UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, ***Plaintiffs,*** **v.** **QUINCY BOOTH, *et al.*,** ***Defendants.***	**Civil Action No. 20-0849 (CKK)**

DEFENDANTS' MOTION TO ALTER AND VACATE THE COURT'S PRELIMINARY INJUNCTION

Defendants Quincy Booth, Director of the District of Columbia Department of Corrections (DOC), and Lennard Johnson, DOC Warden, (collectively, DOC or the District), move to alter and vacate the Court's June 18, 2020 Order [99] granting in part plaintiffs' amended motion for a preliminary injunction. Fed. R. Civ. P. 54(b), 59(e), 60(b)(5). As set forth in the accompanying memorandum of points and authorities, reconsideration is appropriate and the Court should vacate the preliminary injunction based a significant change in the factual circumstances underlying the lawsuit and errors of law in the Court's Memorandum Opinion [100].[1]

[1] Shortly after this motion, the District will also file a protective notice of appeal. Properly filed under Civil Rules 59(e) and 60(b), this motion tolls the time to appeal, *see* Fed. R. App. P. 4(a)(iv)(A)(iv), (vi); the notice of appeal will become effective only once this Court rules on the motion, *see* Fed. R. App. P. 4(a)(iv)(B). Civil Rules 59 and 60 both apply because a preliminary injunction is an appealable order and thus a "judgment" under the Civil Rules. Fed. R. Civ. P. 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies."). This motion is therefore proper under both Rule 59(e), as a "motion to alter or amend a judgment," as well as under Rule 60(b), as a motion for "relief from a judgment or order." *See* 16 Charles Alan Wright, *et al.*, Federal Practice and Procedure § 3920 (3d ed. 2020) (citing *Manning v. Sch. Bd. Of Hillsboro Cnty.*, 244 F.3d 927, 940 n.23 (11th Cir. 2001)) ("A timely motion under Civil Rule 59(e) suspends appeal time [for appealable interlocutory orders] … ."). Even if this

In short, the District has halted the spread of COVID-19 at DOC facilities. There have been no positive cases at the facilities since June 15, 2020, and the situation remains stable. The Court granted injunctive relief, in part, because it found that the health risks of COVID-19 sufficed to show a likelihood of irreparable harm to plaintiffs. Mem. Op. at 13. But any such risk has been substantially curtailed and the conditions dramatically improved as a result of actions that DOC has taken, and continues to take, across a range of areas—including medical care and testing, sanitation and staffing, and social distancing. Moreover, in finding a District policy of reckless disregard to the risks faced by plaintiffs, the Court erred by failing to point to any evidence of the District policymakers' disregard of those risks and by instead focusing on alleged imperfections in the response to the COVID-19 pandemic. Under these circumstances, injunctive relief is—and has been—unwarranted and inappropriate, and the Court should vacate the preliminary injunction. A proposed order is attached.

Dated: July 16, 2020.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

TONI MICHELLE JACKSON
Deputy Attorney General
Public Interest Division

/s/ Fernando Amarillas
FERNANDO AMARILLAS [974858]
Chief, Equity Section

/s/ Micah Bluming
MICAH BLUMING [1618961]
PAMELA DISNEY [1601225]
Assistant Attorneys General
ANDREW J. SAINDON [456987]
Senior Assistant Attorney General

Court were to conclude that it lacks jurisdiction to grant this motion, it should still issue an indicative ruling under Civil Rule 62.1.

441 Fourth Street, N.W.
Suite 630 South
Washington, D.C. 20001
(202) 724-7272
(202) 730-1833 (fax)
micah.bluming@dc.gov

Counsel for Defendants Quincy Booth and Lennard Johnson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, ***Plaintiffs,*** **v.** **QUINCY BOOTH, *et al.*,** ***Defendants.***	**Civil Action No. 20-0849 (CKK)**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO ALTER AND VACATE THE PRELIMINARY INJUNCTION

INTRODUCTION

Defendants Quincy Booth and Lennard Johnson (collectively, DOC or the District) seek reconsideration of the Court's June 18, 2020 Order [99] granting in part plaintiffs' amended motion for a preliminary injunction, based on material changes to the factual circumstances underlying this lawsuit and errors of law in the Court's Memorandum Opinion [100].

The District's continuing actions, initiated from the beginning of this pandemic, have reversed the spread of COVID-19 at the Department of Corrections (DOC) facilities. Notably, since June 15, 2020, no DOC resident has tested positive for COVID-19. DOC's tireless efforts have improved and stabilized conditions through various measures with respect to medical care and testing, sanitation and staffing, and social distancing. Apart from this material change in the factual circumstances, the Court erroneously found that plaintiffs were likely to succeed on the merits of their constitutional claims. The Court identified no evidence of DOC's reckless disregard of excessive health risks, pointing instead to alleged imperfections in the District's response to the COVID-19 pandemic. The evidence shows that DOC's efforts to stop the spread of COVID-19

are effective, and injunctive relief is therefore unnecessary. The Court further erred in finding plaintiffs exhausted their administrative remedies. In light of these circumstances, and the fact that several federal courts of appeals have recently stayed or reversed similar injunctions based on comparable evidence and analysis, the Court should reconsider its ruling and vacate the preliminary injunction.

BACKGROUND

The District has previously recounted in detail DOC's vigorous response to the COVID-19 pandemic. *See* Opp'n to Pls.' Mot. for PI (Opp'n Mem.) [82] at 4-20. Since the close of briefing on preliminary injunctive relief, DOC has continued to implement numerous infection-control measures within its facilities based on advice and guidance from the D.C. Department of Health (DOH), the Homeland Security and Emergency Management Agency (HSEMA), and the Centers for Disease Control and Prevention (CDC). *See id.* at 4.

I. Medical Care and Testing

As of this filing, there have been no known cases of COVID-19 in the Central Detention Facility (CDF) or the Correctional Treatment Facility (CTF) since June 15, 2020. Third Supp. Decl. of Dr. Beth Jordan (Jordan Third Supp. Decl.), Ex. A, ¶ 2. With the exception of new intakes, there have been no isolation or quarantine units operating at CDF or CTF since then. *Id.* ¶ 5. DOC has discharged all residents previously in quarantine or isolation units back into the general resident population. *Id.* ¶ 4.

As previously reported, DOC has implemented new systems to ensure that residents in general population units receive attention from a medical provider within 24 hours of reporting a health issue. *Id.* ¶ 6. To ensure that this new sick call system is working as intended, DOC recently conducted an internal audit analyzing all sick call slips from June 1, 2020, through June 24, 2020,

at both CDF and CTF. *Id.* ¶ 8. The audit found that every non-quarantine resident but one saw a health care provider within 24 hours of the sick call slip being triaged (one resident was not present at the housing unit during the sick call clinic and was seen the next day). *Id.* The audit also revealed that only 20% of the residents seen by a provider at sick call clinics had completed a sick call slip; most residents were referred for medical attention through chronic care clinic providers, providers walking the tiers before the sick call clinic, attorney or court referrals, or as part of follow-up from the urgent care clinic. *Id.* ¶ 8.

DOC has implemented, and continues to follow, numerous testing protocols. *See* Supp. Decl. of Dr. Beth Jordan (Jordan Supp. Decl.) [82-2] ¶¶ 10–13, 18; Jordan Third Supp. Decl. ¶¶ 9–10. For example, as previously explained, DOC has been testing all new residents at intake (as of May 18). Jordan Supp. Decl. ¶ 10. In addition, DOC is now testing all new residents again ten days after intake. Jordan Third Supp. Decl. ¶ 10. DOC also now tests residents prior to attending court hearings, and, as of June 15, 2020, prior to release. *Id.*

In addition to the extensive round of testing done in late May, *see* Second Supp. Decl. of Dr. Beth Jordan (Jordan Second Supp. Decl.) [94] ¶ 3, DOC recently conducted another round of testing a large sample of asymptomatic residents. Jordan Third Supp. Decl. ¶ 9. On June 26, DOC—in collaboration with DOH and Unity Health Care—tested 87 residents, including: (1) residents on the intake unit who have been there for more than 14 days; (2) residents on C2B, the CTF unit for inmates over 50 years old; (3) residents on SW1; and (4) residents on NE3. All tests came back negative. *Id.*

II. Sanitation and Staffing

DOC has also engaged in continuous efforts to improve sanitation at its facilities. *See* Opp'n Mem. at 12–15. Since April 9, 2020, assigned program analysts—with supervisor follow-

up—confirm that sufficient cleaning supplies are on all units and that cleanings are occurring as scheduled. Second Supp. Decl. of Lennard Johnson (Johnson Second Supp. Decl.), Ex. B ¶ 3. Since April 25, DOC has required correctional officers to document daily that each cell is clean and, at the end of each shift, complete a housing checklist that includes whether the housing unit has cleaning and hygiene supplies. *Id.*

DOC contracted with Rock Solid District Group, LLC for professional cleaning services at CDF and Spectrum Management LLC for professional cleaning services at CTF; the contracts are for a base period of 90 days with options to extend. Supp. Declaration of Gitana Stewart-Ponder (Stewart-Ponder Supp. Decl.), Ex. C ¶ 3. These vendors continue to perform the services for which they were contracted, including cleaning the common areas of all housing units on the secure and non-secure sides of the DOC facilities. *Id*. Additionally, DOC contracted with Potomac-Hudson Engineering, Inc., a registered sanitarian, to provide onsite inspections and cleaning procedure plans. *Id.* ¶ 4. The sanitarian began work at DOC facilities on May 18, 2020. *Id.* DOC continues to advertise for a permanent sanitarian position for the facilities. *Id.* ¶ 5. Inmate details performed daily cleaning of common areas before DOC hired professional cleaners and will continue to do so while the cleaning contracts are in effect. *Id.* ¶ 6.

Inmates have access to adequate supplies to clean their cells. *Id.* ¶ 7. DOC has fully implemented a system that provides all inmates microfiber towels, replacing the paper towels previously used. *Id.* Correctional officers issue each inmate daily a microfiber cloth sprayed with a peroxide multi-surface cleaner and disinfectant. *Id.* The environmental officer pre-mixes the cleaning solutions, based on the instructions provided on the solution labels, before it is sent to the housing units. *Id.* After use each day, the cloths are collected and laundered. *Id.*

DOC also continues to undertake substantial efforts to increase staffing, which has significantly improved since the pandemic began. As of July 13, 2020, 294 correctional officers who were previously unavailable at various points during the pandemic have returned to work. *Id.* ¶ 2. This includes 83 of the 87 staff members who previously tested positive for COVID-19 and have since recovered. *Id.* Other than three staff members who have not yet recovered, there are currently no staff members under self-quarantine at the advice of a physician or DOC. *Id.*

III. Social Distancing, PPE, and Education

As previously noted, DOC continues to require correctional officers, after each shift, to document compliance with various requirements, including that staff and inmates wore masks and that inmates were reminded to socially distance. Johnson Second Supp. Decl. ¶ 3. Moreover, since May 10, 2020, DOC supervisors have conducted unannounced walkthroughs on each unit twice a week to ensure that COVID-19 precautionary measures are being followed. *Id.* A surveillance team continues to monitor video footage and inform supervisors of any social distancing and PPE violations, and discipline has been imposed on correctional officers who fail to implement social distancing. *Id.* ¶ 2. Signs remain posted throughout DOC facilities reminding staff and residents to engage in social distancing. *Id.* DOC continues to provide inmates paper copies of educational materials on COVID-19 every week, and training modules are also available electronically on tablets. Supp. Decl. of Amy Lopez (Lopez Supp. Decl.), Ex. D ¶ 2; *see also* Exs. A, B and C to June 29, 2020 Notice of Compliance [101-1 to 101-3].

IV. Legal Calls

DOC has continued to improve access to legal calls, including its previously described emergency legal call process. See Opp'n Mem. at 19–20; June 29, 2020 Status Report [101] at 6. Between April 20, 2020, and July 11, 2020, there have been 3,234 calls facilitated through that

process. Supp. Decl. of Camille Williams (Williams Supp. Decl.), Ex. E ¶ 2. Newly acquired cell phones with headsets were first used by residents on June 15, 2020, after testing confirmed that there were no technical issues and case managers were trained on how to use them. *Id.* ¶ 5. Since June 24, 2020, DOC residents have been able to make all emergency legal calls directly from their cells (if they reside in a single cell) or from a designated empty cell (if they do not have a single cell) using DOC's newly acquired cell phones and wired headsets. *Id.* ¶ 6.

DOC has also begun to facilitate video legal calls and continues to expand these capabilities. On June 18, 2020, DOC began video legal calls with the Federal Public Defender for the District of Columbia (FPD). *Id.* ¶ 7. Every Thursday, between 10:00 a.m. and 2:00 p.m., DOC and FPD arrange for one-hour video legal calls between attorneys and clients at CDF. *Id.* Effective July 10, 2020, every Friday, DOC and FPD arrange for one-hour video legal calls between attorneys and clients at CTF. *Id.*

DOC and the Office of the Federal Public Defender for the District of Maryland (Maryland FPD) each agreed to install an iPad at the CDF and CTF to allow for video visits between attorneys and clients one day a week at each location. *Id.* ¶ 8. DOC and Maryland FPD have arranged for legal calls to occur every Tuesday; since July 7, 2020, DOC and Maryland FPD attorneys have coordinated legal visits by video at each facility. *Id.*

DOC is developing a plan to accommodate a request for legal visits by video recently received from the Public Defender Service for the District of Columbia (PDS). *Id.* ¶ 9. While DOC finalizes that plan, DOC has provided legal visits by video as requested from PDS attorneys and private counsel, using the WebEx video conferencing platform. *Id.* DOC has additionally facilitated regular legal calls by video for a deaf resident at CTF since May 18, 2020. *Id.*

In May 2020, DOC received five tablets from American Prison Data Systems (APDS), the tablet vendor, to allow for confidential video conferencing between residents and their attorneys. *Id.* ¶ 10. Case managers and officers were trained on safety, sanitation, and security of the tablets, and testing was conducted in June 2020. *Id.* As of June 29, 2020, four of the five tablets are available for use and one is out for repair. *Id.* APDS offered these tablets as a solution to allow for attorney-client communication in response to pandemic-related limitations to in-person meetings. *Id.* APDS is currently working to enhance APDS THRIVE (Therapeutic Interactive Video Engagement), which will allow for a higher number of attorney-client meetings and provide capability beyond single-use capacity. *Id.* APDS THRIVE is in development with anticipated release within the next 60 days; once launched, DOC will create a new plan for the use of tablets after testing has been conducted. *Id.*

As of July 7, 2020, DOC completed the renovation of new spaces for conducting video conference hearings with the Superior Court of the District of Columbia and the U.S. District Court for the District of Columbia. Johnson Second Supp Decl. ¶ 4. Since DOC launched the tablet messaging service on May 4, 2020, 289 residents have submitted attorney names and emails, and residents are reporting that they are using the tablets to communicate with their attorneys through the designated messaging system. Lopez Supp. Decl. ¶ 3. DOC continues to work with the electronic platform vendor to accommodate new account requests from residents in a timely manner.

LEGAL STANDARD

Federal Rule of Civil Procedure 54(b) provides that any order "which adjudicates fewer than all the claims" in a case "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Under Rule 54(b), the

Court has "inherent power to reconsider an interlocutory order 'as justice requires.'" *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011). "Justice … may require reconsideration where a controlling or significant change in the facts has occurred since the submission of the issue to the court." *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 81 (D.D.C. 2018) (alterations adopted) (internal quotation marks omitted); *see Rosenberg v. U.S. Dep't of Def.*, — F. Supp. 3d —, 2020 WL 1065552, at *5 (D.D.C. Mar. 5, 2020) (granting Rule 54(b) motion where new information in declarations "constitute[d] a 'change in the court's awareness of the circumstances,' … which 'might reasonably be expected to alter the conclusion reached by the court'").

Similar to the inherent power to grant a Rule 54(b) motion, granting a motion under Federal Rule of Civil Procedure 59(e) is "discretionary." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Grounds for granting a Rule 59(e) motion include "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Pigford v. Perdue*, 950 F.3d 886, 891 (D.C. Cir. 2020).

Finally, Rule 60(b)(5) authorizes a court to relieve a party from an injunction "where prospective application of the order is 'no longer equitable'" if the movant shows "a significant change in … factual conditions[.]" *Gov't of Province of Manitoba v. Zinke*, 849 F.3d 1111, 1117 (D.C. Cir. 2017) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383–84 (1992)); *accord Petties v. District of Columbia*, 662 F.3d 564, 571 (D.C. Cir. 2011) (noting that the significant change in factual conditions inquiry should include whether the risks that led to injunctive relief have been "ameliorated, if not eliminated, as a result of changed circumstances"). Courts must take a "flexible approach" when considering motions under Rule 60(b)(5) because it "allows courts to ensure that 'responsibility for discharging the State's obligations is returned

promptly to the State and its officials' when the circumstances warrant." *Horne v. Flores*, 557 U.S. 433, 450 (2009) (quoting *Frew v. Hawkins*, 540 U.S. 431, 442 (2004)).

ARGUMENT

I. DOC Has Halted the Spread of COVID-19 in Its Facilities, and the Material Change in Factual Circumstances Renders Injunctive Relief Improper.

DOC has had zero known cases of COVID-19 among its resident population for 30 days. *See* Jordan Third Supp. Decl. ¶ 3. In its Memorandum Opinion partially granting plaintiffs' amended motion for a preliminary injunction, the Court concluded that despite "the progress Defendants have made" in curbing the spread of COVID-19, "such progress is not sufficient to negate Plaintiffs' risk of harm" because "COVID-19 is an infectious disease which spreads quickly and fatally in congregate settings, such as DOC facilities." Mem. Op. at 34. Yet the Court identified only two items of evidence plaintiffs had proffered to meet their burden of establishing irreparable harm: two declarations by Dr. Jaimie Meyer made on March 29, 2020 and May 14, 2020. *See* Mem. Op. at 34 (citing Decl. of Jaimie Meyer (Meyer Decl.) [5-2], and Supp. Decl. of Dr. Jaimie Meyer (Meyer Supp. Decl.) [70-2]). Even in her most recent declaration—made 35 days before the Court issued the preliminary injunction—Dr. Meyer reached her conclusions about the risks of COVID-19 without reviewing any of the new information the District provided in its opposition to plaintiffs' motion for injunctive relief, let alone the supplemental test result data the District submitted thereafter. *See* Meyer Supp. Decl. ¶ 2; Second Supp. Decl. of Dr. Beth Jordan (Jordan Second Supp. Decl.) [94] ¶¶ 3-7 (4.6% positive rate after mass testing in late May).

Even at the time the request for preliminary injunction was submitted to the Court, the number of known cases in DOC facilities was relatively low. *See* Supp. Decl. of Reena Chakraborty [82-3] ¶ 8 (17 residents positive as of May 24, 2020). In a May 22, 2020 test of 304 DOC residents at the highest risk of contracting the virus, only 4.6% tested positive. Jordan Second

Supp. Decl. ¶ 7.[2] As noted above, testing has continued and the number of positive cases at DOC facilities have since dropped to zero—and have stayed there now for 30 days in a row. *See* Jordan Third Supp. Decl. ¶ 3. Whatever the risk of irreparable harm plaintiffs have faced over time, that risk has been thoroughly addressed by the ongoing efforts of DOC officials. *Petties*, 662 F.3d at 571; *cf. Horne*, 557 U.S. at 466 (in Rule 60(b)(5) analysis, lower courts should have considered that defendants had "adopted policies that ameliorated or eliminated many of the most glaring inadequacies" previously identified).

If plaintiffs moved for a preliminary injunction today, they could not show a likelihood of irreparable harm under the current circumstances. DOC officials' efforts to get positive cases down to zero likewise undermine any notion they have acted with reckless disregard, *see* Section II below (no evidence of reckless disregard all along), or that there is any excessive risk to inmates, and those efforts similarly tilt the balance of the equities and the public interest in the District's favor. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring) ("When [public] officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." (internal quotation marks, brackets, and citations omitted)). Other courts have recently vacated or remanded preliminary injunctions in light of such changed circumstances. *See Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, at *5 (9th Cir. June 17, 2020) (remanding appeal of preliminary injunction to permit the parties "to present any evidence of changed circumstances to the district court" for determination on whether to "modify or dissolve the injunction," observing that "the circumstances surrounding the COVID-19 pandemic are evolving rapidly"); *Valentine v. Collier*, 960 F.3d 707 (Mem.) (5th Cir. June 5,

[2] This result, and the results of other widespread testing conducted since, did not depend on "self-reporting." *See* Mem. Op. at 13.

2020) (vacating preliminary injunction based on conclusion that defendant state corrections agency "has substantially complied with the measures ordered by the district court in its preliminary injunction).[3]

To continue enjoining DOC would not serve the ends of justice, *Dunlap*, 319 F. Supp. 3d at 81, and would be "no longer equitable" under the current circumstances, *Zinke*, 849 F.3d at 1117.

II. The Court Improperly Concluded That Plaintiffs Are Likely To Succeed on the Merits.

A. The Court Did Not Identify Any Reckless Failure To Act on an Excessive Risk To Inmate Health, Let Alone a Municipal Policy of Such Recklessness.

The Court found that plaintiffs were likely to succeed on the merits of their constitutional claims without identifying any reckless disregard on the part of DOC, pointing only to apparent imperfections in the measures that had been implemented to that point. *See, e.g.*, Mem. Op. at 17 (highlighting "difficulties" with sick call process); 18 ("insufficiencies in social distancing practices"); 20 ("aspects of sanitation which have not improved"). The Court focused its analysis of reckless disregard on the wrong evidence. Rather than analyzing whether Director Booth or Warden Johnson had recklessly disregarded the risks related to COVID-19, the Court instead identified what it believed to be ongoing inadequacies in various infection control measures, failing to assess whether those deficiencies were the result of their reckless disregard. *Id*. at 16–23. As a result, the Court erred in finding plaintiffs were likely to succeed on the merits.

---

[3] The injunctive relief regarding legal calls does not relate to the health risks regarding COVID-19, and plaintiffs have never articulated any injury that they have suffered or might imminently suffer regarding access to their lawyers. However, even assuming there had been a basis for such injunctive relief, the District has shown through additional developments that such legal access is being provided to inmates. *See* Background Section IV.

As the District argued, constitutional liability attaches only where relevant officials "consciously disregar[d]" a known risk. *Farmer v. Brennan*, 511 U.S. 825, 839 (1994); *see* Opp'n Mem. at 25-26.[4] In addition, even assuming the *Farmer* standard is inapplicable and that plaintiffs could show a predicate constitutional violation, they would have to prove that the District caused the violation through a course of conduct that its final "policymakers consciously chose to pursue." *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 691 (D.C. Cir. 2009). Numerous facts in the record—including the oral and written *amici* reports—made clear that DOC had taken measures from the start of the pandemic and had been working to improve its practices in all areas identified by the Court, even if those efforts were not perfect. *See* Opp'n Mem. at 19–20, 28–33 (summarizing DOC efforts in access to medical care, sanitation, education, PPE, social distancing, staffing and legal calls). The Court nevertheless discounted the evidence that DOC had been continually addressing and improving conditions at its facilities, reasoning that despite "efforts [that] have been made to improve conditions, Defendants cannot claim that the need for an injunction is now moot because the Defendants have ceased their wrongful conduct." Mem. Op. at 15 (alterations adopted) (internal quotation marks omitted) (quoting *Costa v. Bazron*, Civil Action No. 19-3185, 2020 WL 2735666, at *4 (D.D.C. May 24, 2020)). The Court concluded that plaintiffs had showed a likelihood of success on the merits merely because deficiencies remained in DOC's provision of medical care, *id*. at 16–18; enforcement of social distancing protocols, *id*. at 18–20; implementation of sanitation protocols, *id*. at 20–22; maintenance of non-punitive medical isolation units, *id*. at 22–23; and provision of access to legal calls, *id*. at 23–26.

[4] As the Court has observed, plaintiffs were required to show at least a reckless failure to act for both their Fifth and Eighth Amendment claims alike. *See* Mem. Op. at 12 (Fifth Amendment due process requires showing officials "intentionally or recklessly failed to act" on known risk); 14-15 (Eighth Amendment claim requires showing officials "recklessly disregarded the excessive risk").

That conclusion turned on the imperfection of DOC's efforts to address the issues identified by *amici*. Reckless disregard, however, requires more than a mere showing of "imperfect enforcement" of policies and protocols designed to address any existing risk to the plaintiffs. *See Scott v. District of Columbia*, 139 F.3d 940, 944 (D.C. Cir. 1998) ("imperfect enforcement" of a policy insufficient to show officials were "knowingly and unreasonably disregarding an objectively intolerable risk of harm" to plaintiffs). Given that even a due process violation requires more than negligence, *see Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015), imperfect results alone cannot suffice for constitutional liability. *See Abdullah v. Washington*, 530 F. Supp. 2d 112, 119 (D.D.C. 2008) (plaintiff could not show jail officials knowingly and unreasonably disregarded risk of secondhand smoke where proffered evidence was "largely based on asserted imperfections in the nonsmoking policy"); *see also Parker v. District of Columbia*, 850 F.2d 708, 719-20 (D.C. Cir. 1988) (Williams, J., dissenting) (observing that "low-level 'inadequacies' plainly do not reflect … 'deliberate indifference' to constitutional violations").

The Court also erred in dismissing DOC's efforts as having been "taken subsequent to the TRO Order." Mem. Op. 15-16; *see also id.* at 22, 23. The Supreme Court has made clear that, in this type of constitutional inquiry, the proper focus is the defendants' "current attitudes and conduct, which may have changed considerably since" previous points in the litigation. *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Even so, the Court's TRO here did not come amid extended inaction by policymakers with ample time to deliberate and reflect. Rather, despite the pandemic's sudden onset, DOC had numerous measures in place even before the start of this litigation. These included, among other things, isolation and quarantine protocols, *see* Decl. of Dr. Beth Jordan [20-2] ¶ 6, 7, 11; limitations on outside visitors, *see* D.C. Department of Corrections, Coronavirus Prevention, available at https://doc.dc.gov/page/coronavirus-prevention; measures to encourage

social distancing, *see* Johnson Sec. Supp. Decl. ¶ 2; and cleaning and sanitation measures, *see* Stewart-Ponder Supp. Decl. ¶¶ 3–7. The record is clear that DOC made genuine attempts to address the pandemic well before plaintiffs even requested a TRO.

Justice requires reconsideration of the Court's decision to enjoin DOC based on an unduly high legal standard. *See Capitol Sprinkler*, 630 F.3d at 227. Whatever could have been done better in hindsight, the record shows consistent efforts by officials to impose infection-control measures, which have proven to be effective. *See* Background Section above. Those efforts are a far cry from a reckless failure to act.

B. The Court Erred in Finding a Likelihood of Success on Exhaustion of Administrative Remedies.

The Court also erred in rejecting the District's argument that plaintiffs had not exhausted their administrative remedies under the Prison Litigation Reform Act (PLRA), finding that plaintiff Banks had filed an emergency grievance with Director Booth on March 24, 2020, but that DOC had not responded within the 72 hours required by its policies. Mem. Op. at 28–29.

DOC implemented a new grievance policy in January 2020 which authorized residents to proceed to the next step in the process if they fail to receive a timely or unsatisfactory response. Decl. of Desiree Townes (Townes Decl.), Ex. F ¶ 7. Exhaustion under the PLRA—as in administrative law generally—must be "proper," *i.e.*, "using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Woodford v. Ngo*, 548 U.S. 81, 91 (2006) (emphasis in the original) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)); *see also Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (rejecting a "special circumstances" exception, including when the inmate makes "a reasonable mistake about the meaning of a prison's grievance procedures").

Because the evidence shows that plaintiff Banks—the only one of the three remaining plaintiffs who even attempted to file a grievance—failed to properly exhaust his administrative remedies, the Court erred in finding a likelihood of success on the merits. *Johnson v. District of Columbia*, 869 F. Supp. 2d 34, 41 (D.D.C. 2012) ("A prisoner's lack of awareness of a grievance procedure, however, does not excuse compliance.") (quoting *Twitty v. McCoskey*, 226 F. App'x 594 (7th Cir. 2007)).

III. Reconsideration Is Appropriate Because Federal Courts of Appeals Have Recently Overturned Similar Preliminary Injunctions.

While this Court relied on a preliminary injunction entered in *Cameron v. Bouchard*, No. 20-10949, 2020 WL 1929876 (E.D. Mich. April 17, 2020), to support its entry of preliminary injunctive relief, Mem. Op. at 37, the Sixth Circuit recently reversed that decision and vacated the preliminary injunction. *See Cameron v. Bouchard*, No. 20-1469, 2020 WL 3867393, at *3 (6th Cir. July 9, 2020). The Sixth Circuit concluded the evidence was "insufficient to demonstrate that the jail officials acted with reckless disregard to the serious risk COVID-19 poses." *Id.* at *5. In determining that plaintiffs had no likelihood of success on the merits, the court relied upon reasonable steps that jail officials had taken to prevent the spread of COVID-19, *id.*, similar to those taken by defendants here.

Throughout the pandemic, federal courts of appeals have repeatedly held that similar steps by correctional officials constitute a reasonable response to the risk posed by COVID-19 and thus required a stay or reversal of preliminary injunctions. *See Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020) (vacating preliminary injunction); *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020) (same); *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (staying injunction pending appeal), *application to vacate stay denied*, 140 S. Ct. 1598 (2020); *Marlowe v. Leblanc*, 810 F. App'x 302 (5th Cir. 2020) (same). These courts have found fault with district court determinations on the

likelihood of success on the merits, as well as on the other preliminary injunction factors. *See Swain*, 961 F.3d 1276 (finding that the district court erred in its consideration of all four preliminary injunction factors); *Valentine*, 956 F.3d at 803-04 (finding that irreparable harm, as well as the balance of equities and the public interest, all supported staying the preliminary injunction).

IV. The Court Should Hold a Hearing on This Motion Because It Failed To Hold a Hearing on the Preliminary Injunction Motion, As Contemplated By The Civil Rules.

This Court entered a preliminary injunction without holding a hearing. The Civil Rules plainly contemplate that a hearing be held on a preliminary injunction motion prior to the entry of such relief. Fed. R. Civ. P. 65; *see Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 432 n.7 (1974) ("The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application … ."). In addition to protecting the District's right to be heard and present argument, a hearing would also serve the Court's decisional process, including by helping to clarify the evolving circumstances and continuing developments in this case. This Court should therefore grant a hearing to reconsider the preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should grant the District's motion and vacate the preliminary injunction.

Dated: July 16, 2020.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

TONI MICHELLE JACKSON
Deputy Attorney General
Public Interest Division

/s/ Fernando Amarillas
FERNANDO AMARILLAS [974858]
Chief, Equity Section

/s/ Micah Bluming
MICAH BLUMING [1618961]
PAMELA DISNEY [1601225]
Assistant Attorneys General
ANDREW J. SAINDON [456987]
Senior Assistant Attorney General
441 Fourth Street, N.W.
Suite 630 South
Washington, D.C. 20001
(202) 724-7272
(202) 730-1833 (fax)
micah.bluming@dc.gov

Counsel for Defendants Quincy Booth and Lennard Johnson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, ***Plaintiffs*,** **v.** **QUINCY BOOTH, *et al.*,** ***Defendants*.**	**Civil Action No. 20-0849 (CKK)**

ORDER

Upon consideration of defendants' motion to alter and vacate the Court's preliminary injunction (Motion to Vacate), plaintiffs' opposition, and the entire record, it is this _____ day of _____, 2020,

ORDERED that defendants' Motion to Vacate is GRANTED, and it is further

ORDERED that the preliminary injunction entered on June 18, 2020 [99] is VACATED.

SO ORDERED.

_____
THE HONORABLE COLLEEN KOLLAR-KOTELLY
Judge, United States District Court
for the District of Columbia

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, **Plaintiffs,** **v.** **QUINCY BOOTH, *et al.*,** **Defendants.**	**Civil Action No. 20-00849 (CKK)**

DECLARATION OF BETH JORDAN

Pursuant to 28 U.S.C. § 1746, I, Dr. Beth Jordan, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained in this declaration and testify based on my personal knowledge acquired in the course of my official duties. I have previously submitted declarations in this matter [20-2], [82-2], [94].

2. The spread of coronavirus (COVID-19) in Department of Corrections (DOC) facilities has been stopped. As DOC reported publicly, as of June 15, 2020, there were no positive coronavirus (COVID-19) cases at DOC's correctional facilities.

3. That situation has remained stable. As of the date of this declaration, July 14, 2020, there are no positive coronavirus (COVID-19) cases at DOC's correctional facilities.

4. All DOC residents who previously tested positive for COVID-19 have been moved out of the isolation units and back into the general population in accordance with guidelines from DC Health and the Centers for Disease Control and Prevention (CDC). As I previously testified, DOC releases residents from isolation when they are free from fever for at least 72 hours without the use of fever-reducing medications; there are improvements in the resident's other symptoms,

including coughing and shortness of breath; and at least 10 days have passed since the resident's first symptoms appeared.

5. With the exception of new intakes who are placed on initial enhanced medical observation (at CDF if they are men and CTF if women), there have been no quarantine or isolation units operating at CDF and CTF since June 14, 2020.

6. Also as I previously testified, DOC has implemented an additional new pathway to ensure that residents in general population units receive attention from a medical provider within 24 hours of reporting a health issue. Since April 13, 2020, medical staff has walked the tiers of general population housing units to allow residents who have not submitted a sick call slip to alert medical staff of any issues; and medical staff will see those residents reporting COVID-19 symptoms or other serious health concerns at the sick call clinic on the same day. This new system is above and beyond our accreditation requirements and requires additional staff. Additionally, since May 18, 2020, nurses or medical assistants have visited general population housing units each day to pick up sick call slips so that the slips can be triaged within hours of the resident submitting one and any resident experiencing COVID-19 symptoms—or any other kind of medical concern—is seen within 24 hours from triage. Since June 23, 2020, DOC even further enhanced access to care by seeing residents within 24 hours of their sick-call slip submission.

7. Although these new protocols were initially designed to monitor and respond quickly to the small number of non-quarantined, non-positive residents in April and May, even though there are currently no quarantine or isolation units these protocols have been expanded to the entire population at CTF and CDF, representing a major enhancement in the medical care system.

8. To ensure that these new sick call systems have been effective, DOC recently conducted an internal audit analyzing all sick call slips from June 1, 2020, through June 24, 2020, at both CDF and CTF. The audit found that 100% of non-quarantine residents saw a health care provider within 24 hours of the sick-call slip being triaged. The only exception was one resident who submitted a slip but was not present at the housing unit during the sick call clinic—he was seen the next day. The audit also revealed that only 20% of the residents seen by a provider at sick call clinics completed a sick call slip; most residents were referred for medical attention through chronic care clinic providers, providers walking the tiers before the sick call clinic, attorney or court referrals, or as part of follow-up from the urgent care clinic. DOC is currently auditing this more recently enhanced process of ensuring that residents are seen within 24 hour of their sick-call slip submission.

9. DOC also recently conducted another round of testing a large sample of asymptomatic residents. On June 26, 2020, DOC—in collaboration with DOH and Unity—tested approximately 87 residents, including: (1) residents on the intake unit who have been there for more than 14 days; (2) residents on C2B, the CTF unit for inmates over 50 years old; (3) residents on SW1; and (4) residents on NE3. These residents were believed to be at the highest risk for COVID-19 as well as those who had not previously been tested. All tests came back negative.

10. As I previously testified, DOC began testing (on May 5, 2020) any resident to be transferred to Saint Elizabeths Hospital; cell mates of positive inmates (on May 18, 2020); new residents (on May 18, 2020); and any resident being transferred to a federal correctional facility (on May 22, 2020). DOC also tests residents prior to attending court hearings. DOC also continues to test those inmates who report or exhibit COVID-19 symptoms, though no such tests are currently pending. DOC also tests residents at intake and again 10 days after intake. As of June

15, 2020, residents are tested prior to release. DOC has adhered to each of these testing protocols since their initial implementation and plans to continue implementing them.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on July 14, 2020

/s/ Beth Jordan
BETH JORDAN, M.D.

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, **Plaintiffs,** **v.** **QUINCY BOOTH, *et al.*,** **Defendants.**	**Civil Action No. 20-00849 (CKK)**

DECLARATION OF LENNARD JOHNSON

Pursuant to 28 U.S.C. § 1746, I, Lennard Johnson, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained in this declaration, and testify based on my personal knowledge acquired in the course of my official duties, including my daily observations of conditions and procedures at District of Columbia Department of Corrections (DOC) facilities. I am a defendant and previously submitted declarations in this matter [20-1], [82-1].

2. DOC continues to enforce social distancing among inmates and staff, consistent with guidance from the Centers for Disease Control and Prevention (CDC) and the District of Columbia Department of Health (DOH). As I previously testified, staff and inmates are instructed to engage in social distancing in signs posted throughout the facilities and in a public address announcement that plays throughout correctional facilities every two hours. Staff are additionally reminded to enforce and engage in social distancing at roll call. Additionally, a surveillance team monitors video footage and informs supervisors of any social distancing and PPE violations, and discipline has been imposed on correctional officers who fail to implement

social distancing. DOC will continue to enforce social distancing through these measures consistently with CDC and DOH guidance.

3. DOC continues to take measures to enforce cleaning protocols and ensure cleaning supplies are available at all housing units. Since April 9, 2020, an assigned program analyst has called correctional officers at all housing units twice a day Monday through Friday (and on weekends beginning May 16, 2020) to ask if there are any cleaning supplies needed on the unit, confirms that the two-hour cleanings are being done, and confirms that documentation is being completed. Supervisors follow-up on any noted deficiencies. Since April 25, 2020, DOC has required that correctional officers verify that each cell is clean every day on the Housing Unit Cell Cleaning Verification Form. Also since that date, DOC has required that correctional officers complete the COVID-19 Housing Unit Checklist after each shift that requires correctional officers to note whether: (1) the housing unit has cleaning and hygiene supplies, (2) staff and residents wear masks, (3) all residents were allowed to shower and allowed one hour out of their cells, (4) residents were reminded to social distance, (5) COVID-19 information was discussed during roll call, and (6) any residents reported feeling ill. Since May 10, 2020, supervisors have conducted unannounced walkthroughs on each unit twice a week to ensure that COVID-19 precautionary measures are being adhered to. DOC has enforced these protocols since their initial implementation and plans to continue doing so consistently with CDC and DOH guidance.

4. As of July 7, 2020, DOC completed the renovation of new spaces for conducting video conference hearings with the Superior Court of the District of Columbia and the U.S. District Court for the District of Columbia. Since that time, DOC has allowed each resident with a hearing to speak with an attorney for a 15-minute video call prior to the start of the hearing.

5. Since the District entered Phase II of its Pandemic Recovery Plan on June 23, 2020, DOC has begun scheduling no-contact, in-person legal visits at CDF and CTF. Attorneys requesting in-person visits may contact CDF and CTF by fax to schedule a visit with clients at the facility.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 7/10/20

LENNARD JOHNSON

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, **Plaintiffs,** **v.** **QUINCY BOOTH, *et al.*,** **Defendants.**	**Civil Action No. 20-00849 (CKK)**

DECLARATION OF GITANA STEWART-PONDER

Pursuant to 28 U.S.C. § 1746, I, Gitana Stewart-Ponder, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained in this declaration, and testify based on my personal knowledge acquired in the course of my official duties, including regular observations of District of Columbia Department of Corrections (DOC) facilities and procedures. I previously submitted a declaration in this matter [82-7].

2. DOC has continued to undertake substantial efforts to increase staffing. As of July 13, 2020, 294 correctional officers had returned to work who were previously unavailable at various points during the crisis. This includes 83 of the 87 staff members who previously tested positive for COVID-19 and have since recovered. Other than 3 staff members who have not yet recovered, there are currently no staff members under self-quarantine at the advice of a physician or DOC.

3. As I previously testified, DOC has contracted with Rock Solid District Group, LLC for professional cleaning services at the Central Detention Facility (CDF) and Spectrum Management LLC for professional cleaning services at the Correctional Treatment Facility (CTF).

These vendors continue to perform the services for which they were contracted, including cleaning the common areas of all housing units on the secure and non-secure sides of the DOC facilities. The cleaning contracts are for a base period 90 days, with options to extend.

4. Also, as I previously testified, DOC contracted with Potomac-Hudson Engineering, Inc (PHE), a registered sanitarian, to provide onsite inspections and cleaning procedure plans. The sanitarian began work at DOC facilities on May 18, 2020. PHE has a base contract for 60 days, with options to extend up to 6 months.

5. Meanwhile, the Department of Corrections continues to advertise for a permanent sanitarian position for the facilities.

6. As I previously testified, a detail of inmates supervised by correctional officers continues to perform overnight cleaning of all areas of the correctional facilities, with the exception of the inmates' cells. During the day, the inmate detail cleans common areas and high-touch surfaces every two hours. The detail of inmates performed this cleaning prior to DOC's engagement of professional cleaners and will continue to do so while the cleaning contracts are in place.

7. Also, as I previously testified, inmates have access to supplies to ensure that their cells are clean. DOC has also fully implemented a new system that provides microfiber towels to all inmates for cleaning, rather than the paper towels previously used. During the morning roll call, correctional officers now receive sufficient cleaning cloths to be used by residents for cell and common-area cleaning. Another set of microfiber cloths is issued to correctional officers at the evening roll call. Every day, correctional officers issue each resident a microfiber cloth sprayed with peroxide multi-surface cleaner and disinfectant for cell cleaning. The environmental correctional officer pre-mixes the cleaning solutions based on the instructions provided on the

solution labels before the solution is sent to the housing units for correctional officer and inmate use. Cloths are collected and laundered after each use. Inmates are expected to clean their cells using the cleaning solution and microfiber towels provided every day.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on July 14, 2020

GITANA STEWART-PONDER

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, **Plaintiffs,** **v.** **QUINCY BOOTH, *et al.*,** **Defendants.**	**Civil Action No. 20-00849 (CKK)**

DECLARATION OF AMY LOPEZ

Pursuant to 28 U.S.C. § 1746, I, Amy Lopez, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained in this declaration, and testify based on my personal knowledge and information, including information provided to me by other District of Columbia employees in the course of my official duties. I previously provided a declaration in this matter. [82-8].

2. All staff and residents have received paper copies of educational information and—for all staff and residents with tablet access—through online training modules. Residents receive paper copies of information about COVID-19 on a weekly basis.

3. Since DOC launched the tablet messaging service on May 4, 2020, 289 residents have submitted attorney names and emails, and residents are reporting that they are using the tablets to communicate with their attorneys through the designated messaging system. DOC continues to work with the electronic platform vendor to accommodate new account requests from residents in a timely manner.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 7/14/2020

___/s/ Amy K. Lopez
AMY LOPEZ

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, **Plaintiffs,** **v.** **QUINCY BOOTH, *et al.*,** **Defendants.**	**Civil Action No. 20-00849 (CKK)**

DECLARATION OF CAMILE WILLIAMS

Pursuant to 28 U.S.C. § 1746, I, Camile Williams, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained in this declaration, and testify based on my personal knowledge and information, including information provided to me by other District of Columbia employees in the course of my official duties. I previously submitted a declaration in this matter. [82-9].

2. DOC and its telephone service providers continue to provide each resident a free, unmonitored and unrecorded telephone call to an attorney each day for up to 30 minutes. Between April 20, 2020, and July 11, 2020, residents used this phone system to make 2,618 legal calls at CTF and 1,737 legal calls at CDF.

3. DOC continues to improve the process for emergency legal calls. DOC developed processes for the Public Defender Service for the District of Columbia (PDS) and the Federal Public Defender for the District of Columbia (FPD) to register their staff attorneys' numbers with the automated system and request emergency legal calls with their clients. Additionally, DOC continues to make its centralized case management email address available for private attorneys and other legal entities to add their contact information to the automated system and to request

emergency legal calls by email. Between April 20, 2020, and July 11, 2020, there have been 3,234 calls facilitated through DOC's emergency legal call process. During this period, 3,705 emergency legal calls were requested—averaging 56 requested calls per workday—but some of those calls were not completed because, for example, the resident was unavailable (because of a court appearance, medical appointment, behavioral issues, or being released), the resident chose not to call his lawyer, or the resident's unit was on lockdown.

4. On June 11, 2020, 9 of the 50 cell phones DOC recently acquired for facilitating confidential legal calls were issued to case management staff along with 9 wired headsets. The remaining cell phones will be used with the 50 ordered wireless headsets, 8 of which arrived on July 1, 2020, and 42 of which are expected around late-August 2020.

5. The cell phones with the wired headsets were first used on June 15, 2020, after testing confirmed that there were no technical issues and case managers were trained on how to use them.

6. Since June 24, 2020, DOC residents have been able to make all emergency legal calls directly from the cells (if they reside in a single cell) or from a designated empty cell (if they do not have a single cell) using DOC's newly acquired cell phones and wired headsets. A case manager dials the phone number on record for the resident's attorney, places the cell phone in a locked box, gives the cell phone box and headset to the resident, and steps away from the cell. The case manager wipes each headset with disinfectant after each use. In cases in which this process cannot be implemented—such as instances of poor reception, excessive noise in the unit, or if a single or designated cell is unavailable—case managers facilitate the legal calls in the empty classroom in the case management suite or in their offices. DOC also honors requests from

attorneys that calls be made in case managers' offices because of reception or noise issues when the resident uses the cell phone.

7. DOC has also begun to facilitate video legal calls and continues to expand these capabilities. On June 18, 2020, DOC began video legal calls with the FPD. Every Thursday, between 10:00 a.m. and 2:00 p.m., DOC and FPD arrange for one-hour video legal calls between attorneys and clients at CDF. Effective July 10, 2020, every Friday, DOC and FPD arrange for one-hour video legal calls between attorneys and clients at CTF.

8. DOC and the Office of the Federal Public Defender for the District of Maryland (Maryland FPD) agreed to install an iPad each at CDF and CTF to allow for video visits between attorneys and clients one day a week at each location. DOC and Maryland FPD have arranged for legal calls to occur every Tuesday. Since July 7, 2020, DOC and Maryland FPD attorneys have coordinated video legal visits at each facility.

9. DOC is developing a plan to accommodate a video legal visit request recently received from PDS. While DOC finalizes that plan, DOC has provided video legal visits as requested from PDS attorneys and private counsel, using the WebEx video conferencing platform. DOC has additionally facilitated regular legal video calls for a deaf resident at CTF since May 18, 2020.

10. In May 2020, DOC received five tablets from American Prison Data Systems (APDS), the tablet vendor, to allow for confidential video conferencing between residents and their attorneys. Case managers and officers were trained on safety, sanitation, and security of the tablets, and testing was conducted in June 2020. During testing, technical issues were identified with three of the tablets, but, as of June 29, 2020, four of the five tablets were available for use with one out for repair. On July 1, 2020, a tablet was used to facilitate a video legal call, however,

case management identified several technical issues related to using these first generation ZOOM tablets (including connectivity, battery power and ease of use) which has limited a broader scheduled role out for use throughout the facility. ADPS offered these tablets as a temporary solution to allow for attorney/client communication as a response to pandemic related limitations to in person meetings; however, the current tablets are unknowingly cumbersome due to multiple required steps for scheduling and logging into programs. APDS is currently working to enhance APDS THRIVE – (Therapeutic Interactive Video Engagement), which will allow for a higher capacity of attorney/client meetings and have the ability to be used beyond the current single use capacity. APDS THRIVE is in development with anticipated release within the next 60 days. Once launched, DOC will create a new plan for use of the ZOOM tablets after testing has been conducted.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 7/13/2020

CAMILE WILLIAMS

EXHIBIT F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, **Plaintiffs,** **v.** **QUINCY BOOTH, *et al.*,** **Defendants.**	**Civil Action No. 20-00849 (CKK)**

DECLARATION OF DESIREE TOWNES

Pursuant to 28 U.S.C. § 1746, I, Desiree Townes, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained in this declaration, and testify based on my personal knowledge and information, including information provided to me by other District of Columbia employees in the course of my official duties.

2. I am Program Manager within the Programs and Case Management division of the District of Columbia Department of Corrections (DOC). I have worked for DOC since August 2015. In this role, I oversee inmate voting and the inmate grievance process, participate in policy development, and supervise 2 employees. My educational background includes a bachelor's degree and Juris Doctor from the University of Pittsburgh. Prior to working for DOC, I worked as the Chief of Staff and Associate Director with the DC Department of General Services, where I was responsible for overseeing Human Resources, Risk Management, Budget Office, Communications/Government Affairs, Information Technology, Performance Management and Strategic Planning. Prior to working for the District, I worked as a Compliance/Senior Analyst and contractor with the DC Office of the Chief Technology Officer, where I drafted legislation, legal

documents and interagency agreements while coordinating implementation of the Safe Passages Information System between several District agencies.

3. I provide this declaration to inform the Court about the inmate grievance process.

4. In January of 2020, DOC issued an updated inmate grievance procedure (IGP), a copy of which is attached (Policy and Procedure No. 4030.1L (eff. Jan. 9, 2020)) (the Policy).

5. Once the policy was approved, DOC began holding a series of "town halls" to explain the Policy to all inmates, discuss the new procedures and address any questions regarding the new Policy. DOC also placed posters in all housing units explaining the Policy. A copy of the English-language version of the poster is attached (posters in Spanish were also placed in all housing units). The Policy change became effective for inmates on March 2, 2020.

6. The Policy sets out the procedure for an inmate to file a grievance, generally in four stages—an informal complaint, a formal grievance, the Warden's Administrative Remedy, and Appeal to the Deputy Director. *See* Policy at 14–21 and Attachment A.

7. As stated in the poster, if an inmate fails to receive a satisfactory response, he or she may move to the next stage in the process. *See* Policy at 16, 17, 20.

8. Emergency grievances (for those matters "in which an inmate would be subjected to substantial risk of personal injury or serious and irreparable harm if the inmate filed the grievance in the routine manner with the normally allowed response time," Policy at 18) have a similar procedure. Inmates must submit emergency grievances—like informal complaints and other grievances—in a sealed envelope appropriately marked and put them in the IGP Box. *Id.* at 5, 11, 14, 16–19, 21, 23. As with other grievances, if an inmate does not receive a timely response to an emergency grievance, then the inmate may take the next stage of the process. *Id.* at 16. This has been the standard DOC interpretation of the Policy and its predecessors.

9. There is no provision in the Policy for staff to accept hand-delivery of complaints or grievances.

10. Counsel has provided me with a copy of Mr. Banks' emergency grievance dated March 24, 2020 and the attached declaration from Mr. Banks' attorney stating that the emergency grievance was submitted by email to the Director because staff at the Jail "refused to accept it." [89-8].

11. Because Mr. Banks did not put a paper copy of his emergency grievance in the IGP Box, DOC has no record of it. DOC has no record of Mr. Banks filing any grievance processed by the IGP unit, which means he did not act further after failing to receive a response to his emergency grievance.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 7/16/20

DESIREE TOWNES