No. 20-1469

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMAAL CAMERON, et al., )
)
Plaintiffs-Appellees, )
)
v. )
)
MICHAEL BOUCHARD, et al., )
)
Defendants, )
)
and )
)
OAKLAND COUNTY, MI, )
)
Defendant-Appellant. )

**FILED**
May 26, 2020
DEBORAH S. HUNT, Clerk

O R D E R

Before: COLE, Chief Judge; GUY and BUSH, Circuit Judges.

Plaintiffs, five pretrial detainees or convicted prisoners (collectively, "inmates") housed in the Oakland County Jail ("the Jail"), on behalf of themselves and others housed or to be housed there, filed a complaint under 42 U.S.C. § 1983 and 28 U.S.C. § 2241 to obtain: basic safeguards to contain the transmission of the COVID-19 virus and protect inmates' health; and the release or home confinement of a subclass of medically-vulnerable inmates in order to limit their exposure to the COVID-19 virus. Defendant Oakland County ("Oakland") appeals a preliminary injunction requiring it to: (1) provide all Jail inmates with access to certain protective measures and medical care intended to limit exposure, limit transmission, and/or treat COVID-19; and (2) provide the district court and Plaintiffs' counsel with a list of medically-

vulnerable inmates within three business days. Oakland separately moves to stay the injunction pending resolution of the appeal and to expedite briefing and submission of the appeal. Plaintiffs oppose a stay, but not expediting the appeal. Oakland replies in support of a stay. Plaintiffs move to strike a portion of Oakland's reply.

We balance four factors to determine whether, in our discretion, a stay is appropriate: (1) whether the movant "has made a strong showing that he is likely to succeed on the merits"; (2) whether the movant "will be irreparably injured absent a stay"; (3) whether issuance of a stay will "substantially injure" other interested parties; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). Oakland bears a "heavy burden" to demonstrate a stay is warranted, and must "make a '*strong* showing that [it is] likely to succeed on the merits.'" *Ohio State Conference of NAACP v. Husted*, 769 F.3d 385, 389 (6th Cir. 2014) (emphasis in original) (citation omitted).

Oakland challenges the preliminary injunction on multiple grounds, alleging that: the district court lacked jurisdiction under § 2241 over the action; even if Plaintiffs' claims are cognizable under § 2241, they did not exhaust their state court remedies; habeas relief is not warranted on the merits; if the suit had been properly brought under the PLRA, Plaintiffs failed to exhaust their state administrative remedies and the injunction contravenes its requirements for the release of prisoners; and Plaintiffs' municipal-liability claim fails because they cannot establish a violation of their Eighth and Fourteenth Amendment rights.

We review a district court's grant of a preliminary injunction for an abuse of discretion, its legal conclusions de novo, and its factual findings for clear error. *See Babler v. Futhey*, 618 F.3d 514, 519−20 (6th Cir. 2010). The Supreme Court has neither foreclosed nor authorized a prisoner or pretrial detainee from using habeas relief to challenge his conditions of confinement. *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973); *cf. Ziglar v. Abbasi*, ––– U.S. ––––, 137 S. Ct. 1843, 1862−63 (2017).

Plaintiffs are not a homogenous group. Some are especially vulnerable to complications from COVID-19 while others face lower risks. That is why the injunction calls for both changes to protect all Plaintiffs while they remain in the Jail and also requires lists of higher-risk prisoners who may be conditionally released at some point. All of the plaintiffs, however, seek release, and not because the conditions of their confinement fail to prevent irreparable constitutional injury, but based on the fact of their confinement. Where a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of the confinement. *See Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011); *cf. Terrell v. United States*, 564 F.3d 442, 446−49 (6th Cir. 2009). Insofar as § 2241 is properly invoked, it forecloses Oakland's argument that the PLRA applies. *See* 18 U.S.C. § 3626(g)(2) (expressly excluding "habeas corpus proceedings challenging the fact or duration of confinement in prison" from the PLRA's reach).

A plaintiff must exhaust state court remedies before filing a habeas petition "except in unusual circumstances." *Rose v. Lundy*, 455 U.S. 509, 515 (1982). This requirement may be excused, however, if the state court remedies are "unavailable." *O'Sullivan v. Boerckel*, 526 U.S. 838, 847−48 (1999). The district court found that Plaintiffs' failure to exhaust was excused, noting that the cases granting relief on similar claims were alternatives to the standard review process and the Michigan state courts had not previously provided relief through those remedies." Our review of the cases cited below establishes that that is the case here.

Given the procedural posture of the case, we do not review the merits of Plaintiffs' remaining claims, but only whether the district court abused its discretion in entering the preliminary injunction. We accept the district court's factual findings unless we find them clearly erroneous. Fed. R. Civ. P. 52(a)(6). Following an evidentiary hearing, and based on declarations and evidence submitted by the parties, the district court found that Oakland could not implement or enforce social distancing given how closely inmates were housed together.

COVID-19 is highly contagious, can be transmitted by asymptomatic but infected individuals, and has reached pandemic proportions. Older individuals and those with certain underlying medical conditions are more likely to experience complications, need medical intervention, and die. Oakland has numerous positive COVID-19 infections, and inmates who are asymptomatic are housed near those with positive confirmed cases. The district court's "account of the evidence is plausible in light of the record viewed in its entirety." *United States v. Ables*, 167 F.3d 1021, 1035 (6th Cir. 1999). Thus, at this juncture, and given our deferential standard of review on motions to stay, "[t]he district court's choice between two permissible views of the evidence cannot . . . be clearly erroneous." *Id.*

And, as yet, the district court has not ordered the release of any inmate. If the district court does order the release of a prisoner, that may present a different question. Instead, it has required Defendants to provide the district court and Plaintiffs' counsel with a list of medically-vulnerable inmates so it may further consider, based on these inmates individual circumstances, whether release or other alternatives to detention are warranted. We have "consistently rejected attempts to obtain review of orders requiring the submission of remedial plans." *Groseclose v. Dutton*, 788 F.2d 356, 359 (6th Cir. 1986) (per curiam).

"Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." *Maryville Baptist Church*, 957 F.3d 610, 615−16 (6th Cir. 2020). The district court's injunction requires Oakland to implement numerous measures in the Jail and fast-track a process to evaluate medically-vulnerable inmates for potential release. But "[m]ere 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, 154 (6th Cir. 1991) (citation omitted). And, notably, the Jail agreed below to adhere to many of the requested safeguards and also asserted it had already implemented many of them. Plaintiffs are rightfully

frightened of contracting COVID-19. There is credible evidence here that Oakland's efforts in mitigating transmission are not evenly or consistently applied. The public has a strong interest in both reducing the transmission of COVID-19. While the public also has an obvious interest in avoiding the release of inmates, the district court has emphasized that release is contingent upon a full and complete vetting of each inmate.

Finally, we consider whether to expedite briefing and submission of the appeal. "A party may move to expedite [an] appeal. The motion must show good cause to expedite." 6 Cir. R. 27(f). A party may also move to expedite oral argument. 6 Cir. R. 34(c)(1). "The court may expedite oral argument, even if the time to file briefs has not expired by the date of the expedited hearing." *Id.* If we schedule oral argument on an appeal from the grant of a preliminary injunction, "argument will generally be expedited." 6 Cir. R. 34(c)(2). "When the court grants a motion to expedite, the clerk will schedule oral argument at an early date. A judge may direct an earlier hearing." 6 Cir. R. 34(c)(3). Oakland has shown good cause to expedite briefing and submission, given that the district court directed it to act in a short period of time to implement procedural safeguards and start evaluating certain inmates for possible release.

The motion to stay is **DENIED**, the motion to expedite is **GRANTED**, and the motion to strike is **DENIED AS MOOT**. Upon submission, the merits panel will determine whether it will expedite oral argument or a decision.

**JOHN K. BUSH, Circuit Judge, dissenting.**

Oakland County Jail, like the rest of our country, has been unable to fully escape the effects of COVID-19. There is evidence that Oakland County officials have reacted swiftly and implemented many measures to mitigate the spread of COVID-19 at the jail. As expected, and as is the case throughout the country, those efforts have fallen short of completely eradicating the risks of the virus. The district court thought the alleged deficiencies rose to the level of a constitutional violation. Despite the extensive efforts taken by Oakland County Officials, the

district court "assumed the role of super-warden," to borrow words used by the Eleventh Circuit in staying a preliminary injunction similar to the one issued below. *See Swain v. Junior*, No. 20-11622-C, 2020 WL 2161317, at *5 (11th Cir. May 5, 2020); *see also Valentine v. Collier*, 956 F.3d 797, 806 (5th Cir. 2020) (staying preliminary injunction issued against a state prison system relating to COVID-19 issues). The district court entered an injunction that "hamstrings [those] officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic." *Swain*, 2020 WL 2161317, at *5. The majority blesses the district court's decision by denying Defendants' motion to stay pending appeal. I respectfully dissent, because (1) the district court's broad preliminary injunction does not respect the principles of federalism and comity inherent in habeas actions and espoused in the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(2) (PLRA); and (2) the district court erred in its application of *Farmer v. Brennan*, 511 U.S. 825 (1994), to Plaintiffs' deliberate indifference claims.

**I.**

Jail officials first began meeting to discuss COVID-19 around the end of February of 2020. These discussions quickly turned into action. On March 11, Captain Curtis Childs, the Commander of Corrective Services for the Sheriff's Office, distributed a memo to the jail staff about proper cleaning procedures intended to limit the spread within the jail. On March 13, the jail stopped all visitation. On March 18, the jail initiated new arrest screenings for COVID-19. The next day, another memo from Captain Childs was posted throughout the jail advising inmates of the risks associated with COVID-19 and precautions that should be taken.

As the pandemic progressed, Oakland County officials took more extensive precautionary measures. On March 20, the jail initiated its first prison release program, in which 110 inmates were released by Michigan state courts. The jail started quarantining new arrests for 14 days. It also began quarantining any inmate experiencing symptoms of COVID-19 and any

inmate who had contact with a symptomatic inmate. Officials began to check inmates who were in symptomatic quarantine three times a day with a full set of vitals including a temperature check. If inmates tested positive, they were placed in the positive COVID-19 cells. All inmates received level-one masks as well as medical treatment if needed. The onsite jail clinic is staffed 24/7 by medical professionals. The jail has a contract with McLaren Pontiac Hospital to receive inmates who need hospital care.

Consistent with CDC guidelines, the jail cancelled group activities, used prepackaged meals for food service, used a UVI disinfecting machine and sanitized cells more frequently. The jail gave all inmates access to a disinfectant called DMQ, which is effective against COVID-19. The disinfectant has been provided no less than three times per day during food delivery. Captain Childs has also attempted to promote social distancing by reducing cell numbers dependent upon inmate classification. As a result of these efforts, the jail population has been reduced from 1,156 on March 20 to 664 on May 1. In addition, the entire inmate population has been provided access to COVID-19 testing. As of the date of this appeal, there are six inmates who have tested positive for COVID-19 at the jail with a total population of more than 600. No inmate has died from the virus.

Plaintiffs filed this action on April 17. Two hours after Plaintiffs filed their petition and complaint, the district court entered a temporary restraining order against Defendants, requiring Defendants to, among other things, enhance their cleaning and sanitation measures, make efforts to increase social distancing, ensure that all jail staff wear personal protective equipment, respond to all COVID-19 related emergencies "within an hour," and ensure there is no retaliation against any inmates for raising grievances about the health and safety conditions in the jail.

On May 21, following a telephonic evidentiary hearing, the district court entered a preliminary injunction against Defendants. The complete list of measures that the preliminary injunction orders is as follows:

- "Provide each incarcerated person, free of charge, on a bi-weekly basis, two bars of individual hand soap and a hand towel to allow regular hand washing and drying. Provide unrestricted access to additional hand soap upon an inmate's request";

- "Provide each cell and each dormitory-style housing unit, at no cost, a supply of disinfectant hand wipes or disinfectant products effective against the COVID-19 virus for daily cleanings. Any disinfectant products shall be provided at the manufacturer's required concentration level and in sufficient quantities for inmates to clean and disinfect the floor and all surfaces of their housing unit";

- "Provide daily access to cleaning supplies at no cost for inmates to clean their cells, including showers, toilets, telephones, and sinks. Supplies shall be disinfected before being shared between housing cells";

- "Require cleaning of any surface or area shared by four (4) or more inmates, for example tabletops, telephones, door handles, television controls, equipment, and restroom fixtures. Surfaces and areas shall be cleaned every hour from 7 a.m. to 10 p.m. with bleach-based cleaning agents";

- "Establish a protocol for monitoring and supervising the regular sanitization of housing units, common areas, and surfaces. Provide guidance to correctional staff to provide them with the knowledge needed to oversee and assure that cleaning is adequate and effective. Within five (5) business days of this Order, Defendants shall submit a certified report to the Court identifying the procedures implemented to carry out these directives";

- "Provide access to clean showers and clean laundry, including clean personal towels on a regular basis, but at a minimum on a bi-weekly basis";

- "Provide masks for all inmates and staff members. If cotton masks are provided, such masks must be laundered regularly. Users must be instructed on how to use the mask and the reasons for its use";

- "Require all Jail staff to wear personal protective equipment, including masks and gloves, when interacting with any person, distributing items to prisoners (e.g., mail and hygiene supplies), or when touching surfaces in cells or common areas";

- "Ensure, to the fullest extent possible, that all Jail staff wash their hands with soap and water or use hand sanitizer containing at least 60% alcohol both before and after touching any person or any surface in cells or common areas. Consider allowing staff to carry individual sized bottles of the referenced hand sanitizer while on duty";

- "Maintain a protocol through which an incarcerated person may self-report symptoms of COVID-19 infection and to evaluate those symptoms, including temperature monitoring";

- "Within three (3) business days, provide the Court and Plaintiffs with a detailed plan to continue testing all inmates for COVID-19, prioritizing members of the Medically-Vulnerable Subclass, as well as a plan to test all individuals who (i) have access to the housing units or (ii) interact with inmates or with individuals who have access to the housing units";

- "Conduct immediate testing for anyone displaying known symptoms of COVID-19 and submit a weekly list to the Court and Plaintiffs' counsel indicating (i) the number of tests performed that week and (ii) whether any inmates or Jail staff have tested positive for coronavirus";

- "Provide adequate spacing of six feet or more between people incarcerated, to the maximum extent possible, so that social distancing can be accomplished";

- "Ensure that individuals identified as having COVID-19, with symptoms of COVID-19, or having been exposed to COVID-19 receive adequate medical care and are properly quarantined in a non-punitive setting, with continued access to showers, mental health services, reading materials, phone and video calling with loved ones, communications with counsel, and personal property (to the extent reasonable and necessary to the inmate's physical and mental well-being). Such individuals shall remain in quarantine and wear face masks and gloves when interacting with other individuals until they are no longer at risk of infecting other people. Facemasks must be replaced at medically appropriate intervals";

- "Respond to all COVID-19 related emergencies (as defined by the medical community) within an hour";

- "Post signage and information in common areas that provide: (i) general updates and information about the COVID-19 pandemic; (ii) information on how inmates can protect themselves from contracting COVID-19; and (iii) instructions on how to properly wash hands. Among other locations, all signage must be posted in every housing area and above every sink. Require staff to provide this information orally to low literacy and non-English speaking people";

- "Train all staff regarding measures to identify inmates with COVID-19, measures to reduce transmission, and the Jail's policies and procedures during this crisis (including those measures contained in this Order)";

- "Suspend co-pays for medical treatment for the duration of the pandemic and encourage all inmates to seek treatment if they are feeling ill";

- "Waive all charges for medical grievances during the pandemic until further order of the Court";

- "Within five (5) business days of this Order, establish and put into effect a policy

suspending, to the extent possible, the use of multi-person cells (i.e., with more than two individuals), except where: (i) the person is currently under quarantine, or (ii) a person for whom a medical or mental health professional has documented that particular housing is needed. All housing units utilized shall be configured to permit social distancing, to the maximum extent possible. If dormitory-style housing must be utilized, those areas shall be reconfigured to allow six-feet between inmate beds to the maximum extent possible. Defendants shall submit a report to the Court and Plaintiffs' counsel within seven (7) business days detailing (i) the policy put into effect, (ii) the housing cells occupied, and (iii) the number of inmates in each cell, similar to the Housing Occupancy List introduced at the evidentiary hearing. (ECFNo. 68.) Defendants shall submit updated reports as to (i) and (ii) on a weekly basis";

- "Ensure that Plaintiffs' counsel have the ability to promptly communicate with detainees";

- "Within three (3) business days, provide the Court and Plaintiffs' counsel with a list of the members of the Medically-Vulnerable Subclass, which includes inmate identification numbers, ages, any health vulnerabilities, as well as records detailing the instant charges or convictions and any criminal history of the Subclass member. The purpose of this order 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. After reviewing the list, the Court will issue a schedule for Defendants to submit the following additional information for each Subclass member: (i) their position on whether the individual should be released on bond; (ii) the reasons why they maintain the individual should not be released; and (iii) what conditions should be put into place if bond is granted"

Defendants timely appealed and sought a stay of the preliminary injunction pending appeal.

**II.**

We balance four factors to determine whether a stay is appropriate: (1) whether the movant "has made a strong showing that he is likely to succeed on the merits"; (2) whether the movant "will be irreparably injured absent a stay"; (3) whether issuance of a stay will "substantially injure" other interested parties; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). "Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors." *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 615−16 (6th Cir. 2020) (citing *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam)). Applying these factors, I would conclude that a stay is warranted.

A. A Likelihood of Success on Appeal

Defendants have made a strong showing that they are likely to succeed on appeal for at least three reasons: (1) Plaintiffs failed to exhaust their state remedies before bringing their claims under 28 U.S.C. § 2241; (2) the broad scope of the district court's injunction contravenes the PLRA; and (3) the district court erred in its application of *Farmer v. Brennan* to Plaintiffs' deliberate indifference claims.[1] I will address each issue in turn.

1. Failure to Exhaust

Plaintiffs concede that they did not attempt to exhaust state remedies before bringing their § 2241 claim. We have held that "[a] federal habeas petitioner 'must first exhaust his available remedies before filing a § 2241 petition for habeas corpus relief.'" *Aron v. LaManna*, 4 F. App'x 232, 232 (6th Cir. 2001) (citing *Little v. Hopkins*, 638 F.2d 953, 953–54 (6th Cir. 1981)). There are exceptions to the exhaustion requirement, but none are applicable here.

First, the exhaustion requirement is excused "where pursuing [a] remed[y] [at the state court] would be futile or" would fail to "afford the petitioner the relief he seeks." *Fazzini v. Ne. Ohio Corr. Ctr.*, 473 F.3d 229, 236 (6th Cir. 2009) (citations omitted). This exception does not apply here. Defendants provided several examples to the district court of Michigan state court judges releasing inmates from OCJ as a result of concerns related to COVID-19. For example, in *State of Michigan v. James Neal Webb*, No. 15-001821, an inmate at Oakland County Jail filed an "Emergency Motion for Release Due to Safety Threat Posed by COVID-19." A Michigan State court granted Webb's motion and released him from the OCJ. This was not a one-off occurrence. As Defendants note, Michigan state courts released 110 inmates in March alone.

[1] In addition, many of the measures ordered by the district court were already being performed by Defendants pursuant to their existing policies. In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), "[t]he Supreme Court held that the Eleventh Amendment prohibits federal courts from enjoining state facilities to follow state law." *Valentine*, 956 F.3d at 802. Thus, it was improper for the district court to enter an injunction requiring Defendants to engage in actions that they were already performing pursuant to existing policies. *See id.*

Plaintiffs have not shown that the relief they seek is unavailable in Michigan state courts.[2]

Second, a federal habeas court may consider unexhausted claims where "'unusual' or 'exceptional' circumstances" exist. *Rockwell v. Yukins*, 217 F.3d 421, 423 (6th Cir. 2000) (citation omitted). The district court found that it could "conceive of few more unusual or exceptional circumstances than the current pandemic." While I agree that COVID-19 presents unique circumstances for inmates, I disagree that those circumstances should excuse Plaintiffs' failure to exhaust their state remedies. "[T]he Supreme Court has been quite clear that exhaustion is the preferred avenue and that exceptions are to be for narrow purposes only." *O'Guinn v. Dutton*, 88 F.3d 1409, 1412 (6th Cir. 1996). If Michigan state courts were routinely delaying weeks or months to rule on petitions like the one Plaintiffs brought before the district court, then I might agree that exhaustion should be excused. But we have no evidence of such delays. For instance, in one of the Michigan state court cases cited by Defendants, the court received an emergency motion for release on April 27, 2020, and granted the motion only one day later. *See State of Michigan v. James Neal Webb*, No. 15-001821. So long as the state courts are capable of and willing to hear inmates' petitions, "both comity and judicial efficiency . . . make it appropriate for [us] to insist on complete exhaustion." *Granberry v. Greer*, 481 U.S. 129, 135 (1987).

2. Scope of the District Court's Injunction

I would also hold that the district court's broad injunction contravenes the PLRA's mandate that "[p]reliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive

[2] The district court discounted the availability of relief through the Michigan state courts, finding that the relief Plaintiffs were seeking in their habeas petition was not the sort of relief the Michigan state courts had "provided . . . in the past." *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (citation omitted). This was error. Plaintiffs here are seeking an injunction to either improve the conditions of, or be released from, the OCJ. That is precisely the type of relief that Michigan state courts provided in the cases Defendants cited.

means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). As the Fifth Circuit held in a similar case:

> This is a class-action injunction that applies to all inmates—disabled and non-disabled alike . . . . And it's hard to see how an injunction that prescribes both a prison-wide testing regime and a cleaning schedule down to the [hour] interval is "narrowly drawn" or the "least intrusive means" available. So too with the requirement that every single sink have a sign over it with COVID-19 information. These may be salutary health measures. But that level of micromanagement, enforced upon threat of contempt, does not reflect the principles of comity commanded by the PLRA.

*Valentine*, 956 F.3d at 806. The injunction issued by the district court in this case is at least as broad as the injunction issued in *Valentine*. For the reasons discussed in *Valentine*, the district court's injunction violates the PLRA.[3]

3. Deliberate Indifference Inquiry

The district court also erred in holding that Plaintiffs satisfied the "subjective component" necessary to show that prison officials acted with deliberate indifference. *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001). In a deliberate indifference claim challenging the conditions of a prisoner's confinement, the plaintiff must satisfy both the objective and subjective components of the Eighth Amendment inquiry. *See Farmer v. Brennan*, 511 U.S. at 846. The same requirements apply to a pre-trial detainee's due process rights under the Fourteenth Amendment. *See Richko v. Wayne Cty., Mich.*, 819 F.3d 907, 915 (6th Cir. 2016) (citation omitted) ("Supreme Court precedents governing prisoners' Eighth Amendment rights also govern the Fourteenth Amendment rights of pretrial detainees."). "To satisfy the objective component, the plaintiff must allege that the medical need at issue is 'sufficiently serious.'" *Comstock*, 273 F.3d at 702 (citing *Farmer*, 511 U.S. at 834). "To satisfy the subjective

[3] The majority appears to hold that the PLRA does not apply at all in this case because a subclass of Plaintiffs properly invoked § 2241. Nobody disputes that the PLRA applies to § 1983 claims, and Plaintiffs brought § 1983 claims on behalf of each subclass, including the medically-vulnerable subclass. Thus, the majority is incorrect to hold that the PLRA does not apply to those claims.

component, the plaintiff must . . . show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and then disregarded that risk." *Id.* at 703 (citing *Farmer*, 511 U.S. at 837). The defendant must have a subjective "state of mind more blameworthy than negligence," akin to criminal recklessness. *Farmer*, 511 U.S. at 835, 839–40.

With respect to the "Jail Class" members, the district court found that Plaintiffs satisfied the subjective component because the record "reflects a willingness to continue housing Jail Class members in a manner that increases their risk of infection." The district court highlighted the following as evidence of Defendants' deliberate indifference:

- "[T]hough the jail outlined enhanced cleaning and sanitation policies and procedures, members of the Jail Class continue to share toilets, sinks, showers, [etc.], . . . sometimes without disinfection between each use."
- Several inmates have indicated that "Jail Class members still have insufficient access to soap and cleaning supplies."
- Some jail officers sometimes either do not wear masks or only wear masks under their chins, and they "usually" do not wear gloves when serving food."
- There are purportedly some jail cells unoccupied, yet Defendants have offered no explanation regarding why individuals have not been moved to those cells.
- Defendants' quarantine procedure is "insufficient."
- Defendants transferred some inmates from the East annex, where there are currently no cases of COVID-19, to the Main Jail, where there are multiple cases of the virus.

With respect to the medically-vulnerable population, the district court found that "Defendants' failure to make prompter . . . use of their authority to" release or place these inmates in home confinement was enough to satisfy the subjective component. The district court noted that "at this moment, Defendants are actively seeking the release of only 7 percent of the medically-vulnerable population."

In focusing only on Defendants' purportedly inadequate measures and failing to address Defendants' culpable mental state, the district court incorrectly collapsed the subjective and objective components of the deliberate indifference inquiry. Critically, none of the above evidence tends to show that Defendants subjectively believed the measures they were taking were inadequate. To be sure, the proof supports a finding that the measures have been ineffective in completely eradicating the risk of Covid-19 in the jail, but there are no measures currently available that will do that for *any* facility, prison or otherwise. This reality is tragic, but it is not sufficient to find that Plaintiffs are likely to succeed on their deliberate indifference claims, because the evidence does not show that Defendants acted with the level of indifference akin to criminal recklessness. While evidence of the ineffectiveness of measures to eradicate COVID-19 is relevant to the objective component, it is not sufficient, standing alone, to satisfy the subjective component. There is no evidence of Defendants' culpable mental state, and this lack of evidence renders it unlikely that Plaintiffs will prevail on their deliberate indifference claim. *See Rhinehart v. Scutt*, 894 F.3d 721, 738 (6th Cir. 2018) (citing *Farmer*, 511 U.S. at 844) ("A[n] [official] is not liable under the Eighth Amendment if he or she provides reasonable treatment, even if the outcome of the treatment is insufficient or even harmful."); *Swain*, No. 20-11622-C, 2020 WL 2161317, at *3 (reversing a finding of deliberate indifference because "the district court cited no evidence to establish that the defendants subjectively believed the measures they were taking were inadequate"); *Valentine*, 956 F.3d at 802 ("[T]reating inadequate measures as dispositive of the Defendants' mental state . . . resembles the standard for civil negligence, which *Farmer* explicitly rejected.").

In contrast to the absence of evidence showing subjective deliberate indifference, there is substantial evidence that the OCJ has implemented several important measures to combat

COVID-19. Such measures included, but were not limited to, stopping all visitation, posting COVID-19 memos throughout the facility, advising inmates of the risks associated with COVID-19, initiating a prison release program, quarantining new arrestees for fourteen days, quarantining inmates who have COVID-19 symptoms, checking symptomatic inmates three times a day with a full set of vitals, and distributing masks to all inmates. In fact, Plaintiffs' own expert, Dr. Paredes, performed an inspection of the OCJ and found zero violations of the district court's Temporary Restraining Order, which ordered many safety and health measures that were already being followed pursuant to the OCJ's existing policies prior to issuance of the TRO. This evidence belies the notion that Defendants acted in a criminally reckless manner, and further undercuts the district court's conclusion to the contrary. *See Rhinehart*, 894 F.3d at 738.

B. Irreparable Injury

"[A]ny time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citation omitted). The Michigan state legislature assigned prison policy to the Michigan Department of Corrections (MDOC). In the face of the MDOC's authority, the district court's order sets forth measures that include hourly cleaning, the production of a list of inmates in the medically-vulnerable subclass within three business days, and the reconfiguration of portions of the jail. Indeed, the order requires Defendants to implement measures not even recommended by the CDC. The order thus places the district court in a position of second-guessing Defendants and other experts while they are already implementing and executing policies that have helped curb the outbreak at the jail. That constitutes irreparable injury. *See Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (citation omitted) ("[I]t is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'"); *Valentine*, 956 F.3d at 803–04 (holding that an order requiring the Texas

Department of Criminal Justice to enact various measures to mitigate the spread of COVID-19 in jails irreparably harmed the defendants); *Swain*, No. 20-11622-C, 2020 WL 2161317, at *5 (holding that "the district court assumed the role of 'super-warden'" and irreparably harmed the defendants by granting similar injunctive relief).

C. Balance of Harms and Public Interest

The balance of harms and public interest also weigh in favor of Defendants. Because the local officials are the appealing party, the government interests that they represent and the harms to the government merge with those of the public. *See Nken*, 556 U.S. at 435. As discussed above, the government's, and therefore the public's, interest in a stay is substantial. *See Rhinehart v. Scutt*, 509 F. App'x 510, 516 (6th Cir. 2013) ("The public interest in leaving the administration of state prisons to state prison administrators is another factor weighing against preliminary injunctive relief in this case.").

The public, of course, also has interests in keeping in jail those prisoners who have been convicted of crimes and those pre-trial detainees who have not satisfied judicially-imposed requirements and conditions for bail. *See King*, 567 U.S. at 1301. Although the preliminary injunction does not order the release of any prisoner, its requirement that jail officials provide a list of certain prisoners sets in motion what may be the release of prisoners to the general population in the future. This outcome flows from the district court's observation in its Order that "home confinement or early release is the only reasonable response to this unprecedented and deadly pandemic . . . . Any response other than release or home confinement placement constitutes deliberate indifference." This statement suggests that the district court may be contemplating the release of convicted prisoners without adequate consideration of the danger that may be posed to society by their release, and the release of pre-trial detainees who have not satisfied judicially-imposed conditions and requirements of bail, which are imposed to reduce flight risk. These concerns are best left to state courts in the first instance. That is why, as noted,

Plaintiffs are required to exhaust their state-court remedies—which they admit they have not done—before they come to federal court for relief.

Furthermore, the district court's finding that the public has an interest "in avoiding serious illness and/or death" does not tip the balance of harms in favor of the preliminary injunction. While COVID-19 certainly poses a harm to all Americans, the question is not "whether COVID-19 presents a danger to the [public] . . . The question is instead whether the plaintiffs have shown that they will suffer irreparable injuries that they would not otherwise suffer in the absence of an injunction." *Swain*, No. 20-11622-C, 2020 WL 2161317, at *5 (citations omitted). They have not shown that they are likely suffer any such injuries, because their deliberate indifference claim is likely to be unsuccessful.

Finally, as for the harm to Plaintiffs, the district court found that Plaintiffs will suffer injury to their constitutional rights if the preliminary injunction against Defendants does not proceed. But because it is likely that Plaintiffs do not satisfy the subjective component of the deliberate indifference inquiry, it is also likely that their constitutional rights have not been violated.

**III.**

I would hold that each of the four factors weighs in favor of granting Defendants' motion to stay pending appeal. In particular, Defendants have made a strong showing of likelihood of success on appeal because Plaintiffs have not exhausted their remedies at the state level, the broad scope of the district court's preliminary injunction contravenes the PLRA, and Plaintiffs have not submitted evidence to show any subjective deliberate indifference by Defendants in responding to COVID-19. I therefore must respectfully dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk