

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WAYNE COUNTY JAIL INMATES, et. al.,

Case No. 71 173 217 CZ

Hon. Timothy M. Kenny

Plaintiffs,

v

WILLIAM LUCAS, et. al.,
Defendants.

DEBORAH ANN HOLY (P34766)
Michigan Legal Services
Attorney for Plaintiffs
2727 Second Ave., Suite 333, Box 37
Detroit, MI 48201
(313) 573-0073

JAMES HEATH (P65419)
Wayne County Corporation Counsel
Attorney for Wayne County/CEO
500 Griswold Street, 30th Floor
Detroit, MI 48226
(313) 224-0055

WILLIAM H. GOODMAN (P14173)
Goodman, Hurwitz, & James, PC
Attorney for Plaintiffs
1394 E. Jefferson Ave.
Detroit, MI 48207
(313) 517-6170

FELICIA O. JOHNSON (P66430)
Commission Counsel
Attorney for Wayne County
500 Griswold Street, Suite 810
Detroit, MI 48226
(313) 224-6459

DAVID MELTON (P63891)
Legal Advisor Wayne County Sheriff
4747 Woodward Ave.
Detroit, MI 48201
(313) 224-6888

**PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs hereby move this Court, pursuant to Michigan Court Rules 3.310

(A) & (B), for a temporary restraining order. The grounds for this Motion are set forth in the Brief in Support of Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction, filed herewith, and the accompanying declarations and exhibits, which includes the Complaint and supporting exhibits filed in *Russell et al., v. Wayne County et al.*, No. 2:20-cv-11094-MAG-EAS, ECF No. 1 (E.D. Mich. May 4, 2020) (“Compl.”).¹ Plaintiffs request that this Court issue a temporary restraining order requiring Defendants to immediately undertake the following essential minimum measures to improve the hygiene and safety—to reduce the risk of severe illness and death from COVID-19—at the Wayne County Jail:

- 1) Effectively communicate to all people incarcerated, including low-literacy and non-English-speaking people, sufficient information about COVID-19, measures taken to reduce the risk of transmission, and any changes in policies or practices to reasonably ensure that individuals are able to take precautions to prevent infection;
- 2) Provide adequate spacing of six feet or more between people incarcerated so that social distancing can be accomplished;
- 3) Ensure that each incarcerated person receives, free of charge: (1) an individual supply of liquid hand soap and paper towels sufficient to allow frequent hand washing and drying each day, and (2) an adequate supply of disinfectant hand wipes or other products effective against the virus that causes COVID-19 for daily cleanings;
- 4) Ensure that all incarcerated people have access to hand sanitizer containing at least 60% alcohol;
- 5) Provide an adequate stock of daily cleaning supplies, such as sponges,

¹ This Motion relates back to May 4, 2020, the date an analogous motion for emergency relief was filed in *Russell et al., v. Wayne County et al.* See No. 2:20-cv-11094-MAG-EAS, ECF. 3 (E.D. Mich. May 4, 2020).

brushes, disinfectant hand wipes, and/or disinfectant products effective against the virus that causes COVID-19;

- 6) Provide sufficient disinfecting supplies, free of charge, so incarcerated people can clean high-touch areas or items (including, but not limited to, telephones, tablets, tables, bathrooms, seating, and door handles) between each use;
- 7) Provide daily access to clean showers and clean laundry, including clean personal towels and washrags for each shower;
- 8) Require that all Jail staff wear personal protective equipment, including masks and gloves, when interacting with any person or when touching surfaces in cells or common areas;
- 9) Require that all Jail staff wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol both before and after touching any person or any surface in cells or common areas;
- 10) Take each incarcerated person's temperature daily (with a functioning, properly operated, and sanitized thermometer) to identify potential COVID-19 infections;
- 11) Conduct immediate testing for anyone displaying known symptoms of COVID-19 and who has potentially been exposed to infection;
- 12) Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined in a non-punitive setting, with continued access to showers, recreation, mental health services, reading materials, phone and video calls with loved ones, communications with counsel, and personal property;
- 13) Respond to all emergency (as defined by the medical community) requests for medical attention within an hour;
- 14) Waive all medical co-pays for those experiencing COVID-19-related symptoms; and
- 15) Cease and desist retaliatory disciplinary action in response to (a) incarcerated persons' requests for medical attention and basic, necessary protections, and/or (b) efforts by incarcerated persons to publicize unsafe and life-threatening conditions inside the Jail.

Plaintiffs further request that this Court appoint an independent monitor to

ensure compliance with any injunctive order that this Court may enter relating to the conditions of confinement at the Wayne County Jail during the pendency of the COVID-19 pandemic.

In addition, Plaintiffs ask this Court for the immediate entry of an order requiring the Jail to reduce its detainee population to a level where detainees and Jail staff can meaningfully practice social distancing and maintain daily living practices that reasonably mitigate the risk of infection and spread of COVID-19. This includes immediately discontinuing the use of Division II to house detainees. Dr. Fred Rottnek, the medical expert appointed by this Court to conduct an inspection of all three Jail divisions on May 16, 2020, concluded that social distancing is impossible in Division II and that the physical conditions of the facility—which include pervasive disrepair, irregular surfaces, rust, paint peeling and chipping, mildew, and mold—make it impossible to adequately clean. The inability to socially distance in and adequately clean Division II makes it impossible to mitigate the spread of COVID-19 at the facility. Thus, the federal and state constitutions cannot and do not permit the continued incarceration of detainees in Division II during the pandemic.

Lastly, Plaintiffs request that this Court set an evidentiary hearing to examine allegations in Plaintiffs' Emergency Motion for a Temporary Restraining Order and Preliminary Injunction.

Dated: May 28, 2020

Respectfully submitted,

/s/Deborah Choly

DEBORAH ANN CHOLY (P34766)
Michigan Legal Services
2727 Second Ave., Suite 333, Box 37
Detroit, MI 48201
(313) 573-0073

/s/ William Goodman

WILLIAM H. GOODMAN (P14173)
Goodman, Hurwitz, & James, PC
1394 E. Jefferson Ave.
Detroit, MI 48207
(313) 517-6170

/s/Desiree M. Ferguson

Desiree M. Ferguson (P34904)
Erin Keith (P81298)
DETROIT JUSTICE CENTER
1420 Washington Blvd., Suite 301
Detroit, MI 48226
Tel: (313) 736 -5957
dferguson@detroitjustice.org
ekeith@detroitjustice.org

/s/Allison L. Kriger

Allison L. Kriger (P76364)
LARENE & KRIGER, P.L.C.
645 Griswold Street, Suite 1717
Detroit, Michigan 48226
Tel: (313) 967-0100
allison.kriger@gmail.com

/s/Miriam R. Nemeth

Miriam R. Nemeth (P76789)
ADVANCEMENT PROJECT
NATIONAL OFFICE
1220 L Street NW, Suite 850
Washington, DC 20005
Tel: (202) 728-9557
mnemeth@advancementproject.org

Attorneys for Plaintiffs

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WAYNE COUNTY JAIL INMATES, et. al.,

Case No. 71 173 217 CZ

Hon. Timothy M. Kenny

Plaintiffs,

v

WILLIAM LUCAS, et. al.,
Defendants.

DEBORAH ANN CHOLY (P34766)
Michigan Legal Services
Attorney for Plaintiffs
2727 Second Ave., Suite 333, Box 37
Detroit, MI 48201
(313) 573-0073

JAMES HEATH (P65419)
Wayne County Corporation Counsel
Attorney for Wayne County/CEO
500 Griswold Street, 30th Floor
Detroit, MI 48226
(313) 224-0055

WILLIAM H. GOODMAN (P14173)
Goodman, Hurwitz, & James, PC
Attorney for Plaintiffs
1394 E. Jefferson Ave.
Detroit, MI 48207
(313) 517-6170

FELICIA O. JOHNSON (P66430)
Commission Counsel
Attorney for Wayne County
500 Griswold Street, Suite 810
Detroit, MI 48226
(313) 224-6459

DAVID MELTON (P63891)
Legal Advisor Wayne County Sheriff
4747 Woodward Ave.
Detroit, MI 48201
(313) 224-6888

**BRIEF IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND AND FACTS	3
I. The COVID-19 Crisis is a Health Crisis Unmatched in Living Memory.....	3
II. A COVID-19 Jail Outbreak is an Extreme Threat to Public Health.....	6
III. Defendants Are Not Taking Necessary Steps to Prevent A Widespread Outbreak in the Jail.	7
A. The Three Divisions of the Jail House Numerous People Who Are Currently at Risk of Contracting COVID-19.....	7
B. Defendants maintain dangerous conditions at the Jail by failing to practice critical social distancing and confining detainees in facilities where social distancing is impossible.	8
C. Defendants do not properly sanitize the Jail and do not provide detainees with adequate or effective cleaning supplies.	11
D. Defendants do not provide basic personal hygiene supplies to detainees.....	14
E. Jail staff do not consistently wear protective gear, putting detainees further at risk.....	15
F. Defendants are failing to properly treat and quarantine detainees who test positive.....	16
G. Defendants are failing to provide adequate and timely medical care.....	18
1. Defendants’ medical procedures are inadequate.....	18
2. Defendants punish detainees who raise concerns about the lack of medical care or unsanitary conditions of confinement.	20

H.	Defendants’ testing procedures are insufficient.	22
I.	Defendants fail to provide information about COVID-19 and its spread, instead misleading detainees to believe they are <i>safer</i> within the Jail.	23
J.	Defendants do not properly screen individuals entering the Jail, exacerbating the potential for viruses to infiltrate the Jail.....	24
K.	Dr. Rottnek’s inspection report confirms the allegations in the <i>Russell</i> Complaint and shows that Defendants continue to disregard the risk that Plaintiffs will contract COVID-19 at the Jail.	26
ARGUMENT		29
I.	Plaintiffs are likely to succeed on the merits because Defendants are violating Plaintiffs’ rights under the Eighth and Fourteenth Amendments.	31
A.	Plaintiffs are objectively at a substantial risk of harm.....	33
B.	Defendants have acted and are continuing to act with subjective indifference towards Plaintiffs’ substantial risk of harm.....	37
II.	Plaintiffs will suffer irreparable harm.	43
III.	The public interest and balance of equities weigh heavily in Plaintiffs’ favor.	46
CONCLUSION		48
CERTIFICATE OF SERVICE		2

TABLE OF AUTHORITIES

Cases

<i>ACLU of Ky. v. McCreary Cty., Ky.</i> , 354 F.3d 438, 445 (6th Cir. 2003)	45
<i>Bell v. Wolfish</i> , 441 U.S. 520, 535 (1979)	34
<i>Brown v. Bargery</i> , 207 F.3d 863, 867 (6th Cir. 2000).....	32
<i>Brown v. Plata</i> , 563 U.S. 493, 531-32 (2011)	34
<i>Cameron v. Bouchard</i> , No. 20-cv-10949, 2020 WL 2569868 (E.D. Mich. May 21, 2020)	46
<i>Carlton v. Dep't of Corrections</i> , 215 Mich. App. 490, 505, 546 N.W.2d 671 (Mich. 1996)	33
<i>Castillo v. Barr</i> , __ F. Supp. 3d __, CV 20-00605 TJH (AFMx), 2020 WL 1502864, at *5 (C.D. Cal. Mar. 27, 2020).....	46
<i>City of Dearborn v. Comcast of Mich.</i> , 558 F. Supp. 2d 750, 754 (E.D. Mich. 2008)	30
<i>City of Revere v. Mass. Gen. Hosp.</i> , 463 U.S. 239, 244 (1983)	32, 34
<i>DeShaney v. Winnebago Cty. Dep't of Soc. Servs.</i> , 489 U.S. 189, 200 (1989).....	33
<i>Detroit Fire Fighters Ass'n, IAFF Local 344 v. Detroit</i> , 482 Mich. 18, 34, 753 N.W.2d 579 (Mich. 2008)	30
<i>Dodds v. U.S. Dep't of Educ.</i> , 845 F.3d 217, 222 (6th Cir. 2016).....	47
<i>Estelle v. Gamble</i> , 429 U.S. 97, 104 (1976)	32, 33
<i>Farmer v. Brennan</i> , 511 U.S. 825, 834 (1994).....	32, 35, 43
<i>Flanory v. Bonn</i> , 604 F.3d 249, 255-56 (6th Cir. 2010).....	35
<i>G & V Lounge, Inc. v. Mich. Liquor Control Comm'n</i> , 23 F.3d 1071, 1079 (6th Cir. 1994)	47
<i>Garner v. Michigan State University</i> , 462 N.W.2d 832, 838 (Mich. App. 1990)...	45
<i>Helling v. McKinney</i> , 509 U.S. 25, 33 (1993)	35, 36, 38, 45
<i>Hope v. Pelzer</i> , 536 U.S. 730, 738 (2002)	38
<i>Hopper v. Phil Plummer</i> , 887 F.3d 744, 752 (6th Cir. 2018), <i>reh'g denied</i> (May 1, 2018).....	32
<i>In re DeLorean Motor Co.</i> , 755 F.2d 1223, 1229 (6th Cir. 1985).....	30
<i>Johnson v. Operation Get Down, Inc.</i> , No. 11-15487, 2014 WL 3752481, at *5 (E.D. Mich. 2014).....	35
<i>Jolly v. Coughlin</i> , 76 F.3d 468, 477 (2d Cir. 1996)	35
<i>Kingsley v. Hendrickson</i> , 576 U.S. 389, 135 S. Ct. 2466, 2472–2473 (2015) .	32, 34
<i>Lee v. Birkett</i> , No. 09–cv–10723, 2010 WL 1131485, at *5 (E.D. Mich. Feb. 18, 2010)	35
<i>People v. Bullock</i> , 485 N.W.2d 866, 872, 440 Mich. 15, 30 (Mich. 1992).....	33
<i>Richko v. Wayne Cty., Mich.</i> , 819 F.3d 907, 915 (6th Cir. 2016).....	32, 34

<i>Richmond v. Huq</i> , 885 F.3d 928, 937 (6th Cir. 2018)	38
<i>Thakker v. Doll</i> , __ F. Supp. 3d __, 2020 WL 1671563 at *8 (M.D. Pa. Mar. 31, 2020)	40
<i>United States v. Garlock</i> , No. 18-Cr-00418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020)	46
<i>United States v. Stephens</i> , __ F. Supp. 3d __, No. 15-CR-95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020)	7
<i>Wilson v. Gordon</i> , 822 F.3d 934, 958 (6th Cir. 2016)	45
<i>Wilson v. Seiter</i> , 501 U.S. 294, 300 (1991)	34, 38
<i>Youngberg v. Romeo</i> , 457 U.S. 307, 324 (1982)	34
<i>Zhang v. Barr</i> , No. ED CV 20-00331-AB, 2020 WL 1502607, at *6 (C.D. Cal. Mar. 27, 2020)	46

INTRODUCTION

An outbreak of the novel coronavirus is occurring in the Wayne County Jail (“Jail”), where Defendants confine approximately 700 human beings in life-threatening conditions. Recently released COVID-19 test results show that Defendants have failed to contain the spread of the virus in the Jail, and detainees, especially the medically vulnerable, remain in grave danger. As of May 11, 2020, 171 of the 689 (25%) detainees tested had either an active COVID-19 infection or COVID-19 antibodies in their blood, meaning that they were previously infected with the virus. These 171 infections are in addition to the 206 Wayne County Sheriff’s Office employees who have already tested positive for COVID-19 and four members of the Jail staff who have already died as a result of being infected with the virus.²

Despite the staggering rate of infections, Defendants continue to confine detainees in conditions that fail to mitigate the spread of the virus. Plaintiffs are detained in cells with open steel grids or bars that allow aerosolized and large droplets containing COVID-19 to freely spread between cells; are sometimes double-bunked, sleeping on top of each other; have limited or no access to hygiene

² See Amber Ainsworth, *206 Wayne County Sheriff’s Office employees, 29 jail inmates test positive for COVID-19*, WDIV ClickOnDetroit (May 8, 2020), <https://www.clickondetroit.com/news/local/2020/05/09/206-wayne-county-sheriffs-office-employees-29-jail-inmates-test-positive-for-covid-19/>.

products and cleaning supplies; are not properly quarantined when sick; and do not have access to medical care or equipment (including facemasks) anywhere near sufficient in quality or volume to respond to the COVID-19 outbreak that is occurring.

Most importantly, Defendants continue to confine detainees in areas of the jail where social distancing—the single most important precaution anyone can take to prevent spreading or contracting COVID-19—is impossible. The most troubling of which is Defendants continued use of Division II to confine detainees during the pandemic. Dr. Rottnek found that it is impossible to practice medically required social distancing in Division II. He also found that it is impossible to adequately clean Division II because of its decrepit physical condition. There is thus no way to reasonably mitigate the spread of COVID-19 in Division II, and its continued use during the pandemic will lead to increased COVID-19 infections among detainees and staff. *See* Ex. 1 (Report of the Inspection of the Wayne County Jail on May 16, 2020 by Fred Rottnek, MD, MAHCM (“Rottnek Report”)) at 1, 4, 8-9, 12; Ex. 6 (Declaration of Dr. Adam Luring (“Luring Decl.”)) ¶¶10, 30-39, 45. Because many people confined at the jail are medically vulnerable, the continued spread of the virus puts their health and lives in grave danger.

As COVID-19 spreads inside and outside the Jail, time is running out to save Plaintiffs’ lives and to prevent the Jail from becoming an epicenter of community

infection. Plaintiffs seek two forms of immediate relief. First, Plaintiffs seek class-wide relief requiring Defendants to take critical steps inside the Jail to safeguard people who, due to the nature of their confinement, are at serious risk of infection, illness, or death from COVID-19. Second, Plaintiffs seek an order requiring the Jail to reduce its detainee population to a level where detainees and Jail staff can adequately practice social distancing and maintain daily living practices that reasonably mitigate the risk of infection and spread of COVID-19.

This extraordinary moment requires the Court’s immediate intervention. The “horizon of risk for COVID-19 in this facility is a matter of days, not weeks.” Lauring Decl. ¶ 45. More persons incarcerated in Michigan prisons have died from COVID-19 than in any other state except Ohio.³ And immediate relief is in the public interest, as a further outbreak within the Jail could drain the Detroit metropolitan area of limited healthcare resources, including ventilators. For these reasons, and for the reasons explained further below, this Court should grant Plaintiffs’ motion for temporary restraining order.

BACKGROUND AND FACTS

I. The COVID-19 Crisis is a Health Crisis Unmatched in Living Memory.

We are in the midst of an unprecedented public health emergency. *See* Ex. 2,

³ *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project, (May 20, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

Compl. ¶ 29. The number of people infected by COVID-19 has grown exponentially in this country since the first case was identified in January. *Id.* ¶ 32. By March 11, 2020, the World Health Organization defined the outbreak as a global pandemic. *Id.* ¶ 29. As of May 27, over 1,678,000 people have been diagnosed with COVID-19 in the United States, with over 99,000 deaths confirmed.⁴ Without effective public health interventions, the Centers for Disease Control and Prevention (“CDC”) project that as many as 2.2 million Americans will die. *Id.* ¶ 32. This number is sure to rise if conditions in this country’s jails and prisons are not rapidly addressed.⁵

COVID-19 is a highly contagious virus that can severely damage lung tissue, impede cardiac functions (causing heart failure), and permanently harm other organs. *Id.* ¶ 33. Experiencing a severe case of COVID-19 has been compared to “drowning in [one’s] own blood.” *Id.* ¶ 34. Approximately 20% of people infected experience life-threatening complications; between 1% and 3.4% die. *Id.* ¶ 36. The fatality rate is about ten times higher than a severe seasonal influenza, even in countries with

⁴ See Centers for Disease Control & Prevention, *Coronavirus 2019: Cases in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited May 27, 2020).

⁵ See Lisa Freeland, David Patton, & Jon Sands, *We’ll see many more covid-19 deaths in prisons if Barr and Congress don’t act now*, Wash. Post (Apr. 6, 2020), <https://www.washingtonpost.com/opinions/2020/04/06/covid-19s-threat-prisons-argues-releasing-at-risk-offenders/>; Udi Ofer & Lucia Tian, *New Model Shows Reducing Jail Population will Lower COVID-19 Death Toll for All of Us*, ACLU (Apr. 22, 2020), <https://www.aclu.org/news/smart-justice/new-model-shows-reducing-jail-population-will-lower-covid-19-death-toll-for-all-of-us/>.

highly effective health care systems. *Id.* Complications manifest at an alarming pace, and the required levels of medical support—which include highly specialized equipment like ventilators, as well as an entire team of health care providers—have been rapidly overwhelming hospitals nationally and globally. *Id.* ¶ 35.

Although everyone is at risk of contracting COVID-19, some populations are at higher risk for severe health outcomes. Certain underlying medical conditions—including lung disease, asthma, chronic obstructive pulmonary disease, chronic liver or kidney disease, diabetes, epilepsy, hypertension, hepatitis C, compromised immune systems, blood disorders, inherited metabolic disorders, and a history of strokes—increase the risk for individuals of any age. *Id.* ¶ 33. People over the age of fifty and pregnant people also face greater chances of serious illness or death. *Id.* The only known effective measure to mitigate these more extreme risks is to prevent infection in the first instance. *Id.* ¶ 37.

Accordingly, public health experts and officials urge “social distancing”—isolating oneself from other people at a minimum distance of six feet—as well as frequent hand-washing, use of hand sanitizer, and frequent cleaning and disinfecting of high touch surfaces and objects. *Id.* These measures are particularly important in jail, a congregate setting that can rapidly become a “public health disaster unfolding before our eyes.”⁶

⁶ Jan Ransom & Alan Feuer, *We’re Left for Dead: Fears of Virus Catastrophe at Rikers Jail*, N.Y.

II. A COVID-19 Jail Outbreak is an Extreme Threat to Public Health.

Incarcerated persons are at heightened risk of infection and death from COVID-19. Compl. ¶ 43 (citing the CDC’s guidance for detention facilities). According to public health experts, “the risk posed by COVID-19 in jails and prisons is significantly higher than in the community . . . in terms of risk of transmission, exposure, and harm to individuals who become infected.” *Id.* ¶ 40; *see also* Ex. 4 (Declaration of Dr. Jaimie Meyer (“Meyer Decl.”)) ¶ 7; Luring Decl. ¶ 41. This is due to a number of factors, including forced proximity of detained individuals, their inability to protect themselves through social distancing, lack of medical and hygiene supplies, heavy reliance on outside hospitals for serious medical care, forced labor of incarcerated people in cleaning the facilities with insufficient supplies, constant cycling of people through the jails, and inadequate medical care within the jail itself. Compl. ¶ 41.

The growing devastation in jails around the country (and in Michigan) is a harbinger for what awaits Wayne County. In New York City, less than a month after the detection of the first case at Rikers Island, more than 700 people—including more than 400 jail staff—had tested positive, and two jail officers had died. *Id.* ¶ 47. As of May 20, 2020, Michigan prisons have reported at least 3,262 cases of

Times, Mar. 30, 2020, <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html>.

coronavirus among detainees and 59 deaths, rates that are more than 1500% and 200% higher, respectively, than Michigan’s overall infection and death rates.⁷

An outbreak cannot be contained inside the Jail. What happens to the people trapped inside this “ticking time bomb”⁸ affects others who cycle through the Jail, including Jail and medical staff. Compl. ¶ 38; Ex. 3 (Declaration of Dr. Marc Stern (“Stern Decl.”)) ¶11. The outbreak then spreads to staff’s families and the community. Stern Decl. ¶ 11. Jail outbreaks can quickly overwhelm regional hospitals, making resources unavailable to treat others suffering from COVID-19 or unrelated life-threatening conditions like heart attacks. Compl. ¶ 51; Stern Decl. ¶ 11. As courts have noted, “[t]he more people we crowd into [a] facility, the more we’re increasing the risk to the community.” *United States v. Stephens*, __ F. Supp. 3d __, No. 15-CR-95, 2020 WL 1295155, at *2 (S.D.N.Y. Mar. 19, 2020) (internal citation omitted).

III. Defendants Are Not Taking Necessary Steps to Prevent A Widespread Outbreak in the Jail.

A. The Three Divisions of the Jail House Numerous People Who Are Currently at Risk of Contracting COVID-19.

Many of the persons detained in Division I (the “New Jail”) and Division II

⁷ *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project, (May 20, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

⁸ St. Louis Univ., “*Ticking Time Bomb*,” *Prisons Unprepared For Flu Pandemic*, ScienceDaily (2006), <https://www.sciencedaily.com/releases/2006/09/060915012301.htm>.

(the “Old Jail”) are detained pretrial and regularly travel back and forth between Division I and Division II. Many of the detainees confined in Division III (the “Dickerson Facility”) have been sentenced by the trial court, and some leave the Jail on work release and return each day and night. Ex. 7 (“C. White Decl.”) ¶ 11. The laundry services for all three Divisions and the juvenile detention center occur in Division III.

Aggressive measures are required to stop the spread of germs between and within Divisions, as an outbreak of COVID-19 in one part of one Division would all but guarantee a spread of the virus to other detainees and staff. This risk is not hypothetical given the number of Jail staff and detainees who have already contracted COVID-19 and those Jail employees that have already died. Defendants are thus well aware of COVID-19 and its grave risks, but they have failed to undertake the necessary measures to protect detainees from contracting the virus, instead directly placing detainees in harm’s way.

B. Defendants maintain dangerous conditions at the Jail by failing to practice critical social distancing and confining detainees in facilities where social distancing is impossible.

Social distancing is the single most important precaution anyone can take to prevent the spread of COVID-19. Compl. ¶ 8. Governors, mayors, and local city and county officials—including Defendant Sheriff Benny Napoleon, *see infra* note 21—have all urged the public to practice social distancing. *Id.* Gatherings where it

is impossible to maintain social distancing have been cancelled across the country and the world, and in several states, including Michigan, police are arresting or ticketing people who fail to maintain six feet of separation between themselves and others. *Id.* Yet, Defendants continue to confine detainees in areas of the Jail where socially distancing is impossible.

In Divisions I and II, social distancing at the current jail population level simply cannot be done. In both Divisions, the jail cells have front-facing walls of bars or open steel grids, which allow large aerosolized droplets containing COVID-19 to spread freely between cells. Rottnek Report at 3, 4, 8. The layout of Division II makes it impossible to maintain at least 6 feet of distance from another person while in the common area or walking in the secured area or hallway. *Id.* at 8-9. Thus, Jail staff cannot practice social distancing in Division II when conducting routine activities such as making rounds. *Id.* Therefore, Jail staff that are infected with the virus may be transmitting it to detainees when making rounds. *Id.* Additionally, the physical conditions of Division II render the facility completely unsafe for detainees during the pandemic: the “pervasive disrepair, irregular surfaces, rust, paint peeling and chipping, mildew, and mold” make it impossible to adequately clean. *Id.* at 12. Because the virus can survive on inanimate objects and surfaces, the inability to properly and adequately clean high touch objects and surfaces seriously increases the risk of the spread of COVID-19. Loring Decl. ¶¶

21, 30.

Detainees with serious underlying medical conditions and other concurrent illnesses, like pneumonia, are confined in general population units where social distancing is impossible. Ex. 8 (“Mathews Decl.”) ¶ 3; Ex. 9 (“Russell Decl.”) ¶ 8. Charles Russell, who has stage three prostate cancer⁹ and diabetes, lived in a general population unit with 25 other detainees; they were all forced to share three working showers and four working toilets. Russell Decl. ¶ 8-9.¹⁰

Dr. Rottnek found that, as of May 16, 2020, Defendants continue to double-bunk detainees, in beds that are only a few feet apart from each other. Rottnek Report at 8, 11-12; *see also* Ex. 10 (“Nickel Decl.”) ¶ 5. This practice does not allow for the requisite social distancing to occur. Even more troubling, Dr. Rottnek found that, in the medical unit, four detainees were on stretchers in one room, positioned head to foot. *Id.* at 8. The detainees had co-occurring health problems and were using breathing machines, and thus very likely to be at higher risk of severe illness if infected by COVID-19. *Id.*

Even where social distancing is possible, Jail staff are failing to practice social distancing. Dr. Rottnek observed Jail staff in a medical clinic “sitting side by side,

⁹ Cancer patients have shown a higher risk of death or severe complications from COVID-19 compared with those without cancer. *See* Laurie McGinley, *Patients with certain kinds of cancers are nearly three times as likely to die of covid-19, study says*, Wash. Post (Apr. 28, 2020), <https://www.washingtonpost.com/health/2020/04/28/coronavirus-cancer-deathrates/>.

¹⁰ Mr. Russell was released after the filing of the *Russell* complaint.

two feet apart, without wearing masks.” *Id.* at 14. Further, the signage at the Jail is old and inaccurate, and thus detainees are not informed about the need to social distance. Specifically, the signage in Divisions I and II does not mention COVID-19 or define social or physical distancing. *Id.* at 14, 17.¹¹

C. Defendants do not properly sanitize the Jail and do not provide detainees with adequate or effective cleaning supplies.

Defendants are not taking basic measures to maintain safe, hygienic conditions at the Jail and are instead creating and perpetuating a dangerous, unsanitary environment that is putting detainees at risk. Some of the cell walls in Division I are covered with urine, feces, and vomit. *See* Ex. 11 (“Kelly Decl.”) ¶ 15. Dr. Rottnek found, and Jail staff reported, cleaning of the kitchen area to be insufficient and allow for the transmission of the virus: one kitchen “had many wet surfaces” and staff reported that “we can’t clean like we’re supposed to” because two trustees are now handling the cleaning responsibilities that were previously shared by 25 to 28 trustees. *Id.* at 14. Common surfaces that are touched frequently

¹¹ At the time the *Russell* Complaint was filed, detainees were at times confined in 8 feet by 15 feet cells that were shared with up to four other people, making social distancing impossible. *See* Compl. Ex. 4 (“Mathews Decl.”) ¶ 6; C. White Decl. ¶ 3; Compl. Ex. 5 (“Nickel Decl.”) ¶ 5. Detainees were only allowed to eat in common areas, and deputies often forced detainees to sit together at tables that are less than six feet apart, with four to five men per table. C. White Decl. ¶¶ 3, 5. At mealtimes, detainees were no more than a few feet from one another. Compl. Ex. 8 (“Carline Decl.”) ¶ 7; Mathews Decl. ¶ 8; Ex. 9 (“Smelley Decl.”) ¶ 7; C. White Decl. ¶¶ 3, 5; Nickel Decl. ¶ 6; Compl. Ex. 10 (“Blanks Decl.”) ¶ 7; Compl. Ex. 11 (“Pearson Decl.”) ¶ 6. After the *Russell* Complaint was filed, [REDACTED]

are not cleaned regularly; even when they are cleaned, proper disinfectant is often not used. Ex. 12 (“Smelley Decl.”) ¶ 8-10. Showers are cleaned only on a weekly basis, if at all. *Id.* ¶ 10. Phones and tablets, shared by all detainees on a given unit to communicate with loved ones or attorneys, are cleaned once a day, at most. *Id.* ¶ 10; C. White Decl. ¶ 6; Kelly Decl. ¶ 31. On some units, detainees attempt to clean the phones and tablets themselves using generic cleaning liquids, but detainees on other units have no way of doing so. Russell Decl. ¶ 10; Ex. 13 Carline Decl. ¶ 10. In other instances, detainees attempt to protect themselves by using a sock or a t-shirt to cover the phone during use. Ex. 14 (“McKay Decl.”) ¶ 4. Towels, clothes, and bedding are not laundered frequently, either; detainees sometimes wait weeks to receive clean uniforms or blankets. Carline Decl. ¶ 12. Upon completion of laundering, detainees are not returned the same uniforms or bedding materials. Underclothes are infrequently laundered, if at all, by the jail laundry system. McKay Decl. ¶ 10. Detainees are forced to wash their underclothes in the sinks inside their cells when one is available. They are relegated to using the same sinks to obtain drinking water. *Id.* ¶ 11.

The bathrooms and showers the detainees share are unsanitary or often not even functioning. Some sink water is tainted with fecal matter because the sink water is connected to the toilet water. Ex. 15 (“Blanks Decl.”) ¶ 4, Nickel Decl. ¶ 10. Some sink basins have mold, others are crawling with maggots and bugs, and

others do not function at all. Blanks Decl. ¶ 5; Nickel Decl. ¶ 10. Some showers are unusable, requiring detainees to take “bird baths” instead. Carline Decl. ¶ 6; Russell Decl. ¶ 9. The showers that do work are “filthy.” Nickel Decl. ¶ 10. Detainees must share showers, which are not large enough for detainees to have at least six feet of space between each other. *Id.* ¶ 11. Plaintiffs are prevented from adequately cleaning any of these surfaces and spaces more frequently themselves because the Jail controls access to basic cleaning supplies, like mops and buckets, and provides them to detainees, at most, only once every morning. Carline Decl. ¶ 9; Kelly Decl. ¶ 30; Blanks Decl. ¶ 11. Detainees also do not have any bleach to clean these shared surfaces, even though the Jail staff has such chemicals available for this purpose. Russell Decl. ¶ 14. Deputies keep bleach in a secluded area that only deputies can access. *Id.* Deputies use Lysol, PineSol, and other name-brand cleaning supplies to clean their own areas, but the detainees are forced to use a different cleaner, called “Simple Green,” which does not protect against coronavirus. Rottnek Report at 4; Ex. 16 (“Hubbard Decl.”) ¶ 6, 8; Ex. 17 (“Pearson Decl.”) ¶ 15, 18, 19. Indeed, Simple Green’s own website states: “Simple Green All-Purpose Cleaner is not a disinfectant and will not kill bacteria or viruses.”¹²

¹² See Simple Green, *Coronavirus Frequently Asked Questions* (Mar. 11, 2020), <https://simplegreen.com/news-and-media/coronavirus-faq/>. The CDC has not identified Simple Green as one of the EPA-registered disinfectants effective against the virus in its Interim Guidance on Management of Coronavirus in Correctional and Detention Facilities. See Ex. 5 at 7, 9, 18.

D. Defendants do not provide basic personal hygiene supplies to detainees.

In addition to the deplorable conditions they maintain inside the Jail, Defendants do not provide detainees with enough of the basic hygiene supplies that are critical to preventing the spread of COVID-19. Although the CDC advises that handwashing is one of the best ways to protect against COVID-19,¹³ the Jail does not supply enough soap for detainees to regularly wash their hands. With the exception of Division I, Defendants provide detainees with only two or three hotel-sized bars of soap per week, which Plaintiffs must use to wash their clothes, hands, and bodies. Carline Decl. ¶ 11; Smelley Decl. ¶ 11; Rottnek Report at 17-18, 22. Defendants do not provide additional soap when a detainee runs out; the detainee's only option is to ask another detainee for soap or purchase it from commissary if they have funds in their account. Carline Decl. ¶ 11; Smelley Decl. ¶ 11. Defendants do not otherwise provide Plaintiffs with supplies for hand sanitization. Carline Decl. ¶ 11. Defendants' distribution of hygiene supplies "is *remarkably inadequate* for regular hand washing and showering, particularly during a pandemic in which people are encouraged to frequently wash hands." Rottnek Report at 7 (emphasis added).

¹³ See Centers for Disease Control & Prevention, "When and How to Wash Your Hands," <https://www.cdc.gov/handwashing/when-how-handwashing.html> (last visited Apr. 27, 2020).

E. Jail staff do not consistently wear protective gear, putting detainees further at risk.

Jail staff fail to consistently wear appropriate protective gear while inside the Jail—a stunning fact given that two deputies and two physicians working in the Jail have already died from COVID-19, and over 200 employees from the Wayne County Sheriff’s Office have already tested positive. C. White Decl. ¶ 9; Kelly Decl. ¶ 32; Carline Decl. ¶ 11; Pearson Decl. ¶ 13; Rottnek Report at 14. Commander Donafay Collins, an employee of the Sheriff’s Office and one of the staff fatalities, was present on units with detainees right before he died of COVID-19.¹⁴ Smelley Decl. ¶ 14. Even the deputies who have been diagnosed with COVID-19 still do not consistently wear masks or gloves. *Id.*

Compounding these egregious practices by the guards, Defendants have also denied detainees access to sufficient personal protective equipment. Though some detainees have been provided blue cloth masks, those masks are now weeks old. Mathews Decl. ¶ 11; C. White Decl. ¶ 9; Pearson Decl. ¶ 11; Ex. 18 (“Malec Decl.”) ¶ 7 (explaining that these masks are “like those you see at the dentist’s office.”). Other detainees were given paper masks that they were expected to wear for two weeks, even though the masks were so cheap that they tore once they were worn.

¹⁴ *Wayne County Sheriff’s Commander Donafay Collins dies of COVID-19*, WXYZ Detroit (Mar. 25, 2020), <https://www.wxyz.com/news/coronavirus/wayne-county-sheriffs-commander-donafay-collins-dies-of-covid-19>.

Ex. 19 (“H. White Decl.”) ¶ 4. Most of the detainees do not have gloves. Mathews Decl. ¶ 11; Hubbard Decl. ¶ 9.

Dr. Rottnek confirmed that the distribution of masks to detainees was “inadequate.” Rottnek Report at 7. He found that the masks that have been distributed are designed for *single use*—not sustained use. *Id.* Nevertheless, they are replaced only once every two weeks. *Id.* Thus, “[m]ost of the masks are fraying and/or visibly dirty,” *id.*, or they are “falling apart,” *id.* at 15. And detainees have even gone as far as “trying to wash these masks with soap—which would further damage their integrity.” *Id.* Dr. Rottnek also found that Defendants have failed to provide information about how to properly use the masks, *id.* at 16, which makes misuse more likely and increases the risk of transmission and infection.

F. Defendants are failing to properly treat and quarantine detainees who test positive.

Even though COVID-19 has already infiltrated the Jail, Defendants are not taking adequate measures to prevent the virus from spreading by quarantining and caring for detainees who may be or are positive for COVID-19. Instead, Jail staff place these detainees in a makeshift medical ward on another cell block without access to meaningful medical care.

Detainee Mark Malec was confined in the same unit as Michael Meshinski, a former detainee who exhibited symptoms of COVID-19 in the Jail and died of the

virus just two days after his release in early April.¹⁵ Mr. Malec became seriously sick shortly after Mr. Meshinski's release. Malec Decl. ¶ 9. He had a headache and a cold, was coughing up black phlegm, and was unable to taste anything for two weeks. *Id.* Despite his known proximity to Mr. Meshinski, serious symptoms, and numerous requests for medical attention, Mr. Malec was not tested for COVID-19 until April 20, 2020—almost three weeks after Mr. Meshinski's death. *Id.* ¶ 9. Mr. Malec tested positive for COVID-19, and he was placed into an 11-man makeshift infirmary after receiving his test results. *Id.* Mr. Malec explained that, in the unit:

[N]o one can come out of their cell, except for once a day. The Jail keeps bringing more sick people into the unit, so we keep getting exposed to the virus again, and I feel like I won't ever get healthy. We are not in any kind of pressurized rooms. The air just passes freely from one cell to the other. The deputies hand out meals, which we eat in our cells. Some of them wear gloves and masks and some of them don't. All of the detainees wear masks but not gloves, and we all share tablets, phones, and showers. They are cleaned with Simple Green after each use, but with disinfectant only once weekly.

Id. ¶ 9-10. Since being forced onto this “medical ward,” Mr. Malec has not seen a doctor, and the Jail has provided him only Tylenol, Gatorade, and cough syrup. Malec Decl. ¶ 11. Defendants' conduct in this instance not only unreasonably endangered Mr. Malec's health, but it also put other detainees in direct danger of

¹⁵ See Charlie Leduff, *Wayne County Jail Gave an Infected Inmate a Bus Pass Home. Now He's Dead*, Deadline Detroit (Apr. 7, 2020), https://www.deadlinedetroit.com/articles/24915/leduff_the_wayne_county_jail_gave_an_infected_inmate_a_bus_pass_home_now_he_s_dead.

exposure to the virus.

Davonte Velez began feeling ill on April 2, 2020. Ex. 20 (“Velez Decl.”) ¶ 3. For five days, he consistently asked for medical treatment, all while experiencing common symptoms of COVID-19, including coughing and shaking. *Id.* ¶ 4. After five days, the Jail staff finally took Mr. Velez’s temperature, which was 103 degrees Fahrenheit. *Id.* Mr. Velez, too, was taken to the Jail’s inadequate “infirmary.” Mr. Velez describes his horrifying experience while recovering from COVID-19:

Being locked in a room for 23 hours per day without being able to talk to anyone is causing me and some of the other guys to have psychological problems. For 23 hours a day, I think about how I’m stuck in here with all of these sick people and I’m not getting better. When I try to ask the Jail staff about what’s going on, they don’t give me any answers.

Id. ¶ 12. The Jail did not even inform Mr. Velez that he had tested positive for COVID-19 until two weeks later. *Id.* ¶ 10. Mr. Velez is still sick and has been sick for almost a month—since April 2, 2020, he has tested positive for the virus twice. *Id.* ¶¶ 10-11.

G. Defendants are failing to provide adequate and timely medical care.

1. Defendants’ medical procedures are inadequate.

In general, the process for obtaining medical attention—for COVID-19 symptoms or otherwise—is shockingly deficient. To request medical attention,

detainees are required to fill out medical “kites”¹⁶ but may do so only once in the morning or once at night. Carline Decl. ¶ 17. The Jail takes anywhere from weeks to months to respond to a detainee’s kite, and sometimes, Jail staff never respond at all, or dismiss detainees’ request for medical care. Carline Decl. ¶ 17; Smelley Decl. ¶ 3; C. White Decl. ¶ 12-13; Nickel Decl. ¶ 3; H. White Decl. ¶ 9; McKay Decl. ¶ 8.

Nurses distribute medication to detainees only twice a day, but they often bring detainees the wrong medication or fail to even bring any at all. Carline Decl. ¶ 18. Nurses use and re-use the same cups to hand out medication to multiple detainees without any regard for which detainees may be exhibiting symptoms of COVID-19. Carline Decl. ¶ 18. And nurses admonish detainees for seeking medical care, sometimes even withholding kites from detainees so they cannot put in the request. Pearson Decl. ¶ 14. Individuals showing symptoms of COVID-19 are frequently given little more than Tylenol and sent back to their units. Pearson Decl. ¶ 17; Malec Decl. ¶ 7.

The medical facilities are understaffed, which severely hinders the quality and availability of treatment given to detainees who test positive for COVID-19, in addition to those who have preexisting chronic and serious medical ailments. Rottnek Report at 5. Even the Jail and medical staff have recognized this deficiency.

¹⁶ A “kite” is a signed written request for medical attention that can be submitted once in the morning or once at night. Carline Decl. ¶ 17.

Id. One nurse stated that the Jail is “not really” adequately staffed to deal with COVID, chronic care, and sick calls. *Id.* And Detainees continue to report delayed and ignored requests for medical care. *Id.* at 10. In addition to increasing the risk that a detainee with COVID-19 will suffer serious illness due to a lack of prompt medical care, the staffing shortage also threatens detainee’s ability to get medical care for non-COVID-19 related ailments. Dr. Rottnek found that detainees were disincentivized to seek medical care for anything other than complaints related to COVID-19. *Id.* at 9, 11. Delaying or ignoring routine care for detainees with chronic illness or other ailments increases the likelihood of adverse health outcomes. *Id.* at 11.

2. Defendants punish detainees who raise concerns about the lack of medical care or unsanitary conditions of confinement.

Detainees who raise concerns about the lack of medical care or unsanitary conditions are punished. As a result, detainees are hesitant to inform Jail staff that they may be feeling sick for fear that they will be disciplined. Smelley Decl. ¶ 4; Mathews Decl. ¶ 3.

Plaintiff Christopher Hubbard is diabetic and asthmatic, and he has had pneumonia at least four times. Hubbard Decl. ¶ 2. He did not receive proper insulin or the right inhaler to treat his asthma, further exacerbating his already heightened risk for more serious complications from COVID-19—a risk that was even more

concerning because Mr. Hubbard had been confined with Mr. Meshinski, who died from COVID-19 after his release. *Id.* ¶ 3. But after raising his concerns regarding his medical needs to an officer, Jail staff placed Mr. Hubbard in “the hole”—a solitary confinement wing of the Jail packed with detainees, many of whom are showing signs of COVID-19—for seven days. *Id.* ¶ 10-12. “The hole” is musty and damp, like a basement, and crawling with mice and roaches. *Id.* ¶ 13. Mr. Hubbard could hear other detainees coughing and was forced to share an infrequently cleaned shower with these coughing detainees. *Id.* ¶ 12.

Like Mr. Hubbard, Mr. Velez has severe asthma and requires an albuterol inhaler. Velez Decl. ¶ 2. Even though Mr. Velez remains sick one month after first showing symptoms, and even though he has tested positive for COVID-19 *twice*, the Jail still refuses to provide him an inhaler. *Id.* Marlon Blanks also has severe asthma, and despite a prescription for an inhaler, the Jail has refused to provide him one either. Blanks Decl. ¶ 2. One deputy told Mr. Blanks to “fuck off” when he asked for an inhaler, while a nurse told him he didn’t know what he was talking about. *Id.*

Similarly, after CalDerone Pearson discovered that his cell was filled with bugs and unsuccessfully sought supplies to clean it, he asked to be moved to a different cell. Pearson Decl. ¶ 19. The sergeant on duty told him he was “disobeying an order” and moved him to solitary confinement, where Mr. Pearson was locked in

his cell for 23 hours a day, unable to access commissary or the phone, and denied hot water for a shower. *Id.* ¶ 20.

H. Defendants' testing procedures are insufficient.

Although widespread testing of both symptomatic and asymptomatic individuals is widely accepted as *essential* in combatting the spread of COVID-19,¹⁷ Defendants did not begin to conduct such testing until after the *Russell* lawsuit was filed. Defendants tested all detainees at the Jail between May 8-11, 2020. This one-time, Jail-wide testing is insufficient because the possibility of infection still remains high: COVID-19 continues to spread throughout the Jail, and detainees and staff routinely enter and leave the Jail and are not tested upon entrance, which allows for the virus to repeatedly be brought into the Jail. Rottnek Report at 9, 11.

Prior to the one-time, Jail-wide testing, Defendants routinely failed to identify and test detainees that were obviously symptomatic or who have been in close proximity to those who are. For example, it took Defendants weeks to test Mr. Malec, who had shared a unit with Mr. Meshinski, the former detainee who is now deceased. Courtney White is a trustee who worked closely alongside Mr. Meshinski in the laundry room. C. White Decl. ¶ 10; Compl. ¶ 93. When Mr. White and Mr. Meshinski worked together, none of the detainees had masks, and even though Mr.

¹⁷ Umair Irfan, *The case for ending the Covid-19 pandemic with mass testing*, Vox (Apr. 13, 2020), <https://www.vox.com/2020/4/13/21215133/coronavirus-testing-covid-19-tests-screening>.

Meshinski exhibited visible symptoms of COVID-19, Jail staff kept him in the laundry room without personal protective equipment. C. White Decl. ¶ 10. Mr. White was not tested for COVID-19 even after Mr. Meshinski’s highly reported death—an obvious, proactive measure Defendants clearly should have taken. *Id.*

Jail staff are also not tested regularly. Rottnek Report at 9. Jail staff reported to Dr. Rottnek that they have only been tested for COVID-19 once during the pandemic. *Id.* Failure to regularly test Jail staff who enter and exit the jail multiple times daily, and who already have a high infection rate among their population, compounds the risk of infection and spread of the virus in the Jail.

I. Defendants fail to provide information about COVID-19 and its spread, instead misleading detainees to believe they are *safer* within the Jail.

Although Defendants are clearly aware of the COVID-19 crisis, they have done little to educate the detainees in their care about the pandemic; detainees are instead forced to rely on the news or information from loved ones—when they can access it—for details about the virus and how to best protect themselves. Mathews Decl. ¶ 10; Smelley Decl. ¶ 13; Nickel Decl. ¶ 4; Pearson Decl. ¶ 16; Rottnek Report at 14, 17 (finding that signage at Jail is “old,” “inaccurate,” and makes “no mention of COVID-19”). Some Jail staff have unplugged the television to restrict detainees’ access to news about COVID-19. H. White Decl. ¶ 12. Defendants have not even explained to detainees’ basic preventative measures such as proper hand washing.

C. White Decl. ¶ 14. Female detainees who express concerns over COVID-19 are dismissed by Jail staff as “being dramatic.” Nickel Decl. ¶ 2. Other detainees report that the deputies treat them as “less than human” and dismiss their coronavirus-related concerns. Blanks Decl. ¶ 16.

Defendants have also engaged in active misinformation. On at least one occasion in Division I, Jail staff turned up the heat and told detainees that the heat would kill the virus.¹⁸ Nickel Decl. ¶ 4. Other Jail staff have improperly suggested that the Jail is the “best place possible” to be during the pandemic.¹⁹ Nickel Decl. ¶ 4; C. White Decl. ¶ 14. Mr. Carline explains:

The Jail isn’t telling us anything about COVID. When I ask about COVID, they dismiss what we have to say. When detainees are scared or in fear of getting sick or dying, the deputies tell us we are in the best place possible. One deputy told us that he had been exposed to people with the virus but hadn’t caught it.

Carline Decl. ¶ 15.

J. Defendants do not properly screen individuals entering the Jail, exacerbating the potential for viruses to infiltrate the Jail.

¹⁸ Turning up the heat in the Jail will not kill the virus, at least not before it seriously harms the detainees and staff inside the Jail. A research team had to heat the virus up to 197 degrees Fahrenheit for 15 minutes to kill it. See Hannah Osborne, *Coronavirus can Survive High Temperatures for Long Periods, Study Finds*, Newsweek (Apr. 15, 2020), <https://www.newsweek.com/coronavirus-heat-kill-virus-1498074>.

¹⁹ Dr. Homer Venters, former chief medical officer of the New York City jail system, cautions that persons held in jails are at a higher risk in the jail and are likely to face serious, even grave, harm due to the outbreak of COVID-19. See Dr. Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. Times, Mar. 16, 2020, <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>.

Finally, Defendants do not effectively screen detainees entering the Jail or transferring between the various Divisions—a common-sense, proactive measure that would prevent the spread of COVID-19 from outside the Jail or from one Division to another. *See, e.g.*, Smelley Decl. ¶ 15; C. White Decl. ¶ 11.

For example, Dominick Kelly was transferred back into the Jail on March 31, 2020 from a program at the Detroit Reentry Center where individuals were sick. Kelly Decl. ¶ 1. Upon reentering the Jail, Mr. Kelly was placed in “quarantine,” which consisted of ten five-by-five cages lined up in a row in Division I, separated only by bars, not walls. *Id.* ¶ 3. Because of how easily air and objects passed between the cells in this area, it is impossible to suggest that individuals detained here were quarantined from other individuals. *See* Rottnek Report at 3-4.

Before placing him in this communal area, Jail staff never questioned Mr. Kelly about how he was feeling, never gave him gloves or a mask, and did not wear appropriate protective gear themselves. *Id.* ¶ 5-7. Mr. Kelly was forced to share a shower with five other detainees who were also in “quarantine,” but he never saw the shower being cleaned. *Id.* ¶ 10. The Jail staff gave him one hotel-sized bar of soap and refused his requests for more soap. *Id.* ¶ 11. After three days, Mr. Kelly was transferred to the mental health ward for a second phase of this “quarantine,” where he had a cellmate and shared a shower with thirty other detainees. *Id.* ¶ 17-18. He was transferred again to a different floor in Division I, then to Division II. *Id.* ¶

24, 28. At no point was Mr. Kelly ever tested for COVID-19.

Similarly, Mr. McKay was in Division I for approximately seven days before being transferred to Division II. McKay Decl. ¶ 2. In Division I, Mr. McKay was detained in an open setting with eleven other people. *Id.* ¶ 2. After being in this area for about 4 days, he began to feel ill. *Id.* ¶ 4. He was transferred to Division II three days later. *Id.* ¶ 6. Although he experienced “shortness of breath and a very serious mucus build-up,” he was not tested for COVID-19. *Id.* ¶ 8. For at least two weeks he suffered serious coughing, continued mucus build-up, and loss of taste and smell. *Id.* ¶ 8. After initially experiencing difficulty accessing a medical kit from nursing staff, *id.* at 7, he was eventually given one, which he completed and submitted. But he was never treated for his ailments.

After the COVID-19 epidemic began, Plaintiff Shane Carline required unrelated medical attention in a local hospital. Carline Decl. ¶ 14. When Mr. Carline was transferred back into the Jail, he was sent to the mental health ward in Division I, where he was locked down for 24 hours a day. *Id.* He was then transferred back to general population in Division III without being tested or screened, even though he had been in a hospital, where he likely encountered patients and hospital workers infected by COVID-19. *Id.*

K. Dr. Rottnek’s inspection report confirms the allegations in the *Russell* Complaint and shows that Defendants continue to disregard the risk that Plaintiffs will contract COVID-19 at the Jail.

As noted above, Dr. Rottnek's inspection report confirms many of the dire facts alleged in the *Russell* Complaint and accompanying motion for emergency relief. Those pleadings were filed in federal court on May 4, 2020. Dr. Rottnek conducted his inspection 12 days after that filing, and his report shows that in those intervening 12 days, Defendants did little, if anything, to remedy the constitutional harms alleged in the *Russell* pleadings. Dr. Rottnek's report, therefore, not only shows that the constitutional violations are ongoing, but provides further evidence of Defendants' disregard for the safety, welfare, and lives those detained.

Dr. Rottnek's report clearly demonstrates that Defendants *still* are not taking the minimally necessary measures to improve the hygiene and safety at the Jail, which would mitigate the risk of infection and spread of COVID-19:

- Detainees “are not receiving basic medical care or [] hygiene supplies.” Rottnek Report at 12.
 - Medical facilities “have been understaffed with providers recently.” *Id.* at 5.
 - The distribution of soap “. . . is remarkably inadequate for regular hand washing and showering, particularly during a pandemic in which people are encouraged to frequently was[h] hands.” *Id.* at 7.
- Critical facilities are not sufficiently cleaned:
 - Kitchen staff “. . . can't clean like [they're] supposed to' because [they] used to have 25-28 trusties for cleaning and now only [have] 2.” *Id.* at 5.
 - “[Bathrooms] should be cleaned after each use,” but some are cleaned only “. . . one/day by a trust[y].” *Id.* at 4.

- Parts of the jail are in such disrepair that they cannot be adequately cleaned: “The physical conditions [in Division II] are filthy and cannot be adequately cleaned due to pervasive disrepair, irregular surfaces, rust, paint peeling and chipping, mildew, and mold.” *Id.* at 12.
- Jail staff are not wearing PPE inside the facility. *Id.* at 14.
- Detainees are not given a sufficient supply of PPRE: “Most of the masks I saw were fraying and/or visibly dirty.” *Id.* at 7.
- The signage at the Jail does not mention COVID-19 or discuss measures that must be taken to mitigate the spread of the virus. *Id.* at 14, 17.

Additionally, social distancing, the single most effective tool in combatting the spread of the virus, is impossible in areas of the Jail that are still being used to confine detainees, and is not being practiced in other areas:

- Detainees are still being double bunked. *Id.* at 8.
- It is impossible to practice social distancing in parts of Division II, yet Defendants continue to house detainees there: In Division II, “no one can walk in the secured area of the hallway, without being closer than 6 [feet] to another person.” *Id.* at 8-9.
- Physical structure of jail cells in Divisions I and II do not allow for social distancing even in single bed cells: “Bars and open grids do not allow for social distancing, since COVID-19 can be transmitted by surface (fomite), where COVID-19 can remain for 2-3 [days], by large droplet, which can be projected at least 6 feet, and by aerosolized particles, which can hang in the air for several hours and can be transmitted through ventilation.” *Id.* at 8.
- In Divisions I and II, “[t]oilets and sinks are located near the front wall of these cells. COVID-19 can be aerosolized from fecal matter—whether from the act of voiding or flushing a toilet.”

- Jail staff are not practicing social distancing, even where they can: Dr. Rottnek observed “two CO’s sitting . . . sitting side by side, two feet apart, without wearing masks.” *Id.* at 14.
- Detainees are not properly instructed about the need to practice social distancing: “Signage is old and inaccurate . . . [and makes] no mention of COVID-19 or definition of social/physical distancing.” *Id.* at 17.

Despite the filing of a lawsuit alleging serious constitutional violations, Defendants’ continued failure to institute minimum measures to improve the hygiene and safety of the Jail and to ensure that social distancing is practicable and being practiced demonstrates the urgent need for this Court to provide the relief Plaintiffs seek.

ARGUMENT

Plaintiffs are at imminent risk of death or serious injury. If this litigation is decided in the ordinary course, many class members will become seriously ill and some may die before final judgment. Numerous others will suffer severe pain or organ damage. To avoid that dire result, Plaintiffs seek two forms of immediate relief.

First, Plaintiffs seek an order requiring Defendants to undertake and follow the basic preventative measures and procedures recommended by medical professionals for the management of COVID-19 in jails and correctional settings. These procedures ensure that those detained at the Jail: 1) have access to adequate and timely medical treatment to screen, test, and treat symptoms; 2) can practice

social distancing; 3) can maintain necessary hygiene; and 4) are educated about COVID-19.

Second, Plaintiffs seek an order requiring the Jail to reduce its detainee population to a level where incarcerated persons and jail staff can adequately practice social distancing and maintain daily living practices that reasonably mitigate the risk of infection and spread of COVID-19.

Plaintiffs meet the legal requirements for a temporary restraining order and preliminary injunction that would require Defendants to reduce the Jail population and conform their practices to medically accepted means of preventing and mitigating the spread of COVID-19. As explained below: (1) Plaintiffs are likely to succeed on the merits of their claims; (2) Plaintiffs are likely to suffer irreparable harm in the absence of relief; (3) the balance of equities weighs in Plaintiffs' favor; and (4) an injunction is in the public interest. *Detroit Fire Fighters Ass'n, IAFF Local 344 v. Detroit*, 482 Mich. 18, 34, 753 N.W.2d 579 (Mich. 2008). This Court must balance each of the four factors and "no single factor is dispositive." *City of Dearborn v. Comcast of Mich.*, 558 F. Supp. 2d 750, 754 (E.D. Mich. 2008). Where, as here, plaintiffs demonstrate "irreparable harm which decidedly outweighs any potential harm to the defendant," the "degree of likelihood of success required" is less, and a plaintiff need only show "serious questions going to the merits." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

I. Plaintiffs are likely to succeed on the merits because Defendants are violating Plaintiffs’ rights under the Eighth and Fourteenth Amendments.

Plaintiffs are highly likely to succeed on their claims because Defendants are deliberately disregarding the risk that Plaintiffs will contract COVID-19 within the current conditions at the Jail, in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 16 and 17, of the Michigan Constitution. Defendants’ failure to implement the basic steps recommended by health experts, the CDC, and Governor Gretchen Whitmer²⁰—including access to basic medical screening and treatment protocols for infectious disease, providing soap and water so that those detained can wash their hands after touching objects or other people, the ability to clean and disinfect all surfaces touched by multiple people at least once daily, access to information about COVID-19, and, above all, giving people sufficient space to stay at least six feet away from others at all times—when they are well aware of the extreme risks posed by this virus constitutes deliberate indifference.

Under the United States Constitution, the government has a duty to protect persons it detains from “a substantial risk of serious harm.” *Farmer v. Brennan*, 511

²⁰ See Compl. Ex. 12, Executive Order 2020-29 (Mar. 29, 2020); Compl. Ex. 7, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC.gov (March 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

U.S. 825, 834 (1994). This right arises under the Eighth Amendment for individuals that are post-conviction, *see id.*; *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), and under the Fourteenth Amendment’s Due Process Clause for individuals that are pre-conviction, *see City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Richko v. Wayne Cty., Mich.*, 819 F.3d 907, 915 (6th Cir. 2016).

To demonstrate a violation of the Eighth Amendment, convicted persons must show both an objectively substantial risk of serious harm and that prison officials subjectively “acted with deliberate indifference” towards the hazardous condition in question. *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000). Pursuant to the Supreme Court’s decision in *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466, 2472–2473 (2015), pre-trial detainees need only satisfy the objective prong of the inquiry. *Hopper v. Phil Plummer*, 887 F.3d 744, 752 (6th Cir.), *reh’g denied* (May 1, 2018). Accordingly, pre-trial detainees can prove a Fourteenth Amendment claim by demonstrating solely that class members face a substantial risk of serious harm. *Kingsley*, 135 S. Ct. at 2472–73.

The Michigan Constitution affords Plaintiffs even more protection than the Eighth Amendment. The Michigan Supreme Court has held that “the Michigan Constitution’s prohibition against ‘cruel *or* unusual’ punishment may be interpreted more broadly than the Eighth Amendment’s prohibition against ‘cruel and unusual’ punishment.” *Carlton v. Dep’t of Corrections*, 215 Mich. App. 490, 505, 546 N.W.2d

671 (Mich. 1996) (emphasis added); *People v. Bullock*, 485 N.W.2d 866, 872, 440 Mich. 15, 30 (Mich. 1992) (“[T]he Michigan provision prohibits ‘cruel or unusual’ punishments, while the Eighth Amendment bars only punishments that are both ‘cruel and unusual.’”)

The Eighth and Fourteenth Amendment standards, as well as any requirements under the Michigan Constitution, are satisfied here because Defendants are violating Plaintiffs’ constitutional rights by incarcerating them in conditions that fail to mitigate the spread of a potentially fatal virus amid a growing pandemic despite Defendants’ knowledge and ability to do so.

A. Plaintiffs are objectively at a substantial risk of harm.

All people confined in the Jail, whether detained pretrial or incarcerated post-conviction, are entitled to be protected from conditions of confinement that create a substantial risk of serious harm. *See Farmer*, 511 U.S. at 834 (correctional officer violated Eighth Amendment by failing to prevent “a substantial risk of serious harm”); *Estelle*, 429 U.S. at 104 (“deliberate indifference” to serious medical needs violates the Eighth Amendment).

Jail officials have a constitutional obligation to provide for detainees’ reasonable safety and to address their serious medical needs. *See DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989) (“[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it

renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”); *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (the state has an “unquestioned duty” to provide adequate medical care for detained persons); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991); *Estelle*, 429 U.S. at 104; *Brown v. Plata*, 563 U.S. 493, 531-32 (2011).

It is well established that, under the Fourteenth Amendment, pretrial detainees are entitled to at least the same level of protection as convicted detainees. *See Richko*, 819 F.3d at 915; *see also City of Revere*, 463 U.S. at 244 (“[T]he due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner”); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding that the Fourteenth Amendment requires that pretrial detainees be protected from any form of “punishment”). Thus, pretrial detainees need show only that the conditions of their confinement are unreasonable. *Kingsley*, 135 S. Ct. at 2473-74 (pretrial detainees need not show that prison officials subjectively “acted with ‘deliberate indifference’ towards the hazardous condition in question).

Exposure to an infectious disease like COVID-19 without adequate preventive measures is objectively unreasonable under the Fourteenth Amendment and constitutes deliberate indifference to a serious risk to health and safety, in direct

violation of the Eighth Amendment. A “condition of confinement that is sure or very likely to cause serious illness and needless suffering” to someone detained, which includes “exposure of inmates to a serious, communicable disease,” is precisely the type of serious harm that the Constitution protects against. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease”); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease.”); *Johnson v. Operation Get Down, Inc.*, No. 11-15487, 2014 WL 3752481, at *5 (E.D. Mich. 2014) (finding that even a “short period” of exposures to an infectious antibiotic resistant staph infection could constitute deliberate indifference); *see also Farmer*, 511 U.S. at 833 (“[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.”); *Flanory v. Bonn*, 604 F.3d 249, 255-56 (6th Cir. 2010) (recognizing that a complete denial of dental hygiene products can constitute deliberate indifference); *Lee v. Birkett*, No. 09-cv-10723, 2010 WL 1131485, at *5 (E.D. Mich. Feb. 18, 2010) (holding that allegations that prisoners were forced to use common razors and be exposed to other unsanitary conditions for two months could constitute deliberate indifference).

COVID-19 is the quintessential “serious” and “communicable disease” from which the Constitution requires incarcerated people be protected. *Helling*, 509 U.S. 25 at 33-34. This disease has no vaccine, effective treatment, or cure. Even mild and moderate cases, it can feel like “having glass in your lungs” or “drowning in [one’s] own blood,” leaving patients choking and struggling to breathe. Compl. ¶ 34. It can cause permanent lung damage. *Id.* ¶ 33. In critical cases, patients may need to spend weeks attached to a ventilator and blood oxygenation machine. *Id.* ¶ 35. And, in the most serious cases, patients do not recover: COVID-19 has a fatality rate ten times higher than influenza. *Id.* ¶ 36.

Plaintiffs have an extreme and unreasonable risk of contracting COVID-19 because of their confinement. Laring Decl. ¶¶ 28-29 (the “Jail’s intake, screening, and quarantine procedure is wholly inadequate and staggeringly ineffective against preventing the risk of infection”). Across the country, governments have issued “shelter in place” orders closing public schools and non-essential businesses, banning people from eating in restaurants or even congregating in small groups, and requiring individuals to stay in their homes unless it is absolutely necessary to leave. When people leave their homes, they are advised to stay at least six feet from others, wear masks, avoid touching their faces, and wash their hands immediately upon returning home. The message is clear: individuals must take every possible step to avoid contracting and spreading COVID-19 because the risk of infection is so high.

But Plaintiffs, whose risk of contracting the virus is even higher, are being denied the ability to take the same basic precautions the government has deemed so essential for everyone else. Lauring Decl. ¶ 41.

Medically vulnerable detainees are “at significantly higher risk, probably double or triple the risk of having a severe outcome from their infection,” including “hospitalization, potentially winding up in an ICU, or even death,” if exposed to COVID-19. Testimony of Dr. Lauring, Trx. 5/4/2020 Evidentiary Hearing, p. 78, *Cameron v. Bouchard*, No. 20-cv-10949 (E.D. Mich.) (Parker, J.). As a result, the only practicable way to protect these persons from contracting COVID-19 is to reduce the Jail population to a number where incarcerated persons and Jail staff can adequately practice social distancing, the single most important precaution anyone can take to prevent spreading or contracting COVID-19. Compl. ¶¶ 8, 12. Otherwise, older detainees and those with underlying medical conditions, such as asthma, lung disease, heart disease, or diabetes, are more substantially likely to be infected and to develop serious illnesses. Lauring Decl. ¶ 15. Therefore, continued detention of medically vulnerable persons is a grave risk to their lives and violates the Constitution.

B. Defendants have acted and are continuing to act with subjective indifference towards Plaintiffs’ substantial risk of harm.

This Court need not consider the subjective prong of the deliberate indifference standard with respect to Plaintiffs that are incarcerated pretrial. Yet, even under the

Eighth Amendment’s more exacting standard, immediate injunctive relief is clearly appropriate for all Plaintiffs. That is because Defendants have certainly known of and disregarded an excessive risk to detainee health or safety. *Wilson*, 501 U.S. at 303; *Richmond v. Huq*, 885 F.3d 928, 937 (6th Cir. 2018).

With respect to an impending infectious disease like COVID-19, deliberate indifference is satisfied when corrections officials “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” even when “the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33 (holding that a prisoner “states a cause of action . . . by alleging that [corrections officials] have, with deliberate indifference, exposed him to conditions that pose an unreasonable risk of serious damage to future health”); *see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (court “may infer the existence of [deliberate indifference] from the fact that the risk of harm is obvious” (citing *Farmer*, 511 U.S. at 842)).

This Court need not “await a tragic event” to find that Defendants are maintaining unconstitutional conditions of confinement amid a global pandemic. *See Helling*, 509 U.S. at 33. So long as the risk of serious harm is “likely,” as it is here, the Eighth Amendment is violated, even if “the complaining inmate shows no serious current symptoms,” it is “not alleged that the likely harm would occur immediately,” and “the possible infection might not affect all of those exposed.” *Id.*

Defendants are aware of the imminent severe risks posed by the coronavirus.²¹ Through government orders,²² CDC guidance aimed at jails,²³ and nationwide publications,²⁴ Defendants have been made well aware of the risks to incarcerated people. The Sheriff's own communications and announcements emphasize this awareness.²⁵ Similarly, the widespread public discussion regarding the heightened risk to medically vulnerable people make clear that Defendants are aware of the mortal peril that Jail conditions pose to such individuals. *See, e.g.*, H. White Decl. ¶ 12 (“I

²¹ This is particularly true for Defendant Sheriff Benny Napoleon, who lost an employee, Donanfay Collins, to COVID-19 and whose brother, Hilton Napoleon, was hospitalized for several weeks due to this virus. *See, e.g., We will remember: Tribute to a few of the metro Detroiters who died of coronavirus*, Detroit Free Press (May 2, 2020), <https://www.freep.com/in-depth/news/local/michigan/detroit/2020/04/12/coronavirus-covid-19-metro-detroit-tributes/2966714001/> (“‘It was like someone put an anvil around my neck and just dropped it,’ Napoleon said, when learning of [Collins’s] passing. ‘And I’ve been feeling very heavy since all of this transpired because I know this is not the last of it.’”); Marlowe Alter, *Highland Park Police Chief Hilton Napoleon hospitalized for 2 weeks with coronavirus*, Detroit Free Press (Mar. 26, 2020), <https://www.freep.com/story/news/local/michigan/wayne/2020/03/26/hilton-napoleon-coronavirus-michigan/2916825001/> (noting that Defendant Napoleon has been practicing social distancing from his family members due to the virus and believes in the importance of these practices).

²² *See* Michigan Executive Order 2020-42, Michigan.gov (Apr. 9, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-525173--,00.html.

²³ Compl. Ex. 7.

²⁴ *See* David Mills & Emily Galvin-Almanza, *As many as 100,000 incarcerated people in our prisons will die from the coronavirus, unless the US acts now*, Bus. Insider (Apr. 2, 2020), <https://www.businessinsider.com/failure-to-release-prisoners-is-condemning-thousands-to-death-2020-4>; Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, N.Y. Times (Mar. 31, 2020), <https://nyti.ms/3aIBHjv>; Timothy Williams et al., *Jails Are Petri Dishes’: Inmates Freed as the Virus Spreads Behind Bars*, N.Y. Times (Mar. 30, 2020), <https://nyti.ms/2Jmnf4z>.

²⁵ *WCSO COVOID-19 [sic] Response*, Wayne County Sherriff Connect (Apr. 11, 2020), <http://www.sheriffconnect.com/home/item/280-wcso-covoid-19-response.html>.

see Coronavirus on TV . . . When the guards hear something bad coming from the TV, they unplug it.”).

The list of reasonable measures to prevent the spread of COVID-19 is well delineated and publicized: “[s]ocial distancing and proper hygiene are the only effective means by which we can stop the spread of COVID-19.” *Thakker v. Doll*, __ F. Supp. 3d __, 2020 WL 1671563 at *8 (M.D. Pa. Mar. 31, 2020). Yet, Defendants have failed to ensure that either is being done at the Jail. As noted above, the CDC has pushed detention facilities to implement social distancing and “[p]rovide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing,” and advised that facilities must, “[s]everal times a day, clean and disinfect surfaces and objects that are frequently touched, especially in common areas.” Compl. ¶ 43.

Despite these clear directives, Defendants have not provided Plaintiffs with protective measures—the space, soap, sanitizer, and cleaning supplies—necessary to allow staff and detainees to remain safe. Nor have Defendants provided timely and adequate medical care to identify, medically isolate (not punitively detain), and treat infected people. As a result, Plaintiffs have a substantial risk of contracting COVID-19, and medically vulnerable detainees face a very realistic threat of death and/or permanent organ damage. Laring Decl. ¶¶ 38, 43. Defendants’ failure to act constitutes deliberate indifference.

Even more importantly, however, the overwhelming medical and scientific consensus is that social distancing of at least six feet is required to reasonably reduce the risk of transmission of the novel coronavirus. The CDC,²⁶ the American Medical Association,²⁷ the American Red Cross,²⁸ and the Michigan Department of Health and Human Services²⁹ have all concluded that social distancing is essential to preventing transmission of the deadly infection. The CDC itself describes social distancing as “a cornerstone of reducing transmission of respiratory diseases such as COVID-19,” as “[t]he best way to prevent illness,” and as “extra important” for vulnerable individuals.³⁰ Defendant Napoleon concedes this point: “If you really love [your family and the people around you], you will adhere to the governor’s

²⁶ *Social Distancing, Quarantine, and Isolation*, CDC.gov (Apr. 4, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>; *How to Protect Yourself & Others*, CDC.gov (Apr. 13, 2020) (explaining the paramount importance of social distancing, even if one is already taking other precautions such as a mask).

²⁷ *AMA, AHA, ANA: #StayHome to confront COVID-19*, Am. Medical Ass’n (Mar. 24, 2020), <https://www.ama-assn.org/press-center/press-releases/ama-aha-ana-stayhome-confront-covid-19>.

²⁸ *Coronavirus – What Social Distancing Means*, Am. Red Cross (Apr. 14, 2020), <https://www.redcross.org/about-us/news-and-events/news/2020/coronavirus-what-social-distancing-means.html>.

²⁹ *MDHHS issues Emergency Order requiring compliance with Executive Orders under penalty of civil fines up to \$1,000 and referral to licensing agencies for enforcement*, Mich. Dep’t of Health & Human Servs. (Apr. 2, 2020), <https://www.michigan.gov/coronavirus/0,9753,7-406-98163-524105--,00.html>.

³⁰ *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC.gov (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>.

directive” to stay and home and practice social distancing.³¹

Nevertheless, in the face of this awareness, Defendants continue to confine Plaintiffs in areas of the Jail where social distancing cannot be practiced. This is most evident in Division II. The proximity of the cells to one another, the lack of solid doors and poor ventilation, and the narrowness of hallways and common areas make it impossible to practice social distancing in Division II. Rottnek Report at 11. Further, the “pervasive disrepair, irregular surfaces, rust, paint peeling and chipping, mildew, and mold” makes Division II impossible to adequately clean, rendering it inhabitable during the pandemic. *See id.* at 12.

Although courts give some latitude to jail and prison officials to decide what actions are “reasonable” to deal with safety within facilities, COVID-19 is a threat to detainees’ health and safety of a magnitude unseen in recent history. At this moment, in the absence of a vaccine, there is only one way to minimize the risk of COVID-19: prevent its spread by social distancing.³² By failing to take the necessary steps to do so in the Jail, Defendants are knowingly exposing Plaintiffs, guards and staff, and the public at large to the serious risk of a painful and lethal

³¹ Marlowe Alter, *Highland Park Police Chief Hilton Napoleon hospitalized for 2 weeks with coronavirus*, Detroit Free Press (Mar. 26 2020), <https://www.freep.com/story/news/local/michigan/wayne/2020/03/26/hilton-napoleon-coronavirus-michigan/2916825001/>.

³² Compl. ¶ 8; Lauring Decl. ¶ 13; Dr. Francis Collins, *To Beat COVID-19, Social Distancing is a Must*, NIH Director’s Blog (March 19, 2020), <https://directorsblog.nih.gov/2020/03/19/to-beat-covid-19-social-distancing-is-a-must/>.

disease. Defendants’ ongoing confinement of Plaintiffs in conditions where they cannot adequately practice social distancing constitutes further deliberative indifference to the risks caused by this virus. The risk is unacceptable and unconstitutional. *See Farmer*, 511 U.S. at 847 (“Failing to take reasonable measures to abate [risk]” demonstrates disregard of such risk.)

Officials’ indifference to the significant risk of permanent damage and death to medically vulnerable detainees is even more unacceptable. It is well-documented that these individuals face a risk of death or permanent organ damage far in excess of the rest of the population. Stern Decl. ¶ 11; Luring Decl. ¶¶ 38, 43. This risk is evident in the COVID-19 death toll to date—for instance, in New York state, almost 90% of reported COVID-19 deaths involved at least one comorbidity, according to the state’s department of health.³³ Defendants’ refusal or inability to provide circumstances that would limit the exposure of medically vulnerable detainees to the virus is unconscionable and constitutes deliberate indifference. Plaintiffs have shown that they are likely to succeed on the merits of their claims.

II. Plaintiffs will suffer irreparable harm.

Plaintiffs allege injuries that are irreparable and, therefore, are not suitable for resolution in the ordinary course of litigation. There is no injury that is more

³³ *NYSDOH COVID-19 Tracker*, N.Y. State Dep’t of Health, <https://covid19tracker.health.ny.gov/> (last visited May 22, 2020).

irreparable than death, and Plaintiffs face a heightened risk of contracting a deadly virus due to Defendants' actions. Nor can these injuries be redressed through monetary damages. This risk is not speculative: in one Louisiana prison where COVID-19 was been allowed to spread, five people died in less than a week.³⁴

According to Dr. Luring, a virologist, specialist in infectious diseases, and an Associate Professor at the University of Michigan, absent immediate intervention from this Court, people will die because of Defendants' deliberate indifference:

[I]t is my professional judgment that individuals placed in any division of the Jail are at a significantly higher risk of infection with COVID-19 as compared to the population in the community, given the housing conditions in the facility, and that they are at a significantly higher risk of harm if they do become infected. These harms include serious illness (pneumonia and sepsis) and even death.

Without a vaccine, reducing the Jail's population to the point where social distancing can always be achieved is the only way to protect the health and safety of people detained in the facility and the public at large.

For the medically vulnerable . . . immediate release is the only option. The detainees' inability to practice physical distancing at all times, coupled with the Jail's failure to properly screen, identify, and quarantine infection, and their widespread neglect of medical needs creates a meaningfully higher risk of death for these individuals.

Luring Decl. ¶¶41-43.

³⁴ *ACLU Sues Louisiana Prison After 5 COVID-19 Deaths Reported*, Democracy Now (Apr. 7, 2020), https://www.democracynow.org/2020/4/7/headlines/aclu_sues_louisiana_prison_after_5_covid_19_deaths_reported.

Moreover, Plaintiffs seek relief from violations of their constitutional rights. When reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. *See Garner v. Michigan State University*, 462 N.W.2d 832, 838 (Mich. App. 1990) (citing *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)); *see also ACLU of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). An injunction is appropriate to prevent a substantial risk of deprivation of constitutional rights, as well as death or permanent, debilitating injury. Being compelled to endure a substantially increased risk of serious illness and death will always constitute irreparable injury. *See, e.g., Helling*, 509 U.S. at 33 (“It would be odd to deny an injunction to detainees who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”).

The risk of permanent harm to Plaintiffs applies with greater force to the medically vulnerable detainees, for whom continued detention is even more likely to cause injury and death. *See Wilson v. Gordon*, 822 F.3d 934, 958 (6th Cir. 2016) (upholding preliminary injunction “where the alleged irreparable harm involves delay in or inability to obtain medical services”). With 60 active cases of COVID-19 among detainees in the Jail (as well as 111 detainees who tested positive for COVID-19 antibodies) and 206 confirmed cases among Sheriff’s Office employees,

the risk of death and physical devastation to subclass members is an absolute certainty that cannot be ignored. Courts across the country have recognized that risk of exposure to COVID-19 constitutes an irreparable harm; in turn, they have granted immediate release to people exposed to COVID-19 and have otherwise required jails and prisons to take immediate measures to reduce the risk of exposure.³⁵ This groundswell reflects an emerging judicial consensus that people cannot be safely detained when they are exposed to a serious risk of contracting COVID-19.

COVID-19 is already in the Jail. Every possible step must be taken to ameliorate the risk to those detained. Plaintiffs have shown irreparable harm.

III. The public interest and balance of equities weigh heavily in Plaintiffs' favor.

The substantial risk to Plaintiffs of contracting a deadly disease considerably outweighs any potential harm to Defendants. As discussed above, Plaintiffs will suffer significant harm if forced to endure the current conditions in the Jail.

The only potential harm Defendants face if ordered to bring their Jail into

³⁵ The federal district court for the Eastern District of Michigan recently ordered Oakland County jail officials to submit a list of detainees for release consideration. *See Cameron v. Bouchard*, No. 20-cv-10949, 2020 WL 2569868 (E.D. Mich. May 21, 2020). *See also Zhang v. Barr*, No. ED CV 20-00331-AB, 2020 WL 1502607, at *6 (C.D. Cal. Mar. 27, 2020) (granting an immediate bond hearing in light of the “global pandemic by which delay in determining Petitioner’s release exposes him to unnecessary risk”); *United States v. Garlock*, No. 18-Cr-00418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) (ordering, *sua sponte*, extension of convicted defendant’s surrender date and noting “[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided”); *Castillo v. Barr*, __ F. Supp. 3d __, CV 20-00605 TJH (AFMx), 2020 WL 1502864, at *5 (C.D. Cal. Mar. 27, 2020) (noting “the risk of infection in immigration detention facilities – and jails – is particularly high”).

compliance with CDC guidelines is economic: Jail staff may have to expend additional time, and the County may have to expend additional money, to provide the social distance, information, hygiene products, cleaning agents, and medical treatment necessary to kill and/or treat the virus. But the possibility that Defendants will have to spend money to reduce the substantial risk that Plaintiffs will be exposed to a deadly disease does not tip the balance in their favor because “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (protection of constitutional rights is “always in the public interest”).

Immediately implementing the requested hygiene, social distancing, screening, and testing measures for the whole Class is the only way to reduce the imminent and grave risk of serious illness or death. These measures will also promote Defendants’ interests in ensuring the safety of the staff at the Jail and the community at large. Accordingly, the public interest would be served by issuing a preliminary injunction that requires Defendants to implement constitutionally adequate measures to prevent the spread of COVID-19 in the Jail.

The balance of equities and the public interest also favor reduction of the jail population to a level where socially distancing is practicable. Reduction of the jail population will save the Jail money and reduce the demands on Jail staff, including

guards and nurses. Further, reducing the jail population is the only way to eliminate the unacceptable risk of death or serious bodily harm that would occur if any medically vulnerable detainee contracted the virus, and the concomitant demand on public health resources that will result when they become infected in jail.

A worsened outbreak at the Jail has the potential to create a “tinderbox” scenario that drains the Detroit metropolitan area of limited medical resources, including intensive care unit beds and ventilators.³⁶ In Michigan, the COVID-19 outbreak has already resulted in unprecedented public health demands that have strained the local health care system.³⁷

COVID-19 is, at this very moment, devastating Michigan’s carceral system. As of May 20, 2020, at least 59 persons incarcerated in Michigan prisons have died from COVID-19, the second most of any state.³⁸ Releasing vulnerable individuals is the only way to save lives and reduce the burden on the community and health infrastructure, and it is clearly in the public interest.

CONCLUSION

³⁶ *New Model Shows COVID-19 Death Toll is 100,000 Higher Than Current Projections*, ACLU.org (Apr. 22, 2020), <https://www.aclu.org/press-releases/new-model-shows-covid-19-death-toll-100000-higher-current-projections>.

³⁷ See Paul P. Murphy, *Detroit hospital workers say people are dying in the ER hallways before help can arrive*, CNN (April 9, 2020), <https://www.cnn.com/2020/04/09/us/detroit-hospital-workers-sinai-grace-coronavirus/index.html>.

³⁸ *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project, (May 20, 2020), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

For these reasons, Plaintiffs ask this Court to issue a temporary restraining order and preliminary injunction ordering the relief requested in their motion.

DATED: May 28, 2020

Respectfully submitted,

/s/Deborah Choly

DEBORAH ANN CHOLY (P34766)
Michigan Legal Services
2727 Second Ave., Suite 333, Box 37
Detroit, MI 48201
(313) 573-0073

/s/ William Goodman

WILLIAM H. GOODMAN (P14173)
Goodman, Hurwitz, & James, PC
1394 E. Jefferson Ave.
Detroit, MI 48207
(313) 517-6170

/s/Desiree M. Ferguson

Desiree M. Ferguson (MI Bar No.
P34904)
Erin Keith (P81298)
DETROIT JUSTICE CENTER
1420 Washington Blvd., Suite 301
Detroit, MI 48226
Tel: (313) 736 -5957
dferguson@detroitjustice.org
ekeith@detroitjustice.org

/s/Allison L. Kriger

Allison L. Kriger (P76364)
LARENE & KRIGER, P.L.C.
645 Griswold Street, Suite 1717
Detroit, Michigan 48226
Tel: (313) 967-0100
allison.kriger@gmail.com

/s/Miriam R. Nemeth

Miriam R. Nemeth (P76789)
ADVANCEMENT PROJECT
NATIONAL OFFICE
1220 L Street NW, Suite 850
Washington, DC 20005
Tel: (202) 728-9557
mnemeth@advancementproject.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on May 28, 2020, the foregoing document was filed with the Clerk of Court and all parties using this Court's electronic filing system.

/s/ Allison L. Kriger