted record shows, Director Junior is actively cooperating with the state court process that the district court found was responsible for releasing more than 600 inmates because of the risk posed by COVID-19. R.100 at 26-27 & n.12; R.54; R.65-1 ¶¶ 17, 90-91; R.65-22; R.92-2 ¶¶ 16-17; R.113. Plaintiffs' three-judge panel concession makes their blind insistence that Director Junior is deliberately indifferent for not *sua sponte* releasing inmates from custody that much more puzzling. Director Junior cannot be deliberately indifferent for taking every action within his legal authority.

It bears repeating, this is not a finding that the district court actually made. Plaintiffs cite to pages 37-38 of the order, Answer Br. 26, but nothing on those pages remotely suggests that the district court found deliberate indifference in Director's Junior's failure to violate state law, ignore pretrial detention orders, and release inmates at will. Such a finding would run contrary to the district court's crediting of Judge Sayfie's testimony that the state court's "hyper focus" on release, a process with which Defendants were cooperating fully, is working. R.100 at 26-27 & n.12.

Plaintiffs' reliance on *Brown v. Plata*, 563 U.S. 493 (2011), is misplaced; that case provides the wrong lens through which to view this one. *Brown* addressed the propriety of the ultimate remedial order issued by a three-judge court to reduce California's prison population after more than a decade of litigation had already addressed the underlying questions of liability. And *Brown* addresses a very different type of harm,

[3] The PLRA expressly permits only an empaneled three-judge court to release prisoners. 18 U.S.C. §§ 3626(a)(3)(B) & (g)(4).

one caused by the State of California itself in allowing its prisons to reach 200% of design capacity and failing to remediate the overcrowding after a decade of litigation. Unlike in *Brown*, Defendants did not create a situation involving overcrowding (Metro West is operating at one-third *under* capacity and falling), nor are they the reason why it can be difficult to achieve complete social distancing in dormitory style housing units. And since Defendants are not the source of these difficulties—they do not control the inmate population and cannot redesign the physical structure of Metro West in the midst of the pandemic—their failure to reduce the overall inmate population to some magic number cannot bear on the deliberate indifference inquiry. *See supra* note 2.

Brown undermines Plaintiffs for other reasons, too. Before upholding the population reduction order, the Supreme Court noted how numerous public officials, including the former governor of California and secretary of its prison system, decried overcrowding as the cause of substantial harm to inmates. 563 U.S. at 503, 535. But the Court never insisted that these actors should themselves have released inmates. No fair reading of *Brown* supports deliberate indifference here.

MDCR holds pretrial detainees like Plaintiffs *on behalf of* the State of Florida and, unless an inmate posts bond, cannot release the inmate without an order from the state court system. R.135 at 20:3-7; R.65-1 ¶ 89-90. Plaintiffs' argument highlights their fundamental misunderstanding of Florida's criminal justice system. The County and the State are separate legal entities. The State has enacted specific statutes regulating the terms and conditions of pretrial confinement. Fla. Stat. §§ 903.011-.36 (bond and bail); §§ 907.04-.045 (pretrial detention release); §§ 951.01-.29 (county jails). Plaintiffs

do not dispute that state law precludes Defendants from releasing them—indeed, they argue that Defendants violated their rights by following state law.[4]

Plaintiffs fail to appreciate that violating state law is not an option, and Defendants cannot be deliberately indifferent for failing to take steps that would violate state law. And these failings infect their reasoning on deliberate indifference. Defendants' adoption of policies that they are legally and logistically *capable* of implementing, and which they subjectively believe are reasonable to mitigate the harm, necessarily precludes a deliberate indifference claim.[5]

Here too Plaintiffs employ hyperbolic and false hypotheticals rather than address the subjective prong of deliberate indifference. They concoct examples of a broken levee about to flood the jail or a disrupted supply-chain for the jail's food vendor. Answer

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[4] In this respect, Defendants do not stand in the same shoes as ICE or the BOP, who have independent statutory discretion to transfer inmates to home confinement. *E.g.*, *Martinez-Brooks v. Easter*, No. 20-0569, 2020 WL 2405350, at *1 (D. Conn. May 12, 2020).

[5] Plaintiffs' invocation of *Ex parte Young*, 209 U.S. 123 (1908), both here and with respect to their arguments that they satisfied the requirements for municipal liability, is a distraction. *Ex parte Young* is a "narrow" exception to Eleventh Amendment state sovereign immunity, under which "suits seeking prospective, but not compensatory or other retrospective relief, may be brought against state officials in federal court challenging the constitutionality of official conduct enforcing state law." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145-46 (1993). But there's never been so much as a whisper of an argument from Defendants—a municipality and a municipal official sued in his official capacity—that this suit is barred by the Eleventh Amendment. And the *Ex parte Young* doctrine is entirely unsuited to the purpose for which Plaintiffs raise it—to support their likelihood of success on the merits of their deliberate indifference claim—because "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 646 (2002).

Br. 35-36. In these chimerical scenarios Defendants would obviously take *temporary* measures to remove the inmates from harm *while maintaining custody*. Inmates would not drown or starve, but they would not be released back into society, either.

Although COVID-19 is a serious public health threat, it is not a temporary localized disaster than can be averted by a swift and short-term movement of inmates. It pervades every community and affects everyone with no clear end in sight. That said, the Constitution does not require a jailor to release inmates in violation of state law simply because the risk of COVID-19 spreading cannot be ameliorated in a jail setting to the same extent as it could on the outside. "No part of our country has escaped the effects of COVID-19," *Swain,* 958 F.3d at 1085, and the mere fact that the virus is present in Metro West cannot give rise to an obligation on the jailor's part to depopulate the prison.

The premise upon which Plaintiffs now rely to build their entire case—that ideal social distancing (redefined as "medically required" distancing for purposes of this appeal) cannot be achieved at Metro West's current population—is insufficient to override *Farmer*'s stringent culpability standard and to transfer control of the jail over to the district court. Were it otherwise, every dormitory-style prison in the United States in which COVID-19 infections have increased would be subject to federal judicial control, and every inmate in those prisons would have a constitutional right to be removed or to have a number of their fellow inmates removed. That is not the law.

Plaintiffs are clearly not likely to succeed on the merits when, to substitute for the district court's failure to properly analyze deliberate indifference, this Court would be

forced to adopt a radical new rule of law opening up every state and municipal jail in the Eleventh Circuit to a federal lawsuit claiming a jailor is deliberately indifferent for failing to release inmates in violation of state law.

II. The District Court Erred in Failing to Address Municipal Liability.

Doubling down on the district court's error, Plaintiffs argue that they can enjoin a municipality without showing they were likely to succeed in establishing municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). If that doesn't work, they make a half-hearted attempt to persuade this Court to rule in the first instance that they fulfilled *Monell*'s requirements.

Plaintiffs' attempt to distinguish *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994), is unavailing. Answer Br. 41 n.3. *Church*'s conclusion that the district court erroneously held that the plaintiffs would likely satisfy *Monell* is functionally indistinguishable from this Court's conclusion that the district court had to find a likelihood of success on *Monell* to enjoin Defendants. *See Swain*, 958 F.3d at 1091. The result is the same in either situation: vacatur of an injunction on account of a plaintiff's failure to satisfy *Monell*.

On the merits, it is altogether unclear how Plaintiffs can so assuredly state that they will likely prevail when they have never pointed to evidence showing a policy or custom of violating constitutional rights. A plaintiff must show the existence of an officially promulgated county policy or an "unofficial custom or practice of the county shown through the *repeated acts* of a final policymaker for the county." *Grech v. Clayton County*, 335 F.3d 1326, 1329 (11th Cir. 2003) (en banc) (emphasis added). Plaintiffs'

focus on anecdotal evidence of incomplete implementation of the County's policies or on *inmates* failing to social distance raises precisely the type of *respondeat superior* liability *Monell* prohibits. *Knight ex rel. Kerr v. Miami-Dade County*, 856 F.3d 795, 819 (11th Cir. 2017). A plaintiff pursuing a municipal liability claim must demonstrate an unofficial policy by proving a pattern of constitutional violations that are "obvious, flagrant, rampant *and of continued duration*, rather than isolated occurrences." *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999) (emphasis added). Plaintiffs' brief fails to address their burden of demonstrating their likelihood of success in establishing an unofficial policy, a burden which the district court improperly relieved them from undertaking.

As for Plaintiffs' final policymaker argument, no court has ever found delegation to the head of a Miami-Dade County department under *Monell*. "Whether an official has final policymaking authority is a question of state law," *Church*, 30 F.3d at 1342, a question the Southern District of Florida has conclusively answered, rejecting delegation arguments like Plaintiffs'. *See Rosario v. Miami-Dade County*, 490 F. Supp. 2d 1213, 1222-23 (S.D. Fla. 2007). Plaintiffs presented no evidence that *any* inaction they claim persists at Metro West results from deliberate indifference by the County's final policymakers, the Mayor and the Board of County Commissioners or, even under their flawed delegation theory, Director Junior.

Plaintiffs elected to sue a *municipality*, so the requirement that they show a likelihood of proving *municipal* liability is not optional. The district court abused its discretion in failing to address the prerequisites to such liability in its preliminary

injunction order.

III. Defendants Properly Raised the PLRA Exhaustion Defense Below.

Plaintiffs do not defend the district court's erroneous refusal to analyze Defendants' PLRA exhaustion defense at the preliminary injunction stage. They implore the Court to disregard this error because Defendants' decision not to waste the district court's time by copy-pasting their entire motion to dismiss raising failure to exhaust, R.66, into the response to the preliminary injunction motion that they filed (literally) two minutes later, R.67, had the unintended effect of "waiving" the exhaustion defense.

Plaintiffs' argument is premised on a footnote statement that Defendants "have not properly raised the issues in the motion to dismiss with the Court by attempting to incorporate their entire motion in the Response." R.100 at 28 n.14. But this Court found exactly the opposite, and Plaintiffs provide no authority justifying the Court's departure from its prior conclusion that "defendants correctly raised and briefed the defense in a motion to dismiss and in their opposition to the plaintiffs' motion for a preliminary injunction." *Swain*, 958 F.3d at 1092. In any event, the district court's throwaway statement did not weigh in its actual conclusion—announced not once, but twice—that exhaustion "is not an issue to be decided at the preliminary injunction stage." *Id.* at 28; *see also id.* at 29-30.[6]

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[6] Plaintiffs fault Defendants for not mentioning the waiver argument in their initial brief but cite no caselaw supporting the proposition that an appellant abandons an issue if it does not discuss every jot and tittle a district court writes on the way to its ultimate conclusion. To the contrary, when a district court finds a waiver but then

Even if this Court were to accept Plaintiffs' formalistic contention that the exhaustion argument was waived in the district court, it should exercise its discretion to excuse any possible waiver. *Manning v. City of Roanoke ex rel. Caldwell*, 930 F.3d 264, 271 (4th Cir. 2019) (en banc). Excusal is warranted on three grounds.

First, the question whether a district court is required to consider an exhaustion defense at the preliminary injunction stage is "a pure question of law" that would "result in a miscarriage of justice" if it weren't addressed now. *Cita Tr. Co. AG v. Fifth Third Bank*, 879 F.3d 1151, 1156 (11th Cir. 2018) (cleaned up); *see also Blue Martini Kendall, LLC v. Miami-Dade County*, 816 F.3d 1343, 1349 (11th Cir. 2016) ("[A]ny wrong result resting on the erroneous application of legal principles is a miscarriage of justice in some degree.").

Second, a federal appellate court is justified in resolving an issue not passed on below, in this case administrative exhaustion, "where the proper resolution is beyond any doubt." *Cita Trust Co.*, 879 F.3d at 1156 (cleaned up). Plaintiffs impliedly concede this, as their brief puts all their eggs in the waiver basket and devotes not a word to the merits of the district court's decision to defer analyzing exhaustion.

And third, any concern for avoiding prejudice is assuaged here because Plaintiffs took the opportunity to address the argument below. *See Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982). Plaintiffs' forty-

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conducts analysis inconsistent with that finding, this Court is not bound by the waiver. *Cf. Reese v. Herbert*, 527 F.3d 1253, 1270 (11th Cir. 2008) (refusing to accept a "deemed admitted" record on summary judgment when district court analyzed the evidence).

one-page "consolidated reply/response" in support of their preliminary injunction motion included a six-page "response to the main arguments in Defendants' Motion to Dismiss *that were incorporated into the preliminary injunction response*." R.84 at 1 (emphasis added); *see* R.85 at 27-32. In fact, Plaintiffs' sole live witness at the injunction hearing was called to address exhaustion. R.134 at 27-35. If anything, this manifest lack of prejudice excuses any waiver on Defendants' part. *See Ochran v. United States*, 117 F.3d 495, 503 (11th Cir. 1997) (finding no prejudice when the opponent "fully briefed all the issues"); *Kimbrough v. Sec'y, Fla. Dep't of Corr.*, No. 18-10502, 2020 WL 1933929, at *5-6 (11th Cir. Apr. 22, 2020) (same).

It cannot be disputed that the exhaustion defense was raised, in accordance with Circuit precedent, via Defendants' motion to dismiss filed before their response to the preliminary injunction motion.[7] "The district court could not determine that the plaintiffs were likely to succeed on their § 1983 claim without, at the very least, finding that the defendants were unlikely to carry their burden of establishing failure to exhaust." *Swain*, 958 F.3d at 1092 (cleaned up). But it made no such finding, so its entry of the preliminary injunction was an abuse of discretion.

[7] Plaintiffs' suggestion that Defendants didn't need to raise the exhaustion defense in a motion to dismiss is wrong: a defendant "must raise the exhaustion defense in his first Rule 12 motion, otherwise the defense is forfeited and cannot be raised in a later motion under Rule 12." *Brooks v. Warden*, 706 F. App'x 965, 968 (11th Cir. 2017) (Martin, J.).

IV. The District Court Erred in Its Analyses on the Remaining Preliminary Injunction Elements.

A. The district court erred in finding irreparable harm based solely on the danger of COVID-19.

Plaintiffs once again attempt to rewrite the district court's order by discussing the portions dealing with mootness instead of irreparable harm. Answer Br. 48. Still lacking, however, is any *factual basis* for the district court to reject Defendants' assertion that Plaintiffs faced no irreparable harm because they would continue enforcing safety measures to respond to the virus, nearly all of which were in place before the district court ordered them. Initial Br. 42 & n.21 The district court grounded its rejection of the sworn assurances of three high-ranking officials in three *non sequiturs*: "expert testimony," "medical data on the presence and progress of virus," and the fact "that Metro West is in the crosshairs of this contagion." R.100 at 40. But none of the medical experts or data indicated that Defendants would abandon safety measures absent an injunction. And Plaintiffs bypass the question of whether "they will suffer irreparable injuries that they would not otherwise suffer in the absence of an injunction." *Swain*, 958 F.3d at 1090-91.

B. The district court erred in balancing the harms.

Plaintiffs have no regard for the idea that decision-making on matters of jail administration should be left to jail officials, especially during a public health crisis. But as Chief Justice Roberts just days ago observed, decisions about public health and safety matters should generally be made by those with the most intimate knowledge of them, not by lawyers and judges:

> Our Constitution principally entrusts "the safety and health of the people" to the politically accountable officials of the States "to guard and protect." When those officials "undertake to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground.

South Bay United Pentecostal Church v. Newsom, 590 U.S. —, 2020 WL 2813056, at *1-2 (May 29, 2020) (Roberts, C.J., concurring) (cleaned up).

"[A]bsent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or substitute their judgment for that of the trained penological authorities charged with the administration of such facilities." *Taylor v. Freeman*, 34 F.3d 266, 268 (4th Cir. 1994). Mandatory injunctive relief of the type ordered here is only appropriate when a defendant abdicates responsibility to address constitutional problems—a finding the district court never made and which the record could not support. *Id.* at 269.

Like the district court, Plaintiffs do not address the inspection report—probably because its finding that MDCR was doing its "best" to address the challenges of the pandemic at Metro West conclusively undermines their case. No binding precedent in this Circuit authorizes what the district court did here: enter a TRO, keep the TRO in place without assessing Defendants' compliance, and then supplement the TRO by ordering Defendants to take actions (testing, masks, information sharing with criminal justice system) that *Defendants had already taken voluntarily*, and many of which

(masks and information sharing) they had taken before this lawsuit was filed. While Plaintiffs may downplay the harm that comes from divesting elected representatives and local government officials of the authority to act during a pandemic, there is no basis to order injunctive relief against Defendants—whom the record shows are already committed to protecting Plaintiffs from COVID-19 and have taken substantial steps to do so—simply because Defendants' wide-ranging remedial efforts failed to achieve social distancing perfection. The injunction works real and immediate harm on Defendants but provides only speculative benefits to Plaintiffs.

V. The Mandatory Injunction Violates the PLRA and Rule 65.

The district court entered a TRO, then a preliminary injunction, requiring Defendants to take numerous steps across a range of areas, including education, hygiene, sanitation, and medical care. R.25. at 2-5; R.100 at 49-52. Social distancing was but one of the aspects of detention about which the district court ordered mandatory injunctive relief. Plaintiffs do not dispute that the district court failed to analyze Defendants' substantial compliance with the TRO. And given Plaintiffs' apparent concession that the district court's deliberate indifference finding was limited to social distancing, there is no basis for enjoining Defendants in any other area, making the preliminary injunction *de facto* overbroad.

With respect to social distancing, Plaintiffs argue the district court respected Defendants' discretion in giving them leeway to propose additional social distancing measures. Answer Br. 55-67. But having already found that social distancing is impossible at current population levels, the district court set Defendants on a fool's

errand. A narrowly drawn injunction would have delineated factual findings supporting deliberate indifference as to any specific areas and ordered remedial relief. As Plaintiffs' redefinition of social distancing for purposes of appeal shows, the district court's social distancing mandates are the very type of vague, overbroad, and inchoate standards that do not satisfy the PLRA or Rule 65.

CONCLUSION

The district court's preliminary injunction should be vacated, and this cause should be remanded with instructions to the district court to deny the motion for preliminary injunction with prejudice.

Dated: June 1, 2020.

Respectfully submitted,
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CERTIFICATES OF COMPLIANCE

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 6,477 words.

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CERTIFICATE OF SERVICE

On June 1, 2020, I filed this document electronically with the Court of Appeals via ECF and served a true and correct copy on counsel of record via ECF.

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