IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

NICHOLAS FRAZIER, *et al.* **PLAINTIFFS**

v. **Case No. 4:20-cv-00434**
KGB

WENDY KELLEY, *et al.* **DEFENDANTS**

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Plaintiffs Nicholas Frazier, Alvin Hampton, Marvin Kent, Michael Kouri, Jonathan Neeley, Alfred Nickson, Harold ("Scott") Otwell, Trinidad Serrato, Robert Stiggers, Victor Williams, and John Doe submit this reply memorandum in support of their emergency motion for a temporary restraining order and a preliminary injunction.

INTRODUCTION

Immediately prior to the filing of this reply, four men from Cummins Unit lost their lives to COVID-19.[1] Two died on Friday, May 1, 2020, while hospitalized and two more men died early Sunday May 3.[2] The loss of significantly more lives is an imminent danger as the COVID-19 outbreak within ADC facilities worsens in the face of Defendants' deficiencies in their preparation and response to this pandemic.

When Plaintiffs filed their Complaint, on April 21, 2020, Arkansas had 1,971 COVID-19 infections and 41 deaths. In the interim two weeks, the number of COVID-19 infections and deaths in Arkansas soared by over 50% to 3,431 infections and 76 deaths. More than one-quarter of the infections statewide are in a single prison—Cummins Unit, the largest prison in Arkansas. Almost half of the people incarcerated in Cummins (approximately 860 of 1800) have tested positive for the virus, and thirteen have been hospitalized. Cummins Unit has one of the largest viral outbreaks in prisons nationwide—from 44 of 46 prisoners in a single barrack to over 800 prisoners testing positive in a matter of days. Far from the success story that Defendants suggest, Cummins is a wakeup call for what happens when state officials, charged with ensuring the safety of prisoners in their custody, disregard an unprecedented health crisis in violation of federal law.

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[1] *4 Cummins Unit inmates die due to COVID-19*, May 3, 2020, at https://www.4029tv.com/article/2-cummins-unit-inmates-die-due-to-covid-19/32353084.

[2] Ginny Monk, *2 more inmate deaths connected to virus; Arkansas death toll up to 76*, Arkansas Times, May 3, 2020, at https://www.arkansasonline.com/news/2020/may/03/three-more-arkansas-inmates-die-two-covid-19/.

This is an extraordinary time in our country's history. American commerce has been largely shuttered, and schools have closed nationwide. The United States Supreme Court has closed its doors and will hear oral argument remotely for the first time. There is broad agreement that a new set of rules are necessary, for the time being, to protect our very lives. Yet, neither the urgency nor the unprecedented nature of this pandemic is evident in Defendants' preparation for, and management of, COVID-19 in Arkansas Department of Corrections ("ADC") facilities or in Defendants' Response in Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction ("Defendants' Response" or "Def. Resp.") (ECF No. 36).

Rather than prepare for the greatest public health crisis in 100 years, Defendants adopted a set of incomplete and haphazard measures that, when faced with their first challenge, could not have failed more miserably to protect both Plaintiffs and corrections staff. Directly impacted witnesses paint a harrowing portrait of filthy and crowded conditions, insufficient staffing, confusing and inadequate protocols, and sick people left unattended. These descriptions from multiple prisons across Arkansas cannot be characterized as the negligent actions or inactions of non-compliant corrections staff. Instead, Defendants knew a deadly pandemic was at high risk of spreading—and, indeed, was spreading—in ADC facilities, and they knew that their policies were not adequate to limit the risk of transmission. That is quintessential deliberate indifference.

Defendants' Response reflects their continued failure to acknowledge the urgency created by the COVID-19 pandemic. They compare the substantial risk of contracting a novel and potentially lethal virus, which has already infected 860 Arkansas state prisoners and led to four deaths in less than three weeks, with exposure to second-hand smoke. And they suggest prisoners must wait for the conclusion of a lengthy administrative grievance procedure, which has already

shown itself incapable of providing emergency relief responsive to this pandemic, to address the immediate risk of COVID-19 infection and illness.

Whatever Plaintiffs or the putative class members did in the past—either before or during their incarceration—does not diminish their humanity and their entitlement to legal protections under the Eighth Amendment and the Americans With Disabilities Act ("ADA"). Indeed, it is during times of crises like this pandemic when adherence to constitutional and statutory obligations should be most vigilant, and when it is most necessary for the courts to step in and hold state officials accountable. Yet, Defendants' Response makes clear that they view Plaintiffs as nothing more than criminals, who are not deserving of the protections provided by federal law. This sentiment is evidenced by Defendants' decision to allow or require corrections staff who test positive for COVID-19, even if asymptomatic, to work inside the prison during their self-quarantined, isolation period—going against every public health directive, except, of course, the guidance from Arkansas state officials. It is impossible to imagine any employer permitting or requiring COVID-19 infected employees to work while they are infectious and can spread the virus to others. But, as demonstrated in this case, the substantial risk of infection did not deter Defendants since that risk would be borne primarily by prisoners.

Indeed, while Defendants now raise security concerns from Plaintiffs' requested relief, the viral outbreak in Cummins Unit and Defendants' deficient response resulted in security risks of their own making. This spread of COVID-19 in Cummins Unit led to infections of corrections staff, as well as prisoners, creating staffing shortages that resulted in Defendants taking the extraordinary step of having *infected* corrections officers report to work in the most congested and congregate setting imaginable, thereby facilitating even further spread of the virus. Adopting

adequate measures to reduce and ultimately stop the spread of infection will make ADC facilities safer and more secure.

As explained below and in our prior submissions to this Court, Plaintiffs have a likelihood of successfully proving their Eighth Amendment and ADA claims. In particular, Plaintiffs have discovered new evidence since the TRO hearing that Defendants have disregarded and continue to "'disregard[] a known risk to the inmate's health.'" ECF 42 at 15 (quoting *Gordon v. Frank*, 454 F.3d 858, 862 (8th Cir. 2006)). This evidence includes, among other things, proof that: 1) ADC permits infected correctional staff to continue to work at Cummins Unit after they receive positive test results for COVID-19; 2) ADC relies solely on a disinfectant that has not been approved by the EPA as effective against COVID-19; 3) ADC has failed to conduct widespread COVID-19 testing of incarcerated people in all ADC facilities despite their notice of the severe outbreak at Cummins Unit, where the virus spread to hundreds of incarcerated people in only a few days; and 4) ADC has failed to implement basic sanitation and social distancing factors even after the virus began to spread at Cummins Unit and Plaintiffs filed the instant lawsuit, as demonstrated by the numerous declarations attached to this document describing the conditions as they actually exist in ADC facilities.

Further, as the Court recognized in its May 4 Order, Plaintiffs will likely suffer irreparable harm if this Court does not grant a preliminary injunction: (a) requiring the prison to adopt basic measures to improve sanitation and social distancing within ADC facilities; and (b) releasing from confinement prisoners who are advanced in age, are medically vulnerable, or have disabilities susceptible to COVID-19 disease. The balance of equities weighs heavily in Plaintiffs' favor given the tremendous public interest in reducing the spread of COVID-19 both within ADC facilities and in the surrounding communities.

The Prison Litigation Reform Act ("PLRA") is not an obstacle to the preliminary injunction. The PLRA's exhaustion requirement does not apply to Plaintiffs' emergency request for sanitation and social distancing measures within ADC facilities, because there are no available administrative remedies for Plaintiffs to exhaust. The Supreme Court has instructed courts to consider the facts on the ground in determining whether prison remedies are capable of providing relief, and the facts in this case show that Arkansas's "emergency" grievance procedures are not available to address the emergency faced by Plaintiffs here.

Writs of habeas corpus provide an appropriate legal vehicle for Plaintiffs and the subclasses to pursue release. For these individuals, no other remedy is sufficient to protect their legal rights or their health, and the release from confinement that they request represents the core function of the writ. Courts across the country have overwhelmingly affirmed the propriety of habeas corpus relief for individuals seeking redress because of the COVID-19 pandemic, and this request is fully consistent with extant Eighth Circuit case law. Furthermore, the PLRA is inapplicable to Plaintiffs' request for release for prisoners who are medically vulnerable or have disabilities that place them at high risk of severe illness or possible death from COVID-19. The statute's plain text is unambiguous that it does not apply when, as here, Plaintiffs seek habeas corpus relief challenging the fact or duration of their confinement in prison. Nor are there any state court remedies available for Plaintiffs to exhaust before they seek habeas relief; indeed, Defendants do not even assert that release is a potential remedy in proceedings brought under the Arkansas Civil Rights Act, which is the only state court mechanism they identify.

Finally, this Court is authorized to, and should, order statewide injunctive relief pre-certification because class certification is not a prerequisite for issuing such relief, and Plaintiffs

will likely be granted class certification in this lawsuit. Accordingly, Plaintiffs respectfully request entry of a preliminary injunction order as outlined by Plaintiffs in this reply memorandum.

FACTUAL BACKGROUND

As detailed more fully in Plaintiffs' Memorandum in Support of Emergency Motion for Temporary Restraining Order and Preliminary Injunction, dated Apr. 21, 2020 (ECF No. 3), Defendants have failed to adopt and implement adequate policies and procedures to prevent and mitigate the spread of COVID-19. Specifically, Defendants have not implemented the heightened hygienic, cleaning, and disinfecting practices called for by the Center for Disease Control Interim Guidance on Management of COVID-19 in Correctional Facilities ("CDC Guidance").[3] They have also failed to adequately implement measures to reduce crowding, minimize interpersonal contact, and encourage social distancing. Moreover, Defendants have still not adequately addressed the presence of incarcerated people and staff members who exhibit symptoms of COVID-19 or have tested positive for COVID-19. All of these deficiencies have led to violations of Plaintiffs' federal rights—violations that have been most recently exemplified by the massive viral outbreak of several hundred people incarcerated in Cummins Unit.

I. The Viral Outbreak in Cummins Unit Demonstrates the Inadequacies of Defendants' Preparation for, and Containment of, COVID-19 that Serve as a Warning for Other ADC Facilities.

In the face of claims by Defendants that "ADC's response to the COVID-19 pandemic has been immediate, proactive, [and] comprehensive," this Court must consider the stark reality of the public health crisis unfolding at Cummins Unit, which ranks in the top ten COVID-19 outbreaks in the nation.

[3]https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.

CASES CONNECTED TO	CASES
Marion Correctional Institution — Marion, Ohio	2,268
Pickaway Correctional Institution — Scioto Township, Ohio	1,655
Smithfield Foods pork processing facility — Sioux Falls, S.D.	1,095
Trousdale Turner Correctional Center — Hartsville, Tenn.	1,037
U.S.S. Theodore Roosevelt — Guam	969
Cook County jail — Chicago, Ill.	940
Cummins Unit prison — Grady, Ark.	911

Hot spots: Counties with the highest number of cases per resident

COUNTY	CASES	▼ PER 100,000 PEOPLE	SLOWER — FASTER CASE GROWTH RATE
Trousdale, Tenn.	1,344	14,039	Feb. 26 – May 2
Lincoln, Ark.	817	5,966	
Dakota, Neb.	942	4,637	
Nobles, Minn.	899	4,116	
Bledsoe, Tenn.	596	4,082	
Rockland, N.Y.	11,945	3,690	
Marion, Ohio	2,294	3,511	
Cass, Ind.	1,226	3,219	

Coronavirus in the U.S.: Latest Map and Case Count, N.Y. TIMES, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html ("Times journalists have for weeks tracked clusters of cases and deaths across the country. The largest such outbreaks

include prisons in Ohio and Arkansas. . . ."); https://www.arkansasonline.com/news/2020/apr/21/arkansas-cases-top-2-000-officials-say-/ ("The outbreak at the prison has made rural Lincoln County—population 13,024—one of the densest hot spots in the nation, according to an analysis by *The New York Times*.").

As Plaintiffs have made clear from the outset of this litigation, the outbreak of a highly infectious, deadly virus in a closed detention setting threatens not only the health of those confined, those who work there, and those medical professionals who will treat the infected. It also threatens the lives of Arkansans far beyond prison walls, as the virus inevitably will boomerang back into surrounding communities, straining limited medical capacity, before continuing to spread across the State. *See* Declaration of Marc Stern, filed Apr. 21, 2020 ("Stern Decl.") ¶ 11 (ECF No. 3-2). And boomerang it has. At least thirteen people who were incarcerated at Cummins have been hospitalized, including three at University of Arkansas for Medical Sciences ("UAMS") and seven at Jefferson Regional Medical Center. Daniel Breen, *Arkansas COVID-19 Gym Restrictions Rolled Back; Small Business Grants Delayed*, UA LITTLE ROCK PUBLIC RADIO, *available at* https://www.ualrpublicradio.org/post/arkansas-covid-19-gym-restrictions-rolled-back-small-business-grants-delayed. The latest reports indicate that at least four of those hospitalized patients have died. *See supra* at 1.

Defendants have presented this Court with a view that does not fairly capture, and indeed radically distorts, the reality of what is happening, and what continues to happen, inside their correctional facilities. Rather than confronting the reality on the ground, Defendants cite the declaration of Defendant Dexter Payne, Director of the Arkansas Division of Correction, over 150 times. But Defendant Payne's declaration either fails to address, or is flatly inconsistent with, the facts at the heart of this litigation.

Unattended prisoners in Cummins Unit have been so gripped by illness that they defecate on themselves. Declaration of Janice Nicholson, dated May 3, 2020 ("Nicholson Decl.") ¶ 12, attached hereto as Exhibit 25. Some sick prisoners lay in bed for days soaked in their own sweat, coughing, gasping, and sometimes convulsing; once they are finally carried away, those beds, soaked in the fluids of the unattended ill, are neither cleaned nor disinfected. Declaration of Kenna Lewis, dated May 3, 2020 ("Lewis Decl.") ¶¶ 7-9, attached hereto as Exhibit 24. For instance, Kenna Lewis' son, who is incarcerated in Cummins, reported that a man was "so sick he couldn't even get up to go to chow. After they let him lay in the bed for four days, he tested positive. No guard had even been in their barracks to check on that man. My son said the man was shaking, sweating, convulsing, and no longer coherent." Lewis Decl. ¶ 7. Carrie Coleman's son, also at Cummins, had a fever reaching 104 degrees and became so ill before receiving any medical treatment that he had to be carried to the infirmary. Declaration of Carrie Coleman, dated May 2, 2020 ("Coleman Decl.") ¶ 7, attached hereto as Exhibit 15. Ms. Coleman also reported that there was an older person who was very ill, and "they were not doing anything for him," and that, in fact, "a lot of people were getting really sick and no one was taking them to the infirmary or doing anything for them." Coleman Decl. ¶ 16.

Those in the infirmary have been similarly neglected. Janice Nicholson, herself an employee of the Arkansas Department of Corrections, has described her son's treatment in the Cummins infirmary in detail:

> On April 21st, Quintionus called me. He sounded very weak. He said he defecated on himself and had to be wheeled to the infirmary because he was too sick to walk. I told him to ask for some noodle soup and he said there was no hot food. He said he only had cough drops. I told him to put the cough drops in some hot water and drink it. He said at the barrack nurses were not coming to check on him and the other inmates. He said one of the inmates in the barrack was also having trouble breathing and he let him take a couple of pumps of his inhaler.

> On April 22nd, I called Shelley Byers three times. Each time I was informed that she was busy and could not speak with me. I explained that I wanted an update on my son. A staff member said she was looking at Quintionus' chart and he was refusing treatment. I said there was no way my son would refuse treatment.
>
> Quintionus called me on the evening of April 22nd. He still sounded weak and sick. I told him that I spoke to medical staff in Pine Bluff and she said he was refusing treatment. Quintionus said he absolutely never refused treatment. He said the nurses were barely coming to the barrack to see about the inmates. When the nurses did come they would stand at the gate and yell for the inmates to come to the gate to be seen. He remembered at about 2am a nurse yelled his name to come to the gate, but he was too weak to get up.

Nicholson Decl. ¶¶ 12-14. The treatment of Ms. Nicholson's son—even though she is an ADC employee who appealed to both the Warden and her son's attorney—stands in stark contrast to Defendant Payne's promise that "any inmate who believes he or she is experiencing symptoms of COVID-19 may seek immediate treatment from Wellpath, for free." Def. Resp. at 5.

Defendants likewise rely on Defendant Payne for the proposition that masks have been "made by Arkansas Correctional Industries ('ACI') in the garment factory outside an adjacent ADC unit." Def. Resp. at 9. Notably absent from this narrative is that ACI, staffed by incarcerated people,[4] had *infected* prisoners from Cummins Unit working to make these masks. For example, Carrie Coleman's son Brandon got sick around April 8, 2020, but from Wednesday to Friday of that week, even though he was feeling very ill, officers forced him to keep going to work at ACI, "where he was making masks." Coleman Decl. ¶ 4. Infected prisoners at Cummins Unit also have been compelled to continue to work in the kitchen. Declaration of Valencia White, dated May 1, 2020 ("White Decl.") ¶¶ 6-8, attached hereto as Exhibit 29.

[4] "The mission of ACI is to train and educate inmates in life skills and marketable job skills through various programs, enabling them to produce quality goods, products and services at competitive prices; in combination will aid in the reduction of recidivism." About ACI, https://www.acicatalog.com/store/about (last visited May 3, 2020).

This, coupled with Defendants compelling infectious COVID-19 positive corrections officers to work at Cummins Unit, has exacerbated the risk of infection to not only prisoners, but also other ADC employees. Indeed, Defendant's own exhibits to their Response indicate that Defendants had a policy of allowing corrections officers infected with COVID-19 to disavow clear public health guidance to remain quarantined, and instead report to work if they were asymptomatic—even though asymptomatic carriers are able to transmit the virus. *See, e.g.*, *What We Know About the Silent Spreaders of COVID-19*, NATIONAL PUBLIC RADIO, April 13, 2020, *available at* https://www.npr.org/sections/goatsandsoda/2020/04/13/831883560/can-a-coronavirus-patient-who-isnt-showing-symptoms-infect-others; *see also* Second Declaration of Dr. Marc Stern, dated May 3, 2020 ("Stern Decl. 2") ¶ 5 ("[S]taff who have or are suspected of having COVID-19, even if asymptomatic, should not be allowed in any ADC facility until they are no longer contagious."), attached hereto as Exhibit 12; Stern Decl. ¶ 13c ("The prison must establish clinically effective non-punitive quarantine of all individuals believed to have been exposed to COVID-19, but not yet symptomatic, . . .").

Moreover, even when corrections officers use personal protective equipment (which by no means would allow a corrections officer known to be infected with COVID-19 to safely report for work), they wear gloves and wear masks irregularly and often incorrectly. Kouri Decl. ¶ 12; *see also* Arkansas Department of Corrections, Twitter, Apr 8, 2020, 11:22 AM, at https://twitter.com/ADCPIO/status/1247907645765357568 (bottom center, mask below nose); Arkansas Department of Corrections, Twitter, Apr 27, 2020, 5:35 PM, at https://twitter.com/ADCPIO/status/1254886542075744259/photo/1 (masks below noses).

Plaintiffs respectfully suggest that these accounts, and not the idealized picture painted by Defendants, would permit a reasonable person to make sense of the remarkable spike of infections

at Cummins Unit and the remarkable amount of pain and suffering those numbers reflect. That suffering extends beyond Cummins Unit, reverberating out into the broader community, as family members desperate with worry try to call the infirmary again and again to ask about their sons and grandsons and brothers, only to get a busy signal. Coleman Decl. ¶ 19.

The worst is yet to come. Despite Defendants' representations about their actions to date and moving forward, the way that the situation at Cummins Unit was actually handled has left incarcerated individuals and the prison at large at grave risk: with infected corrections officers told to report to work; with infected prisoners ordered to cook and make masks for the uninfected; with the sick and not-yet-sick incomprehensibly moved around and mixed together; and where the ill and the well have been essentially abandoned. Lewis Decl. ¶ 10 ("They also have not been feeding them properly. One day they had 'lunch' at 9:30 p.m. This worried me too, especially since so many of these men are sick—very sick. Sick people need to eat and drink. But when I called to ask about them not getting enough to eat, I was told that they were understaffed which is why they weren't able to feed them correctly."); Ninette Sosa, *Cummins Unit Inmates Angry Over Lack of COVID Care and Food Shortages*, KNWA FOX NEWS 24, May 2, 2020, *available at* https://www.google.com/amp/s/www.nwahomepage.com/lifestyle/health/coronavirus/cummins-unit-inmates-angry-over-lack-of-covid-care-food-shortages/amp/.

Given the trajectory of the illness as we now understand it, and the number of hospitalizations we are already seeing, there is no question that there will be more hospitalizations and likely more deaths to come among the several hundred prisoners in Cummins Unit known to be infected. Failing this Court's intervention, more and more correctional facilities will go the way of Cummins Unit, jeopardizing not only those who live and work there, but also the surrounding communities more broadly, as we have seen happen elsewhere. *See, e.g.*, Sarah Volpenhein,

Marion Star, Apr. 25, 2020, at https://www.marionstar.com/story/news/local/2020/04/25/marion-prison-ohio-coronavirus-outbreak-seeping-into-larger-community/3026133001/. Cummins Unit is the canary in the coal mine.

II. Defendants' Recitation of Preexisting Cleaning Protocols Are Hardly "Enhanced" and Are Contradicted by Prisoners' Experiences in Multiple Facilities.

Defendants assert that ADC has "ordered" enhanced disinfection of its units; however, Defendants have failed to provide details of enhanced measures or any documentation of these orders being carried out. Although Defendants allege that open barracks in general population are cleaned continuously throughout the day by inmate porters, Plaintiffs in such barracks at the Varner and Ouachita River Units all report that porters are only given chemicals to clean once to twice a day, if that. Second Declaration of Alvin Hampton, dated Apr. 29, 2020 ("Hampton Decl. 2") ¶ 6, attached hereto as Exhibit 2; Second Declaration of Marvin Kent, dated Apr. 29, 2019 ("Kent Decl. 2") ¶ 13, attached hereto as Exhibit 3; Second Declaration of Jonathan Neeley, dated Apr. 29, 2020 ("Neeley Decl. 2") ¶ 6, attached hereto as Exhibit 5; Second Declaration of Harold Otwell, dated Apr. 29, 2929 ("Otwell Decl. 2") ¶ 14, attached hereto as Exhibit 7; Second Declaration of Trinidad Serrato, dated Apr. 29, 2020 ("Serrato Decl. 2") ¶ 13, attached hereto as Exhibit 8; Second Declaration of Victor Williams, dated Apr. 29, 2020 ("Williams Decl. 2") ¶ 12, attached hereto as Exhibit 10.

Individuals housed at multiple units, including the Cummins Unit, have reported they lack access to disinfectants. Nicholson Decl. ¶ 15; Declaration of Tonya Williams, dated May 3, 2020 ("Williams Decl.") ¶ 3, attached hereto as Exhibit 30; Declaration of Rocxena Smith, dated May 1, 2020 ("Smith Decl.") ¶ 3, attached hereto as Exhibit 28; Declaration of Susie Anita Daniels, dated May 3, 2020 ("Daniels Decl.") ¶ 8, attached hereto as Exhibit 17; Declaration of Nicole Cleveland, dated May 3, 2020 ("Cleveland Decl.") ¶ 12, attached hereto as Exhibit 16. At other units,

chemicals and cleaning supplies are provided to porters for a small window of time—once in the morning and once in the evening, at most. Serrato Decl. 2 ¶ 13, Neeley Decl. 2 ¶ 6, Kent Decl. 2 ¶ 13. Continuous cleaning cannot be achieved without continuous access to disinfectant and cleaning supplies.

Plaintiffs at the Ouachita River Unit have actually noticed a decrease in cleaning efforts. Serrato Decl. 2 ¶ 13, Williams Decl. 2 ¶ 11. Porters responsible for cleaning barracks at the Ouachita River Unit have been reported to their staff supervisors for failing to adequately clean, including spending as little as fifteen minutes cleaning an entire barracks. Williams Decl. 2 ¶ 11. Despite these complaints, ADC has failed to remedy the problem. Williams Decl. 2 ¶ 11. The frequently used surfaces on the metal bench area in the Charlie barrack are only cleaned about every other day, and porters must be prompted by inmates in the barrack to clean the area. Declaration of Carlton Hayes, dated May 2, 2020 ("Hayes Decl.") ¶ 6, attached hereto as Exhibit 22. Without direct access to cleaning chemicals, inmates are completely dependent upon the access to supplies afforded to assigned porters and the efforts of those porters and staff.

In their response, Defendants state that people in restrictive housing are provided cleaning supplies only twice per week to clean their cells, yet ADC staff come into contact with their cells through the trap on their doors at least six times per day to deliver meals and pick up plastic meal trays. Second Declaration of Nicholas Frazier, dated Apr. 29, 2020 ("Frazier Decl. 2") ¶ 4, attached hereto as Exhibit 1. Additionally, staff come to these cells for medication pass, mental health checks, and to escort individuals in restrictive housing to showers, yard calls, sick calls, and to make phone calls. Second Declaration of Robert Stiggers ("Stiggers Decl. 2") ¶ 4, attached hereto as Exhibit 9; Frazier Decl. 2 ¶¶ 4, 10. As of April 29, 2020, toilets in approximately 30 restrictive housing cells in Cummins Unit had been turned off since April 24, 2020. Second Declaration of

Alfred Nickson, dated Apr. 29, 2020 ("Nickson Decl. 2") ¶ 6, attached hereto as Exhibit 6. This leaves approximately sixty inmates without a working toilet, as these are two-man cells. Nickson Decl. 2 ¶ 6. These inmates must now be taken out of their cells and into another unit to use the bathroom, exponentially increasing their exposure to staff and communal spaces. *Id.*

Showers in restrictive housing continue to be cleaned only after all 90 men in the barracks have had a chance to shower. Stiggers Decl. 2 ¶ 4. These are the same procedures used prior to the alleged "enhanced disinfection." Stiggers Decl. ¶ 4. Despite having COVID-19 positive cases in restrictive housing at Cummins Unit, Defendants have failed to increase access to cleaning supplies or cleaning procedures for showers and other communally used spaces. Nickson Decl. 2 ¶ 10. Although Defendants may have ordered enhanced disinfection, they clearly have not taken necessary steps to ensure this order is carried out within ADC facilities.

Moreover, Defendants have stated that they use Razor Chemical's Citrus Breeze III to disinfect frequently touched surfaces, but they have not claimed that this cleaner is effective against the virus that causes COVID-19. Def. Resp. at. 6. Importantly, CDC Guidance requires the use of *EPA-registered disinfectants effective against the virus that causes COVID-19* to clean and disinfect frequently touched surfaces several times a day. But searches for "Razor Chemical" and "Citrus Breeze" in the database of EPA-registered disinfectants effective against the COVID-19 virus have returned no results. *See* Search Results for Citrus Breeze on EPA List of Disinfectants for Use Against SARS-CoV-2, attached hereto as Exhibit 40.

III. The Provision of PPE to Corrections Staff and Prisoners, as Well as Their Use, Are Insufficient and Inconsistent.

Defendants have failed to distribute personal protective equipment ("PPE")—including masks and gloves—to all individuals under ADC custody. Prisoners in restrictive housing are not provided with any protective equipment, even when interacting with correctional staff. Frazier

Decl. 2 ¶ 5 and 10; Kent Decl. 2 ¶ 7; Stiggers Decl. 2 ¶ 6. Defendants falsely claim that individuals in restrictive housing do not need masks because ADC staff wear masks and gloves as precautionary measures during all interactions. *See* Declaration of Dexter Payne, filed Apr. 30, 2020 ("Payne Decl.") ¶¶ 48-49 (ECF No. 36-1). On April 25, 2020, Mr. Frazier was transported by two corrections officers to the infirmary. Frazier Decl. 2 ¶ 10. Neither of the officers nor Mr. Frazier were wearing masks. *Id.* Eventually, Mr. Frazier made his own mask out of a shirt after requesting a mask and being denied. Frazier Decl. 2 ¶ 5. Similarly, while in restrictive custody, Mr. Kent was not provided a mask, even after making several requests. Kent Decl. 2 ¶¶ 5-7. Mr. Kent has a serious heart condition and pacemaker and interacted with correctional staff and nurses without masks. *Id.*

Other Plaintiffs and class members have received cloth masks, made from corrections shirts. Hampton Decl. 2 ¶ 8; Kent Decl. 2 ¶ 8; Neeley Decl. 2 ¶ 9; Nickson Decl. 2 ¶ 7; Daniels Decl. ¶ 12. Individuals in ADC custody are required to wash their mask by hand. Hampton Decl. 2 ¶ 8; Declaration of Audrey Brown, dated May 3, 2020 ("Brown Decl.") ¶ 20, attached hereto as Exhibit 14. Many individuals in ADC custody have received only one mask—which does not provide uninterrupted protection while their only mask is cleaned and drying. Daniels Decl. ¶ 12; Brown Decl. ¶ 20; Declaration of Cici Sangers Ponder, dated May 3, 2020 ("Ponder Decl.") ¶ 12, attached hereto as Exhibit 26; Smith Decl. ¶ 3; Declaration of Juanita Singleton, dated May 3, 2020 ("Singleton Decl.") ¶ 2, attached hereto as Exhibit 27. Only some Plaintiffs have received multiple masks—Mr. Hampton, Mr. Neeley, Mr. Otwell, Mr. Serrato, and Mr. Williams received one mask in early April and a second mask the week of April 20th. Hampton Decl. 2 ¶ 8; Neeley Decl. 2 ¶ 9; Otwell Decl. 2 ¶ 12; Serrato Decl. 2 ¶ 6; Williams Decl. 2 ¶ 9.

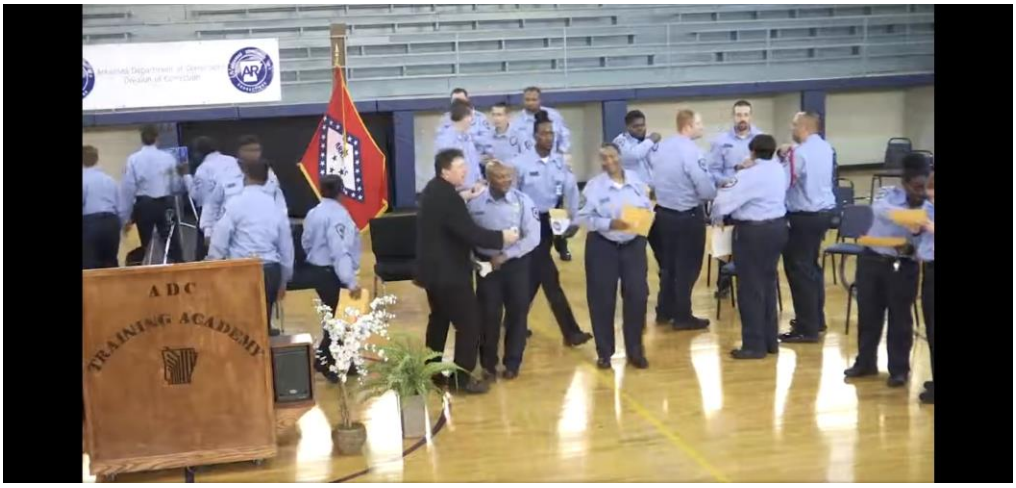
As discussed above, masks are made by prisoners at Cummins Unit, despite the facility's unprecedented COVID-19 outbreak. White Decl. ¶ 12; Serrato Decl. 2 ¶ 15; Cleveland Decl. ¶ 13. Moreover, those incarcerated at Cummins Unit, like Brandon Coleman, have been forced to continue working to produce masks despite feeling ill and exhibiting COVID-19 symptoms. Coleman Decl. ¶ 4. To afford adequate protection, the masks "should meet or exceed the requirements set forth by the Arkansas Department of Health; these are clothes non-medical masks. (COVID-19 Fabric Mask Pattern with Three Layers, March 27, 2020)." Stern Decl. 2 ¶ 2.

No prisoners have received gloves. Even prisoners working in laundry and food service are not provided with adequate PPE like gloves. Mr. Serrato works in the kitchen at Ouachita River Unit. Serrato Decl. 2 ¶ 14. Neither Mr. Serrato nor other prisoners that work in the kitchen are provided with gloves. *Id.* Food is unloaded from delivery trucks and transported to the kitchen without masks or gloves. *Id.* Mr. Hampton also observed prisoners not wearing masks while serving food. Hampton Decl. 2 ¶ 9. Another prisoner, working in the kitchen at Grimes Unit, states that no one in the kitchen is allowed to wear gloves while handling food. Cleveland Decl. ¶ 6.

Defendants claim that gloves and masks have been provided to all correctional staff members, yet corrections officers do not consistently wear PPE or fail to wear PPE correctly. And many corrections officers are observed without masks at all. Frazier Decl. 2 ¶ 10; Neeley Decl. 2 ¶ 11; Stiggers Decl. 2 ¶ 6; Williams Decl. 2 ¶ 7; Cleveland Decl. ¶ 8. On April 20, 2020, when Mr. Serrato went to the infirmary, three nurses in the infirmary did not have on masks. Serrato Decl. 2 ¶ 8; *see also* Arkansas Department of Corrections, Twitter, Apr 16, 2020, 8:55 PM, at https://twitter.com/ADCPIO/status/1250950916754345984/photo/1 (picture from ADC infirmary with plastic sheets installed, but nurse and patient both without masks). On Friday, April 17, 2020,

two officers in Mr. Serrato's barracks did not wear their masks until the Warden entered the barracks. Serrato Decl. 2 ¶ 7.

In early April 2020, after Central Arkansas Community Correctional Counselor Richard Richardson passed away, another officer was reprimanded for wearing PPE. Daniels Decl. ¶ 13. ADC's aversion to PPE was also captured at the ADC Training Academy graduation ceremony on March 27, 2020. In a video of the ceremony, a large group of correctional officers are congregating without masks or other personal protective equipment.



The ceremony was held at least a day after Governor Hutchinson prohibited gatherings of 10 or more people in indoor spaces.

Furthermore, even if ADC staff members are wearing PPE, often the equipment is not utilized correctly. Defendants have not claimed that they have followed the CDC Guidance's recommendation to train incarcerated people and correctional staff on how to don and doff PPE. As a result, both Plaintiffs and Class Members have observed officers wearing masks below the nose or mouth or on the chin. Kent Decl. 2 ¶ 10; Neeley Decl. 2 ¶ 10; Otwell Decl. 2 ¶ 10; Williams Decl. 2 ¶ 11; Ponder Decl. 2 ¶ 13. Frequently, correctional staff deliberately pull down their masks to speak to prisoners and give orders in the barracks. Neeley Decl. 2 ¶ 11; Otwell Decl. 2 ¶ 10. On

April 28, 2020, Corporal Little, in the Ouachita River Unit, was not properly wearing his mask during his entire shift. Neeley Decl. 2 ¶ 11. On April 29, 2020, during an interview with Plaintiffs' counsel, Lieutenant Seley, in Ouachita River Unit, entered Mr. Otwell's barracks with his mask pulled down under his chin. Otwell Decl. 2 ¶ 10. On another occurrence, a family member—on a videocall with a loved one incarcerated at Cummins Unit—witnessed a female correctional officer working with prisoners that tested positive for COVID-19 but not wearing gloves. Ponder Decl. 2 ¶ 13; *see also* Stern Decl. 2 ¶ 6 ("Correctional officers must receive adequate training in relevant preventive public health measures as they apply personal protection . . . .") This pattern of sanctioned non-compliance with COVID-19 guidance is all the more serious in light of the fact that ADC has infectious COVID-19 staff working in these facilities.

IV. The Impossibility of Social Distancing, and Staffing Shortages, Pose Serious Risks to Both Prisoners and Corrections Staff.

Defendants concede that the most essential measure for minimizing the spread of COVID-19 is not possible at the current population levels of ADC facilities. As Defendant Payne acknowledges, "ADC housing units are not large enough so that every inmate's bed can be moved six-feet away from another." Def. Resp. at 12.

Nor have Defendants implemented the measures that they could implement to improve social distancing within ADC facilities. Upon reviewing materials regarding Defendants' response to the pandemic, corrections expert Eldon Vail's "biggest concerns is ADC's resistance to exploring avenues to increase social distancing." As he puts it:

> Accepting ADH guidance that, "not all strategies will be feasible in all facilities", there is no evidence that the ADC has made a systemic effort to come up with a list of "social distancing strategies" or any such implementation in their prisons. The failure to do so in the face of the pandemic puts prisoners at increased risk of harm.
>
> . . .

> One of my biggest concerns is ADC's resistance to exploring avenues to increase social distancing. Mr. Dexter says: In light of the physical characteristics of ADC units, as well as security and staffing needs, a court order requiring additional social distancing measures would both risk the safety and security of the facilities and constitute an undue burden on the operations of the ADC's prison system.
>
> . . .
>
> Mr. Dexter's statement is typical of the orientation of too many corrections officials. We get stuck in the ways we have always done business and when faced with a crisis such as COVID-19 fail to be willing to examine the assumptions of how we regularly operate. **This pandemic is different. We must examine all of the opportunities to move in the direction of increased social distancing such as expanding where prisoners are housed within the secure perimeter of corrections facilities. Lives are at stake.**

Declaration of Eldon Vail, dated May 3, 2020 ("Vail Decl.") ¶ 57 (emphasis added), attached hereto as Exhibit 11.

The lack of adequate social distancing has already led to a crisis at Cummins, which includes a facility where staff shortages and fear of contracting the virus appear to be resulting in dramatic deficiencies in even the most basic essentials, such as food. Lewis Decl. ¶ 10 ("They also have not been feeding them properly. One day they had 'lunch' at 9:30 p.m. This worried me too, especially since so many of these men are sick—very sick. Sick people need to eat and drink. But when I called to ask about them not getting enough to eat, I was told that they were understaffed which is why they weren't able to feed them correctly."); Ninette Sosa, *Cummins Unit Inmates Angry Over Lack of COVID Care and Food Shortages*, KNWA FOX NEWS 24, May 2, 2020, at https://www.google.com/amp/s/www.nwahomepage.com/lifestyle/health/coronavirus/cummins-unit-inmates-angry-over-lack-of-covid-care-food-shortages/amp/. The fear, hunger, and illness of those locked down in Cummins has created a powder keg environment. Peyton Knott, *Inmates*

cause disturbance in Cummins Unit, KNWA Fox 24, May 2, 2020, at https://www.nwahomepage.com/news/inmates-cause-disturbance-in-cummins-unit/.

The staffing shortages at ADC's facilities are widespread and contribute to these dangerous conditions. There were 651 vacancies in the correction division and 117 in community correction division, even before staff began taking leave due to COVID-19. Arkansas Department of Corrections Secretary's Report, March 2020, at page 3. https://adc.arkansas.gov/images/uploads/DOC_Secretarys_Board_Report_March2020-FINAL.pdf at page 3. The Arkansas state government jobs page has by far more open positions for the Department than for any other state agency or department, with more than double the number of job listings for than the next highest state agency, the Department of Human Services, and roughly triple the number of vacancies listed for the Department of Workforce Services. https://www.ark.org/arstatejobs/index.php Even at that, "only" 121 of the Department's 651 vacancies are posted.

The state's webpage clearly shows that community correction and corrections divisions are in serious need of Correctional Officers across the state to perform the following duties, among others, specified in its job descriptions: supervise the security and conduct of inmates/residents in cells, during group meetings, meals, bathing, at recreation, during visitations, while working and other assignments; maintain security at front gate by logging in visitors to unit; performing security checks of buildings and grounds; maintain a log for work release, status, and movement of inmates/residents; write incident reports and take disciplinary action; escort inmates/residents; attend shift briefing to discuss incidents, problems, and security issues; operate communications equipment by receiving/transmitting messages, logging incoming/outgoing calls, and contacting requested parties. The state needs corrections officers and sergeants in Chicot, Crittenden, Hot

Spring, Izard, Jackson, Jefferson, Lee, Lincoln, Miller, Mississippi, Pulaski, and Saline counties, with multiple vacancy listings for almost every county.

The Department also lacks sufficient Food Preparation Managers and Supervisors to supervise food service personnel; direct food service activities; monitor security and safety practices; coordinate production and serving of food; order supplies; prepare and cook food; check the quality of raw and cooked food products to ensure standards are met; checks quality of received food products; inspect supplies, equipment and storage areas for temperature and sanitation requirements, and inspect work areas to ensure conformance to established standards. The state needs Food Preparation Managers and Supervisors in Crittenden, Hot Spring, Jackson, Lee, Lincoln, Miller, Saline, and Washington counties, again with multiple listings within the same counties.

V. Defendants Have Not Conducted Adequate Testing and Have Not Provided Timely and Appropriate Medical Care to Sick Prisoners Infected with COVID-19.

Defendants assert that "[i]mportantly, as of April 30, 2020, COVID-19 has only been *detected* in inmates in one unit within ADC: the Cummins Unit." Def. Resp. at 13. (emphasis added). Indeed, according to Defendants, "Plaintiffs' whole case is about mitigating the risk that a disease *that has not yet arrived* will spread." *Id.* at 55. Citing the "limited presence of the virus in ADC prisons," *id.*, Defendants claim that their record "rivals not only that of other prison systems but the general population's," *id.* at 56.

Leaving aside the stark fact that, under Defendants' watch, Cummins Unit became one of the ten largest documented COVID-19 outbreaks in the country, the fact that COVID-19 has not been detected at other facilities does not mean it is not there, much less that it is not at substantial risk of spreading. The fact that "it is ADC policy to test, at no expense, any inmate who has a fever," Def. Resp. at 56, provides cold comfort when there is substantial evidence that Defendants

have not reliably taken the temperatures or tested individuals concerned that they are ill, and have no provided timely and appropriate medical care to sick prisoners infected with COVID-19. *See, e.g.*, Kent Decl. 2 ¶¶ 4-6 ("I have had headaches, body aches, coughing, and nausea for at least 5 weeks and I have not been tested for COVID-19. I submitted a written request for a COVID test, mask, and gloves approximately 4-5 weeks ago and I have not received a response. . . . I submitted an emergency grievance on April 21, 2020 explaining that I have a serious heart condition and pacemaker, asking to be tested, and asking for a mask because I am in contact with staff and nurses."); Neeley Decl. 2 ¶¶ 10, 14 ("The only time my temperature has been taken is when I leave the facility for an off-site visit. The last time that happened was two weeks ago. I filed a grievance on April 19, 2020 regarding my vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or prevent the spread of the virus.); Nickson Decl. 2 ¶ 9 ("My temperature has not been taken. I do not know of anyone's temperature being taken.").

None of the signage attached to Defendants' Response instructs incarcerated people on how to report symptoms of COVID-19 to correctional staff, despite the CDC Guidance calling for such signage. *See* Def. Resp., Exhibits 6, 7, 12, 13, 14 (ECF Nos. 36-6, 36-7, 36-12, 36-13, 36-14). As of April 18, 2020, no incarcerated people at Varner Unit or East Arkansas Regional Unit had been tested for COVID-19, even though these prisons had received more than 350 and 650 medical grievance this year respectively. ADC COVID Response, attached hereto as Exhibit 42; ADC Total of Medical Grievances – Jan 1 - April 1, 2020, attached hereto as Exhibit 41. Tellingly, in their brief, Defendants do not state how many people from these other facilities have been tested for COVID-19.

Furthermore, waiting to test people who have been exposed to COVID-19 until they exhibit symptoms is irresponsible and contrary to Arkansas state procedures in other congregate settings,

such as nursing homes. Arkansas Department of Health ("ADH") e-mails indicate that all staff at the Central Arkansas Community Corrections Center ("CACCC") were tested, with 27 testing positive, before *any* of the people residing there were tested. Email from Dr. Naveen Patil, Arkansas Dep't of Health to Nate Smith, Arkansas Dep't of Health, dated Apr. 12, 2020, attached hereto as Exhibit 49. In fact, the email indicates the facility only began "random testing" 15 of 150 inmates after the death of CACCC counselor Richard Richardson. *Id.* Another ADH email indicates that all staff at a West Memphis correctional facility were tested, with two testing positive, but there is no indication that any of the people incarcerated there were tested. Email from Dr. Naveen Patil, Arkansas Dep't of Health, West Memphis to Austin Porter, Arkansas Dep't of Health, dated Apr. 13, 2020. At least 59 people incarcerated at CACCC later tested positive. Alexis Wainright, *Little Rock inmate tests positive for COVID-19, family worried*, KARK 4 News, Apr. 16, 2020, at https://www.kark.com/news/local-news/little-rock-inmate-tests-positive-for-covid-19-family-worried/. Meanwhile ADH policy appears to have been to test *all* staff and residents at nursing homes when anyone living or working there has been exposed. 5News, *Two nursing home residents test positive for COVID-19 in Huntsville and Rogers*, April 11, 2020, at https://www.5newsonline.com/article/news/nursing-home-resident-tests-positive-for-covid-19-in-huntsville/527-4987adc3-5b6d-46c6-a9d7-2d9e339c5545 (noting that ADH is "prioritizing testing for those in long term care facilities when there is a staff member or resident affected . . . even those who are asymptomatic").

As discussed above, there is substantial evidence that Defendants have not provided timely and appropriate medical care to prisoners infected with COVID-19. *See also* Otwell Decl. 2 ¶ 9 ("There was a guy throwing up in the barracks for more than 24 hours and they just left him there.").

VI. Plaintiffs Are Especially Vulnerable to Serious Illness or Death from COVID-19 due to Their Serious Medical Conditions.

Named Plaintiffs have credibly pleaded they have a variety of preexisting conditions that make them particularly vulnerable to serious illness or death if they become infected with covid-19. *See* Class Action Complaint, filed Apr. 21, 2020, ¶¶ 15-35 (ECF No. 1). Each Named Plaintiff has filed now two sets of declarations in which they confirm they are so afflicted.

Defendants counter, on the basis of a single declaration provided by Dona Gordon, a Certified Correctional Health Professional employed by Wellpath (the private, for-profit, medical provider to the Arkansas Department of Corrections), that her review of Wellpath's medical records for Plaintiffs does not bear out many of these conditions. *See* Declaration of Dona Gordon, filed Apr. 30, 2020 (ECF No. 36-23). Yet, Ms. Gordon does not provide any of the records that she claims to have examined to corroborate her declaration. Nor does she claim to have met or examined any of the Named Plaintiffs to gain first-hand information. Nor did she even attempt to discuss their medical history, as little of it that is likely known, with medical staff on the ground who have had contact with Named Plaintiffs.

This is hardly an adequate rebuttal to Named Plaintiffs' declarations. Nor should it come as any surprise. Wellpath is not a general medical services provider that would provide, or be knowledgeable about, the comprehensive health of people who are incarcerated. Rather, it is a large, for-profit contractor of medical services for correctional institutions that has been accused and sued for grossly inadequate medical care, which has led to serious injury and death for multiple people in jails and prisons across the country. *See, e.g.*, Blake Ellis and Melanie Hicken, *19 years old, in jail and begging to go to the hospital*, CNN.com, June 2019, at https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs-cnnphotos/index.html; John Moritz, *Sister sues over Arkansas inmate's '14 death, says prison, medical staff ignored*

pneumonia's grip, Arkansas Democrat Gazette, Nov. 15, 2017, www.arkansasonline.com/news/2017/nov/15/sister-sues-over-inmate-s-14-death-2017/.

VII. Defendants' Grievance Procedures, Which Can Take up to Two Months to Exhaust, Were Unavailable to Plaintiffs During the Crisis of the COVID-19 Pandemic.

By Defendants' own representations, the normal administrative grievance process includes multiple steps and can take up to two months to exhaust for both medical and non-medical grievances. *See* Def. Resp. 26, 28. To put this in context, the Cummins Unit went from one confirmed infection to 850 in just ten days.

Plaintiff Frazier noted in his declaration that several grievances he filed in the past were never responded to. Or, consistent with Defendants' representations, it took multiple months to complete the process for another grievance he filed. Frazier Decl. 2 ¶ 13. Plaintiff Jonathan Neeley also filed multiple grievances to no avail, and his grievance experience demonstrates the futility of the grievance process especially in light of a fast-moving pandemic. He began the grievance process for Defendants' failure to treat his cancer on March 2, 2020, and was told he will not have a response to his appeal as part of Step 3 until May 28, 2020. Neeley Decl. 2 ¶ 16. In other words, it will take Mr. Neeley three months to exhaust his grievance regarding his serious health condition that makes him more susceptible to serious illness and death in light of the pandemic.

Mr. Neeley also filed two other grievances, noting his vulnerability to COVID-19 because of his recent diagnosis of rectal cancer, and requesting ADA accommodations. Neeley Decl. 2 ¶¶ 14-15. He also noted the prison's non-compliance with procedures to decrease or prevent the spread of the virus. Neeley Decl. 2 ¶ 14. In response to Mr. Neeley's grievances, ADC did not indicate the steps it would take to prevent the spread of the virus, or what accommodations it would make for Mr. Neeley. The only response ADC provided was that "no matter the situation, release is a non-grievable issue." Neeley Decl. 2 ¶ 14. Separately, ADC had responded to Mr. Neeley's ADA grievance, as it had to

other inmates, that ADC was doing everything it could and asked for Mr. Neeley to be patient. Neeley Decl. 2 ¶ 15; *see, e.g.*, Otwell Decl. 2 ¶ 21; Williams Decl. 2 ¶ 16.

Plaintiff Alvin Hampton also filed two grievances, noting his vulnerability to COVID-19 and that ADC officials were not adhering to procedures necessary to slow the spread of the virus, similar to the allegations in this lawsuit. Hampton Decl. 2 ¶ 14. He was simply told that his complaint was non-grievable because he had requested release. Hampton Decl. 2 ¶ 14. In Mr. Hampton's second grievance, he asked for ADA accommodations in light of COVID-19. Hampton Decl. 2 ¶ 15. The deputy warden did not address Mr. Hampton's request for accommodations, and only responded that ADC was doing everything they could do and for him to be patient. Hampton Decl. 2 ¶ 15.

Plaintiff Marvin Kent filed multiple grievances beginning in December 2019 about his underlying health issues and requesting to see medical staff. Kent Decl. 2 ¶ 3. Mr. Kent received no response to his grievances. Then, because he was having headaches, body aches, coughing, and nausea, and had not yet been tested for COVID-19, Mr. Kent filed yet another grievance. Kent Decl. 2 ¶¶ 4-5. In his new grievance, Mr. Kent asked for a COVID-19 test, mask and gloves. *Id.* ¶ 5. He did not receive a response to this grievance.

Furthermore, an "emergency" grievance that requires ADC to address the issue within 24 hours has not provided Plaintiffs with a pathway for timely exhaustion. Defendants' indifference to the seriousness of COVID-19 has led them to deem such complaints as not an emergency grievance. Plaintiff Frazier, for example, filed a grievance explaining that his health condition put him at high risk and asking for additional cleaning supplies. Frazier Decl. 2 ¶ 12. Though the grievance was submitted in the midst of the COVID-19 pandemic, Sgt. Garcia said the grievance was not an emergency. Frazier Decl. 2 ¶ 12; *see also* Nickson Decl. 2 ¶ 11 (stating ADC's failure to respond to Mr. Nickson's emergency grievance).

Along with the grievance process not being generally available to Plaintiffs, it is also unusable, and administrators have thwarted inmates from taking advantage of the process. For example, after Mr. Kent filed the grievances discussed above, he filed yet another grievance, explaining that he has a serious heart condition and pacemaker, and asking to be tested and to be given a mask. Kent Decl. 2 ¶ 6. Mr. Kent received a response a week later stating that he did not need a mask or other PPE because he was in supermax. However, by the time ADC had finally responded, Mr. Kent was no longer in supermax. *Id.* ¶ 7. Further, he received the response to the grievance by mail, rather than it being delivered by a staff member, resulting in more than 72 hours passing before he received notice of the response to his grievance. *Id*. Because of how ADC handled Mr. Kent's grievance, it was too late for him to move to the second step of the process. *Id*.

Plaintiff Alfred Nickson filed an emergency grievance on April 17, 2020, concerning his vulnerability to COVID-19 and the prison's non-compliance with procedures to decrease or prevent the spread of the virus but, as of the time of his second declaration, had not yet received a response from the grievance officer. Nickson Decl. 2 ¶ 11. Further, Mr. Nickson explains that a number of sergeants have stopped picking up and signing grievances in order for inmates to file. *Id.* ¶ 12. In fact, Sergeant Knight refused to pick up a grievance from Mr. Nickson on three different days in April. *Id.*; *see also* Williams Decl. ¶ 9 ("My son, [Jarvis Flowers], informed me that he filed a grievance about the conditions in Cummins, but the warden refused to sign the grievance.").

Plaintiff Robert Stiggers encountered similar roadblocks as Mr. Nickson. It took him nearly 10 days to submit his completed grievance related to COVID-19 and the prison's inadequate response because he could not get the appropriate staff to sign and take the grievance. Stiggers Decl. 2 ¶ 8. ADC was unwilling to provide Mr. Stiggers any relief, responding to his grievance by stating that inmates in restrictive housing cannot get the masks that would assist in reducing the spread of the virus. *Id*.

ARGUMENT

I. Plaintiffs Have Standing to Seek to Maintain the Status Quo of Living in a Carceral Setting Without a Viral Outbreak.

Defendants' argument that Plaintiffs lack standing is meritless. Defendants first argue a lack of standing, because, according to Defendants¸ Plaintiffs have already obtained much of the relief they are seeking. Def. Resp. at 34-35. That assertion simply ignores the overwhelming factual record submitted by Plaintiffs. As discussed above, among other things, Plaintiffs still have not been tested or temperature-checked, and those who are experiencing COVID-19 symptoms are still being denied adequate treatment; still lack basic personal cleaning products and PPE; continue to be housed within 6 feet from other prisoners; are still interacting with corrections officers that do not wear PPE or wear them improperly; and are being exposed to COVID-19 by asymptomatic corrections staff that are required to work per ADH guidelines adopted by the ADC.[5] *See supra* at 7-25.

To support their contention that they have provided the relief sought, Defendants rely on the statement of Defendant Dexter Payne, the ADC Division Director. But Defendant Payne does not assert that he has personal knowledge of the implementation of any of the measures ADC purportedly adopted for the prison facilities. *See generally* Declaration of Dexter Payne, filed on Apr. 30, 2020 ("Payne Decl.") (ECF No. 36-10). In fact, with the exception of three personal statements in his 20-page declaration,[6] all of Mr. Payne's statements were made on behalf of ADC

[5] Defendants have produced, cited, and relied on two Arkansas Department of Health Guidance documents that state that asymptomatic correctional staff could be required to work during their isolation period. *See* Def. Resp. at 15, Ex. 19, ADH Apr. 13, 2020, Guidance (ECF No. 36-19); *id.*, Ex. 20, ADH Apr. 15, 2020, Guidance (ECF No. 36-20). With regard to those documents and other ADH guidance, Defendants state "ADC continues to comply with these recommendations as best as possible." Def. Resp. at 15; Payne Decl. ¶ 102.

[6] *See* Payne Decl. ¶ 1 (identifying himself as Director of the Arkansas Division of Corrections); ¶ 110 (stating that he is unaware of any Plaintiff requesting a reasonable accommodation from him or any of the named Defendants, as if that is something that would

and are more akin to an official ADC position statement. Mr. Payne provides no supporting documentation (with the exception of a few posters) for what he states the ADC has done at the ADC facilities and provides the Court with no basis for understanding whether and how he would know that the measures he describes were actually implemented.

Defendants also rely on the statement of Kelly Garner from the ADH, who admitted to working on the ADH guidance to ADC, which would include the guidance that allowed COVID-19 positive corrections officers to work while infectious. *See* Declaration of Kelly Garner ("Garner Decl."), ¶ 4. Ms. Garner states that she visited Cummins Unit once with other ADH colleagues during a pre-planned site tour for a few hours on April 17, 2020, and observed inmate porters with cleaning supplies; posters with information about COVID-19; sinks in inmates' barracks; and all staff, but not all inmates, wearing cloths masks. *Id.* ¶¶ 10-14. This is a far cry from the comprehensive relief sought by Plaintiffs. Moreover, Ms. Garner's limited, first-hand account must be contrasted with Plaintiffs' evidence: over 20 of declarations from prisoners and others, many of whom have no association with each other, and all of whom present similar accounts of the lack of cleaning supplies, PPE, ineffectual social distancing, and inadequate medical care. *See* Pl. Exs. Plaintiffs' assertions are supported by the increasingly deadly toll that the pandemic is taking within ADC facilities. *See supra* at 1.

Defendants alternatively argue that, to the extent Defendants have not adopted the relief requested, Plaintiffs still lack standing because any additional relief beyond what Defendants have already provided would "fundamentally alter" the "status quo." *See* Def. Resp. at 35. It is correct that "[t]he primary function of a preliminary injunction is to preserve the status quo until, upon

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happen in the ordinary course); ¶ 109 (referring to an allegation in the Complaint that Defendants granted emergency release in early March as inaccurate, because the ADC frequently enacts the emergency release provision).

final hearing, a court may grant full, effective relief." *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) (issuing an injunction to restore business activity). However, the "status quo" for Plaintiffs is not an environment where they are exposed to infection from a lethal virus. Sanitizing and other measures to eliminate and prevent the spread of a deadly infection would not fundamentally alter the status quo; it would maintain it. Even emergency release would not fundamentally alter the status quo, as Director Payne has indicated that this is a mechanism used approximately every 90 days by the ADC, Payne Decl. ¶ 109, and the Board of Corrections has voted to expand the Emergency Powers Act to allow release of additional inmates during the pandemic, *id.* ¶¶ 104-105.

Moreover, "where the status quo is a condition not of rest, but of action, and the condition of rest . . . will cause irreparable harm, a mandatory preliminary injunction [one that requires action] is proper."[7] *Ferry-Morse Seed Co.*, 729 F.2d at 593; *see also N. States Power Co. v. Fed. Transit Admin.*, 270 F.3d 586, 487 (8th Cir. 2001) (finding no clear error in imposing a preliminary injunction ordering that work owed to defendants be performed); *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 973 (8th Cir. 1983) (ruling that the trial court's "order of reinstatement of benefits pending a proper adjudication is a restoration of the status quo"); *United States v. Vertac Chem. Corp*., 489 F. Supp. 870, 888-889 (E.D. Ark. 1980) (ordering, on a P.I. motion, extensive remedial action as a result of improper waste disposal practices by defendants). The status quo imposes an affirmative obligation on Defendants to make reasonable accommodations under the ADA and a

[7] "While some courts appear to apply more stringent requirements when a mandatory preliminary injunction is sought rather than a prohibitory preliminary injunction, the Eighth Circuit has not done so." *Scott v. Sanders*, No. 06-6007, 2006 U.S. Dist. LEXIS 99338, *4-6 (W.D. Ark.) (August 15, 2006) (citing *Ferry-Morse Seed Co.*, 729 F.2d at 593) (ultimately ruling that plaintiff could not show success on the merits of his deliberate indifference claims as he could only prove a "mere disagreement with a course of medical treatment"); adopted by *Scott v. Sanders*, 2006 U.S. Dist. LEXIS 62446 (W.D. Ark., Aug. 30, 2006).

constitutional obligation not to be deliberately indifferent to a substantial risk of harm faced by prisoners. Therefore, the status quo that must be maintained is a "condition not of rest, but of action," that warrants the entry of injunctive relief for Defendants to take action. *See, e.g., Hoffer v. Jones*, 290 F. Supp. 3d 1292, 1305-1306 (N.D. Fl. 2017) (granting class-wide P.I. relief because "[p]reventable deaths from [Hepatitis C] are occurring within the prison system" and ordering defendants to adopt a new treatment policy and implement a new treatment plan consistent with the recommendations of experts in the case); *Austin v. Penn. Dep't of Corrections*, No. 90-7497, 1992 U.S. Dist. LEXIS 14971, *22, *24-25 (E.D. Pa. Sept. 29, 1992) (granting class-wide preliminary injunctive relief because inmates have demonstrated a likelihood of success as to their claim that they are "threatened with [tuberculosis] infection and disease are provided a constitutionally deficient level of medical care" and ordering that defendants implement their recently adopted TB guidelines); *Phelps v. Godinez*, No. 15-cv-0073-SMY-PMF, 2015 U.S. Dist. LEXIS 72397, *4-5, 2015 WL 3534257 (S.D. Ill June 4, 2015) (granting preliminary injunctive relief on ADA claim and requiring that prison officials ensure wheelchair-bound plaintiff has daily shower access pursuant to his medical permit).

II. Plaintiffs Have Demonstrated a Likelihood of Succeeding on the Merits.

As detailed below, and in Plaintiffs' prior submissions, there is a likelihood of success on the merits of both Plaintiffs' Eighth Amendment and ADA claims.

A. Defendants Have Been Deliberately Indifferent to Plaintiffs' Eighth Amendment Rights Through Their Deficient COVID-19 Preparation and Response.

As discussed below, given the outbreak at Cummins Unit, the declarations from the prisoners at multiple ADC facilities, and the obvious inadequacy of Defendants' actions in preparation and response to the viral outbreak in Cummins Unit to ensure that similar outbreaks do not occur at other ADC facilities, Plaintiffs incarcerated in ADC facilities face a substantial risk

of serious harm, which Defendants have been deliberately indifferent to, in violation of the Eighth Amendment.

As the Supreme Court explained in *Farmer v. Brennan*, "[t]he Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal citations and quotation marks omitted). The Eighth Amendment imposes duties on prison officials to "ensure that inmates receive adequate food, clothing, shelter, and medical care, and [to] take reasonable measures to guarantee the safety of the inmates[.]" *Id*. (internal citations and quotation marks omitted).

To prevail on an Eighth Amendment claim, an incarcerated person must satisfy a two-part test, which includes both an objective and subjective component. First, the plaintiff must demonstrate that he has been exposed to a substantial risk of serious harm. *Id*. at 834. Second, the plaintiff "must show that the defendant has been deliberately indifferent to this risk. *Id*. "[A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id*. at 842.

Defendants' argument that the protective measures they have undertaken sufficiently reduce the risk of harm to Plaintiffs such that it no longer amounted to a constitutional violation is inconsistent with the facts presented by Plaintiffs describing the reality in ADC facilities, including the evidence Plaintiffs have discovered since the TRO hearing. Although Defendants correctly note that Plaintiffs do not seek monetary damages for harm that has already occurred, Def. Resp. at 53, this case is distinct from other cases seeking injunctive relief in which the court must make a reasonable determination as to the harm that would come to Plaintiffs were the requested actions not taken. In this case, that harm has occurred and is continuing unabated, causing severe illness

and at least four deaths among members of the putative Plaintiff Class at Cummins Unit. Tens of thousands of other prisoners at other ADC facilities are at high risk of suffering the same fate.

1. Plaintiffs Are Subject to Substantial Risk of Serious Harm from a Highly Contagious and Potentially Lethal Virus in a Congregate Environment.

The risks posed by the COVID-19 pandemic satisfies the objective component of the Eighth Amendment test, i.e., a sufficiently serious risk of harm. Indeed, although Plaintiffs here are subject to an immediate risk, such an immediate risk is not even required under the Eighth Amendment. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993). The Supreme Court has rejected the argument that a defendant may ignore a situation "that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Id*. And the Court has specifically recognized that the Eighth Amendment requires a remedy for exposure of inmates to "infectious maladies" such as hepatitis and venereal disease "even though the possible infection might not affect all of those exposed." *Id*.

Defendants cannot dispute the gravity of the risks posted by COVID-19. Instead, they emphasize the minimal measures they have taken in response to that pandemic and suggest those are enough to reduce Plaintiffs' risk of contracting the disease. Def. Resp. at 56. Defendants, however, vastly overstate the measures they have taken, as Plaintiffs are still at substantial risk of contracting COVID-19 and suffering greatly from any related illness.

Defendants—by their own admission—have failed to provide prisoners alcohol-based hand sanitizer, Payne Dec., ¶ 56, implement meaningful social distancing, Payne Dec., ¶ 76, and have even allowed prisoners and corrections officers to work in ADC facilities after testing positive, ADH Guidance for Reducing Spread on COVID-19 in Correctional Facilities, April 15, 2020, at 1 (ECF No. 36-20); Letter from Arkansas Dep't of Health to Arkansas Dep't of Corrections Employee, dated Apr. 24, 2020, regarding positive test results and work restrictions,

attached hereto as Exhibit 32. These failures, which are undisputed, place Plaintiffs at great risk.

The risk is exacerbated by Defendants' failure to undertake the additional measures which they claim to have taken. Defendants' claims regarding cleaning are largely vague generalized and unsupported statements, from which it is difficult to determine whether ADC is actually taking any *additional* measures to address the COVID-19 pandemic. For example, Defendants claim that ADC ordered "enhanced cleaning and disinfection of its units." Payne Decl. ¶ 52. In support, they claim first that porters "continuously" clean barracks style housing, and that they also have been instructed to clean common areas. *Id*. The former is so vague that it is unclear when and if additional cleaning is occurring, and the latter is a basic measure that ADC should employ even in the absence of a pandemic.

Regardless, in spite of these vague assertions, all evidence indicates that such cleaning is not actually occurring, Kent Decl. 2 ¶ 13 ("I have not seen them wiping down commonly touched items like doorknobs or the remote controls."), is being poorly done, Otwell Decl. 2 ¶ 15 ("[T]hey supposedly wash the tables in the dining hall, but they just use the same bucket of water again and again and the water turns brown."); Stiggers Decl. 2 ¶ 4 ("The showers are not cleaned until after everyone in the barracks showers which is approximately 90 inmates."), or is no different than it was before the outbreak. Payne Decl, ¶ 15 ("ADC reminded and encouraged inmates and staff to . . . continue regular surface cleaning."); Neeley Decl. 2 ¶ 6 ("Cleaning and disinfecting has not increased since the pandemic began."); Otwell Decl. 2 ¶ 14 (same); Williams Decl. 2 ¶ 12 (same).

Many of Defendants' other claimed efforts—regarding the provision of masks to prisoners, the use of protective equipment by correctional staff, and the testing of prisoners who suspect they may have contracted COVID-19—are not actually occurring. Several plaintiffs continue to be denied face masks or any other protective equipment, Frazier Decl. 2 ¶ 5, while others received

them only after this lawsuit was filed. Nickson Decl. 2 ¶ 7 (reporting that although he finally received a mask on April 29, 2020, no one else in his unit has). Likewise, while some ADC staff wear masks, "a lot of them do not wear them properly and they rarely have gloves on." Frazier Decl. 2 ¶ 9; *see* Kent Decl. 2 ¶¶ 10-11 (same); Otwell Decl. 2 ¶¶ 10-11 (same); Neeley Decl. 2 ¶¶ 11-12 (same); *see also* Hampton Decl. 2 ¶ 10 ("A lot of staff do not wear their masks properly. Some staff wear gloves when they do pat downs. I have not seen staff wearing gloves at any other time."); Serrato Decl. 2 ¶¶ 7-8 (noting that he sees officers almost daily not wearing masks); Stiggers Decl. 2 ¶ 6 ("I see guards daily that are either not wearing a mask or not wearing it properly."); Williams Decl. 2 ¶ 7 (same).

Contrary to Defendants' claims, prisoners' temperatures, until recently, were not tested, s*ee* Frazier Decl. 2 ¶ 7 ("My temperature has not been taken at any time."), and still are often done improperly. Hampton Decl. 2 ¶ 12 ("They started taking our temperature this weekend when we go to chow. Sometimes they touch our forehead with the thermometer and sometimes they hold it a few inches from our forehead."). Additionally, prisoners continue to be denied access to COVID-19 testing when they request it. Neeley Decl. 2 ¶ 5 ("To my knowledge, no one here has been tested even though multiple inmates have requested testing."); Otwell Decl. 2 ¶ 8 ("I have not been tested for COVID-19 and to my knowledge no one at this facility has been tested."); Williams Decl. 2 ¶ 8 (same). Testing of staff, contrary to Defendants' claims, is similarly inconsistent. Serrato Decl. 2 ¶ 9 ("When this situation started up a month ago, they would check staff temperatures, but staff have told us that they are not checking temperatures anymore because they are desperate for anyone to work.").

Plaintiffs continue to live in congregative settings with large numbers of other prisoners, undercutting Defendants' claims regarding even the minimal social distancing efforts they allege

they are undertaking. Kent Decl. 2 ¶ 9 ("On an average day, I come into contact with approximately 100 other inmates and officers through chow hall, yard call, sick class, and commissary."); Otwell Decl. 2 ¶ 6 ("I come into contact with between 150-200 inmates and 30 guards per day."); Williams, Decl. 2 ¶ 6 (noting that on an average day he interacts with 100 prisoners). Likewise, prisoners continue to be regularly moved in and out of ADC facilities, contrary to Defendants' claims. Otwell Decl. 2 ¶ 5 ("People are still being transferred between barracks and we are still receiving new commitments on the intake side."); Serrato Decl. 2 ¶ 5 ("Until last week, busloads of people [we]re still being brought from Pulaski to Ouachita every day. At least 60 inmates a day were being shipped out of Ouachita to other units.").

The crisis in Cummins Unit provides direct evidence of the risk facing all ADC facilities as a result of Defendants' gross inadequacies. The same policies which Defendants present to the Court as purportedly sufficient were in place at the Cummins Unit, which is suffering one of the worst outbreaks at a correctional facility in the country. *See* Coronavirus in the U.S.: Latest Map and Case Count, New York Times, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (reporting that the outbreak at the Cummins Unit is the seventh largest outbreak at a correctional facility in the United States). Defendants do not make any claims that they have improved their cleaning, social distancing, or protective practices statewide as a result of the outbreak at the Cummins Unit, or that there was anything unique about the facility that made the COVID-19 outbreak more likely to occur. Def. Resp. at 13-15 (noting that in response the only changes they made were at Cummins). Accordingly, the same policies and practices that ultimately led to 860 cases of COVID-19 at the facility, Coronavirus in the U.S.: Latest Map and Case Count, New York Times, *supra,* and the deaths of at least four if not more individuals, Ginny Monk, *2 more inmate deaths connected to virus; Arkansas death toll up to 76*, Arkansas Times, May 3,

2020, at https://www.arkansasonline.com/news/2020/may/03/three-more-arkansas-inmates-die-two-covid-19/, pose a substantial risk of serious harm to prisoners at all other ADC facilities throughout the State.

The two unpublished opinions cited by Defendants are inapposite here. Neither of the cases Defendants cite actually concerned the legal issue in this case—whether Defendants' failure to adequately address the conditions in ADC facilities exposes Plaintiffs to a substantial risk of harm, in violation of the Eighth Amendment—but rather concerned whether individual plaintiffs in jails in Arkansas were entitled to release under 18 U.S.C. § 3142(i) of the Bail Reform Act. *United States v. Lunnie*, No. 4:19-CR-00180, 2020 WL 1644495, at *1 (E.D. Ark. Apr. 2, 2020); *United States v. Villagran*, No. 4:19CR00609-14 DPM, 2020 WL 1862188, at *3 (E.D. Ark. Apr. 13, 2020).

Moreover, the risk of harm to the plaintiffs in the cases Defendants cite was lower than the case here. None of the plaintiffs in the cases Defendants cite, in contrast with Plaintiffs here, alleged that they were suffering from an illness that would have increased their risk of exposure to and harm from COVID-19. *Lunnie*, 2020 WL 1644495, at *3 ("Mr. Lunnie does not advance that he is currently suffering from a 'bout' of bronchitis, making him more susceptible to illness or death if he contracts the COVID-19 virus."); *Villagran*, 2020 WL 1862188, at *3 ("Villagran does not claim to suffer from any of the medical conditions designated by the Centers for Disease Control ("CDC") as most at risk for contracting COVID-19, nor is he 65 or older."). In contrast, Plaintiffs here only seek release for those individuals who are actually suffering from illnesses that increase their vulnerability to the virus and the degree of harm they will suffer if they contract it. *See* Mem. in Support of Temporary Restraining Order and Preliminary Injunction, at 22 (requesting "the appointment of an expert to determine the members of the High Risk and

Disability Subclasses, who, due to age, medical condition or disability, merit temporary medical furlough from confinement").

Plaintiffs in the cases Defendants cite, also in contrast with Plaintiffs here, did not allege that the conditions within the facilities in which they were housed were particularly dangerous due to the defendants' failure to take precautions, but rather alleged, as a general matter, that any detention in any correctional facility posed a substantial risk of serious harm to them. *Villagran*, 2020 WL 1862188, at *5 ("Under the circumstances presented, *the fact of incarceration alone* and the greater risks it presents do not tip the scale in favor of release in light of the risks to the community and of nonappearance *Villagran* presents." (emphasis added)); *see also Lunnie*, 2020 WL 1644495, at *3 ("[H]is arguments about being incarcerated are general and speculative. Mr. Lunnie suggests that he is at a greater risk of contracting COVID-19 given his presence in the Greene County jail, and that release would afford him the opportunity for social distancing[.]").

And, as discussed above, the situation within ADC facilities has dramatically changed even in the short period since both of the unpublished decisions cited by Defendants were issued. As of April 13, 2020, the date on which the latter case was decided, COVID-19 had barely been detected within ADC facilities. The day before, ADC had detected its first prisoner case of COVID-19. Payne Dec., ¶ 86. At that time, the most recent information on ADC's website reported no cases of infection among prisoners, CORONAVIRUS (COVID-19) UPDATES, ADC, https://adc.arkansas.gov/coronavirus-covid-19-updates, and the courts in both of those cases noted this was also true for the jails in which the individual plaintiffs were detained. *Villagran*, No. 4:19CR00609-14 DPM, 2020 WL 1862188, at *5 ("Villagran's position is based on unconfirmed allegations and speculation at this time. There is no evidence before the Court of when the infected inmate was admitted, whether the infected inmate was housed with and/or in contact with

Villagran."); *Lunnie*, 2020 WL 1644495, at *3 ("[T]here are no known cases of COVID-19 at the facility.").

Since those cases were decided, however, COVID-19 has exploded in ADC facilities. As of April 28, 2020, ADC reported 921 prisoners statewide who had been infected. CORONAVIRUS (COVID-19) UPDATES, ADC, https://adc.arkansas.gov/coronavirus-covid-19-updates. Although Defendants have not confirmed infections in all ADC facilities, the extent of COVID-19 spread is currently unknown due to lack of widespread testing and the prevalence of asymptomatic carriers. And importantly, the same conditions that led to the outbreak in Cummins Unit—namely, Defendants' failure to ensure adequate cleaning and disinfecting of ADC facilities, to provide PPE to corrections staff and prisoners, to test prisoners, to ensure appropriate social distancing, to deny appropriate medical attention to prisoners exhibiting symptoms or testing positive, and otherwise to prevent the spread of the virus—pose a substantial risk that the same events will unfold in other facilities statewide.

2. Defendants Disregarded the Known Substantial Risk to Plaintiffs in Their Deficient COVID-19 Preparation and Response.

As discussed above, Plaintiffs have discovered new evidence since the TRO hearing that Defendants have disregarded and continue to "'disregard[] a known risk to the inmate's health.'" ECF 42 at 15 (quoting *Gordon v. Frank*, 454 F.3d 858, 862 (8th Cir. 2006)). This evidence includes, among other things, proof that: 1) ADC permits infected correctional staff to continue to work at Cummins Unit after they receive positive test results for COVID-19; 2) ADC relies solely on a disinfectant that has not been approved by the EPA as effective against COVID-19; and 3) ADC has not taken any enhanced sanitation and social distancing measures since COVID-19 infected an entire Cummins barrack on April 13 and later spread to over 850 prisoners in a matter of days.

Defendants' argument regarding their deliberate indifference to the substantial risk of serious harm is based on a misstatement of law, as well as a repetition of their arguments that no substantial risk of serious harm actually exists—when clearly it does. In fact, given Defendants' public statements acknowledging the threat that COVID-19 poses to prisoners, Plaintiffs' Mem. in Support of Temporary Restraining Order and Preliminary Injunction, dated April 21, 2020 ("Plaintiffs' TRO Brief" or "Pff. TRO Br."), at 30-31 (ECF No. 3), and the outbreak at Cummins Unit, there is simply no reasonable argument that Defendants are not aware of the substantial risk that the combination of COVID-19 and Defendants' inadequate policies and practices pose to prisoners in ADC facilities.

Despite this awareness, Defendants have failed to adjust their statewide policies to account for this risk. As further explained in Plaintiffs' TRO Brief, Defendants' policies fall well short of CDC guidance with respect to social distancing and sanitation to reduce the risk of COVID-19 transmission. Pff. TRO Br. at 14-20. In fact, it is now clear that Defendants adopted a policy that even infected corrections officers should continue working so long as they are asymptomatic, even though it is well-known that asymptomatic carriers transmit the virus. Angela N. Baldwin and Sony Salzman, *What We Know and Don't About Asymptomatic Transmission and Coronavirus*, ABCNEWS, Apr. 1, 2020, https://abcnews.go.com/Health/asymptomatic-transmission-coronavirus/story?id=69901758. This dramatic departure from CDC guidance is yet another example of Defendants' knowing disregard of the substantial risk of harm facing Plaintiffs, which is classic deliberate indifference. Pff. TRO Br. at 31; *see also Farmer*, 511 U.S. at 842 ("[I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk . . . was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information

concerning the risk and thus must have known about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk." (internal citations and quotation marks omitted)).

Defendants begin by advancing the novel argument that a correctional system's creation of policies is alone sufficient to defeat a claim that a correctional facility has been deliberately indifferent. *See* Def. Resp. at 59 ("But Plaintiffs who sue prisons that do have policies to combat the spread of a communicable disease will lose."). Defendants' cited authority does not support this claim. In *Butler v. Fletcher*, 465 F.3d 340 (8th Cir. 2006), upon which Defendants exclusively rely in support of this argument, the court made no such conclusion. First, the court did not conclude that the defendant in that case was not deliberately indifferent merely because the defendant had policies addressing the subject matter of the plaintiffs' claim. Instead, and unlike the circumstances here, the court examined the relevant correctional policies and found them adequate. *See id.* at 345 ("[T]the policies specifically acknowledged the risk and promulgated detailed procedures for the diagnosis, segregation, and treatment of . . . inmates infected with active cases of TB."). Second, the plaintiff in *Butler* presented "virtually no supporting evidence" that the correctional policies were not implemented. *Id*. *Butler* stands in stark contrast to this case, where Plaintiffs have presented dozens of declarations from Plaintiffs, as well as an expert declaration, detailing Defendants' failure to implement their policies as they claim.

As other courts have recognized, a defendant may be deliberately indifferent even when they have formal policies that address the substance of the claim. *See Parsons v. Ryan*, 754 F.3d 657, 662 (9th Cir. 2014) (certifying a plaintiff class alleging Eighth Amendment violations for, among other things, failure to provide medical care despite the fact that the department of corrections had "promulgated extensive statewide policies governing health care and conditions

of confinement that apply to all of the inmates in its custody, all of its staff, and all of its facilities"); *Dockery v. Fischer*, 253 F. Supp. 3d 832, 854 (N.D. Miss. 2015) (certifying a class in a deliberate indifference case in which Plaintiffs alleged, among other things that Defendants failed to comply with their own written policies).

Here, Defendants' policies would be inadequate even if they had been properly implemented. Indeed, the few guidance documents, memoranda, and representations made by Defendant Payne that were cited in Defendants' Response[8] hardly constitute a comprehensive written policy to prepare for, and manage, the COVID-19 pandemic in ADC facilities. As detailed in Plaintiffs' prior submissions to the Court, Complaint, ¶¶ 98-125, Plaintiffs' Supplemental Motion for a Temporary Restraining Order, dated Apr. 27. 2020, at 6-7 (ECF No. 20), these efforts fell far short of what was recommended by the Centers for Disease Control and Prevention and, unsurprisingly, were unable to prevent or manage the extensive viral outbreak in Cummins Unit.

Defendants' characterization of Plaintiffs' argument regarding Defendants' deliberate indifference is also inaccurate. Contrary to Defendants' assertions, Plaintiffs' claims are not limited to Defendants' failure to ensure that prisoners have six-feet of social distancing "throughout the day." Def. Resp. at 61. Rather, there are a host of failures by Defendants that demonstrate their deliberate indifference, in addition to Defendants' admitted failure to institute even basic social distancing measures, such as: their failure to ensure that areas are properly cleaned and disinfected; their failure to provide sufficient PPE to all prisoners; their failure to train

[8] Defendants also cite to ADC's Emergency Preparedness Manual, asserting that it describes "many of the ways ADC responded to the threat posed by COVID-19, but security concerns prohibit identification and explanation of every approach." Def. Resp. at 2n.1. Defendants have not disclosed the contents of this Emergency Preparedness Manual, which Plaintiffs have requested in expedited discovery, but nothing in their Response indicates that this manual provided sufficient guidance or direction on preparing and responding to the COVID-19 pandemic.

their staff on the proper use of PPE and enforce compliance; and their failure to promptly test prisoners who fear they may have contracted the virus.

For the same reasons, this case is not like *Valentine v. Collier*, 2020 WL 1934431 (5th Cir. Apr. 22, 2020), in which the court ordered Defendants to undertake measures *which it was already taking*. *See* Def. Resp. at 63 (citing *Valentine* for the proposition that Plaintiffs may not ask the "Court to order Defendants to take the measures they already are taking"). To the contrary, Defendants here have *not* been taking measures requested by Plaintiffs, which is why a preliminary injunction is needed in this case.

Not only have Defendants failed to take measures necessary to prevent and contain the spread of COVID-19, they have policies that actually promote and facilitate a viral outbreak. Defendants have an official policy that corrections staff who test positive for COVID-19 may report to work within the crowded, congregate conditions of an ADC facility as long as they are asymptomatic and wear face masks, even though fully aware that asymptomatic carriers can spread the virus and face masks are not sufficient to prevent transmission of the virus without social distancing. Indeed, Defendants have ordered some infected staff to continue to work in ADC facilities, while also failing to ensure appropriate sanitation and social distancing at the single point of entry to the ADC facility, thereby creating an immediate danger to prisoners, other staff, and other individuals outside the facility. *See* Vail Decl. ¶ 58 ("At a minimum all staff must travel to their workplace from outside the institution, putting all who they encounter at risk.").

Additionally, Defendants have failed to provide prisoners with alcohol-based hand sanitizer, Payne Decl. ¶ 56, despite the CDC's recommendations to the contrary. Center for Disease Control and Prevention, *Show Me the Science—When & How to Use Hand Sanitizer in Community Settings*, https://www.cdc.gov/handwashing/show-me-the-science-hand-

sanitizer.html. As Plaintiffs' expert notes, "it is not realistic to expect all prisoners at all times will have access to hot water and soap[,]" thus necessitating the availability of sanitizer in certain situations. Vail Decl. ¶ 31. Defendants' claims that the provision of hand sanitizer would jeopardize the safety of ADC institutions is undermined by the fact that correctional facilities in at least three other states have begun providing hand sanitizer, *see id*. ¶ 34, concluding that the overwhelming danger posed by COVID-19 necessitates the relaxing of regular rules, *id*. Moreover, corrections officers can keep hand sanitizer on their person to provide to an incarcerated person as needed.

Finally, while social distancing is difficult to achieve in the correctional setting—thus necessitating the appointment of a special master to consider the release of certain members of the subclasses—Defendants must undertake reasonable measures to do so rather than simply proclaiming that nothing can be done with social distancing in the correctional setting. Payne Decl. ¶ 76. Among other things, Defendants could ensure that bunks are arranged in such a manner that prisoners in the same cell do not have their heads facing the same direction when sleeping, Vail Decl. ¶ 48, or repurpose available space in the facility, such as classrooms and extended family rooms, so that individuals could sleep in them, *id*. ¶¶ 54-56. Rather than attempting such measures, Defendants have brushed off suggestions that they even consider them because of the "undue burden" they would allegedly impose. As Plaintiffs' expert describes:

> This pandemic is different. We must examine all of the opportunities to move in the direction of increased social distancing such as expanding where prisoners are housed within the secure perimeter of corrections facilities. Lives are at stake.

Id. ¶ 57.

As noted above, the best evidence of the risk posed by the conditions in ADC facilities, and Defendants failure to address them, is the outbreak at Cummins Unit. In addition to the

declarations from Plaintiffs' experts, the lived reality of prisoners and corrections staff in ADC facilities—and Defendants' failure to take sufficient actions to prevent another viral outbreak like what is happening in Cummins Unit—is the ultimate proof that Plaintiffs' claim is not based on a "mere disagreement," Def. Resp. at 62, but rather Defendants' deliberate indifference.

B. Defendants Failed to Provide Reasonable Accommodations Requested by Named Plaintiffs.

Defendants have violated the ADA by failing to provide Plaintiffs in the Disability Subclass with reasonable accommodations that would allow them to safely access their facilities and failing to release incarcerated people with disabilities or transfer to home detention, where they could quarantine safely during the pandemic. Pff. TRO Br. at 30-31.

In their brief, Defendants erroneously claim that Named Plaintiffs never made requests for reasonable accommodations because of their disabilities. Def. Resp. at 65. In fact, several Named Plaintiffs have informed Defendants of their disabilities and requested reasonable accommodations amid the pandemic. For example, Plaintiff Michael Kouri informed Defendants that he has degenerative heart disease when he complained of not being able to social distance from others amid the pandemic, and the inadequate disinfection of his living area and frequently touched surfaces. Michael Kouri Grievances, Apr. 2020, at 3, attached hereto as Exhibit 32. In his grievance, Mr. Kouri specifically referenced the ADA and asked for "reasonable accommodations," such as cleaning supplies, PPE, and a single cell. *Id*. Similarly, Plaintiff Harold Otwell filed a grievance, in which he informed Defendants of his disability for which he requested accommodations, referencing his inability to social distance and lack of training on how to don and doff PPE. Harold Otwell Grievances, Apr. 2020 ("Otwell Grievances"), at 3, attached hereto as Exhibit 37. Other Named Plaintiffs have made similar requests which Defendants have refused to grant. Trinidad Serrato Grievances, Apr. 2020, at 2, attached hereto as Exhibit 38; Nicholas

Fraizer Affidavits and Grievances, Apr. 2020, at 3, attached hereto as Exhibit 33; Jonathan Neeley Grievances, Apr. 2020 ("Neeley Grievances"), at 2, attached hereto as Exhibit 36.

Further, the requested accommodations Plaintiffs' seek here are not unduly burdensome. Defendants' argument that they are already providing much of the relief Plaintiffs request (which Plaintiffs dispute) demonstrates the reasonableness of Plaintiffs' requested accommodations. Def. Resp. at 33. If Plaintiffs' requests were unreasonable, Defendants would not admit that they should be doing what much of what Plaintiffs' requests call for (e.g., providing access to disinfectants, hand sanitizer, and PPE). Therefore, the accommodations Plaintiffs seek are not unduly burdensome.

Defendants repeatedly reference the dangers of giving incarcerated people bleach in their Response (Def. Br. at 7, 64, 66 (twice), at 67); however, Plaintiffs have not requested bleach, or any other similarly dangerous disinfectant. Instead, Plaintiffs have requested exactly what the CDC Guidance calls for "disinfectant products, that are effective against COVID-19." Class Action Complaint, Prayer for Relief ¶ f(ii). Plaintiffs also request hand sanitizer containing at least 60% alcohol. Class Action Complaint, Prayer for Relief ¶ f(iii).) The court in *Cameron* issued a preliminary injunction providing for precisely this type relief. 2020 WL 1929876, at *2 (requiring defendants to give incarcerated people disinfectant products effective against the COVID-19 virus and hand sanitizer containing at least 60% alcohol to all incarcerated people where permissible based on security restriction); *see also* Vail Decl. ¶ 34 (noting correctional facilities in at least three other states have begun providing hand sanitizer and recognizing benefits of combatting dangerous virus with hand sanitizer far outweighed any security concerns).

Finally, Defendants' argument that the requested accommodations with respect to release would fundamentally alter the nature of Defendants' system is undercut by the fact that Arkansas

law already provides for early release of incarcerated people, as recognized by Defendant Dir. Payne. *See* Payne Decl. ¶¶ 104-105, 109. For example, a permanently incapacitated incarcerated person may be released early if they are eligible for medical parole. Ark. Code Ann. § 12-29-404 (permitting certain terminally ill and permanently incapacitated incarcerated people to be transferred to parole supervision before their parole eligibility date). Also, certain classes of incarcerated people may be released early during a prison overcrowding state of emergency. Ark. Code Ann. § 12-28-604 (providing for the early release of certain incarcerated people during a prison overcrowding emergency). Notably, three days after Plaintiffs filed their complaint in this matter, the Board of Corrections, whose members are Defendants in this matter, recommended over 1,200 incarcerated people be released due to the prison overcrowding state of emergency.[9] *See* Payne Decl. ¶ 104. It follows that the relief that the Disability Subclass seeks, in the form of release from their current, hazardous confines, is not out of step with the nature of Defendants' system, which allows for such broad and/or early releases.

C. The PLRA Does Not Require Plaintiffs to Exhaust Administrative Remedies that Are Unavailable in the Midst of an Unprecedented Pandemic.

As the Eighth Circuit has emphasized, the PLRA "requires exhaustion of only 'such administrative remedies as are available,'" and the "availability of a remedy, according to the Supreme Court, is about more than just whether an administrative procedure is 'on the books.'" *Townsend v. Murphy*, 898 F.3d 780, 783 (8th Cir. 2018) (quoting 42 U.S.C. § 1997e(a), and *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016)). In *Ross*, the Supreme Court explained, "the ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" 136 S. Ct. at 1859 (citations omitted). "Accordingly,

[9] Max Brantley, *Board of Corrections Approves Early Release of More Than 1,200 Inmates*, Arkansas Times, Apr. 24, 2020, https://arktimes.com/arkansas-blog/2020/04/24/board-of-corrections-approves-early-release-of-more-than-1200-inmates.

an inmate is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'" *Ross*, 136 S. Ct. at 1859 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)); *see also Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) (explaining that "available" meant "capable of use for the accomplishment of a purpose: immediately utilizable . . . accessible").

The Supreme Court has identified certain circumstances when a prison remedy is not available. Specifically, "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross*, 136 S. Ct. at 1859. In other words, "when the facts on the ground demonstrate that no . . . potential exists" for some relief, "the inmate has no obligation to exhaust the remedy." *Id*. A remedy is also unavailable when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id*. at 1860.

The facts here establish that there is no "available" remedy for Plaintiffs to obtain any relief for the emergency conditions caused by COVID-19. Although the ADC may have an emergency "administrative procedure . . . 'on the books,'" *Townsend*, 898 F.3d at 783, the "facts on the ground demonstrate" that this procedure is not available to provide emergency relief, *Ross*, 136 S. Ct. at 1860. As such, PLRA exhaustion is not required for Plaintiffs' requests, on behalf of the entire putative class, for injunctive relief for sanitation and social distancing measures within the prison. (As discussed in the next section, the PLRA does not apply at all to Plaintiffs' requests for habeas relief on behalf of the High Risk and Disability Subclasses.).

As early as April 12, 2020, nine days before this suit was filed, multiple prisoners filed emergency grievances describing the serious risks of physical injury they were facing as a result

of COVID-19, and the State's failure to implement basic social distancing and sanitation practices within the prison to protect them from that harm. *See, e.g.*, Kouri Decl. 2 ¶ 16; Serrato Decl. 2 ¶ 13; Hampton Decl. 2 ¶ 8; Neeley Decl. 2 ¶ 7; Williams Decl. ¶ 7; Otwell Grievances. Defendants assert that ADC officials have the authority to take "any number of medical and risk-mitigating actions in response to COVID-19-related grievances." Def. Resp. at 45. Yet, in response to these grievances, prison officials simply stated that Plaintiffs' request for release was not grievable. *See, e.g.*, Serrato Decl. 2 ¶ 13; Hampton Decl. 2 ¶ 14.; Alvin Hampton Grievances, Apr. 2020, attached hereto as Exhibit 34; Neeley Decl. 2 ¶ 14; Neeley Grievances; Otwell Grievances; Williams Decl. 2 ¶ 15. Defendants did not address the need to take other "medical and risk-mitigating actions" in response to these grievances. During the nine days between the time these emergency grievances were first filed and the date this case was filed, the number of COVID-19 cases increased from 1 to approximately 850 in the Cummins Unit.[10]

And, even when prisoners filed grievances that did not focus on release as a remedy, prison officials denied them without even treating them as "emergency" grievances. Mr. Frazier expressly requested that his grievance requesting improvements to sanitation and additional cleaning supplies be treated as an "emergency grievance," but the prison responded by stating that his grievance did not raise an emergency. *See* Frazier Decl. 2 ¶ 14; Nicholas Fraizer Affidavits and Grievances, Apr. 2020, attached hereto as Exhibit 33.

Mr. Kouri likewise requested "emergency" treatment of his request; in response, the prison appeared to acknowledge that his grievance did present an emergency, but then failed to follow its own procedures for an emergency grievance—rather than presenting it directly to the warden

[10] Emma Tucker, *850 of 1,200 Inmates at Arkansas Prison Reportedly Have Coronavirus*, Daily Beast, Apr. 21, 2020, https://www.thedailybeast.com/850-of-1200-inmates-in-arkansas-prison-reportedly-have-coronavirus (last visited May 1, 2020).

consistent with the prison's emergency grievance process, the prison first went through the "step one" process and denied his request. *See* Kouri Decl. 2 ¶ 16; Declaration of Jason Gray, filed on April 30, 2020 ¶ 10 (ECF No. 36-40). Mr. Nickson also filed an emergency grievance on April 17. *See* Nickson Decl. 2 ¶ 11. As of April 29, 2020, he had not even heard back from the grievance officer. *See id.*

In sum, "the facts on the ground" show that there is no administrative grievance process available to address the emergency conditions caused by COVID-19. *Ross*, 136 S. Ct. at 1859. The grievances filed by Plaintiffs plainly count as emergency grievances under ADC's definition of that term, "a problem that, if not immediately addressed, subjects the inmate to a substantial risk of personal injury or other serious and irreparable harm." *See* Declaration of Terry Grigsby, filed on April 30, 2020, (ECF No. 36-37) (attaching AD 19-34, definition of "emergency" available at § III(F)). This reflects ADC's own recognition that some problems must be dealt with "immediately," because, if they are not, a prisoner faces a substantial risk of harm. Yet, by failing to follow its own procedures and treat grievances concerning a rapidly spreading deadly pandemic as an emergency, ADC's grievance procedure "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross*, 136 S. Ct. at 1859. Contrary to Defendants' assertion, *see* Def. Resp. at 45, the issue here is not that Defendants are failing to provide a specific remedy. It is that they are disregarding their own emergency grievance procedures and thereby are "unable or unwilling to provide any relief to aggrieved inmates" to address the emergency conditions created by COVID-19. *Ross*, 136 S. Ct. at 1859.

Defendants' responses to other grievances confirms that the process "operates as a simple dead end" for grievances requesting emergency relief to mitigate the risks posed by the COVID-19 pandemic. *Id*. Mr. Hampton, Mr. Neeley, Mr. Otwell, and Mr. Williams all filed grievances

seeking reasonable accommodations under the ADA. *See* Hampton Decl. 2 ¶ 15; Hampton Grievance; Neeley Decl. 2 ¶ 15; Neeley Grievance; Otwell Decl. 2 ¶ 21; Otwell Grievance; Williams Decl. 2 ¶ 16. Each received a typed form letter in response, telling them that they needed to be patient and that the Division of Correction was already doing all that they could. *See id.* Put otherwise, they were told that the grievance process could provide no emergency relief for them. When Mr. Kouri filed a grievance seeking reasonable accommodations under the ADA and cleaning supplies, he was informed (incorrectly) that the Division of Correction was already doing everything the CDC had recommended and that upper management has directed. Kouri Decl. 2 ¶16.

In other circumstances, prison officials have made it impossible for prisoners to file emergency grievances through "machination [or] misrepresentation." *Ross* 136 S. Ct. at 1860. Mr. Stiggers completed a grievance on April 18, 2020, but he could not get an appropriate staff member to sign and take the grievance until April 27—nine days later. *See id.* Mr. Stiggers' experience is not unique. Mr. Nickson reports that "[a] lot of sergeants have stopped picking up and signing grievances." Nickson Decl. 2 ¶ 12. When Mr. Nickson attempted to file a grievance, a sergeant refused to sign it on April 25th, April 26th, and again on April 27th. *See id.* In another case, Mr. Kent filed an emergency grievance on April 21, 2020, explaining that he had a serious heart condition and pacemaker, and asking for a mask to avoid contracting COVID-19. *See* Kent 2nd Decl. ¶ 6. Because the facility mailed him the response to his grievance, more than 72 hours had passed before he received it, and he could not make the deadline to advance to the second step of the grievance process. *Id.* ¶ 7. Furthermore, Defendants are unable to even locate the record of Mr. Frazier's COVID-19 grievance (Def. Resp. 29), though an ADC officer acknowledged receiving the grievance on April 18, 2020. *See* Frazier Grievance.

Defendants do not address the key question posed by the Supreme Court in *Ross*, i.e., whether the "facts on the ground" demonstrate the potential for ADC's grievance procedure to provide emergency relief that will protect Plaintiffs' safety and remedy the violation of their rights under the Eighth Amendment and the ADA before it is too late to do so. *Ross*, 136 S. Ct. at 1860. Instead, Defendants insist that Plaintiffs must wait to file a federal lawsuit in these emergency circumstances until an appeal to the appropriate Chief Deputy/Deputy/Assistant Director is filed and resolved, which they admit can take more than two months. *See* Declaration of Terry Grigsby, filed on April 30, 2020, ¶¶ 15-20 (ECF No. 36-37); AD 19-34 § IV(G)(6). But a grievance process for an emergency requiring immediate action is plainly not available if it would take two months to address.

This is precisely the point Judge Posner made in *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171 (7th Cir. 2010). "If a prisoner has been placed in imminent danger of serious physical injury by an act that violates his constitutional rights, administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available." *Id.* at 1173. For instance, "[a]n administrative remedy could not be thought available to a prisoner whose grievance was that he had been told that members of the Aryan Brotherhood were planning to kill him within the next 24 hours and the guards were refusing to take the threat seriously." *Id*. Similarly, when a prisoner files an emergency grievance because he has serious health conditions, and the novel coronavirus is sweeping through the facility where he is detained, the failure of prison officials to follow their own "emergency" grievance procedures and address the risks immediately shows that the administrative remedy is unavailable because the procedures "offer no possible relief in time to prevent the imminent danger from becoming an actual harm." *Id*. By the

time the appeal process is finished, which can take more than two months, it will be too late to address the emergency.

Defendants contend that *Fletcher* is inapplicable here, but their arguments are based on a misreading of the decision. First, Defendants assert that *Fletcher* recognizes an "imminent danger" exception to the PLRA's exhaustion requirement and thus, cannot apply in the Eighth Circuit where binding case law has ruled otherwise. Def. Resp. 46-47. But *Fletcher* says just the opposite. It states that imminent danger does *not* excuse a plaintiff's duty to exhaust administrative remedies.[11] *See Fletcher*, 623 F.3d at 1173. *Fletcher* simply recognizes that availability must be assessed based on whether the prison grievance system is, in reality, providing an emergency remedy in emergency circumstances. *See id. Fletcher* thereby anticipated the Supreme Court's direction in *Ross* that courts must consider "the facts on the ground" in determining the availability of a prison grievance process. *Ross*, 136 S. Ct. at 1859.

Second, Defendants attempt to distinguish *Fletcher* by suggesting that Judge Posner's reasoning would apply only if the prison's administrative procedure forbade officials from acting for two weeks. Def. Resp. at 47. Of course, as Defendants note, prisons do not operate that way. But Defendants are wrong. Judge Posner's point was that "if it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no 'possibility of

[11] Defendants also rely on this Court's decision in *Brazell v. Ruh*, stating that no "exception to the PLRA's exhaustion requirements exists where an inmate feels that he is in imminent danger of harm." *Brazell v. Ruh*, No. 5:14-CV-00238-KGB, 2015 WL 2452410, at *3 (E.D. Ark. May 21, 2015). Plaintiffs do not dispute that an inmate's subjective feelings of danger create no exception to the PLRA's exhaustion requirement. Indeed, Plaintiffs are not arguing for an exception at all; they are simply applying the Supreme Court's directive that courts must consider whether a prison remedy is available by looking to the "facts on the ground." Here, those facts show that ADC's grievance process is not available to provide emergency relief in response to the COVID-19 pandemic.

some relief' and so nothing for the prisoner to exhaust."[12] *Fletcher*, 623 F.3d at 1174; *see also id.* at 1173 ("Suppose the prison requires that its officials *be allowed two weeks to respond* to any prisoner grievance and that before the two weeks are up there can be no action taken to resolve it.") (emphasis added).

Defendants appear to believe that so long as their grievance process "does not prohibit them from acting sooner," the length of the exhaustion period is immaterial because it is possible that they might respond more quickly than the time prescribed. Def. Resp. at 47. If this were true, Defendants could permit ADC officials six months to respond to a grievance, and declare that an inmate seeking to grieve a lack of medical care after his appendix burst would still have an "available" remedy simply because Defendants retained the possibility that they *might* act in minutes and not months. That is not, and cannot be, the law.

Judge Higginson's opinion concurring in the Fifth Circuit's stay order in *Valentine v. Collier* is also instructive. Judge Higginson agreed with the majority that prison officials were likely to succeed on their PLRA exhaustion argument when plaintiffs, unlike here, "did not submit any grievance request to prison authorities before filing this lawsuit." *See Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *8 (5th Cir. Apr. 22, 2020) (concurring opinion). After all, if a prisoner has not filed *any* grievance in an emergency situation, a court will rarely be able to determine whether the process is unable to emergency relief. But, even in those circumstances, Judge Higginson recognized that the merits panel "may nevertheless conclude that a remedy using

[12] The panel majority that granted a stay in *Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *7 (5th Cir. Apr. 22, 2020), makes the same mistake in its reading of *Fletcher*. *Valentine* otherwise offers little guidance for the resolution of this case because the plaintiffs there sought relief in district court before filing any grievance, which meant there was no basis to determine whether the prison grievance in that case was in fact available to address the emergency caused by COVID-19.

the Texas Department of Criminal Justice's (TDCJ) grievance system is not 'available' because of the immediacy of the COVID-19 medical emergency coupled with statements credited by the district court that prisoners' grievances may not be addressed promptly." *Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *8 (5th Cir. Apr. 22, 2020). If evidence suggested that plaintiffs did not have an opportunity to "expedite systemic medical grievances," the court may conclude that the grievance system "operate[d] as a simple dead end" and was therefore unavailable. *Id.* (citing *Ross*, 136 S. Ct. at 1859).

Judge Higginson's analysis effectively mirrors Judge Posner's. Both opinions make the obvious point that when a grievance requires an immediate response, a grievance system that does not provide responses fast enough to address the issue is not "available." The fact that a system may be available to a different person raising a different grievance at a different time does not speak to a remedy's availability in emergency circumstances such as those here.

Plaintiffs have no administrative remedies available to them under the "ordinary meaning" of the word. *Ross*, 136 S. Ct. at 1858. Whatever they are supposed to be on paper, for purposes of the emergency created by the COVID-19 pandemic, the ADC's administrative grievance procedure is nonexistent in practice. "When the facts on the ground demonstrate that no potential [for relief] exists, [an] inmate has no obligation to exhaust the remedy." *Id.* Here, the facts on the ground have made clear that no potential for relief exists. This Court should reject Defendants' exhaustion arguments.

D. Prisoners in the High Risk and Disability Subclasses Are Entitled to Habeas Relief Because Their Confinement Is Illegal and Unconstitutional.

From the very beginning of American history, the Great Writ of habeas corpus "has time and again played a central role in national crises." *Fay v. Noia*, 372 U.S. 391, 401 (1963) (reversed in part on other grounds); *see also Holland v. Florida*, 560 U.S. 631, 649 (2010) (emphasizing

"[t]he importance of the Great Writ, the only writ explicitly protected by the Constitution"). "Its function has been to provide a prompt and efficacious remedy for whatever society deems intolerable restraints." *Fay*, 372 U.S. at 401. Its "root principle" is that the government must always be accountable to the judiciary for a person's imprisonment, and "immediate release" is required where an individual's confinement cannot be shown to comport with the dictates of the law. *Id.* As a once-in-a-century pandemic has swept across the country, incarcerated people have turned to the Great Writ, seeking its protection from terms of confinement that suddenly pose a grave risk of serious illness, life-long injury, or death. In response, courts have recognized both the serious risks posed by COVID-19 and the propriety of habeas corpus as a vehicle for seeking relief from detention that has been rendered unconstitutional by the pandemic.[13]

On April 22, Plaintiffs/Petitioners and the High Risk Subclass they seek to represent petitioned this court for "immediate[] release … or transfer … to home confinement" pursuant to a writ of habeas corpus. Compl. at 43-44, 46. Several Petitioners are held in the Cummins Unit, where the actions and inactions of Defendants have led to one of the largest COVID-19 outbreaks in the country. At least 850 people held at Cummins have contracted COVID-19.[14]

The State asserts that this Court cannot even consider Petitioners' habeas claim because it is a noncognizable conditions-of-confinement claim, and because Petitioners failed to exhaust all available state remedies. *See, e.g.*, Def. Resp. at 35-43. Respondents' arguments misconstrue both Petitioners' claim and the relevant Eighth Circuit case law, disregard the overwhelming weight of

[13] *See infra* at 63 n.17 (collecting cases that have recognized the cognizability of constitutional challenges seeking release because of COVID-19).

[14] Emma Tucker, *850 of 1,200 Inmates at Arkansas PrisonReportedly Have Coronavirus*, Daily Beast, Apr. 21, 2020, https://www.thedailybeast.com/850-of-1200-inmates-in-arkansas-prison-reportedly-have-coronavirus (last visited May 1, 2020).

national authority regarding habeas and COVID-19, and ignore the exigent circumstances created by the ongoing-19 pandemic. This Court should reject their meritless contentions.

1. Petitioners' Claims Are Properly Cognizable in Habeas.

The Supreme Court has made clear that a state prisoner may, in habeas, "challeng[e] the fact or duration of his physical confinement" and "seek immediate release or a speedier release from that confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973). This sort of claim represents the heart—but not the outer limits—of habeas corpus. *See id.* at 498-500. Because Petitioners and the high-risk subclass are explicitly seeking "immediate[] release" from their current confinement because of its unconstitutional character, *Preiser* should represent the first and last word regarding the cognizability of Petitioners' claim. *See id.*; *see also Muhammad v. Close*, 540 U.S. 749, 750 (2004) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus . . . .").

Despite this clear Supreme Court precedent, Respondents contend that Petitioners' claim must be classified as a "conditions-of-confinement" claim, and such claims are not cognizable in habeas in the Eighth Circuit. Def. Resp. at 35-40. Respondents' assertion turns on a distinction that courts sometimes draw to determine whether an incarcerated petitioner's claim should properly be classified as a petition for habeas corpus or a complaint seeking relief pursuant to § 1983. *See, e.g.*, *Spencer v. Haynes*, 774 F.3d 467, 470-72 (8th Cir. 2014). To date, the Supreme Court has expressly declined to answer the question whether conditions-of-confinement claims sound in habeas. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862-63 (2017) ("[W]e have left open the question whether [detainees] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus."). The Court's silence has caused a split in the Circuits with some permitting conditions claims in habeas and others refusing to countenance them. *See Spencer*, 774 F.3d at 470 & n.6; *Aamer v. Obama*, 742 F.3d 1023, 1036-38 (D.C. Cir. 2014) (cataloguing the

split and concluding that most circuits that do not permit conditions-of-confinement claims in habeas reached this conclusion based on "a fundamental misunderstanding of *Preiser*").

As Respondents observe, the Eighth Circuit has held that conditions claims are not cognizable in habeas. *See Spencer*, 774 F.3d at 470 (citing *Kruger v. Erickson*, 77 F.3d 1071, 1073 (8th Cir. 1996) (per curiam)). But the Eighth Circuit has *also* held that conditions claims *are* cognizable in habeas. *See Willis v. Ciccone*, 506 F.2d 1011, 1014 (8th Cir. 1974) ("[I]t it is generally acknowledged that habeas corpus is a proper vehicle for any prisoner, state or federal, to challenge unconstitutional actions of prison officials."); *see also Aamer*, 742 F.3d at 1037-38 (observing that Eighth Circuit "completely overlook[ed] their own post-*Preiser* precedent recognizing that conditions of confinement sound in habeas"). Given the inconsistency between *Spencer* and *Kruger* on the one hand and *Willis* on the other, *Willis* should control because it preceded *Kruger*, and *Kruger* was not an *en banc* decision. *See Mader v. United States*, 654 F.3d 794, 800 (8th 2011) (holding that "when faced with conflicting panel opinions, the earliest opinion must be followed 'as it should have controlled the subsequent panels that created the conflict'") (citation omitted). Thus, conditions-of-confinement claims are cognizable in habeas in the Eighth Circuit.

Nonetheless, this Court need not reach that issue because Petitioners' habeas claim is a challenge to the execution of their sentences, not to their conditions of confinement. Petitioners' contention is that, in light of the COVID-19 pandemic and the ways in which Respondents have already failed to prevent its spread, there are no conditions under which they may be lawfully confined in prison. That is a challenge to the fact or duration of their confinement and to the execution of their sentence, not to the conditions of their confinement.

The Eighth Circuit recognizes that habeas petitioners may challenge the execution of their sentences, as do circuits that bar petitioners from raising conditions-of-confinement claims. *See, e.g.*, *United States v. Knight*, 638 F.2d 46, 47 (8th Cir. 1981) (observing that "[w]e have frequently held that an attack on the manner in which a sentence is executed . . . may be cognizable in a habeas corpus petition"); *compare Luedtke v. Berkebile*, 704 F.3d 465, 465-66 (6th Cir. 2013) (holding that habeas is not "the proper vehicle for a prisoner to challenge conditions of confinement"), *with United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001) (allowing challenge to execution of sentence).

Respondents' assertion that Petitioners have "obvious[ly]" raised a conditions-of-confinement claim does not make it so. First, Respondents flatly ignore *Preiser*'s holding that the "heart of habeas corpus" involves petitioners challenging the fact or duration of their physical confinement and seeking immediate or speedier release from that confinement. *Preiser*, 411 U.S. at 499. Petitioners here are all challenging the fact of their "physical confinement" and seeking release from that confinement because of it is irremediably unlawful during the pendency of the COVID-19 pandemic.

Second, the conditions-of-confinement cases cited by Respondents illustrate why this is not a conditions-of-confinement case. Put simply, Petitioners here are seeking release, and the petitioners in conditions-of-confinement cases are not. In *Kruger*, for instance, prison officials took a sample of Mr. Kruger's blood for placement in a DNA databank. 77 F.3d at 1073. Mr. Kruger brought an action pursuant to § 1983 seeking money damages and injunctive relief. *Id.* When his claim was denied, he filed a habeas petition raising the same claim, and seeking the return or destruction of his blood sample. *Id.* The Eighth Circuit held that Mr. Kruger should have brought his petition as a § 1983 lawsuit, and noted that there are "fundamental differences"

between a civil rights action under § 1983, "where a prisoner might seek money damages," and a habeas petition. *Id.* Mr. Kruger did not seek release and did not allege that the fact of his confinement was itself unconstitutional. He instead brought a claim that was susceptible to resolution through money damages. By contrast, Petitioners do seek release, do contend that the fact of their confinement is unconstitutional, and raise a claim that is not susceptible to resolution through money damages.

Respondents' reliance on *Spencer* fares no better. In *Spencer*, the petitioner brought a habeas action raising a Fifth Amendment challenge because a staff member placed him in "four-point restraints" without providing him a hearing. 774 F.3d at 469. The Court ruled that Mr. Spencer should not have filed his claim as a habeas petition because it challenged his conditions of confinement instead of "'the fact or length of the confinement.'" *Id.* at 470-71 (quoting *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979)). As in *Kruger*, the petitioner did not challenge the fact of his confinement, did not seek immediate or speedier release, and did raise a claim amenable to resolution through a damages award.

Rather than address the holdings of *Spencer* and *Kruger*, Respondents rely on selective quotations divorced from their factual context. *But see generally Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944) ("It is timely again to remind counsel that the words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."). In short, the Eighth Circuit case law cited by Respondents is consistent with Petitioners' argument and provides no support for theirs.

The weight of recent authority involving COVID-19 habeas claims like this one similarly favors Petitioner's interpretation. Consider, for instance, the recent decision in *Wilson v. Williams*, where the court ordered the prison to develop a plan for releasing high-risk prisoners at the Elkton Federal Correctional Institution following a COVID-19 outbreak in which 59 prisoners tested positive.[15] No. 4:20-cv-00794, —— F.Supp.3d ——, ——, 2020 WL 1940882, at *2 (N.D. Ohio Apr. 22, 2020). Petitioners had requested release for a high-risk subclass and "an alteration to the confinement conditions" for the remaining class members. *Id.* at *6. The Court stated that the "seemingly bright line rules" between challenges to the fact of confinement and challenges to the conditions of confinement "are difficult to apply in practice" and even more challenging in the context of COVID-19. *Id.* at *5. The court explained that although the high-risk subclass "challenge the dangerous conditions within the prison," because "the only truly effective remedy" requires "the release of a portion of the population," the action also challenged the fact or duration of confinement.[16] *Id.* Ultimately, the court held that the request for release to home confinement

[15] *Fourteen times* more inmates at Cummins Unit have tested positive than had tested positive at Elkton at the time the court in *Wilson* ordered a plan to release petitioners and their putative class. The district court in *Wilson* relied on its "inherent authority to grant an enlargement to a defendant pending a ruling on the merits of that defendant's habeas petition" to accomplish its release plan. 2020 WL 1940882, at *4. This Court should follow its lead.

[16] Respondents complain that the cases that Petitioners have cited where courts have granted habeas relief "come out of Circuits that . . . allow conditions-of-confinement claims in habeas." Def. Resp. at 39. To the contrary, district courts have frequently recognized the cognizability of habeas claims in Circuits that do not recognize conditions-of-confinement habeas claims. For instance, as expressly discussed in *Williams*, the Sixth Circuit is one of the circuits that has held that conditions of confinement claims cannot be raised in habeas. *Williams*, 2020 WL 1940882. at *5 n.46; *see also Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *7 (E.D. Mich. Apr. 5, 2020) (same); *Bent v. Barr*, No. 19-CV-06123-DMR, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020) (same).

or halfway houses for the high risk subclass "is closer to a challenge to the manner in which the sentence is served and is therefore cognizable" in habeas.[17] *Id.* at *6.

The court's decision in *Wilson* is similar to the decision in *Malam v. Adducci*, 2020 WL 1672662, where the district court faced the same question regarding the proper classification of a COVID-19 habeas case. As in *Wilson*, the court decided that petitioner had alleged a challenge to the fact of confinement and not to the conditions of confinement. *Id.* at *3. Because the petitioner had—as here—alleged that no set of conditions could render her current confinement constitutional, and because she sought immediate release, habeas provided an appropriate vehicle for the challenge. Thus, the Court granted her petition and ordered her release. *Id.* at *14.

[17] Respondents assert that the release sought by Petitioners—whether it is release to parole, home confinement, a halfway house, or some other reduction in the level of confinement—does not constitute release for the purpose of habeas. This contention is incorrect. To start, it has been effectively rejected by *Wilson*—where petitioners sought the same type of release—and by each of the dozens of other courts that have ruled that habeas is an appropriate vehicle to pursue relief based on the threat from COVID-19 in carceral facilities. *See infra* at n.17. Moreover, Petitioners have undoubtedly sought release from "confinement" both because they are literally seeking release from their confinement in prison and because any of the requested release options would constitute "a quantum change in the level of custody." *See Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991); *see also Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J. concurring). Where petitioners seek to "reduce[] the level of custody" in which they are held, *see id.*, such as seeking release to the general prison population from solitary confinement, or seeking parole, they have stated a claim for release from confinement. *See Broglin*, 922 F.2d at 381. District courts in this circuit have held that release from a carceral facility to a halfway house constitutes a release from confinement from these purposes. *See, e.g.*, *Bania v. Roal*, No. 11-cv-925 (SRN/TNL), 2011 WL 7945547, at *3 (D. Minn. Oct. 24, 2011), R.& R. adopted by 2012 WL 1886485 (D. Minn. May 23, 2012) (citation omitted); *Silva v. Paul*, No. 18-CV-02177 (ECT/ECW), 2019 WL 542945, at *5 (D. Minn. Jan. 7, 2019), report and recommendation adopted, No. 18-CV-2177 (ECT/ECW), 2019 WL 536668 (D. Minn. Feb. 11, 2019), appeal dismissed, No. 19-1424, 2019 WL 4145562 (8th Cir. May 20, 2019). As the court observed in *Silva*, "[c]learly, the difference between a prison and a halfway house represents a 'quantum change in the level of custody' under *Graham* because the two forms of custody are qualitatively different." *Id.* Given that release to a halfway house, "clearly" represents a "quantum change in the level of custody," release to home confinement necessarily represents such a change.

Wilson and *Adducci* are consistent with recent cases across the country recognizing that petitioners may properly challenge the constitutionality of their confinement based on the threat from COVID-19 through habeas.[18] This Court should similarly rule that Plaintiffs' claims are cognizable in habeas here, and the State has advanced no meritorious arguments to the contrary.

2. Petitioners Did Not Need to Exhaust Their Habeas Claims In Arkansas State Courts Because No Such Relief Was Available.

Respondents contend that Petitioners' habeas claim faces "an insurmountable roadblock" because 28 U.S.C. § 2254(b)(1)(A) requires Petitioners to exhaust the remedies available to them in state court before a federal court may grant relief in habeas. Def. Resp. at 41. This assertion is incorrect. Even if Respondents are correct that Petitioners' habeas claim brought under 28 U.S.C. § 2241 should be construed as a petition under 28 U.S.C. § 2254,[19] and even if the exhaustion

[18] *E.g.*, *Fofana v. Albence*, No. 20-10869, 2020 WL 1873307, at *11 (E.D. Mich. Apr. 15, 2020); *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662, at *7 (E.D. Mich. Apr. 5, 2020); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1481503, at *1 (S.D.N.Y. Mar. 26, 2020); *Bent v. Barr*, No. 19-CV-06123-DMR, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020); *Doe v. Barr*, No. 20-CV-02141-LB, 2020 WL 1820667, at *8 (N.D. Cal. Apr. 12, 2020); *Coronel v. Decker*, No. 20-CV-2472 (AJN), 2020 WL 1487274, at *8 (S.D.N.Y. Mar. 27, 2020); *Thakkar v. Doll*, No. 1:20-CV-480, 2020 WL 1671563, at *9 (M.D. Pa. Mar. 31, 2020); *Leandro R. P. v. Decker*, No. CV 20-3853 (KM), 2020 WL 1899791, at *9 (D.N.J. Apr. 17, 2020); *Barbecho v. Decker*, 2020 WL 1876328, at *1 (S.D.N.Y. Apr. 15, 2020); *Jeferson V.G. v. Decker*, No. 20-cv-3644, 2020 WL 1873018, at *5 (D.N.J. Apr. 15, 2020); *Valenzuela Arias v. Decker*, No. 20-cv-2802, 2020 WL 1847986, at *2-10 (S.D.N.Y. Apr. 10, 2020); *Savino v. Souza*, No. CV 20-10617-WGY, 2020 WL 1703844, at *9 (D. Mass. Apr. 8, 2020); *Ortuño v. Jennings*, Case. No. 20-cv-2064-MMC, Docket No. 38 (N.D. Cal. Apr. 8, 2020); *Castillo v. Barr*, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020); *Zhang v. Barr*, 2020 WL 1502607, at *9 (C.D. Cal. Mar. 27, 2020); *Vazquez Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 1904497, at *1 (S.D. Tex. Apr. 17, 2020); *Amaya-Cruz v. Adducci*, No. 1:20-cv-789, 2020 WL 1903123, at *2-3 (N.D. Ohio Apr. 18, 2020); *Awshana v. Adducci*, No. 20-10699, 2020 WL 1808906, at *2 (E.D. Mich. Apr. 9, 2020); *Albino-Martinez v. Adducci*, No. 2:20-CV-10893, 2020 WL 1872362, at *2 (E.D. Mich. Apr. 14, 2020); *Habibi v. Barr*, 2020 WL 1864642, at *2 (S.D. Cal. Apr. 14, 2020); *Ousman v. Decker*, 2020 WL 1847704, at *9 (D.N.J. Apr. 13, 2020); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *7 (D. Md. Apr. 3, 2020); *Jones v. Wolf*, No. 20-CV-361, 2020 WL 1643857, at *14 (W.D.N.Y. Apr. 2, 2020); *Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *5 (N.D. Ill. Apr. 9, 2020).

[19] Respondents correctly observe that the Eighth Circuit has held that habeas claims brought by state petitioners challenging the execution of their sentences should be considered

requirement is binding on Petitioners in the context of a life-threatening pandemic,[20] Petitioners need not bring an action in state court because Arkansas does not provide an available procedure by which Petitioners may obtain release for their federal claim. *See* 28 U.S.C. § 2254(b)(1)(B)(i) (writ of habeas corpus shall not be granted unless it appears that "there is an absence of available state corrective process").

The petition in this case claimed that Petitioners and the High Risk Subclass are entitled to immediate habeas release because Respondents were violating their Eighth Amendment rights, and no remedy short of release could satisfy the Eighth Amendment. Compl. ¶¶ 137-38. Respondents contend that Petitioners could have raised this claim in Arkansas state courts under the Arkansas Civil Rights Act, Ark. Code Ann. 16-123-105. Def. Resp. at 42.

The flaw with this argument is apparent on the face of Respondents' brief. Respondents explain that the Arkansas Civil Rights Act "provid[es] identical protections to section 1983." *See id.* But as the Supreme Court has made clear, filing a civil action pursuant to § 1983 is not the proper procedure for seeking release; filing a petition for a writ of habeas corpus is. "[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within

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pursuant to 28 U.S.C. § 2254. *See, e.g.*, *Singleton v. Norris*, 319 F.3d 1018, 1022 (8th Cir. 2003) (citing *Crouch v. Norris*, 251 F.3d 720 (8th Cir. 2001)). Respondents do not dispute that Petitioner's claim falls within the plain language of 28 U.S.C. § 2241 or that myriad other courts have decided claims like Petitioners under § 2241. And the Eighth Circuit has never considered the proper vehicle for bringing a claim under the factual circumstances presented by COVID-19. But this Court need not address this issue because the exhaustion requirement of 28 U.S.C. § 2254 is not an obstacle to the relief sought by Petitioners, and Respondents raise no other reason why § 2254 prohibits consideration of the merits. For example, the general rules limiting second or successive habeas petition under § 2254 do not apply when, as here, the basis for Petitioners' claim did not arise until well after the imposition of their state court sentence. *See Singleton*, 319 F.3d at 1023. Similarly, the limitations imposed by 28 U.S.C. § 2254(d) are not applicable here because Petitioners' claim was not "adjudicated on the merits in State court proceedings."

[20] *See infra* at 64-66.

the literal terms of § 1983." *Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (citing *Preiser*, 411 U.S. at 488-90). Thus, a state statute that affords "identical protections to section 1983" does not provide Petitioners with an available procedure by which they may seek release.

This understanding is confirmed by an examination of Arkansas law. Just as federal law has codified the division of labor described above between habeas corpus and § 1983, Arkansas has codified the same division of labor between state post-conviction relief and the Arkansas Civil Rights Act. For incarcerated individuals seeking to challenge the execution of their sentence, Arkansas law provides just one avenue: filing a state post-conviction petition pursuant to Arkansas Rule of Criminal Procedure 37. "*All* grounds for postconviction relief from a sentence imposed by a circuit court . . . must be raised in a petition under this rule." Ark. R. Crim. P. 37.2(c) (emphasis added). If Petitioners had a state court remedy, it would lie under Rule 37.

But Respondents do not invoke Rule 37, because it is plainly unavailable to Petitioners for two reasons. First, Rule 37 imposes time limits by which Petitioners must file their claims which depend upon the resolution of the underlying criminal case. *See* Ark. R. Crim. P. 37.2(c) (imposing 60- and 90-day filing limits depending on the resolution of the underlying criminal matter). The time limitations imposed by Rule 37.2 are jurisdictional, and "where they are not met, a trial court lacks jurisdiction to grant postconviction relief." *Carter v. State,* 2010 Ark. 231, 2, 364 S.W.3d 46, 49 (2010). Here, Petitioners are time-barred by Rule 37.2(c) from raising the claims that they have brought in federal habeas. Second, Rule 37 is narrower than habeas corpus, and Petitioners' claims are not cognizable under Rule 37. *See, e.g., Whitmore v. State*, 771 S.W.2d 266, 272 (Ark. 1989) (holding that "Rule 37 does not apply to the execution of a sentence"). Consequently, Arkansas law does not provide Petitioners with an "available state corrective process," and their federal claim is not barred by 28 U.S.C. § 2254.

None of the three COVID-19 cases cited by Respondents, *see* Def. Resp. at 42-43, are to the contrary because they all involve circumstances where the petitioners undisputedly could have raised their claims in state court. For instance, in *Money v. Pritzker*, the petitioners did not dispute that state law provided causes of action that could grant them the relief they sought. Instead, they contended that state remedies were unavailable because the state courts in a single county were closed because of the pandemic. *See Money v. Pritzker*, __ F.3d __, 2020 WL 1820660, at *21 (N.D. Ill. Apr. 10, 2020). The court rejected that argument because the allegedly unavailable court system cited by the petitioners was still available for emergency matters, and because the petitioners could have filed the same action in the courts of various other counties, which were undisputedly available. *See id.*

Similarly, in *Mays v. Dart*, the petitioners did not contend that state law provided no mechanism by which the petitioners could seek release. *Mays*, No. 20 C 2134, 2020 WL 1812381, at *5. Petitioners were all pretrial detainees who could file motions to review or reduce bail, and more than 400 detainees had been released in the prior week through expedited bond hearings. *Id.* at *6. Because there was no dispute that the petitioners had an available means by which to obtain release and an available court in which to pursue release, the court found that they had failed to exhaust their state court remedies. *Id.* Finally, Respondents' attempted reliance on *Petry-Blanchard v. Louis* fails for the same reason. *Petry-Blanchard v. Louis*, No. 4:20-CV-P49-JHM, 2020 WL 1609493, at *4 (W.D. Ky. Apr. 1, 2020) (finding that petitioners had not exhausted their state court claims where there was no dispute that petitioners had valid claims to release under state law and where courts remained open and available for emergency matters).

Because the only state court remedy suggested by Respondents is plainly unavailable, there is nothing for Petitioners to exhaust, and this court may reach the merits of their habeas claims.

3. Even if Arkansas Did Provide State Remedies, This Court Should Waive the Exhaustion Requirement Because of the Grave Threat Posed by COVID-19.

Even if Petitioners did have available state court remedies (and they do not), the failure to exhaust would not require the dismissal of Petitioners' federal habeas claims. "A [plaintiff's] failure to exhaust his remedies in state court . . . does not divest a federal court of jurisdiction over the petition." *Puertas v. Overton*, 272 F. Supp. 2d 621, 626 (E.D. Mich. 2003). Rather, a court should assess whether "unusual or exceptional circumstances" exist such that "'the interests of comity and federalism will be better served by addressing the merits.'" *Id.* (quoting *Granberry v. Greer*, 481 U.S. 129, 134 (1987)). Indeed, 28 U.S.C. § 2254(b)(1)(B)(ii) provides that exhaustion of state court remedies is not required where circumstances exist that render such process "ineffective to protect the rights of the applicant."

In *Chitwood v. Dowd*, the Eighth Circuit recognized that "[c]ourts may grant habeas relief in 'special circumstances,' even though petitioner did not exhaust state remedies." 889 F.2d 781, 784 (8th Cir. 1989). Determining whether such special circumstances exist is a factual question for the district court. *See id.* In *Chitwood*, petitioner sought habeas relief after the negligent action of state officials impaired the proper execution of his sentence, leading to an undue extension of his incarceration. Although Mr. Chitwood had not exhausted his stated court remedies, he sought relief in federal court through a writ of habeas corpus, arguing that he did not have time to exhaust his state-court claims before his sentence expired, leading to a loss of justiciability. *Id.* at 785. The district court ruled, and the Eighth Circuit affirmed, that the combination of the state officials' action and the threatened mootness of his claims constituted special circumstances that permitted him to proceed in federal court without exhausting his state court remedies. *Id.*

Petitioners in this case are similarly situated to the petitioner in *Chitwood*. As in *Chitwood*, the execution of Petitioners' sentence is threatened by the actions of state officials—here, the

deliberate indifference of Respondents, who have violated Petitioners' Eighth Amendment rights. And as in *Chitwood*, the delay inherent to the exhaustion of state court remedies would render their claims moot. Petitioners require relief immediately to ensure that they do not become infected with COVID-19; any delay—much less the delay required for (futile) state court exhaustion—would likely mark the difference between sickness and health.

Other district courts in the Eighth Circuit have also permitted petitioners to pursue habeas relief without exhausting their state claims when circumstances dictated that state corrective processes would be "ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii). Thus, in *Reeves v. McSwain*, Case No. 4:12CV2185 AC, 2016 WL 812572 (E.D. Mo. Mar. 2, 2016), the court found the plaintiff was procedurally unable to exhaust their remedies because of the location of their incarceration and therefore excused them. *Id.* And in 2007, a district court found special circumstances warranted relief in a similar situation: "[o]n the information before the court, it appears that petitioner's incarceration in another state will result in an inordinate delay in the processing of petitioner's claims in Missouri state court, thereby rendering such state processes ineffective in securing the rights of petitioner in this cause." *Metzger v. Nixon*, No. 4:06CV999 HEA, 2007 WL 2746726 *3-4 (E.D. Mo. Sept. 18, 2007).

Similarly, a district court in Michigan applied this exception when pursuit of state court procedure could amount to a death sentence. In *Puertas*, the court waived the exhaustion requirement for a 76-year-old prisoner with coronary disease and bladder cancer who had recently gone into remission, releasing him on bond pending a decision on his petition for a writ of habeas corpus. *Id*. at 628. In doing so, the court found that the petitioner's "age, ill health, and dire need for continued medical treatment" warranted special consideration. *Id*. Considering the situation, "'the interests of comity and federalism'" were better served by addressing the merits of the

petition rather than allowing the petitioner to risk death in prison while awaiting adjudication in state court. *Id*. at 629 (quoting *Granberry*, 481 U.S. at 131).

The same conclusion is warranted here. Requiring Petitioners in the High Risk Subclass to file a new action in state court could easily be the difference between life and death. As many as four individuals from the Cummins Unit have died in recent days. Conditions at Cummins—and at other ADC facilities—are going to get far worse before they get better. Pursuing state court remedies at this juncture will serve no benefit to comity or federalism; it will merely expose Petitioners to grave and unnecessary additional risk. This Court has the power to consider Petitioners' petition on the merits and should do so.

4. The PLRA Does Not Apply to Plaintiffs' Requests for Habeas Release.

Respondents next contend that Plaintiffs cannot obtain release because the preconditions for a release order under the PLRA have not yet been satisfied. But the PLRA provisions cited by Respondents do not apply when, as here, Plaintiffs seek release under habeas. The PLRA is unambiguous on this point. Its requirements for release orders only to "any civil action with respect to prison conditions." 18 U.S.C. § 3626(a)(3). And it expressly states that "the term 'civil action with respect to prison conditions' . . . does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id.* § 3626(g)(2).

Here, Petitioners contend that individuals in the High Risk and Disability Subclasses cannot be lawfully confined in prison during the pandemic as a result of their high vulnerability to serious illness or death if they contract COVID 19 in prison. They therefore sought habeas relief under 28 U.S.C. § 2241. And, whether or not the claim is properly litigated in § 2241 or recharacterized as a claim under 28 U.S.C. § 2254, plaintiffs have brought a "habeas corpus proceeding[] challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). Therefore, under the plain language of the statute, the PLRA's limitations on release orders do not

apply here. And "[w]hen the words of a statute are unambiguous, then . . . judicial inquiry is complete." *United States v. Krause*, 914 F.3d 1122, 1127 (8th Cir. 2019) (citation and internal quotation makes omitted).

Respondents attempt to circumvent the PLRA's plain language by asserting that this is actually a challenge to conditions of confinement in which "Plaintiffs . . . do not challenge the fact or duration of confinement in prison." Def. Resp. at 49 n.8. But that is simply incorrect. As explained at length above, Petitioners challenge the fact and duration of their confinement in prison; specifically, they contend that the High Risk and Disability Subclasses cannot be lawfully confined in prison during the pandemic, which means that release from prison is the only remedy that would satisfy the Eighth Amendment and the ADA. Indeed, on the very same page of their brief in which Respondents falsely assert that Petitioners "do not challenge the fact or duration of confinement in prison," Respondents acknowledge that Petitioners are seeking "release from prison." *See* Def. Resp. at 49 & n.8; *see also id.* at 50 (referring to "[t]he order Plaintiffs seek here—insofar as it would provide for release from prison, as Plaintiffs request for a putative subclass"). And, while Respondents elsewhere make much of the point that Petitioners would still be in state custody if released from prison, that is irrelevant to their PLRA argument. The PLRA specifically exempts "habeas corpus proceedings challenging the fact or duration of confinement *in prison*," from its limitations on release orders. 18 U.S.C. § 3626(g)(2) (emphasis added).

Case law is consistent with the plain text of the PLRA. Courts have recognized that the PLRA, including its preconditions for release orders, do not apply to claims for habeas relief challenging the fact or duration of confinement. Thus, in *Wilson v. Williams*, __ F.3d. __, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020), the court granted preliminary injunctive relief requiring

a prison to formulate a plan for releasing some members of a medically vulnerable subclass from prison. In so doing, the court specifically rejected the same argument made by Respondents' here:

> Respondents argue that the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, bars this Court from granting the inmates' release. This is not so. The PLRA does not extend to "habeas corpus proceedings challenging the fact or duration of confinement in prison." Because the Court has determined that the subclass's claims are properly before the Court as a habeas action, this prohibition does not apply.

Id. at * 10 (footnotes omitted). Similarly, although Respondents rely on *Money v. Pritzker*, the court there emphasized that "case law clearly holds that the PLRA applies in Section 1983 suits, but not to habeas petitions." *Money v. Pritzker*, __ F.3d __, 2020 WL 1820660, at *10 (N.D. Ill. Apr. 10, 2020); *see id.* at 10.[21]

Two of the other cases cited by Respondents are irrelevant here, because the plaintiffs had not sought release under habeas, so there was no need for the court to address the distinction between "civil action[s] with respect to prison conditions," to which the PLRA applies, and "habeas corpus proceedings challenging the fact or duration of confinement in prison," to which it does not. 18 U.S.C. § 3626(g)(2). *See Coleman v. Newsom*, __ F. Supp. 3d __, 2020 WL 1675775, at *4 (E.D. Cal. Apr. 4, 2020) (three-judge court); *Plata v. Newsom*, __ F. Supp. 3d __, 2020 WL 1908776, at *10-11 (N.D. Cal. Apr. 17, 2020).

The sole case cited by Respondents that supports their position is *Mays v. Dart*, __ F. Supp. 3d __, 2020 WL 1987007, at *20 (N.D. Ill. Apr. 27, 2020), which did hold that the PLRA applied to habeas corpus claims. But *Mays* failed to apply the plain language of the PLRA. Instead, *Mays*

[21] Although recognizing the PLRA was inapplicable, the court in *Money* denied requests for emergency release under habeas because it concluded that the petitioners had not exhausted available state remedies. *See id.* at *20-*22. For the reasons explained above, there are no available state remedies for petitioners to exhaust in this case.

reasoned that the PLRA should apply because the plaintiffs' habeas claims "bear on the conditions of their confinement," even though the court acknowledged that the claims also "'*do* bear on the duration of their confinement.'" *Id.* (citation omitted). But the text of the PLRA is clear: it exempts "habeas corpus proceedings challenging the fact or duration of confinement in prison," from the definition of "civil action[s] with respect to prison conditions." 18 U.S.C. § 3626(g)(2). Thus, when a plaintiff brings a habeas corpus proceeding challenging the fact or duration of confinement, the relief the plaintiff is requesting through habeas means the PLRA does not apply. It does not matter whether the underlying claim in some way "bear[s] on the conditions of confinement," *Mays*, 2020 WL 1987007, at *20, because that is not the relevant inquiry under the statute. Indeed, as the Second Circuit explained in one of the two cases *Mays* misinterpreted as supporting its decision, the "type of relief sought" is the critical inquiry. *Jones v. Smith*, 720 F.3d 142, 145 n.3 (2d Cir. 2013); *see Mays*, 2020 WL 1987007, at *20 (citing *Jones*).[22]

Plaintiffs respectfully urge this Court to apply the plain text of the PLRA, and the decisions in *Williams* and *Money*, rather than *Mays*. Because they seek habeas relief challenging the fact or duration of their confinement, the PLRA does not apply.

III. Plaintiffs Will be Irreparably Harmed by the Substantial Risk of Serious and Possibly Lethal COVID-19 Infection and Related Illnesses.

In order to demonstrate irreparable harm in the Eighth Circuit, "a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013). Defendants read this standard to require Plaintiffs to prove that, if the Court does not issue preliminary injunctive

[22] The other case cited by *Mays* simply assumed that the PLRA would apply in habeas cases challenging conditions of confinement, but did not suggest the PLRA would apply when, as here, a plaintiff challenges the fact or duration of confinement simply because the underlying legal claims may bear on the conditions of confinement. *See Blair-Bey v. Quick*, 151 F.3d 1036, 1042 (D.C. Cir. 1998).

relief, Plaintiffs and the class members are 100% likely to contract COVID-19. Taken to its logical conclusion, Defendants' reading of irreparable harm would prevent incarcerated people deprived of any protections from an outbreak of a lethal virus from seeking preliminary injunctive relief until the instant before they make contact with the contagion; by then, of course, it would have been too late for the courts to provide the needed, lifesaving protection. This cannot be. Plaintiff John Doe did not know he was 100% likely to contract COVID-19 until after he had already been infected with the virus, but he was entitled to protection from this potentially deadly harm even before he made contact with the contagion. Defendants' position is a clear misapplication of the Eighth Circuit's standard, and is contrary to other court decisions, which have applied an irreparable harm standard similar to the Eighth Circuit in awarding preliminary injunctive relief to similarly situated plaintiffs in COVID-19-prison cases.

For example, in *Banks*, the District Court for the District of Columbia found that "Plaintiffs' risk of contracting COVID-19 and the resulting complications, including the possibility of death, is the prototypical irreparable harm." *Banks*, 2020 WL 1914896, at *11 (citing *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 766 (9th Cir. 2004) (finding irreparable harm from pain, infection, and possible death due to delayed treatment from the reduction of hospital beds)). The court also found irreparable harm, in part, because the plaintiffs' incarceration placed them at a significantly higher risk of infection. *Id.* Importantly, in the United States Court of Appeals for the District of Columbia, a plaintiff seeking a preliminary injunction must show that, unless granted preliminary injunctive relief, the plaintiff will suffer an irreparable injury that is "both certain and great, actual and not theoretical, beyond mediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015). This standard, like

that of the Eighth Circuit, is high. Still, the court found that the plaintiffs demonstrated irreparable harm in *Banks*.

The Sixth Circuit Court of Appeals also has a high irreparable harm standard, which requires plaintiffs to show that, unless preliminary injunctive relief is granted, "actual and imminent harm rather than harm that is speculative or unsubstantiated" would result. *See Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006). With this standard in mind, a district court within the Sixth Circuit found that "Plaintiffs also are likely to suffer irreparable harm absent an injunction, as they face a heightened risk of contracting this life-threatening virus simply as incarcerated individuals and even more so without the imposition of these cautionary measures." *Cameron v. Bouchard*, No. CV 20-10949, 2020 WL 1929876, at *2 (E.D. Mich. Apr. 17, 2020), *modified on reconsideration*, No. CV 20-10949, 2020 WL 1952836 (E.D. Mich. Apr. 23, 2020) (removing a provision requiring defendants to produce a list of highly vulnerable incarcerated people). It follows, therefore, that the standard for demonstrating irreparable harm is not so high as to bar preliminary injunctive relief protecting incarcerated people from a lethal pandemic like COVID-19.

The authorities cited by Defendants are either distinguishable from this matter or, in some cases, actually support Plaintiffs' argument that they have demonstrated irreparable harm. As Defendants note, the court in *Thakker v. Doll*, No. 1:20-CV-480, 2020 WL 2025384 (M.D. Pa. Apr. 27, 2020), allowed its temporary restraining order, permitting the release of various COVID-19-vulnerable incarcerated people from multiple correctional facilities, to convert into a preliminary injunction covering a correctional facility incarcerating forty people who had tested positive for COVID-19. 2020 WL 2025384, at *8; (Dkt. 36, 71). In other words, instead of categorically denying plaintiffs injunctive relief, the *Thakker* court granted partial preliminary

injunctive relief. *Thakker* thus supports Plaintiffs' argument that irreparable harm may be demonstrated by incarcerated people challenging their facilities' deliberate indifference to the risk of COVID-19, especially in regards to incarcerated people who, like Named Plaintiffs, have "comorbidities [that] would likely cause sever COVID-19 complications." *Thakker*, 2020 WL 2025384, at *8.

Thakker is also factually distinguishable from this matter because the court found that, *after* the court issued its temporary restraining order covering multiple facilities, the defendants quickly and effectively implemented the CDC Guidance. *Id.*, at *8. As explained *supra*, Defendants in this matter have not fully implemented the CDC Guidance. This noncompliance demonstrates the irreparable harm Plaintiffs and the class members currently face.

The other cases cited by Defendants are also distinguishable in telling ways. In *Verma v. Doll*, No. 4:20-CV-14, 2020 WL 1814149, at *1 (M.D. Pa. 2020), the court found that there was no irreparable harm, in part, because the detention facility at issue was under capacity. 2020 WL 1814149, at *1. This is consistent with Dr. Stern's conclusion that "the lower the number of incarcerated persons in a facility, the lower the risk [of contracting COVID-19]." Stern Decl. ¶ 14. Here, in contrast, the Arkansas Board of Corrections has declared a prison overcrowding state of emergency and one member recently reported "as usual, all of the major units are above capacity"[23] Ark. Parole Bd. Minutes, Mar. 26, 2020, at https://www.paroleboard.arkansas.gov/Websites/parole/images/03%2026%20Mins.pdf.

[23] Defendant Payne claims this is false, stating that ADC regularly releases people when the county jails are backlogged with people awaiting transfer to ADC. Payne Decl. ¶ 109. What Defendant Payne omits from this denial, however, is that this is done pursuant to the Prison Overcrowding Emergency Powers Act, which entails the BOC "declar[ing] a prison overcrowding state of emergency." Ark. Code Ann. § 12-26-603(a)(1).

In *Verna*, the court found that detainees were given disinfectant and gloves as requested, and "all medical staff [are required to] be fitted for and wear an N95 mask [and] [d]etainees on isolation status are required to wear a N-95 mask when they leave a cohorted housing unit." *Verma*, 2020 WL 1814149, at *2. Defendants have not engaged any comparable efforts to mitigate the spread of COVID-19. If the correctional facility being under capacity, along with the provision of gloves to incarcerated people and N95 masks to select incarcerated people and staff, contributed to the finding of no irreparable harm in *Verma*, the absence of these safeguards supports a finding of irreparable harm in this matter. The other case cited by Defendants, *Engelund v. Doll*, also supports Plaintiffs because, unlike that case, there have been no remedial interventions in this matter that would be relevant to an irreparable harm determination. *See Engelund v. Doll*, No. 4:20-CV-00604, 2020 WL 1974389, at *6, 12 (M.D. Pa. Apr. 24, 2020) (no finding of COVID-19-related irreparable harm where the detention facility was under capacity and incarcerated people were issued surgical masks).

Accordingly, as explained in Plaintiffs' prior submissions, irreparable harm has been established, and Defendants' arguments to not support a contrary conclusion, as is evidenced by the recent decisions finding irreparable harm under similar circumstances and the key differences between this matter and other cases in which preliminary injunctive relief was denied for lack of irreparable harm.

IV. The Balance of Equities Weighs Heavily in Favor of Granting a Preliminary Injunction.

As Plaintiffs have argued previously, the balance of equities in this matter outweigh any harm to Defendants. Pff. TRO Br. At 43-46. Notably, Defendants have not disputed this argument. Additionally, preliminary injunctive relief is in the public interest because it would decrease the risk that Plaintiffs will contract COVID-19. *See Banks*, 2020 WL 1914896, at *12 (finding that

preliminary injunctive relief that protected incarcerated people from COVID-19 is in the public interest).

In determining whether a preliminary injunction should be issued, "the Court must balance the harm to Plaintiffs if no relief is granted with the potential harm to Defendants if an injunction is issued." *Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 950 (E.D. Mo. 2004). The Court must also determine the effect of a preliminary injunction on the public interest. *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 578 (E.D. Ark. 2019).

If granted, preliminary injunctive relief for remedial interventions within ADC's correctional facilities will pose no harm to Defendants, other than potentially increased costs and energy, which are insufficient to justify a denial of Plaintiffs' motion. *See Cameron*, No. 2020 WL 1929876, at *2 (finding the balance of equities weighed in favor of preliminarily injunctive relief requiring certain remedial interventions to protect incarcerated people from COVID-19 where the only cost to defendants would be financial and in the form of extra energy expended to protect the people in defendants' care).

Further, as explained *supra*, Plaintiffs have established a likelihood that they will prevail on the merits of their Eighth Amendment claims, and "it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012) (en banc); *see also Soman*, 424 F. Supp. 3d at 578 ("The public is served by the preservation of constitutional rights.")

The balance of inequities also favors removing the vulnerable subclasses from ADC correctional facilities amid the pandemic, and such a removal is in the public interest. In *Wilson*, the court found that releasing a class of highly vulnerable incarcerated people from their detention

facility was in the public interest. *Wilson*, 2020 WL 1940882, at *9–10. In so doing, the court noted that the "grave danger" defendants argued such a release posed was mitigated by: 1) the fact that many of the class members had release dates anyway, which meant the question was not *if* they would ever be released, but *when*; 2) the elderly age and/or vulnerable medical conditions of the class members made them less of a threat to the public; and 3) the fact that the court was not "dump[ing] inmates out into the streets," but, instead, was ordering that they be removed from a dangerous correctional facility under various supervision options. *Id.*

Similarly, all of the Named Plaintiffs, like most of the members of the subclasses, will one day be released from prison, unless they die while incarcerated. Kent Decl. 2 ¶ 2; Serrato Decl. 2 ¶ 2; Otwell Decl. 2 ¶ 2; Stiggers Decl. 2 ¶ 2; Frazier Decl. 2 ¶ 2; Nickson Decl. 2 ¶ 2; Alvin Decl. 2 ¶ 2; Neeley Decl. 2 ¶ 2; Williams Decl. 2 ¶ 2. For example, Alvin Hamptom will be eligible for parole in June 2020, while Harold Otwell has already been approved to be transferred out of prison into an Arkansas Community Corrections facility. Hampton Decl.2 ¶ 2; Otwell Decl. 2 ¶ 2. If their release in as little as four months does not pose an imminent risk of harm to the public, then release now, amid the pandemic, will similarly not pose a harm sufficient to outweigh the potential harm of them contracting COVID-19 while incarcerated. Also, the High Risk and Disability Subclasses are, by definition, elderly, infirm, and disabled, which makes them less likely to harm the public if released. *Wilson*, 2020 WL 1940882, at *9–10.

In their brief, Defendants frame the relief Plaintiffs seek as an attempt to "micromanage" the Defendants in executing their duties. Resp. at 33. However, the relief sought will actually improve the execution of Defendants' duties, which already includes protecting Plaintiffs and the class members from COVID-19. And, more importantly, "[c]ourts may not allow constitutional

violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U.S. 493, 511 (2011).

The irreparable harm to Plaintiffs in the absence of preliminary injunctive relief, as detailed *supra*, far outweighs any harm to Defendants if preliminary injunctive relief is granted, and therefore the balance of equities and public interest weighs in favor of granting injunctive relief at this time.

V. This Court Should Grant Class-Wide Preliminary Injunctive Relief.

Class-wide preliminary injunctive relief is appropriate here because the violations established by Named Plaintiffs apply uniformly across ADC correctional facilities statewide. Notably, in order to issue class-wide preliminary injunctive relief, the Court does not have to conditionally approve the Named Plaintiffs' class or subclasses, nor does it have to assess the class certification factors. But even if the Court did have to assess the class certification factors, the facts here demonstrate that class certification would likely be granted.

A. Class-Wide and/or Statewide Preliminary Injunctive Relief Does Not Require Class Certification or Consideration of the Merits of Class Allegations.

Named Plaintiffs have made class allegations and are properly seeking class-wide preliminary injunctive relief. Compl. ¶¶ 41-49. The Eighth Circuit notably does not have a rule requiring provisional class certification before the issuance of class-wide preliminary injunctive relief. In fact, multiple courts in the Eighth Circuit have granted plaintiffs' motions for preliminary injunctive class-wide relief without assessing plaintiffs' class allegations. *See, e.g. Barrett v. Claycomb*, 936 F. Supp. 2d 1099 (W.D. Mo. 2013) (class-wide preliminary injunctive relief granted without assessing plaintiffs' class allegations); *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963 (D. Minn. 2016) (same). Defendants' erroneous argument that Named Plaintiffs have to

prove that they are likely to succeed on their request for class certification before seeking class-wide preliminary injunctive relief is, therefore, without merit.

Even if Named Plaintiffs had brought their claims solely as individual plaintiffs, as opposed to putative class representatives, this Court could still issue statewide preliminary injunctive relief. *See Rodgers v. Bryant*, 942 F.3d 451, 457–58 (8th Cir. 2019). In *Rodgers*, two individual plaintiffs were granted a preliminary injunction enjoining the enforcement of Arkansas's anti-loitering law, which criminalized begging in certain circumstances in contravention of the First Amendment. *Id.* at 451. The defendants appealed, arguing, in part, that statewide preliminary injunctive relief was improper and, instead, any such relief should have applied solely to the individual plaintiffs. *Id.* at 457-458. In upholding the preliminary injunction, the Eighth Circuit Court of Appeals found that "injunctive relief should extend statewide because the violation established—the plain unconstitutionality of Arkansas's anti-loitering law—impacts the entire state of Arkansas." *Id.* at 458. Similarly, the violations Named Plaintiffs have established—the plain unlawfulness of Defendants' deliberate indifference to the risk of incarcerated people contracting COVID-19 and failure to accommodate the needs of the state's incarcerated population with disabilities rendering them vulnerable COVID-19 illness—impacts the entire state of Arkansas, which has correctional facilities spread throughout. Accordingly, even if Named Plaintiffs had not made any class allegations in their Complaint, they would still be entitled to the class-wide preliminary injunctive relief sought here.

B. Class Certification Will Likely Be Granted in This Case.

Setting aside the fact that the Court does not have to assess the Named Plaintiffs' class allegations to issue statewide preliminary injunctive relief, class certification will likely be granted

in this case.[24] Courts in similar cases have found that similarly situated plaintiffs have satisfied the Rule 23(a) and Rule 23(b)(2) requirements to obtain class certification.

1. The Named Plaintiffs Are Likely to Meet the Rule 23(a) Requirements.

Defendants raise only a cursory argument in support of their assertion that Named Plaintiffs are unlikely to meet Rule 23(a). With good reason. The precedent is clear that Named Plaintiffs are likely to make the requisite showing of commonality and typicality.

There is longstanding precedent within the Eighth Circuit for finding commonality in cases involving a class, or subclasses, of incarcerated people suffering unconstitutional confinement, including as a result of overcrowding. *See Rentschler v. Carnahan,* 160 F.R.D. 114, 115-16 (E.D. Mo. 1995) (finding common legal and factual questions in a "prison overcrowding case"). Regarding typicality, the Eighth Circuit has previously held that "[t]he fact that individuals may also seek relief on the basis of facts peculiar to their individual cases does not deflect the thrust of [the] lawsuit away from the constitutional questions which will ultimately determine if there is any reason to hear individual claims." *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980).

Recently, in *Savino v. Souza*, No. CV 20-10617-WGY, 2020 WL 1703844 (D. Mass. 2020), a court certified a class and subclasses of immigrant detainees who brought due process and Rehabilitation Act claims arising out of, *inter alia*, a detention centers' lack of hygiene and social distancing amid the COVID-19 pandemic. The court found that "[t]he case law supports a finding of commonality for class claims against dangerous detention conditions, even when some detainees are more at risk than others" *Id.* at *8. Importantly, the court also determined that "the

[24] Plaintiffs are seeking to certify a general class, namely "people who are currently incarcerated, or will be in the future, in an ADC detention facility during the duration of the COVID-19 pandemic," and two subclasses: a high risk subclass consisting of sick, elderly, and otherwise medically vulnerable incarcerated people, and a disability subclass consisting of disabled incarcerated people. Complaint ¶ 41.

admittedly significant variation among the Detainees does not defeat commonality or typicality . . . . To be sure, the harm of a COVID-19 infection will generally be more serious for some petitioners than for others. Yet it cannot be denied that the virus is gravely dangerous to all of us." *Id.* Therefore, the fact that there may be some differences in the circumstances in which the individual class members find themselves does not vitiate their common challenge to Defendants' deliberate indifference to the risk of COVID-19 spreading throughout ADC correctional facilities and related discrimination on the basis of prisoners' disabilities.

Similar to *Savino*, the common questions of law and fact in this case, at bottom, are whether Defendants must modify the conditions of confinement for all Plaintiffs, and whether they must release vulnerable incarcerated people who comprise the two subclasses for whom modified conditions would not provide adequate protection from the substantial risk of serious harm that COVID-19 poses. *See id.* at 7; *see also Fraihat v. U.S. Immigration & Customs Enf't*, No. EDCV191546JGBSHKX, 2020 WL 1932570, at *18 (C.D. Cal. Apr. 20, 2020) ("Plaintiffs present the Court with shared factual and legal issues more than adequate to support a finding of commonality. Stated in general terms, the common question driving this case is whether Defendants' system-wide response—or the lack of one—to COVID-19 violates Plaintiffs' rights.").[25] Further, this case involves High Risk and Disability Subclasses for which the shared factual and legal issues are even more closely aligned than those of the general class certified in

[25] The questions of law and fact that are common to all class members and to the subclass members, also include (a) have Defendants failed to adequately protect the Class from the immediate threat of COVID-19; (b) whether Defendants' actions and/or inactions constitute deliberate indifference to the rights of putative class members; (c) whether members of the High Risk Subclass are entitled to habeas corpus relief; and (d) whether the rights of the Disability Subclass under the Americans with Disabilities Act ("ADA") are being violated by ADC's policies and practices.

Savino. It follows that Named Plaintiffs are likely to be successful in meeting the Rule 23(a) requirements to class certification, including commonality and typicality.

2. The Named Plaintiffs Are Likely to Meet the Rule 23(b)(2) Requirements.

Rule 23(b)(2) permits class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Notably missing from Defendants' argument that Named Plaintiffs will not meet the requirement of Rule 23(b)(2) is the axiom that "'[b]ecause one purpose of Rule 23(b)(2) was to enable plaintiffs to bring lawsuits vindicating civil rights, the rule must be read *liberally* in the context of civil rights suits.'" *Planned Parenthood Arkansas & E. Oklahoma v. Selig*, 313 F.R.D. 81, 90 (E.D. Ark. 2016) (citing *Coley*, 635 F.2d 1364 at 1366) (emphasis added).

Named Plaintiffs are likely to satisfy the liberally construed requirements of Rule 23(b)(2) because: 1) Defendants have acted on grounds generally applicable to the class and subclasses by failing to adequately protect people incarcerated in ADC facilities from COVID-19; and 2) the injunctive and declaratory relief Named Plaintiffs seek may be uniformly applied the class and subclasses. *See Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1039 (8th Cir. 2018) ("Plaintiffs [seeking the certification of a Rule 23(b)(2) class] must demonstrate that 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'") (citing Rule 23(b)(2)); *Selig*, 313 F.R.D at 90-91 ("If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).").

Defendants' failures, as detailed above, uniformly increase the risk of all class and subclass members contracting the lethal COVID-19 virus. For example, contrary to CDC Guidance, *none*

of the putative class and subclass members' housing or shared areas are cleaned by an EPA-registered disinfectant that is effective against the virus that causes COVID-19.[26] Shortcomings such as this, as well as those detailed above, pose a threat to all people incarcerated in ADC uniformly, which supports a finding that Named Plaintiffs have met the requirements of Rule 23(b)(2). *See Coley*, 635 F.2d at 1378 (finding a class action could be maintained under Rule 23(b)(2) where there is a common question related to the incarcerated class members' conditions of confinement); *Rentschler*, 160 F.R.D. at 117 (finding the requirements of Rule 23(b)(2) met where "Plaintiffs allege that defendants have created unconstitutional policies and conditions at PCC which affect all inmates, and so defendants have acted or refused to act on grounds generally applicable to the class.") (internal quotation marks omitted); *Brown v. Precythe*, No. 2:17-CV-04082-NKL, 2018 WL 3118185, at *8 (W.D. Mo. 2018) (finding the requirements of Rule 23(b)(2) met where "Plaintiffs allege that Defendants, applying policies and procedures uniformly across the class, acted or refused to act on grounds that apply generally to the class.") (internal quotation marks omitted).

In *Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882 (N.D. Ohio 2020), another prison COVID-19 case, a court recently found that the plaintiffs had satisfied the requirements of Rule 23(b)(2), in part, because "Respondents' failure to protect the inmates from the spreading virus applies to the entirety of the subclass generally." 2020 WL 1940882, at *8. This is precisely what Named Plaintiffs are arguing here. Hence Plaintiffs are likely to succeed in demonstrating that their claims turn on a single question that uniformly applies to each class.

[26] Instead, these facilities are cleaned, sparsely, with Razor Chemical Company's Citrus Breeze III (Dkt. 36, 7), which is not an EPA-registered disinfectant that is effective against the virus that causes COVID-19. Search Results for Citrus Breeze on EPA List of Disinfectants for Use Against SARS-CoV-2, Ex. 40.

Furthermore, Named Plaintiffs seek relief that may be uniformly applied to the Class and Subclasses. That is clearly true with respect to Plaintiffs' request for a declaratory judgment that their conditions of confinement amid the COVID-19 pandemic are unconstitutional. *Coley*, 635 F.2d at 1378 ("relief sought . . . includes a declaration that certain . . . conditions of confinement are unconstitutional. Therefore, a class action may be maintained under Fed.R.Civ.P. 23(b)(2), which is an especially appropriate vehicle for civil rights actions seeking such declaratory relief for prison . . . reform.").

In addition, Named Plaintiffs are likely to be successful in meeting these requirements because the injunctive relief Named Plaintiffs' seek would provide relief to the class as a whole (e.g., increased access to effective disinfectants, social distancing to the extent possible, and vigilant screening for—and treatment of—COVID-19). *See Brown*, 2018 WL 3118185, at *8 ("[Incarcerated] Plaintiffs seek final injunctive relief or corresponding declaratory relief . . . respecting the class as a whole. Because a single injunction or declaratory judgment would provide relief to each member of the class, Rule 23(b)(2) is satisfied.") (internal citation and quotation marks omitted); *Rentschler*, 160 F.R.D. at 117 ("The putative class seeks declaratory and injunctive relief based on the asserted inadequacies of Defendants' COVID-19 protocols and response . . . . Injunctive relief addressing overcrowding issues is appropriate with respect to the class as a whole."); *Savino*, 2020 WL at *8 ("The Court concludes that a uniform remedy would be possible in this case, whether in the form of declaratory relief or (depending on the proper reading of 8 U.S.C. § 1252(f)…) an injunction ordering the government to reduce crowding of Detainees."). It follows that the general class is likely to satisfy the requirements of Rule 23(b)(2).

Plaintiffs' putative subclasses are also likely to satisfy the requirements of Rule 23(b)(2), because here too, Defendants have acted on grounds generally applicable to the subclass (denying

them release despite their high vulnerability to COVID-19), and Plaintiffs seek a release mechanism that may be uniformly applied across the subclasses. In their brief, Defendants erroneously argue that it would be "virtually impossible" for the subclasses to satisfy the Rule 23(b)(2) requirements because they seek the release of people with varying health conditions and security risks. However, in *Wilson*, the court did just this, finding a subclass of medically vulnerable incarcerated people seeking release were likely to meet the requirements of Rule 23(b)(2) where the petitioners argued that the respondents acted on ground generally applicable to the class members and the respondents failure to protect incarcerated people "from the spreading [COVID-19] virus applies to the entirety of the subclass generally . . . ." *Wilson*, 2020 WL 1940882, at *8. The *Wilson* court order the defendants to compile a list of putative subclass members, review their eligibility to be released, and transfer the putative subclass members who were ineligible for release to a facility where appropriate measures to protect them from COVID-19 could be accomplished. *Id.* at *11. Similar relief may be granted here. For these reasons, the subclasses in this matter are likely to meet the requirements of Rule 23(b)(2).

VI. Plaintiffs' Proposed Preliminary Injunction

As detailed above and in Plaintiffs' prior submissions, Cummins Unit is already in crisis, and other ADC correctional facilities are likely to follow soon if there is no immediate intervention. Given the rapid spread of COVID-19, a single infection within a crowded, congregate facility can lead to a massive viral outbreak in a few days. And the overwhelming evidence presented by Plaintiffs leaves no assurance that Defendants, left to their own devices, will take appropriate action to prevent such crises from developing. To the contrary, it is only a matter of time when we should expect viral outbreaks in other ADC correctional facilities to overwhelm Defendants and Arkansas' limited health care resources.

Plaintiffs, therefore, respectfully request that the Court appoint the following:

1. A special master or an expert under Federal Rule of Evidence 706 to make recommendations to the Court regarding the number of incarcerated people that each Arkansas Department of Corrections facility can house while following the Centers for Disease and Control and Prevention's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities on best practices to prevent the spread of COVID-19;

2. A special master or an expert under Federal Rules of Evidence 706 to make recommendations to the Court regarding a comprehensive plan to ensure adequate spacing of six feet or more between incarcerated people, to the maximum extent possible, so that social distancing can be accomplished (this plan shall include an account of current and projected numbers of incarcerated people in shared spaces at any given time);

3. A special master or an expert under Federal Rule of Evidence 706 to make recommendations to the Court regarding the people in the custody of the Arkansas Department of Corrections (a) who are older than 50 years old; (b) who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19; and/or (c) who are at increased risk of contracting, becoming severely ill from, and/or dying from COVID-19 due to their disability or any medical treatment necessary to treat their disability, and who should be released from their facility or transferred to home confinement due to their age, serious underlying medical condition(s), and/or disability; and

4. A special master or an expert under Federal Rule of Evidence 706 to make recommendations to the Court regarding a safe and secure method of releasing or

transferring to home confinement people in the custody of the Arkansas Department of Corrections in a manner that properly considers the safety, security, and public health of the people incarcerated in the Arkansas Department of Corrections facility and the people residing in the neighboring communities.

Plaintiffs further request that the Court order Defendants to comply with the following preliminary injunctive relief to maintain the status quo of Plaintiffs not being unnecessarily exposed to, and suffering from, the potentially lethal virus, COVID-19:

1. Ensure that each incarcerated individual receives a free and adequate personal supply of: hand soap sufficient to permit frequent hand washing, paper towels, facial tissues, cleaning implements such as sponges or brushes, and EPA-registered disinfectants that are effective against COVID-19 infection, without costs;
2. Ensure that all individuals have access to hand sanitizer containing at least 60% alcohol or, to the extent such hand sanitizer is not permitted, the best alternative, consistent with the Centers for Disease and Control and Prevention's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities;
3. Provide daily access to showers and clean laundry, including clean towels after each shower;
4. Disinfect frequently touched surfaces, including but not limited to doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, and telephones, at least three times a day with EPA-registered disinfectants that are effective against the virus that causes COVID-19, as appropriate for the surface;

5. Thoroughly clean and disinfect all areas where people who have tested positive for COVID-19, or have been suspected of having COVID-19, spent time (e.g., cells, bathrooms, and common areas) with EPA-registered disinfectants that are effective against the virus that causes COVID-19, as appropriate for the surface;

6. Require that all Arkansas Department of Corrections staff wear personal protective equipment consistent with the Centers for Disease and Control and Prevention's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, including masks and gloves, when interacting with visitors and incarcerated individuals or when touching surfaces in common areas;

7. Train all Arkansas Department of Corrections staff and people incarcerated in Arkansas Department of Corrections facilities on how to properly don, doff, and dispose of personal protective equipment;

8. Post signage through Arkansas Department of Corrections facilities communicating the following:

    (a) *For all:* the symptoms of COVID-19 and hand hygiene instructions;

    (b) *For incarcerated/detained persons:* how to report symptoms to staff;

    (c) *For staff:* to stay at home when sick; if symptoms develop while on duty, leave the facility as soon as possible and follow CDC-recommended steps for persons who are ill with COVID-19 symptoms, including self-isolating at home, contacting their healthcare provider as soon as possible to determine whether they

need to be evaluated and tested, and contacting their supervisor; and

(d) Ensure that signage is understandable for non-English speaking persons and those with low literacy, and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or low-vision;

9. Provide an anonymous mechanism for incarcerated individuals to report staff who violate these guidelines so that appropriate corrective action may be taken;

10. Take each incarcerated person's temperature daily (with a properly disinfected and accurate thermometer) to identify potential COVID-19 infections;

11. Assess each incarcerated individual daily through questioning to identify potential COVID-19 infections;

12. Conduct immediate testing for anyone displaying known symptoms of COVID-19;

13. Immediately provide clean masks for all individuals who display or report potential COVID-19 symptoms until they can be evaluated by a qualified medical professional or placed in a non-punitive quarantine and ensure the masks are properly laundered with replacements as necessary;

14. Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 are properly quarantined in a non-punitive setting, with continued access to showers, recreation, mental health services, reading materials, commissary, phone and video visitation with loved ones, communication with counsel, and personal property;

15. Assure incarcerated people are told that they will not be retaliated against for reporting COVID-19 symptoms;

16. Respond to all emergency (as defined by the medical community) requests for medical attention within an hour;

17. Provide timely and appropriate medical care for any illness associated with COVID-19;

18. Provide frequent communications to all incarcerated individuals regarding COVID-19, measures taken to reduce the risk of infection, best practices for incarcerated people to avoid infection, and any changes in policies and practices;

19. Prohibit Arkansas Department of Corrections employees from entering Arkansas Department of Corrections facilities if they test positive for COVID-19 and/or exhibit symptoms of having contracted COVID-19;

20. Identify all individuals in the custody of the Arkansas Department of Corrections who are older than 50 years old and/or who have serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19, including but not limited to people with respiratory conditions such as chronic lung disease or asthma; people with heart disease or other heart conditions; people who are immunocompromised as a result of cancer, HIV/AIDS, or any other reason; people with chronic liver or kidney disease, or rectal failure (including hepatitis and dialysis patients); people with diabetes, epilepsy, hypertension, blood disorders (including sickle cell disease), or an inherited metabolic disorder; people who have had or are at risk of stroke; and people with any condition specifically identified by CDC, currently or in the future, as increasing their risk

of contracting, having severe illness, and/or dying from COVID-19;

21. Identify all individuals in the custody of the Arkansas Department of Corrections who suffer from a disability that substantially limits one or more of their major life activities and who are at increased risk of contracting, becoming severely ill from, and/or dying from COVID-19 due to their disability or any medical treatment necessary to treat their disability;

22. Permit any Court-appointed special master or expert to freely access and inspect any Arkansas Department of Correction facility without notice;

23. Permit any Court-appointed special master or expert to freely contact, call, visit, and/or interview any person in the custody of the Arkansas Department of Correction facility within 24-hour notice;

24. Permit any Court-appointed special master or expert to freely access and inspect the medical records of any person in the custody of the Arkansas Department of Correction facility on the condition that the person authorizes such access and inspection;

25. Implement any plan recommended by any Court-appointed special master or expert, and approved by the court, to ensure adequate spacing of six feet or more between incarcerated people, to the maximum extent possible, so that social distancing can be accomplished (this plan shall include an account of current and projected numbers of incarcerated people in shared spaces at any given time); and

26. Release or transfer to home confinement any person currently in the custody of the Arkansas Department of Corrections pursuant to any recommendation by any Court-appointed special master or expert that has been approved by the Court.

Dated: May 4, 2020

Respectfully submitted,

By: /s/ Omavi Shukur

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CERTIFICATE OF SERVICE

I certify that on May 4, 2020, I filed the foregoing Plaintiffs' Reply Memorandum in Support of Emergency Motion for Temporary Restraining Order and Preliminary Injunction electronically via the Court's CM/ECF system, which will send a copy to all counsel of record.

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