UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CODY BARNETT, et al.,

Plaintiffs/Petitioners,

Case No. 0:20-cv-61113-WPD

v.

GREGORY TONY,

Defendant/Respondent.
/

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

Broward County Jail is at high risk of a COVID-19 outbreak. There have been at least 52 confirmed cases of COVID-19 among detainees, and at least 106 employees of the Broward County Sheriff's office have also tested positive. Given that the Jail has tested only a tiny fraction of the total detainee population, the true number of infected persons is almost certainly much higher. Moreover, these numbers reflect a time when the community at large was observing significant restrictions to curb transmission of the virus, and when intake into the Jail was at a historic low. Both are changing. The County is now in the process of opening up—with a surge in both infections and deaths—and the admission rate into the Jail has likewise started to increase. Since the filing of this lawsuit just over two weeks ago, 4,282 more people in the County have been infected with the virus, and 52 have died.

Given the substantial risk of COVID-19 infections spreading in the Jail, detainees and staff must rely on the Jail's policies and procedures to protect them from becoming infected and to stop the spread. But it is clear that such policies and procedures are not up to this task. For example, Allan Pollock was admitted to the Jail on March 16, reportedly showing no symptoms of COVID-19 infection. During his confinement, Mr. Pollack started to display telltale symptoms of infection, including a severe cough. His symptoms should have set off alarm bells at the Jail, particularly for someone like Mr. Pollock, who was medically vulnerable to the disease: a 64-year-old man in a wheel chair, with hypertension and a history of serious mental illness. And yet, Mr. Pollock was not even tested for COVID-19—the diagnosis was only confirmed after he was sent to a hospital for unrelated reasons. He died within a week of being admitted to the hospital, on April 7. And the fallout from the Jail's failures did not end there: at least three staff members who had contact with Mr. Pollock later tested positive, and other prisoners housed with Mr. Pollock were not tracked down, screened, tested or quarantined, but

were instead transferred to other Jail facilities, potentially spreading the infection to countless others.

The gross mismanagement of Mr. Pollock's case is not unique. On April 14, Clifford Alcenor complained to Jail staff that he was experiencing coughing, shortness of breath, loss of appetite and vomiting. Concerned that he had contracted COVID-19, Mr. Alcenor asked guards and nurses that he be tested and given a mask, but—contrary to public health guidelines and the practice of correctional departments nationwide —Mr. Alcenor was repeatedly refused. Meanwhile, he spent most of his days in close proximity to a cellmate and others in his unnecessarily packed unit. It was not until a week later, when Mr. Alcenor's condition further deteriorated, that he was finally tested for COVID-19. He was positive. It is impossible to say how many other detainees were needlessly infected in the intervening week due to the Jail's failure to take basic precautions to contain the spread of the infection.

Mr. Pollack's and Mr. Alcenor's cases are just two of many showing that Defendant has put everyone living and working at the Jail at serious risk, through his failure to consistently and fully implement necessary public health interventions and established COVID-19 practices for correctional facilities. The voluminous documentary and expert evidence presented in support of this Motion, as well as the evidence to be presented to the Court at a hearing on Plaintiffs' motion, show why Plaintiffs are likely to succeed on the merits of their claims, warranting immediate injunctive relief.

First, Plaintiffs are likely to succeed on their § 1983 claim, because their conditions of confinement violate the Eighth and Fourteenth Amendments. Day after day, Plaintiffs are being needlessly exposed to the risk of COVID-19 infection, and Defendant is demonstrating his deliberate indifference to these risks by failing to adopt basic preventive policies recommended

by public health authorities and adopted by other correctional departments. For example, Defendant could, but has refused to, (i) spread out detainees to permit more effective social distancing by utilizing empty cells or transferring them to less crowded facilities, (ii) expand COVID-19 testing and screening, or (iii) timely provide detainees with basic cleaning and hygiene procedures and supplies to protect themselves against the virus.

Second, Plaintiffs who are medically vulnerable are likely to succeed on their claims to be released because their confinement violates the Eighth and Fourteenth Amendments. Given their underlying medical conditions and, advanced age, these detainees face a far greater risk of severe illness or death from COVID-19, and in the present circumstances, there are no measures Defendant could adopt to reduce that risk to a constitutionally acceptable level. Accordingly, the only remedy available to those Plaintiffs is release from or enlargement of confinement through a writ of habeas corpus or an order under § 1983, consistent with public safety considerations.

Third, Plaintiffs with disabilities are likely to succeed on their claims under the Americans with Disabilities Act and Rehabilitation Act because Defendant is failing to discharge his affirmative obligation to reasonably accommodate detainees' disabilities. By refusing to take adequate measures to protect disabled detainees from COVID-19 infection, Defendant is effectively excluding them from the Jail's programs and services. Federal law prohibits such conduct that is tantamount to discrimination against the disabled. In these circumstances, the only accommodation that is reasonable for Plaintiffs with disabilities at high risk of COVID-19 complications or death is release.

As the Eleventh Circuit has recently made clear, jail administrators cannot be expected to do what is "impossible." *Swain* v. *Junior*, 2020 WL 3167628, at *7 (11th Cir. June 15, 2020). That is not this case. Instead, the record here shows that Defendant has wantonly refused to take

steps available to him to protect detainee health and safety, including steps recommended by public health authorities and adopted by countless other corrections departments nationwide. For example, the jail in *Swain*—only a county away in Miami-Dade—has adopted a panoply of COVID-19 prevention measures, including twice-daily temperature checks of all detainees, deploying industrial grade fogging-type sanitization equipment, and encouraging social distancing by requiring detainees to sleep head to foot. Inexplicably, Defendant has adopted *none* of these measures, nor several other proven risk-reduction methods that are well within his means. Indeed, Defendant has an entire other facility at his disposal that is sitting *empty*, which could be used to spread out detainees and substantially reduce the risk of infection, and yet he has made no effort to avail himself of this excess capacity. Neither the Eleventh Circuit nor any other court has given jail administrators carte blanche to consciously disregard effective methods for protecting detainees from a lethal infectious disease during a pandemic. This Court's intervention is required to ensure Defendant complies with his statutory and constitutional obligations.

STATEMENT OF FACTS

A. The Parties and Classes

1. Parties

Plaintiffs Cody Barnett, William Bennett, Christopher Brown, Jesse Callins, Gregory Dunning, Bernard Franklin, Ricardo Gonzalez Guerra, Heather Lewis, Robert Morrill, Samuel Paulk, Darius Walker Greaves, and Todd Watson are detainees at the Broward County Jail.

Disability Rights Florida, Inc. is a not-for-profit corporation serving as Florida's federally funded Protection and Advocacy Agency for individuals with disabilities, and serves as such by Executive Order signed by the Governor of Florida. As a Protection and Advocacy Agency, Disability Rights Florida has a congressional mandate to, among other things, "pursue legal,

administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of [disabled] individuals within the State who are or who may be eligible for treatment, services, or habilitation." 42 U.S.C. § 15043(a)(2)(A)(i).

Defendant Gregory Tony is the Sheriff and Chief Correctional Officer for Broward County, and is solely responsible for the operation of its jails: Joseph V. Conte, North Broward Bureau, Paul Rein, Main Jail Bureau, and the Central Intake Bureau[1] (together, "Broward County Jail"). Defendant Tony is currently confining over 2,800 people within the Broward County Jail, in conditions that threaten their health and lives.

2. Classes

Plaintiffs Cody Barnett, William Bennett, Christopher Brown, Bernard Franklin, Ricardo Gonzalez Guerra, Robert Morrill, Todd Watson, Jesse Callins, Gregory Dunning, Heather Lewis and Samuel Paulk seek to represent a class of all current and future detainees in pretrial custody at the Broward County Jail who are Florida residents (the "Pre-Adjudication Class").[2] The Pre-Adjudication Class includes (i) a Subclass of all persons who, by reason of age or medical condition, are particularly vulnerable to serious illness or death if they were to contract COVID-19 (the "Medically Vulnerable Pre-Adjudication Subclass"),[3] and (ii) a Subclass of all persons

[1] The Central Intake Bureau is housed in the Main Jail building, but is a separate facility used for booking, processing arrests, pre-magistrate holding, court activities, confinement status, releasing, hospital details, and transportation of inmates.

[2] Plaintiffs' Motion for Class Certification is forthcoming. Although this is a prototypical case for which the class action vehicle was created, the Court "may issue a preliminary injunction in class suits prior to a ruling on the merits" of the class certification motion. Newberg on Class Actions § 4:30 (5th ed. 2020) (collecting cases).

[3] The "Medically Vulnerable" Subclasses are defined as all current and future detainees age 50 and above, as well as all current and future detainees of any age with impaired immunity, including chronic diseases and health conditions such as (a) lung disease, (b) heart disease, (c) chronic liver or kidney disease (including hepatitis and dialysis patients), (d) diabetes, (e) hypertension, (f) compromised immune systems (such as from cancer, HIV, or autoimmune

who have a disability as defined under the Americans with Disabilities Act ("ADA") that puts them at an increased risk of being severely ill and/or dying from COVID-19 (the "Disability Pre-Adjudication Subclass").[4] Plaintiffs Christopher Brown, Cody Barnett, Ricardo Gonzalez Guerra, Robert Morrill, Gregory Dunning, William Bennett and Heather Lewis are also representatives of the Medically Vulnerable Pre-Adjudication Subclass and the Disability Pre-Adjudication Subclass.

Plaintiffs Helen Piciacchi and Darius Walker Greaves seek to represent a class of all current and future detainees in post-conviction custody at the Broward County Jail who are Florida residents (the "Post-Adjudication Class"). The Post-Adjudication Class includes (i) a Subclass of all persons who, by reason of age or medical condition, are particularly vulnerable to serious illness or death if they were to contract COVID-19 (the "Medically Vulnerable Post-Adjudication Subclass"), and (ii) a Subclass of all persons within the Medically Vulnerable Post-Adjudication Subclass who have a disability as defined under the ADA that puts them at an increased risk of severely ill and/or dying from COVID-19 (the "Disability Post-Adjudication Subclass"). Plaintiffs Helen Piciacchi and Darius Walker Greaves are also representatives of the Medically Vulnerable Post-Adjudication Subclass and the Disability Post-Adjudication Subclass.

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disease), (g) blood disorders (including sickle cell disease), (h) developmental disability, (i) severe mental illness, (j) severe obesity, and/or (k) moderate to severe asthma.

[4] The "Disability" Subclasses are defined as all current and future detainees with a disability that substantially limits one or more of their major life activities and who are at an increased risk of becoming severely ill and/or dying from COVID-19 due to their disability or any medical treatment necessary to treat their disability. The Disability Subclasses include everyone in the Medically Vulnerable subclasses except those who are medically vulnerable solely because of age or obesity. All other members of the Medically Vulnerable Subclasses are also members of the Disability Subclasses and are protected by the Constitution as well as disability rights laws.

B. The Lethal COVID-19 Disease Has Led to a Crisis Across the Globe, Including in Broward County.

The novel coronavirus that causes COVID-19 has led to a global pandemic. As of June 23, 2020, there were more than 9,131,445 reported COVID-19 cases worldwide, and more than 2,313,445 reported COVID-19 cases in the United States alone.[5] So far, over 120,450 people in the United States have lost their lives to the virus.[6]

Broward County has not escaped the pandemic. Following the rest of the country, the County has declared a state of emergency because "COVID-19 constitutes a clear and present threat to the health and welfare of the people of Broward County."[7] The state of Florida and Broward County are now in the midst of the most serious surge in COVID-19 infections since the pandemic began. Statewide data shows that from June 16-20, 2020, the number of new COVID-19 cases surged to their highest daily totals, with 4,700 new cases on June 20, 2020.[8] In Broward County, 507 new cases were reported for June 20, 2020, and three more people died from the virus, bringing the total of those infected in the county to 11,744 and deaths to 377 as of June 23.[9]

Statewide, 5.7% of persons tested were positive, while in South Florida the positive rate sits at 8.2%.[10]

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[5] *Florida's COVID-19 Dashboard*, FLA. DEP'T OF HEALTH (accessed June 23, 2020), https://cutt.ly/7yVgURO.

[6] *Id*.

[7] Broward County, *Declaration of Emergency* (Mar. 10, 2020), https://cutt.ly/9uzAX6u.

[8] *Florida Adds All-Time record 3,207 coronavirus cases in one day*, Sun Sentinel (June 18, 2020), https://cutt.ly/ju5q36S; *Florida's COVID-19 Dashboard*, *supra* note 5.

[9] *Florida's COVID-19 Dashboard*, *supra* note 5.

[10] *More Than 1,300 New Coronavirus Cases in Florida, as State Death Toll Reaches 2,800*, NBCMIAMI.COM (June 10, 2020), https://cutt.ly/UuzDZYt.

Those infected with COVID-19 can suffer from a variety of symptoms, the most common of which are fever, chills, coughing and difficulty breathing, muscle pain, sore throat, and loss of taste and smell. (Ex. 12 (Cohen Decl.) ¶ 44.)[11] In serious cases, COVID-19 causes acute respiratory disease syndrome ("ARDS"), which is life-threatening: those with ARDS who receive ideal medical care have a 30% mortality rate. (*Id.* ¶ 20.) Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurologic damage, loss of digits, and loss of respiratory capacity. (*Id.* ¶ 23.)

The risk posed by COVID-19 is especially grave to persons 50 years of age and over, as well as persons of any age with certain underlying medical conditions, including chronic diseases and health conditions, such as lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), developmental disability, severe obesity, and moderate to severe asthma. (*Id.* ¶ 24.)[12] For example, compared to an overall COVID-19 mortality rate of about 2.3%,[13] reports estimate that the mortality rate for those with cardiovascular disease is 13.2%, 9.2% for diabetes, 8.4% for

[11] Exhibits in this motion have been filed as attachments to Plaintiffs' notice of filing, also filed today.

[12] WORLD HEALTH ORG., *Coronavirus disease (COVID-19) advice for the public: Myth busters*, https://cutt.ly/dtEiCyc ("Older people, and people with pre-existing medical conditions (such as asthma, diabetes, heart disease) appear to be more vulnerable to becoming severely ill with the virus."); CDC, *Groups at Higher Risk of Severe Illness*, https://cutt.ly/AtJDxSv; CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, https://cutt.ly/8uzZfqC ("Note that incarcerated/detained populations have higher prevalence of infectious and chronic diseases and are in poorer health than the general population, even at younger ages.").

[13] UNIV. OF MINN. CENT. FOR INFECTIOUS DISEASE RESEARCH AND POLICY, *Study of 72,000 COVID-19 patients finds 2.3% death rate*, https://cutt.ly/NuzLyDI.

hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer. (*Id.*)[14] In New York City, the epicenter of the pandemic in the United States, over 17,000 people have died from COVID-19, nearly half of whom were between the ages of 45 and 74; nearly 90% of those deaths were of people with underlying health conditions, including lung disease, asthma, heart disease, a weakened immune system, obesity, kidney disease, liver disease and cancer. (*Id.* ¶ 24.)[15] Similarly, risk of hospitalization increases dramatically for older individuals—the hospitalization rate for ages 50-64 is nearly three times the rate as for younger individuals. (*Id.* ¶ 29.)

Correctional facilities are at particularly high risk of a COVID-19 outbreak. The same combination of factors that makes nursing homes and cruise ships hotbeds for contagion spread are present in prisons and jails: many people living in a closed space, with shared ventilation, common food preparation space, communal living/bathing/toileting/eating, limited medical facilities, and limited ability to leave the facility when symptomatic or after potential exposure to the virus.[16] These conditions make it particularly difficult to contain the virus, which is known to spread from person to person through respiratory droplets, close personal contact, and from

[14] WORLD HEALTH ORG., *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, at 12 (Feb. 28, 2020), https://cutt.ly/xtEokCt.

[15] N.Y. CITY HEALTH DEP'T, *Details on Deaths* (June 15, 2020), https://cutt.ly/VuzZOzl (filter for underlying conditions).

[16] The CDC notes that long-term care facilities and nursing homes pose a particular risk because of "their congregate nature" and the residents served. CDC, *Preparing for COVID-19 in Nursing Homes* (updated June 22, 2020), https://cutt.ly/DuzVqmb. As of June 1, 2020, nearly 26,000 nursing home residents had died from COVID-19 and more than 60,000 had fallen ill. *See* Ina Jaffe, *Nearly 26,000 Nursing Home Residents Have Died from COVID-19, Federal Data Show*, NPR (June 1, 2020), https://cutt.ly/4yVkhVV. The CDC is currently recommending that travelers defer cruise ship travel worldwide. "Cruise passengers are at increased risk of person-to-person spread of infectious diseases, including COVID-19." CDC, *COVID-19 and Cruise Ship Travel*, https://cutt.ly/7tEEQvT.

contact with contaminated surfaces and objects. COVID-19 is thought to survive for three hours in the air in droplet form, up to twenty-four hours on cardboard, and up to seventy-two hours on plastic and steel.[17] Further, jails face the additional challenge of "jail churn,"[18] where members of the community, including both detainees and jail staff, regularly move in and out of the facility, bringing illnesses with them into the jail and then, after infection, out to the community.

Correctional facilities are also particularly at-risk environments because they contain relatively large proportions of at-risk individuals:[19]

[17] Neeltje van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, NEW ENG. J. MED. (Apr. 16, 2020).

[18] "The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside." Laura M. Maruschak et al., *Pandemic Influenza and Jail Facilities and Populations*, AM. J. OF PUB. HEALTH (Oct. 2009).

[19] Peter Wagner & Emily Widra, *No need to wait for pandemics: The public health case for criminal justice reform*, PRISON POLICY INITIATIVE (Mar. 6, 2020), https://cutt.ly/7tJXmlC. Eric Reinhart & Daniel Chen, *Incarceration and its Disseminations: COVID-19 Pandemic Lessons From Chicago's Cook County Jail*, HEALTH AFFAIRS 39, No. 8 (2020) ("The data suggest that cycling through Cook County Jail alone is associated with 15.7 percent of all documented novel coronavirus disease (COVID-19) cases in Illinois and 15.9 percent in Chicago as of April 19, 2020.").

	Prevalence of health condition by population			
Health condition	**Jails**	**State prisons**	**Federal prisons**	**United States**
Ever tested positive for Tuberculosis	2.5%	6.0%		0.5%
Asthma	20.1%	14.9%		10.2%
Cigarette smoking	n/a	64.7%	45.2%	21.2%
HIV positive	1.3%	1.3%		0.4%
High blood pressure/hypertension	30.2%	26.3%		18.1%
Diabetes/high blood sugar	7.2%	9.0%		6.5%
Heart-related problems	10.4%	9.8%		2.9%
Pregnancy	5.0%	4.0%	3.0%	3.9%

Health conditions that make respiratory diseases like COVID-19 more dangerous are far more common in the incarcerated population than in the general U.S. population. Pregnancy data come from our report, Prisons neglect pregnant women in their healthcare policies, the CDC's 2010 Pregnancy Rates Among U.S. Women, and data from the 2010 Census. Cigarette smoking data are from a 2016 study, Cigarette smoking among inmates by race/ethnicity, and all other data are from the 2015 BJS report, Medical problems of state and federal prisoners and jail inmates, 2011-12, which does not offer separate data for the federal and state prison populations. Cigarette smoking may be part of the explanation of the higher fatality rate in China among men, who are far more likely to smoke than women.

Because there is no known cure or even an effective treatment for the disease,[20] correctional facilities must adopt strict procedures to prevent or control the spread of COVID-19. The only known effective measures for preventing the transmission of COVID-19 are social distancing (deliberately keeping at least six feet of space between persons to avoid spreading illness) and a vigilant hygiene regimen, including frequent handwashing, use of alcohol-based hand sanitizers, frequent cleaning and disinfecting of any surfaces touched by any person, and the use of personal protective equipment ("PPE") such as masks and gloves.[21]

[20] Saralyn Cruickshank, *Experts Discuss Covid-19 and Ways to Prevent Spread of Disease*, JOHN HOPKINS MAG. (Mar. 17, 2020), https://cutt.ly/VtKoV9N.

[21] CDC, *How to Protect Yourself and Others*, https://cutt.ly/1uz1Y1K.

Numerous public health experts, including Dr. Gregg Gonsalves,[22] Dr. Ross MacDonald,[23] Dr. Marc Stern,[24] Dr. Oluwadamilola T. Oladeru and Adam Beckman,[25] Dr. Anne Spaulding,[26] Dr. Homer Venters,[27] Jaimie Meyer,[28] the faculty at Johns Hopkins schools of nursing, medicine, and public health,[29] and Dr. Josiah Rich[30] have all strongly cautioned that people booked into and held in jails are likely to face serious, even grave, harm due to the outbreak of COVID-19. That is why so many experts are united in their recommendation that jails like the Broward County Jail significantly downsize their population and reduce new incoming bookings.[31]

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[22] Kelan Lyons, *Elderly Prison Population Vulnerable to Potential Coronavirus Outbreak*, THE CONN. MIRROR (Mar. 11, 2020), https://cutt.ly/BtRSxCF.

[23] Craig McCarthy & Natalie Musumeci, *Top Rikers Doctor: Coronavirus 'Storm is Coming,'* N.Y. POST (Mar. 19, 2020), https://cutt.ly/ptRSnVo.

[24] Marc F. Stern, MD, MPH, *Washington State Jails Coronavirus Management Suggestions in 3 "Buckets,"* WASH. ASSOC. OF SHERIFFS & POLICE CHIEFS (Mar. 5, 2020), https://cutt.ly/EtRSm4R.

[25] Oluwadamilola T. Oladeru, et al., *What COVID-19 Means for America's Incarcerated Population – and How to Ensure It's Not Left Behind* (Mar. 10, 2020), https://cutt.ly/QtRSYNA.

[26] Anne C. Spaulding, MD, MPDH, *Coronavirus COVID-19 and the Correctional Facility*, EMORY CTR. FOR THE HEALTH OF INCARCERATED PERSONS (Mar. 9, 2020), available at https://cutt.ly/6uz9MaH.

[27] Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, MOTHER JONES (Mar. 12, 2020), https://cutt.ly/jtRSPnk.

[28] *Velesaca* v. *Wolf et al.*, No. 20-cv-1803, ECF No. 42 (S.D.N.Y. Mar. 16, 2020).

[29] Letter from Faculty at Johns Hopkins School of Medicine, School of Nursing, and Bloomberg School of Public Health to Hon. Larry Hogan, Gov. of Maryland, March 25, 2020, https://cutt.ly/stERiXk.

[30] Amanda Holpuch, *Calls Mount to Free Low-risk US Inmates to Curb Coronavirus Impact on Prisons*, THE GUARDIAN (Mar. 13, 2020 3:00 p.m.), https://cutt.ly/itRSDNH.

[31] Jeanna Lucci-Canapari, *Release Connecticut's Prisoners? Health Experts, Activists Urge 'Decarceration' to Slow Pandemic*, YALE SCH. OF MED. (May 12, 2020), available at https://cutt.ly/buz4Lh0; Timothy Williams et al., *'Jails are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. TIMES (Mar. 30, 2020), available at https://cutt.ly/nuz7Jte.

C. The Conditions at the Broward County Jail Are Unnecessarily Exposing Detainees to an Intolerable Risk of Infection.

Despite public health guidelines on how to prevent widespread transmission of COVID-19, and repeated attempts by detainees (through grievances) and outside groups (through detailed letters) to sound the alarm for Defendant, detainees at the Broward County Jail are continuously facing an unreasonable risk of COVID-19 infection because Defendant is failing to implement basic preventive measures.

Inadequate Intake Procedures. As soon as detainees enter the central intake area, they are exposed to an unreasonable risk of infection. Video of the sally port leading into the booking area shows that the space the Sheriff uses for intake does not permit social distancing—and indeed compels detainees to be in close proximity. (Ex. 12 (Cohen Decl.) ¶ 61; (Ex. 15 (Cunningham Decl.) ¶ 10 ("I spent about 15-20 minutes in the sally-port area. I was checked-in with four others. We sat right next to one another as we each waited to be called by an officer.").) After the initial screening, prisoners are kept packed together in holding cells. Ex. 44 (Watson Decl.) ¶ 10 ("During intake to the jail, I waited to be booked in a small holding cell with 15 people, sitting shoulder to shoulder, for about six hours.").) Intake procedures have not meaningfully changed over the last few months, despite the increased spread of COVID-19 in Broward County. (*See* Ex. 17 (Evans Decl.) ¶ 5 (detainee who had gone through the intake process both before and after the COVID-19 crisis observing that "[t]he [booking] procedures followed haven't changed one bit").)

Defendant's current intake-COVID-19 screening procedures to prevent infected persons from entering the Jail are inadequate. Detainees are not tested for COVID-19 at intake. (Ex. 34 (Permenter Decl.) ¶ 16.) (Ex. 11 (Carrion Decl.) ¶ 6). Yet there is no substitute for identifying a carrier other than by testing them, especially given the high percentage of infected persons who

are asymptomatic or pre-symptomatic. (Ex. 12 (Cohen Decl.) ¶¶ 18, 61-62.) Without testing, Defendant's screening procedures are manifestly inadequate as they do not screen persons for recognized COVID-19 symptoms or consistently involve temperature checks, as public health guidelines require. (*See* Ex. 12 (Cohen Decl.) ¶¶ 32, 62; Ex. 11 (Carrion Decl.) ¶ 7 ("I asked the nurse during intake if she was going to take my temperature because of COVID 19. . . . She said no one would get their temperature taken until we all got to the jail facility where we were to be housed. In my case that meant that no one would take my temperature until I got to the Conte facility, after I had already spent two days in the Main jail."); Ex. 17 (Evans Decl.) ¶ 8 ("She took my temperature and asked me if I was on any drugs . . . She didn't ask me any other questions.").)

Following screening, Defendant also is not cohorting detainees for 14 days—*i.e.*, holding detainees together for 14 days and monitoring them for symptoms before their assignment to a housing unit in the Jail —as recommended by the CDC. (Ex. 12 (Cohen Decl.) ¶ 64; Ex. 17 (Evans Decl.) ¶¶ 9, 22 (detainee held in Main Jail, "Detox Unit," 4B2 for only six days before his transfer to Main Jail, Unit 4C2. Before his transfer from Detox to Unit 4C2, "no officer or nurse checked [his] temperature or asked [him] any questions about [his] health or whether [he] had coronavirus symptoms."); Ex. 30 (Morrill Decl.) ¶ 6 ("People - who are held [in Conte 'quarantine' Unit B3] for as long as a couple of weeks and as little as 3 days - come from booking or from other Broward facilities before they are transferred out to Joseph Conte units including my one.").) Cohorting is a crucial step in preventing the introduction of COVID-19 into the Jail, because it vastly increases the likelihood that anyone infected will be identified before they infect others. (Ex. 12 (Cohen Decl.) ¶ 64.) By failing to properly cohort detainees at

intake, Defendant risks infected individuals slipping into the Jail and causing an outbreak, serious illness, or even death in the Jail.

Inadequate Social Distancing. Despite ubiquitous guidance from public health authorities to maintain six feet of distance between people where feasible (*see* Ex. 12 (Cohen Decl.) ¶¶ 16, 65), detainees are held under conditions preventing them from being able to socially distance. *See Banks* v. *Booth*, 2020 WL 3303006, at *20 (D.D.C. June 18, 2020) (finding deliberate indifference where, "[d]espite widespread understanding of the importance of social distancing, Defendants have taken insufficient and delayed steps to ensure that social distancing is occurring consistently"). For example, one detainee describes being held in a large "gymnasium"-type space where detainees are "housed in low-walled cubicles, either three or four inmates per cubicle," and where the cubicle does not allow people to be six feet apart. (Ex. 6 (Bennett Decl.) ¶¶ 18-23.) Another describes being held in a unit with six-man cells, with everyone in the cell within six feet of each other. (Ex. 8 (Brown Decl.) ¶¶ 6-8.) Detainees are unable to social distance either in their cells or out of them. Defendant has not even instructed them to sleep head to foot as a way of maintaining social distancing, as is recommended by the CDC. (Ex. 42 (Vail Decl.) ¶¶ 40-41; Ex. 12 (Cohen Decl.) ¶¶ 65-66; *see*, *e.g.*, Ex. 22 (Guerra Decl.) ¶ 38.) And, during the brief periods when Defendant allows detainees out of their cells, they are prevented from practicing social distancing in the common areas, including day rooms —spaces that are estimated to be 40 feet by 60 feet, serving as many as 30 detainees at a time. (Ex. 42 (Vail Decl.) ¶ 44.) Shared bathrooms, which are used by 6-8 people at one time, are likewise overcrowded. (Ex. 37 (Piciacchi Decl.) ¶ 12.)

Defendant has also forced detainees into close proximity. "[S]taff corralled all of the inmates in the unit together and made them stand shoulder to shoulder for an extended period

while officers searched their cells." (Ex. 12 (Cohen Decl.) ¶ 68; Ex. 18 (Franklin Decl.) ¶ 30; *see also* Ex. 44 (Watson Decl.) ¶ 14 ("[T]he officers handcuffed us in pairs and moved about 12 of us together. The group of us were coming from all different units.").) Defendant also forces detainees during transport between facilities and to wait in line for their medications. (Ex. 12 (Cohen Decl.) ¶ 86.) Jail staff themselves do not comply with social distancing requirements. (Ex. 6 (Bennett Decl.) ¶ 30 ("[O]fficers themselves don't maintain distance between themselves or inmates."); Ex. 17 (Evans Decl.) ¶ 29 ("I regularly see officers in the unit control room, huddled together talking and joking."); Ex. 44 (Watson Decl.) ¶ 24 ("Deputies also gather in groups in the bubble/watch tower area.").)

Inadequate Quarantining, Medical Isolation, Treatment and Care. Defendant's quarantine and medical isolation policies and practices *increase*, rather than *decrease*, the risk of spread of infection in the Jail. Infected individuals, once identified, are not immediately removed from their unit. (Ex. 12 (Cohen Decl.) ¶ 74.) Defendant also does not properly screen, monitor and, in appropriate cases, quarantine or medically isolate detainees who have had contact with known or suspected infected persons. Although medical staff monitors detainees' temperatures, staff do not conduct full symptom-checks or test these detainees. (*Id.* ¶¶ 75, 104; Ex. 15 (Cunningham Decl.) ¶¶ 79-96.) Staff supervising quarantine units also do not take adequate steps to ensure preventive measures within the unit, such as social distancing, cleaning and disinfecting and hygiene procedures, and restricting movements of persons into and out of the unit. Most importantly, Defendant does not test everyone held in a quarantine unit so that those who test positive can be removed from it and treated. (Ex. 12 (Cohen Decl.) ¶ 75.) And, when COVID-19-positive detainees are removed, their cells are frequently not properly cleaned and disinfected before the next occupants are moved in. (Ex. 41 (Stevenson Decl.) ¶ 11; Ex. 15

(Cunningham Decl.) ¶¶ 83-84, 89-90, 98-100.) Defendant's failure to adopt recognized public health quarantining procedures is not only ineffective at preventing the spread of infection in the Jail, but dangerous. (Ex. 12 (Cohen Decl.) ¶ 75.)

Defendant is following equally dangerous quarantine-type procedures that involve: (1) holding persons who have tested positive together in units with those with pending test results, and (2) transferring persons suspected of being infected, and those who have been in contact with them, to units in different facilities. (*Id.* ¶ 74.) These procedures, too, create a risk of uninfected persons becoming infected and spreading infections within the Jail. (*Id.)*

Finally, Defendant also has not adopted procedures to properly care for those who test positive or who may be infected. They are neither medically evaluated or supervised to determine the best course for their treatment and care. (*Id.* ¶¶ 79-80.)[32]

Inadequate Testing: To date, the level of testing at the Jail has been "woefully inadequate." (Ex. 12 (Cohen Decl.) ¶ 43.) As of May 27, 2020, only 216 detainees have been tested, which is a tiny fraction of the thousands of detainees that have passed through the Jail since the COVID-19 pandemic erupted. (*Id.*) In neighboring Miami Dade County, over 1,000 prisoners have been tested, with a positive rate of over 40%. (*Id.*) The significance of the lack of widespread testing is obvious—without identifying everyone in the Jail who is positive for COVID-19, Defendant can neither effectively contain the spread of the virus in the Jail by medically isolating infected individual, nor timely initiate appropriate medical monitoring or treatment for infected persons. (*See id.*) Given the high number of asymptomatic or pre-symptomatic individuals, who may nevertheless be infected, testing is a more certain way of

[32] The only medical treatment Tim Ryan received during his 41 days of medical isolation was temperature checks. (Ex. 12 (Cohen Decl.) ¶ 80.)

identifying infected individuals. (*See id.* ¶ 48.) Other screening measures, including symptom screening, are inadequate. (*See Id.* ¶ 18 ("Indeed, the CDC itself has recognized that 'symptom screening alone is inadequate to promptly identify and isolate infected persons in congregate settings such as correctional and detention facilities.'").) The problem of inadequate testing is compounded by Defendant's failure to promptly test detainees who present with recognized symptoms of COVID-19 infection—this also likely accounts for a significant undercount in confirmed infections in the Jail (52, as of May 27). (*See, e.g.*, Ex. 1 (Alcenor Decl.) ¶¶ 19-23 (detainee repeatedly denied testing for a week despite complaining of "cough, shortness of breath, loss of appetite, and vomiting to guards and express[ing] concern that [he] had COVID-19"); Ex. 17 (Evans Decl.) ¶ 3 (detainee denied testing after complaint of "bad cough," "upset stomach," and "running a temperature").) This is the likely consequence of Defendant's policy or practice of only testing persons if they have a fever. (Ex. 12 (Cohen Decl.) ¶ 44 ("The standard list of COVID-19 symptoms includes fever over 100.4 degrees, as well as a prior fever, chills, respiratory symptoms such as coughing and difficulty breathing, and other symptoms such as muscle pain, sore throat, and new loss of taste and smell."); Ex. 8 (Brown Decl.) ¶ 19 ("They've told us we can only be tested for COVID 19 if we have a fever, regardless [of] if we have other symptoms or not. I myself have not been tested because I have not had a fever.")). Defendant's "focus on the need for a fever before testing, ignores the medical fact that those who contract COVID-19 frequently exhibit symptoms before, if ever, a fever manifests." (Ex. 12 (Cohen Decl.) ¶ 44.) Defendant also does not make testing sufficiently available to Jail staff. (*Id.* ¶ 47.) This risks staff infecting their families, detainees and their communities. (*Id.*)

A testing regime based solely on symptomology is dangerously inadequate, as public health authorities have recognized. The New England Journal of Medicine has recommended

universal testing be offered in jails and prisons.[33] Moreover, testing of everyone in the Jail is feasible: Florida Governor Ron DeSantis has repeatedly stated that testing supply far exceeds demand in the state, that there is capacity to conduct over 10,000 tests daily from drive-thru sites alone, but that only half that number have been requested.[34] Broward County has publicly announced ten testing sites, with more set to open.[35] Further, correctional and detention facilities nationwide are now implementing mass testing to prevent the spread of COVID-19 infections. Ex. 12 (Cohen Decl.) ¶ 53 (mass testing offered in facilities in Arkansas, Ohio, North Carolina, Tennessee, Texas, and Virginia). In Texas, the prison system there has begun mass testing, and, as of June 15, 2020, had tested 107,646 prisoners and 31,293 employees.[36] And, in June, the Los Angeles County Jail system announced that it had tested 10,000 detainees and planned to test everyone.[37]

Failure to Conduct Contact Tracing: Public health authorities have urged the adoption of "contact tracing"—tracking down close contacts of patients with suspected or confirmed infection during the time frame while they may have been infectious, quarantining close contacts until 14 days after their last exposure, and monitoring those individuals for symptoms. A directive from the White House, the CDC, and the Food and Drug Administration hails contact

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[33] Monica Gandhi, et al., *Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19*, N. ENG. J. MED. (Apr. 24, 2020), https://cutt.ly/VulXgc3.

[34] John Kennedy, *As Second Month of Reopening Begins, Florida Coronavirus Testing Still Falls Short*, HERALD-TRIB. (June 1, 2020), https://cutt.ly/Wur6x0f.

[35] *Coronavirus (COVID-19): Collection Sites*, BROWARD.ORG (accessed June 15, 2020), https://cutt.ly/RutwQNI.

[36] *COVID-19 TDCJ Update*, TEX. DEP'T CRIM. JUSTICE (accessed June 15, 2020), https://cutt.ly/nulBujO.

[37] L.A. TIMES, *Correctional Health Officials Hope to Test All L.A. County Inmates for Coronavirus by Next Week*, KTLA5 (June 1, 2020), https://cutt.ly/IulBBwq.

tracing as a "priority" to "prevent or contain outbreaks, especially within . . . congregate living settings in which the residents are particularly vulnerable to rapid spread."[38] But Defendant is not making effective use of this "invaluable tool." (Ex. 12 (Cohen Decl.) ¶ 104 *see, e.g.*, Ex. 8 (Brown Decl.) ¶¶ 15-16, 19; Ex. 15 (Cunningham Decl.) ¶¶ 79-84; Ex. 44 (Watson Decl.) ¶¶ 19-21; Ex. 13 (Costello Decl.) ¶¶ 16-23; Ex. 2 (Artis Decl.) ¶¶ 17-21.) For example, after Mr. Pollock—who tested positive for COVID-19 and eventually died from the virus—was relocated, other inmates who had been "in contact with him" were "relocated . . . throughout the jail causing a cross contamination of non-positive COVID-19 areas." (Ex. 12 (Cohen Decl.) ¶ 106.)

Inadequate Protections for the Medically Vulnerable. Despite the significantly increased risk of serious illness or death for medically vulnerable detainees, Defendant is taking no special precautions for that population other than a daily symptom check for persons 65 and older, which itself is inadequate because the Jail has placed determinative importance on the presence of a fever. (Ex. 8 (Brown Decl.) ¶ 19 ("They've told us we can only be tested for COVID 19 if we have a fever, regardless [of] if we have other symptoms or not. I myself have not been tested because I have not had a fever.").) Even this screening procedure is sporadic. (Ex. 6 (Bennett Decl.) ¶ 8 ("For the past few weeks, a nurse has been sporadically taking and recording my own and other inmates' temperatures.").) Indeed, Defendant has not provided any information suggesting that Jail staff have even systematically identified who the medically vulnerable detainees are, an obvious and readily accomplished first step to protecting these detainees. (Ex. 42 (Vail Decl.) ¶ 66.)

[38] WHITE HOUSE, CDC, & FDA, *Testing Blueprint: Opening Up America Again* (Apr. 27, 2020), https://cutt.ly/Jy1Ft7m; CDC, *Case Investigation and Contact Tracing: Part of a Multipronged Approach to Fight the COVID-19 Pandemic* (Apr. 29, 2020), https://cutt.ly/9y1FXp4.

Defendant has also not implemented other safeguards that could at least somewhat reduce the risk of transmission of COVID-19 to this particularly vulnerable group. Symptom screening is currently limited to those age 65 and older, which excludes other prisoners who are medically vulnerable to COVID-19 due to a pre-existing chronic medical condition. This population has a mortality rate associated with COVID-19 of up to 13%, and is at risk of developing serious illness from COVID-19 requiring hospitalization at rates that far outstrip those without correlated chronic illness. (Ex. 12 (Cohen Decl.) ¶¶ 24-26.) Defendant's policy likewise excludes those who are between the ages of 50-64, who have a hospitalization rate that is three times higher than those under age 50, and a mortality rate substantially higher than those under the age of 45. (*Id.* ¶¶ 29-30.) Other protective measures have not been implemented for the medically vulnerable, including prohibiting their housing in open-bay dormitory housing, housing medically vulnerable persons in units with test-negative confirmed persons, providing separate housing for medically vulnerable persons who are under quarantine, and restricting ingress and egress to units holding medically vulnerable persons to reduce the risks of transmission. (*Id.* ¶¶ 59, 75.)

Inadequate Personal Protective Equipment. Detainees lack the equipment they need to protect themselves and others from infection. Although Defendant gives detainees flimsy single-use paper masks, many detainees have to use them for days or even weeks before Defendant replaces them, even when they become soiled or tear or are otherwise rendered ineffective. (Ex. 12 (Cohen Decl.) ¶ 102; Ex. 15 (Cunningham Decl.) ¶ 102 (masks "barely last a day but officers only give us new ones every week or so"); Ex. 6 (Bennett Decl.) ¶¶31-32 (detainees given "single-use masks, thin and easily broken or damaged" and that are not immediately replaced when damaged; detainee only given two masks in a month); Ex. 37 (Piciacchi Decl.) ¶ 19 ("They did not replace the mask for almost a month, so my mask became disgusting."); Ex. 10 (Callins

Decl.) ¶ 16 (used same mask for a month); Ex. 8 (Brown Decl.) ¶ 17 ("The elastic breaks off and I have to create new holes to put the elastic back in. I've had to do that with all of my masks."); Ex. 30 (Morrill Decl.) ¶ 14 ("They broke easily too and officers didn't replace them when they did.").) Indeed, these shortcomings are not limited to detainees; even staff (who at least received KN95 masks, unlike the flimsy paper masks given to detainees) "were only give[n] one mask which they signed for and were told not to lose it, because they were only getting one." (Ex. 49 (4.24.2020 FOPE Safety Committee Letter) at 1; *see* Ex. 6 (Bennett Decl.) ¶ 36 ("Some officers wear the same masks as inmates, thin single-use surgical masks. Others wear their own masks, including one officer who wears a gas mask.").) Defendant's failure to provide deputies with sufficient PPE is among the reasons they voted no confidence in him during the pandemic.[39]

Inadequate Hygiene Supplies. As is now a fact of life for all Americans, frequent and effective handwashing is a key safeguard against contracting and spreading COVID-19, yet Defendant is denying Plaintiffs the supplies they need to protect themselves and to prevent the spread of the infection to others. Defendant does not provide detainees with sufficient soap for handwashing. They are given only two or three small bars of soap, similar to hotel soap, per week that deputies do not replace when they run out. (Ex. 12 (Cohen Decl.) ¶ 98; Ex. 6 (Bennett Decl.) ¶ 45.) Nor does Defendant give detainees paper towels to dry their hands. (Ex. 12 (Cohen Decl.) ¶ 98.) Detainees instead must use their towels, which are only laundered once a week. (*Id*.) As an alternative for handwashing, Defendant does not provide detainees with even supervised access to liquid hand sanitizer, as recommended by the CDC. (Ex. 12 (Cohen Decl.) ¶¶ 98-99; Ex. 40 (Sissle Decl.) ¶ 13; Ex. 6 (Bennett Decl.) ¶ 46; Ex. 37 (Piciacchi Decl.) ¶ 21;

[39] *BSO Deputies' Union Votes No Confidence in Sheriff Gregory Tony*, 6 S. FLA. NEWS (Apr. 20, 2020), https://cutt.ly/Iul78WC.

Ex. 18 (Franklin Decl.) ¶ 28; Ex. 30 (Morrill Decl.) ¶ 21; Ex. 17 (Evans Decl.) ¶¶ 20, 34.) Defendant recognizes the importance of this measure as deputies are permitted to carry hand sanitizer. (Ex. 12 (Cohen Decl.) ¶ 99.)

Inadequate Cleaning and Disinfecting Procedures and Supplies. Notwithstanding CDC guidance to clean "high touch" areas as often as practicable, common amenities—such as tables, chairs, phones, kiosks, video modules, etc.—are being cleaned and disinfected only once or twice a day, and by trustees (detainees with special privileges) rather than professional cleaning staff. (Ex. 12 (Cohen Decl.) ¶¶ 100-101.) This is especially problematic for equipment such as phones, video modules and kiosks that detainees use constantly throughout the day. (Ex. 6 (Bennett Decl.) ¶ 26.) Cleaning procedures for vehicles used to transport detainees are likewise inadequate. (Ex. 49 (4.24.2020 FOPE Safety Committee letter) at 3.)

Disinfectants and equipment supplied to detainees are also inadequate to prevent the spread of infection in the Jail. Detainees report that they do not smell like bleach or a strong disinfectant, raising concerns that they either do not use a CDC-approved cleaner or that the cleaner is so watered down as to be ineffective. (Ex. 15 (Cunningham Decl.) ¶ 109; Ex. 8 (Brown Decl.) ¶ 27.) Cleaning equipment (mops and buckets) is passed by detainees cell to cell without gloves (Ex. 12 (Cohen Decl.) ¶ 100), and bucket water is not replaced (*id.*; Ex. 6 (Bennett Decl.) ¶ 44; Ex. 10 (Callins Decl.) ¶ 14); *see Banks*, 2020 WL 3303006, at 21* (sanitation is inadequate where, among other shortcomings, "[m]any inmates explained that they lack cleaning supplies to clean their cells").

Inadequate Detainee Education. A key safeguard to protect detainees from infection is education on the COVID-19 virus and its spread, yet Defendant has done little to educate detainees. (*See* Ex. 42 (Vail Decl.) ¶ 55.) Many detainees report that they have received little or

no information in this regard from Jail staff and have relied instead on snippets of information gleaned from newspapers or the television. (Ex. 32 (Paulk Decl.) ¶ 4 ("I have been coughing a lot and my chest hurts. I am having difficulty breathing. I did not know these were symptoms of COVID 19 until my lawyer told me so because they are not teaching us about COVID 19 in the jail or the symptoms of it."); Ex. 6 (Bennett Decl.) ¶ 16; Ex. 40 (Sissle Decl.) ¶ 3; Ex. 27 (Melici Decl.) ¶¶ 4, 18.) Jail staff do not even model and reinforce preventive measures, such as social distancing and wearing masks, in many units. (Ex. 6 (Bennett Decl.) ¶ 30 ("Officers don't instruct us to remain six feet apart during recreation."); Ex. 8 (Brown Decl.) ¶ 21 ("The officers don't make people keep their distance from each other."); Ex. 17 (Evans Decl.) ¶ 16 ("None of the officers instructed inmates to stay six-feet apart from one another when we were out of our cells."); Ex. 15 (Cunningham Decl.) ¶ 31 ("No officer instructed us to keep six feet apart from each other.").) Defendant does not inform detainees about infections in the Jail, or whether people they have been in close contact with have tested positive. (Ex. 44 (Watson Decl.) ¶ 21 ("The guards informed me that some people in the facility had tested positive but would not tell me who."); Ex. 15 (Cunningham Decl.) ¶¶ 79, 83, 95; Ex. 18 (Franklin Decl.) ¶ 33.)

* * *

Over the past months, the Jail has benefitted from the public health interventions that were taken in Florida and Broward County to prevent the spread of COVID-19. But as those measures are ending, the number of infected people in the community has risen. Since Plaintiffs filed this lawsuit just over two weeks ago, the number of positive cases in Broward County alone has increased by 3,587, and 48 more people have died.[40] In March and April, lower than normal admissions meant a decreased risk of potentially infected persons entering the Jail, but the

[40] *See Florida's COVID-19 Dashboard*, supra note 5.

admission rate is now on the rise. In May 2020, 1,205 persons were booked into the Jail; an increase of around 300 on April's booking number. (Ex. 12 (Cohen Decl.) ¶ 14.) As these numbers grow, so does the risk of another outbreak—particularly as preventative measures in the community decrease. This Court should intervene to ensure this does not happen.

LEGAL STANDARD

A temporary restraining order or preliminary injunction is warranted if the movant demonstrates that: "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Wreal, LLC* v. *Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016). Where circumstances are such that even the time needed to hear a request for a preliminary injunction is too long to prevent irreparable harm, a temporary restraining order may issue while a court considers a request for a preliminary injunction. *See United States* v. *Kaley*, 579 F.3d 1246, 1264 (11th Cir. 2009) ("TROs are designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction.").[41]

Because the "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held," and "given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). "A party thus is not required to prove his case in full at a preliminary-injunction hearing." *Id.* Indeed, the U.S. Supreme

[41] Unless otherwise indicated, internal quotation marks and citations are omitted.

Court has cautioned against "improperly equat[ing] 'likelihood of success' with 'success'" when considering requests for preliminary injunctions. *Id.* at 394. Because Plaintiffs have met their burden, the Court should grant their Motion.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. Plaintiffs Are Entitled to a Remedy Under § 1983 for Unconstitutional Conditions of Confinement, in Violation of the Eighth and Fourteenth Amendments.

Under 42 U.S.C. § 1983, detainees have the right to seek redress for violations of their Eighth and Fourteenth Amendments rights, including constitutionally inadequate conditions of confinement. Here, Plaintiffs seek relief from Defendant's failure to discharge his "obligation to take reasonable measures to guarantee the safety of the inmates" under his care. *Hudson* v. *Palmer*, 468 U.S. 517, 526-27 (1984).[42] On each and every day, Plaintiffs and class members are being exposed to an intolerable risk of COVID-19 infection, and Defendant is wantonly refusing to take the steps required to mitigate that risk. Having abdicated his responsibility under the Constitution, Defendant leaves this Court no option but to order remedial measures until minimum constitutional standards are met.

1. Defendant Has Been Deliberately Indifferent to the Risk that Class Members Will Be Infected with COVID-19.

To prove unconstitutional conditions of confinement under the Eighth Amendment, detainees must show (i) that a prison official is exposing them to "an objectively intolerable risk

[42] These protections extend to post-adjudication detainees through the Eighth Amendment, and to pre-trial detainees through the Fourteenth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 545-46 (1979); *see Hamm* v. *DeKalb Cty.*, 774 F.2d 1567, 1573-74 (11th Cir. 1985) ("[T]he due process rights of a [pretrial detainee under the Fourteenth Amendment] are at least as great as the Eighth Amendment protections available to a convicted prisoner." (alterations modified)).

of harm" (the "objective" component), and (ii) that "the prison official acted with deliberate indifference" (the "subjective" component). *Swain* v. *Junior*, 958 F.3d 1081, 1088-89 (11th Cir. 2020).[43] In this case, Defendant has continuously and repeatedly failed to implement critical procedures necessary to protect detainees against the serious harm of COVID-19 infection, demonstrating a clear deliberate indifference to the health and safety of the detainees under his care.

a. Plaintiffs Are Exposed to the Objectively Intolerable Risk of Contracting COVID-19, Which Can Result in Serious Illness and Death.

Plaintiffs satisfy this first "objective" prong by showing that "the challenged conditions [a]re extreme and present[] an unreasonable risk of serious damage to [their] future health or safety." *Id.* at 1088. It is well established that the risk of contracting a communicable disease constitutes such an unreasonable risk of harm. *See, e.g.*, *Helling* v. *McKinney*, 509 U.S. 25, 33-34 (1993) (exposure to unreasonably high levels of second-hand smoke satisfy objective prong); *Truss* v. *Warden*, 684 F. App'x 794, 796 (11th Cir. 2017) (same for exposure to tuberculosis). Also, even if any one of Defendant's shortcomings in isolation were insufficient to show an unreasonable risk of harm, it is clear that the "cumulative effect" of the failures satisfies the

[43] The Supreme Court has held that a pre-trial detainee raising an Eighth Amendment claim must show only that the force was objectively harmful, without needing to show any subjective intent as a post-adjudication plaintiff would. *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2470, 2476 (2015). And although *Kingsley* was an excessive force case, the ruling is not limited to that context; as the basis for its decision, the Supreme Court relied on its prior decision in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), which applied an "objective standard to evaluating *a variety of prison conditions*," and not just an excessive force claim. *Kingsley*, 135 S. Ct. at 2473-74 (emphasis added). However, Plaintiffs recognize that the Eleventh Circuit in *Swain* interpreted *Kingsley* differently, 2020 WL 3167628, at *5 n.4, and reserves all rights to challenge that ruling at the appropriate time.

objective risk of harm standard. *Rhodes* v. *Chapman*, 452 U.S. 337, 362-63 (1981); *see Harvard* v. *Inch*, 411 F. Supp. 3d 1220, 1239-1240 (N.D. Fla. 2019).

There can be no serious dispute that COVID-19 infection constitutes serious harm. The overall mortality rate for COVID-19 is estimated to be between 2 and 3 percent (Ex. 12 (Cohen Decl.) ¶ 4), and that figure is much higher for older people and medically vulnerable individuals, of whom there are many in the Broward County Jail (*id.* ¶¶ 24, 29). And even for those who do not succumb to the virus, COVID-19 infection can be a harrowing experience, with symptoms including severe cough, difficulty breathing, fever, persistent chest pain, chills and loss of taste or smell. (*Id.* ¶¶ 43, 61.) Serious cases frequently require hospitalization, including the use of a ventilator to assist with breathing, and might result in neurological damage, loss of digits, and loss of respiratory capacity. (*Id.* ¶¶ 16, 23; *see Gayle* v. *Meade*, 2020 WL 3041326 (S.D. Fla. June 6, 2020) (objective deliberate indifference satisfied in light of COVID-19's lethality).)

Also, given the conditions prevailing at Broward County Jail, as detailed in the above statement of facts, detainees are clearly at risk of infection. This is more than enough to satisfy the objective component of the standard. *See Swain*, 2020 WL 3167628, at *5 ("[D]efendants seem to agree—wisely, we think—that the risk of COVID-19 satisfied [the objective] requirement."); *Wilson* v. *Williams*, 2020 WL 3056217 (6th Cir. June 9, 2020) (holding that "the objective prong is easily satisfied" in a COVID-19 jail case).

b. Defendant's Failure to Take Reasonable Steps to Prevent Plaintiffs' Infections Demonstrates Deliberate Indifference to the Risk of Harm.

The second prong of the deliberate indifference inquiry is the "subjective component," which asks whether the prison official "knows of and disregards an excessive risk to inmate health or safety." *Swain*, 958 F.3d at 1088. A prison official is liable under this standard "if the evidence showed . . . that he knew of ways to reduce the harm but recklessly declined to act."

Hale v. *Tallapoosa Cty.*, 50 F.3d 1579, 1583 (11th Cir. 1995); *see Banks*, 2020 WL 3303006, at 26* ("Defendants are aware of the risks that COVID-19 poses to Plaintiffs' health and have disregarded those risks by failing to take comprehensive, timely, and proper steps to stem the spread of the virus."); *Farmer* v. *Brennan*, 511 U.S. 825, 847 (1994) (prison official liable for "failing to take reasonable measures to abate . . . substantial risk of serious harm"). Moreover, a failure to take such reasonable steps will not be excused because prison officials claim to lack sufficient resources. *See Ancata* v. *Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) ("Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates."); *see Braggs* v. *Dunn*, 257 F. Supp. 3d 1171, 1251 (M.D. Ala. 2017) ("[A] choice to provide care known to be less effective because it is easier or cheaper can constitute deliberate indifference.").

Here, the evidence shows not only that class members are being subjected to an intolerable risk of COVID-19 infection, but that prison officials are refusing to take specific reasonable steps to mitigate that risk—including those recommended by public health authorities and adopted by other correctional systems—despite having been repeatedly alerted to those risks.[44] (*See*, *e.g.*, Ex. 31 (Morrill Supp. Decl.) ¶¶ 5-6 (exhausted June 6); Ex. 3 (Artis Supp. Decl.) ¶¶ 3-7 (exhausted May 20); Ex. 35 (Permenter Supp. Decl.) ¶¶ 5-18 (exhausted twice in May); Ex. 29 (Moncur Supp. Decl.) ¶¶ 3-6 (exhausted May 15); Ex. 7 (Bennett Supp. Decl.) ¶ 7 (exhausted May 16); Ex. 9 (Brown Supp. Decl.) ¶¶ 11-12 (exhausted May 21); Ex. 24 (Jinks Supp. Decl.) ¶ 8 (exhausted June 5); Ex. 5 (Barnett Supp. Decl.) ¶ 9 (exhausted May 29); Ex. 38

[44] Both Disability Rights of Florida and the Broward County Public Defender have sounded the alarm for Defendant, alerting him to reported conditions in the jail giving rise to increased risk of infection and demanding that he enact and implement policies to safeguard prisoners from COVID-19. (*See* Ex. 48 (4.17.2020 letter from Public Defender BSO); Ex. 50 (5.15.2020 letter from Disability Rights Florida to BSO). Defendant has failed to act on these warnings.

(Piciacchi Supp. Decl.) ¶¶ 8, 11 (Exhausted May 7)); *see also LaMarca* v. *Turner*, 995 F.2d 1526, 1537 (11th Cir. 1993) (finding Eighth Amendment violation where prison official "could have, but did not, take steps" to mitigate risk); *Ahlman* v. *Barnes*, 2020 WL 2754938, at *11 (C.D. Cal. May 26, 2020) ("An institution that is aware of the CDC Guidelines and able to implement them but fails to do so demonstrates that it is unwilling to do what it can to abate the risk of the spread of infection. In other words, failure to comply demonstrates deliberate indifference toward the health and safety of the inmates."). A few examples illustrate the point:

Defendant Is Not Adequately Screening at Intake, in Violation of CDC Guidance. The CDC advises jails to screen detainees effectively at intake, since a single positive case that slips through the cracks could be devastating. (Ex. 12 (Cohen Decl.) ¶¶ 55-56, 62.) Nevertheless, Defendant's intake process omits a variety of screening tools that could readily be employed. For example, detainees are not tested (Ex. 34 (Permenter Decl.) ¶ 16; Ex. 11 (Carrion Decl.) ¶ 6; Ex. 14 (Costello Supp. Decl.) ¶ 2.), and the screening that is done omits a variety of important symptoms (Ex. 12 (Cohen Decl.) ¶ 63). Moreover, even the limited screening Defendant purports to conduct is done only intermittently. (Ex. 17 (Evans Decl.) ¶ 8; Ex. 11 (Carrion Decl.) ¶ 7.) Defendant cannot justify such a haphazard screening process. *See McElligott* v. *Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999) ("[D]eliberate indifference may be established by a showing of . . . a decision to take an easier but less efficacious course of treatment.").[45]

Defendant Is Forcing Detainees to Share Cramped Cells, Despite the Availability of Empty Cells, Units and Facilities. Detainees are being forced to spend up to 20 hours a day in

[45] The risk of potential COVID-19-positive entrants only grows as Defendant increases the rate of new admissions into the Jail. For example, there were 1,205 detainees booked into the jail from May 1 to May 29, 2020, nearly three hundred more than were booked into the jail in April. (Ex. 12 (Cohen Decl.) ¶ 14.)

close proximity to other detainees (and often several other detainees), creating an obvious risk that one infected detainee will spread it to several others. (*See, e.g.*, Ex. 6 (Bennett Decl.) ¶¶ 18-23, 27; Ex. 8 (Brown Decl.) ¶¶ 6-8, 10; Ex. 12 (Cohen Decl.) ¶ 66.) A clear solution to this problem is to reduce the number of detainees in each cell. (Ex. 12 (Cohen Decl.) ¶ 112.) However, the record shows that a high number of cells are going *unused*. (*See, e.g.*, Ex. 37 (Piciacchi Decl.) ¶ 8 ("Although some cells in the unit are empty, jail officials refuse to detain persons alone except for me and one other person. Everyone else must share a room with someone else."); Ex. 25 (Lewis Decl.) ¶ 7.) For example, based on jail housing data from May 18, there are certain medium-security units that are nearly full (82 detainees for a capacity of 84), while other medium-security units are substantially underutilized or even *empty*. (Ex. 42 (Vail Decl.) ¶¶ 30-33.) In light of the pandemic, there is no reasonable excuse to force detainees together when there are empty cells that could be used. *See Gayle* v. *Meade*, 2020 WL 2086482, at *4 (S.D. Fla. Apr. 30, 2020) (finding failure to social distance "placed Petitioners at a heightened risk of not only contracting COVID-19, but also succumbing to the fatal effects of the virus"); *Carranza* v. *Reams*, 2020 WL 2320174, at *9 (D. Colo. May 11, 2020) (finding deliberate indifference where "defendant has not identified any impediment to formulating" a plan to maintain six feet of distance between cellmates); *Banks* v. *Booth*, 2020 WL 1914896, at *7 (D.D.C. Apr. 19, 2020) (finding deliberate indifference where "social distancing was slow to be instituted and has not been fully operationalized"); *Powell* v. *Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990) (plaintiff stated claim for "deliberate indifference to the plaintiff's serious medical needs" where "defendants forced him to remain in a dormitory when the dormitory atmosphere was filled with friable asbestos" and "refused to move the plaintiff to an asbestos-free environment").

Indeed, not only are there empty cells, but there is an entire unused *facility* where detainees could be housed in a way that would enable far greater social distancing. In 2009, Defendant closed a facility called the Stockade that previously housed 430 detainees, but the county said that the jail was "available to reopen if needed."[46] As recently as a few years ago, a county administrator noted that "[t]he Stockade is available as a contingency jail facility in the event more jail space is needed, as authorized by the Broward County Commission,"[47] and the Sheriff's Office said that the facility "could easily be reactivated for jail overflow."[48] If ever there were a time to reactivate the facility, that time is now, and yet Defendant has demonstrated no effort whatsoever to make that happen. (*See, e.g.*, Ex. 42 (Vail Decl.) ¶ 36 (noting that "the California Department of Corrections and Rehabilitation has moved more than 1,000 inmates from dormitory housing into vacant space in an effort to increase physical distancing in these living environments."); Ex. 12 (Cohen Decl.) ¶ 112 (noting that jail officials in New York opened a closed jail facility to permit greater social distancing during COVID-19).)

Defendant Is Failing to Perform Adequate Testing, Despite a Surplus of Tests in the State. Correctional systems around the country have recognized the growing and well-known public health consensus for offering mass and universal testing of persons who live and work in congregate settings like prison, jails, and nursing homes. Consistent with the practice of jails

[46] Associated Press, *Budget Cuts Could Close Broward County Jail*, GAINESVILLE SUN (June 8, 2009), https://cutt.ly/fuziUjs.

[47] Affidavit of Alphonso Jefferson ¶ 10, *Jonas* v. *Stack*, 76-cv-06086, ECF No. 899-1 (S.D. Fla. Aug. 31, 2015).

[48] Brittany Wallman, *County Rejects Proposed Homeless Shelter*, SUN SENTINEL (Mar. 11, 2015), https://cutt.ly/Buzkbzr; *see* Broward Housing Council, Meeting Minutes (June 23, 2017), available at: https://cutt.ly/xyVAiUE (Broward County Commission's Housing Committee stating that "[t]he design of the stockade is to house the jail overflow, especially during crisis or emergency needs").

across the rest of the country, Defendant could vastly expand testing. (*See* Ex. 12 (Cohen Decl.) ¶ 53 (describing universal testing programs in Arkansas, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, and Virginia).) However, the Jails have conducted only 216 tests as of May 27, which pales in comparison to the 1,166 tests conducted in the neighboring Miami-Dade jail system—itself an inadequate number. (*Id.* ¶¶ 42, 53.) As the experience of other prison systems show, testing is now widely available as compared to the nascent days of the pandemic. (*Id.* ¶¶ 52,56.) In fact, there is now a reported *surplus* of tests in Florida,[49] and so Defendant has no excuse for failing to seek out sufficient equipment to significantly expand testing. *See Savino* v. *Souza*, 2020 WL 2404923, at *10 (D. Mass. May 12, 2020) ("Keeping individuals confined closely together in the presence of a potentially lethal virus, while neither knowing who is carrying it nor taking effective measures to find out, likely displays deliberate indifference to a substantial risk of serious harm."); *see also, e.g.*, *Mays* v. *Dart*, 2020 WL 1812381, at *13-14 (N.D. Ill. Apr. 9, 2020) (ordering "implementation of prompt testing" in COVID-19 jail case).

The lack of testing is all the more alarming given the number of detainees that have presented with classic COVID-19 symptoms, but have not been tested. For example, according to the medical examiner, detainee Alan Pollack—who was medically vulnerable—had been experiencing COVID-19 symptoms for several days while at the jail, and was tested for the first time only after his condition so thoroughly deteriorated that he needed to be hospitalized. (Ex. 52 (ME Investigation Report) at 2.) Mr. Pollack died from COVID-19 a week later, and there is no telling how many people he may have infected in the meantime because of the Jail's

[49] Steve Thompson, Juliet Eilperin, & Brady Dennis, *As Coronavirus Testing Expands, a New Problem Arises: Not Enough People to Test*, WASH. POST (May 17, 2020), https://cutt.ly/Jur5Evk; Justin Soto, *Gov. DeSantis: Covid-19 Testing Capacity Statewide Surpassing Demand*, SPECTRUM NEWS 13 (Apr. 26, 2020), https://cutt.ly/iuteuMN.

inexcusable failure to test him for COVID-19. (*See also, e.g.*, Ex. 1 (Alcenor Decl.) ¶¶ 19-23, 27.) However, in spite of his death and the overwhelming evidence showing the grave risk of serious illness and death that COVID-19 poses to all medically vulnerable detainees, the Defendant has still not instituted universal testing for all medically vulnerable detained persons.

Defendant Is Actively Dissuading Detainees from Reporting COVID-19 Symptoms by Housing Suspected Cases In Worse Conditions and Charging Detainees for Medical Treatment. Given Defendant's inadequate screening and testing, it is especially important that detainees are encouraged to self-report COVID-19 symptoms so that cases can be effectively quarantined and treated. But Defendant has put into place measures that actively dissuade detainees from self-reporting. For example, detainees suspected of infection have been sent to "medical isolation," which is in some instances a segregation unit that is typically used to punish detainees for serious disciplinary infractions. (*See, e.g.*, Ex. 13 (Costello Decl.) ¶¶ 28-31; Ex. 39 (Ryan Decl.) ¶ 41; see also Ex. 42 (Vail Decl.) ¶ 78.) The conditions in these medical isolation units encourage detainees to mask symptoms out of fear that they will be sent to a punitive setting for reporting their symptoms. (See, e.g., Ex. 15 (Cunningham Decl.) ¶ 125 ("I've also heard that the [North Broward] infirmary and Unit 3 are dirty and overcrowded, and much less sanitary than my unit. That's why I haven't reported my symptoms, because I don't want to be transferred there."); Ex. 46(West Decl.) ¶¶ 23-40 (describing conditions in Main Jail infirmary); Ex. 13 (Costello Decl.) ¶ 29 ("On May 5, I was moved to 11-C, an isolation cell which was not sanitized, and contained flooding and feces smears on the walls."); Ex. 43 (Vickers Decl.) ¶¶ 5-13 (describing conditions in the North Broward infirmary).)

Similarly, detainees report that they are being charged a co-pay when they try to report symptoms, or request screening or testing. (*See, e.g.*, Ex. 23 (Jinks Decl.) ¶ 10 ("Last month

when my cough first started, I requested to speak to a sick-call nurse. I had to pay $17 to see the nurse."); Ex. 32 (Paulk Decl.) ¶ 9 ("The nurse told me they will not take our temperatures and we will have to put in a sick-call request if we want our temperature taken. This means I would have to pay $7 to see a nurse or doctor and get my temperature taken."); Ex. 30 (Morrill Decl.) ¶ 4 ("It's expensive to get proper treatment in the Jail."); Ex. 18 (Franklin Decl.) ¶ 3 ("I've run up over $100 in co-pays since arriving here."); Ex. 36 (Perpignand Decl.) ¶ 3 ("[I]f I ask the nurse for a sick-call, I have to pay for it, something like $17. That's a lot for me.").) For a detainee population that is largely impoverished, such financial barriers deter detainees from reporting symptoms, having the effect of keeping potentially infected detainees in close proximity to others for a far longer period of time. (Ex. 42 (Vail Decl.) ¶¶ 81-84.)

Defendant Has Not Devised a Procedure to Protect the At-Risk Medically Vulnerable Class, Despite Guidance from Health Authorities to Do So. As the CDC has explained, medically vulnerable detainees face significantly higher risk, and so jails must prioritize implementing all possible changes to prevent transmission to these individuals. (Ex. 12 (Cohen Decl.) ¶ 58.) Defendant appears to be failing to take even the initial step of systematically identifying medically vulnerable detainees in need of these protections. (Ex. 42 (Vail Decl.) ¶ 66). Having failed to identify who in his custody is medically vulnerable, Defendant has taken no meaningful steps to stem the spread of disease among this particularly vulnerable population. See *Carranza*, 2020 WL 2320174, at *9 (finding deliberate indifference where "defendant has not tried to formulate a plan that would optimize social distancing for medically vulnerable inmates"). For example, Defendant could—but inexplicably does not—(i) prohibit housing this population in open dormitory housing units, (ii) ensure they are housed in single cells, (iii) cohort them in long-term housing to reduce the number of new persons being admitted to

these units, (iv) quarantine any individual before placement in a medically vulnerable unit to prevent transmission by those with false-negative testing results, (v) implement long-term staff assignment by test-confirmed negative staff to prevent staff–prisoner transmission, and (vi) conduct symptom checks (including, but not limited to, temperature checks) twice daily. (Ex. 12 (Cohen Decl.) ¶ 59; *see Howell* v. *Evans*, 922 F.2d 712, 720 (11th Cir. 1991) (noting deliberate indifference established by "failure to provide or allow proper treatment in the face of information which reasonably should compel action"), opinion reinstated by *Howell* v. *Burden*, 12 F.3d 190, 191 (11th Cir. 1994).) Even in the face of evidence showing the deadly consequences of COVID-19 on the medically vulnerable, Defendant continues to refuse to take the well-understood steps necessary to protect these individuals.

Defendant Is Not Providing Adequate Personal Protective Equipment. Defendant is unreasonably requiring detainees to reuse flimsy, single-use paper masks, which easily become damaged and ineffective, to reduce spread of the virus. (Ex. 12 (Cohen Decl.) ¶ 102.) There is no reason for Defendant to deny detainees daily replacements for their masks, or, at a minimum, reusable cloth masks that can be washed daily. (*Id.* ¶¶ 102, 120.)

Defendant Is Not Providing Adequate Hygiene Supplies. Although frequent handwashing is a critical safeguard against contracting and spreading COVID-19, Defendant has failed to furnish adequate supplies of soap, causing detainees to frequently exhaust their supply before being restocked. (Ex. 12 (Cohen Decl.) ¶ 98.) Nor does Defendant provide detainees with paper towels to dry their hands after they wash them. Instead, detainees must use their towels, which are only laundered once a week. (*Id.*) Similarly, Defendant continues to deny detainees supervised access to hand sanitizer, which the CDC also recommends. (*Id.* ¶ 99.) Given the number of other corrections departments that provide prisoners with hand sanitizer

without incident, there is no reason for Defendant to maintain the prohibition. (*Id.*; Ex. 42 (Vail Decl.) ¶¶ 74-77 ("[R]isk [of hand sanitizer] pales in comparison to the benefit for a much larger number of prisoners").) Defendant cannot seriously contend that he is unable to provide detainees with these vital hygiene supplies.

Defendant Has Not Meaningfully Changed Cleaning Procedures to Suit the COVID-19 Crisis, nor Provided Detainees with Adequate Cleaning Equipment and Supplies. The CDC stresses that "intensified cleaning and disinfecting procedures" are necessary to combat the spread of COVID-19, and, yet, Defendant continues to rely on untrained detainees to clean common areas on at best a twice-daily basis. (Ex. 12 (Cohen Decl.) ¶¶ 100-101.) This is insufficient, particularly for the high-touch areas that are being constantly utilized by multiple detainees, like phones and video kiosks. (Id.) Defendant can and should require more frequent cleaning by knowledgeable, trained staff. (See, e.g., Ex. 42 (Vail Decl.) ¶ 72 (describing changes to cleaning procedures in California correctional facilities).) Similarly, Defendant should be providing detainees with sufficient equipment and supplies to clean and disinfect their own cells, like cleaning solution with bleach or a strong disinfectant, and gloves. (Id. ¶ 87.)

c. Defendant Cannot Defeat a Deliberate Indifference Claim by Adopting a Series of Half-Measures Facially Inadequate to Mitigate the Risk.

Undoubtedly, Defendant has taken *some* steps to respond to the COVID-19 crisis. But a series of half-measures that do not reasonably mitigate the risks that detainees face is insufficient to discharge Defendant's constitutional obligations. *See Farmer*, 511 U.S. at 832 (the Eighth Amendment requires that prison officials "take reasonable measures to guarantee the safety of the inmates"). For example, in *LaMarca*, 995 F.2d at 1526, detainees complained that prison officials were failing to stop an epidemic of violence at a Florida prison. The prison warden pointed to a number of "good faith efforts to resolve the dilemmas facing" the prison, including

that "he attempted to secure additional funds, make improvements to GCI's physical plant, expand recruitment efforts, and institute policies that would have reduced the risk of violence if his staff had followed them." *Id.* at 1537-38. Nevertheless, Judge Tjoflat explained that because the warden had "recklessly disregarded solutions within his means," that was sufficient to establish deliberate indifference. *Id.* at 1538. So, too, here. The Defendant's adoption of certain good faith measures to reduce the risk of COVID-19 transmission does not excuse his failure to implement "solutions within his means." *Id.*; *see Hale*, 50 F.3d at 1584 (warden "was deliberately indifferent by disregarding alternative means" to reduce prison violence "such as those advanced by [plaintiff]"); *Waldrop* v. *Evans*, 871 F.2d 1030, 1035 (11th Cir. 1989) ("[G]rossly incompetent medical care or choice of an easier but less efficacious course of treatment can constitute deliberate indifference.").[50]

Defendant's refusal to take critical steps known and available to him distinguishes this case from the Eleventh Circuit's recent decision in *Swain*, 2020 WL 3167628, which addressed a challenge to conditions at a jail in Miami-Dade County. In *Swain*, the Eleventh Circuit vacated a preliminary injunction, holding that plaintiffs were unlikely to succeed on the merits of their conditions of confinement claim because complete social distancing at that facility was "impossible," and so the jail could not be blamed for failing to do what could not be done. *See*

[50] *Accord De'lonta* v. *Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) ("But just because Appellees have provided De'lonta with *some* treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment."); *Riley* v. *Olk-Long*, 282 F.3d 592, 597 (8th Cir. 2002) ("Although the record indicates that defendants investigated the several reports filed against Link, [defendants] are not shielded from liability because their responses were not adequate given the known risk."); *Edmo* v. *Corizon, Inc.*, 935 F.3d 757, 793-94 (9th Cir. 2019) ("The provision of some medical treatment, even extensive treatment over a period of years, does not immunize officials from the Eighth Amendment's requirements."); *Bistrian* v. *Levi*, 696 F.3d 352, 368 (3d Cir. 2012) ("placing an informant in the SHU does not automatically shield officials from suit" for deliberate indifference to likelihood of assault).

id. at *7 ("Failing to do the 'impossible' doesn't evince indifference, let alone deliberate indifference."). Similarly, the Eleventh Circuit noted that according to a court-appointed expert, jail staff were "doing their best balancing social distancing and regulation applicable to the facility" under the circumstances. *Id.* at *8; *see Valentine* v. *Collier*, 956 F.3d 797, 803 (5th Cir. 2020) (similar).[51]

The record here is far from showing that Defendant is doing his "best." As detailed above, there is voluminous evidence of measures that Defendant can, but will not, adopt to substantially reduce the risk of COVID-19 transmission—including spreading detainees out into unused or underused units and facilities, adopting widespread testing, and performing adequate screening at intake, among many others. In *Swain*, the Eleventh Circuit held that the district court had erred by basing its finding on likelihood of success on the jail's failure to fully implement social distancing. The trial court there had credited Defendants' asserted other mitigation efforts, but nevertheless found that the failure to institute social distancing alone supported a finding of likelihood of success. While overturning the district court, the *Swain* court left open whether (as is the case here) a failure to implement "feasible" measures to increase social distancing could alone constitute deliberate indifference; on the record in that case, the district court simply had not found that the jail had failed to implement feasible social distancing measures. *See Swain*, 2020 WL 3167628, at * 9 ("The plaintiffs assert that the district court determined that the defendants—despite knowing that social distancing is critically important—were deliberately indifferent because they 'neither adopted nor implemented feasible social-distancing measures.). But the portion of the district court's analysis that the plaintiffs cite

[51] The Eleventh Circuit also held that deliberate indifference could not be established solely through an "increased rate of infection." *Swain*, 2020 WL 3167628, at *7. Plaintiffs here do not make such an argument, and so this aspect of *Swain* has no bearing on this case.

doesn't say that at all; indeed, although the plaintiffs refer to "feasible" social distancing some 14 times in their brief, the district court didn't mention "feasible" social distancing even once.

If anything, the Eleventh Circuit's decision is further proof that Defendant's conduct in this case reflects deliberate indifference, since Defendant here has not adopted several measures that were found to be part of the jail's reasonable response in *Swain*. For example:

- To locate potentially infected detainees, the jail in *Swain* "checked inmates' temperatures twice a day," installed "body-heat cameras to measure inmates' temperatures," and "had even begun testing asymptomatic detainees." *Id.* at *8. Defendant is doing none of these. (Ex. 12 (Cohen Decl.) ¶¶ 44-46, 53-54, 56). Here, Defendant is not even conducting daily checks of medically vulnerable detainees, let alone *twice*-daily check of *all* detainees.

- To facilitate social distancing, the jail in *Swain* "put tape on the floor to encourage social distancing in lines," "staggered [bunks] with head to foot configuration in order to maximize the distance between faces during sleep," and "staggered and appropriately distanced [detainees] when going to medical." *Swain*, 2020 WL 3167628 at *8. Defendant here is taking none of these steps. (Ex. 12 (Cohen Decl.) ¶¶ 66, 68-69.)

- To appropriately disinfect the jail facilities, the jail in *Swain* "acquired industrial grade fogging type sanitization equipment to sanitize housing units when inmates are in recreation (three times per week)," and "installed ionizers to clean the facility's air." *Swain*, 2020 WL 3167628 at *8. Defendant has not adopted anything close to these measures.

- To encourage detainee hygiene, the jail in *Swain* provided detainees with "liquid soap," *id.*, which Defendant has not done here.

- To ensure that COVID-19 preventive measures were being uniformly and consistently applied, the jail in *Swain* "deployed an internal auditing team to ensure compliance throughout the facility." *Id.* at *9 n.6. No such auditing team exists here.

And this just includes certain practices that Defendant here *does not even claim to have adopted*. While Defendant asserts that he has taken certain other of the steps that the jail took in

Swain,[52] detailed and credible reports from detainees and Defendant's announced policies say otherwise. For example:

- The jail in *Swain* "provided inmates access to cleaning supplies." *Swain*, 2020 WL 3167628 at *2. But here, detainees are being provided with dirty mop water that does not even smell like it has any cleaning agent in it—either because it is too watered down, or it is not there. (*E.g.*, Ex. 36 (Perpignand Decl.) ¶ 18; Ex. 17 (Evans Decl.) ¶ 33; Ex. 40 (Sissle Decl.) ¶ 11; Ex. 41 (Stevenson Decl.) ¶ 8; Ex. 10 (Callins Decl.) ¶ 14; Ex. 34 (Permenter Decl.) ¶ 71; Ex. 2 (Artis Decl.) ¶ 33; Ex. 18 (Franklin Decl.) ¶ 27; Ex. 25 (Lewis Decl.) ¶ 20.)

- The jail in *Swain* "increased awareness about social distancing." *Swain*, 2020 WL 3167628 at *2. In contrast, here, detainees explain that they have been provided with barely any information about COVID-19 other than sparse notices that are often too small to read, and must resort to picking up whatever information they can from newspapers and the TV. (*E.g.*, Ex. 32 (Paulk Decl.) ¶ 17; Ex. 44 (Watson Decl.) ¶ 30; Ex. 22 (Guerra Decl.) ¶ 66; Ex. 15 (Cunningham Decl.) ¶ 76; Ex. 41 (Stevenson Decl.) ¶ 3; Ex. 34 (Permenter Decl.) ¶ 81; see also Ex. 1 (Alcenor Decl.) ¶¶ 15-16.)

- The jail in *Swain* "instructed staff to continually walk through [the jail] to enforce social distancing by officers and inmates." *Swain*, 2020 WL 3167628 at *2. Here, not only are staff not enforcing social distancing (*e.g.*, Ex. 8 (Brown Decl.) ¶¶ 21, 23-24; Ex. 16 (Dunning Decl.) ¶¶ 16-17; Ex. 25 (Lewis Decl.) ¶¶ 13-14), they are themselves congregating in violation of social distancing guidelines. (Ex. 39 (Ryan Decl.) ¶ 70; Ex. 17 (Evans Decl.) ¶ 29.)

- The jail in *Swain* provided for "an expedited review of inmates with COVID-19 symptoms." *Swain*, 2020 WL 3167628 at *2. Here, Defendant is continuously refusing to screen or test detainees with textbook COVID-19 symptoms. (Ex. 8 (Brown Decl.) ¶ 19; Ex. 1 (Alcenor Decl.) ¶¶ 15-22, 27; Ex. 17 (Evans Decl.) ¶ 3; Ex. 12 (Cohen Decl.) ¶¶ 89-95.)

- The jail in *Swain* "conduct[ed] screening for all staff entering the facility." *Swain*, 2020 WL 3167628 at *8. The Defendant's announced policy is to only provide a temperature screen, and rely on self-reporting of symptoms by staff. (Ex. 12 (Cohen Decl.) ¶ 39.)

- The jail in *Swain* "formalized a new intake quarantine protocol." *Swain*, 2020 WL 3167628 at *2. Here, Defendant has failed to implement an intake quarantine

[52] Both the district court and Eleventh Circuit in *Swain* "assumed for the purposes of [their] decision[s] that the defendants *had* implemented numerous precautionary measures." *Swain*, 2020 WL 3167628, at *8 & n.5. Here, to the extent there is a factual dispute between Plaintiffs' and Defendant's evidence, it would be appropriate for the Court to resolve those factual disputes before deciding Plaintiffs' motions.

protocol that keeps newly admitted detainees cohorted for 14 days, per CDC recommendations. (Ex. 12 (Cohen Decl.) ¶ 64.)

- The jail in *Swain* "modified the 'sick call process' in order to 'allow for an expedited review' of inmates with COVID-19 symptoms." *Swain*, 2020 WL 3167628 at *2. Here, Defendant has failed to implement a sick call process that reliably identifies and responds to prisoners with COVID-19 symptoms. (Ex. 23 (Jinks Decl.) ¶ 10; Ex. 36 (Perpignand Decl.) ¶ 3; Ex. 17 (Evans Decl.) ¶¶ 3-4; Ex. 16 (Dunning Decl.) ¶ 6; *see Banks*, 2020 WL 3303006 (ordering an "enhanced sick call process" to "ensure[] that the precaution[] [is] being taken consistently and effectively").)

Swain suggests that Defendant's acts and omissions here support a finding of likelihood of success supporting issuance of emergency relief.

2. <u>There Is No Barrier to Relief on Plaintiffs' Conditions of Confinement Claim.</u>

Aside from the substantive merits, plaintiffs advancing a § 1983 conditions of confinement claim must have exhausted available administrative remedies. *Swain*, 2020 WL 3167628, at *6-7. Further, organizational plaintiffs must show that they have standing. Each of those requirements is satisfied here.

a. Plaintiffs Have Satisfied Their Obligation to Exhaust All Available Administrative Remedies Under the PLRA

Under the Prison Litigation Reform Act of 1996 ("PLRA"), prisoners must exhaust all available administrative remedies before filing suit concerning prison conditions in federal court. 42 U.S.C. § 1977e(a). Any attempt by Defendant to raise this affirmative defense would fail for at least three reasons: (i) the PLRA does not apply to the organizational plaintiffs, (ii) Plaintiffs have exhausted the grievance procedures; and (iii) to the extent that Defendant claims that Plaintiffs have not, there is no administrative remedy available under these circumstances.

Organizational Plaintiffs Need Not Exhaust. On its face, the PLRA mandates exhaustion only by a "prisoner," defined as "any person incarcerated or detained in any facility."

42 U.S.C. § 1997e. Plainly, Disability Rights Florida is not a "prisoner" within this definition, and is not subject to the PLRA's exhaustion requirements. *See Ala. Disabilities Advocacy Program* v. *Wood*, 584 F. Supp. 2d 1314, 1316 (M.D. Ala. 2008) ("As [an organizational plaintiff] is not a 'person' and has neither been incarcerated nor detained, the prisoner-litigation sections of the PLRA do not apply.").

To the extent Defendant argues that the PLRA nonetheless applies to Disability Rights Florida because it pursues a "representative" or "associational" standing theory, that argument, too, fails. To establish associational standing, an organization must show that one of its members "would otherwise have standing to sue in their own right." *Hunt* v. *Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Because the PLRA exhaustion requirement is not jurisdictional, any member of Disability Rights Florida would have Article III standing without being required to exhaust, and that is sufficient to endow Disability Rights Florida with associational standing. *See Dunn* v. *Dunn*, 219 F. Supp. 3d 1163, 1169 n.9 (M.D. Ala. 2016) (even if prisoners "had failed to exhaust available administrative remedies, and were therefore barred from bringing their claims under the [PLRA], this failure to exhaust would have no effect on [organizational] plaintiffs' standing").

Plaintiffs Have Exhausted the Administrative Grievance Process. As the record shows, many class members have fully exhausted the administrative grievance process that exists, with nothing to show for it. (*See, e.g.*, Ex. 31 (Morrill Supp. Decl.) ¶¶ 5-6; Ex. 3 (Artis Supp. Decl.) ¶¶ 3-7; Ex. 35 (Permenter Supp. Decl.) ¶¶ 5-18; Ex. 29 (Moncur Supp. Decl.) ¶¶ 3-6; Ex. 9 (Brown Supp. Decl.) ¶¶ 7-12; Ex. 24 (Jinks Supp. Decl.) ¶ 8; Ex. 5 (Barnett Supp. Decl.) ¶ 9; Ex. 38 (Piciacchi Supp. Decl.) ¶¶ 8, 11; Ex. 7 (Bennett Supp. Decl.) ¶ 7.) Because this case is a class action, once a single class member has exhausted the available administrative remedies, then the

entire class has "vicariously" exhausted. *Chandler* v. *Crosby*, 379 F.3d 1278, 1287 (11th Cir. 2004); *see Banks*, 2020 WL 3303006 ("Because at least one Plaintiff has pursued available administrative remedies through the emergency grievance process, 'the plaintiff class has met the filing prerequisite.'").

There Are No Available Administrative Remedies. The PLRA's "edict" for detainees to exhaust administrative remedies "contains one significant qualifier: the remedies must indeed be 'available' to the prisoner." *Ross* v. *Blake,* 136 S. Ct. 1850, 1856 (2016). This is fully consistent with the purpose of the PLRA: while a prisoner "must give the prison a shot at attempting [administrative] remediation before he drags its employees into court," "if there are no administrative remedies, then of course there's nothing to exhaust." *Fletcher* v. *Menard Corr. Ctr.,* 623 F.3d 1171, 1173-74 (7th Cir. 2010). To the extent Defendant claims that Plaintiffs failed to exhaust the administrative remedies, there are no such "available" remedies to exhaust, for at least four reasons.

First, Defendant's administrative procedures are unavailable because they are "incapable of use" to provide the detainee Plaintiffs with the urgent relief they need. *See McPherson* v. *Lamont*, 2020 WL 2198279, at *10 (D. Conn., May 6, 2020) ("[T]he imminent health threat that COVID-19 creates has rendered [the jail's] administrative process inadequate to the task of handling Plaintiffs' urgent complaints regarding their health."). Time is of the essence in the fight against COVID-19, and every minute Plaintiffs spend without a remedy is a minute where they suffer the risk of infection, serious illness, or death. However, the Broward County Jail's administrative grievance process takes up to *thirty days* to receive a final response, including appeals. (*See* Ex. 47 (Broward County Inmate Handbook) at 7 (describing inmate grievance process).) Such a lengthy process is "utterly incapable of responding to a rapidly spreading

pandemic like COVID-19," rendering it effectively unavailable. *Valentine* v. *Collier*, 2020 WL 2497541, at *3 (U.S. May 14, 2020) (statement of Sotomayor, J.); *see Fletcher*, 623 F.3d at 1173 ("If it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no 'possibility of some relief' and so nothing for the prisoner to exhaust."). Indeed, Broward County Jails offer no expedited grievance process, confirming that the administrative process was never designed to address an emergency like the COVID-19 crisis. (Ex. 47 (Broward County Inmate Handbook).)

Second, Defendant categorically precludes prisoners from obtaining a remedy on certain of the key issues related to the COVID crisis. For example, it is imperative that Defendant spreads detainees out into unused cells and units, rather than keeping them in multi-person cells where social distancing is impossible. (Ex. 12 (Cohen Decl.) ¶ 66.) However, "housing assignments" are expressly "not grievable" under the jail's administrative grievance process (Ex. 47 (Broward County Inmate Handbook) at 7), meaning that there is no administrative process to address this critical issue.

Third, the Broward County administrative remedies are unavailable because they have acted as a "dead end," with Defendant "unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross*, 136 S. Ct. at 1859. Class members have filed dozens—if not hundreds—of administrative grievances requesting relief from unconstitutional conditions, but they have fallen on deaf ears. (*See, e.g.*, Ex. 21 (Walker Greaves Supp. Decl.) ¶ 4 ("I made a grievance on hygiene conditions . . . . The response stated that cleaning procedures were adequate."); Ex. 15 (Cunningham Decl.) ¶ 126 ("I even filed a grievance that everyone in the Broward County Jail be tested. The response is that the medical staff decide who is tested and only those inmates who show symptoms are tested."); Ex. 34 (Permenter Decl.) ¶¶ 86-96 ("I

filed another grievance about the lack of social distancing in the jail. . . . The jail responded to that grievance by saying that they were doing everything per CDC Guidelines."); Ex. 31 (Morrill Supp. Decl.) ¶¶ 5-6 ("On June 6, my grievance was denied for essentially the same reasons as my May-grievance had been denied: social distancing was impossible and because other conditions were fully compliant with CDC [and] Florida Department of Health standards."); Ex. 45 (Watson Supp. Decl.) ¶ 12 ("The grievance process has been unavailable to me because the jail refuses to respond to my grievances."); Ex. 26 (H. Lewis Supp. Decl.) ¶ 6 ("The jail responded to both of my grievances . . . stat[ing] that they were not doing any COVID-19 testing and that they were following CDC protocol. I do not know what following CDC protocol means, so this response did not answer my grievance in an understandable way for me.").) Given Defendant's clear signal that he will "decline ever to exercise" his authority to remedy conditions, "the facts on the ground demonstrate that no such potential [for an administrative remedy] exists." *Ross*, 136 S. Ct. at 1859.

Fourth, administrative remedies are unavailable because Broward County jail officials have thwarted many Plaintiffs' efforts to file grievances concerning the conditions of their confinement. (*See, e.g.*, Ex. 16 (Dunning Decl.) ¶¶ 31-32 (guard repeatedly refusing to open grievance kiosk; Ex. 19 (Franklin Supp. Decl.) ¶ 2 ("Each time I've requested to file a grievance, officers, including both deputies and Sergeants, have prevented me from doing so."); Ex. 17 (Evans Decl.) ¶ 3 ("I attempted to grieve the lack of testing on Memorial Day but the grievance box was locked. I and other inmates in my unit have been locked out of the grievance box since then, and officers have refused to open it."); Ex. 26 (H. Lewis Supp. Decl.) ¶¶ 7-8.) *See Ross*, 136 S. Ct. at 1860 (noting administrative remedies are not available when "prison administrators thwart inmates from taking advantage of a grievance process"); *Booth* v. *Allen*, 758 F. App'x

899, 902 (11th Cir. 2019) (holding that allegations that "prison officials withheld certain necessary forms to thwart his efforts to timely file" suggests the remedy was not available).

b. Defendant Is Liable Because His Policies and Customs Caused Plaintiffs' Injuries.

To the extent the Court applies the municipal liability standards to this Motion, those standards are also met. To establish liability against a municipality under 42 U.S.C. § 1983, a plaintiff must show that its injury was caused by a municipal "custom or policy." *Fisher* v. *Miami-Dade Cty.*, 114 F. Supp. 3d 1247, 1251-52 (S.D. Fla. 2015); *see Monell* v. *New York City Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978). Municipal liability may be based on actions of "an official responsible for making final policy in that area of the city's business," or by "a practice or custom that is so pervasive, as to be the functional equivalent of a policy adopted by the final policymaker." *Hale*, 50 F.3d at 1582.[53] This requirement is easily satisfied here. Plaintiffs are not complaining about isolated and unsanctioned actions by rogue government employees, but, instead, about Defendant's policies and pervasive customs that fail to adequately protect them from the risk of COVID-19 infection.[54]

As detailed above, the record shows widespread failure to adopt adequate COVID-19 prevention measures at the Broward County Jail—for example, detainees are needlessly kept in multi-person cells despite the availability of empty cells, pods and units; detainees are not being

[53] Sheriff Tony is liable as the "state official with final policymaking authority over the jails." *Jones ex rel. Albert* v. *Lamberti*, 2008 WL 4070293 (S.D. Fla. Aug. 28, 2008); *see* Admin. Code of Broward County, ch. 18, pt. II, sec. 18-40 (designating Sheriff as chief correctional officer).

[54] The Eleventh Circuit in *Swain* held that plaintiffs there were unlikely to succeed on the merits because the district court had not made a ruling on whether plaintiffs' claims were proper under *Monell*. 2020 WL 3167628, at *10. There, plaintiffs had sued the county in addition to the Sheriff. Here, Plaintiffs have not sued the county, so that portion of the opinion is inapplicable. However, to the extent this Court applies *Monell*, Plaintiffs respectfully request that the Court make an express ruling that Plaintiffs' claims satisfy *Monell*.

adequately screened or tested, including during booking and when they report and develop symptoms; and detainees are being deprived of adequate sanitation, hygiene and cleaning supplies. Whether these practices reflect official written policy or merely a "persistent and wide-spread practice," *Depew* v. *City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986),[55] is irrelevant—in either case, municipal authorities are responsible for curing the constitutional violations. *See, e.g.*, *Farmer*, 511 U.S. at 832 (prison officials must "take reasonable measures to guarantee the safety of the inmates"); *Fisher*, 114 F. Supp. 3d at 1252-54 (multiple instances of inadequate medical care sufficient to establish "custom or practice of deliberate indifference").

c. Disability Rights Florida Has Associational Standing to Raise Claims on Behalf of Detainees with Disabilities at Broward County Facilities.

An organization has standing to sue on behalf of its members—known as "associational" or "representative" standing—when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. Disability Rights Florida easily satisfies all three prongs here.

The first prong of *Hunt* requires "that at least one identified member ha[s] suffered or [will] suffer harm." *Ga. Republican Party* v. *Sec. & Exch. Comm'n*, 888 F.3d 1198, 1203 (11th Cir. 2018). This prong is satisfied because *all* disabled persons in Florida are Disability Rights Florida's members: as Florida's designated "Protection and Advocacy" (or "P&A")

[55] Because Defendant has withheld his COVID-19 policies in response to public records requests (*see* Ex. 51 (Email from T. Lynch to B. Stull)), Plaintiffs currently cannot completely assess the sources of Defendant's unconstitutional practices.

organization, Disability Rights Florida has a Congressional mandate to "protect the legal and human rights of individuals with disabilities" in Florida, including prisoners with disabilities. 29 U.S.C. § 794e. As courts have recognized, this means that P&As like Disability Rights Florida have standing to sue on behalf of disabled persons in the state, including prisoners. *See Dunn*, 219 F. Supp. 3d at 1167 ("The Eleventh Circuit has squarely held that P & As may sue on behalf of the constituents they serve."). And because several Disability Rights Florida members—including nine of the named Plaintiffs in this case—are suffering harm arising from Defendant's unconstitutional conduct, Disability Rights Florida has standing in this case.

The second prong of *Hunt* is "undemanding" and requires "only 'mere pertinence' between the subject of the litigation and the organizational purpose." *In re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1307 (S.D. Fla. 2003). Because one of Disability Rights Florida's primary objectives is to advocate for persons with disabilities, it has standing to assert claims that Defendant has violated the constitutional and statutory rights of prisoners with physical disabilities.

The third prong of *Hunt*—which normally asks whether the participation of an individual member is necessary to the suit— is satisfied when the organizational plaintiff is a Protection & Advocacy organization. *See Dunn*, 219 F. Supp. 3d at 1171 ("Congress had, by passing statutes that explicitly authorize[ ] [P & As] to bring suit on behalf of their constituents, abrogated *Hunt*'s third, prudential prong.").

For these reasons, courts routinely recognize that P&A organizations like Disability Rights Florida have standing to challenge detainee conditions of confinement. *See, e.g.*, *Dunn*, 219 F. Supp. at 1166-72; *Oregon Advocacy Ctr.* v. *Mink*, 322 F.3d 1101, 1116 (9th Cir. 2003) (P&A organization has standing to challenge the treatment afforded to pre-conviction criminal

defendants who are mentally incapacitated); *Disability Rights Pa.* v. *Pa. Dep't of Human Servs.*, 2020 WL 1491186, at *5-6 (M.D. Pa. Mar. 27, 2020) (P&A organization has standing on behalf of its constituents who were allegedly injured while residing in youth development centers). There is no reason to treat Disability Rights Florida any differently in this case.

B. Because No Set of Remedial Measures Will Adequately Safeguard the Medically Vulnerable Subclasses, Those Detainees Are Entitled to Release.

1. The Medically Vulnerable Plaintiffs Are Entitled to Habeas Relief Because the Fact of Their Confinement Under Present Circumstances Is Unconstitutional.

Detainees are entitled to habeas relief where they are held "in violation of the Constitution." 28 U.S.C. § 2241(c)(3); *see Preiser* v. *Rodriguez*, 411 U.S. 475, 499 & n.14 (1973) (action challenging "fact or length of that confinement . . . is cognizable only in federal habeas corpus" whereas "§ 1983" allows "claim[s] relating to the conditions of [] confinement"). Here, while there are measures the Court can order to address the risk of infection for many detainees, that is not true for the Medically Vulnerable Subclasses. Because of the exacerbated risk of severe illness and death from COVID-19 infection faced by members of the Medically Vulnerable Subclasses, there is no set of conditions the Court could impose that would render their continuing confinement constitutional—instead, the fact of their ongoing confinement during this pandemic is unconstitutional. *See Wilson*, 2020 WL 3056217, at *5-6 ("[P]etitioners' claims are properly brought under § 2241 because they challenge the fact or extent of their confinement by seeking release from custody."). Accordingly, the Court should order that members of the Medically Vulnerable Subclasses be released pursuant to an established process to consider public safety objections and under terms and conditions as are reasonable.

a. Because of the Specific Characteristics of the Medically Vulnerable Subclass, There Is No Set of Conditions that Will Adequately Reduce the Risk of Serious Harm.

While COVID-19 has proven a grave challenge for all Americans, there can be no doubt that "certain individuals – 'older adults and people of any age who have serious underlying medical conditions' – are at an elevated risk of serious illness or death should they contract COVID-19." *Carranza*, 2020 WL 2320174, at *2. The CDC recently reported that persons who are medically vulnerable are twelve times more likely to die, and six times more likely to be hospitalized, from COVID-19 infection.[56] Similarly, while the overall rate of COVID-related hospitalization for those between the ages of 18-49 is 46.7 per 100,000, that number jumps to 126.2 per 100,000 for those between 50-64 years old, and a shocking 254.7 per 100,000 for those above 65. (*Id.* ¶ 28.) These problems are magnified by the lack of adequate healthcare present at most jails, including the Broward County Jail, which prevents medically vulnerable individuals from accessing the treatment they would need upon infection. (*Id.* ¶ 59.) Thus, for medically vulnerable detainees, the consequences of COVID-19 are so dire that even a diminished risk of infection is constitutionally intolerable—for them, the only remedy is release or enlargement from their current confinement.

b. The Court Is Authorized to Order Release from Confinement Where No Other Forms of Relief Would Cure the Constitutional Violation.

During the pendency of a habeas petition, this Court has broad discretion to order class-wide relief, including "enlargement"—an order "to release Petitioner on bond." *Martinelli Berrocal* v. *Sessions*, 2018 WL 10152504, at *1 (S.D. Fla. Feb. 13, 2018); *see Jimenez* v.

[56] *See* CDC, *Coronavirus Disease 2019 Case Surveillance – United States, January 22 – May 30, 2020*, https://cutt.ly/HionAmp.

Aristiguieta, 314 F.2d 649, 652 (5th Cir. 1963) ("The District Court ha[s] inherent power as the habeas corpus court or judge to enter [an] order . . . respecting the custody or enlargement of [the petitioner]."). The Court likewise has broad discretion on the form of the remedy, including to tailor the form of relief best suited to alleviate Plaintiffs' constitutional injuries while respecting Defendant's legitimate penal objectives. *See* 28 U.S.C. § 2243 ("The court shall . . . dispose of the matter as law and justice require."). Given the circumstances of this case, it would be appropriate to order that members of the Medically Vulnerable Subclasses be released to home confinement on a non-monetary bond.

The Eleventh Circuit's opinion in *Gomez* v. *United States*, 899 F.2d 1124, 1126 (11th Cir. 1990) is not to the contrary. There, the court held that "relief of an Eighth Amendment violation does not include release from confinement." *Id.* However, in that case, the defendants could cure the alleged Eighth Amendment violation—inadequate AIDS treatment—by providing the petitioner treatment at another facility. *Id.* The situation contemplated here, where *no* conditions at Broward County Jail could render Plaintiffs' confinement constitutional, is not a conditions of confinement claim at all, and so *Gomez* has nothing to say about it.[57] Courts around the country have recognized a habeas petition as an appropriate vehicle in such circumstances.[58]

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[57] *Gomez* itself is an outlier in federal jurisprudence. *See Dawson* v. *Asher*, 2020 WL 1704324, at *8 (W.D. Wash. Apr. 8, 2020) ("The majority of federal circuit courts allow detainees to challenge the conditions of confinement via a habeas petition."). To the extent Plaintiffs' habeas claim is construed as a conditions of confinement claim, Plaintiffs acknowledge that this Court is bound by *Gomez*, but reserve all rights to challenge *Gomez* as wrongly decided at the appropriate time.

[58] *See, e.g.*, *Wilson*, 2020 WL 3056217, at *5 ("[P]etitioners' claims are properly brought under § 2241 because they challenge the fact or extent of their confinement by seeking release from custody."); *Vazquez Barrera* v. *Wolf*, 2020 WL 1904497, at *4 (S.D. Tex. Apr. 17, 2020) ("Because Plaintiffs are challenging the fact of their detention as unconstitutional and seek relief in the form of immediate release, their claims fall squarely in the realm of habeas corpus. The

Further, to alleviate any concern that a particular detainee's release would be contrary to the public interest, Plaintiffs have suggested in their proposed order a process for Defendant to make good faith objections to release (if any exist). Thus, the equities favor granting habeas relief.

c. Plaintiffs Have Exhausted Available State Remedies.

As with Plaintiffs' § 1983 claim, exhaustion does not stand in the way of Plaintiffs' § 2241 habeas claim. Although § 2241 itself contains no exhaustion requirement, courts have read in such a requirement to mirror the § 2254 habeas provision. *Dill* v. *Holt*, 371 F.3d 1301, 1302-03 (11th Cir. 2004). However, the "rule of exhaustion is not rigid and inflexible," *Granberry* v. *Greer*, 481 U.S. 129, 136 (1987), and "cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims," *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973).[59] The record here shows not only that there are class members who have exhausted state remedies, but that exhaustion is not required in any event because they are not equipped to deal with the current crisis.

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mere fact that Plaintiffs' constitutional challenge requires discussion of conditions in immigration detention does not necessarily bar such a challenge in a habeas petition."); *Bent* v. *Barr*, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020) ("In this case, Bent does not solely challenge the conditions of his confinement. He contests that his continued detention during the COVID-19 pandemic violates his substantive due process rights. This is patently a 'challenge[ ] to the validity' of his confinement."); *Malam* v. *Adducci*, 2020 WL 1672662, at *3 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) ("Petitioner may nonetheless bring her claim under 28 U.S.C. § 2241 because she seeks immediate release from confinement as a result of there being no conditions of confinement sufficient to prevent irreparable constitutional injury under the facts of her case."); *Coreas* v. *Bounds*, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020) (Plaintiffs entitled to seek habeas relief where there otherwise would be "no vehicle by which to seek redress for the constitutional violation they allege").

[59] Courts in the Eleventh Circuit require petitioners to exhaust administrative remedies before filing a § 2241 federal habeas action. *See Santiago-Lugo* v. *Warden*, 785 F.3d 467, 474-75 (11th Cir. 2015) ("The [administrative remedies] exhaustion requirement is still a requirement; it's just not a jurisdictional one."). For the reasons addressed in Section I.A.2.a. above, Plaintiffs have satisfied the administrative remedies exhaustion requirement.

To start, a named Plaintiff has already sought—and been denied—state habeas relief. On April 21, Plaintiff Darius Walker Greaves filed an emergency motion to reduce his unaffordable $250,000 bond, arguing that his continued confinement violated the Eighth and Fourteenth Amendments. *See* Emergency Motion for Release, *Florida* v. *Walker Greaves*, No. 18011391CF10A (Broward Cty. Cir. Ct. Apr. 21, 2020). In a supplemental filing, Mr. Walker Greaves further explained to the court that he "has suffered from th[e] underlying health condition of asthma since birth," which places him "at high risk for serious infection from COVID-19." Supplemental Emergency Motion ¶ 3, *Florida* v. *Walker Greaves*, No. 18011391CF10A (Broward Cty. Cir. Ct. Apr. 22, 2020). However, Mr. Walker Greaves' motion was denied, Order *Florida* v. *Walker Greaves*, No. 18011391CF10A (Broward Cty. Cir. Ct. Apr. 29, 2020), as was his subsequent petition for a writ of habeas corpus before the Fourth District Court of Appeal, *see* Order, *Walker Greaves* v. *Florida*, No. 4D20-1121 (Fla. 4th DCA May 15, 2020). Mr. Walker Greaves' fruitless efforts are sufficient to satisfy class members' state habeas exhaustion obligations. *See St. Jules* v. *Savage*, 512 F.2d 881, 882 (5th Cir. 1975) (sufficient for one petitioner to exhaust state habeas remedies); *U.S. ex rel. Sero* v. *Preiser*, 506 F.2d 1115, 1130 (2d Cir. 1974) (non-named class member's habeas exhaustion satisfies requirement for class).

Even if he and other class members had not exhausted state habeas remedies, Mr. Walker Greaves' example shows why "circumstances exist that render [the state habeas] process ineffective to protect the rights of the [habeas] applicant," thus excusing exhaustion. *McCarthan* v. *Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1088 (11th Cir. 2017) (quoting 28 U.S.C. § 2254(b)(1)(B)(ii))). It took Mr. Walker Greaves nearly a month to exhaust his state remedies—it took less time than that for Alan Pollack to enter the Broward County Jail, contract

COVID-19, enter a hospital, and die.[60] Given the rapidly evolving nature of the COVID-19 pandemic, class members can ill afford another month without relief. *See, e.g.*, *McPherson* 2020 WL 2198279, at *7 (concluding "that § 2241's exhaustion requirement should be waived in light of the extraordinary circumstances presented by the COVID-19 pandemic").

2. In the Alternative, Medically Vulnerable Subclass Members Are Entitled to Release Under § 1983.

To the extent the Court construes the Medically-Vulnerable Plaintiffs' claim for release as a challenge to the conditions—rather than the fact—of their confinement, they remain entitled to relief under § 1983. As set forth above, members of the Medically-Vulnerable Subclasses are being kept in conditions that expose them to an unacceptable risk of harm from COVID-19 infection, and "the courts have a responsibility to remedy the resulting Eighth Amendment violation." *Brown* v. *Plata*, 563 U.S. 493, 511 (2011). Here, there is only one remedy that will cure the violation for these subclasses—release. And where, as here, the unconstitutional conditions giving rise to the § 1983 claim does not relate to "overcrowding"—*i.e.*, detainee population over a jail's capacity—then a single district court judge is empowered to grant the requested relief.[61]

C. Defendant Is Unlawfully Discriminating Against Members of the Disabled Class by Failing to Offer Reasonable Accommodation in Light of their Disabilities.

Plaintiffs are likely to prevail on their claims under the ADA and Rehabilitation Act ("RA") because Defendant has failed to provide reasonable accommodations to protect members

[60] Raychel Lean, *Broward Inmate Dies After Contracting COVID-19*, LAW.COM (Apr. 8, 2020), https://cutt.ly/FuA1IxH.

[61] To the extent the Court characterizes Plaintiffs' § 1983 release claim as a request for relief from "overcrowding," Plaintiffs reserve the right to request a three-judge court for a prisoner release order at the appropriate time. *See* 18 U.S.C. § 3626(a)(3).

of the Disabled Subclasses from the serious dangers posed by COVID-19. To state an ADA or RA claim, a plaintiff must show "(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability." *Savage* v. *S. Fla. Reg'l Transp. Auth.*, 2011 WL 13136160, at *4 (S.D. Fla. Nov. 15, 2011); *see Iaciofano* v. *Sch. Bd. of Broward Cty., Fla.*, 2016 WL 4216326, at *2 (S.D. Fla. Aug. 10, 2016) ("The standard for determining liability under the Rehabilitation Act is the same as the standard under the [ADA]."). Importantly, the ADA and RA claims are entirely distinct from Plaintiffs' constitutional claims, and do not require a showing that Defendant was deliberately indifferent—only that he failed to discharge his affirmative obligation to reasonably accommodate disabled class members. Each of the elements of Plaintiffs' ADA and RA claims is satisfied here.

First, the members of the disabled class have disabilities under the ADA, which are disabilities that "substantially limit[] one or more major life activities of such individuals."[62] 42 U.S.C. § 12102(1)(A).[63] For example, members of the class include individuals with asthma (Ex. 34 (Permenter Decl.) ¶ 4; Ex. 32 (Paulk Decl.) ¶ 3), a history of cancer (Ex. 6 (Bennett

[62] Under the ADA, a detainee is "qualified" to participate in prison programming unless there are "disciplinary reasons, health reasons, or other, valid penal justifications" for excluding them. *Miller* v. *King*, 384 F.3d 1248, 1266 (11th Cir. 2004), *vacated on other grounds*, 449 F.3d 1149 (11th Cir. 2006); *see also Onishea* v. *Hopper*, 171 F.3d 1289, 1300 (11th Cir. 1999) (detainees are "qualified" unless contagious with "significant risk" of transmission to others, or if "legitimate penological interests" weigh against including them).

[63] "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. § 12102(2).

Decl.) ¶ 4), liver disease (Ex. 22 (Guerra Decl.) ¶ 4; Ex. 8 (Brown Decl.) ¶ 2; Ex. 40 (Sissle Decl.) ¶ 2; Ex. 14 (Costello Supp. Decl.) ¶ 4), HIV (Ex. 40 (Sissle Decl.) ¶ 2), and heart conditions (Ex. 22 (Guerra Decl.) ¶ 9; Ex. 8 (Brown Decl.) ¶ 2); Ex. 32 (Paulk Decl.) ¶ 3). All of these conditions are disabilities under the ADA and RA, and all significantly increase the risk of serious medical complications or death upon COVID-19 infection. (Ex. 12 (Cohen Decl.) ¶¶ 24, 26.)

Second, the Broward County Jail—a "public entity" within the meaning of the ADA and RA[64]—has failed to satisfy its affirmative obligation to reasonably accommodate class members' disabilities. *See Forbes* v. *St. Thomas Univ., Inc.*, 768 F. Supp. 2d 1222, 1227 (S.D. Fla. 2010) ("[T]he ADA not only protects against disparate treatment, it also creates an affirmative duty in some circumstances to provide special, preferred treatment, or 'reasonable accommodation.'"). Specifically, because Defendant has failed to take steps necessary to mitigate the risk of COVID-19 infection—as discussed in Section I.A.1. above—he is effectively denying disabled detainees an equal opportunity to benefit from the jails' services, including "recreational 'activities,' medical 'services,' and educational and vocational 'programs.'" *Penn. Dept. of Corr.*, 524 U.S. at 210; *see United States* v. *Georgia*, 546 U.S. 151, 157 (2006) (plaintiff adequately alleged exclusion where he was deprived of "mobility, hygiene, medical care, and virtually all prison programs"); *Ahlman*, 2020 WL 2754938, at *12 (jail likely violated ADA by "fail[ing] to make reasonable accommodation to allow members of the Disabled Class to participate safely in the programs of the Jail" during the COVID-19 crisis).

[64] *See Penn. Dept. of Corrections* v. *Yeskey*, 524 U.S. 206, 210 (1952) (holding that state prisons are "public entities" under the ADA); *Kruger* v. *Jenne*, 164 F. Supp. 2d 1330, 1338 (S.D. Fla. 2000) ("[T]here is nothing to suggest that the [North Broward Detection Center] is not a 'public entity' as defined in the statute.").

The record is replete with instances of Defendant failing to discharge his affirmative obligation to reasonably accommodate disabled detainees—*i.e.*, to ensure that the Jail is not more dangerous for people who are medically vulnerable because of their disabilities. For example, disabled detainees are housed with non-medically vulnerable detainees, without regard to the substantially elevated risk they face. (*See* Ex. 8 (Brown Decl.) ¶ 4; Ex. 37 (Piciacchi Decl.) ¶ 9; Ex. 25 (H. Lewis Decl.) ¶ 8.) Disabled detainees also are provided the same inadequate personal protection equipment and sanitization supplies as others, despite the disproportionate risks they face. (*See* Ex. 8 (Brown Decl.) ¶ 17; Ex. 37 (Piciacchi Decl.) ¶¶ 12, 19-23; Ex. 6 (Bennett Decl.) ¶¶ 31-34, 37-46; Ex. 32 (Paulk Decl.) ¶¶ 29-32, 35-44.) Further, disabled detainees—even ones showing symptoms of COVID-19—are being denied testing that would allow them and Defendant to know their health status so as to allow them to seek the necessary medical treatment as soon as possible if they do develop COVID-19. (*See, e.g.*, Ex. 8 (Brown Decl.) ¶ 19; Ex. 37 (Piciacchi Decl.) ¶ 3; Ex. 25 (H. Lewis Decl.) ¶ 3; Ex. 32 (Paulk Decl.) ¶¶ 10-12; Ex. 22 (Guerra Decl.) ¶ 39.) Even when detainees are tested, disabled individuals are not given the results of others with whom they came in contact with, preventing them from taking additional precautions when interacting with those who tested positive. (*See, e.g.*, Ex. 18 (Franklin Decl.) ¶ 33.) Further, disabled detainees are put at unnecessary risk because of Defendant's failure to put in safety precautions at jail infirmaries, where they must go to receive treatment for their underlying medical conditions. (*See* Ex. 37 (Piciacchi Decl.) ¶ 18 (describing lack of social distancing and inadequate personal protective equipment at medical unit); Ex. 22 (Guerra Decl.) ¶ 15 (same).)

The result of Defendant's inattention is as predictable as it is tragic—disabled detainees are selecting themselves out of jail facilities, programs and services because they fear

participation will lead to infection. (*See, e.g.*, Ex. 22 (Guerra Decl.) ¶¶ 52-53 (disabled detainee "afraid to use [the laundry] because all inmates share the same facilities" and so he "wash[es] [his] underwear and socks in the shower every day"); Ex. 37 (Piciacchi Decl.) ¶ 16 ("I do not congregate with others in the dayroom because COVID 19 is life threatening to me.").) Such failure to make basic services accessible to disabled individuals, even if merely out of "thoughtlessness and indifference" rather than "invidious animus," is exactly the type of harm that the ADA and RA are meant to prevent. *Alexander* v. *Choate*, 469 U.S. 287, 295 (1985); *see Lonergan* v. *Fla. Dep't of Corr.*, 623 F. App'x 990, 994 (11th Cir. 2015) (detainee unlawfully excluded from activities that required him to go outside because of disability of having pre-cancerous skin condition). Moreover, it almost goes without saying, class members will be completely excluded from jail programming—or the ability to confer with counsel, participate in their defense and meaningfully participate in court hearings—if they are actually infected with the virus and rendered seriously ill or comatose.

In the face of the COVID-19 pandemic, which is far deadlier for people with disabilities, and in the face of the widespread and expanding prevalence of COVID-19 in the Jail, the *only* accommodation that is reasonable to avoid disability discrimination is release of the Disabled Subclasses. (*See* Section I.B.1. above.) In this pandemic, where jails are inherently congregate, dangerous settings that create a high risk of continued spread of COVID-19, there is simply no set of steps that Defendant could take to ensure safe and equal access to services to members of the Disabled Subclasses, and so the only available remedy is release—for example, into home

confinement, a halfway house, probation or any other circumstances where class members can be free of the unreasonable risk of illness and death they currently face every day.[65]

II. THE REMAINING REQUIREMENTS FOR PRELIMINARY INJUNCTIVE RELIEF HAVE BEEN MET

A. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

As shelter-in-place orders have lapsed, Broward County is experiencing a surge in COVID-19 infections which threatens to make its way into the Jail, but Defendant has not taken the steps required to prevent an outbreak, exposing all Detainees to a constitutionally unacceptable risk of infection. Without intervention from this Court, Plaintiffs' risk of contracting COVID-19—and the corresponding risk of severe illness and death—will certainly increase. There can scarcely be a harm more irreparable than that. *See Banks*, 2020 WL 3303006, at *33 ("[Detainees'] risk of contracting COVID-19 and the resulting complications, including the possibility of death, is the prototypical irreparable harm."); *Ahlman*, 2020 WL 2754938, at *13 ("Without additional measures to abate the spread [of COVID-19], more inmates will contract the disease. Undoubtedly some will die. Certainly, there is no greater irreparable harm than death."). Indeed, judges in this District have found irreparable harm with far less dire and imminent threats to health. *See, e.g.*, *Fla. Pediatric Soc'y/The Fla. Chapter of the Am. Acad. of Pediatrics* v. *Benson for Health Care Admin.*, 2009 WL 10668677, at *2 (S.D. Fla. Nov. 12, 2009) (Jordan, J.) ("delayed" provision of "medical services" constitutes "irreparable injury"); *Edmonds* v. *Levine*, 417 F. Supp. 2d 1323, 1342 (S.D. Fla. 2006) ("The denial of medical benefits, and resultant loss of essential medical services, constitutes an irreparable harm."). Absent an injunction, the precautionary measures at Broward County Jail

[65] If the Court declines to order the release of any disabled class members, Defendant should be ordered to carry out all steps possible that can limit the risk of COVID-19 infection.

will remain inadequate, and prisoners will continue to face the preventable increased risk of contracting COVID-19.

For these reasons, courts across the country have had no trouble finding that the risk of COVID-19 infection constitutes irreparable injury, and this Court should do the same. *See, e.g.*, *Gayle*, 2020 WL 3041326, at *21 ("Even in the early days of the pandemic, and with few exceptions, courts did not hesitate to find irreparable harm as a result of potential COVID-19 exposure in prison and detention, including in facilities where there had not been a confirmed case. At this stage of the pandemic, the threat is even clearer."); *Seth* v. *McDonough*, 2020 WL 2571168, at *14 (D. Md. May 21, 2020) ("irreparable harm . . . factor is easily met" in COVID-19 conditions of confinement case).

B. The Threatened Injury to Plaintiffs Outweighs any Harm the Injunction Might Cause Defendant.

In contrast to Plaintiffs' injury, injunctive relief would impose no appreciable harm on Defendant. To be sure, complying with an injunction may require Defendant to devote more resources to bring the Broward County Jail up to constitutional standards, but Defendant does not suffer any cognizable "harm" by being prevented from engaging in unconstitutional actions. *See Hispanic Interest Coal. of Ala.* v. *Governor of Ala.*, 691 F.3d 1236, 1249 (11th Cir. 2012) ("Alabama has no interest in enforcing a state law that is unconstitutional."). Indeed, if Defendant were ordered to release members of the Medically Vulnerable Subclasses, that would, if anything, alleviate any burden on Defendant's operation of the jails. And despite prison officials' interest in "flexibility" to respond to the virus, *Swain*, 2020 WL 3167628, at *12, "[c]ourts may not allow constitutional violations to continue simply because a remedy would

involve intrusion into the realm of prison administration," *Brown*, 563 U.S. at 511.[66] Given the life-or-death stakes for detainees, the balance of equities here is not a close one. *See Sampson* v. *Murray*, 415 U.S. 61, 90 (1974) (Defendant's "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough" to demonstrate irreparable harm).

C. An Injunction Is in the Public Interest.

It does the public no good to countenance a COVID-19 outbreak in its community jail. To the contrary, "the public has a powerful interest in ensuring that there is not an outbreak within the detention center that is then primed to spread via the staff to the wider community." *Savino*, 2020 WL 2404923, at *10.[67] If these dangerous conditions continue unabated without an injunction, there will likely be a wave of detainees requiring treatment at local hospitals, putting an unnecessary strain on the community healthcare system. (*See, e.g.*, Ex. 15 (Cunningham Decl.) ¶ 89 (describing detainee transferred to "North Broward public hospital for treatment" after testing positive for COVID-19); Ex. 46 (West Decl.) ¶ 11; Ex. 12 (Cohen Decl.) ¶ 89 ("[Mr.

[66] The Eleventh Circuit in *Swain* noted that an injunction was improper there because "it forced the defendant to allocate limited testing resources to Metro West at the expense of other county facilities." 2020 WL 3167628, at *12. However, the record in *Swain* is inapposite. While there may have been a shortage of testing in April when the record in that case was developed, that is no longer true—indeed, there is now a *surplus* of tests in Florida. *See* Thompson, Eilperin, & Dennis, *supra* note 49; Soto, *supra* note 49. Defendant has either failed to acquire or to deploy these tests, either of which demonstrates his deliberate indifference.

[67] *See Banks*, 2020 WL 3303006, at *35 ("Additionally, granting injunctive relief which lessens the risk that Plaintiffs will contract COVID-19 is in the public interest because it supports public health. No man's health is an island. If Plaintiffs contract COVID-19, they risk infecting others inside the DOC facilities. Plaintiffs also risk infecting DOC staff members who work inside DOC facilities but also live in the community, thus increasing the number of people vulnerable to infection in the community at large. Additionally, if Plaintiffs contract COVID-19 and experience complications, they will be transported to community hospitals—thereby using scarce community resources (ER beds, general hospital beds, ICU beds). As such, ordering Defendants to take precautions to lower the risk of infections for Plaintiffs also benefits the public." (citation omitted)).

Pollock] was transported from the jail's infirmary to the hospital for evaluation and treatment.").) Broward County can ill afford such an additional burden on its healthcare system—as of June 17, 2020, 71% of hospital beds and 74% of ICU beds in Broward County have been filled,[68] and this limited excess capacity is likely to come under pressure as COVID-19 cases surge with the State's reopening.[69] It is in the public interest to prevent that entirely avoidable outcome. *See Seth*, 2020 WL 2571168, at *14 ("The public also maintains a broader interest in reaping the collateral benefits of reduced risk, such as conserving precious healthcare resources.").

CONCLUSION

This Court should grant Plaintiffs' motion as set out in Plaintiffs' proposed order, filed concurrently herewith.

REQUEST FOR HEARING

Given the importance and complexity of the issues presented in this Motion, Plaintiffs respectfully request (i) oral argument in advance of the Court's order on a temporary restraining order, and (ii) an evidentiary hearing in advance of the Court's order on a preliminary injunction. Plaintiffs anticipate that one hour shall be required for oral argument on the temporary restraining order, and that two days shall be required for an evidentiary hearing on the preliminary injunction.

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[68] Skyler Swisher & Aric Chokey, *Here's How South Florida Stacks Up on Gov. Ron DeSantis' Reopening Benchmarks*, S. FLA. SUN SENTINEL (last updated Jun. 17, 2020), https://cutt.ly/duA2d4y.

[69] David Selig, *Coronavirus: Florida Sets Another Records and Passes 80,000 cases of COVID-19*, LOCAL 10 NEWS (last updated Jun. 16, 2020), https://cutt.ly/tuA2cPJ.

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Respectfully submitted,

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