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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2084CV00855

STEPHEN FOSTER and others¹

vs.

CAROL MICI, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF
CORRECTION and others²

MEMORANDUM OF DECISION AND ORDER ON
CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter has spanned the arc of the Covid-19 public emergency in the Commonwealth and offers a window into the making of public policy in real time. It showcases effective public policy advocacy working through and with all three branches of government and a government that has been responsive to the unprecedented public health crisis presented by Covid-19. On March 10, 2020, the Governor of Massachusetts declared a state of emergency in the Commonwealth to aid in responding to the Covid-19 pandemic.³ Within days of that announcement, the Supreme Judicial Court (SJC), pursuant to its superintendency powers over the judiciary, issued a series of orders to “protect the public health by reducing the risk of exposure to the virus and slowing the spread of the disease.” *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, 484 Mass. 431, 434 (2020). These orders ranged

¹ Michael Gomes, Peter Kyriakides, Richard O’Rourke, Steven Palladino, Mark Santos, David Sibirich, Michelle Tourigny, Michael White, Frederick Yeomans and Henrick Davis, individually and on behalf of all others similarly situated. All plaintiffs in the class, save one, the only female in the named class, Michelle Tourigny, have been released as of the time of the January, 2023 hearing.

² Gloriann Moroney, Chair Massachusetts Parole Board, and Thomas Turco, Executive Office of Public Safety and Security. As of this writing Ms. Maroney has vacated her post, however, this suit would continue against the agency under the acting or newly appointed chair.

³ The Governor terminated the state of emergency and all emergency and public health orders issued pursuant to the emergency on June 15, 2021.

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from limiting public physical access to courthouses, promoting videoconference hearings, and directing criminal courts, in appropriate cases, to reconsider bail or conditions of release for defendants – all with the goal of reducing public spread of the Covid-19 virus especially in the early months of the pandemic before there were vaccines, booster shots or effective treatments such as Paxlovid.⁴ With respect to the prison population, as result of the Committee for Public Counsel Services’s (CPCS) dogged advocacy, the SJC took a close oversight role, through the appointment of a Special Master, to monitor prison and jail populations throughout the state of emergency.⁵ Additionally, they sent this case to the Superior Court for fact finding and ultimately to handle this resulting litigation. By order dated November 12, 2020, this court certified a class of all prison inmates and certified a subclass of prison inmates who are at an increased risk from contracting Covid-19 due to their age (that is, over 50 years old) and/or medical conditions that have been determined to increase one’s vulnerability to Covid-19. See Memorandum of Decision and Order on Plaintiffs’ Motion for Class Certification. (Ullmann, J. 11/12/2020).⁶ Prisoner’s Legal Services represents the class and the sub class.

Now before the court are the Plaintiffs’ partial motion for summary judgment on Count IV, seeking declaratory relief; Defendants Carol Mici’s Commissioner of the Department of Correction (DOC), and Thomas Turco’s, former Secretary of the Executive Office of Public Safety and Security (collectively, Mici, Commissioner, or DOC defendants), motion for summary judgment on all four counts of the Plaintiffs’ Complaint; and Defendant Gloriann

⁴ See SJC Order Regarding Access to State Courthouses and Court Facilities, March 13, 2020, and SJC Order Limiting In-Person Appearances in State Courthouses To Emergency Matters that Cannot be Resolved Through a Videoconference or Telephonic Hearing, March 18, 2020.

⁵ Additionally, and as discussed *infra* at 16, the Legislature directed the Commissioner to hire an ombudsperson to serve as liaison between the DOC and the Legislature, to monitor DOC’s policies and practices during Covid-19, to promote effective public health practices in the state prisons, and to protect the inmates, the staff and the public.

⁶ The Court’s Order referred to and relied upon a November 2, 2020 CDC guidance listing those medical conditions. See Memorandum of Decision and Order on Plaintiffs’ Motion for Class Certification, FN 2 and FN 5. (Ullmann, J. 11/12/2020).

Moroney's, as Chair of the Parole Board, motion for summary judgment on all four counts of the Plaintiffs' Complaint.⁷ After extensive briefing, supplemental filings, and two hearings, now for the reasons explained below the court **DENIES** the Plaintiffs' partial motion for summary judgment on count IV, and **ALLOWS** the Defendants' motions for summary judgment on counts I, II, and IV.⁸

FACTS

The facts leading up to this decision are well chronicled in the SJC's case history in addition to the various rulings and orders by the Superior Court in this matter. See e.g., Findings of Fact entered by the Superior Court on May 1, 2020 and the Superior Court's decision on class certification, and its denial of the Plaintiffs' motion for a preliminary injunction.⁹

Starting in March of 2020 it became apparent to the SJC and Legislative policymakers that prison populations, like other congregate living populations, were at particular risk from the Covid-19 virus. At that time, the only tool to combat Covid-19 was prevention. The SJC's early order appointing a Special Master and its decision in *Foster I* reflect an urgent concern to prevent widespread infections in the prisons. The initial public health strategies, according to the Centers for Disease Control (CDC) and other public health officials, were to limit interpersonal interaction, socially distance, reduce population density, isolate when sick, initiate testing to trace Covid exposure and attempt to limit its spread, hand washing and mask wearing. DOC

⁷ Count 1 of the complaint alleges violations of the Massachusetts Declarations of Rights articles 1, 10, 12 and 26; Count II claims violations of 8th and 14th Amendments to the United States Constitution; Count III claims violations of G.L. c. 123, §35 for civilly committed persons; and in Court IV, the Plaintiffs seek a declaration that the Commissioner has failed to comply with the mandate for "decarceration" as enacted by the Legislature in Chapter 24 of the Acts of 2021 section 2 lines 8900.

⁸ Count III of the complaint sought relief on behalf of civilly committed people under G.L. c. 123, §35. No class was certified and no claim was pursued on their behalf. The parties do not address this claim in their briefs on summary judgment. The court orders the parties to file a stipulation dismissing this claim so final judgment may enter in this case.

⁹ *Foster v. Mici*, SJC 2020-0212 Reservation and Report and & Interim Order (April 20, 2020) (Cypher, J.) (*Foster I*); *Foster v. Mici*, 484 Mass. 1059 (2020) (*Foster II*); and *Foster v. Mici*, 488 Mass. 643 (2021).

followed this guidance and adapted it as necessary for the prison setting. Recall that *Foster I* and *II*, and much of the motion practice in this case came before vaccinations or treatments to help make the virus less lethal and reduce adverse health outcomes especially among vulnerable populations. Under the direction of the SJC, weekly Covid-19 infection rates for both inmates and correctional staff were reported to and monitored by the Special Master and that data was publicly available on the state's website. Subsequently, in fiscal year (FY) 2021, the Legislature directed the Commissioner to appoint an ombudsperson to facilitate and monitor DOC's response to Covid-19 in the state's prisons. See *infra* at 16.

DOC's response to Covid-19 was closely scrutinized by the Plaintiffs, their advocates, the SJC, and the public at large. As public health guidance evolved and vaccines and boosters emerged, DOC acted responsibly to educate inmates about the vaccines and widely disseminated vaccines across its incarcerated population. As of February 2, 2023, 67% of the class members have received at least one dose of the vaccine and there is a better than 80% vaccination rate among members of the more vulnerable subclass. These statistics are a testament to DOC's commendable efforts.¹⁰

The following additional facts are relevant to the court's decision.

1. The total state prison population as of May 25, 2020 was 6639 inmates. *Foster I* at 704.
2. In DOC's most recent response to the court, dated January 27, 2023, DOC reports that its custody population is 5860. (DOC submission 1/27/2023).
3. DOC's custody population has decreased by 779 inmates between May 25, 2020 and January 27, 2023:

¹⁰ The class members, indeed all prisoners, are free to accept or decline the offer of a vaccine and in that sense DOC's experience with vaccination hesitancy is not unlike what has been observed outside the prison population.

4. The decrease in DOC's custody population was largely driven by the lower number of admissions to state prison. (Plaintiffs' submission dated 1/27/2023).
5. In FY 2020 (ending June 30, 2020), there were 270 petitions for medical parole and 26 were granted. (Plaintiffs' 1/27/23 submission citing to DOC mandated annual report regarding medical parole).¹¹
6. According to DOC's data, in FY 2021, there were 211 petitions for medical parole and 17 were granted.¹²
7. Also, according to DOC data, in FY 2022, there were 67 petitions for medical parole and 17 were granted.¹³
8. DOC reported the numbers of medical parole petitions/releases to the court in a different format than the Plaintiffs. However, upon review, there is little resulting change in the percentage of petitions allowed over this time period. DOC reported that since the enactment of the Medical Parole Statute, G.L. c. 127, §119A, enacted April 13, 2018, and between that date and up to January 6, 2023, there have been 642 petitions for medical parole, 72 have been allowed, 11 were pending, and 5 were returned to custody. (DOC submission dated 1/27/2023).
9. Based on DOC data reported in ¶8 above, the Commissioner has granted approximately 9% - 10% of the medical parole petitions submitted to her. This is in line with the data presented by the Plaintiffs.

¹¹ G.L. c. 127, §119A, <https://www.mass.gov/doc/fy20-doc-medical-parole-report/download>

¹² <https://www.mass.gov/doc/fy21-doc-medical-parole-report/download>

¹³ <https://www.mass.gov/doc/fy22-doc-medical-parole-report/download>

10. Only 9 of the total number of medical parole petitions that have been filed were initiated by DOC or its healthcare vendor. (Mici deposition pg 28 – 29). The remainder of the petitions were initiated by inmates or their advocates.
11. The Plaintiffs were previously unsuccessful in their motion to have the court order the Commissioner to “implement a home confinement program.” Memorandum of Decision and Order on Plaintiffs’ Motion for Order Requiring Implementation of Home Confinement Program. (Ullmann, J. December 18, 2020). The court denied the relief sought because the Plaintiffs could not establish that the Commissioner was violating G.L. c. 127, §§ 48, 49 and 49A, which the *Foster I* Court noted would allow the Commissioner to release DOC prisoners to home confinement under certain conditions as part of an early release program. However, the court rejected Plaintiffs’ argument that the law *mandated* certain action by the Commissioner; the court instead noted: “[h]aving authority to take certain action ... is fundamentally different from being required to take such action.” *Id.* at 5.¹⁴
12. Since January of 2021, DOC has worked to educate its custody population regarding the benefits of Covid-19 vaccinations and has offered to vaccinate all inmates (absent a clinical contraindication). (Mici supplemental aff. (2/4/2023)).
13. DOC reported that as of 2/2/2023, 67% of the class members have received at least one dose of the vaccine. (2/2/23 DOC letter and Mici Supp. Aff.).

¹⁴ The court denied Plaintiffs’ motion to require the Commissioner to establish a home confinement program but did underscore the spirit of *Foster I* that the DOC should make good faith efforts to explore ways of reducing the inmate population.

14. DOC also reported that of the identified subclass, of the 187 inmates who are 50 years or older, 157 inmates are fully or partially vaccinated, thus representing 84% of the subclass (157/184). (2/2/23 DOC submission).
15. Inmates are not required to be vaccinated. They may decline the vaccine offered by DOC.
16. Since March of 2020, there have been 21 class members who have died of Covid-19 or from complications related to Covid-19. Specifically, this number represents the total number of class members who: (1) died while incarcerated; and (2) whose cause of death was Covid-19 or whose cause of death was Covid-19 related. (DOC submission 2/2/2023 Response to Request No. 3).¹⁵
17. The SJC established a Special Master on March 25, 2020 in the matter of *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, SJC-12926.
18. The SJC ordered that the Special Master would, *inter alia*, periodically report to the SJC weekly Covid-19 rates of inmates and staff at DOC facilities and county jails, and report on measures being taken by DOC and the county jails to mitigate the then burgeoning pandemic.
19. In the same matter, *Committee for Public Counsel Services v. Chief Justice of the Trial Court*, SJC-12926, on April 3, 2020, the SJC entered the following Order:

Due to the crisis engendered by the COVID-19 pandemic, pretrial detainees who have not been charged with an excluded offense as set forth in Appendix A are entitled to a rebuttable presumption of release on personal recognizance, and a hearing within two business days of filing a motion for reconsideration of bail and release, in accordance with the procedures set forth in this opinion. The special

¹⁵ Plaintiffs may contend that DOC's number of deaths is underreported because there were several DOC inmates who died within days or weeks after they had been released from custody on medical parole with or of Covid-19. Mici deposition pg. 36 – 37. However, such data is more difficult to quantify and verify, whereas the number of deaths of class members in DOC custody is a verifiable number, and the Plaintiffs do not take issue with the number DOC has reported - 21 deaths.

master shall report weekly to this court, as set forth in this opinion, in order to facilitate any further response necessary as a result of this rapidly evolving situation.

20. Appendix A referred to in ¶19 was a list of dozens of violent crimes that the SJC “excluded” from consideration of the rebuttable presumption of personal recognizance release.
21. Subsequently, when DOC was considering early release of inmates in response to the Covid-19 health crisis, the Commonwealth’s state of emergency, and in its response to Plaintiffs’ argument that the budget language quoted below in paragraph 23 required the Commissioner to take affirmative steps to release more inmates, DOC acknowledged that it used the precluded categories of crimes from Appendix A to, in part, inform the Commissioner’s decision about who could, and who could not, be “safely” returned to the community. (DOC submission 1/27/23).
22. DOC claims, and the Plaintiffs have not rebutted, that “approximately 82% of the DOC custody population is incarcerated for one or more expressly excluded offense[s] [under Appendix A] and 88% of the DOC custody population is incarcerated for one or more expressly or presumptively excluded offense[s] [under Appendix A].” (DOC submission 1/27/23).
23. Starting in FY 2021, and continuing into the current FY (2023), the Legislature added a provision in the Acts concerning the early release of prisoners. The same essential language appears in each of the three fiscal year budgets. See also chapter 227 of the Acts of 2020.¹⁶ Each year this provision was enacted by the Legislature but only after

¹⁶ Chief Justice Gants’ concurrence in *Foster I* at 734, written prior to the enactment of the language at issue here, is certainly consistent with this statutory language. In his June 6, 2020 concurrence, Chief Justice Gants exhorts DOC to do more within the law and consistent with public policy to reduce the inmate population because of the Covid-19 pandemic and the threat of more waves of infection. *Id.* at 734 -735.

the Legislature voted to override the Governor's veto of this language, which he did in each of the three budgets. The provision reads 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; provided further, that the department shall seek recommendations from public health experts to ensure that policies are appropriate in relation to the 2019 novel coronavirus; provided further, that funds shall be made available from this item for the creation and full operation of an independent ombudsman's office for the duration of fiscal year 2022; provided further, that not later than September 1, 2021, the department shall submit a report to the joint committee on the judiciary and the house and senate committees on ways and means that shall include, but not be limited to, the status of the appointment of the ombudsman pursuant to chapter 227 of the acts of 2020; provided further, that the office shall monitor compliance with the requirements of this item relative to 2019 novel coronavirus public health precautions including, but not limited to, actions taken or not taken by the department to ensure the health and safety of individuals under the department's purview including, but not limited to, employees and inmates, as well as the families of such individuals, and shall have access to information related to the department's use of the mechanisms for release, home confinement or furlough stated in this item; provided further, that the office 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; provided further, that, if the office determines that the department is not taking actions necessary to mitigate the rate of infection in facilities under its purview or is in noncompliance with its established public health standards, the office may recommend that the joint committee on the judiciary and the joint committee on public health 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 standards¹⁷.... (*emphasis added*)

Chapter 24 of the Acts of 2021 section 2 lines 8900 et seq. (underlined section referred to by the Plaintiffs as the “decarceration” language).

24. The Governor ended the Massachusetts state of emergency due to Covid-19 on June 15, 2021.

25. On January 27, 2023, the SJC ended the requirement of daily inmate Covid-19 reports to the Special Master and the presumptive pretrial release referred to in paragraph 19 above, and discharged the Special Master appointed by the SJC on March 25, 2020.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment will be granted if there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Miller v. Mooney*, 431 Mass. 57, 60 (2000); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). It is the moving party's burden to demonstrate the absence of a triable issue, and that the summary judgment record entitles it to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of the case at trial. *Flesner*

¹⁷ <https://malegislature.gov/Laws/SessionLaws/Acts/2021/Chapter24>

v. *Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Summary judgment will be denied if there are genuine issues of material fact. *Golub v. Milpo, Inc.*, 402 Mass. 397, 400 (1988).

Here, all parties are moving for at least partial summary judgment. The salient facts are not disputed. The procedural history that brings this case to this juncture is well developed. The issue Plaintiffs present is this: has the Commissioner met her legislative mandate to step up the early release of inmates as envisioned by the Legislature? The Plaintiffs urge the court to find no, she has not, and issue a declaration ordering her to do so. The defendants disagree, arguing that the Legislature vested the Commissioner with discretion to determine who can safely be released to the community and that is exactly what she has done. Moreover, they point to DOC's record to demonstrate that the DOC has responsibly navigated an unprecedented public health crisis. The spotlight put on DOC, due to this and the various other Covid-19 related lawsuits, in addition to the SJC orders and the Special Master's weekly monitoring as well as the oversight by the ombudsperson, combined to create an environment in which DOC adopted and implemented policies and procedures that were informed by the best science and public health policies available. But was it enough? This court is now presented with a legal question, how to interpret the above quoted "decarceration" budget provision to determine if the Commissioner is and has complied with the law.¹⁸ This case then is ripe for summary judgment.

¹⁸ The Commissioner and the Chair of the Parole Board have moved for summary judgment on all four counts. As discussed *infra* at 19, the constitutional claims in counts I and II alleging cruel and unusual punishment and deliberate indifference to the medical needs of the inmates were seriously, if not mortally, wounded by the SJC's decision in *Foster I*. Then in this case, in the court's Memorandum and Decision on Plaintiffs' Second Motion for Preliminary Injunction (February 17, 2021) (Ullmann, J.), the court put a stake in the heart of the subjective element (deliberate indifference by prison officials) of the Plaintiffs' 8th amendment claim. Those claims fare no better here at summary judgment.

DISCUSSION

I. PLAINTIFFS' CONTENTION THAT THE COMMISSIONER BREACHED HER MANDATE UNDER THE "DECARCERATION" BUDGET LANGUAGE FAILS TO CREDIT THE COMMISSIONER'S STATUTORY DISCRETION AND IS CONTRARY TO GENERAL STATUTORY CONSTRUCTION RULES.

The Legislature has stated: "[G]iven 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." What does this law require of the Commissioner? According to the Plaintiffs, it imposes on her a new and overriding duty to release inmates by awarding more earned good time credits, granting more petitions for medical parole, implementing a more robust home confinement program where inmates wrap-up their sentences at home under conditions of confinement. The defendants' response is two-fold. First, the defendants offer a bit of excuse rather than explanation on accelerated releases, saying the Commissioner has done all she possibly can do to safely release inmates.¹⁹ According to recent statistics, DOC's incarcerated population has decreased by over 700 inmates since March of 2020. The defendants then asks the court to concentrate on DOC's efforts to keep inmates safe and healthy, especially with the roll out of vaccinations for all willing inmates. This, they contend, shows that DOC has effectively managed the pandemic in the prison setting, thus preventing widespread waves of

¹⁹ DOC's accelerated release efforts, especially in the area of medical parole, when looked at over a three-year period, have been lackluster. Numbers do not tell the whole story, however given the confluence of an older prison population with a pandemic, one might have expected a higher percentage of releases on medical parole. Whether the 9% - 10% approval of medical parole over this time is due to the difficulty in finding resources to aid in identifying appropriate end of life placements for inmates with only months left to live is not discernable on this record. Moreover, as explained *infra* at 18, a class action is not the appropriate procedure to determine whether, in each individual petition, the Commissioner properly exercised her discretion under the medical parole statute. G.L. c. 127, §119A.

infection and serious adverse medical outcomes, and resulting in 21 inmate Covid-19 deaths, a number, while regrettable, is of a magnitude far less than could have been imagined in March of 2020 or that was experienced in other types of public congregate living situations, even here within the Commonwealth.

“Statutory interpretation is a question of law for the court.” *Boston Police Patrolmen’s Ass’n v. Boston*, 435 Mass. 718, 719 (2002). In interpreting a statute, the court’s primary goal is “to effectuate the intent of the Legislature in enacting it.” *Water Dep’t of Fairhaven v. Department of Env’tl. Protection*, 455 Mass. 740, 744 (2010). “[T]he plain language of the statute” is the “principal source of insight into legislative intent.” *HSBC Bank USA, N.A. v. Morris*, 490 Mass. 322, 332 (2022). “Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent.” *City Council of Springfield v. Mayor of Springfield*, 489 Mass. 184, 187 (2022). However, “[w]here the draftsmanship of a statute is faulty or lacks precision, it is our duty to give the statute a reasonable construction.” *Capone v. Zoning Bd. of Appeals of Fitchburg*, 389 Mass. 617, 622 (1983). Where the statutory language is not clear, “familiar principles of statutory construction guide our interpretation.” *Patel v. 7-Eleven, Inc.*, 489 Mass. 356, 362 (2022). See *Boston Police Patrolmen’s Ass’n*, 435 Mass. at 720 (court may consider “cause of [statute’s] enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated”). An overarching principle of statutory construction requires courts to “take into account the interrelationship of different statutes,” with the goal of harmonizing other statutes so that they do not “undercut each other.” *Ryan v. Mary Ann Morse Healthcare Corp.*, 483 Mass. 612, 620 (2019).

If the budgetary language is read plainly to mean that for the duration of the time when the “continued prevalence and threat of the 2019 novel coronavirus within department of correction facilities” exists, and not beyond, then there is an argument that the Plaintiffs’ partial motion for summary judgment on count IV, seeking a declaration that the Commissioner has violated the “decarceration” budget language (such as quoted above from Chapter 24 of the Acts of 2021 section 2 lines 8900 et seq.), is moot. The Commonwealth has ended the state of emergency and the SJC has ended its order concerning the Special Master and presumptive pretrial release. The pandemic has evolved into an endemic. Whether prisoner or not, we are all still susceptible of contracting Covid-19 but the general availability of vaccinations, boosters, and other treatments has reduced the lethality of Covid-19 so we can resume a new sort of normal social intercourse. Notwithstanding, the Plaintiffs press the court to reject any mootness contention. And, the Plaintiffs persuasively argue that the disputed budget line item was passed again this year, over the Governor’s veto, in the FY 23 budget that was enacted after the Governor ended the state of emergency in Massachusetts. Thus, the Legislature was aware of that changed circumstance yet remained committed to enacting this language. The court agrees that the issue is not moot and will address the parties’ arguments about the “decarceration” language.

The Plaintiffs focus the court on that language that reads: “the commissioner of correction shall release, transition to home confinement or furlough individuals in the care and custody of the department.” Shall is a “command,” whereas “the word may is one of permission.” *Cepulonis v. Superintendent, Massachusetts Correctional Inst. Cedar Junction*, 61 Mass. App. Ct. 669, 702 (2004) (*emphasis added*). Plaintiffs urge the court to find that the Commissioner has failed to use available tools to accelerate the early release of prisoners.

Plaintiffs maintain that while DOC touts lower numbers of incarcerated people three years after the declared state of emergency, it must concede the current reduction in DOC's incarceration population has more to do with the reduction in people entering prison (as well as the regular termination of sentences) rather than any affirmative act by the Commissioner to accelerate early releases. Moreover, the dearth of medical parole petitions allowed by the Commissioner, despite acknowledging that Massachusetts has or had the highest percentage of elderly prisoners relative to other states,²⁰ is proof that the Commissioner has been derelict in implementing the Legislature's "decarceration" mandate.²¹

DOC vociferously objects to this characterization of its efforts and responds that the Plaintiffs are cherry picking a portion of the phrase and ignoring the remainder that adds: "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..." (*emphasis added*). This additional language rounds out the extent of the mandate, and that is: the Commissioner shall release those whom she can safely release with special consideration for the medically vulnerable. And that, the Commissioner argues, is what she has done.

By enacting this language as part of the annual budget, three years in a row, over the Governor's veto, did the Legislature mean to abruptly upend, and sweepingly overrule, all prior statutes and standards governing the Commissioner's dual responsibility for the inmates sentenced to her custody and maintaining public safety? Or was this provision targeted to meet the ongoing Covid-19 state of emergency and its potential impact on the incarcerated population,

²⁰ See *Foster I* at 702 – 703.

²¹ The Plaintiffs also argue that the Commissioner's failure to step up the award of good time credits to hasten release time or implement an effective home confinement program serve as further evidence of the Commissioner's slow roll response to Covid-19.

but kept intact, and did not override, the Commissioner’s other statutory authorities, restrictions and discretion? The court finds that the prefatory language which reads: “that given the continued prevalence and threat of the 2019 novel coronavirus within department of correction facilities, the commissioner of correction shall release....” provides the necessary context for construing the mandate given to the Commissioner. (*emphasis added*). Specifically, the provision otherwise left undisturbed the Commissioner’s statutory authority over the prisoners in her care as well as her inherent and explicit discretion when deciding such matters as awarding earned credits, medical parole and the like. The “decarceration” language also references the Commissioner’s discretion when directing her to release those who she determines “can safely be released.”

The underlined language quoted above makes clear that the provision was enacted to address the impact of Covid-19 in the prisons. It is through that lens that this language must be viewed. This conclusion is further underscored by the actions (or inactions) of the ombudsperson, whom the Legislature appointed to monitor DOC’s Covid mitigation efforts. Specifically, the Act quoted in ¶23 appoints and funds an ombudsperson who shall:

monitor compliance with the requirements of this item relative to 2019 novel coronavirus public health precautions including, but not limited to, actions taken or not taken by the department to ensure the health and safety of individuals under the department’s purview including, but not limited to, employees and inmates, as well as the families of such individuals, and shall have access to information related to the department’s use of the mechanisms for release, home confinement or furlough stated in this item; provided further, that the office 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....

Chapter 24 of the Acts of 2021 section 2 lines 8900 et seq.

In this provision, the Legislature expressed its will that the DOC use effective public health practices, including reducing prison populations, to combat Covid-19. To ensure

compliance with its stated desires, the Legislature funded an ombudsperson to serve as its watchdog. Should the ombudsperson conclude that DOC is not in compliance with public health standards or if there was a spike in infections, the ombudsperson could have recommended to the Legislature that the Commissioner testify in a public hearing about DOC's noncompliance and any required remediation plan. See Chapter 24 of the Acts of 2021, Section 2 line item 8900-0001. The record reflects that DOC worked cooperatively and closely with the ombudsperson to implement an effective Covid mitigation effort that included upgraded cleaning procedures, hand washing, social distancing, masking, ventilation in visiting areas, and, later, rolling out vaccinations. The ombudsman did not press DOC on its efforts in the area of the early release of inmates. Importantly, the Commissioner was not called to testify before the Legislature at the request of the ombudsman nor did the Legislature indicate that DOC was not in compliance with its Act. Silence is not acquiescence; however, the Legislature charged its ombudsman to be its eyes and ears on the ground at DOC and make frequent reports on progress and compliance. There is nothing in this record to indicate that the ombudsperson determined that DOC's release of inmates fell short of what the law required. Given that, it is fair for the court to conclude that the ombudsman, and by extension, the Legislature, was satisfied with DOC's efforts to use its available tools to facilitate early release of class members as part of its overall Covid-19 mitigation strategy.²²

Further, in a June 2022 Rule 23.0 decision from the Massachusetts Appeals Court addressing the same "shall release" language found in Chapter 227 of the Acts of 2020, the court concluded that the "budgetary line item was advisory and imposed no obligation upon or limit to the commissioner's statutory discretion." *Murphy v. Mici*, 101 Mass. App. Ct. 1111 *5 (2022).

²² Indeed, the ombudsperson observed at one point that "depopulation is not a uniformly adopted public health standard." Statement of Facts ¶27.

This is the only decision construing this budget language and this court finds it instructive here. As explained in *Murphy*, there is nothing in the Act that eliminates the Commissioner's discretion. *Id.*, citing *Piggott v. Commissioner of Correction*, 40 Mass. App. Ct. 678, 684 (1996). This is especially so in the area of decisions affecting public safety. The Act states the Commissioner "shall release ... those who can safely be released." This Act neither expressly nor impliedly repeals all prior statutes governing the Commissioner's discretion or responsibility for managing those in her charge.²³ It is not in conflict and can be harmonized with other laws regulating the administration of prisons, including those that vest discretion in the Commissioner to make choices and decisions.

The Commissioner has the discretion to make an individual assessment about each inmate, not a categorical one, as to who can be safely released before their sentence has ended. The individual assessment necessarily involved in early release decisions do not lend themselves to a class resolution. For example, when the Plaintiffs argue that the Commissioner has not released enough inmates to meet her mandate under the Act, the court asked Plaintiffs: how many class members must the Commissioner release to comply with the Act? Ten class members, 100, 1000; or 10% of the class or 25%? What is the measure by which the court could judge compliance? There is none. Rather, the court would need to look at each exercise of the Commissioner's discretion, on an individual basis, to determine if she abused her discretion in denying medical parole, or earned credits, or home confinement. There is nothing in the plain language of the Act that calls for such a result.

The Act aims to ensure that, because of the lasting prevalence and threat of Covid-19, our prisons are adopting the best public health practices available and using the full panoply of tools

²³ Implied repeal of a statute is disfavored by our courts. See e.g., *George v. National Water Main Cleaning Co.*, 477 Mass. 371, 378 (2017); *Commonwealth v. Harris*, 443 Mass. 714, 725 (2005).

and resources at DOC's disposal to protect the health and safety of those in its custody, its staff, and the public. In its implementation, as discussed below, the role of and work of the ombudsperson serves as a further safeguard against a claim that state officials have been deliberately indifferent to the health and welfare of prisoners during the Covid-19 pandemic. Accelerated prisoner releases to reduce prison population density was one type of tool to mitigate the effects of Covid, not the only tool at DOC's disposal. Decarceration, as that term is envisioned by these Plaintiffs, was not written into this section of the budget. The Plaintiffs' motion for summary judgment on Count IV is DENIED. The Defendants' cross motions on Count IV are ALLOWED. The court declares that the Commissioner has not violated the Act.

II. THE COMMISSIONER'S CROSS MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS OF DELIBERATE INDIFFERENCE IN COUNTS I AND II IS GRANTED

Counts I and II are claims brought under the state (Article 26) and federal constitutional (Eighth Amendment) protections due to the conditions of confinement in light of the Covid-19 pandemic. The constitutional protections afforded to the class members under art. 26 are not greater than those available under the Eighth Amendment to the United States Constitution. *Foster I*, at 716. Thus, these claims have been viewed under Eighth Amendment jurisprudence. The SJC has instructed that to "establish an unconstitutional condition of confinement, a claimant must show both an objective element and a subjective element." *Foster I* at 717. The class members must show objectively, that their conditions of confinement "amount to a 'serious deprivation of basic human needs...' including denial of medical care of serious medical needs." *Id.* (cited cases omitted). Additionally, on the subjective element, the class members must demonstrate that the prison official(s) acted with "deliberate indifference." *Id.*

On appeal, at the preliminary injunction stage, the SJC concluded that the Plaintiffs could show a likelihood of success in proving the objective component of the Eighth Amendment claim because of the high risk of contracting Covid-19 in prisons “where physical distancing may be infeasible to maintain.” *Id.* at 718. On Plaintiffs’ Second Motion for a Preliminary Injunction, decided five months after *Foster I*, “due to the recent vaccination of inmates and staff...,” the court could not say whether Plaintiffs had met their burden to show a likelihood of success on the objective element of their Eighth Amendment claim. Memorandum of Decision and Order on Plaintiffs’ Second Motion for Preliminary Injunction. (February 17, 2021) (Ullmann, J.). However, because the Plaintiffs had not met their burden to show a likelihood of success on the subjective element of deliberate indifference at the preliminary injunction stage, the injunction was denied. *Id.* At summary judgment, this court follows the *Foster I* determination that the Plaintiffs can satisfy the objective prong of the analysis and now turns to the second, subjective, prong.²⁴

The subjective prong of the Eighth Amendment requires a showing that the official’s conduct amounts to something more than negligence but does not require a showing that the official acted with the purpose of causing harm or with the knowledge that the action would

²⁴ This court notes that that pronouncement from the SJC in June of 2020 was approximately six or seven months before the first widespread roll out of the Covid-19 vaccines. The objective element of an Eighth Amendment analysis requires “an inmate to show that his or her living conditions amount to a serious deprivation of basic human needs.” *Foster I*, at 717. The widespread availability of effective vaccines, which DOC has disseminated to all willing inmates, in addition to treatments for Covid-19, and, further, as our public health knowledge evolves and effective medical prevention and treatments are made available to inmates, it raises the question whether the ongoing risk of contracting Covid-19 in our state prisons crosses the high threshold of meeting the objective prong under an Eighth Amendment analysis. Cf. *Perri v. Warden of Fort Dix*, 2023 WL 314312 *8 (D.N.J.) (January 19, 2023) (“Additionally, the Court takes judicial notice of the now widespread availability of COVID-19 vaccines, which could very well eliminate the need for habeas corpus relief in this context. Cf. *Garrett v. Murphy*, 17 F.4th 419, 433 (3d Cir. 2021) (suggesting that the widespread availability of the COVID-19 vaccines eliminated the need for compassionate release due to the pandemic). “Vaccination greatly reduces the risk of COVID-19 exposure and infection,” as well as the severity of infection and risk of death. *United States v. Gonzalez*, No. 96-114-1, 2022 WL 9997471, at *3 (D.N.J. Oct. 17, 2022); *United States v. Martinez*, No. 16-503, 2022 WL 1320618, at *4 (D.N.J. May 2, 2022) (“The likelihood of a COVID-19 infection has also been greatly reduced by vaccination of [the defendant] and others at the prison.”)).

cause harm. *Foster I*, at 719. DOC has an affirmative duty to take reasonable steps to protect inmates from communicable diseases. *Id.* (and cases cited therein at Footnote 18). In *Foster I* and in this court's decision on the Plaintiffs' Second Motion for Preliminary Injunction, there is a historical chronology of the steps and measures that the Commissioner and DOC have taken since March of 2020 to abate the threat of Covid-19 in the prisons. See *Foster I* at 719-724; Memorandum of Decision and Order on Plaintiffs' Second Motion for Preliminary Injunction, at pg 4 – 7 (February 17, 2021) (Ullmann, J.).²⁵ Since that time, the record has further developed based on reports from the Special Master and Ombudsperson. The development of this record over time has added more evidence to support the conclusion that the commissioner has not acted with deliberate indifference to the health or medical needs of these class members. As the additional facts listed above demonstrate, the Commissioner has been receptive to the recommendations of the ombudsperson and she has used best efforts to follow the public health and CDC recommendations.

The Plaintiffs argue, essentially, that the Commissioner has been too conservative in using her discretion and this has resulted in a failure to accelerate the release of class members to prevent their contraction of Covid-19 and its attendant health risks. The Plaintiffs offer expert affidavits to challenge some of the public health recommendations from the ombudsperson and question whether the ombudsperson's representations accurately reflect the state of the current public health recommendations. However, even if the Plaintiffs could show that there are two different policy choices: the one pursued by the Commissioner under the auspices of the ombudsperson and the recommendations from the Plaintiffs' experts that does mean that the

²⁵ The Plaintiffs were unsuccessful in their second motion for a preliminary injunction because even there the court was not persuaded that the Plaintiffs could meet their burden on the subjective prong of the Eighth Amendment. Analysis. The evidence that has become available since that time does not change the court's conclusion on this point.

Commissioner's choice amounts to deliberate indifference. Experts in the same field, can and often do, hold different views. And, courts have been hesitant to find deliberate indifference to a serious [medical] need "where the dispute concerns not the absence of help, but the choice of a certain course of treatment." *Sires v. Berman*, 834 F.2d 9, 13 (1st Cir. 1987); cf. *Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (quotations omitted) (deliberate indifference may be found where the attention received is "so clearly inadequate as to amount to a refusal to provide essential care"). Unless the Plaintiffs could mount a case that the Commissioner's choice of public health policies and Covid-19 mitigation strategies was so uninformed or baseless that it was no care at all, it cannot be an Eighth Amendment violation. Here, the Plaintiffs cannot meet the high bar of showing that the Commissioner's conduct amounts to reckless indifference to the Covid-19 threat facing these class members.

The Commissioner and her staff have been fully invested in managing this health crisis. She has used her discretion to reduce the prison population. Perhaps, as the Plaintiffs' claim, she has used it too conservatively, but that is not evidence of deliberate indifference to serious health or medical condition especially when she has also been earnestly working to implement education about vaccines, roll out vaccines, and improve hand washing, masking, Covid-19 testing, etc. It might be observed that Plaintiffs' disappointment is that the Commissioner did not achieve the goal of protecting them from Covid-19 in the manner that they wished: through more widespread early release. Notwithstanding, the Commissioner has been effective in managing this crisis. There is better than an 80% vaccination rate among the subclass and almost two-thirds of all class members are vaccinated with at least one dose. The court also considers the relatively low number of deaths from Covid-19 among the class members over the last three years, 21 deaths. Moreover, there has been a significant reduction in the prison

population, 779 inmates, that, in addition to vaccination rates, especially in the subclass, bodes well for class members withstanding future waves of Covid-19 outbreaks. This record does not support the Plaintiffs' contention that the Commissioner has acted with deliberate indifference towards the class members' health and safety.

The Commissioner and her staff have had to adapt as the public health guidance and CDC's recommendations have evolved over the last three years. The commissioner and her staff have had to manage this health crisis transparently, under close scrutiny from the courts, and under the SJC's Special Master and the ombudsperson appointed at the behest of the Legislature. It is not hyperbolic to suggest that the Commissioner's handling of this public health crisis has been the most intensely scrutinized crisis she has had to manage in the Commonwealth's prison history. The DOC was under a microscope making weekly and monthly reports for the Special Master and Ombudsperson or in response to various motions in these court cases. CPCS has held DOC's feet to the fire and they have been a tireless advocate on behalf of these class members. Despite the mounds of periodic public reports, the deposition of the Commissioner, the sharing of CDC guidance, the observations by the class members and their advocates, there has not been any evidence presented by Plaintiffs that the Commissioner acted with deliberate indifference to the medical and health needs of these class members during the Covid-19 crisis. DOC's motion for summary judgment on counts I and II is ALLOWED because the Plaintiffs cannot meet their burden to show that the Commissioner acted with deliberate indifference.

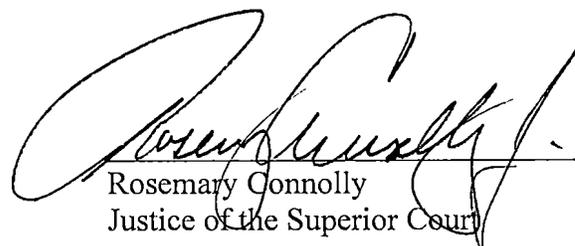
III. THE DEFENDANT CHAIR OF THE PAROLE BOARD'S CROSS MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND II IS GRANTED BECAUSE THE PAROLE BOARD IS NOT PROPERLY SUED FOR DELIBERATE INDIFFERENCE ON THIS RECORD.

In *Foster II*, the SJC explained that the Chair of the Parole Board was a proper defendant, acting within the parole board's statutory authority, if in fact the Parole Board has failed to hold

timely hearings or implement timely decisions and thus unnecessarily held people who would otherwise be eligible for release. In that sense, the claim against the Parole Board is derivative of the claim against DOC. If the Commissioner has not violated the class members Eighth Amendment rights, then neither has the Parole Board. For the reasons stated above, because the court finds in favor of DOC on the constitutional claims, it likewise enters judgment in favor of the Chair of the Parole Board on Counts I and II.

ORDER

The Court now **DENIES** Plaintiffs' Partial Motion for Summary Judgment on Count IV. Concerning Count IV, the court declares that the defendants have not violated the Act. Additionally, the court **ALLOWS** Summary Judgment on Counts I, II and IV for the DOC defendants and the Chair of the Parole Board. Further the court **ORDERS** that the parties submit a stipulation of dismissal for Count III by March 20, 2023, and thereafter the court will enter final judgment in this matter.



Rosemary Connolly
Justice of the Superior Court

DATE: March 7, 2023