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' OPPOSITION TO DEFENDANT GOVERNOR CHARLES D. BAKER'S MOTION TO DISMISS

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INTRODUCTION

The Court should deny Defendant Governor Baker's motion to dismiss. The Complaint alleges that the Governor is aware of the serious risk of harm that COVID-19 poses but has not taken necessary action to mitigate its spread in prisons and jails. The Governor has not used any of his readily available powers to alleviate the risk, and he has publicly endorsed the lack of meaningful steps taken by other executive branch agencies that are also in a position to reduce this danger. The Governor's conscious lack of action, and his condonation of his subordinates' inaction, constitute deliberate indifference to Plaintiffs' health and safety in violation of the federal and state constitutions. Governor Baker's arguments about the state-law limitations on this Court's authority to order him to take certain actions are incorrect, and in any event, have no bearing on the obligation to enforce the federal Constitution under 42 U.S.C. § 1983.

STANDARD OF REVIEW

On a motion to dismiss under Mass. R. Civ. P. 12(b)(6), the Court must "take as true the allegations of the complaint, as well as such inferences as may be drawn therefrom in the plaintiff's favor." *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004) (citations and quotation marks omitted). "To survive a motion to dismiss, the facts contained in the complaint, and the reasonable inferences drawn therefrom, must "'plausibly suggest [ ]' . . . an entitlement to

relief[.]" *Flagg v. AliMed, Inc.*, 466 Mass. 23, 26–27 (2013) (citations and quotation marks omitted).

FACTS

Plaintiffs respectfully refer the Court to the Complaint for a complete statement of facts. The most salient points about the Governor's conduct are as follows.

Defendant Charles Baker is the Governor of the Commonwealth of Massachusetts and retains ultimate executive authority over the operation of the Department of Correction ("DOC") and the county correctional institutions. That authority is even greater during emergencies, such as the one presented by COVID-19. Under Chapter 639 of the Acts of 1950, 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); Compl. ¶ 25.

Unlike Governors in other states, Governor Baker, and the other Defendants who work under him, have failed to take action to effectuate the release of prisoners despite their clear authority to do so. The Governor has refused to act on his near plenary emergency powers when it comes to the health and safety of prisoners, publicly confirming his intention to stick with a failing status quo.

Compl. ¶ 4. There have been no commutations, no furloughs, no increase in earned good times, no releases by the DOC to home confinement, little if any increase in the use of medical parole, and no effort by the parole board to streamline the parole process or modify the criteria for release in light of COVID-19. Compl. ¶ 68.

The Governor has made it clear that he does not intend to take any additional action to protect prisoners or correctional staff from infection. Compl. ¶ 4. In commenting about the petition filed by the Committee for Public Counsel Services ("CPCS") and the Massachusetts Association of Criminal Defense Lawyers, he stated:

> "We don't buy as a matter of law, fact or policy that the argument that's being made before the court is the correct one. We believe the correct position is for us to be continue doing the things we're doing to keep the people inside safe, and that's gonna be the way we play this one."

Compl. ¶ 4.

ARGUMENT

I. THE GOVERNOR IS NOT IMMUNE FROM THIS COURT'S AUTHORITY TO REDRESS VIOLATIONS OF THE STATE AND FEDERAL CONSTITUTIONS

Plaintiffs allege that Defendants, including Governor Baker, are violating the federal constitution and Massachusetts Declaration of Rights by subjecting them to inhumane conditions of confinement. Plaintiffs seek an injunction from this Court ordering Defendants to take steps to remedy these violations. As this Court stated in *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Ct.*, the

constitutional claims made *in this case* are "the proper vehicle by which to seek injunctive relief." No. SJC-12926, 2020 WL 2027846, at *2, n. 4 (Mass. Apr. 28, 2020). The Governor's contentions regarding the availability of mandamus relief, and Plaintiffs' inability to sue the Governor under the Declaratory Judgment Act, while correct, are irrelevant.

The Governor is not immune from suit in Plaintiffs federal claims. "The Supremacy Clause makes [federal law] 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Mulhern v. MacLeod*, 441 Mass. 754, 756 (2004) (citations and quotation omitted). The Governor's arguments about the limitations on the Court's authority to remedy violations under Massachusetts law are inapposite to its power, and duty, to redress violations of federal law. *See Stratos v. Dep't of Pub. Welfare*, 387 Mass. 312, 316 (1982) ("Section 1983 provides an independent remedy for violation of rights protected by Federal law"); *see also Haywood v. Drown*, 556 U.S. 729 (2009) (holding that states cannot immunize a particular defendant or class of defendants from suit under Section 1983).

Nor is the Governor immune from suit for violations of the Declaration of Rights. This Court's authority to enforce these rights does not depend on the Governor's susceptibility to suit under the Declaratory Judgment Act. *See, e.g.*,

CommCan, Inc. v. Baker, 2020 WL 1903822, at *8 (rejecting argument that the court lacked authority to hear constitutional claims against the Governor, on grounds that "[t]he absence of a statutory remedy for the violation of constitutional rights cannot absolutely and in all cases bar judicial protection of those rights") (citing *Phillips v. Youth Dev. Program, Inc*., 390 Mass. 652, 658 n.4 (1983)); *see also Layne v. Superintendent*, 406 Mass. 156, 160 (1989) ("Certainly a State may not violate a person's constitutional rights and then fairly assert that no redress can be had because the State has not provided a statutory means of enforcing those rights.").

Finally, this is not a mandamus action, and the Court's authority to order relief is not constrained by its more limited powers to issue a writ. This Court has not hesitated to order public officials to take affirmative measures that would otherwise be discretionary when necessary to remedy state or federal constitutional violations. *See, e.g., Richardson v. Sheriff of Middlesex Cnty.,* 407 Mass. 455, 468–69 (1990); *Michaud v. Sheriff of Essex Cnty*., 390 Mass. 523, 534–36 (1983)

II. THE COMPLAINT STATES A CLAIM AGAINST THE GOVERNOR FOR VIOLATION OF THE EIGHTH AMENDMENT

Governor Baker's failure to take action to protect Plaintiffs from a highly contagious virus that frequently causes severe illness and death constitutes deliberate indifference to Plaintiffs' health and safety, in violation of the Eighth Amendment. Governor Baker's contention that the Complaint fails to allege

sufficient personal involvement to establish his liability under 42 U.S.C. § 1983 lacks merit.

An official violates the Eighth Amendment by showing deliberate indifference to a prisoner's health and safety. To establish deliberate indifference, the prisoner must show that the official (1) was subjectively aware of the substantial risk of serious harm to the prisoner and (2) that the official disregarded that risk. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 296–97 (1991). It is enough that the official acts recklessly; acts or omissions for the purpose of causing harm or with knowledge that harm will result are not required. *Farmer*, 511 U.S. at 825. A finder of fact may conclude that the official knew of a substantial risk from the very fact that it was obvious. *Id*. at 826

The Governor is well aware of the substantial risk of serious harm posed by COVID-19, and his motion to dismiss does not argue otherwise. His declaration of a state of emergency demonstrates his understanding of the severity of this risk. As he stated, **"**the worldwide outbreak of COVID-19 and the effects of its extreme risk of person-to-person transmission throughout the United States and the Commonwealth significantly affect the life and health of our people, as well as the economy, and is a disaster that impacts the health, security, and safety of the

public."[1] He further stated, "it is critical to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of the people of the Commonwealth." *Id.* Among the "additional steps" he has taken are measures designed reduce the "extreme risk of person-to-person transmission," including a ban on gatherings of more than 10 people, and orders closing businesses and schools.[2] These actions are sufficient to create an inference of his subjective awareness of the risk to prisoners of transmission of the illness without similarly dramatic steps. Indeed, the risk is "obvious." *Farmer*, 511 U.S. at 626.

The Governor's failure to take readily available steps to address the threat to prisoners' health and safety constitutes deliberate indifference. As alleged in the Complaint, the Governor has refused to act on his near plenary emergency powers when it comes to the health and safety of prisoners, nor has he availed himself of the multiple statutory devices to achieve this end. And he has publicly approved his subordinate executive agencies' response to COVID-19—which the Complaint alleges has failed to prevent unconstitutional conditions in violation of the Eighth Amendment—and suggested that the resistance to any significant reductions in the

[1] Mass. Exec. Order No. 591 (March 10, 2020), *available at* https://www.mass.gov/executive-orders/no-591-declaration-of-a-state-of-emergency-to-respond-to-covid-19

[2] Mem. in Support of Mot. to Dismiss of Def. Governor Charles D. Baker, at 10-12.

incarcerated population will continue. Compl. ¶ 4 ("[T]hat's gonna be the way we play this one."). Under the law of § 1983, these allegations are sufficient to establish his liability for the unconstitutional conditions. *See, e.g., Grajales v. Puerto Rico Ports Auth.*, 682 F.3d 40, 47 (1st Cir. 2012) (supervisory liability for subordinates actions may be shown by "encouragement, condonation or acquiescence[,] or gross negligence of the supervisor amounting to deliberate indifference") (alterations, internal quotation marks, and emphasis omitted); *see also Guadalupe-Baez v. Pesquera*, 819 F.3d 509, 516 (1st Cir. 2016). Given the clear message from the Governor, it is no surprise that the DOC and Parole Board have followed his lead, and done little to reduce the prison population.

The law does not require the Governor to have acted with a bad motive or to have caused the unlawful and dangerous conditions at issue. In *Brown v. Plata*, 563 U.S. 493 (2011), prisoners with serious medical conditions and mental health disorders filed two separate suits against the Governor of California alleging that due to prison overcrowding, both groups received inadequate medical and mental health care in violation of the Eighth Amendment. The Supreme Court confirmed that where the prison population is such that reduction is the only way to cure a constitutional violation, an injunction may issue even if the defendant's affirmative conduct was not the cause of the violation. 563 U.S. at 521, 526–29 (noting that prisoner-release order was appropriate because adequate care was "impossible"

without a reduction). The court's use of the word "impossible" is telling; if it were true that doing one's best under the circumstances meant that there could be no constitutional violation under the Eighth Amendment, then Brown's conclusion that non-release measures were "impossible" would have ended that case. It did not. Indeed, the Court not only upheld the conclusion that medical care was so constitutionally deficient that it could only be remedied by the release of thousands of prisoners, it also recommended particular mechanisms to accomplish that result by explaining that the "[s]tate may employ measures, including good-time credits and diversion of low-risk offenders and technical parole violators to community-based programs, that will mitigate the order's impact. The population reduction potentially required is nevertheless of unprecedented sweep and extent." *Id.* at 501; *see also Libby v. Marshall* 653 F. Supp. 359, 364 (D. Mass. 1986) (allowing amended complaint to name the Governor and other state officials as defendants in order to ensure that necessary remedy, including population caps, could be executed).

CONCLUSION

For the foregoing reasons, the Court should deny Defendant Governor Charles D. Baker's motion to dismiss in its entirety.

Dated: May 4, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on May 4, 2020 by email to the following addresses:

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