No. 20-1469

In the United States Court of Appeals for the Sixth Circuit

JAMAAL CAMERON, RICHARD BRIGGS, RAJ LEE, MICHAEL CAMERON, and MATTHEW SAUNDERS,
Plaintiffs-Appellees,
v.
MICHAEL BOUCHARD, CURTIS G. CHILDS, and OAKLAND COUNTY, MICHIGAN,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Michigan,
Case No. 2:20-cv-10949 (The Honorable Linda V. Parker)

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL

Daniel S. Korobkin
Philip Edwin Mayor
ACLU FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, MI 48201

Alexandria Twinem
CIVIL RIGHTS CORPS
1600 Connecticut Avenue, NW
Washington, DC 20009

Krithika Santhanam
Thomas B. Harvey
ADVANCEMENT PROJECT
1220 L Street, NW, Suite 850
Washington, DC 20005

Deepak Gupta
Daniel Wilf-Townsend
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036

Jennifer Dale Bennett
Neil K. Sawhney
GUPTA WESSLER PLLC
100 Pine Street, Suite 1250
San Francisco, CA 94111

Counsel for Plaintiffs-Appellees
(additional counsel listed on signature page)

May 23, 2020

TABLE OF CONTENTS

INTRODUCTION

There are few places more vulnerable to a pandemic than jail. In the Oakland County Jail, there are cells in which ten or more inmates share a space the size of a large bathroom. There are holding tanks and bunk rooms that can house more than thirty people. Social distancing in this environment is impossible. But the least the Jail could do is attempt to minimize the risk. Yet, the Oakland County Jail refused to do even that. It failed to provide sufficient soap or cleaning supplies. It failed to properly quarantine the sick. Its staff failed to wear masks. Worse, the Jail has used the pandemic as punishment, threatening to transfer—and in some cases, actually transferring—inmates who dared to raise safety concerns from units that did not yet have a COVID-19 outbreak to those that did.

After this lawsuit was filed, the district court moved quickly but cautiously. It ordered an inspection. It heard days of live testimony from lay and expert witnesses by video conference. It read dozens of declarations to ascertain the situation on the ground. And it made detailed findings before entering a narrowly-tailored preliminary injunction, concluding that the Jail has "crafted no plan" to protect the vulnerable and that "the overall record reflects a willingness to continue housing" prisoners "in a manner that increases their risk of infection."

To hear the Jail tell it, the district court's preliminary injunction is a broad decree, "provid[ing] authority for the release of all 'medically vulnerable' state court

inmates," and "setting forth a universal mandate nonspecific to prison systems (regardless of state or federal)" that "is the equivalent of granting Plaintiffs' habeas petition." Mot. 2, 12–13. But this characterization bears no relationship to the actual order that the court issued. *See* PI Order, ECF 94. The court's order releases no prisoners. It grants no habeas relief to anybody. And it certainly does not "mandate" the "release of all 'medically vulnerable' state court inmates."

The district court's preliminary injunction does two things. *First*, it requires the Jail to take basic steps to reduce the risk of disease transmission—such as providing soap, cleaning frequently-used surfaces, and quarantining those with COVID-19. *Second*, it requires the Jail to provide the court with a list of medically-vulnerable inmates, which can then be used, in cooperation with the parties, "to enable the Court to implement a system for *considering* [their] release on bond *or other alternatives*." PI Order at 6 (emphasis added).

These are not drastic measures. And there is no reason this Court needs to take the drastic step of staying them pending appeal. The first aspect of the court's order rests on detailed factual findings and credibility determinations regarding deliberate indifference that the Jail barely attempts to assail. Indeed, the Jail never identifies *any* legal error in the court's Eighth Amendment or Fourteenth Amendment analysis. And review of the second aspect of the order—at which the Jail directs most of its fire—is premature. This Court "has consistently rejected

attempts to obtain review of orders" that constitute only intermediate steps toward potential relief, such as those "requiring the submission of remedial plans." *Groseclose v. Dutton*, 788 F.2d 356, 359 (6th Cir. 1986).

Most critically, the Jail has not identified *any* irreparable harm that it might suffer by implementing these measures—reason alone to deny the requested stay. The Jail's entire argument on harm consists of a broad appeal to federalism and a conclusory assertion of administrative burden. These generalized assertions—assertions that could apply to literally any injunction against any jail—fall far short of identifying, let alone substantiating, any actual irreparable injury. After all, the basic hygiene and safety precautions are measures the Jail claims to have already implemented. And it's difficult to imagine that any harm will befall the Jail merely from having to provide the court with a list of medically-vulnerable inmates—a list it has already provided, at least in part, in camera.

On the other side of the scale, a delay of even a few days in implementing these measures could very well cost the lives of those living and working in the Jail—and endanger the neighboring community—as COVID-19 is allowed to spread within and beyond the walls of the Jail. The district court's injunction is essential to safeguarding the lives of those within and surrounding the Oakland County Jail. This Court should not stay it.

FACTUAL AND PROCEDURAL BACKGROUND

After a three-day evidentiary hearing by videoconference, during which both sides presented live testimony and significant documentary evidence, the district court found that the record demonstrated that Oakland County Jail acted with deliberate indifference by failing to mitigate—and in some instances, actually exacerbating—the severe threat that COVID-19 poses to people detained there. To remedy the constitutional violation, the district court issued a narrowly-drawn preliminary injunction requiring that the Jail adopt basic policies to safeguard inmate safety and hygiene and institute protocols to provide testing and medical attention to those who may have been exposed to the virus.

The Jail's stay request simply ignores the district court's careful examination of the record, instead cherry-picking evidence—primarily testimony from its own two witnesses—that it believes is most favorable to its side. Mot. 4–8. But the Jail never once refutes the district court's detailed factual findings. *See* PI Op. 5–28, ECF 93·

I. The district court found that the Jail disregarded—and continues to disregard—the substantial risks presented by COVID-19.

A. Based on the testimony and expert evidence, the district court found that the Jail failed to take adequate measures to prevent the spread of COVID-19 despite its awareness of the severe risks to the class members.

The district court made extensive findings, rooted in the record, that the Jail failed to take known preventative measures (and actively took dangerous actions) relating to the spread of COVID-19 in the Jail. "[T]he overall record," the district court summarized, "reflects a willingness to continue housing Jail Class members in a manner that increases their risk of infection." PI Op. 53.

As we are all too painfully aware, COVID-19 "is a highly infectious respiratory illness that easily spreads from person to person." PI Op. 10. Michigan has become an "epicenter" of the pandemic, with more than 50,000 confirmed cases and over 5,000 deaths. PI Op. 10. And Oakland County has been hit especially hard—nearly 10,000 confirmed cases and 1,000 COVID-19-related deaths.[1] The CDC has recognized that jail and prison environments "present[] unique challenges for control of COVID-19 transmission among incarcerated/detained persons" and "heighten[] the potential for COVID-19 to spread once introduced."[2]

Yet the district court found that Oakland County Jail "ha[s] crafted no...plan" for providing special protections to medically vulnerable detainees" and "house[s] inmates throughout the Jail without regard to their medical vulnerabilities." PI Op. 58 n.44; Tr. Vol. 3A at 16–24, ECF 61. This is so even though the Jail is aware of the "greater risk of severe illness or death for certain persons," such as those with lung

[1] *See* State of Michigan, *Coronavirus*, https://www.michigan.gov/coronavirus.
[2] CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (March 23, 2020), https://perma.cc/MG2F-EEMZ.

disease, asthma, chronic liver or kidney disease, diabetes, hypertension, and other medical conditions. PI Op. 10–12. In fact, the plaintiffs' expert witness explained that "medically-vulnerable individuals are probably at double or triple the risk of experiencing severe COVID-19 outcomes as compared to the general population," and incarcerated people "are more likely than members of the general public to have the chronic underlying health problems that cause greater risk of infection." PI Op. 12, 15. As a result, highly vulnerable people like Antione Hustons, who suffers from myeloma cancer and kidney failure, are housed in crowded cells with people who are coughing and sniffling without being monitored by medical staff. PI Op. 22 & n.32.

Worse yet, the Jail has actively transferred people, including medically vulnerable people like named plaintiff Jamaal Cameron, from the East Annex (where, at the time, there was no outbreak) into the main jail building (where there was an outbreak). It has done so for reasons including, but not limited to, retaliation against incarcerated people who raised safety concerns. PI Op. 37 ("[C]orrections officers have threatened—and in [Plaintiff] Lee's case, carried out the threat—to transfer inmates who dare to complain to areas infested with a deadly and highly contagious virus"); *id.* at 56; Tr. Vol. 1 at 24, 27–29, ECF 56; ECF 5-3 ¶¶ 8–10; ECF 5-4 ¶ 8 (threats of transfer); ECF 5-5 ¶¶ 9–17; ECF 31-2 ¶ 7. Further, transfers occurred into a particularly crowded and dirty cell that directly adjoins a cell where

quarantined people were held. PI Op. 24, 37; Tr. Vol. 1 at 34–35; ECF 5-5 ¶21; ECF 55 ¶¶ 3–7. Even after this litigation began, the Jail continued to use transfers and threats of transfers as punishment. *See, e.g.*, ECF 31-2 ¶ 4; ECF 31-3 ¶ 8. The day before the plaintiffs' expert inspected the facility, the Jail removed a sign that warned inmates "that they would be sent to the Main Jail" as punishment for failing to perform cleaning tasks, and replaced it with signs about COVID-19. PI Op. 22–23. Yet the very next day someone who did not sweep the floor when instructed by a deputy was transferred as punishment. ECF 31-2 ¶ 7.

In addition to deliberately moving people to areas where they are exposed to COVID-19, the district court found that the Jail does not have adequate procedures in place for quarantining and locating people. PI Op. 24 (describing numerous "mov[ements] from cell to cell without consideration of who is symptomatic and who is not"). It noted that even after the evidentiary hearing in which the Jail's witnesses claimed to have established quarantining procedures, class member Richard Watkins was transferred from a one-man cell to a crowded cell with seven other people without first receiving COVID test results. When his results were later determined to be positive (after Mr. Watkins was initially told they were negative due to an unspecified "human error"), the crowded cell where he had been held was not quarantined even though other areas where he had been were. PI Op. 55–56.

In addition, "Jail medical staff are not responding appropriately to inmates who report symptoms of COVID-19." PI Op. 25. For example, one class member with coronavirus-like symptoms and his cellmates were prescribed Tamiflu; Plaintiff Briggs (who later *was* diagnosed with COVID-19) was initially denied a test or treatment and was told by a nurse he couldn't possibly be suffering from shortness of breath because he was speaking to the nurse. *Id.*

The court made further factual findings about the impossibility of sufficient social distancing at the Jail and the Jail's failure to even allow social distancing to the maximum extent possible at its current population. Because COVID-19 spreads through respiratory droplets when an infected person coughs, sneezes, or sprays saliva, public health experts (including the CDC) have made clear that the primary means of preventing the virus's spread is to "[s]tay at least 6 feet (about 2 arms' length) from other people," to not "gather in large groups," and to "[s]tay out of crowded places." *Social Distancing*, CDC (May 6, 2020), https://perma.cc/49Z7-9TUK; *see* PI Op. 12–14. The "single most important strategy" for preventing the spread of the virus in jails and prisons, the CDC has explained, is "social distancing"—it is the "cornerstone of reducing transmission." PI Op. 15; CDC, *Interim Guidance*, at 4.

But, as the district court found, social distancing is currently impossible at the Jail. Pretrial detainees and convicted individuals are housed in a number of different

types of units, ranging from two-person cells to "holding tanks" housing up to 37 people. PI Op. 7–8. Many individuals are housed in ten-person cells that are approximately 12 by 15 feet. PI Op. 8. The Jail's Health Services Administrator, who is partially charged with creating the Jail's COVID-19 response, testified that social distancing is "impossible" in these ten-man cells. Tr. Vol. 2 at 94, ECF 60. In some cells, inmates sleep a foot apart or less. PI Op. 9. In other areas, like in the holding tanks, there are no bunks at all—meaning that inmates "have to sleep side-by-side in the middle of the floor," PI Op. 9, sleeping close enough to "essentially . . . cuddle" each other, ECF 31-2 ¶ 9. Some bunks adjoin toilets, which have no lids, and thus can disperse fecal matter when flushed. PI Op. 9 (citing Paredes Report, ECF No. 42, at 1373.) "In some cells, the telephone is so close to the toilet or sink that an inmate using the phone may get splashed when the toilet is flushed or the sink is used." PI Op. 9. Inmates also can reach through the bars into other cells, and often pass materials, such as food and hygiene items, from one cell to the next. PI Op. 9.

As the district court noted, the Jail has exacerbated the crowding problem by continuing to keep many of its cells at maximum or near-maximum capacity despite the drop in the Jail's overall population and the fact that "many of the Jail's housing cells remain empty." PI Op. 54 (citing Defs.' Hr'g Ex. C, ECF No. 68); *see also* Tr. Vol. 2 at 58–59; Tr. Vol. 3A at 23-24. And the court found that, despite having legal authority to facilitate a population reduction at the Jail and recognizing the risk to

inmates (especially the medically vulnerable), the Jail did not "expend[] even a basic level of effort" on release efforts. PI Op. 59–60.

The district court also credited ample evidence that class members share dirty bathroom facilities, lack adequate soap and cleaning supplies, and must share bathrooms and supplies that are not disinfected before being passed from cell to cell between each use—conditions that all contribute to the spread of COVID-19. PI Op. 53–54; *id.* at 23–24 (describing declarations and testimony); Tr. Vol. 1 at 20–21, 32–34 (describing unclean bathroom in both jail buildings and insufficient supply of cleaning equipment and soap); ECF 5-3 ¶¶ 17, 19; ECF 5-4 ¶¶ 5–6; ECF 5-5 ¶ 19; ECF 5-6 ¶ 4; ECF 5-7 ¶ 15; ECF 5-8 ¶ 11; ECF 5-9 ¶¶ 4, 11. The district court further found that these unhygienic conditions have persisted even after the court's issuance of a TRO. PI Op. 54; *see id.* at 23–24; *see, e.g.*, Tr. Vol. 1 at 36–38 (no improvement in hygiene until the jail inspection ordered by the district court); Tr. Vol. 3A at 134–35 (contradicting Defendants' testimony that cleaning supplies are now available on demand); ECF 46 ¶¶ 4–6 (dirty cell; watered down cleaning supplies; no personal protective equipment; insufficient soap); ECF 48 ¶ 5 (insufficient cleaning supplies and soap; shared brooms not disinfected when passed between cells; washcloths replaced less than monthly); ECF 49 ¶¶ 8–10 (similar); ECF 50 ¶ 7 (allowed to clean cell only once every 5 days); ECF 51 ¶¶ 6, 11 (four days without soap; grossly insufficient tooth paste and deodorant; filthy showers). These practices directly conflict with the

CDC's guidelines that jails "provid[e] personal protective equipment, conduct[] stringent cleaning, [and] provid[e] access to personal hygiene products." PI Op. 15 (citing *Interim Guidance*).

Each day, approximately 170 jail staff and contractors enter the Jail. PI Op. 9. The district court not only found that these jail staff fail to wear masks, an obvious hygiene failure and violation of the TRO in this case, but also credited evidence that many staff put on masks just during the court-ordered jail inspection and then immediately reverted to not using them, evincing a knowing pattern and practice of defying hygiene norms and a complete failure by the Jail to enforce appropriate measures. PI Op. 24, 54; *see also* ECF 31-2 ¶ 6; ECF 31-3 ¶ 11; ECF 31-4 ¶ 7. Similarly, the district court credited evidence that the Jail did not post signs around the Jail about the dangers of COVID-19 until just before the Jail inspection that resulted from this lawsuit. PI Op. 22. The district court noted that Captain Childs' contrary testimony that signs were posted earlier was deceptively based on an old video of a staff area of the Jail—not a housing area. PI Op. 17 n.25; *see also* ECF 46 ¶ 9; ECF 48 ¶ 10; ECF 49 ¶ 12.

The district court also credited the extensive evidence that a COVID-19 outbreak occurred in the kitchen area of the main jail, PI Op. 24; Tr. Vol. 1 at 23, and that rather than taking immediate action, inmates who worked in the kitchen and fell ill were forced to continue serving food to other inmates. PI Op. at 26. "For

example, around the end of March 2020, Inmate Jason Arsineau [a paramedic in his regular life], was experiencing COVID-19 symptoms and was feeling sick, so he informed a Jail deputy that he should not be serving food. The deputy called Mr. Arsineau a 'motherf---er' and told Mr. Arsineau: 'you do what I tell you to do, and you are going to serve food.' Mr. Arsineau continued to serve food for four days until he was unable to get out of bed, leading a deputy to physically assault him." PI Op. 26 n.34 (citing ECF 5-9).

B. The district court determined that the plaintiffs' testimony was more credible than that of the Jail's witnesses.

The district court credited the plaintiffs' testimony over that of the defendants' witnesses based on a number of factors. First, the court credited the live testimony of named plaintiff Jamaal Cameron as well as the plaintiffs' declarations from eighteen individuals who were then detained at (or had recently been released from) the jail. As the court noted, these declarants "detail events and interactions with specifically identified Jail staff members." PI Op. 52. The Jail, by contrast, failed to rebut the inmates' accounts and provided no "testimony from any of the identified or named staff members" either in their live testimony or in the form of declarations. PI Op. 52. The court thus credited the plaintiffs' detailed, mutually-corroborating testimony even after "tak[ing] into consideration that some of the declarants may have . . . convictions which could be considered when assessing their credibility under the Federal Rules of Evidence." *Id.*

Second, the district court largely discounted the testimony of the Jail's live witnesses because neither had direct knowledge about conditions in the Oakland County Jail. Although both defense witnesses—Captain Curtis Childs and the Jail's Health Services Administrator, Vicky Lynn Warren—purported to testify to then-current conditions at the Jail, the court found it significant that Captain Childs had not been in any area where detainees are kept for "a couple of weeks" before he testified and Warren "very seldom" enters the occupied portions of the Jail at all. PI Op. 17. The court therefore concluded that "Nurse Warren and Captain Childs have painted a picture of those areas which is not based on their own knowledge and may not even be based on reality." *Id.* at 53. The court reasonably credited the "dramatically different picture of what is occurring at the Jail" as described by Mr. Cameron and plaintiffs' declarations, witnesses who were actually present in the Jail, over the Jail's witnesses, who were not. *Id.* at 22.

Both defense witnesses also made unreasonable statements that called into question their credibility and judgment, statements that the district court either explicitly or implicitly rejected in its decision. For example, the court discounted Captain Childs's testimony that social distancing is possible at the jail because inmates could "remain in the same positions on opposite corners of the cells for the 23 hours a day they must remain there." PI Op. 54. The court described this testimony, provided under oath in open court, as "disingenuous at best." *Id.* The

court also implicitly concluded that there was reason to doubt Warren's testimony. As the court recognized, well-respected medical professionals have concluded that "asymptomatic individuals can transmit the [coronavirus] to others." *Id.* at 13 & n.18. Yet Warren testified that, based on "conflicting information" she'd seen "on the television" and "on the Internet," she did not believe that asymptomatic individuals could transmit COVID-19. Tr. Vol. 2 at 94–96.[3]

Finally, the district court credited the Plaintiffs' expert, Dr. Adam Lauring, who testified extensively during the three-day hearing as to the unreasonable risk of COVID spread created by the Jail's inaction. Tr. Vol. 1 at 73-104. And the court found it "noteworthy" that "Defendants presented no expert testimony on the adequacy of their COVID-related policies or their implementation of those policies." PI Op. 53. In contrast, the plaintiffs provided numerous declarations about the inadequacy of the Jail's response to the threat of COVID-19. *See id.* at 11 (crediting opinions of Plaintiffs' experts).[4]

[3] Warren went on to testify that she could not remember what medical guidance she received from her own employer about the possibility of asymptomatic transmission. Tr. Vol. 2 at 96.

[4] The Jail's failure to provide expert testimony was particularly egregious in light of the parties' agreement, which the Court approved during a status conference, that the Jail could also have an expert inspect the jail and submit a report.

C. The district court found that the class members had no available administrative or state-court remedies, and that the Jail has retaliated against individuals who have filed grievances.

The district court found that there is no available state remedy—either by court rule or state statute— upon which class members can rely to seek the specific relief of removal from the Jail during the pendency of the coronavirus pandemic. PI Op. 32–33. Of the four state court release decisions introduced by the Jail, the district court noted that two are devoid of any legal authority or statutory basis for justifying release from the Jail due to the coronavirus. PI Op. 32. The remaining two decisions rely on Michigan's County Jail Overcrowding Act, Statute MCL 801.59b—which does not provide a remedy that class members can pursue and only grants judicial officers the authority to suspend or reduce a jail sentence or modify bond in the narrow context of "'a county jail overcrowding state of emergency.'" PI Op. 32. The PI Op. 32. The district court found that this statute does not provide a "standard review process" for requests for relief by post-conviction class members. PI Op. 32. Similarly, the district court found pre-trial class members have no meaningful available state-court remedies. PI Op. 33 (discussing Mich. Ct. R. 6.106(H)). And the court explained that the unprecedented nature of this pandemic only further rendered any state corrective process unavailable to class members. PI Op. 33. Indeed, the court could "conceive of few more unusual or exceptional circumstances than the current pandemic." PI Op. 34.

Additionally, the district court found that the plaintiffs have no available administrative remedies to pursue because the "Jail's grievance procedures do not...provide an avenue for medically-vulnerable inmates to seek release on the basis of the serious and deadly risk COVID-19 poses." PI Op. 37. Further, the plaintiffs' "affirmative efforts" to nevertheless try to exhaust administrative grievances were "thwarted by machination and intimidation." PI Op. 36. Corrections officers at the Jail have repeatedly "threatened—and in [Plaintiff] Lee's case, carried out the threat—to transfer inmates who dare to complain to areas infested with a deadly and highly contagious virus." PI Op. 37. After raising coronavirus-related health concerns, Mr. Cameron was similarly retaliated against by being moved to the holding tank. ECF 5-3 at ¶ 9.

The district court found that his testimony, along with the plaintiffs' declarations, confirmed that the Jail's officers threatened inmates for raising health concerns, denied inmates grievance forms, and retaliated against inmates for filing grievances. Tr. Vol 1. at 56–57, 62–63 (Plaintiff Jamaal Cameron was refused a grievance form and also witnessed a cellmate be denied a grievance form); ECF 5-3 at ¶ 26 (similar); ECF 5-4 at ¶ 8 (Plaintiff Briggs "asked the guard to give me a grievance form to complain about the lack of sufficient medical care, and the guard refused and asked me if I wanted to be sent down to 'the [holding] Tank"); ECF 5-6 at ¶ 15 (Plaintiff Michael Cameron was "aware that people around me have been

retaliated against for turning in a grievance form. I have seen guards retaliate by putting inmates in the hole, placing them on bunk restriction, or taking away inmates' phone privileges"); ECF 5-7 ¶ 22 ("When I asked a guard for a form, he wanted to know why I was filing a grievance. I told him that it was to protest the jail ignoring my COVID-19 related hygiene and medical needs. He then refused to give me a form to file a grievance.").

D. The district court issued a narrowly-drawn preliminary injunction requiring the Jail to provide class members with basic hygiene products, undertake social-distancing efforts, and ensure proper testing and medical treatment.

Based on its factual findings and determination that the Jail had acted with deliberate indifference, the district court entered a modest preliminary injunction that largely required the Jail to actually fulfill policies it purported to have already implemented and to follow basic hygiene and sanitation recommendations made by the CDC. *See* PI Order.

For instance, the court's first several provisions include a requirement to provide each person "on a bi-weekly basis, two bars of individual hand soap and a hand towel" and provide daily access to cleaning supplies and a daily supply of disinfectant. PI Order 3. The Jail claims that its policies already required these exact actions. *See* PI Op. 18; *see also* CDC, *Interim Guidance*, at 7 (requiring same); Mike Martindale, *Judge issues restraining order against Oakland County Jail in COVID-19 suit*, Detroit News (Apr. 17, 2020), https://bit.ly/2XqSDW0 (including statement from

defendants that "everything the judge issued we have already done and been doing well prior to the lawsuit"). Likewise, the injunction requires "access to clean showers and clean laundry," the provision of masks to staff and inmates, testing inmates for COVID-19, implementing social distancing "to the maximum extent possible," and ensuring that individuals who test positive for COVID-19 "receive adequate medical care," PI Order 4–5, all of which the Jail says it already does under its existing protocols, PI Op. 18–19. *See* CDC, *Interim Guidance*, at 7, 11.

Other measures the district court implemented include requiring surfaces shared by inmates to be cleaned regularly, establishing a protocol to monitor the (untrained) inmates charged with cleaning to ensure that the cleaning is effective to prevent the spread of the virus, requiring jail staff wash their hands regularly or use hand sanitizer, and training staff on measures to reduce the spread of COVID-19. PI Op. 4-5. The district court tailored these terms to the guidance the CDC issued for those overseeing jails and other detention facilities, which requires "rigorous hygiene—including regular and thorough hand washing with soap and water, the use of alcohol-based hand sanitizer, proper sneeze and cough etiquette, and frequent cleaning of all surfaces," as well as "establishing protocols for detecting and treating individuals exhibiting COVID-19 symptoms and testing positive for the virus, providing personal protective equipment, conducting stringent cleaning, providing

access to personal hygiene products, restricting transfers to those that are 'absolutely necessary,' and practicing social distancing." PI Op. 13–15.

And the district court put in place several measures that require the Jail to report weekly to the court to allow the court to monitor the injunction's efficacy. *See* PI Order 4-6. Specifically, the court requested information on the number of COVID tests that the Jail conducts, the results of those tests, and the occupancy of the jail and its housing cells—information that the Jail already provided during the three-day evidentiary hearing.

E. The district court ordered the Jail to provide it more information about medically-vulnerable class members to evaluate what additional remedies should be afforded.

In its preliminary-injunction order, the district court did not order a single individual to be released from the Jail. The order simply instructed the Jail to provide the court with a list "of the members of the Medically Vulnerable Subclass." PI Ord. ¶22. Since the first status conference in this case, the Jail has repeatedly represented to the district court that they are already creating such a list. *See, e.g.*, Tr. Vol. 1 at 117. The district court expressly stated that the purpose of the list "is to enable the Court to implement a system for *considering* the release on bond or other alternatives to detention in the Jail for each subclass member." PI Op. 58 n.43 (emphasis added). This system, the details of which are to be worked out in conjunction with the parties, will require the district court to conduct "individualized consideration[s] of the

suitability for release . . . based on factors such as public safety." *Id.* And the district court made clear that, no matter the process, the Jail would have the opportunity to submit its position on whether any individual should be released, and under what conditions. PI Order ¶ 22.

STANDARD OF REVIEW

A party seeking a stay of an injunction pending appeal shoulders a "heavy burden." *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 389 (6th Cir. 2014). This Court considers four factors in deciding whether to issue a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

When considering a request for a stay, the Court's "review of the district court's ultimate decision regarding injunctive relief is reviewed under the 'highly deferential' abuse-of-discretion standard." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008). As this Court recently recognized when denying a similar stay request: "Given the procedural posture of the case, we review not the merits of Petitioners' [constitutional] claim, but whether the district court abused its discretion

in entering the preliminary injunction." Order at 3–4, *Wilson v. Williams*, No. 20-3447 (6th Cir. May 4, 2020).

The abuse-of-discretion standard here is particularly deferential to the district court's extensive factual findings, which are reviewed for clear error. *See Land*, 546 F.3d at 380. Where "a district court's account of the evidence is plausible in light of the record viewed in its entirety, the reviewing court 'may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *United States v. Ables*, 167 F.3d 1021, 1035 (6th Cir. 1999) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985)). "The district court's choice between two permissible views of the evidence cannot, therefore, be clearly erroneous." *Id.* Indeed, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson*, 470 U.S. at 575.

ARGUMENT

I. The Jail has not made the "strong showing" of likely success on the merits necessary for a stay.

A. The Jail is not likely to succeed in demonstrating that the district court abused its discretion in requiring the Jail to comply with basic safeguards to prevent the transmission of COVID-19.

The Jail's stay motion is devoted almost entirely to hyperbolic speculation about what the district court *might* order in the future to alleviate the plight of medically-vulnerable inmates. But the preliminary injunction the Jail asks this Court to stay does not order the release or transfer of a single prisoner or detainee. Nobody has received habeas relief.

The relief that the court has *actually* ordered—and hence the only relief actually before this Court—is far less dramatic. It requires the Jail to comply with basic safeguards necessary to prevent COVID-19 from spreading within the Jail's walls—safeguards like providing soap, disinfectant, and masks. Nothing about compliance with this injunction will cause the Jail any irreparable harm. The Jail barely contends otherwise. And, on the other side of the ledger, the imminent risk to the lives of the Jail's inhabitants is obvious—they could die.

The district court, based on careful findings of deliberate indifference, crafted a "narrowly drawn" injunction that "extend[s] no further than necessary to correct" the class members' constitutional injuries. 18 U.S.C. § 3626(a)(2). Mirroring the Centers for Disease Control guidelines, the court ordered the Jail to provide inmates with access to soap, disinfectant, other cleaning supplies, clean showers and laundry, and personal protective equipment like masks. *See* PI Order ¶¶ 1–3, 6–7. It ordered Jail staff to institute cleaning protocols, *id.* ¶¶ 4–5, and requires "to the fullest extent possible" that Jail staff wear masks and gloves, and wash their hands, when

interacting with inmates, *id.* ¶¶ 8–9. Under the order, the Jail must continue testing inmates for the virus and ensure that those who have been infected (or had contact with infected individuals) are properly quarantined and provided with adequate medical attention. *Id.* ¶¶ 10–12, 14–19. Finally, the Jail must "[p]rovide adequate spacing of six feet or more between people incarcerated, *to the maximum extent possible*." *Id.* ¶ 13 (emphasis added); *see id.* ¶ 20.

These eminently reasonable measures are the bare minimum necessary to prevent the spread of infection in the face of a deadly pandemic. They hardly "place[] authority, supervision and control of [the Jail] squarely with the district court," as the Jail contends. Mot. 9. And they are "rooted" in the court's "detailed factfinding regarding the prison's failure to live up to its promises." *Valentine v. Collier*, 2020 WL 2497541, at *2 (U.S. May 14, 2020) (statement of Sotomayor, J.).

1. The district court did not abuse its discretion in finding, based on the plaintiffs' credible testimony and documentary evidence, that the Jail acted with deliberate indifference to the risk that COVID-19 posed to the class members' health and safety.

The Jail cannot dispute the district court's finding that "COVID-19 is a highly infectious virus that poses a significant risk of severe illness and death, particularly for the medically vulnerable." PI Op. 50. An Eighth Amendment claim for deliberate indifference "has an objective and subjective prong." *Berkshire v. Beauvais*, 928 F.3d

520, 537 (6th Cir. 2019). The Jail does not argue with the district court's conclusion that these findings "easily satisf[y]" the objective prong. PI Op. 50.[5]

After reviewing the testimony presented at the three-day hearing and the voluminous evidence submitted by both parties—and concluding that the plaintiffs' testimony was more credible than the defendants'—the district court found that "the overall record reflects a willingness to continue housing Jail Class members in a manner that increases their risk of infection." *Id.* at 53. Those findings amply satisfy the subjective prong of the inquiry as well. *See* PI Op. 50–61. That prong "requires a finding of deliberate indifference, that is, that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.'" *Berkshire*, 928 F.3d at 537 (quoting *Barker v. Goodrich*, 649 F.3d 428, 434 (6th Cir. 2011)). Deliberate indifference "may be "infer[red] from circumstantial evidence," including "the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842.

---

[5] This two-prong requirement is the standard under the Eighth Amendment, which applies to post-conviction prisoners. Plaintiffs here include both people who have been convicted and pretrial detainees. Pretrial detainees' right to safety and medical care is governed by the Fourteenth Amendment. Although this Court has not yet decided the issue, multiple Circuits have held—following the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)—that Fourteenth Amendment claims are required to meet only an objective standard. *See e.g.*, *Miranda v. Cty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (citing Second and Ninth Circuit decisions); *see also Richmond v. Huq*, 885 F.3d 928, 938 n.4 (6th Cir. 2018) (explaining *Kingsley* "calls into serious doubt" whether the Fourteenth Amendment requires a subjective prong, but declining to decide the issue). But, as explained above, even under the higher, Eighth Amendment standard, the Jail is unlikely to succeed in demonstrating that the district court abused its discretion.

The evidence supporting that finding is substantial. The Jail's awareness of the substantial risk that COVID-19 posed to inmates generally—and to the "Medically-Vulnerable Subclass particularly"—was "undisputed." PI Op. 51. Further, although the Jail had "taken steps to curb the spread," the district court determined that those steps were woefully inadequate in light of the known risks. *Id.* at 53. Specifically, the district court pointed to evidence showing that the Jail failed (1) to disinfect common spaces between each use; (2) to provide class member with sufficient access to soap and cleaning supplies; and (3) to ensure that correctional officers wear masks and gloves while interacting with inmates and inmates' materials. *See id.* at 53–54. And the district court found that the Jail continued to house nearly half of the Jail's population in multi-person cells, "with a significant number in housing units with more than 10 individuals"—even though many of the Jail's cells remain "empty." *Id.* at 54.

What's more, the district court found that the Jail failed to quarantine a ten-person cell even after the Jail learned that an individual who had been living in that cell tested positive in early May. PI Op. 55–56. In fact, the district court determined that "there is no evidence that . . . Jail staff ha[s] instituted a policy for contact tracing" despite these known positive cases. *Id.* at 56.

Even worse, the court found that the Jail had *affirmatively transferred* individuals from an area of the jail that had no COVID-19 cases "to the Main Jail, where there

are multiple cases of the virus," thereby "likely expos[ing] and continu[ing] to expose members of the Medically-Vulnerable Subclass to COVID-19." *Id.* at 56, 58 n.44. These actions, the court found, reflected the Jail's "deliberate[] indifferen[ce] to the risk of accelerating an outbreak that already exists in the Jail." *Id.* at 56.

The Jail disregards the district court's credibility and factual findings, urging this Court to adopt the Jail's own selective reading of the record instead. *See* Mot. 18–20. This Court may not do so. Even in appeals on the merits, "if a district court's account of the evidence is plausible in light of the record viewed in its entirety, the reviewing court 'may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *United States v. Ables*, 167 F.3d 1021, 1035 (6th Cir. 1999) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985)). "The district court's choice between two permissible views of the evidence cannot, therefore, be clearly erroneous." *Id.* "What's more, the Supreme Court has [held] that district courts deserve even more deference when they make credibility judgments." *United States v. Sheron*, 787 F. App'x 332, 333 (6th Cir. 2019). That is because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575.

These principles carry even more force when, as here, this Court is being asked to issue "the extraordinary relief of a stay pending appeal." *CREW v. FEC*, 904

F.3d 1014, 1017 (D.C. Cir. 2018); *see Nken*, 556 U.S. at 437 (Kennedy, J., concurring) (describing a stay pending appeal as "an extraordinary remedy"). In this procedural posture, "the district court's ultimate decision regarding injunctive relief is reviewed under the 'highly deferential' abuse-of-discretion standard." *Land*, 546 F.3d at 380. The Jail cannot use its stay request as an opportunity to relitigate the facts and evidence before the district court.

The Jail does not identify *any* legal error in the district court's legal analysis. And the handful of evidentiary disputes that the Jail highlights do not justify reversal here. For example, the Jail claims (at 19) that it has "continued to implement new and proactive measures to protect inmates" such as "canceling group activities" and "using prepackaged meals for food service." But for that proposition, the Jail cites only a few lines of Captain Childs' testimony, which the district court specifically found to lack credibility. PI Op. 52–53. And in any event, these measures—even if true—do not rebut the district court's findings, discussed extensively above, about the numerous steps that the Jail *failed* to take, let alone the affirmative steps that it *did* take that exacerbated the risks of COVID-19 in the carceral setting.

The Jail also asserts that Dr. Paredes, the plaintiffs' expert, "did not find any violations of the TRO" when he inspected the Jail. Mot. 19. But the fact that on a day it knew it was being inspected, the Jail purportedly complied with the TRO—an order issued to remedy the Jail's constitutional violations—does not demonstrate

that the Jail is likely to succeed in showing that the district court abused its discretion in issuing a preliminary injunction ensuring that the Jail continues to do so. The Jail also ignores the record evidence—credited by the district court—that the Jail took several measures *only* on the day of the inspection before immediately reverting to its prior dangerous practices. PI Op. 22–24, 54; *see also, e.g.*, ECF 31-2 ¶ 4; ECF 31-3 ¶ 8. Furthermore, the purpose of Dr. Paredes's inspection was not to assess compliance with the TRO; it was to evaluate the Jail's conditions.

And the Jail's motion conspicuously fails to mention Dr. Paredes's primary conclusion—that the Jail's "interventions are insufficient to interrupt the transmission of COVID-19 infection, unless social distancing is also meaningfully implemented." Paredes Rpt. (ECF 42) at 1. Among other things, Dr. Paredes specifically found that "there is severe overcrowding" in the Jail's cells "and toilet hygiene is insufficient to adequately prevent spread of the infection." *Id.* at 2. The Jail's staff "did not answer [Dr. Paredes'] questions about the medical care being provided to inmates with COVID-19," so Dr. Paredes "did not receive sufficient information to properly assess whether the facility is providing adequate medical care." *Id.* at 3. And Jail staff likewise "refused to answer any questions" he had about testing. *Id.* at 6. Contrary to the Jail's claims, therefore, this report is nothing like that in *Swain*, which found that the defendants there had succeeded on all measures except for social distancing, and specifically concluded that the jail's staff "*should be*

commended for their commitment to protect the staff and inmates in this facility during this COVID-19 pandemic." *Swain v. Junior*, 2020 WL 2161317, at *4 (11th Cir. May 5, 2020) (emphasis added).

Finally, that the Jail submitted the names of certain inmates to state courts in March for consideration of early release is of no moment. Mot. 19. As the district court explained, the Jail's initial list was an incredibly small fraction of the number of medically-vulnerable people at the jail—about 40 among some 200 individuals. *See* PI Op. 60. What's more, the district court found that "the record is lacking in support that, during the almost eight weeks that passed between March 20 and May 13, Defendants expended even a basic level of effort to continue the release initiative." PI Op. 59–60. And even after the preliminary-injunction hearing, the Jail forwarded the names of only 17 inmates—less than 7 percent of the total medically-vulnerable population. *Id.* at 60. The Jail offers no reason to question the district court's conclusion that the defendants' meager actions "disregard[] the seriousness of the risk faced by medically-vulnerable inmates." *Id.* at 59.

2. The district court did not clearly err in finding that there were no available administrative remedies.

Nor is the Jail likely to succeed on its argument that the plaintiffs' claims are barred because they failed to exhaust the Jail's administrative remedies. Mot. 15–17. The Prison Litigation Reform Act contains a "textual exception to mandatory exhaustion": an inmate is not required to exhaust an administrative remedy that is

"unavailable." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016). This limitation requires courts to look at how an allegedly available form of exhaustion operates "in practice," not simply relying on "what regulations or guidance materials may promise." *Id.* at 1859. The Supreme Court has described a variety of scenarios "in which an administrative remedy, although officially on the books, is not capable of use to obtain relief," including where an administrative process effectively "operates as a simple dead end" for the relief sought, and where "prison administrators thwart inmates from taking advantage of a grievance process through . . . intimidation." *Id.* at 1859–60.[6]

Here, the district court found that the Jail's grievance procedure was unavailable to the plaintiffs to bring their COVID-related claims. As the district court explained, "corrections officers have threatened—and in Mr. Lee's case, carried out the threat—to transfer inmates who dare to complain to areas infested with a deadly and highly contagious virus." PI Op. 37. Corrections officers also "refuse to provide grievance forms to some inmates who request them." *Id.* at 35. Threatening an inmate who complains with exposure to the very disease they are concerned about is exactly the kind of "improper action[]" that this Court has said

[6] The PLRA's administrative-exhaustion requirements applies only to the class members' section 1983 claims; this requirement does not apply to the medically-vulnerable sub-class's habeas claims. *See* PI Op. 31 (citing 28 U.S.C. § 3626(g)(2)); *see Phillips v. Court of Common Pleas, Hamilton Cty.*, 668 F.3d 804, 810 (6th Cir. 2012) (noting that habeas "petitioners must exhaust all available *state court remedies* before proceeding in federal court").

would "deter a person of ordinary firmness from continuing with the grievance process," rendering that process unavailable. *Himmelreich v. Federal Bureau of Prisons*, 766 F.3d 576, 577 (6th Cir. 2014) (internal brackets omitted) (holding that a threat of reassignment to a more dangerous housing unit can be sufficient intimidation to excuse failure to exhaust).

Incredibly, the Jail does not contest these factual findings. Instead, the Jail has offered only a broad statistic, that "276 grievances were filed by inmates since January 1, 2020 including eight (8) grievances specifically related to unsanitary conditions." Mot. 16. But the fact that some grievances have been filed in the Jail in general over the last five months does not demonstrate that the district court clearly erred in finding that the plaintiffs' efforts to use the Jail's administrative processes to remedy their COVID-related claims "have been thwarted by machination and intimidation." Exhaustion is an affirmative defense for which the Jail bears the burden of proof. *Does 8-10 v. Snyder*, 945 F.3d 951, 961 (6th Cir. 2019). It cannot satisfy this burden in the face of specific factual findings of widespread inmate intimidation by pointing broadly to the fact that eight people (out of well over a thousand) have filed claims regarding unsanitary conditions this year.

Even if the Jail had demonstrated that inmates were not being intimidated and threatened, its grievance process would still be unavailable for exhaustion purposes here for two distinct reasons. First, as the district court noted, PI Op. 37, the Jail's

grievance process provides no basis by which inmates can seek release or home confinement—so for inmates seeking such release, the grievance process is "a simple dead end." *Ross*, 136 S. Ct. at 1858. Second, the Jail's administrative processes are so slow when compared with the speed at which COVID-19 can progress that they "offer no possible relief in time to prevent the imminent danger" involved in COVID "from becoming an actual harm." *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010); *see also* ECF No. 90 at 3–4. Because the Jail's grievance process will "not provide relief before an inmate face[s] a serious risk of death," it is "unavailable" for purposes of the PLRA. *Valentine v. Collier*, 2020 WL 2497541, at *3 (U.S. May 14, 2020) (statement of Sotomayor, J.).[7]

B. The Jail is not likely to succeed in demonstrating that the district court abused its discretion in ordering the Jail to provide a list of medically-vulnerable inmates.

1. The district court did not order anyone to be released.

The Jail frames its motion for stay as if the district court ordered the immediate release of numerous inmates. Indeed, the Jail complains the district court "set[] forth a *universal* mandate nonspecific to prison systems (regardless of state or federal)." Mot.

[7] This Court has held that the "failure to exhaust administrative remedies under the PLRA is an affirmative defense that must be established by the defendants." *Napier v. Laurel Cty.*, 636 F.3d 218, 225 (6th Cir. 2011). Here, the Jail made no argument about administrative exhaustion in its motion to dismiss and opposition to the preliminary-injunction motion. Thus, this Court should find that the Jail has forfeited any objection on this ground.

2, 12–13 (emphasis added). But this characterization bears little resemblance to the actual order the district court issued. *See* PI Order. The district court's order releases no prisoners. And it certainly does not "mandate" the "release of all 'medically vulnerable' state court inmates."

Besides requiring that the Jail institute basic safeguards against the transmission of Covid-19, all the district court's order requires the Jail to do is provide the district court "with a list of the members of the Medically-Vulnerable Subclass," which will then be used "to enable the Court to implement a system for *considering* the release on bond or other alternatives . . . for each subclass member." PI Order at 6 (emphasis added). This system will involve further input and argument from the Jail; after the Jail submits the list, "the Court will issue a schedule" according to which the Jail will submit, for each individual on the list, the Jail's "position on whether the individual should be released on bond," any reasons why "the individual should not be released," and "what conditions should be put into place if bond is granted." *Id.* at 6–7.[8] The district court's order, in other words, is the start of a process rather than the culmination of a judgment ordering release. To the extent the Jail seeks to stay a release order, this appeal is premature—there is no release order to stay.

[8] The Jail has already completed much of the work needed to produce this list. It has already generated the list of the medically-vulnerable subclass, and as part of its prior list of people to be considered for release, assessed whether it thought each individual could be released based on previous convictions. *See* Tr. Vol. 2 at 197–98.

And to the extent the Jail seeks specifically to stay the part of the district court's order requiring it to submit a list of medically-vulnerable individuals, this Court lacks jurisdiction. This Court "has consistently rejected attempts to obtain review of orders" that constitute only intermediate steps toward relief, such those "requiring the submission of remedial plans." *Groseclose v. Dutton*, 788 F.2d 356, 359 (6th Cir. 1986). This is true even for orders requiring much more detailed and involved plans and processes than the ones at issue here, such as the desegregation order for Detroit's school systems in *Bradley v. Milliken*, 468 F.2d 902 (1972). And it is true where, as here, the trial court has already issued a ruling on the question of liability and the orders at issue go only to the nature of the remedy. *Groseclose*, 788 F.2d at 359.

This Court has, in the past, held that "where an order by a district court" that would not otherwise be appealable "also incorporates injunctive measures which are properly appealable," then "the court of appeals has jurisdiction to review the entire order of the district court including" the otherwise non-appealable part. *Newsom v. Norris*, 888 F.2d 371, 380 (6th Cir. 1989). But since then, the Supreme Court has "sharply restricted the use of pendent appellate jurisdiction" that makes such review possible. *Abelesz v. OTP Bank*, 692 F.3d 638, 647 (7th Cir. 2012) (discussing *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43–51 (1995)). As this Court's more recent jurisprudence recognizes, pendent appellate jurisdiction has only a "narrow scope." *Wedgewood Ltd. Partnership I v. Township Of Liberty, Ohio*, 610 F.3d 340, 348 (6th Cir.

2010). Matters "that ordinarily may not be reviewed on interlocutory appeal" may be reviewed because of their intermingling with appealable matters only if "the resolution of the appealable issue necessarily and unavoidably decides the nonappealable issue." *Id.* (quoting *Summers v. Leis*, 368 F.3d 881, 890 (6th Cir. 2004)).

That is not the case here. "It is not necessary to decide" the propriety of the district court's order requiring the Jail to submit a list of medically vulnerable inmates "in order to review" the other aspects of the district court's injunction—for instance, the provisions requiring the Jail to open up unused cells and provide a more hygienic environment for the inmates. *Summers*, 368 F.3d at 890. As a result, this Court lacks pendent appellate jurisdiction over the Jail's appeal of the district court's list-submission order. The "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more." *Cf. PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J.). Just a few weeks ago, this Court denied a prison's request for a stay of a district court's order "to produce a list" of medically-vulnerable inmates within *one* day. *See* Order, *Wilson v. Williams*, No. 20-3447 (6th Cir. Apr. 30, 2020). This Court should do the same here and decline the Jail's invitation to review release orders that do not yet exist

2. The district court did not abuse its discretion in finding that it had habeas jurisdiction over the medically vulnerable sub-class.

Even if this Court could review a nonexistent release order, the Jail is unlikely to succeed in arguing that the district court's habeas analysis was an abuse of discretion. The Supreme Court has described the federal habeas statute as "legislation . . . of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the national constitution, treaties or laws." *Ex parte Burrus*, 136 U.S. 586, 592 (1890). "It is impossible to widen this jurisdiction." *Id.* Habeas corpus empowers federal courts not only to grant simple release orders, but also orders of "enlargement" that alter the custodial status of habeas petitioners by ordering them to be placed in home confinement or temporarily allowed out of custody on bail. *See, e.g.*, *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990); *Mapp v. Reno*, 241 F.33d 221, 226 (2d Cir. 2001). In the midst of the pandemic that the nation is currently grappling with, it is no surprise that federal district courts have exercised this powerful and flexible writ to safeguard the constitutional liberties of individuals around the country. *See, e.g.*, *Martinez-Brooks v. Easter*, 2020 WL 2405350, at *14–*15 (D. Conn. May 12, 2020); *Chavez Garcia v. Acuff*, 2020 WL 1987311, at *2 (S.D. Ill. April 27, 2020) (exercising the court's "inherent authority in habeas corpus" to grant bail pending resolution of writ).

The Jail argues that habeas is unavailable because "Plaintiffs' claims relate to their conditions of confinement." Mot. 15. This Court has recently acknowledged

that the Supreme Court has left open the question whether a prisoner is authorized to use habeas to challenge his or her conditions of confinement. *See* Order, *Wilson v. William*, No. 20-3447, at 3 (6th Cir. May 4, 2020). But, the Court need not reach the issue here, because the district court reasonably concluded that the medically-vulnerable subclass is challenging the *fact* of their confinement, not the conditions of it. PI Op. 29; *see* Order at 3, *Wilson v. Williams*, No. 20-3447 (6th Cir. May 4, 2020) (concluding that habeas jurisdiction under 28 U.S.C. § 2441 was proper because the petitioners "claim[] no set of conditions would be constitutionally sufficient"). The district court found, based on review of witness testimony regarding the conditions of the Jail as well as the testimony and reports of medical experts, that the plaintiffs are likely to succeed on the merits of their claim that medically vulnerable subclass cannot be safely confined at the Oakland Jail under any achievable conditions. PI Op. 57–59.

The Jail has no response to this. After wrongfully accusing the district court of ignoring its argument, *compare* Mot. 15 *with* PI Op. 28–29, the Jail ignores the district court's reasoning entirely, making only the conclusory assertion that the plaintiffs' claims "relate to their conditions of confinement" without anything more. Mot. 15. But restoring the plaintiffs' constitutional rights will potentially require changing the fact of their confinement, not merely the conditions at the Jail, making habeas an appropriate remedy.

The Jail's remaining argument is that the plaintiffs may not avail themselves of habeas because they have not "exhaust[ed] state remedies." Mot. 13. But this Court has long recognized that a prisoner seeking habeas need not exhaust state or administrative remedies "where pursuing such remedies would be futile or unable to afford the petitioner the relief he seeks." *Fazzini v. Northeast Ohio Correctional Center*, 473 F.3d 229, 236 (6th Cir. 2006). Nor must a prisoner "invoke extraordinary remedies" outside "the standard review process" such as hoping that their sentencing judges will grant them release out of clemency. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999).

The district court did not clearly err in finding that there are no available state-court remedies for the plaintiffs here. The Jail does not dispute that state habeas corpus is not available. And as the district court pointed out, the Jail's examples of inmates being released by judicial officers or prison officials are examples of people released *outside* of the "standard review process." PI Op. 33 (quoting *O'Sullivan*, 526 U.S. at 844). It does not demonstrate the general availability of "a remedy for inmates to pursue." PI Op. 32. In its motion for a stay, the Jail nowhere responds to this analysis, instead simply reiterating their examples. Mot. 14. But because "there is an absence of available state corrective process" for the remedies that the plaintiffs seek, these examples of, essentially, judicial grace are insufficient to prove that habeas should be made unavailable to them. *Turner v. Bagley*, 401 F.3d 718, 724 (6th Cir. 2005). And the plaintiffs here are not challenging any state court judgment of conviction.

Additionally, even if some form of remedy were available in theory, state prisoners are not required to exhaust state remedies where "circumstances exist that render" existing processes "ineffective to protect the petitioners rights." *Id.* The evidence presented at the preliminary injunction hearing demonstrated that one of the plaintiffs who attempted to seek relief through the state court system had to wait weeks just to get a hearing after which his request was summarily denied without a written decision. Tr. Vol. 1 at 61:2–9. In the face of a deadly and rapidly spreading disease, the possibility that a state court could, after weeks or months, potentially exercise grace in isolated cases is not an available remedy for constitutional deprivations. *See, e.g.*, *McPherson v. Lamont*, 2020 WL 2198279, at *7 (D. Conn. May 6, 2020) (concluding "that § 2241's exhaustion requirement should be waived in light of the extraordinary circumstances presented by the COVID-19 pandemic" where "Plaintiffs are at substantial risk of contracting the disease prior to completing the exhaustion process").[9]

[9] The district court also concluded that in addition to habeas, relief for the medically-vulnerable subclass is alternatively available under § 1983. PI Op. 66–70. The Jail argues (at 17) that such relief would be barred by the PLRA unless issued by a three-judge panel after the Jail had been given a "reasonable amount of time to comply with" prior court orders. But as the district court explained, those requirements apply only where prisoners are released because of overcrowding. PI Op. 68–69; *see* 18 U.S.C. § 3626(a)(3)(E)(i). But overcrowding for purposes of the PLRA is "the presence in a facility or prison system of a prisoner population exceeding that facility or system's capacity." *Id.* at 69. Here, the Jail is at less than 40% of its capacity. *Id.* at 70. The problem isn't overcrowding. It's the the

II. The Jail has not shown that any irreparable harm will follow from complying with the preliminary injunction.

The Jail has not and cannot show "a likelihood that irreparable harm [will] result from the denial of the stay." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (internal citation omitted). The Jail's conclusory assertion that the injunction "places extensive administrative requirements" on it is not only false but irrelevant. Mot. 21–22. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Indeed, just recently, this Court rejected a prison's argument that "the enormous burden compliance with [an] injunction places on the [prison's] time and resources constitutes irreparable harm." Order at 4–5, *Wilson v. Williams*, No. 20-3447 (6th Cir. May 4, 2020). And here, the injunction's requirements are not burdensome—they are reasonable measures to safeguard the class members' health and safety, such as providing "two bars of individual hand soap and a hand towel" on a biweekly basis and "access to clean showers and clean laundry." PI Order 3–4. In fact, most of these

---

inherently dangerous nature of a congregate environment for the medically vulnerable, coupled with the Jail's failure to take any protective measures for the vulnerable subclass and the inability to social distance, even at normal—or well-below-normal—population levels. The PLRA's overcrowding requirements, therefore, do not apply.

requirements were included in the district court's TRO, with which the Jail asserts it has already complied. *See* PI Op. 17–20.

Nor can the Jail blithely convert general "[p]rinciples of federalism and comity" into irreparable harm. Mot. 20–21. The injunction here does not enjoin a statute; it merely requires that the Jail take basic health and safety precautions. Though it is true the State has a strong interest in running its prisons, the Jail's argument proves too much. *Any* injunctive relief to remedy prison conditions under section 1983 will interfere to some extent with prison administration. That is the point of an injunction: to require the prison administration to change the conduct that is violating prisoners' constitutional rights. But "'federal courts *must* take cognizance of the valid constitutional claims of prison inmates,' since '[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.'" *Hanrahan v. Mohr*, 905 F.3d 947, 954 (6th Cir. 2018) (emphasis added) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)); *see also Valentine v. Collier*, 2020 WL 2497541, at *1 (U.S. May 14, 2020) (statement of Sotomayor, J.) ("[W]hile States and prisons retain discretion in how they respond to health emergencies, federal courts do have an obligation to ensure that prisons are not deliberately indifferent in the face of danger and death."). State and local jails cannot avoid all injunctive relief, simply by averting to federalism.

General principles of federalism and conclusory assertions of administrative burden are not irreparable harm. The Jail has identified no actually-irreparable injury that will result if it complies with the preliminary injunction.

III. Staying the preliminary injunction will expose the class members and the wider community to danger of illness and even death, and the public interest weighs strongly against a stay.

Remarkably, the Jail claims that "Plaintiffs are unable to show substantial injury" if the injunction is stayed. Mot. 22. For the class members—and particularly the medically vulnerable—the risks of COVID-19 are literally life threatening. That the Jail's current testing (putting aside its accuracy) has not *yet* shown hundreds of positive cases is no answer. "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). "The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event." *Id.* Indeed, numerous courts have recognized that the risk of exposure to COVID-19 is a grave, irreparable harm that warrants preliminary injunctive relief. *See* ECF 5 at 22 n.13; ECF 33 at 18–19 & n.8 (citing cases).

As for the public interest, "[w]e need not say much on this point"—"it is always in the public interest to prevent the violation of a party's constitutional rights." *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 929 (6th Cir. 2020) (quotation marks omitted). That is all the more true in the midst of an unprecedented pandemic, where

the constitutional violation has the potential to lead to severe illness and even death—not only for the class members but for the Jail's staff and the Oakland County community at large. As the district court explained: "The public has a significant interest in avoiding serious illness or death. Indeed, efforts to curb the spread of COVID-19—including implementing procedures to curb the spread of COVID-19 within the Jail, as well as placing on home confinement populations who cannot be protected from the virus while housed in the Jail—helps 'flatten the curve,' limit potential strain on healthcare systems, and reduce the likelihood of death and long-term health complications." PI Op. 63–64; *see Thakker v. Doll*, 2020 WL 1671563, at *9 (M.D. Pa. Mar. 31, 2020) ("Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest.").

The Jail barely contests the public-interest factor. Its only argument (at 23) is that releasing medically-vulnerable class members poses a "significant threat to the public" because they have felony convictions, but (as explained above) the district court's order does not release anyone—and the court made clear that any future release decisions would require "individualized consideration of the subclass member's suitability for release, taking into account criminal history and other relevant factors." PI Op. 65; *see id.* at 58 n.43. The Jail says nothing at all about how the public interest could be served by staying the preliminary injunction's other measures—which require access to basic hygiene and medical treatment, adequate

testing protocols, and meaningful social distancing. Nor could it: Public health experts and the federal government have concluded that these measures are necessary to prevent the uncontrolled spread of the virus, both in the Jail and beyond. *See supra* page 8.[10]

CONCLUSION

The emergency motion for a stay pending appeal should be denied.

Respectfully submitted,

Daniel S. Korobkin
Philip Edwin Mayor
ACLU FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6803
dkorobkin@aclumich.org
pmayor@aclumich.org

/s/Deepak Gupta
Deepak Gupta
Daniel Wilf-Townsend
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

[10] The Jail's claim that its interest "merge[s]" with the public interest misreads *Nken*. Mot. 22–23. In *Nken*, the Court held that "when the Government is the opposing party," the harms to a government agency merge with the public interests. 556 U.S. at 435. That is because that posture implicates the public's interest in "prompt execution" of valid orders. *See id.* at 436. Here, the Jail is the party *seeking* a stay, not opposing it. It must therefore show both that it will suffer an irreparable harm and that a stay is in the public's interest.

Alexandria Twinem
CIVIL RIGHTS CORPS
1600 Connecticut Avenue, NW
Eighth Floor
Washington, DC 20009
(202) 894-6126
alexandria@civilrightscorps.org

Krithika Santhanam
Thomas B. Harvey
ADVANCEMENT PROJECT
NATIONAL OFFICE
1220 L Street, NW, Suite 850
Washington, DC 20005
(202) 728-9557
Ksanthanam@advancementproject.org
Tharvey@advancementproject.org

Jennifer Bennett
Neil K. Sawhney
GUPTA WESSLER PLLC
100 Pine Street, Suite 1250
San Francisco, CA 94111
(415) 573-0336
jennifer@guptawessler.com

Cary S. McGehee
Kevin M. Carlson
PITT, MCGEHEE, PALMER,
BONANNI & RIVERS, PC
117 W. Fourth Street, Suite 200
Royal Oak, MI 48067
(248) 398-9800
cmcgehee@pittlawpc.com
kcarlson@pittlawpc.com

Allison L. Kriger
LARENE & KRIGER, PLC
645 Griswold, Suite 1717
Detroit, MI 48226
(313) 967-0100
Allison.kriger@gmail.com

CERTIFICATE OF COMPLIANCE

This Court granted Appellees permission to exceed the word limits in Federal Rule of Appellate Procedure 27(d)(2)(A). This response complies with the type-volume limitation because this brief contains 11,336 words, excluding the parts of the brief exempted by Rule 27(a)(2)(B). This brief complies with the typeface and typestyle requirements of Rule 27(d)(1)(E) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Baskerville font.

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2020 I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/Deepak Gupta
Deepak Gupta