SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-12935

STEPHEN FOSTER, MICHAEL GOMES, PETER KYRIAKIDES, RICHARD O'ROURKE, STEVEN PALLADINO, MARK SANTOS, DAVID SIGNICH, MICHELLE TOURIGNY, MICHAEL WHITE, FREDERICK YEOMANS, & HENDRICK DAVIS,

Plaintiffs,

v.

CAROL MICI, Commissioner of the Massachusetts Department of Correction, GLORIANN MORONEY, Chair, Massachusetts Parole Board, THOMAS TURCO, Secretary of the Executive Office of Public Safety and Security, & CHARLES BAKER, Governor of the Commonwealth of Massachusetts,

Defendants.

On Reservation & Report from the
Supreme Judicial Court for Suffolk County, SJ-2020-0212

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR EMERGENCY MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

On April 17, 2020, Plaintiffs filed this suit seeking relief from the conditions of confinement in prisons and jails that expose them to unreasonable risk from the COVID-19 pandemic. At the time—and, indeed, long before then—certain facts about the virus were widely accepted: It is highly contagious, particularly in congregate settings. It can be spread by carriers with mild or no symptoms. It is deadly, particularly in people who are older or have underlying medical conditions. And it is best controlled by "social distancing"—*i.e*, people maintain at least six feet of separation from one other so that they do not transmit the virus.

Society has taken drastic action to implement social distancing. In Massachusetts, all non-essential businesses are closed. Grade schools and college campuses are empty. Gatherings of more than ten people are prohibited. A nightly curfew is in effect. But Defendants have wholly failed to implement social distancing in prison. Thousands of prisoners still sleep and eat fewer than six feet from others. Each day many are locked for 23 hours or more in shared cells and large dormitories where physical separation is impossible. Not even all those who are medically vulnerable to the virus have been put in single cells.

Social distancing is currently impossible in Massachusetts prisons and jails because they are overcrowded. Many of them exceed their design capacity and fail to meet minimum space standards promulgated by the Department of Public

Health. In describing the threat posed by COVID-19, this Court has declared that "the situation is urgent and unprecedented, and . . . a reduction in the number of people who are held in custody is necessary." *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, 484 Mass. 431, ___, 142 N.E.3d 525, 537 (Mass. Apr. 3, 2020). Despite the obvious and unavoidable threat, Defendants have failed to meaningfully reduce the prison and jail population. . The results have been predictable: once the virus has been introduced to a prison or jail, it spreads uncontrollably despite all DOC's efforts to contain it. In just three Department of Correction ("DOC") facilities, there are now more than 300 prisoners infected by the virus. At least eight prisoners have died already. Now, before the virus spreads to more facilities, and more people unnecessarily lose their lives while in the care of the state, Plaintiffs ask this Court to grant emergency preliminary relief to reduce the prison and jail population to a reasonably safe level where the lives of those who must remain incarcerated can be protected.

STATEMENT OF FACTS

I. Massachusetts Prisoners Continue to Face a Substantial Risk of Death or Serious Harm

The extent of COVID-19 in Massachusetts prisons and jails is only now beginning to become apparent. On March 27, only ten DOC prisoners had tested positive, all in the Massachusetts Treatment Center (MTC), and Commissioner of Correction Carol Mici's affidavit of that date assured this Court that DOC "ha[d]

taken steps to prevent the introduction of COVID-19 to other facilities."[1] In the weeks since then, the number of cases has exploded as the virus spreads and DOC has begun to do broader testing at a few facilities. As of May 5th, 358 DOC prisoners, 102 correctional officers, and 47 contractual staff had tested positive.[2] MCI-Shirley now reports 143 cases, 118 men held at the MTC have tested positive, and 74 women at MCI-Framingham have confirmed COVID-19 infections. Yet Commissioner Mici continues to maintain that DOC efforts to contain the virus have been successful because prisoners had tested positive at only five of the DOC's sixteen facilities.[3] (The correct number is six.) But DOC has still done minimal or no testing in most of its facilities. This includes those with large, open dormitories such as MCI-Concord (where only six people have been tested) and the North Central Correctional Institution (NCCI) (where only one has been

[1] Joint Appendix ("RA") 104 (Affidavit of Carol Mici ¶ 31).
[2] Unless otherwise indicated, data on COVID-19 in Massachusetts prisons throughout this brief is that reported daily to the Special Master in *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, No. SJC-12926 (hereinafter, "*CPCS v. Chief Justice*"), as tracked on https://data.aclum.org/sjc-12926-tracker/. Public reports are issued weekly by the Special Master. The Special Master's May 4th report says 266 DOC inmates had positive tests as of May 3. See Report of the Special Master of May 4th, Appendix at 15. Daily reports submitted to the ACLU show an additional 92 prisoners produced positive test results over the next two days.
[3] Findings of Fact by the Superior Court ("FF") 7-8.

tested).[4] In fact, as of May 3rd, DOC had conducted a total of only 14 tests in the 10 facilities where it reports no confirmed COVID-19 infections.[5]

The numbers for COVID-19 cases in county correctional facilities are equally alarming, with 129 prisoners, 88 correctional officers, and 30 other staff with confirmed cases.[6] Although testing has been inadequate in nearly all counties, some, such as Middlesex and Essex, still report large numbers of COVID-19 cases. Middelex reports that 32 of the 50 prisoners it tested and 35 of the 52 officers were positive for COVID-19.[7] Given that about two-thirds of all those who were tested were positive for COVID-19,[8] the actual number of cases is certainly much higher.

Because COVID-19 is so contagious, each invisible case is very likely to spread the virus to others. As Commissioner Mici said in a memorandum to staff, "The infection can be spread by people who are asymptomatic; therefore, any one of us can unknowingly spread the virus to co-workers, family and friends, and the

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[4] DOC began reporting the number of tests conducted in each facility on April 13, 2020. According to the Special Master's Weekly Report in SJC-12926 issued May 4, 2020, as of May 3 the DOC had tested no prisoners in Northeastern Correctional Center, Pondville, Bridgewater State Hospital, and Boston Pre-Release facility; had tested one person each in MASAC, NCCI, Old Colony Correctional Center, MCI-Cedar Junction, and Souza Baranowski Correctional Center; three each in MCI-Norfolk and in South Middlesex Correctional Center; and 6 in MCI-Concord.

[5] Special Master's Weekly Report in SJC-12926 issued May 4, 2020.

[6] *Id.* at 1.

[7] Special Master Report of May 3, 2020 at 10. Essex County reports an even higher number, with 65 confirmed inmate cases. *Id*. at 6.

[8] *Id.*

inmate population."[9] But even if every prisoner were tested and found not to be infected, no prison would be completely safe from infection because hundreds of correctional officers and other staff come into each facility every day, and DOC's self-administered screening procedures cannot prevent the entry of asymptomatic carriers of COVID-19.[10]

Between 20 and 25 DOC prisoners have been hospitalized, and seven have already died.[11] As the infection spreads, more hospitalizations and deaths will inevitably follow.

[9] RA 394.

[10] *See* Statement of Agreed Facts Between Plaintiffs and DOC, ¶ 12 **(**RA 149**)** Affidavit of Carol Mici ¶¶ 46-49 (RA 327) and Ex. 16.1 to Mici Declaration (RA 395), describing "self-screening" procedures for employees, listing symptoms that would call for exclusion from entry if "not attributed" (by the employee) to allergies, and instructing employees to take their own temperature and denying entry if greater than 99.9 F.

[11] FF 13. At least one prisoner at Essex County has also died. *See* Matt Murphy, *First Prisoner at County Jail Dies of COVID-19*, WBUR (April 30, 2020), available at https://www.wbur.org/commonhealth/2020/04/30/essex-jail-dies-coronavirus.

A. The prison population is vulnerable due to age and illness

The prison population is older and sicker than the general public. The Massachusetts DOC has the highest percentage of elderly prisoners in the nation, with 13 percent over 60 years old and 30 percent over 50 years old.[12] Moreover, studies show that prisoners age more rapidly than the general population, meaning that they develop chronic conditions and disabilities about 10-15 years earlier.[13] Prisoners generally have a higher rate of chronic disease than the general population.[14]

Older adults and those with underlying health conditions such as cardiovascular diseases, respiratory diseases, liver disease, and diabetes are at increased risk for severe COVID-19 complications and death.[15] Commissioner Mici testified that at least 50% of all prisoners in DOC custody are over the age of 60 or have an underlying medical condition putting them in the high-risk group.[16]

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[12] FF 23; Statement of Agreed Facts Between Plaintiffs and DOC ¶ 15 (RA-140). The Superior Court's Findings of Fact use the lower percentage of 11 percent over 60 that was available to Plaintiffs when they filed their Preliminary Injunction Papers.
[13] FF 23.
[14] FF 23; RA 52 (Declaration of Six Internal Medicine Attending and Resident Physicians at Boston Medical Center ¶¶ 6-9).
[15] RA 140 (Statement of Agreed Facts Between Plaintiffs and DOC ¶ 14).
[16] FF 9.

B. Prisoners cannot practice social distancing

According to the Centers for Disease Control, "Although social distancing is challenging to practice in correctional and detention environments, it is a cornerstone of reducing transmission of respiratory diseases such as COVID-19."[17] Yet it is beyond dispute that prisoners in the DOC cannot maintain the recommended six-foot social distancing while sleeping, eating, or doing many other things inside the institution. DOC admits that 58 percent of its prisoners live in a double cell or dorm where "it is not possible to maintain six foot social distancing."[18] Among those living in shared quarters are many of DOC's most vulnerable prisoners —those over 60 or with high-risk medical conditions —since there are insufficient single cells where they might be housed.[19] The "head to toe" sleeping arrangement DOC has recommended is often unworkable or impractical.[20] Similarly, many prisoners in the county jails cannot protect themselves because they share a cell with another person or live in crowded dorms.[21] Prisoners who do

[17] CDC Guidance, at 4.
[18] FF 8; the distance is sometimes half that amount. *See, e.g.,* FF 14, 15, 18.
[19] FF 8.
[20] FF 18, Pena Decl. ¶ 19 (RA-93).
[21] FF 8. Massachusetts Sheriffs have made similar representations about county facilities, stating the following percentages of prisoners sleeping within six feet of another prisoner: Middlesex County, over 64%; Bristol County, 64%; Norfolk County, 80%; Worcester County, 75%. *Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Ct.*, No. SJC-12926, The Sheriffs' of the Fourteen Counties of the Commonwealth of Mass. Response to the Ct.'s Order of April 1, 2020 Letter (Mass. Apr. 3, 2020).

not live in dormitories mostly live in double- and triple-bunked cells, many of which do not meet the minimum standards for cell and floor space set by the Department of Public Health.[22] Many prisoners in the county jails cannot protect themselves because they share a cell with another person or live in crowded dorms.[23]Complete social distancing is impossible even for those in single cells, since they still share telephones, showers, and other surfaces with others in their unit.[24]

The DOC admits that approximately 70% of DOC prisoners eat within six feet of another prisoner.[25] Prisoners eat meals close together, whether at dormitory dining tables or sitting on their beds or lockers, as they've done since the

[22] *See* Declaration of Lucy Eleanor Umphres, Esq. ("Umphres Decl.") ¶ 3 (RA 124) ("Nearly 68% of all facilities across the Commonwealth currently fail to comply with the DPH cell size and floor space regulations, and 99% of the cell size and floor space violations—all but two—are repeat violations."). The Umphres Declaration surveys the most recent Department of Public Health (DPH) inspection reports for each state facility and for each county jail and house of correction, noting the number of total violations and the number of cell size and floor space violations at each institution. Id. ¶ 2 (RA-124) and pp. 2-14 (RA 124 - 137).

[23] FF 8. Massachusetts Sheriffs have made similar representations about county facilities, stating the following percentages of prisoners sleeping within six feet of another prisoner: Middlesex County, over 64%; Bristol County, 64%; Norfolk County, 80%; Worcester County, 75%. *Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Ct.*, No. SJC-12926, The Sheriffs' of the Fourteen Counties of the Commonwealth of Mass. Response to the Ct.'s Order of April 1, 2020 Letter (Mass. Apr. 3, 2020).

[24] *See, e.g.*, Decl. of Frederick Yeomans, ¶¶ 4, 6 (RA 75); Decl. of Tevon Ngomba, ¶¶ 1-3 (RA 90).

[25] RA 141 (Statement of Agreed Facts Between Plaintiffs and DOC ¶ 29).

lockdown.[26] They may be no more than a foot apart when speaking on the phone,[27] or an arm's length apart when lining up to receive medication.[28] At a dayroom in NCCI-Gardner, prisoners sit within a few feet of one another and play cards.[29]

Bathrooms are also crowded and cramped. Most prisoners share these spaces with many others, making social distancing impossible.[30] For example, prisoners in a 38-man dorm at NCCI share three sinks (plus a mop bucket sink) roughly one foot apart; Dana Durfee testified that most of the time he uses a sink someone is next to him.[31] During busy times at MTC, prisoners using the sink are "elbow to elbow."[32]

The Superior Court credited consistent accounts that prisoners in dormitories and shared cells cannot maintain six-foot social distancing throughout the day.[33] The Court also credited consistent testimony that corrections officers do not attempt to enforce social distancing requirements in shared spaces.[34] The testimony

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[26] *See, e.g.*, FF 14, 16, 18.
[27] Foster FF 20; *see also, e.g.*, FF 14, RA 68 (¶¶ 3-4), RA 94 (¶ 7). Phones are often not wiped down between uses. RA 62 (¶3), RA 88 (¶6), RA 68 (¶ 3).
[28] FF 18 (15-20 prisoners lined up in hall and in stairway one or two steps apart); FF 20 (typically 5 to 6 prisoners "an arm's length apart").
[29] FF 18; RA 83 (Durfee Decl. ¶ 5).
[30] *See, e.g,* Ex. 6, Declaration of Plaintiff Michael Gomes ("Gomes Decl.") ¶ 3 (RA-60) (84 people, two bathrooms); Kryiakides Decl. ¶ 3 (RA-62) (large group of people each morning waiting 2-3 feet apart to use toilets and sinks).
[31] FF 18.
[32] FF 16.
[33] FF 14, 15-16, 18, 20.
[34] FF 14, 16, 18.

of Ryan Duntin at MTC is typical in this regard: he estimated he was within six feet of another prisoner at least half the day, and he has never heard an officer tell a prisoner to move farther apart from anyone else.[35]

C. Conditions are unhygienic and unsanitary

Not all prisoners have regular access to hand sanitizer, cleaning supplies, or soap.[36] Despite the DOC's asserted efforts to remedy this, Commissioner Mici admitted that "supplies of hand sanitizer and cleaning supplies have run short at times."[37] Duntin, who was "more favorable" about the frequency of cleaning, testified that while prisoners try to clean the two bathrooms in his unit twice or three times a day, they sometimes fall short; the toilets are cleaned once a day; and shower stalls one or twice a day.[38] Phones are often are not wiped down between

[35] FF 16.
[36] *See* FF 14 (testimony of Michael White that hand sanitizer, which had previously been available earlier in the month "until 3 p.m.," was now longer available); FF 20 (hand sanitizer periodically unavailable; at times no access to cleaning supplies for his cell); *see also, e.g.*, Watkins Decl. ¶ 7 (RA-96) (no hand sanitizer); Guzman Decl. ¶ 9 (RA-87) (same); Ngomba Decl. ¶ 4 (RA-90) (no hand sanitizer, denied soap after running out); Davis Decl. ¶ 7 (RA-77) (hand sanitizer dispenser empty for three weeks); Maramaldi Decl. ¶ 7 (RA-88) (hand sanitizer and bathroom soap dispensers often empty); Santos Decl. ¶ 6 (RA-67) (no soap in bathroom).
[37] FF 9.
[38] FF 16.

uses.[39] Prisoners in one roughly 75-person dorm share hot pots, microwaves, and televisions that are not cleaned between uses.[40]

Since the lockdown began on April 3rd, which was supposed to reduce opportunities for infection, cleaning crews work less often,[41]resulting in conditions ranging from unsanitary to squalid. Prison workers used to clean on a daily basis the cell of a woman in the health services unit at MCI-Framingham who suffers from morbid obesity and chronic heart, lung, and spinal conditions; after April 3, they no longer came.[42] At Pondville Correctional Center, the floor beneath a urinal shared by 50 prisoners is regularly covered with urine, shared sinks are dirty, and trash receptacles are often overflowing.[43] Toilets in a large dorm unit at MCI-Concord are sometimes clogged with toilet paper and feces.[44] In some places bathrooms and showers are not cleaned daily or with bleach or other appropriate disinfectants.[45] At Souza-Baranowski, healthy prisoners in segregation have been

[39] *See, e.g.*, Powell Decl. ¶ 7 (RA-94); Gomes Decl. ¶ 4 (RA-60); Pena Decl. ¶ 5 (RA-92); Maramaldi Decl. ¶ 6 (RA-88); Sibinich Decl. ¶ 3 (RA-68).
[40] *See* Zuniga Decl. ¶ 3 (RA-97); Powell Decl. ¶ 4 (RA-94).
[41] *See, e.g.*, Davis Decl. ¶ 10 (RA-78); Ex. 12, Declaration of Plaintiff Michelle Tourigny ("Tourigny Decl.") ¶ 7 (RA-70); Kyriadides Decl. ¶ 3 (RA-62).
[42] *See* Touringny Decl. ¶ 7 (RA-70).
[43] *See* Kyriakides Decl. ¶ 5 (RA-62).
[44] *See* Maramaldi Decl. ¶ 5 (RA-88).
[45] *See, e.g.*, Davis Decl. ¶ 10 (RA-78); Ngomba Decl. ¶ 2 (RA-90).

forced to share showers and telephones with prisoners who are "quarantined" because of possible COVID-19 infection.[46]

The DOC's inability to provide the stringent sanitation necessary to prevent COVID-19 transmission must be understood within a history of violations of Department of Public Health standards, including rodent and insect infestation, unsanitary bathrooms, and other repeated violations.[47]

D. Neither guards nor prisoners consistently use personal protective equipment

At the time the lawsuit was filed on April 17, most prisoners did not have masks.[48] DOC began providing masks to all prisoners a week later and was still distributing them during the hearing.[49] Prisoners are not required to wear the masks, and Commissioner Mici acknowledged that some prisoners do not.[50] Stephen Foster estimated that 60-70% of prisoners do not wear masks.[51]

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[46] *See* Ngomba Decl. ¶¶ 2-3 (RA-90).
[47] *See* RA 124-127 (Declaration of Eleanor Umphres and DPH reports cited therein).
[48] *See, e.g.*, RA 58 (decl. of Stephen G. Foster ¶ 5); RA 62 (Decl. of Peter Kyriakides ¶ 7); RA 65 (Decl. of Steven Palladino ¶ 4), RA 68 (¶ 4), 70 ¶ 6; 76 ¶ 8. *See, e.g.*, Powell Decl. ¶ 8 (RA-94); Ngomba Decl. ¶ 7 (RA-91); Pena Decl. ¶ 6 (RA-93); Maramaldi Decl. ¶ 10 (RA-69); White Decl. ¶ 8 (RA-73); Duntin Decl. ¶ 6 (RA-62); *see also* Guzman Decl. ¶ 10 (RA-87) (prisoners get one mask every 10 days).
[49] FF 10.
[50] FF10.
[51] FF 20.

Correctional staff have masks but some officers wear them irregularly, and some do not wear them at all. Officers often fail to wear masks or gloves when handing out meals or personal items.[52] This was true when Plaintiffs filed suit and remained true at the time of the hearing despite the DOC's purported efforts to enforce compliance.[53] A prisoner at MTC reports that officers wear gloves, but put bread on prisoners' trays using the same gloves they've worn while touching cell doors, keys, and other surfaces in the unit.[54] Since the lockdown at MCI-Shirley, diabetic prisoners receive insulin injections in their cells from nurses wearing the same gloves used when giving injections to other prisoners.[55]

E. Lockdown conditions are harsh and dangerous

On April 3, 2020, the DOC instituted a system-wide lockdown. Prisoners are locked in their units 24 hours a day.[56] Prisoners in dormitories remain in the dormitory or in a dayroom during the day. *Id.* Prisoners who live in cells are locked in those cells 23 or more hours a day, with time out only to shower or talk on the

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[52] FF 14 (officers wear masks roughly 75% of the time); 16 (officers wear masks 60 to 70% of the time); 17 (officers entering room of prisoner in Health Services Unit at MCI-Framingham "sometimes" wear masks and gloves); 20 (some officers do not wear masks, including when serving meals and when inmates receive medication). *See, e.g.*, Maramaldi Decl. ¶ 10 (RA-89); Zuniga Decl. ¶ 9 (RA-97), Cummins Decl. ¶ 20 (RA-80).

[53] That is, prisoners' testimony about officers' inconsistent use of masks was consistent with their declarations and others' submitted at the time of filing.

[54] *See* Davis Decl. ¶ 6 (RA-77).

[55] *See* Pena Decl. ¶ 2 (RA-92).

[56] FF 26.

phone.[57] No prisoners go outside or to the gym, and all group programs and education has been suspended. *Id.* Although the DOC has instituted a journaling program in which prisoners can earn up to 7.5 days of good time credit per month,[58] this is half of the amount they could earn before the lockdown.[59]

The lockdown has deprived prisoners of access to adequate medical and mental health care. Declarations of two prisoners not called as witnesses attest to serious lapses in medical care.[60] A third declarant, who is housed in a COVID quarantine unit, attested to being unable to discuss medical issues with nurses or doctors and struggling to get staff to change the undergarments of a cell mate who regularly soils himself.[61] The lockdown has exacerbated documented shortcomings in DOC's medical care that predate the COVID-epidemic, including failures to timely process sick call request forms which, according to the State Auditor in a

[57] *See, e.g.*, FF at 22.
[58] FF 11. Commissioner Mici testified she is considering increasing the credit to 10 days in May.
[59] G.L. c. 127, § 129D.
[60] Plaintiff Michael Gomes, who has had a liver transplant, went for three days without necessary anti-rejection medication. *See* Gomes Declaration ¶ 2 (RA-60). Michael Watkins, a leukemia survivor at Massachusetts Treatment Center who requires daily blood-thinning medication to prevent life-threatening blood clots, did not receive this medication for five days after being put in the COVID quarantine unit. Watkins Decl. ¶ 4 (RA 95).
[61] Aff. of Gregory Sierhus ¶¶ 13-15 (RA 206).

report issued on January, 9, 2020, frequently cause delays in treatment of over a week and enganger outcomes.[62]

According to Commissioner Mici, nearly one quarter of DOC inmates have serious mental illness.[63] Mental health services have been curtailed at a time when fear and harsh conditions have greatly increased prisoners' need for them.[64] Many prisoners, particularly those with underlying health conditions, fear they will become severely ill or die if they become infected.[65] Stephen Foster, who has serious mental illness in addition to multiple underlying physical conditions, saw a mental health therapist twice a month before the lockdown; since the lockdown began on April 3 he has had one brief conversation with a therapist at his cell door.[66] He feels as if someone is "playing Russian roulette" with his life.[67] At NCCI-Gardner a mental health clinician comes twice a week to a 30-man dorm,

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[62] Suzanne Bump, Office of the State Auditor, *Massachusetts Department of Correction Official Audit Report* 11-12 (Jan. 9, 2020) (RA 253-254). In addition, a federal court recently found that the DOC was "neither able nor willing to provide" for a prisoner's medical needs, and that as a result of its "woeful disregard" for his well-being, the DOC was "slowly killing him." *Reaves v. Mass. Dep't of Correction*, 392 F. Supp. 3d 195, 200, 210 (D. Mass. 2019).
[63] FF 13 ("around 23-24 %").
[64] *See, e.g.*, FF 21.
[65] *E.g.,* Gomes Decl. ¶ 7 (RA-61) (prisoner with past suicide attempt: "I try to avoid people, not even talking to them when possible, and I wash my hands constantly. Despite these efforts, I am scared of dying."); Zuniga Decl. ¶ 7 (RA-97) (prisoner with PTSD "going crazy with worry about my family and my own health" has not seen mental health clinician in more than a month).
[66] FF 21; *see also* tk his aff (describing physical conditions).
[67] FF 21.

but conducts visits in the dorm, where the lack of privacy discourages open communication.[68] In one three-week period at MTC, mental health staff came twice to visit the 30 men in the COVID unit.[69] The lockdown has exacerbated anxiety and tension by forcing people to remain in their cells or dorms 23 or more hours a day without access to therapeutic counseling or programming, or even ordinary stress-relievers like recreation and outdoor time.[70]

II. The Commonwealth is Failing to Take Minimal and Obvious Steps to Reduce the Prison and Jail Population When Only an Immediate and Substantial Reduction Will Avoid a Public Health Crisis

A reduction in the number of people imprisoned in Massachusetts jails and prisons is the only meaningful way to prevent the spread of the virus. The half measures undertaken by Defendants to date have been ineffective. On March 27, 2020, Defendant Mici attested that only 10 prisoners in one prison in Massachusetts had any confirmed cases of COVID-19, and that the DOC "has taken steps to prevent theintroduction or transmission of COVID-19 to other facilities." In spite of these precautions, the virus has now spread to hundreds of

[68] Cummins Decl. ¶ 23 (RA-81).
[69] Watkins Decl. ¶ 5 (RA-95).
[70] *See, e.g.,* Santos Decl. ¶ 4; Zuniga Decl. ¶ 6 (RA-97); Sibinich Decl. ¶ 5 (RA-68); White Decl. ¶ 4 (RA-72); *see also* Duntin Decl. ¶ 8 (RA-83) ("Because there are many sick people coughing on the unit, tension in the unit was high, with people being worried they would be infected.").

prisoners across six DOC facilities. Special Master's May 4 report at 15-33.[71] As medical experts have universally recognized, the only way to slow the spread of the infection within a population is to maintain separation between people; because that is impossible in prisons and jails at the current population levels, those levels must be reduced.[72]

Other states and the federal government have acknowledged this unavoidable fact and have taken swift action to reduce their incarcerated populations. For example, governors have used their executive authority in a number of ways—ranging from commutation of sentences, to early release through good time, to the use of home confinement—to reduce the prison population in their states.[73] Executive branch agencies have done much as well. For example, in

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[71] While some DOC facilities have reported no positive cases yet, many have tested few if any prisoners. *See, e.g.*, *id.* at 17 (one test at MASAC), 18 (no tests at Boston Pre Release), 19 (three tests at MCI Norfolk), 20 (one test at NCCI-Gardner), 22 (one test at OCCC), 23 (one test at MCI Cedar Junction), 24 (six tests at MCI Concord), 25 (no tests at NECC), 26 (no tests at Pondville).

[72] *See* Declaration of Six Internal Medicine Residents and Attending Physicians at Boston Medical Center ("BMC Decl.") ¶ 4 (RA 51) ("[D]econgesting prison and jail facilities and reducing the prison population as soon as possible are the best way to protect the health and safety of the individuals incarcerated and of the public."); Rich Decl. ¶ 19 (RA 39) ("It is imperative to scale up efforts to 'decarcerate,' or release, as many people as possible, including for consideration those sentenced as well as those detained on bail."); Decl. of Yoav Golan, M.D. ("Golan Decl.") ¶ 20 (RA 44) ("[A] substantial reduction in the prison population is needed in order to help reduce transmission in prison and improve the ability to quarantine, isolate, and treat those infected.").

[73] *See, e.g.*, Ky. Exec. Order No. 2020-267 (April 2, 2020) (commuting sentences of "186 inmates identified as at higher risk for severe illness or death" in order to

Georgia, the Board of Pardons and Paroles has begun considering clemency release for individuals within 180 days of completing their sentences for non-violent offenses.[74] In California, the Department of Corrections and Rehabilitation expedited parole for prisoners with 60 or fewer days left to serve on their sentences.[75] And the Federal Bureau of Prisons, at the direction of the Attorney General, has increased home confinement by more than 70%, putting 1,972 prisoners with COVID-19 risk factors on home confinement since late March.[76]

By contrast, Defendants actions have been woefully inadequate. Governor Baker has flatly declared that he has no intention of doing anything, stating at a press conference, "We believe the correct position is for us to continue to do the

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"reduce the inmate population in the overcrowded state prison facilities"); N.J. Exec. Order No. 124 (April 10, 2020) (creating process for expedited consideration of prisoners for temporary home confinement), available at https://nj.gov/infobank/eo/056murphy/pdf/EO-124.pdf; Co. Exec. Order No. D-2020-016 (March 25, 2020) (suspending caps on good time), available at https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20016%20Suspending%20Certain%20Regulatory%20Statutes%20Concerning%20Criminal%20Justice_0.pdf.

[74] *Board Considering Releases to Address COVID-19 in Georgia Prisons,* State Board of Pardons and Parole (March 31, 2020), available at https://pap.georgia.gov/press-releases/2020-03-31/board-considering-releases-address-covid-19-georgia-prisons.

[75] *CDCR Announces Plan to Further Protect Staff and Inmates from the Spread of COVID-19 in State Prisons*, Cal. Dep't. of Corrections and Rehabilitation (March 31, 2020), available at https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-plan-to-further-protect-staff-and-inmates-from-the-spread-of-covid-19-in-state-prisons/.

[76] *Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic*, Federal Bureau of Prisons (last visited May 4, 2020), available at https://www.bop.gov/coronavirus/faq.jsp.

things we're doing to keep the people inside the system safe, and that's gonna be the way we play this one."[77] Consistent with his public statements, since the emergency began he has neither ordered the early release of any prisoners nor granted any commutations.[78]

The DOC has likewise failed to take steps to lower overcrowding in its prisons, despite admitting that it "should be doing what it can to reduce the prison population," in light of the pandemic.[79] For example, DOC has not furloughed or released any prisoners to home confinement.[80] And despite taking "steps to expedite the [medical] parole process," very few prisoners are actually being released.[81] If anything, the DOC has been *slowing* the rate of release by depriving prisoners of the opportunity to earn good time deductions on their release date. Under G.L. c. 127, § 129D, prisoners can earn up to 15 days per month in good time credit for completion of programs, and many prisoners take full advantage of those opportunities. Since programs have been cancelled due to the lockdown, DOC has offered a replacement program that only provides 7.5 days of credit,

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[77] Plaintiffs' Statement of Facts Not Agreed to by Governor Baker (RA 160) (acknowledging the accuracy of the quote is not disputed).
[78] Stipulation as to Facts Agreed Between the Plaintiffs and the Governor, (RA 156); FF 29.
[79] FF 12; *see id.* 26. Commissioner Mici agreed that decreasing the inmate population at DOC facilities can help contain the spread of COVID-19").
[80] FF 13, 29.
[81] FF 11; *see* Special Master's May 4 Report at 16 (noting that 23 prisoners have been approved for medical parole but that they "will only be approved for release from DOC custody once the Parole Board has approved the inmate's home plan")

which the Commissioner is "considering increasing" to 10 days in May.[82] Prisoners used to be able to also earn "boost" credits of up to 10 days and "completion" credits of up to 80 days for participation in a myriad of DOC programs. Now only one program allows for completion credits, and the maximum is 40 days. Accordingly, it comes as no surprise that the population in DOC custody has declined by less than five percent since the Court required DOC to begin reporting data to the Special Master.[83]

The Parole Board has similarly failed to act with any sense of urgency in the face of the pandemic and the urging of this Court. The Board has not accelerated the scheduling of parole hearings, and has not held any hearings for individuals serving a life sentence since March 10, 2020.[84] And despite its authority to advance the parole eligibility of inmates on its own initiative, the Board only considers petitions from prisoners on an individual basis.[85] Numerous people are also sitting in prison despite the Board approving them for parole. Currently, there are parolees in custody awaiting revocation hearings for technical violations of the conditions of their parole that do not include being charged with a new crime.[86] And as of

[82] FF 11, 28.
[83] Special Master's May 4 Report at 15.
[84] Stipulation as to Facts Agreed Between the Plaintiffs and the Chairperson of the Massachusetts Parole Board (RA 165-166).
[85] *Id.* (RA 167).
[86] *Id.* (RA 167).

April 23, 2020, for a variety of reasons, more than 180 individuals are still in custody despite having received a positive parole vote.[87]

Defendants' lack of action is not due to a lack of options. They have a wide array of mechanisms to reduce the prison and jail population using their existing authority. First, the Governor has near plenary power to protect the lives of prisoners during an emergency. In response to COVID-19 and "its extreme risk of person-to-person transmission," Governor Baker declared a state of emergency on March 10, 2020, invoking his authority under Chapter 639 of the Acts of 1950. Executive Order No. 591. That authority includes the ability to "employ every agency and all members of every department and division of the government of the commonwealth to protect the lives and property of its citizens[.]" Acts of 1950, Ch. 639, § 5(a). More specifically, the Legislature granted the Governor "any and all authority over persons and property" to the extent permissible under the constitution of Massachusetts to address the emergency, including—explicitly—to protect the "[h]ealth or safety of inmates of all institutions." Id. § 7(a).

Apart from Governor Baker's extraordinary emergency powers, Defendants have myriad constitutional, statutory, and regulatory powers to reduce the number of imprisoned people, including:

- Ordering home confinement and GPS monitoring, *see Com. v. Donohue*, 452 Mass. 256, 265 (2008) (citing G.L. c. 127, §§ 48, 49, 49A);

[87] *Id.* (RA 164).

- Granting temporary furloughs, *see* G.L. c 127, § 90A (allowing prisoners "under prescribed conditions to be away from [their] correctional facility[.]");

- Granting parole, *see* G.L. c. 127, §§ 128, 130, 133; 120 C.M.R. §§ 300 (parole decisions must be based on "welfare of society") and 200.10 (prisoners in houses of correction may be paroled early for "compelling reasons");

- Granting medical parole, *see* G.L c. 127, § 119A (authorizing parole for people terminally ill or permanently incapacitated);

- Releasing prisoners before completion of their sentences for "good conduct" while imprisoned, *see* G.L. ch. 127, § 129D; and

- Commuting sentences, *see* Mass. Const. Pt. 2, C. 2, § 1, art. VIII; *In re Kennedy*, 135 Mass. 48, 51 (1883) ("The power of pardoning offences, as conferred on the executive authority by the Constitution of the Commonwealth, is exceedingly comprehensive.").

Upon release, resources in the community are available now to assist even homeless individuals to access shelter and healthcare in a manner far less likely to increase spread of the disease than in prison. Area shelters have substantially expanded their capacity to house people experiencing homelessness, with precautions to avoid COVID-19 spread such as increased distancing, plastic barriers between beds, meals served in shifts, additional hand washing and sanitizing capacity, and increased cleaning.[88] Healthcare providers and substance use disorder treatment programs are "ready and willing" to meet the needs of those released from prison through expanded capacity and the adoption of telemedicine,

[88] *See* BMC Decl. ¶¶ 21-23 (RA 55-56).

and are set up to connect patients to resources such as housing, food, and childcare.[89]

Those released from prison with suspected or confirmed COVID-19—including homeless persons—will be more safely treated and housed in the community, further reducing the spread of the disease. Patients who are unable to isolate at home are being served by programs set up by the Commonwealth, the City of Boston, Boston Medical Center, Boston Health Care for the Homeless, Partners Healthcare, and shelter organizations, and those not eligible for these services are admitted to hospital care.[90] Area hospitals are far better equipped than prisons to treat and contain the disease.[91]

III. Patients Committed to DOC Under G.L. c. 123, § 35 for Treatment of Alcohol or Substance Use Disorders Endure Dangerous Conditions and Receive Inadequate Treatment

The DOC houses men civilly committed under G.L. c. 123, § 35 for substance use disorder ("SUD") treatment at the Massachusetts Alcohol and Substance Abuse Center ("MASAC"), located at MCI Plymouth, and the DOC has also entered into a Memorandum of Understanding with the Hampden County Sheriff's Department to operate a Section 35 facility in the Hampden County Correctional Center. Conditions for Section 35 patients are at least as dangerous as

[89] BMC Decl. ¶ 26 (RA 57); *see also* BMC Decl. ¶¶ 23-25 (RA 56) (describing expanded services).
[90] *See* BMC Decl. ¶¶ 16-20 (RA 54-55).
[91] *See* BMC Decl. ¶¶ 10-15 (RA 53-54).

those for other prisoners and, in a cruel irony, the COVID-19 epidemic has greatly curtailed the very treatment that purportedly justifies their imprisonment.

Conditions at MASAC create a great risk of transmission for each man housed there. PLS's extensive investigation of the conditions under which these men are held, undertaken in separate litigation,[92] has produced dozens of consistent accounts of the unit where initial detoxification previously took place, describing the unit as filthy and stinking of the vomit, urine, and excrement of patients in the throes of cold-turkey withdrawal.[93] DPH sanitation inspections confirm the "generally dirty conditions," describing plumbing in poor repair, mold on the ceilings, scum on shower walls, and a missing door on a bathroom stall.[94] Compounding this risk, stays in the facility average only around 30 days.[95] This rapid turnover ensures that COVID-19 will continue circulating between Section 35 facilities and the community.

The amount of treatment currently provided by the facilities is contested by the parties. Two people recently committed to MASAC have attested to receiving no treatment at all since the lockdown, while DOC employees have attested that

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[92] *Doe et al. v. Mici et al.*, No. 1984CV00828 (Suffolk Super. filed Mar. 14, 2019).
[93] MASAC ceased using that room for detoxification only on April 2, 2020. Affidavit of Jennifer Gaffney ("Gaffney Aff.") ¶ 6 (RA 316).
[94] *See, e.g.*, Department of Public Health, Bureau of Environmental Health, Community Sanitation Program report, February 11, 2020, available at https://www.mass.gov/doc/massachusetts-alcohol-and-substance-abuse-center-masac-in-plymouth-january-30-2020/download.
[95] Gaffney Aff. ¶ 19 (RA 319).

some treatment is available. *See* FF 29; *compare* Declaration of Mark Santos ¶¶ 3-4 (RA 67) *and* Declaration of Robert Peacock ¶ 3 (RA 200), *with* Supplemental Affidavit of Jennifer Gaffney ("Supp. Gaffney Aff.") ¶ 5-6 (RA 563). However, even in DOC's version of the facts, people committed to MASAC receive no treatment during the first 14 days—during which time they are quarantined—beyond some unidentified "individual services from their SUD counselor," "two packets per day of Living in Balance reading and homework," and some "books, puzzles, etc." Supp. Gaffney Aff. ¶ 5 (RA 563). This limited treatment, which would be insufficient to justify imprisonment under normal circumstances, is even more inadequate in light of the risks created by COVID-19, particularly when those 14 days are roughly half of the average time committed. *See* Gaffney Aff. ¶ 19 (RA 319) ("Most civil commitments are currently released around the thirty day point of their commitment."). *Contrast* Supp. Gaffney Aff. ¶ 4 (RA 563) (describing provision of 12 hours of programming per weekday prior to COVID-19). In fact, the U.S. government has recommended that during the COVID-19 pandemic outpatient services be used whenever possible. On March 20, 2020, the Substance Abuse and Mental Health Services Administration ("SAMHSA")—the agency within the U.S. Department of Health and Human Services that leads public health efforts to address mental health and substance use disorders—issued guidance on how to respond to the COVID-19 pandemic, which states: "For those

with substance use disorders, inpatient/residential treatment has not been shown to be superior to intensive outpatient treatment. Therefore, in these extraordinary times of risk of viral infection, it is recommended that intensive outpatient treatment services be utilized whenever possible." Statement of Agreed Facts Between Plaintiffs and Department of Correction ¶ 50 (RA 142-43). The use of prison for Section 35 commitments is controversial even in ordinary times,[96] and now there is no justification for exposing patients to an unreasonable and unnecessary risk of COVID-19 by imprisoning them in correctional facilities.

ARGUMENT

To issue a preliminary injunction the court must determine (1) that the moving party has demonstrated a likelihood that it would prevail on the merits at trial; (2) that without the relief sought it would suffer irreparable harm not capable of remediation by a final judgment in law or equity; and (3) that the risk of irreparable harm, in light of the chances of success, outweighs the defendants' probable harm and the likelihood of their prevailing at trial. *Commonwealth v. Massachusetts CRINC*, 392 Mass. 79, 87-88 (1984). Where a public entity is a

[96] In 2017, the Legislature repealed the provisions in Section 35 that allowed women to be committed to a correctional facility. In 2019, the Commission established by Section 104 of the Acts of 2018 to evaluate Section 35 recommended that the "Commonwealth should prohibit civilly committed men from receiving treatment for addictions at any criminal justice facility." Section 35 Commission Report (July 1, 2019), available at https://www.mass.gov/doc/section-35-commission-report-7-1-2019/download.

party, the court may also consider whether granting preliminary relief is in the public interest. *See Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co*., 399 Mass. 640, 648 (1987).

I. Plaintiffs are likely to succeed on the merits of their claims.

There can be little doubt that Plaintiffs face a substantial risk of serious illness and death from COVID-19 infection because they continue to live, sleep, and eat in conditions that force them to forgo the social distancing that all medical and scientific experts say is essential for their safety. Although Defendants have taken measures to ameliorate the risk, they have failed to reduce the correctional population to a level necessary to remedy the unsafe and unconstitutional conditions that now exist inside our correctional facilities. Further, the civil commitment of men in need of treatment for alcohol or substance use disorders under G.L. c. 123, **§** 35 violates the due process rights of men who have not been charged with any crime but are confined in a correctional facility under unsafe conditions with no or limited treatment.

A. Conditions of Confinement Violate the U.S. Constitution and the Massachusetts Declaration of Rights.

To establish a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, Plaintiffs must show (1) their conditions of confinement presents "a substantial risk of serious harm"; and (2) prison officials have acted with "deliberate indifference" to their health or safety. See *Farmer v.*

Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970 (1994); *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Conditions that pose an unreasonable risk of death or serious illness violate the constitution.. *See Helling*, 509 U.S at 33 ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.") (citation omitted). Where the population density in a prison system results in the deprivation of basic human needs, the population must be reduced for the prison to comply with constitutional requirements. *See Brown v. Plata*, 563 U.S. 493, 510–11 (2011) (ordering the release of thousands of prisoners in California on grounds that a "prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society").

Article 26 bars "cruel or unusual punishments." Mass. Const. Pt. 1, art. XXVI. Protections under the prohibition in Article 26 against "cruel or unusual punishments" have not been precisely defined but are "at least as broad as the Eighth Amendment to the Federal Constitution." *Good v. Comm'r of Correction,* 417 Mass. 329, 335 (1994). In interpreting Article 26, the Court should adopt the "objectively reasonable" standard established by the Supreme Court for pretrial detainees in *Kingsley v. Hendrickson,* 576 U.S. 389 (2015). Since *Kingsley*, numerous courts have held that subjective motive or intent has no role to play in

any form of conditions-of-confinement case brought by pretrial detainees or those civilly committed to correctional facilities. *See Hardeman v. Curran*, 933 F.3d 816, 823 (7th Cir. 2019); *Colbruno v. Kessler*, 928 F.3d 1155, 1161–63 (10th Cir. 2019); *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017); *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1070–71 (9th Cir. 2016) (en banc). The same analysis should apply to Article 26, at least when, as in the present case, Defendants are sued in their official capacity and the Complaint seeks prospective relief only, not monetary damages.[97] Regardless, where conditions of incarceration are so objectively egregious that they rise to the level of cruel or unusual, offending contemporary standards of decency and posing a substantial risk of serious harm, both the Eighth Amendment and Article 26 demand a remedy, even if correctional officials have attempted to remedy the conditions but do not have the capacity to do anything about them.

1. Confining Prisoners Under Current Conditions Subjects Them to a Substantial Risk of Harm

Those incarcerated in Massachusetts prisons and jails are unable to protect themselves and fellow prisoners from the spread of COVID-19 in the ways urged

[97] In Kingsley, the Supreme Court acknowledged that its conclusion that a strictly objective standard is appropriate in the context of claims brought by pretrial detainees may raise questions about the use of a subjective standard in claims brought by convicted prisoners. 576 U.S. at 389.

on the general public and required by the statewide emergency decree: social distancing and sanitation. This constitutes a substantial risk of serious harm.

a) Exposure to COVID-19 Creates a Substantial Risk of Harm

Exposing prisoners to the risk of contracting a serious, communicable disease is clearly and objectively a violation of their right to reasonable health and safety. *Helling*, 509 U.S. at 33 ("Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.").[98] Numerous courts have already concluded that COVID-19 poses an

[98] *See also Gates v. Collier,* 501 F.2d 1291, 1300 (5th Cir. 1974) (affirming finding of violation where "some inmates with serious contagious diseases are allowed to mingle with the general prison population"); *Randles v. Hester*, 2001 WL 1667821, at *3 (M.D. Fla. June 27, 2001) ("Plaintiff has sufficiently alleged a deprivation of his rights under the Eighth Amendment. He claims he was forcibly exposed by Defendant to a potentially fatal contagion without the benefit of available protective gear. Accordingly, the objective prong is satisfied."); *Joy v. Healthcare C.M.S.*, 534 F. Supp. 2d 482, 485 (D. Del. 2008) ("The Supreme Court has recognized that exposure to contagious diseases may violate the Eighth Amendment if prison officials, acting with deliberate indifference, expose a prisoner to a sufficiently substantial 'risk of serious damage to his future health.' . . . Additionally, inmates may be entitled to relief under the Eighth Amendment where they proved threats to personal safety from the mingling of inmates with serious contagious diseases.") (internal citations omitted); *Mark v. Olson et al.*, No. 03-C-516-C, 2003 WL 23221515, at *1 (W.D. Wis. Oct. 21, 2003) (plaintiff properly alleged that prison officials acted with deliberate indifference to his health when they knowingly placed another inmate who had been diagnosed with hepatitis B and hepatitis C in his cell, for "[c]ertainly, in some cases, the risk of harm in placing a healthy inmate in the same cell as one with a

unacceptable risk of substantial harm to individuals in detention facilities. *See, e.g.*, *Savino et al. v. Souza,* No. CV 20-10617-WGY, 2020 WL 1703844, at *4 (D. Mass. Apr. 8, 2020) (D. Mass., April 8, 2020) ("In this moment of worldwide peril from a highly contagious pathogen, the government cannot credibly argue that the Detainees face no 'substantial risk' of harm (if not 'certainly impending') from being confined in close quarters in defiance of the sound medical advice that all other segments of society now scrupulously observe."); *Christian A.R. et al. v. Thomas Decker et al.*, 2:20-cv-03600-MCA, 2020 WL 2092616, at *2 (D.N.J., April 12, 2020) (granting temporary restraining order following funding that "in truth, avoiding exposure to COVID-19 is impossible for most detainees and inmates").

While COVID-19 can be deadly to people of any age or health status, the prison population is at particularly high risk due to its overall advanced age and poor health status. This risk is of constitutional magnitude. *See Malam v. Adducci,* No. 20-10829, 2020 WL 1809675, at *4 (E.D. Mich. Apr. 9, 2020) ("The Court finds the combination of Toma's age, disability, and continued detention presents a sufficient risk of severe illness or death from COVID-19 such that the analysis in the Court's April 6, 2020 order applies, warranting emergency injunctive relief."). Even young, healthy prisoners are at substantial risk of harm. *See Savino,* 2020

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communicable disease would be significant enough to be considered cruel and unusual punishment.")

WL 1703844, at *7 (“Since COVID-19 is highly contagious and the quarters are close, the Detainees’ chances of infection are great. Once infected, taking hospitalization as a marker of ‘serious harm,’ it is apparent that even the young and otherwise healthy detainees face a ‘substantial risk’ (between five and ten percent) of such harm.”).

The DOC’s assertion that it has successfully contained this risk are belied by its own testing. Despite weeks of harsh cell confinement and systemwide lockdown, identified cases have risen from 10 prisoners on March 27, 2020, to 358 prisoners, 102 correctional officers and 47 contractual staff by May 5. And this does not reflect the full extent of contagion. Recent testing in a few facilities such as MCI-Framingham, MCI-Shirley, and the MTC has disclosed alarmingly high numbers of previously unidentified cases in those prisons, but little testing has been done in other facilities. These results show that DOC’s practice of testing only prisoners with severe symptoms will not be adequate to identify and isolate individuals infected with the virus. DOC claims that it is controlling the spread of virus are unfounded since they are based on a total of only 14 tests in the 10 facilities where there are no confirmed COVID-19 cases. Nor is there a basis for DOC’s assertion that its large dormitories are not at risk, given the minimal testing done in the prisons where they are common, such as MCI-Concord (where only six

people have been tested) and the North Central Correctional Institution (NCCI) (where only one has been tested).

b) Current Population Levels Make It Impossible to Avoid Exposure by Social Distancing

It is not possible to avoid exposing Massachusetts prisoners to substantial risk of harm from the virus due to the current population levels of prisons and jails. To avoid the risk of contracting the virus, the CDC recommends that people maintain six feet separation from one another.[99] This is currently impossible for most prisoners in Massachusetts. More than half of the prisoners held by the DOC are housed in rooms with others and cannot sleep or eat more than six feet from them.[100] They stand next to each other at sinks perhaps a foot or two apart. As discussed in the Statement of Facts, *supra*, prisoners are also unavoidably in close contact with others in dayrooms, medication lines, and while using bathrooms. Prisoners in the county jails face similar difficulties practicing social distancing.[101]

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[99] *Social Distancing, Quarantine, and Isolation,* CDC, RA-285.
[100] FF 8.
[101] *See, e.g., Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Ct.*, No. SJC-12926, The Sheriffs' of the Fourteen Counties of the Commonwealth of Mass. Response to the Ct.'s Order of April 1, 2020 Letter, at 14 (Mass. Apr. 3, 2020) (24% of prisons in Nashua Street Jail and 45% in the Suffolk House of Corr. sleep within six feet of another person); *id.* at 15 (75% of Worcester County Sheriff's Office inmate population sleeps within six feet of another inmate); *id.* at 16 (49% of Plymouth County prisoners sleep within six feet of one another, and 56% eat within six feet of one another).

The impossibility of social distancing in these facilities is reinforced by the fact that the population in many of them exceeds their design capacity, despite the decrease in the incarcerated population that began well before the pandemic, and many have cells and dorms that fail to meet minimum space standards promulgated by the Department of Public Health.[102] Unless the population is reduced to levels where prisoners have the same ability to practice social social distancing that is mandated for the general public, it will not be possible to control the spread of the virus, and prisoners will be exposed to a substantial risk of infection, sickness, and death.

c) The DOC's efforts to prevent contagion are insufficient

As discussed *supra*, the steps DOC has taken to mitigate the spread of the virus are inadequate to protect prisoners without a reduction in population. Courts elsewhere have found similar measures insufficient to defeat liability. *See, e.g.*, *Valenzuela Arias v. Decker*, No. 20 CIV. 2802 (AT), 2020 WL 1847986, at *4 (S.D.N.Y. Apr. 10, 2020) (measures including suspension of programming, provision of information to staff and prisoners, increasing supplies, eating in units,

[102] *See*, Quarterly Report on the Status of Prison Capacity, Fourth Quarter 2019, RA-217 (noting 11 of 19 department of correction facilities had average daily populations greater than the design/rated capacities); Declaration of Lucy Eleanor Umphres, Esq., RA-124 (noting nearly 68% of all Commonwealth prisons and jails failed to comply with cell size and floor space regulations according to their most recent Department of Public Health inspection reports).

temperature checks, and suspending visitation would "likely result in some reduction of risk of infection, but . . . are far from sufficient" where social distancing was impossible); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *5 (S.D.N.Y. Mar. 26, 2020) (finding measures "patently insufficient" when respondents "could not represent that the detention facilities were in a position to allow inmates to remain six feet apart from one another, as recommended by the Centers for Disease Control and Prevention"); *see also Medeiros v. Martin*, No. CV 20-178 WES, 2020 WL 2104897, at *3 (D.R.I. May 1, 2020) ("[M]easures designed to mitigate the spread of infection, even perfectly executed, are inadequate to protect vulnerable persons.").

There is no merit to any argument DOC may make that full social distancing of prisoners is not required because CDC guidance governing correctional facilities recognizes that "space limitations may require a departure from better social-distancing practices," and that "[s]trategies will need to be tailored to the individual space in the facility and the needs of the population and staff. Not all strategies will be feasible in all facilities.").[103] First, the CDC's corrections-specific guidelines, which essentially direct prison and jail administrators to do the best

[103] CDC, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, at 6 (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019- cov/downloads/guidance-correctional-detention.pdf *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-1) in Correctional and Detention Facilities*, CDC (March 23, 2020), RA-347.

they can under existing population and space constraints, do not affect controlling constitutional principles. Prisons must be scrutinized under the constitutional standard, which forbids an "unreasonable" risk to prisoners' health where "the risk . . . is not one that today's society chooses to tolerate." *Helling,* 509 U.S. at 36. The CDC never purported to declare that social distancing is unnecessary; it only concluded that at current population levels it may not be feasible. To this point, the CDC guidelines for correctional institutions specifically encourage correctional administrators to "work with local law enforcement and court officials" to "prevent over-crowding of correctional and detention facilities,"[104] Indeed as one court observed:

> Though the CDC has recommended public health guidance for detention facilities . . . these measures are inadequate to sufficiently decrease the substantial likelihood that Petitioner will contract COVID-19. As prison officials are beginning to recognize around the country, even the most stringent precautionary measures— short of limiting the detained population itself—simply cannot protect detainees from the extremely high risk of contracting this unique and deadly disease.

Malam v. Barr, No. 20-10829, 2020 WL 1672662, at *8 (E.D. Mich. Apr. 5, 2020), as amended (Apr. 6, 2020).

Second, because the risk of exposure to COVID-19 is one to which society as a whole is unwilling to subject itself, there is no constitutional justification for subjecting prisoners to lower standards of care. CDC guidance for the public

[104] CDC, Interim Guidance, supra.

includes recommendations to "[s]tay at least 6 feet (2 meters) from other people," "[d]o not gather in large groups," and "[s]tay out of crowded places and avoid mass gatherings."[105] And Governors across the country, including in Massachusetts, have mandated social distancing in other settings, including wholesale cancellation of schools and closure of stores and business offices, and they are using criminal laws to enforce that mandate.

The Defendants' efforts to ameliorate conditions by handing out masks and providing cleaning materials more regularly cannot remedy the risks faced by prisoners. As discussed above, providing masks and gloves to staff, and masks to prisoners, cannot solve the problem; prisoners and staff frequently do not use this protective equipment. Indeed, 24-hour-a-day usage of a mask in a shared cell or dormitory, including while eating or sleeping, is infeasible. And even assuming that adequate cleaning supplies were consistently available--which prisoners and Commissioner Mici agree has not been the case—the frequency and thoroughness of cleaning is often left to the prisoners themselves and varies from unit to unit. Prisoner work crews who used to regularly clean the facility now come less frequently or not at all since the lockdown, and the efforts of correctional cleaning staff is erratic. Furthermore, as shown by DPH inspections, DOC has long failed in

[105] *Social Distancing, Quarantine, and Isolation*, CDC (April 4, 2020), RA-285.

its responsibility to provide clean and sanitary facilities,[106] and that failure now has grave consequences. For example, a recent DPH inspection of the Massachusetts Treatment Center (MTC) found:

> Throughout the facility, bathrooms and shower areas were observed to be poorly maintained resulting in unsanitary conditions. The CSP is concerned with the increased risk of disease transmission with the high number of inmates being exposed to such unsanitary conditions.[107]

Not surprisingly, COVID-19 is rampant at the MTC, with 41 cases and four deaths as of April 13, 2020, and 118 cases and five deaths as of May 5th.

The DOC-wide lockdown that began on April 3, 2020 has not stopped COVID-19 numbers from climbing. Confining prisoners to their cells or dorms for at least 23 hours daily, with no access to the outdoors, is also not a sustainable or effective response to the inevitable spread of COVID-19. Lockdown conditions will take too great a toll on the physical and mental health of vulnerable prisoners since they increase stress and tension, cause psychological harm, and deprive prisoners of the fresh air and exercise that is vital to maintain their health.[108] Monitoring the health of prisoners in lockdown is also a grave concern since a

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[106] *See* Declaration of Eleanor Umphres (RA-127-137)
[107] See Decl. of Eleanor Umphres (RA-128)
[108] *See* David H. Cloud, et al., Public Health and Solitary Confinement in the United States, 105 Am. J. Public Health
(Jan. 2015)("[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has
concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of
emotional, cognitive, social, and physical pathologies.").

patient's condition can worsen dramatically in a matter of hours,[109] and the State Auditor found that it often takes DOC over a week to respond to sick-call requests.[110] The roughly 23 percent of prisoners with serious mental illness[111] are particularly vulnerable to these conditions and, under lockdown have been denied private sessions with their mental health clinicians.

2. The Defendants Have Demonstrated Deliberate Indifference in Violation of the Eighth Amendment

To prove an Eighth Amendment violation, in addition to showing an objective risk of serious harm, a plaintiff must show that the defendant has demonstrated "deliberate indifference" to that risk. This requires that the defendant *"*knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Here, there is no doubt of the Defendants' awareness of the substantial threat that COVID-19 poses to those in their custody. Plaintiffs do not

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[109] Rich Decl. ¶ 18 (RA-38).

[110] Suzanne Bump, Office of the State Auditor, *Massachusetts Department of Correction Official Audit Report* 11-12 (Jan. 9, 2020). The Centers for Disease Control (CDC) did not include wide scale lockdowns in its recommendations for correctional facilities. It does recommend that prisons and jails "Implement social distancing strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of the presence of symptoms)."" available at: https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf p. 11 (last accessed April 15, 2020).

[111] FF 13.

claim that Defendants are ill-intentioned or have stood by idly and failed to take any action to try to address that risk. Rather, as explained above, deliberate indifference is founded on the Defendants' failure to adequately protect prisoners despite the steps they have taken and regardless of their intentions.

The fact that the Defendants have implemented certain measures to attempt to slow the spread of COVID-19 in prisons does not insulate them from liability for conditions that are still dangerous. During the pandemic, numerous courts have found deliberate indifference where defendants took steps to control COVID-19 which were insufficient to protect prisoners in their custody. *See, e.g.*, *Valenzuela*, 2020 WL 1847986, at *7 (finding deliberate indifference and ordering release of detainees where measures taken by defendants "fail to adequately safeguard Petitioners' health," including failing to provide for social distancing measures recommended by the CDC in sleeping, recreational areas, showers, and phone banks); *Basank*, 2020 WL 1953847, at *11 (issuing preliminary injunction and ordering release of detainees from county jails, finding deliberate indifference despite measures taken by defendants, which fail to provide for social distancing); *Ibrahim Fofana v. Albence*, ___ F.Supp.3d ___, 2020 WL 1873307, at *8 (E.D. Mich. Apr. 15, 2020) (finding deliberate indifference where the defendant "has not undertaken adequate measures to protect Petitioners from the risk of serious illness or death from exposure to COVID-19").

If defendants could avoid Eighth Amendment liability through insufficient measures to address harm, prisoners would be left with little effective protection. Courts have not abdicated their responsibility in this way, and deliberate indifference has been found in other contexts where the measures taken by defendants were inadequate. This is the case in *Brown v. Plata*, 563 U.S. 493 (2011), where state officials were unable to provide constitutionally adequate health care due to severe overcrowding and an Eight Amendment violation was found. It is similarly true in other overcrowding cases,[112] in cases of medical deliberate indifference,[113] and in cases alleging failure to protect from assault.[114]

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[112] *See, e.g., Harris v. Angelina Cty., Tex*., 31 F.3d 331, 335-36 (5th Cir. 1994) (rejecting the County's argument that it lacked deliberate indifference because it had done "everything in its power" to remedy overcrowding, including construction, transfers, and alternatives to incarceration);

[113] *See Edmo v. Corizon, Inc.*, 935 F.3d 757, 793 (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."); *Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005) (prison officials' dogged persistence in a course of medical treatment known to be ineffective violates the Eighth Amendment); *Starbeck v. Linn County Jail*, 871 F. Supp. 1129, 1145-47 (N.D. Iowa 1994) ("[m]ere proof that an inmate has obtained *some* medical care . . . does not mean that the course of treatment of an inmate's medical problems cannot manifest deliberate indifference.")

[114] *See Riley v. Olk-Long*, 282 F.3d 592, 597 (8th Cir. 2002) (actions that are "not adequate given the known risk" do not defeat liability); *Hayes v. New York City Dept. of Correction*, 84 F.3d 614, 621 (2d Cir. 1996) (holding official response that did not include transferring the plaintiff or issuing a timely separation order did not defeat liability as a matter of law).

The fact that a court order may be necessary to remedy the harm to Plaintiffs cannot bar Eighth Amendment liability. This was made clear in in *Plata*, where the Court ordered a cap on the state prison population in response to severe overcrowding, stating:

> Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration. Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers and the possibility of consent decrees. When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population.

563 U.S. at 11. If *Plata* had limited liability to those violations that the defendants had the power to solve, the plaintiffs would have lost. Instead, the decision shows that courts are not powerless to address systemic problems where the Defendants lack legal authority or funding to do so. This Court has followed the same principle in overcrowding cases such as *Richardson v. Sheriff of Middlesex Cnty*., 407 Mass. 455, 468 (1990) (imposing population cap on county jail; "[m]any courts have held that population caps are particularly appropriate remedial measures in jail overcrowding cases," using their equitable powers to order early release of prisoners before their sentences expired. 407 Mass. 455, 468 (1990)") (citations omitted).[115]

[115] *Richardson* notes that previously, in *Michaud v. Sheriff of Essex Cnty.*, 390 Mass. 523, 532, (1983), the Court had rejected lack of funds as a defense to liability: "[W]e held that "[w]e flatly reject the notion that an arm of the State may

3. Defendants have failed to take reasonable and necessary measures to reduce the prison population

Courts, public health experts, and corrections professionals agree that a significant decrease in the incarcerated populations is essential to combat the spread of COVID-19 among prisoners, staff, and the greater community. Reducing the incarcerated populations serves four critical public health aims: (1) targeting prisoners who are at elevated risk of suffering from severe symptoms of COVID-19; (2) allowing those who remain incarcerated to better maintain social distancing and avoid other risks associated with forced communal living; and (3) helping to "flatten the curve" of COVID-19 cases among incarcerated populations and limit the impact of transmission both inside correctional facilities and in the community; and (4) reducing the burden on the correctional system in terms of treating critically ill patients, as well as the burden on the community healthcare system where they may have to be hospitalized. Defendants must act to reduce the prisoner population sufficiently to ensure social distancing in prisoners' sleeping,

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be allowed to violate an individual's constitutional rights because funds have not been appropriated to remedy the wrong." *Richardson*, 407 Mass at 466-67 (quoting *Michaud*, 390 Mass. at 532). *See also In the Matter of McKnight*, 406 Mass.787, 797 n.9 (1990) ("We have suggested that the unavailability of appropriated funds would not justify the failure of prison officials to stop violating inmates' constitutional rights . . . In such a case, if the authorities lack appropriated funds sufficient to perform all their duties without violating constitutional rights, a cure would be the early release of some inmates.").

eating, and recreation arrangements, as well as to permit personal hygiene in compliance with CDC guidelines.

In describing the threat posed by COVID-19, this Court has declared that "the situation is urgent and unprecedented, and . . . a reduction in the number of people who are held in custody is necessary." *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, No. SJC-12926, 2020 WL 1659939, at *3 (Mass. Apr. 3, 2020). However, Governor Baker has stated that he doesn't "buy" the argument that prisoners should be released because of the pandemic. It is therefore not surprising that, in contrast to other states and the federal system that have addressed the crisis by reducing the number of prisoners, the Governor has refused to act on his near plenary emergency powers when it comes to the health and safety of prisoners. Despite this Court's urging that DOC and the Parole Board work to "afford relief to as many incarcerated individuals as possible," *Comm for Public Counsel*, 142 N.E.3d at 530, they have done almost nothing to release prisoners any earlier than in the normal course. As a result of this complacency, the DOC population has decreased by less than five percent over the past month.[116]

a) The DOC has failed to take action to reduce the prison population

There have been no commutations, and DOC has granted no furloughs, no releases to home confinement, and little if any increase in the use of medical

[116] Special Master's May 4 Report at 15.

parole. In fact, as explained in the Fact section above, there has been a significant *decrease* in the ability to earn good time deductions as a result of the suspension of work and programming opportunities. DOC's excuses for its failure to use these mechanisms in the face of the current pandemic defy reason.

Commissioner Mici's claim that the DOC lacks authority to allow prisoners to serve any portion of their sentence in home confinement is unfounded. *See* FF 29. This Court has held that sheriffs have such authority under statutes that by their terms give the same authority to the Commissioner. *See Commonwealth v. Donohue, supra*, ("[I]n our view, G.L. c. 127, §§ 48, 49, and 49A, provide specific legislative authorization for the GPS program."). Indeed, the DOC has issued regulations implementing these statutes. 103 C.M.R. 465.00 *et seq*.

The DOC's refusal to use furloughs to reduce the population is also without sound justification. That the Department has not used furloughs since the 1990s based on its belief that it is "bad policy to release an inmate who will need to be reincarcerated" fails to account for the unprecedented health crisis it currently faces.

Finally, although DOC has granted approximately 23 medical parole petitions, only some were granted since the outbreak of the pandemic, and only a few individuals have actually been released. Furthermore, DOC's claim that it is expediting the medical parole process is undercut by Plaintiffs' testimony and

affidavits. Plaintiff Tourigny, for example, submitted her petition on March 31, but as of the date of her testimony on April 27th, she had not received the Notice that Section 119A requires be provided within 21 days.

b) The Parole Board has Failed to Sufficiently Modify its Policies and Procedures to Increase the number of prisoners released on parole.

Although the Parole Board has taken some steps to release more individuals on parole, nearly 200 people have received a positive parole vote yet remain imprisoned while they await approval of a home plan or completion of some other condition imposed by the Parole Board.[117]The Parole Board has not accelerated scheduling of parole hearings, and stopped holding hearings for those serving life sentences altogether as of March 10, 2020.[118] It is also far behind in issuing decisions for lifers who had hearings before the COVID-19 emergency; failing to issue a decision in any hearing held after November 14, 2019, thereby denying the person the opportunity to file for reconsideration.[119] Other prisoners have passed their parole eligibility date without having a hearing.[120] Some parolees are currently imprisoned while they await revocation hearings on technical violations.

[117] *Id.* ¶¶ 9, 27, RA-164, 167.
[118] Stipulation as to Facts Agreed Between the Plaintiffs and the Chairperson of the Massachusetts Parole Board ¶¶ 16, 18, RA-165-66.
[119] *Id.* at ¶¶ 20,23 (RA-166).
[120] *Id* at ¶ 19 (RA-166).

Significantly, the Parole Board argued in its motion to dismiss that it would be improper to consider COVID-19 in making parole release decisions because there is "no nexus between" Plaintiffs' allegations regarding conditions in prison and "parole's statutory purpose."[121] This is, of course, not true. The parole statute by its terms directs the board to consider "the welfare of society" in its parole decisions, G.L. c. 127, § 130, which clearly implicates the impact of the virus both on those who are imprisoned and those who are not. In fact, this Court has already made it clear that when judges decide whether to grant a stay of sentence, they should consider:

> not only the risk to <u>others</u> if the defendant were to be released and reoffend, but also the health risk to the <u>defendant</u> if the defendant were to remain in custody. In evaluating this risk, a judge should consider both the <u>general</u> risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff and the <u>specific</u> risk to the defendant, in view of his or her age and existing medical conditions, that would heighten the chance of death or serious illness if the defendant were to contract the virus.

Christie v. Commonwealth, 484 Mass. 397 (2020) (emphasis in the original). The same analysis should apply to parole release decisions.

[121] Mem. of Law in Support of the Mot. to Dismiss of Def. Massachusetts Parole Board at 7.

Further, the Board had categorically excluded from early parole consideration any prisoner convicted of an excluded offense as set forth in Appendix A of the decision in *Comm. for Pub. Servs.* 2020 WL 1659939. This is improper because in the *CPCS* case this Court simply said that detainees charged with Appendix A offenses are not entitled to a presumption of release on personal recognizance; it explicitly noted that release of such persons might still be appropriate depending on their individual circumstances. *See* 142 N.E.3d at 538-49.

Defendants' failure to address the unconstitutional conditions in Massachusetts prisons and jails necessitates intervention from the Court. The Court should be guided by the principle that all prisoners must be housed under conditions where they do not have to sleep, eat, recreate, or receive medical care within six feet of another person, and where they can safely obtain necessary medical care. More specifically, Plaintiffs ask the Court to order Defendants to reduce the population to the extent required to ensure that no prisoners be housed in any cell or other space that does not comply with the Massachusetts Department of Public Health Standards governing minimum cell size or floor space. *See* 105 CMR 451.320 ("Each cell or sleeping area in an existing facility should contain at least 60 square feet of floor space for each occupant, calculated on the basis of total habitable room area, which does not include areas where floor-to-ceiling

height is less than eight feet."); *see also* 105 CMR 451.321; 105 CMR 451.322. Although these standards are "recommended" rather than required, in a time where close contact with others is perilous, the Court should deem them mandatory.[122]

Plaintiffs also request that the Court order the Defendants to use all mechanisms at their disposal to effectuate immediate releases to reduce the population to a safe level, including but not limited to parole, commutation, clemency, furlough, medical parole, home confinement, good conduct deductions, and the Governor's emergency plenary power. Prisoners in the Medically Vulnerable subclass who are at highest risk of death or serious medical complication from COVID-19 due to age and medical condition should be prioritized for release. This should include prisoners over 50 years of age, which is widely considered to be geriatric for prisoners;[123] those who have any of the

[122] The DPH standards largely reflect the Design Capacity of each institution. Design capacity is the appropriate yardstick because it refers to the number of prisoners the facility was designed to hold, whereas "operational capacity," merely reflects DOC's judgment about how many prisoners it can manage in the facility. Design Capacity is also what DOC is obligated to compare with the actual population in its statutorily mandated overcrowding reports. G.L. c. 799, § 21. The Supreme Court also relied on design capacity in ordering prisoner releases to address overcrowding in California. *See Brown v. Plata*, 563 U.S. 493, 510–11 (2011). As a practical matter, the main difference is that the Operational Capacity reflects DOC's decision to double- bunk cells that were designed for one person, and house more people in a dorm than it was built to hold.

[123] The prison population is subject to "accelerated aging" and is generally considered old at age 50 because living conditions inside prisons are hard on physical and emotional health. *See* BMC Decl ¶ 8 (RA-57)*;* Maurice Chammah, The Marshall Project, "Do You Age Faster in Prison?" (Aug. 24, 2015) available

medical conditions considered high risk by the CDC, including chronic lung disease, moderate to severe asthma, serious heart conditions, severe obesity, diabetes, chronic kidney disease; liver disease; and those who are are immunocompromised..[124]

B. Continued incarceration of prisoners civilly committed pursuant to G.L. c. 123, § 35 is unconstitutional under the 14th amendment to the U.S. Constitution and Articles 1, 10, and 12 of the Massachusetts Declaration of Rights.

Prisoners incarcerated pursuant to G.L. c. 123, § 35 ("Section 35"), who are confined pursuant to a civil order and are not serving a sentence for any crime, are entitled to due process protection. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). Their

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at: https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison; Brie A. Williams, MD, James S. Goodwin, MD, Jacques Baillargeon, PhD, Cyrus Ahalt, MPP, and Louise C. Walter, MD "Addressing the Aging Crisis in U.S. Criminal Justice Healthcare" available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3374923/ (""Accelerated aging" takes into account the high prevalence of risk factors for poor health that are common in incarcerated persons, such as a history of substance abuse, head trauma, poor healthcare, and low educational attainment and socioeconomic status.4,5 While empirical studies of accelerated aging in prisoners are lacking, research shows that incarcerated individuals age 50 or older are significantly more likely to suffer from one or more chronic health conditions or disability than their community-dwelling counterparts.") (last accessed April 15, 2020).

[124] Centers for Disease Control and Prevention, " People who are at higher risk for severe illness" available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last accessed April 15, 2020).

continued confinement during the COVID-19 crisis violates these Constitutional protections in two ways: (1) it violates their right to be free from unreasonable conditions that place their health and safety at risk; and (2) confinement with minimal treatment bears no relation to the purpose of their commitment and falls short of professional standards. Accordingly, Plaintiffs ask that the Commissioner exercise her authority under Section 35 to release immediately all Section 35 patients at MASAC or Hampden County, and to ensure they receive the DPH case management services, to which they are entitled under Section 35, upon their release. Alternatively, the superintendent could use her authority under Section 35 to transfer patients to a DPH licensed or approved facility where treatment is available.

1. Section 35 detainees face unsafe and inhumane conditions.

Due process requires safe conditions for those held pursuant to a civil order. *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."). The imminent risk of substantial harm to incarcerated Section 35 patients is amply described above: a vulnerable population, subject to Hepatitis C and other diseases, cycles frequently in and out of a crowded, unsanitary facility. Although correctional staff and vendors who come

and go daily are screened before entry, they are not tested for COVID-19, and the prevalence of asymptomatic carriers makes transmission of COVID-19 inevitable.[125]

2. The incarceration of Section 35 patients bears no relation to the purpose of confinement.

In addition to requiring safe conditions, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1971). While both DOC policy and DPH regulations mandate that persons committed under Section 35 be offered a minimum of four hours of treatment every day,[126] Defendants concede that patients at MASAC receive next to no treatment for the first fourteen days of their confinement when they are in quarantine.[127] These 14 days represent approximately half the average 30 day stay at MASAC.[128] Since Section 35 provides that the confinement is "for the purpose of inpatient care for the treatment of an alcohol or substance use disorder," their incarceration does not

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[125] *See* Special Master's May 4 Report at 17 (showing no tests done of correctional officers at MASAC).
[126] *See* 105 CMR 164.131(D)(2) ("[T]he licensee shall provide the patient with at least four hours of service programming each day.").
[127] *See* Supp. Gaffney Aff. ¶ 5, RA 563. (explaining during first 14 days, prisoners at MASAC receive "individual services from their SUD counselor," "two packets per day of Living in Balance reading and homework," and some "books, puzzles, etc.")
[128] *See* Gaffney Aff. ¶ 19, RA 319.

serve the purpose for which they were committed, and they must be released. *See Thompson v. Com.*, 386 Mass. 811, 816 (1982) ("[O]nce the conditions justifying confinement cease to exist, the State's power to confine terminates, and the person is entitled to be released[.]"); *Doe v. Gaughan*, 808 F.2d 871, 878–79 (1st Cir. 1986) ("Conceivably, although we do not rule on the question, if Bridgewater were truly indistinguishable from a penitentiary, the mere fact that it prevented patients from doing harm would be insufficient, constitutionally, to justify incarceration there."). Confining a patient alone in a room for 14 days with only some written materials and, at most, a daily visit from a counselor does not qualify as "treatment" within the meaning of either Section 35 or the Constitution.

Civil commitment to a correctional facility is also inconsistent with the exercise of professional judgment as required by *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). No professional would recommend that an SUD patient who has not been charged with any crime would be placed in a correctional facility under unsafe conditions with limited treatment, including spending the first two weeks essentially in solitary confinement. Indeed, even absent COVID-19, the trauma and stigma of incarceration itself are so contrary to SUD treatment principles that imprisoning patients violates *Youngberg*.[129] Furthermore, with COVID-19, federal

[129] State policymakers have recognized that it is wrong to place patients in a correctional facility under Section 35 if they are not even charged with a crime. In 2016 the Legislature repealed the provisions in Section 35 that allowed women to

guidance states with regard to *any* residential SUD treatment, "inpatient/residential treatment has not been shown to be superior to intensive outpatient treatment. Therefore, in these extraordinary times of risk of viral infection, it is recommended that intensive outpatient treatment services be utilized whenever possible."[130] Accordingly, the continued incarceration of men civilly committed under Section 35, instead of quickly discharging them with DPH services, represents a "substantial departure from accepted professional judgment" in violation of Plaintiffs' due process rights. *Youngberg*, 457 U.S. at 314.

II. Without Relief, Plaintiffs Will Suffer Irreparable Harm

Numerous courts have found that the threat of COVID-19 in carceral settings subjects prisoners to irreparable harm. *See, e.g., Christian A.R. et al.*, Dkt. 26 (collecting cases) ("Against this backdrop, Petitioners have demonstrated irreparable harm should they remain in confinement." *Rafael L.O.*, 2020 WL 1808843, at *8; *Thakker*, 2020 WL 1671563 at *7 ("[C]atastrophic results may ensue, both to Petitioners and to the communities surrounding the Facilities."); *see*

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be committed to a correctional facility. In 2019, the Commission established by Section 104 of the Acts of 2018 to evaluate Section 35 recommended that the "Commonwealth should prohibit civilly-committed men from receiving treatment for addictions at any criminal justice facility." *Section 35 Commision Report* at 7 (July 1, 2019), available at https://www.mass.gov/doc/section-35-commission-report-7-1-2019/download.

[130] Statement of Agreed Facts Between Plaintiffs and Department of Correction ¶ 50, RA 142-43.

also Hope v. Doll, No. 20-562 (M.D. Pa. Apr. 7, 2020) ("We cannot allow the Petitioners before us, all at heightened risk for severe complications from COVID-19, to bear the consequences of ICE's inaction."); *Coronel*, 2020 WL 1487274, at *8 (finding that "[d]ue to their serious underlying medical conditions" and their placement in immigration detention, where they are "at significantly higher risk of contracting COVID-19," the petitioners "face a risk of severe, irreparable harm"). The serious risk of illness and death from the virus cannot be remedied later, and plaintly meets the standard.

III. An injunction will not harm the Defendants, and is in the public interest.

In considering preliminary relief, the Court must consider whether harm to the plaintiffs outweighs the defendants' probable harm. *See Massachusetts CRINC*, 392 Mass. 79, 87-88 (1984). In this case, the Defendants are the guardians of the public interest as well as the custodians of the state's prisoners, and they share an interest in limiting the spread of this deadly disease. This Court has already recognized the public interest in curtailing the spread of the virus in prisons and jails. *Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, No. SJC-12926, 2020 WL 1659939, at *4 (Mass. Apr. 3, 2020) (noting that "an outbreak [of COVID-19] in correctional institutions has broader implications for the Commonwealth's collective efforts to fight the pandemic" because it "will further burden the broader health care system that is already at risk of being

overwhelmed."). The Court also saw the danger that prison contagion will spread through correctional, medical and other staff entering prisons and jails daily and "risk bringing infections home to their families and broader communities." *Id*. There can be no question that danger the Court anticipated is here now. From April 6 to May 4, identified COVID cases grew more than fourfold among staff and vendors--from 58 to 264. *See* Special Master's Weekly Report, May 4, 2020. Accordingly, the public interest is served by preliminary relief reducing the prison population so the spread of the virus can be curtailed. *See Hull Mun. Lighting Plant*, 399 Mass. 609, 648 (1987).[131]

Concerns about public safety do not outweigh the public interest in release. First, the Court has recognized that traditional assessments of "danger to other persons and the community" should consider "not only the risk *to others*" but also the risk to people required "to remain in custody." *Christie v. Commonwealth*, 484 Mass. 397 (2020) (emphasis in the original). Accordingly, the danger the virus poses to people incarcerated itself weights in favor of the public interest in release. Further, Plaintiffs do not seek release of prisoners who pose a threat to public

[131] Further, there is a "strong public interest in ensuring that the detainees of correctional facilities are treated in a human fashion." *Mattsen v. Massimiano*, No. 78-cv-2454-F, 1983 U.S. Dist. LEXIS 11891, at *12 (D. Mass. Nov. 8, 1983) (citing *Preiser v. Newkirk,* 422 U.S. 395, 402 (1974)). And "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier,* 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quoting *Awad v. Ziriax,* 670 F.3d 1111, 1132 (10th Cir. 2012)).

safety (or indeed any particular prisoners. Rather, they seek population reductions sufficient to allow for reasonably safe conditions in all correctional facilities primarily by releasing elderly and medically vulnerable prisoners whose lives are endangered and who do not pose a substantial threat to public safety. While no one can say with certainty that released prisoners will commit no infractions, it is well known that people largely "age out" of crime,[132] meaning prisoners over the age of 50 simultaneously are a low risk to public safety and at high risk of serious harm from COVID-19. For example, fewer than one percent of such prisoners over age 55—the age group most seriously threatened by COVID-19—are re-incarcerated for any new crime in the three years after release.[133]

Concerns about the availability of housing or services for prisoners also do not outweigh the public interest in release. Many or most prisoners have homes

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[132] *See* Ulmer, Steffensmeier; The Age and Crime Relationship, available at: https://www.sagepub.com/sites/default/files/upm-binaries/60294_Chapter_23.pdf (last accessed April 16, 2020).

[133] *See* Prescott, Pyle, Starr; "It's Time to Start Releasing Some Prisoners with Violent Records" (April 13, 2020) available at: https://slate.com/news-and-politics/2020/04/combat-covid-release-prisoners-violent-cook.html?utm_source=The+Marshall+Project+Newsletter&utm_campaign=8bb8cf76b0-EMAIL_CAMPAIGN_2020_04_15_11_51&utm_medium=email&utm_term=0_5e02cdad9d-8bb8cf76b0-119447241 (last accessed April 16, 2020). In general, people convicted of violent and sexual offenses are among the least likely to be rearrested. *See* Prison Policy Initiative, Mass Incarceration: The Whole Pie 2020, available at: https://www.prisonpolicy.org/reports/pie2020.html (last accessed April 16 2020).

and families to go, and even prisoners who experience homelessness or have substance use disorders are safer released than incarcerated—and less likely to spread infection. Evidence suggests that a wealth of resources has been created for populations at risk during the COVID pandemic.[134] And even if some released prisoners did risk homelessness when freed from prison, incarceration is an inappropriate remedy for such ills. Accordingly, preliminary relief lowering the population of Massachusetts prisons and jails is in the public interest and should be allowed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court allow their Motion for Preliminary Injunctive Relief.

[134] *See* BMC Decl. ¶¶ 10-29 (RA 53 – 57) (describing expanded housing and health care resources supported by the Commonwealth, the City of Boston, Boston Medical Center, Boston Health Care for the Homeless, Partners Healthcare, and shelter organizations.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on May 6, 2020 by email to the following addresses:

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