COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION NO. 20-00855-D

STEPHEN FOSTER, et al.,
Plaintiffs,

3/28/2022 e-filed KG

v.

CAROL MICI, et al.,
Defendants.

OPPOSITION OF DEFENDANTS MICI AND TURCO TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants Carol A. Mici, Commissioner of the Department of Correction ("Department" or "DOC"), and Thomas Turco, former Secretary of the Executive Office of Public Safety and Security ("EOPSS"), submit this memorandum of law in opposition to the plaintiffs' Motion for Partial Summary Judgment on the Fourth Cause of Action in the Amended Complaint[1]and in support of their Cross-Motion for Summary Judgment on all Causes of Action alleged in the Amended Complaint. As grounds for their Cross-Motion, the defendants state that there are no material facts in dispute and the defendants are entitled to judgment as a matter of law.

INTRODUCTION

As of the date of service of the instant opposition and cross-motion, the number of active inmate COVID-19 cases within the Department's fifteen correctional facilities is zero. Defendants' Statement of Undisputed Facts ("SOF") ¶ 2. The plaintiffs nevertheless press on, moving for partial summary judgment on their Fourth Cause of Action, in which they seek a declaratory judgment that Commissioner Mici has failed to comply with Chapter 24 of the Acts of 2021, Section 2, budget

[1] The plaintiffs have not moved for summary judgment on their other causes of action. This appears to be a tacit admission that they know they cannot succeed on their constitutional claims.

line item 8900-0001 (hereinafter "budget line item 8900-0001"). Plaintiffs also seek the immediate release of an unspecified number of inmates in their Fourth Cause of Action. [2] As set forth more fully below, the plaintiffs are not entitled to a declaration of any sort, much less a declaration in their favor.

As to the plaintiffs' constitutional claims, the Supreme Judicial Court ("SJC"), in both May 2020 and November 2021, definitively and resoundingly ruled that the plaintiffs could not prove defendants Mici and Turco were deliberately indifferent in their comprehensive responses to the COVID-19 pandemic. The first ruling, Foster v. Commissioner of Correction, et al., 484 Mass. 698 (2020) (Foster I), came only weeks into the global pandemic and highlighted Commissioner Mici's impressive and immediate response to COVID-19. The SJC's second ruling, Foster v. Commissioner of Correction, et al., 176 N.E. 3d 610 (2021) (Foster II), upholding this Court's denial of the plaintiffs' motion for injunctive relief based on alleged constitutional violations (Memorandum of Decision and Order on Plaintiffs' Second Motion for Preliminary Injunction, Foster v. Mici, et al., 2084-CV-00855 (Decision) (February 25, 2021), summarized the DOC's extensive, ever-improving responses to the pandemic.

As the SJC has held twice, the plaintiffs' efforts are nothing short of futile. Accordingly, not only should the plaintiffs' Motion for Partial Summary Judgment on the Fourth Cause of Action be denied, and but the defendants' Motion for Summary Judgment on all causes of action should be granted.

As the SJC and this Court found in its 2020 and 2021 rulings, the Department's efforts to prevent the spread of COVID-19 were exemplary from the pandemic's beginning in March 2020. Commissioner Mici has aggressively continued to offer clinics for vaccinations and boosters. SOF

[2] The COVID state of emergency declared by Governor Baker on March 10, 2020 was repealed on June 15, 2021 and never reinstated.

¶ 1; Mici Deposition, 138:22-138:24. Nearly 80 percent of inmates are fully vaccinated. Id.; Mici Deposition, 107:17-107:21.

On August 19, 2021, Governor Baker issued Executive Order No. 595 requiring, with few exceptions, as a condition of employment that all Executive Department employees receive the COVID-19 vaccination. SOF ¶ 3; See Executive Order #595: COVID-19 Vaccination Requirement for Executive Department Employees, Governor Charles D. Baker, August 19,2021, https://www.mass.gov/alerts/executive-order-595-covid-19-vaccination-requirement-for-executive-department-employees. Mirroring the world at large, the Department saw an uptick in cases during the spread of the Omicron variant that has apparently passed (as public health experts predicted). For example, Boston is dropping its indoor mask mandate on March 5, 2022, see Boston.gov., and schools throughout the Commonwealth are dropping mask mandates, see https://www.doe.mass.edu/covid19/on-desktop/2022-0209mask-requirement-update.pdf as COVID-19 becomes "endemic" in the community. Notwithstanding, per public health guidelines, inmates and staff in Department facilities are still required to wear masks. SOF ¶ 4; https://www.mass.gov/info-details/covid-19-mask-requirements#mask-requirements-in-certain-locations. The Department continues to require testing of all visitors before entering correctional facilities, as well as regular testing of inmates and staff at all facilities. SOF ¶ 5; https://www.mass.gov/service-details/visitation-during-covid-19. In light of the near-disappearance of COVID-19 in Department facilities, and as a result of the Department's successful efforts for two years, the Ombudsman, as of March 2, 2022, has recommended that the Department reduce social distancing of staff and inmates to three feet, based on "low COVID-19 numbers in staff and inmates; COVID-19 infection rates remain below 5 percent in the applicable DOC facility; and ongoing testing for staff and inmates as established." SOF ¶ 6; SARS-COV-2

Public Health Compliance and Mitigation Standards, Updated Guidelines from the Office of the Ombudsman, February 28, 2022, https://www.mass.gov/doc/updated-guidelines-feb-28-2022/download.

STATEMENT OF FACTS

In addition to the factual context set forth above, the defendants refer the Court to, and incorporate by reference, the parties' Joint Rule 9A Statements of Undisputed Material Facts, submitted in support of the parties' respective Motions for Summary Judgment.[3]

STANDARD OF REVIEW

Summary judgment shall be granted where there are no material facts in dispute and the moving party is entitled to a judgment as a matter of law. Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community National Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass.R.Civ.P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the moving party is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). "The Court views 'the facts, together with all reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party . . . .'" Cesso v. Todd, 92 Mass. App. Ct. 131, 135 (2017), quoting Pugsley v. Police Dept. of Boston, 472 Mass. 367, 370-371 (2015). Where the party moving for summary judgment does not have the burden of proof at trial, this burden may be met by either submitting affirmative evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Once

[3] Defendants will not repeat the facts already described in numerous prior pleadings and rulings since this case began in April 2020 and incorporated by reference, but refer the Court to Foster I; Foster II ; and Decision.

the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a material fact to defeat the motion. Pederson, supra, at 17.

ARGUMENT

I. THE COURT SHOULD DENY THE PLAINTIFFS' SUMMARY JUDGMENT MOTION AND GRANT THE DEFENDANTS' CROSS-MOTION AS TO THE BUDGET LINE ITEM.

A. Declaratory Relief Is Inappropriate Because There Is No Actual Controversy As To The Statute's Construction.

The dispute in the present litigation is whether Commissioner Mici has ignored the budget law by determining not to release certain inmates on furlough, home confinement, or medical parole, in violation of that law. The answer is clearly no. The relevant budget line-item language, while contemplating the potential reduction of the prison population through various methods, makes absolutely clear that it is within Commissioner Mici's sole discretion, based on her expertise, as to if and when an inmate "can be safely released" to the community. Moreover, plaintiffs have also ignored the Commissioner's compliance with the other provisions of the budget law requiring her to meet established public health standards regarding COVID-19, as directed by the Ombudsman.

The plaintiffs' complaint for declaratory relief therefore is not appropriate because "it appears to a certainty [that plaintiffs are] entitled to no relief under any set of facts which could be proved in support of [their] claims." Harvard Law School Coalition for Civil Rights v. President and Fellows of Harvard College, 413 Mass. 66, 68 (1992). The purpose of the declaratory judgment statute, G.L. c. 231A, is "to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations." Frawley, 473 Mass. at 724; G.L. c. 231A, § 9.

B. The Budget Line Item Confers Discretion On Commissioner Mici, Who Has Dutifully Exercised It.

The plaintiffs' primary argument is that Commissioner Mici and the Department have "ignored" the language of the budget provision and have "failed to consider" the various inmate population reduction methods listed therein. This alleged categorical "failure to consider" various methods is belied by the facts.

Budget line item 8900-0001 provides in relevant part,

> that given the continued prevalence and threat of the 2019 novel coronavirus within department of correction facilities, the commissioner of correction shall release, transition to home confinement or furlough individuals in the care and custody of the department who can be safely released, transitioned to home confinement or furloughed with prioritization given to populations most vulnerable to serious medical outcomes associated with the 2019 novel coronavirus according to the Centers for Disease Control and Prevention's guidelines; provided further, that the department shall consider, but shall not be limited to considering: (a) the use of home confinement without exclusion under chapter 211F of the General Laws; (b) the expedition of medical parole petition review by superintendents and the commissioner; (c) the use of furlough; (d) the maximization of good time by eliminating mandates for participation in programming for those close to their release dates; and (e) awarding credits to provide further remission from time of sentence for time served during periods of declared public health emergencies impacting the operation of prisons.

The plaintiffs claim that the budget line item creates a "decarceration" law and argue that the intent of the legislature was to drastically reduce the population of incarcerated individuals across all facilities in the state. The plaintiffs base their latest arguments largely on one sentence in the 8900-0001 budget line item: "[T]he commissioner of correction shall release, transition to home confinement or furlough individuals in the care and custody of the department who can be safely released, transitioned to home confinement or furloughed . . . ." This language, they claim, requires Commissioner Mici to release large numbers of inmates. As the plaintiffs have always

conceded, the language leaves the application of the "depopulation" methods entirely to the Commissioner's discretion.

Significantly, and as the plaintiffs admit, the budget language properly leaves to the Commissioner's discretion the decision as to which inmates to release. The key words in the budget language are that the Commissioner should consider "individuals who can be safely released." (emphasis added). Therefore, it is up to Commissioner Mici, with her extensive correctional experience and knowledge of relevant statutes and regulations based on more than 34 years of employment with the Department, to determine which inmates "can be safely released." She has been doing this all along, relying on both existing statutes and DOC regulations and policies. The undisputed facts demonstrate Commissioner Mici's full compliance with the budget language: as the language requires, she has considered the five tools for inmate release stated in the budget, and uses the mechanisms that she, in her discretion and under the constraints of the law, can safely be used to release inmates. It is also clear that the legislature enacted the budget language to protect inmates during "the continued prevalence and threat of the 2019 novel coronavirus." (emphasis supplied). [4]

In each case it is the Commissioner who approves inmates for release based on the strictures of the laws and consistent with public safety and security criteria, which Commissioner Mici continues to apply in accordance with existing statutes, the Department's regulations and policies, and the budget law. As Commissioner Mici testified at her 2021 deposition, she considered and implemented the use of 1) electronic monitoring/ home confinement, Mici Deposition, 96-97; she considered and rejected the use of 2) furloughs, Mici Deposition, 101:5; she considered and expedited 3) medical paroles, within the limits of the statute; and she

[4] The COVID state of emergency declared by Governor Baker on March 10, 2020 was repealed on June 15, 2021 and never reinstated.

considered and rejected 4) the grant of unearned good time and "pandemic credits." SOF ¶¶ 7-10; Mici Deposition, 102:12.

Finally, it must be noted that the reduction in population was only part of the legislature's overall intent, as the budget line item sets forth a number of provisions regarding the health and well-being of inmates and the Department's compliance with public health standards. The budget line item further provides that the appointed Ombudsman submit a report to the joint committee on the judiciary and the joint committee on public health not less than biweekly, with topics to include the Department's efforts to mitigate the rate of infection, efforts relative to safe depopulation relative to COVID-19, policies to further mitigate the rate of infection, the amount of population reduction achieved, and the compliance or noncompliance with the office's established public health standards. SOF ¶ 17.

C. The Budget Line-Item Does Not Override Existing Laws And Regulations.

The plaintiffs argue that the 2022 budget line-item language modifies a slew of specific DOC and public safety-focused statutes. It is difficult to believe that the legislature intended, with 197 words in an annual budget line item, to modify or supersede long-established law. In fact, the 2022 budget language does neither, and neither the law of statutory construction nor common sense suggest otherwise. The legislature intended to provide mechanisms for release of inmates during a pandemic, but it also recognized the Commissioner's responsibilities by stating that she should consider only inmates "who can safely be released." This requirement keeps in force longstanding public safety and correctional statutes, especially relating to the Commissioner's overarching duty to protect public safety.

Nothing in the budget language suggests it is intended to affect any existing statute. The Supreme Judicial Court has long held that "[i]mplied repeal of a statute is disfavored, and we

should not impliedly repeal a portion of [the statute] unless it 'is so repugnant to, and inconsistent with, the later enactment that both cannot stand.'" Commonwealth v. Harris, 443 Mass. 714, 725 (2005), quoting LaBranche v. A.J. Lane & Co., 404 Mass. 725, 728 (1989) (citations omitted). Most importantly, "[a] statute is not to be deemed to repeal or supersede a prior statute in whole or in part in the absence of express words to that effect or of clear implication." Commonwealth v. Hayes, 372 Mass. 505, 512 (1977) (citation omitted). As the SJC more recently held, "[u]nder our "long standing rule of statutory interpretation," the implied repeal of a statute by a subsequent statute has "never been favored by our law." George v. National Water Main Cleaning Company, 477 Mass. 371, 378 (2017).

Further, the plaintiffs assert that "while courts attempt to read statutes in harmony, when there is a direct contradiction, the new law controls." Pl. Motion, p. 11. This argument fails for two reasons:

First, as the SJC has explained, "[w]here two statutes appear to be in conflict, we do not mechanically determine "that the more 'recent' or more 'specific' statute . . . trumps the other." Harris, 443 Mass. at 725. Instead, the Court "endeavor[s] to harmonize the two statutes so that the policies underlying both may be honored." Id. (emphasis added). Here, the budget language and the existing statutes work in tandem. The budget language, while giving the Commissioner discretion to use various methods to release inmates, also makes clear that only inmates "who may safely be released" are included. Therefore, the budget language concerning COVID-19 measures and the existing statutes on furlough, medical parole, and earned good time, work together both to protect inmates from COVID-19 and to protect public safety.

Second, and more obviously, the budget language simply does not state an intention by the legislature to repeal or "rewrite" any existing statute. As noted above, courts disfavor "implied" repeal of a statute by a subsequent statute. Nothing in the budget language suggests repeal.

The three cases cited by the plaintiffs to support their new-versus-old statute argument do not, in fact, support their argument. In Doe v. Att'y Gen., 425 Mass. 210 (1997), Wing v. Comm'r of Prob., 473 Mass. 368 (2015), and Berrios v. Dep't of Pub. Welfare, 411 Mass. 587 (1992), the SJC held that where two statutes appear to conflict, courts should consider which law is more specific, favoring specific statutes over general ones.

For example, in Doe the SJC found that a statute forbidding the release of juveniles' sex offense records had been superseded by a newer, more specific sex offender statute that allowed the release of certain juvenile records. The Court found that a portion of the old law had been superseded by the specific provision of the new law. 425 Mass. at 215-216. The Court supported this position by acknowledging that the legislature was aware of the juvenile act when it passed the sex offender act because it used the term "youthful offender" that had been defined by the juvenile act. Id., at 215.

In Wing, the Court held that a statute specifically protecting certain sealed criminal records controlled over the more general statutes regarding discovery in criminal cases. 473 Mass. at 373-34. Similarly, in Berrios, the Court upheld an agency's emergency regulation because it comported with specific language in a budget line item requiring a cut in welfare payments, particularly where the language of the line item combined with the substantial reduction in funds provided strong indication that the legislature intended to focus funds. 411 Mass. at 596. As the Court held, "[a] state administrative agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing." 411 Mass. at 595.

If, as the plaintiffs argue, the budget language supersedes portions of existing statutes and regulations – including, for example, G.L. c. 127, § 90A, which regulates and limits furloughs – then the budget language is so general as to be meaningless. The budget language does not define "furlough" or state any parameters for release; if the Court accepts the plaintiffs' argument, inmates would be released on furlough without any limits whatsoever. It is absurd to suggest that the legislature intended for the Commissioner to release inmates for unspecified periods unconstrained by the strictures of statute or regulation.

The result would be chaos. The budget language does not state what parts of the existing statutes would be affected; the plaintiffs' interpretation, unsupported by any language in the budget item, is that any parts of statutes that do not give effect to the legislature's "intent" should be modified.[5] In fact, the legislature in the budget language does not even acknowledge the existing statutes. The only reference to a statute is to G.L. c. 211F, which does not apply to the Department. In effect, the plaintiffs are asking this Court to "rewrite" existing statutes to fit their interpretation of the budget language. This would include, at the least, statutes on furloughs, home confinement, medical parole, and earned good time. The legislature has now twice passed the budget language, neither time providing any specifics or guidance; the language only generally mentions potential methods for release. Presumably, the legislature recognizes Commissioner Mici's virtually unfettered discretion in the management of the Department based on her judgment, gained through decades of correctional experience. Mici Deposition, 14:21-15:19.

Up until the plaintiffs' instant motion, the plaintiffs had argued that the budget measure's reference to G.L. c. 211F in conjunction with home confinement suggested the legislature's

[5] The plaintiffs do not address the budget language's effect on Department regulations such as 103 CMR 411, Deductions from Sentence, and 103 CMR 463, Furloughs, both properly promulgated regulations that have the force of law. See Berrios, supra, at 595.

intention to expand home confinement beyond any reasonable bounds. Now the plaintiffs argue that the legislature's reference to G.L. c. 211F is a mere "typographical error." This claim fails on two counts: first, the reference is admittedly inapposite, as the plaintiffs concede, because G.L. c. 211F does not apply to the Department; and second, even being aware of the original error, the legislature retained it in the budget language for a second year. If, as the plaintiffs argue, we should parse the plain budget language for the legislature's intent, we should assume the legislature intended to cite an inapplicable statute in the budget language, and as such, it is inapplicable to the Department with no relation to home confinement.

Even if G.L. c. 211F applied here, it contains restrictions that would bind the Commissioner, who is tasked with considering inmates eligible and appropriate for release in light of public safety:

> No offender shall be eligible for sentencing to a community corrections program who is: (1) convicted of a crime that results in serious bodily harm or death to another person, excluding offenses in which negligence was the primary element, (2) convicted of rape, attempted rape, or sexual assault, or (3) convicted of a crime involving the use of a firearm.

M.G.L. c. 211F. Even if these restrictions were lifted, the ultimate factor the Commissioner is required to consider before releasing any inmate is whether the inmate "may safely be released." Pursuant to 103 DOC 468.04, Electronic Monitoring, inmates must be eligible and suitable, including a low risk of recidivism for both general and violent crimes. https://www.mass.gov/doc/doc-468-electronic-monitoring/download.

1. Commissioner Mici Remains Bound By Existing Statutes.

Commissioner Mici is bound by the numerous existing statutes, grounded in public safety considerations, that set specific parameters on her statutory authority to release inmates, including those concerning medical parole, furloughs, electronic monitoring, and earned good time. The

budget law offers certain mechanisms for release of inmates during a pandemic, but it also recognizes the Commissioner's responsibilities by expressly stating that she should consider only those inmates "who can safely be released." This requirement keeps in force longstanding public safety and correctional statutes, especially relating to the Commissioner's overarching duty to protect the public safety.

a. Medical Parole

The medical parole statute, G.L. c. 127, § 119A, became effective on April 13, 2018. G.L. c. 127, § 119A describes in detail the statutory requirements to be eligible for medical parole. It provides that "[i]f the commissioner determines that a prisoner is terminally ill or permanently incapacitated such that if the prisoner is released the prisoner will live and remain at liberty without violating the law and that the release will not be incompatible with the welfare of society, the prisoner shall be released on medical parole." G.L. c. 127, § 119A(e). These are the same eligibility criteria required for traditional parole. G.L. c. 127, § 130. The medical parole statute further defines "permanent incapacitation" as a "physical or cognitive incapacitation that appears irreversible, as determined by a licensed physician, and that is so debilitating that the prisoner does not pose a public safety risk" and "terminal illness" as a "condition that appears incurable, as determined by a licensed physician, that will likely cause the death of the prisoner in not more than 18 months and that is so debilitating that the prisoner does not pose a public safety risk." G.L. c. 127, § 119A.

The statute prescribes timelines: the superintendent must issue a recommendation "not more than 21 days after receipt of the petition" and "[t]he commissioner shall issue a written decision not later than 45 days after receipt of a petition." The superintendent of a correctional facility shall consider a prisoner for medical parole upon a written petition and must transmit a

recommendation with a medical parole plan, a written diagnosis by a licensed physician, and an assessment of the risk for violence that the inmate poses to society. See G.L. c. 127, §119A(c)(1). The written petition can be submitted by the inmate, the inmate's next of kin, a medical provider of the correctional facility or a member of the Department's staff. Id. If a Department employee or vendor feels that an inmate is eligible for medical parole, they can start a petition by asking on behalf of the Superintendent of the facility where the inmate is housed to apply for medical parole, and the process would begin. Mici Deposition, 27:15 – 27:20. Department employees and vendors are also aware of which populations are immune compromised or medically compromised and can submit a petition where warranted. Id., 95:5-95:9. As of July 15, 2021, there were approximately eight petitions submitted by Department employees, including three or four submitted by Commissioner Mici herself, and one petition submitted by a Department vendor. Id., 27:6-30:18. In an additional effort to prioritize vulnerable populations, the Department worked in conjunction with the Committee for Public Counsel Services ("CPCS") by sharing lists of inmates in medical units. SOF ¶ 11; Mici Deposition, 94:19-94:24. As a result, CPCS assisted with preparing medical parole petitions and creating home plans. Id., 94:24-95:2.

Despite all best efforts by Commissioner Mici and her staff, the difficulty of preparing a comprehensive medical parole plan (including, at minimum, post-release housing and medical care) as required by Buckman v. Commissioner, 484 Mass. 14 (2020), makes expediting the process extremely difficult. As a result of the COVID-19 pandemic, Commissioner Mici asked that upon receipt of a petition, superintendents needed to prioritize them as quickly as possible, while also acknowledging the various other tasks required of them at the institutions. Mici Deposition, 20:1-20:5. The medical parole plan is "a comprehensive written medical and psychosocial care plan specific to a prisoner and including, but not limited to: (i) the proposed

course of treatment; (ii) the proposed site for treatment and post-treatment care; (iii) documentation that medical providers qualified to provide the medical services identified in the medical parole plan are prepared to provide such services; and (iv) the financial program in place to cover the cost of the plan for the duration of the medical parole, which shall include eligibility for enrollment in commercial insurance, Medicare or Medicaid or access to other adequate financial resources for the duration of the medical parole." G.L. c. 127, § 119A.

The statute also requires notifications to the district attorney and any victims registered under G.L. c. 258B and provides district attorneys and family members of murder victims with the option to request a hearing before the Commissioner. G.L. c. 127, § 119A. Commissioner Mici shortened the time frame to five days for victims and districts attorneys to respond to the medical parole petition in order to receive information more quickly into her office due to the extremely high volume of petitions, and so that any hearing requested by a DA or victim may be scheduled as quickly as possible. Mici Deposition, 19:11- 19:18. If the Commissioner is inclined to grant medical parole, the Parole Board must be notified to approve the proposed release plan and begin their process for release on medical parole. Then, when the Commissioner reaches a decision, notification must be made to the district attorney, local police departments, the state police, and any registered victims "[n]ot less than 24 hours before the date of a prisoner's release on medical parole." G.L. c. 127, §119A(2)(e).

Submissions of medical parole petitions have risen exponentially since the enactment of G.L. c. 127, § 119A in April 2018, particularly since the beginning of the COVID-19 pandemic. SOF ¶ 12. From April 13, 2018 to June 30, 2019, there were a total of 29 medical parole petitions. Id.; See Report Regarding Medical Parole Required by MGL Chapter 127, §119A to the Clerks of the House and Senate, the Senate and House Committees on Ways and Means, and the Joint

Committee for the Judiciary, March 1, 2019 and March 10, 2020, https://www.mass.gov/lists/department-of-correction-annual-reports#medical-parole-reports-. Between July 1, 2019 and June 30, 2020, there were 270 inmates who petitioned for medical parole, of which 26 were granted medical parole. Id., December 1, 2021. From July 1, 2020 to June 30, 2021, there were 211 inmates who petitioned for medical parole, of which 17 were approved. Id., February 8, 2022.

b. Furloughs

Furloughs are strictly defined by statute. Massachusetts General Laws c. 127, § 90A states in relevant part that the Commissioner may allow a "committed offender under prescribed conditions to be away from such correctional facility but within the commonwealth for a specified period of time, not to exceed fourteen days during any twelve-month period nor more than seven days at any one time . . ." Inmates serving sentences for first-degree murder and several other violent or sex offenses are not eligible. G.L. c. 127, § 90A.

Commissioner Mici considered, and rejected, using furloughs as a tool to reduce the inmate population, for both legal and practical reasons. SOF ¶ 8. Commissioner Mici "did not feel that putting an inmate in the community for up to 14 days and bringing them back was appropriate during a pandemic." Mici Deposition, 101:8-101:11. As she has stated, "[a]ny inmate may apply for a furlough, but only for specific purposes consistent with G.L. c. 127, § 90A and 103 CMR 463.07(2), including a relative's funeral, to obtain medical services that cannot be provided in the facility or in an outside hospital, to meet with a prospective employer, or to find prospective housing. Inmates may only be furloughed within Massachusetts." SOF ¶ 13; Exhibit 1, Affidavit of Carol Mici, January 22, 2021, ¶ 18. Also, 103 CMR 463, Furloughs, a properly promulgated

regulation, sets parameters on inmate furloughs. In addition to precluding convicted murders and other violent or sexual offenders,

> inmates shall be required to have served at least 50% of the time between their effective date of sentence and their parole eligibility date or earliest release or discharge date, whichever is less, and shall be within three years of their parole eligibility date or earliest release or discharge date, whichever is less, before being eligible for an initial furlough.

103 CMR 463.07, Eligibility Requirements.

Even without the legal constraints, Commissioner Mici noted that it is impractical to release an inmate for only a brief period (i.e., not more than seven days at any one time and not to exceed fourteen days during any twelve-month period) during a pandemic and then bring the inmate back into custody. Mici Deposition, 101:8-101:11, see G.L. c. 127, § 90A; 103 CMR 463, Furloughs.

c. Electronic Monitoring

The Department's electronic monitoring (home confinement) policy, 103 DOC 468, Electronic Monitoring, went into effect on February 7, 2021; planning for the program began before the passage of the 2020 budget language. Massachusetts General Laws c. 127, §§ 48, 49, and 49A and 103 DOC 468, Electronic Monitoring, limit the number and type of inmates who are eligible for release on electronic monitoring.

Only inmates in pre-release or minimum security who are within one year of their release date or parole eligibility date may be eligible. 103 DOC 468.04, Eligibility. Inmates in medium security or higher, first-degree murderers, and sex offenders are not eligible for release on electronic monitoring. Id. Inmates in minimum security who are eligible are evaluated for suitability through the classification process, in which all aspects of an inmate's incarceration are reviewed and security status is determined. Id.; Mici Deposition, 100:11-23. Inmates wear a GPS

bracelet and must either work or participate in an educational program. 103 DOC 468.03, Electronic Monitoring.

Since the program began in 2021, eighteen inmates have been placed on electronic monitoring in the community. SOF ¶ 14. The Department regularly reviews inmates for eligibility, and those inmates go through a process to determine their suitability for electronic monitoring. Id.; Mici Deposition, 100:11-23. As Commissioner Mici testified at her deposition, inmates are "constantly being reviewed by classification . . . classification is taking place all the time." SOF ¶ 14; Mici Deposition: 99:20-100:20. Commissioner Mici further noted that there is a "process in place, and as inmates become suitable and eligible, they work with the electronic monitoring team to develop home plans, go out to the community, check out the home plans…" Id., 99:21-100:1. Contrary to the plaintiffs' assertions, the strictures of the relevant laws and policy preclude the use of electronic monitoring as a tool of mass reduction in the inmate population.

d. Earned Good Time

The budget line-item states that the Commissioner "shall consider" 1) "the maximization of good time by eliminating mandates for participation in programming for those close to their release date"; and 2) "awarding credits to provide further remission from time of sentence for time served during periods of declared public health emergencies impacting the operation of prisons." The plaintiffs claim that "[t]he law provides for a new type of credits against sentences for time served since the public health emergency was declared last March," and that its language mandates that the Commissioner begin "awarding credits." But, like most of the rest of the line item, this language only requires the Commissioner to "consider" awarding additional credits. Whether to "award" them, and for what program participation they are awarded, is entirely within her discretion.

Pursuant to G.L. c. 127, §§ 129C, 129D, and 103 CMR 411, Deductions from Sentence, inmates may receive up to fifteen hours per month of "earned good time" for participation in programming and employment. G.L. c. 127, § 129D states that "[t]he commissioner may grant . . . a further deduction of sentence pursuant to this section." Courts have long held that inmates have "no enforceable right to these programs or benefits, which are subject to the commissioner's discretion." Jackson v. Commissioner of Correction, 388 Mass. 700, 703 (1983); Commonwealth v. DeWeldon, 80 Mass. App. Ct. 626, 632-633 (2011) ("A prisoner does not have any entitlement to earned good time until the commissioner acts"). In Haverty v. Commissioner of Correction, 440 Mass. 1, 9 (2003), the SJC held that "[t]he clear language of the statute indicates that good time credits . . . must be earned." Commissioner Mici explained that good time is meant to be given for participation in programming and education that will help the inmate when he returns to the community: "it has to be earned, and the last three months of your sentence, many inmates when they find out it's free, they don't do anything." Mici Deposition,102:14-18. Commissioner Mici further explained that she is "already pushing the limits of the statute there, but [she] think[s] inmates need to have a solid release date, and it can't keep fluctuating based on earned good time or other things…the last 90 days was appropriate." Id., 102:20-102:24. In response to the COVID-19 pandemic and the budget language, Commissioner Mici considered awarding credits to provide further remission from the time of sentence for time served by doing "creative things" such as "the journal program, the COVID education packets, the completion credits, the fact that as soon as [DOC] could get staff back in to produce packets, and get inmates enrolled back in programs, [DOC] got right back into that." SOF ¶ 15; Mici Deposition, 103:1-103:18.

The SJC has held that "the legislative history buttresses the clear language of the statute, indicating that earned good time credits should 'make incarceration a more personally rewarding

experience and improve prisoners' lives outside of prisons." Haverty, supra, at 9. The SJC found that "[t]his is also consistent with the legislative policy behind G.L. c. 124, § 1(e), which authorizes the commissioner to create programs to rehabilitate inmates and thereby make their reentry into society more likely to succeed." Haverty, supra, at 9 (citations omitted). In other words, as the SJC noted, earned good time is a "benefit," awarded to inmates whose participation in programming or employment is a positive step toward their rehabilitation and possible future release to the community. It is an incentive to encourage inmates to take advantage of the opportunities for personal improvement.

It is telling that the two budget language items concerned with good time are vague in terms of both the number of "special" credits to be awarded and the meaning of "those close to their release dates." The budget item defines neither the specific number of credits to be awarded, nor the meaning of "those close to their release dates." Combined with the overall declaration that the Commissioner "shall consider" these two items, the language can mean only one thing: whether to award extra good time hours or credits, to whom, and for what reason, is entirely discretionary.

II. THE BUDGET LINE-ITEM LANGUAGE NOT ONLY DEFERS TO COMMISSIONER MICI'S DISCRETION, BUT ALSO REQUIRES THAT SHE EXERCISE HER DISCRETION IN MATTERS OF PUBLIC SAFETY.

It is undisputed by the plaintiffs that the budget language grants Commissioner Mici full discretion in the matter of depopulation methods. SOF ¶ 16. The law does not require otherwise. The U.S. Supreme Court has repeatedly held that correctional officials are entitled to substantial deference in implementing rules and providing for institutional safety and security. See Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326 (2012); Turner v. Safely, 482 U.S. 78, 84-85 (1987). "Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they

face." Florence, 566 U.S. at 326. The budget language indisputably places the decision of what actions to take in the hands of the Commissioner.

A. The Ombudsman Submits Biweekly Reports Delineating The Department's Ongoing Mitigation Efforts And Compliance With The Budget Line Item.

In asserting that Commissioner Mici has ignored the budget law, plaintiffs conveniently choose to ignore provisions contained in the second half of the law, which provides an enforcement mechanism outside of the courts, which tacitly obviates judicial intervention. Specifically, the line item requires the appointment of an ombudsman, who

> shall establish public health standards, using recommended standards and guidance from public health experts, to evaluate the department's compliance or noncompliance with best practices; provided further, that not less than biweekly, the office shall provide the joint committee on the judiciary and the joint committee on public health with a report on: (1) the department's efforts to mitigate the rate of infection in facilities under its purview; (2) the department's efforts taken relative to safe depopulation relative to the 2019 novel coronavirus; (3) the department's policies in development to further mitigate the rate of infection in correctional settings; (4) the amount of population reduction achieved to-date by the use of the mechanisms for release, home confinement or furlough stated in this item; and (5) the department's compliance or noncompliance with the office's established public health standards.

SOF ¶ 17.

If the Ombudsman finds that the Department is not taking actions necessary to mitigate the rate of infection in its facilities or is in noncompliance with established public health standards, the Ombudsman can recommend that the legislature require the Commissioner to publicly testify before the legislature's joint committees on the judiciary and public health and work on a remediation plan to address any concerns. SOF ¶ 18. This provision is key, because it gives the

Ombudsman a way to address any serious deficiencies it finds in the Department's handling of COVID-19.[6]

In six months of monitoring the Department, as of March 4, 2022, the Ombudsman has not recommended to the relevant committees that the Commissioner be summoned to "discuss the department's noncompliance." SOF ¶ 19. The reason: the Ombudsman's office is satisfied with the Department's good-faith efforts to protect inmates from COVID. SOF ¶ 20. This is borne out in the biweekly reports from the Ombudsman to the legislature. Id.; See Office of the Ombudsman-Massachusetts Department of Correction COVID-19 Update & Mitigation Compliance Reports (OR), https://covidombudsman-madoc.org/view-reports/.

Commissioner Mici has continuously met with the Ombudsman to discuss any issues that arise and has enthusiastically accepted and implemented suggestions to further mitigate COVID-19 rates. Beginning on October 11, 2021, the Ombudsman's office conducted observation visits of facilities with areas of focus on: proper use of PPE including masks; improved quality of PPE provided to DOC staff and Correction Officers; access to hand sanitizer as a safe alternative to soap and water, as well as the instructions and education of handwashing; cleaning procedures, proper maintenance of social distancing, and understanding by staff and inmates regarding the reasons for COVID-19 precautions. SOF ¶ 21; OR No. 3, October 13, 2021, https://covidombudsman-madoc.org/view-reports/.

The Ombudsman also reports "Massachusetts Department of Correction Interactions" in the reports which outline the weekly meetings held between the Ombudsman and Commissioner

[6] The relevant budget language states that **"**[i]f the office determines that the department is not taking actions necessary to mitigate the rate of infections in facilities under its purview or is in noncompliance with its established public health standards, the office may recommend that [the legislature] require the commissioner to testify in a publicly available forum to discuss the department's noncompliance and a remediation plan to meet the office's public health standards." Chapter 24 of the Acts of 2021, Section 2, line item 8900-0001.

Mici and include topics such as vaccine compliance, cleaning processes, COVID-19 trends, and any issues that may arise. SOF ¶ 22. The Ombudsman's office also engaged Unimed MidWest, Inc. (d/b/a Lighthouse Environmental Infection Prevention) ("Lighthouse") to provide expert consultation and environmental testing services, noting that cleaning and disinfecting of the facilities is an essential factor in COVID-19 mitigation. Id.; See OR No. 5, November 10, 2021, https://covidombudsman-madoc.org/view-reports/. Upon completion of the surveys by Lighthouse, the results were provided to DOC leadership, which included a meeting with the Ombudsman to discuss the findings. OR No. 11, February 2, 2022, https://covidombudsman-madoc.org/view-reports/. The Ombudsman noted that "[f]ollowing the meeting, the DOC supports further environmental cleaning initiatives in conjunction with [their] office and Lighthouse." Id. A customized Environmental Infection Prevention Program ("EIP" Program) was developed, which is a twelve-week program which includes "implementation and education, a terminal hospital-grade cleaning and disinfection process, and certification." OR No. 12, February 16, 2022, https://covidombudsman-madoc.org/view-reports/. The Ombudsman also met with the MCI-Concord superintendent relative to COVID-19 recommendations for the opening of the BRAVE Unit's visiting room,[7] which includes tables that allow for six feet of distance for sit-down games, reading, and other activities, as well as air exchanger/cleaner installation, and rapid COVID-19 testing. Id. It was noted that "[t]he Ombudsman appreciates the thoughtful pre-planning by the staff of MCI-Concord to allow this progressive program to advance to more family time for the inmates." Id.

[7] BRAVE is a grant-funded specialized program for inmates between 18 and 24 who have children.

The Ombudsman also began reviewing existing data and reporting related to COVID-19 and the inmate census population to understand how the Department uses data to support operations, noting that after meeting with the Department's Director of Data Analytics, it is "clear the DOC is currently collecting, maintaining, and reporting on a wealth of data related to COVID-19." SOF ¶ 23; OR No. 5, November 10, 2021, https://covidombudsman-madoc.org/view-reports/. On October 28, 2021, the "SARS-Cov-2 Public Health Compliance And Mitigation Standards" were issued for handwashing, masks, social distancing, regular cleaning, COVID-19 vaccination, and screening. SOF 24; OR No. 5, November 10, 2021, https://covidombudsman-madoc.org/view-reports/. The office completed initial visits to 15 DOC facilities which included meeting with members of DOC facility leadership, touring the facilities, and assessing the climate around mitigation efforts. SOF ¶ 25; OR No. 6, November 24, 2021, https://covidombudsman-madoc.org/view-reports/. The Ombudsman has also met with interested third parties, including Representatives and Senators, as well as external groups and individuals that have a vested interest in COVID-19 mitigation efforts in the facilities. SOF 26; OR No. 11, February 2, 2022, https://covidombudsman-madoc.org/view-reports/.

Among the Ombudsman's other areas of review is depopulation of inmates. In its biweekly report dated January 19, 2022, the Ombudsman discussed meeting frequently with Commissioner Mici and specifically discussing the Department's efforts in reducing the prison population. Following a recent meeting, the Ombudsman noted that, while depopulation is one avenue,

> depopulation is not a uniformly adopted public health standard from experts responsible for the public health of both the nation and of Massachusetts (e.g., United States Public Health Service within Department of Health and Human Services, which includes the Centers for Disease Control and Prevention and the National Institutes of Health; as well as the Massachusetts Department of Public Health). Our Office-established standards derive largely from widely accepted public health standards and

> are based on those standards by the entities described in the preceding sentence.

SOF 27; OR No. 11, February 2, 2022, https://covidombudsman-madoc.org/view-reports/.

In the same report, the Ombudsman also reported the number of medical paroles and inmates placed on electronic monitoring and noted the twenty-five percent decrease in inmate population since March 2020. Id. Commissioner Mici's extensive COVID prevention and mitigation efforts since March 2020 include all correctional facilities, including the Massachusetts Alcohol and Substance Abuse Center ("MASAC"), which houses men civilly committed by courts for up to 90 days for substance use disorders, pursuant to G.L. c. 123, § 35.[8] The Ombudsman, at the request of Commissioner Mici and EOPSS Undersecretary Andrew Peck, visited MASAC on November 8, 2021 and then issued a list of recommendations for improvement. SOF ¶ 25; OR No. 6, November 24, 2021, p. 5, https://covidombudsman-madoc.org/view-reports/. The Ombudsman reported that, after she made recommendations, "both the DOC and superintendent at MASAC at Plymouth were receptive to recommendations and initiated changes immediately, including testing all committed individuals housed at the facility upon arrival." Id. In sum, the Ombudsman's reports further confirm Commissioner Mici's undeniable commitment to the safety of all inmates and staff, as well as her obvious compliance with the budget line-item language.

III. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE DEFENDANTS ON THE PLAINTIFFS' CONSTITUTIONAL CLAIMS.

The SJC has twice rejected plaintiffs' constitutional claims alleging deliberate indifference, in its second ruling upholding this Court's denial of their motion for preliminary injunction.

[8] As of May 2020, Wellpath, the Department's medical provider, oversees the operation of MASAC; the Department only provides security staff for the facility's perimeter.

In denying the plaintiffs' motion for injunctive relief on February 17, 2021, this Court flatly rejected the plaintiffs' arguments that 1) DOC failed to prevent thousands of inmate infections and 19 inmate deaths and that 2) DOC demonstrated deliberate indifference by "refusing to employ numerous lawful means to reduce the inmate populations." Decision, pp. 6-7.

The SJC upheld this Court's denial, stating that

> [a]mong the factors the motion judge must consider to determine whether a preliminary injunction should issue, likelihood of success on the merits is especially important. As we have previously emphasized: '[T]he movant's likelihood of success is the touchstone of the preliminary injunction inquiry. [I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.'

Foster II, 176 N.E. 3d at 617-618 (quoting Foster I, 484 Mass. at 712) (internal citations omitted).

The SJC examined the subjective element of the plaintiffs' deliberate indifference claim, as laid out in Farmer v. Brennan, 511 U.S. 825 (1994), explaining that "[c]rucially, prison officials do not disregard such a risk if they 'respond[] reasonably' to that risk." Foster II, supra, at 619 (quoting Farmer, 511 U.S. at 844). The SJC further stated that "[i]ndeed, the [United States Supreme] Court has made clear that 'prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.'" Id., citing Foster I, 484 Mass. at 720 ("Where the risk of serious harm is substantial, but prison officials have undertaken significant steps to try to reduce the harm and protect inmates, courts have concluded that there was no Eighth Amendment liability").

Prison officials' constitutional duty under the Eighth Amendment is "to ensure reasonable safety" by taking "reasonable measures" to mitigate excessive risk. Foster II, supra, at 619-620 (quoting Farmer, 511 U.S. at 844, 847). "[P]rison officials who act reasonably cannot be found

liable under the Cruel and Unusual Punishments Clause." Id. at 845. The SJC stated, in no uncertain terms, that

> [w]e conclude, as did the motion judge, that the plaintiffs did not demonstrate that they are likely to succeed in proving deliberate indifference. As the motion judge found, the DOC continued to implement most of the NPIs that we characterized in Foster I as "significant steps" toward reducing the COVID-19 risk to inmates, probative of a reasonable response to that risk . . .These continued measures included restrictions on in-person visits, mask wearing, heightened cleaning and disinfectant, program limitations to improve social distancing, regular asymptomatic testing, and the medical isolation of confirmed COVID-19 patients. Significantly, in addition to these NPIs, the DOC took full advantage of the availability of COVID-19 vaccines by launching an effort to vaccinate all prisoners in its custody.

Foster II at 620 (citation omitted).

Both this Court and the SJC in their rulings cited numerous examples of the defendants' extensive efforts to prevent and control COVID-19 from the very start of the pandemic in March 2020, noting specifically DOC's success at vaccinating more than 70 percent of inmates within weeks of the COVID vaccines' introduction.: "The DOC's vaccination campaign involved outreach to educate inmates about the benefits of vaccination as well as the offer of the COVID-19 vaccine to all eligible inmates – the overwhelming majority of the prison population." See Foster II, Id. at 616; Memorandum of Decision and Order on Plaintiffs' Second Motion for Preliminary Injunction, Docket No. 104, at pp. 7-8. "In implementing a comprehensive inmate vaccination program, then, the DOC was adopting the state-of-the-art medical response in combatting COVID-19." Id. at 620.

This Court, while noting that DOC's efforts were not without lapses, found that "these lapses reflect sporadic mistakes and sporadic lack of attention to detail, which is far below the standard of deliberate indifference necessary to establish a constitutional violation." Memorandum of Decision, p. 8. The SJC concurred: "these lapses were, as he found, inadvertent and sporadic.

They thus fall far short of the standard needed to establish deliberate indifference, which tracks that of criminal recklessness, not civil negligence." Foster II, supra, at 620.

This Court specifically rejected the plaintiffs' argument that DOC's alleged "failure" to implement programs found in the discretionary language of the 2020/2021 budget line-item represented deliberate indifference. The plaintiffs "wrongly equate DOC's decision not to use certain *programs* with deliberate indifference to inmate *conditions* inside DOC's facilities." Memorandum, p. 9 (emphasis in original). The SJC concurred: "In choosing between reasonable alternatives to combat COVID-19, the DOC could have relied on increased prison depopulation as one of its tools of risk reduction. That being said, DOC was not required to employ or exhaust every measure that would offer a risk-reduction benefit for the COVID-19 response to be 'reasonable' under Farmer." Foster II at 621.

Further, the Department's efforts have only increased since Foster II was issued in November 2021. Nearly 80 percent of inmates are fully vaccinated. SOF ¶ 1; Mici Deposition, 107:17-107:21. Testing remains a priority and two ambulance companies were contracted by the Department to conduct testing. Mici Deposition, 50:11-50:13. In addition, wastewater testing is done at several facilities which aid in dictating where to concentrate additional testing. Mici Deposition; 52:24-53:5. As of today's date of service of defendants' opposition and cross motion, there are no COVID positive inmates in DOC custody. SOF ¶ 2; https://www.mass.gov/info-details/doc-covid-19-inmate-dashboard. To ensure the safety for inmates, staff, and visitors, the Department provides rapid COVID-19 testing to visitors, attorneys, and volunteers at no cost to them and a negative test result is required before entering any facility. SOF ¶ 5; See https://www.mass.gov/service-details/visitation-during-covid-19. As noted above, the Ombudsman has recommended reducing social distancing to three feet based on the Department's

vaccine efforts and on the almost complete lack of new COVID cases. SOF ¶ 6; See SARS-COV-2 Public Health Compliance and Mitigation Standards, Updated Guidelines from the Office of the Ombudsman, February 28, 2022, https://www.mass.gov/doc/updated-guidelines-feb-28-2022/download.

The plaintiffs can offer no evidence or facts to support their claims of Eighth Amendment violations. As this Court and the SJC have each reiterated, nothing even remotely suggests that the defendants or DOC were deliberately indifferent to the plaintiffs. The truth is that every piece of evidence underlines DOC's extensive, on-going efforts to protect inmates during the pandemic.

CONCLUSION

For the reasons stated above, this Court should DENY the plaintiffs' motion for partial summary judgment and GRANT the defendants' cross-motion for summary judgment.

Respectfully submitted,

Defendants,
COMMISSIONER CAROL MICI and
SECRETARY THOMAS TURCO III,

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Dated: March 4, 2022

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CERTIFICATE OF SERVICE

I, Stephanie M. Caffrey, hereby certify, under the penalties of perjury, that on March 4, 2022, I caused a true and accurate copy of the foregoing to be filed and served on counsel of record by email.

/s/ Stephanie M. Caffrey
Stephanie M. Caffrey