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)

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INTRODUCTION

Few places are more vulnerable to a pandemic than jails. In the Oakland County Jail, there are cells in which ten inmates share a space the size of a large bathroom. Holding tanks and bunk rooms can house more than thirty people at a time. Social distancing in this environment is impossible.

The Jail knows that, under these conditions, COVID-19 presents a substantial risk of serious—life-threatening—harm to the inmates in its care. Yet, it failed to take even the basic steps necessary to minimize that risk. It failed, for example, to provide enough soap or cleaning supplies. It did not properly quarantine the sick. The Jail's staff did not wear masks.

But that's not the worst of it. Not only did the Jail disregard the threat posed by COVID-19; it actively exacerbated that threat. The Jail forced sick inmates to serve food to other inmates. It required inmates to crowd together in a limited number of cells, even though other cells are empty. And, worst of all, the Jail used the pandemic as punishment, transferring inmates who raised safety concerns from units that did not yet have a COVID outbreak to those that did—threatening other inmates that if they dared complain, the same thing would happen to them.

The Jail accuses the district court of conducting a "charade," a sham designed to justify the court's ambition of becoming a "super warden" of the Oakland County Jail and the "sole arbiter" of the fate of all Michigan prisoners. Opening Br. 16, 19.

These accusations bear no resemblance to the proceedings the district court actually conducted, nor to what its order actually held.

Presented with allegations of dangerous (and unconstitutional) jail conditions, the district court moved quickly but cautiously. It ordered an inspection of the Jail. It heard days of testimony via video conference. It read dozens of declarations to ascertain the situation on the ground. And it made detailed factual findings. It was this painstaking factual inquiry—not some desire to install itself as warden—that led the court to conclude that the Jail was deliberately indifferent to the life-threatening risk posed by COVID-19.

Because the Jail's deliberate indifference poses an immediate threat, the district court entered a preliminary injunction. But contrary to the Jail's breathless assertions, that injunction does not authorize the court to "unilaterally take over" the Jail, nor does it "provide[] authority for the release of all medically vulnerable state court inmates." It does not order the release of anyone at all.

In reality, the narrowly-tailored preliminary injunction here does only 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, R. 94, PageID 3063.

This second requirement is no longer at issue: Because the Jail has already provided the list to the district court, any appeal on that issue is moot. And in any event, this Court has "consistently rejected attempts to obtain review of orders" that are only intermediate steps toward relief, like those "requiring the submission of remedial plans"—a jurisdictional defect recognized by the motions panel that denied the Jail's stay request. Stay Denial at 4. The Jail offers no response.

The only thing at issue in this appeal, therefore, is the district court's order that the Jail implement basic safeguards to reduce the spread of COVID-19.

These are not drastic measures. And the district court did not abuse its discretion in requiring them. The court's order rests on detailed factual findings and credibility determinations demonstrating that the plaintiffs are likely to succeed in showing the Jail was deliberately indifferent to the deadly threat COVID-19 poses. And the Jail doesn't even attempt to dispute that absent a preliminary injunction, its inmates would suffer irreparable harm. On the other hand, the Jail has not identified *any* real harm it might suffer by implementing these measures. After all, they are primarily measures the Jail claims to have already implemented.

The district court's injunction is essential to safeguarding the lives of those within the Oakland County Jail and the community that surrounds it. This Court should affirm it.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellees respectfully request oral argument under Circuit Rule 34(a). As the Jail notes, this appeal presents issues of significant public interest, review of which will likely require a fact-intensive inquiry. Particularly given the expedited timeframe, we believe that oral argument will assist the panel in conducting that inquiry and evaluating the issues on appeal.

STATEMENT OF JURISDICTION

The plaintiffs do not object to the Jail's jurisdictional statement, with one exception: This Court lacks jurisdiction over the orders denying the Jail's motion to dismiss the plaintiffs' habeas petition and requiring the Jail to produce a list of medically-vulnerable subclass members, because, among other things, these orders are not "inextricably intertwined" with the preliminary injunctive relief over which this Court has jurisdiction in this appeal. *See Wedgewood Ltd. P'ship I v. Twp. of Liberty*, 610 F.3d 340, 348 (6th Cir. 2010); *see also infra*, Argument Part I.C.[1]

[1]Unless otherwise specified, internal quotation marks, emphases, and alterations are omitted throughout the brief.

ISSUES PRESENTED

1. Deliberate indifference. Did the district court abuse its discretion in concluding that the plaintiffs are likely to succeed in establishing the Jail was deliberately indifferent to the threat posed by COVID-19, given substantial testimony and documentary evidence demonstrating that the Jail disregarded—and in some cases actively exacerbated—the risk the virus poses to inmates?

2. Administrative exhaustion. Did the district court abuse its discretion in holding that the plaintiffs need not exhaust the Jail's grievance procedures because the Jail threatens inmates who file grievances and denies access to grievance forms?

3. Appellate jurisdiction. Does this Court have appellate jurisdiction over the district court's order requiring the Jail to produce a list of medically-vulnerable subclass members?

4. State exhaustion. If this Court does have jurisdiction, did the district court err in concluding that the medically-vulnerable subclass's release claims are properly brought under habeas and not barred by the state-exhaustion doctrine?

5. Provisional class certification. Did the district court abuse its discretion in provisionally certifying a class and subclasses, given the multiple common questions central to the validity of the plaintiffs' claims?

6. Other preliminary-injunction factors. Did the district court abuse its discretion in finding that the plaintiffs had established irreparable harm, and that the balance of the equities and the public interest here weigh in favor of preliminary-injunctive relief?

STATEMENT OF THE CASE

After a three-day evidentiary hearing by videoconference, during which both sides presented live testimony and documentary evidence, the district court found that the Oakland County Jail acted with deliberate indifference by disregarding—and in some instances, exacerbating—the severe threat that COVID-19 poses to its inmates.

The court's resulting preliminary injunction is rooted in pages of detailed factual findings and credibility determinations. *See* PI Opinion, R. 93, PageID 2991-3014 (hereafter "PI Op."). In its brief, the Jail simply ignores or misstates this thorough examination of the record, instead cherry-picking evidence—primarily testimony from its own two witnesses—that it believes is most favorable to its side. And the Jail even tries to introduce extra-record evidence on appeal—evidence that the district court specifically excluded as unreliable, not credible, and in violation of its orders. The district court's careful findings are well-grounded in the evidence, and therefore are not clearly erroneous.

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

A. Based on extensive testimony and expert evidence, the district court found that the Jail failed to take adequate measures to prevent the spread of COVID-19 despite knowing 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. "[T]he overall record," the court summarized, "reflects a willingness to continue housing Jail Class members in a manner that increases their risk of infection." PI Op., PageID 3039.

COVID-19 "is a highly infectious respiratory illness that easily spreads from person to person." PI Op., PageID 2996. Michigan is an "epicenter" of the pandemic, with more than 50,000 confirmed cases and over 5,000 deaths. PI Op., PageID 2996. The CDC has recognized that jail environments "present[] unique challenges for control of COVID-19 transmission" and "heighten[] the potential for COVID-19 to spread once introduced."[2]

Yet the district court found that Oakland County Jail "has crafted no . . . plan" for protecting medically-vulnerable detainees and "house[s] inmates throughout the Jail without regard to their medical vulnerabilities." PI Op., PageID 3044 n.44. This

[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.

is so even though the Jail is aware of the "greater risk of severe illness or death for" medically-vulnerable inmates, such as those with lung disease, asthma, chronic liver or kidney disease, diabetes, hypertension, and other medical conditions. PI Op., PageID 2996-98. As a result, highly vulnerable people like Antione Hutson, who suffers from myeloma cancer and kidney failure, are housed in crowded cells with people who show symptoms of infection, without being monitored by medical staff. PI Op., PageID 3008 & 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). The Jail has repeatedly "threatened" to retaliate against inmates who "dare to complain" by transferring them to infected units—and it has "carried out the threat." PI Op., PageID 3023; *see also, e.g.*, PI Op., PageID 3042; PI Tr. Vol. 1, R. 56, at 24, 27-29; Cameron Decl., R. 5-3, PageID 371-72 ¶¶ 8-10; Briggs Decl., R. 5-4, PageID 379 ¶ 8; Lee Decl., R. 5-5, PageID 384-85 ¶¶ 9-17; Cameron Decl., R. 31-2, PageID 1026 ¶ 7. Some transfers were to a particularly crowded and dirty cell that directly adjoins a cell where quarantined people were held. PI Op., PageID 3010, 3023; PI Tr. Vol. 1, R. 56, at 34-35; Lee Decl., R. 5-5, PageID 385 ¶21; White Decl., R. 55, PageID 1445-46 ¶¶ 3-7.

Even after this litigation began, the Jail continued to use transfers and threats of transfers as punishment. *See, e.g.*, Cameron Decl., R. 31-2, PageID 1026 ¶ 4; Baker Decl., R. 31-3, PageID 1030 ¶ 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., PageID 3008-09. Yet the very next day someone who did not sweep the floor when instructed by a deputy was transferred as punishment. Cameron Decl., R. 31-2, PageID 1026 ¶ 7.

The district court also found that, in addition to deliberately moving people to areas where they are exposed to COVID-19, the Jail does not have adequate procedures in place for locating and quarantining people who have COVID-19. PI Op., PageID 3010 (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 just been held was not quarantined. PI Op., PageID 3041.

In addition, "Jail medical staff are not responding appropriately to inmates who report symptoms of COVID-19." PI Op., PageID 3011. 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. PI Op., PageID 3011; *see* Briggs Decl., R. 5-4, PageID 379 ¶ 8. Although the Jail claims its "clinic staff pass out sick call slips daily," Opening Br. 8, the district court credited evidence showing that numerous inmates went for stretches of days without the opportunity to see a nurse or other health staff. *See* PI Tr. Vol. 1, R. 56, at 27:3-6; Kucharski Decl., R. 5-7, PageID 395 ¶¶ 8-10; Arsineau Decl., R. 5-9, PageID405 ¶ 7.

The court made further factual findings about the impossibility of sufficient social distancing at the Jail and the Jail's failure to even facilitate social distancing to the maximum extent possible at its current population. As the CDC has explained, the "single most important strategy," Tr. Vol. 1, R. 56, at 79:19-20, for preventing the spread of the virus in jails and prisons, the CDC has explained, is "social distancing"—it is "a cornerstone of reducing transmission of respiratory diseases" in correctional environments. CDC, *Interim Guidance*.

But, as the district court found, social distancing is currently impossible at the Jail. Inmates are housed in units ranging from two-person cells to "holding tanks"

that can house up to 37 people. PI Op., PageID 2993-94. Many people are housed in ten-person cells that are approximately 12 by 15 feet. PI Op., PageID 2994. 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-person cells. PI Tr. Vol. 2, R. 60, at 94. In some cells, inmates sleep a foot apart or less. PI Op., PageID 2995. In other areas, such as 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., PageID 2995, close enough to "essentially . . . cuddle" each other, Cameron Decl., R. 5-3, PageID 372 ¶ 9.

As the district court noted, the Jail has exacerbated the problem by continuing to keep many of its cells at maximum or near-maximum capacity despite the fact that "many of the Jail's housing cells remain empty." PI Op., PageID 3040 (citing Defs.' Hr'g Ex. C, R. 68, PageID 2286-2332); *see also* PI Tr. Vol. 2, R. 60, at 58-59; PI Tr. Vol. 3A, R. 61, 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 for most medically-vulnerable inmates. PI Op., PageID 3045-46.

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., PageID 3039-40; *see also* PI Op., PageID 3009-10 (describing declarations and testimony). The district court found that these unhygienic conditions have persisted even after the court's issuance of a TRO. PI Op., PageID 3040; *see, e.g.*, PI Op., PageID 3009-10 (crediting declarations); PI Tr. Vol. 1, R. 56, at 36-38 (no improvement in hygiene until the jail inspection ordered by the district court); PI Tr. Vol. 3A, R. 61, at 134-35 (contradicting Defendants' testimony that cleaning supplies are now available on demand); Hutson Decl., R. 46, PageID 1422 ¶¶ 4-6 (dirty cell; watered down cleaning supplies; no personal protective equipment; insufficient soap); Chandler Decl., R. 48, PageID 1428 ¶ 5 (insufficient cleaning supplies and soap; shared brooms not disinfected when passed between cells; washcloths replaced less than monthly); Sheppard Decl., R. 49, PageID 1431 ¶¶ 8-10 (similar). 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., PageID 3001 (citing *Interim Guidance*).

Each day, approximately 170 jail staff and contractors enter the Jail. PI Op., PageID 2995. The district court not only found that these jail staff consistently fail to wear masks—an obvious hygiene failure and a violation of the TRO—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. PI Op., PageID 3010, 3040. Similarly, the district court credited evidence that the Jail did not post signs about the dangers of COVID-19 until just before the Jail inspection that resulted from this lawsuit. PI Op., PageID 3008; *compare* Opening Br. 4-5. The 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., PageID 3003 n.25.

The district court also credited extensive evidence that a COVID-19 outbreak occurred in the kitchen area of the main jail, and that rather than taking immediate action, the Jail forced sick inmates to continue serving food to other inmates. PI Op., PageID 3010, 3012. "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., PageID 3012 n.34.

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. First, the court credited the live testimony of named plaintiff Jamaal

Cameron and the plaintiffs' declarations from eighteen people 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., PageID 3038. The Jail, by contrast, failed to rebut the inmates' accounts and provided no "testimony from any of the identified or named staff members," either live or via declaration. PI Op., PageID 3038. 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." PI Op., PageID 3038.

Second, the district court largely discounted the testimony of the Jail's two live witnesses because neither had direct knowledge about conditions in the Jail. Although both witnesses—Captain Curtis Childs and the Jail's Health Services Administrator, Vicky Lynn Warren—purported to testify to then-current conditions at the Jail, Captain Childs had not been in any area where detainees are kept for "a couple of weeks" and Warren "very seldom" enters the occupied portions of the Jail at all. PI Op., PageID 3003. 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." PI Op., PageID 3039. The court reasonably credited the "dramatically different picture of what is occurring at the

Jail" as described by Mr. Cameron and other inmates, witnesses who were actually present in the Jail, over the Jail's witnesses, who were not. PI Op., PageID 3008.

Both defense witnesses also made unreasonable statements that caused the district court to discount their credibility and judgment. For example, the court discounted Captain Childs's testimony that social distancing is possible at the jail if inmates sit in the "corners" of their cells for "23 hours a day." PI Op., PageID 3040. The court described this testimony, provided under oath in open court, as "disingenuous at best." PI Op., PageID 3040. 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." PI Op., PageID 2999 & 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. PI Tr. Vol. 2, R. 60, at 94-96.

Finally, the district court credited the plaintiffs' expert, Dr. Adam Lauring, who testified extensively as to the unreasonable risk of COVID-19 spread created by the Jail's inaction. PI Tr. Vol. 1, R. 56, 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., PageID 3039. In contrast, the plaintiffs provided numerous declarations about the inadequacy of the

Jail's response to the threat of COVID-19. See PI Op., PageID 2997 (crediting opinions of the plaintiffs' experts).

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

The district court found that the plaintiffs have no available administrative remedies. PI Op., PageID 3022-23. First, the court observed that 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., PageID 3023. More critically, the court found that the plaintiffs' "affirmative efforts" to nevertheless try to file administrative grievances were "thwarted by machination and intimidation." PI Op., PageID 3022. 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., PageID 3023. After raising coronavirus-related health concerns, Mr. Cameron was similarly retaliated against by being moved to a holding tank. PI Op., PageID 3012; Cameron Decl., R. 5-3, PageID 372 ¶ 9.[3]

[3] The Jail asserts (at 12-13)that Mr. Cameron "upon cross-examination admitted that" he was never threatened with transfer for raising these concerns. Although Mr. Cameron said that one of the deputies (Deputy Kettlewell) did not *explicitly* mention "corona" when threatening to transfer him, Mr. Cameron also testified that "numerous" guards made "the threat" to transfer inmates "using the phrase 'where the corona is.'" PI Tr. Vol. 1, R. 56, p. 61:18-25; *see also* PI Tr. Vol. 1,

The district court found that Mr. Cameron's live 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. PI Tr. Vol. 1, R. 56, at 56-57, 62-63; Cameron Decl., R. 5-3, PageID 375 ¶ 26; Briggs Decl., R. 5-4, PageID 379 ¶ 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"); Cameron Decl., R. 5-6, PageID 391 ¶ 15 ("[P]eople 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"); Kucharski Decl., R. 5-7, PageID 396 ¶ 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.").

In light of this evidence, the district court found that despite Captain Childs' testimony that eight grievances "possibly related to COVID-19," the Jail's grievance process was not, in fact, an available remedy. PI Op., PageID 3006 n.27.[4]

R. 56, at 70:20-71:2. He also testified that he witnessed Mr. Lee being transferred in retaliation for filing a grievance. *See* PI Tr. Vol. 1, R. 56, at 62:24-63:7.

[4] The Jail did not offer "any of the filed grievances as evidence prior to, during, or immediately following the evidentiary hearing." PI Op., PageID 3006 n.27. More

III. The district court issued a narrowly-drawn injunction requiring the Jail to provide basic health and hygiene safeguards, and to produce a list of medically-vulnerable class members.

Based on its factual findings and its 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, R. 94, PageID 3058-64.

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, R. 94, PageID 3060. The Jail claims that its policies already required these actions. *See* PI Op., PageID 3004; *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://perma.cc/A6CA-6PS5 (including statement from defendants that "everything the judge issued [in the TRO] we have already done and been doing well prior to the lawsuit"). Likewise, the

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than two weeks after the hearing, the Jail submitted these grievances as exhibits to a proposed surreply on class certification. *See* Grievances, R. 91-3, PageID 2965-80. Because "[p]arties do not have a right to file a surreply brief under the federal procedural rules or the local rules," the district court properly denied the Jail's request. *See Albino-Martinez v. Adducci*, 2020 WL 1872362, at *2 (E.D. Mich. Apr. 14, 2020) (citing cases). Accordingly, the grievances are not part of the record on appeal.

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, R. 94, PageID 3061-62, all of which the Jail says it already does under its existing protocols, PI Op., PageID 3004-05. *See* CDC, *Interim Guidance*, at 7, 11.

Other measures the district court implemented include requiring that surfaces shared by inmates 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 to wash their hands regularly or use hand sanitizer, and training staff on measures to reduce the spread of COVID-19. PI Op., PageID 2990-91. The district court tailored these terms to the guidance the CDC issued for those overseeing jails. *See* PI Op., PageID 2999-3001. And the district court put in place several measures that require the Jail to report testing and occupancy information to the court on a weekly basis to allow monitoring of the injunction's efficacy—information the Jail had no trouble providing during the preliminary-injunction hearing. *See* PI Order, R. 94, PageID 3061-63.

Finally, the preliminary-injunction order instructed the Jail to provide the court a list of medically-vulnerable subclass members. PI Order, R. 94, PageID 3063 ¶22. 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 Order, R.94, PageID 3063 (emphasis added). The preliminary-injunction order—the only order that the Jail has appealed here—does not order a single individual to be released.[5]

IV. This Court and the district court deny the Jail's requests to stay the preliminary injunction.

The Jail moved this Court and the district court to stay the preliminary injunction pending appeal, making many of the same arguments that it repeats in its brief on the merits. Both courts denied the Jail's request. *See* Order Denying Stay, May 26, 2020 (Doc. 22); Stay Denial, R. 121, PageID 3194-3203.

This Court concluded that the district court did not abuse its discretion in entering the preliminary injunction. Doc. 22 at 3-4. In so holding, it discussed several specific findings that it concluded were supported by the record, including that the Jail has had "numerous positive COVID-19 infections, and inmates who are asymptomatic are housed near those with positive confirmed cases"; that its "efforts in mitigating transmission are not evenly or consistently applied"; and that the Jail could not adequately "implement or enforce social distancing given how closely

[5] On May 31, the district court issued an order setting out the process by which it would consider bail applications for medically-vulnerable inmates pending a decision on the merits of their habeas claims. Order, R. 111, PageID 3156-58. The district court then invited the plaintiffs to file bail applications on behalf of certain medically-vulnerable class members. Order, R. 116, PageID 3168-70. The Jail has not appealed either order, and neither is at issue in this appeal.

inmates were housed together." *Id.* at 3-5. The Court also held that the district court correctly determined that habeas was the proper avenue for the medically-vulnerable subclass to seek release and that the plaintiffs' failure to exhaust state-court remedies before doing so was excused. *See id.* at 3. But, the Court observed, because the district court had not yet "ordered the release of any inmate," appellate review of the issue was premature. *See id.* As to the balance of the equities, the Court recognized that the plaintiffs "are rightfully frightened of contracting COVID-19" and that "[t]he public has a strong interest in [] reducing the transmission of COVID-19." *Id.* at 4-5. For similar reasons, the district court also rejected the Jail's arguments for a stay. Stay Denial, R. 121, PageID 3194-3203.

SUMMARY OF ARGUMENT

I.A. The district court did not abuse its discretion in issuing a preliminary injunction. Based on a thorough examination of the record, the district court properly concluded that the plaintiffs are likely to succeed on the merits because it found that the Jail acted with deliberate indifference by disregarding—and, worse, exacerbating—the substantial risk that COVID-19 poses to the plaintiffs' health and safety.

As an initial matter, the standard governing deliberate indifference claims is different for pretrial detainees and post-conviction prisoners. Post-conviction prisoners, whose claims are governed by the Eighth Amendment, must satisfy both

an objective and subjective prong. By contrast, the standard for pretrial detainees claims' under the Due Process Clause of the Fourteenth Amendment are governed by a purely objective standard.

But even if all the plaintiffs were required to satisfy both the objective and subjective components, they are likely to succeed in doing so. First, as to the objective component, as this Court recently held, COVID-19 poses "a substantial risk of serious harm" to inmates, especially where, as here, they are housed in such close quarters that social distancing is impossible. Slip op. 13, *Wilson v. Williams*, No. 20-3447 (6th Cir. June 9, 2020). The objective prong of deliberate indifference is therefore "easily satisfied." *Id.* Indeed, the Jail did not dispute this below. So its argument here is forfeited.

As to the subjective component, the Jail argues that the district court ignored this inquiry. But the court spent ten pages carefully explaining why the plaintiffs are likely to succeed in showing that the Jail disregarded—and, in some ways, exacerbated—the risk posed by COVID-19. Among other things, the court found that the Jail refused to implement basic safeguards like providing sufficient soap and staff wearing masks; refused to use empty cells, so that more inmates than necessary were crowded together in spaces far too small to social distance; failed to implement contact tracing or to quarantine inmates exposed to the virus; required sick inmates to serve food to others; and transferred inmates from units without COVID to units

with the disease as punishment for complaining about safety concerns. As to the Jail's own subjective awareness—a component of deliberate indifference that is usually proved through circumstantial evidence—the Jail did not undertake many of the actions it said it did, and hid that fact, demonstrating that it knew that its conduct was insufficient. It also actively transferred prisoners to units with COVID as punishment, an act that obviously increases the risk of disease transmission. The Jail either ignores these findings, or attempts to rebut them solely through evidence that the district court found lacked credibility—and the Jail never explains why those credibility findings were wrong. That is insufficient to show that the district court's factual findings were clearly erroneous.

B. The Jail's other arguments challenging the plaintiffs' likelihood of success on their § 1983 claims also fail. First, the district court correctly found that the plaintiffs were not required to exhaust their administrative remedies because such remedies are unavailable here: The Jail has thwarted inmates' efforts to exhaust through "machination and intimidation," including by threatening to transfer those who do file grievances to units where there is a COVID outbreak. And even if the Jail did not intimidate inmates from using the grievance process, it is far too slow to adequately address a fast-moving pandemic that poses an immediate threat.

Second, the Jail's argument that the Supreme Court's decision in *Pennhurst* prohibits injunctive relief here is not only forfeited; it's meritless. *Pennhurst* says that a

federal court cannot enjoin state institutions to comply with *state* law, but the district court enjoined the Jail to comply with the *federal* Constitution. Finally, the Jail's contention that the plaintiffs are unlikely to succeed in satisfying *Monell* fails because it is the Jail's policies and widespread practices—not the rogue actions of an individual jailer—that have subjected plaintiffs to a serious risk of harm.

C. The Jail directs most of its fire at arguing the medically-vulnerable subclass's release claims are unlikely to succeed, but those claims are not at issue in this appeal. The only order specific to the medically-vulnerable subclass on appeal is the district court's order that the Jail provide it a list of medically-vulnerable subclass members. The Jail has already done so. This Court does not have jurisdiction to consider orders the district court has not even issued and from which the Jail has not appealed.

In any event, the Jail's arguments are meritless. As this Court recently held, habeas is the proper vehicle for medically-vulnerable inmates to seek release due to a jail's deliberate indifference to the risks posed by COVID-19. State exhaustion is no bar to the plaintiffs doing so here because, as the district court found, there is no available standard review process adequate to remedy their claims.

D. The district court properly preliminarily certified the classes here. There are several common questions central to the validity of the plaintiffs' claims—for example, whether they are excused from exhaustion, the conditions at the Jail, and

whether the Jail's actions (and inaction) demonstrate deliberate indifference. The answers to these questions are classwide, and the injunction required to remedy the Jail's deliberate indifference would also apply to the class as a whole.

II. The Jail does not—and cannot—dispute that absent a preliminary injunction the plaintiffs will suffer irreparable harm. COVID-19 is a highly transmissible, often lethal disease. If the Jail is permitted to continue disregarding it, the plaintiffs' health and lives will be at risk.

III. The balance of harms and the public interest both weigh in favor of upholding the preliminary injunction. The Jail can point to no harm it will suffer if the preliminary injunction remains in force. On the other hand, if COVID-19 is permitted to spread within the Jail, not only will the plaintiffs' lives be at risk, so too will those who work at the Jail and the surrounding community.

STANDARD OF REVIEW

In issuing a preliminary injunction, a court "must balance four factors": "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Am. Civil Liberties Union Fund of Michigan v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015).

This Court "review[s] a district court's decision to grant or deny a preliminary injunction for abuse of discretion." *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 289 (6th Cir. 2019). Under this standard, the Court reviews "the district court's legal conclusions de novo and its factual findings for clear error." *Id.*

"This standard of review is 'highly deferential' to the district court's decision." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019). And 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)). "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). "[W]hen 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.

This Court "review[s] a trial court's evidentiary ruling under an abuse of discretion standard." *Frye v. CSX Transp., Inc.*, 933 F.3d 591, 598 (6th Cir. 2019).

"Generally speaking, [it] will overturn a district court's decision to admit or exclude evidence only if [it is] firmly convinced of an error below." *Id.*

ARGUMENT

I. The district court properly concluded that the plaintiffs have demonstrated a likelihood of success on the merits.

A. The district court did not abuse its discretion in finding that the Jail was deliberately indifferent to the risk that COVID-19 posed to the class members' health and safety.

The Supreme Court has made clear that prison officials violate the Constitution when, "acting with deliberate indifference, [they] expose[] a prisoner to a sufficiently substantial risk of serious damage to his future health." *Farmer v. Brennan*, 511 U.S. 825, 843 (1994). "[H]aving stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Id.* at 833.

After hearing three days of live testimony, reviewing voluminous evidence from both sides, and considering multiple expert reports, the district court found that the Jail acted with deliberate indifference by disregarding—and, in some respects, exacerbating—the substantial risk that COVID-19 poses to the plaintiffs' health. The Jail offers no reason to disturb the district court's considered decision.

1. Although post-conviction prisoners must satisfy the Eighth Amendment's subjective and objective components, pretrial detainees need only meet an objective standard.

Two different standards govern the deliberate indifference claims here, for the plaintiffs include both post-conviction prisoners and pretrial detainees.

a. The claims of the post-conviction prisoners are governed by the Eighth Amendment, under which a plaintiff must satisfy "an objective and subjective prong." *Berkshire v. Beauvais*, 928 F.3d 520, 537 (6th Cir. 2019). To satisfy the objective component, "a prisoner must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Reilly v. Vadlamudi*, 680 F.3d 617, 624 (6th Cir. 2012). The subjective prong, meanwhile, requires "that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Berkshire*, 928 F.3d at 537. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact." *Farmer*, 511 U.S. at 842. And deliberate indifference may be "infer[red] from circumstantial evidence," including "the very fact that the risk was obvious." *Id.*; *see Rhinehart v. Scutt*, 894 F.3d 721, 738 (6th Cir. 2018).

b. Pretrial detainees' right to safety and medical care is governed by the Fourteenth Amendment, not the Eighth Amendment. *See Phillips v. Roane Cnty.*, 534 F.3d 531, 539 (6th Cir. 2008). The Jail contends (at 49) that the standards governing "[d]eliberate indifference claims are the same under the Eighth and Fourteenth Amendments." Although that used to be the case, that's no longer true.

In *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), the Supreme Court clarified that the relevant standard governing officers' state of mind for Fourteenth Amendment violations "is objective not subjective." *Id.* at 2472-76. Acknowledging that a subjective standard applies to "claims brought by convicted prisoners under" the Eighth Amendment, the Court held that a different standard applies to pretrial detainees because the language of the Fourteenth Amendment's Due Process Clause "differs" and "pretrial detainees . . . cannot be punished at all." *See id.* at 2475.

Though *Kingsley* involved excessive-force claims, "nothing in the logic the Supreme Court used [there] would support. . . dissecti[ng] [] the different types of claims that arise under the Fourteenth Amendment's Due Process Clause." *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018). Thus, multiple federal circuits have held that "medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject *only* to the objective unreasonableness inquiry." *Id.* (emphasis added); *see, e.g.*, *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1120, 1122-25 (9th Cir. 2018); *Darnell v. Pineiro*, 849 F.3d 17, 34-36 (2d Cir. 2017). This Court too has recognized that *Kingsley* "calls into serious doubt" whether a pretrial detainee alleging deliberate indifference "need even show" a defendant's subjective awareness to prevail. *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018).

This Court need not decide the issue in this case. Even if a subjective showing were required for pretrial detainees, it is satisfied here. But if this Court disagrees, it

should hold that under *Kingsley*, no such showing is necessary for pretrial detainees. As to such detainees, this Court should hold that "deliberate indifference should be defined objectively." *Darnell*, 849 F.3d at 35.

2. The Jail forfeited any challenge to the objective component of deliberate indifference, and in any event, the plaintiffs are likely to succeed in establishing it.

The danger COVID-19 poses to jail inmates "is practically common knowledge." PI Op., PageID 3037. Indeed, before the district court, the Jail did "not dispute[] that the objective component" of deliberate indifference—a substantial risk of serious harm—"is satisfied here." *Id.*, PageID 3035-36. Now, however, the Jail argues for the first time on appeal that "the objective component of deliberate indifferen[ce] analysis is not satisfied." Opening Br. 47-48. This argument is forfeited. *See, e.g.*, *McDaniel v. Upsher-Smith Labs., Inc.*, 893 F.3d 941, 948 (6th Cir. 2018) ("[A]n argument not raised before the district court is waived on appeal.").

Even if it were not forfeited, the Jail's argument borders on frivolous. As the district court held—and as this Court held just yesterday—the risk posed by COVID-19 "easily satisfie[s]" the Eighth Amendment's "objective prong." Slip op. 13, *Wilson v. Williams*, No. 20-3447 (6th Cir. June 9, 2020); *see* PI Op., PageID 3036. "The transmissibility of the COVID-19 virus in conjunction with" the congregate nature of the Jail "presents a substantial risk that [the plaintiffs] will be infected with COVID-19 and have serious health effects as a result, including, and up to, death."

Wilson, slip op. 13. The Jail does not and cannot dispute this common-sense conclusion.[6]

The Jail asserts (at 47-48) that only 1.5% of its inmates have tested positive for COVID as of May 1. This assertion is misleading at best. According to the Jail's own health staff, the day after this lawsuit was filed, 36 out of 242 inmates tested—*fifteen* percent—tested positive for COVID-19. Warren Aff., R. 30-6, PageID 743. The Jail claims that this number has decreased. *See* Opening Br. 8, 47. But not only are these claims based on weeks-old testing numbers, the Jail says (at 8-9) that 186 inmates (nearly a third of its population) have refused testing altogether. The Jail has offered no explanation for this purported mass refusal—"refusal" that the Jail began to claim only after this lawsuit was filed and the Jail was required to submit infection rates to the district court. *See* PI Op., PageID 3013 n.36.

The Jail's pronouncements, therefore, that the spread of the virus has "been remarkably contained" are baseless. Opening Br. 47-48. Even assuming the Jail's tests

[6] The Jail also suggests (at 47) that the objective component isn't satisfied because people outside of the jail face a risk of COVID-19. But courts have repeatedly permitted deliberate indifference claims for harms that also exist outside the prison environment—some of which involved far less dire threats than COVID-19. *See, e.g.*, *Helling v. McKinney,* 509 U.S. 25, 35-37 (1993) (secondhand smoke); *Talal v. White*, 403 F.3d 423, 427 (6th Cir. 2005) (same); *Flanory v. Bonn*, 604 F.3d 249, 256 (6th Cir. 2010) ("[d]enying an inmate toothpaste"); *Duvall v. Dallas Cnty.*, 631 F.3d 203, 208-09 (5th Cir. 2011) (MRSA infection); *DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990) (tuberculosis outbreak).

are perfectly accurate, up to thirty percent of its population could have COVID-19.[7] And that's not counting new inmates who may have contracted the infection since last being tested.

What's more, any reduction in the Jail's infection rate is likely due to the district court's temporary restraining order and preliminary injunction. Thus, any purportedly low rate of infection now does not show that the Jail wasn't deliberately indifferent to the risk of COVID-19. It shows that the district court's order requiring it to adopt basic safeguards is working to reduce that risk. Absent the preliminary injunction, the rate of infection is likely to resume climbing.

3. The district court did not abuse its discretion in concluding that the Jail not only disregarded but exacerbated the substantial risk posed by COVID-19.

a. The Jail proclaims that the district court "created a new standard never previously recognized by any federal court in the Country." Opening Br. 42. The district court, the Jail argues, ignored the subjective component of deliberate indifference and instead found deliberate indifference "solely based upon a person's medical condition and incarceration status." *Id.* That's just not true. The court did not disregard the subjective component—it spent more than ten pages explaining why the plaintiffs are likely to succeed in satisfying it. *See* PI Op., PageID 3036-47.

[7] Based on the record and CDC guidance, the district court repeatedly expressed "doubt[]" that the Jail's "test results are accurate." Stay Denial, R. 121, PageID 3201-02; *see* PI Op., PageID 3013 n.37.

The court carefully examined the evidence and found that it demonstrated both that the Jail knew of the substantial risk posed by COVID-19 and not only disregarded it but exacerbated it. *See id.*

In response, the Jail casts aside the district court's factual findings, urging this Court to adopt the Jail's own selective reading of the record instead—a reading based almost entirely on the testimony of its two witnesses, whom the district court found lacked credibility. *See* Opening Br. 50-59. This Court may not do so. To the contrary, this Court must defer to the district court's findings unless they are clearly erroneous, which the Jail has not—and cannot—show. *See Ables*, 167 F.3d at 1035. And those findings demonstrate that the Jail was deliberately indifferent to the risk it knew COVID-19 posed to those in its care.

As an initial matter, the Jail did not below—and does not here—dispute that it knew of the substantial risk posed by the virus. *See* PI Op., PageID 3037. The Jail only disputes that it disregarded that risk. *Id.*, PageID 3038. But as the district court found, there is substantial evidence that it did.

i. Punitive housing and transfers that exacerbated the risk of COVID-19. The district court found that several of the Jail's policies and practices regarding housing inmates during the pandemic demonstrated its disregard for the safety—and lives—of the inmates in its care. For example, the court found that the Jail continued to house nearly half of the Jail's population in multi-person cells after

it was aware of the risk of COVID-19—even though many of its cells remained "empty." PI Op., PageID 3040. Though the Jail calls this finding "erroneous," it does not say why—let alone point to anything in the record for support. Opening Br. 56. The Jail concedes that it kept cells empty despite the need for social distancing, asserting it did so because of "housing, security, classification and mental health concerns." *Id.* But the Jail never explained what these concerns might be. Far from "creat[ing] a constitutional right for inmates to be entitled to six feet of social distancing at all times in the jail," as the Jail contends (at 55), the district court found, based on the record evidence, that the Jail declined to institute distancing measures that it should have implemented. *See* PI Op., PageID 3040, 3044 n.44.

Grasping at straws, the Jail contends (at 56) that there is no evidence that it "subjectively believed it could transfer inmates to other [empty] cells in order to curb the spread of C-19." But deliberate indifference may be "infer[red] from circumstantial evidence," including "the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842. It's obvious that unnecessarily crowding inmates together in multi-person cells, when they could instead be housed in empty ones, decreases their ability to social distance and increases the likelihood of transmission of COVID-19. The district court did not clearly err in finding that the Jail's insistence on keeping inmates

crowded together evinced a disregard of the risks posed to the plaintiffs. *See* PI Op., PageID 3040-42.[8]

Even worse, the court found that the Jail *intentionally* transferred people from an area of the jail that had no COVID-19 cases "to the Main Jail, where there are multiple cases of the virus." *Id.*, PageID 3042. The Jail's own witness confirmed that its policy is to transfer people "housed in the east annex to the main jail if they're unwilling to perform their detail" out of a concern that such work "might be unsafe." Tr. Vol. 1, R. 56, at 26; PI Op., PageID 3006. The Jail even had a sign displaying that policy. *See id.* And it's exactly what happened to Plaintiffs Lee and Cameron. *See* PI Op. PageID 3012 n.35, 3021-22 (citing declarations). The Jail attempts to undermine the district court's finding by asserting (at 58) that the majority of the cells in the Main Jail "are free of inmates who have tested positive for C-19." Opening Br. 58. But, as explained above, that assertion is meaningless: Testing was weeks ago, and thirty percent of the Jail mysteriously "refused." Whatever may be the case now, at the time the Jail retaliated against Plaintiffs Cameron and Lee by transferring them to the Main Jail, there were dozens of confirmed COVID-positives cases in that unit.

[8] Because an objective standard governs the Pretrial Subclass's claims, they need not "show that the [Jail] w[as] *subjectively* aware" of the risks posed by its failure to transfer inmates from crowded cells to empty ones; they must only show that the Jail *should have been aware* of the risk its failure caused. *See Kingsley*, 135 S. Ct. at 2470.

See Def. Ex. B, R. 67; White Decl., R. 55, PageID 1446; Lee Decl., R. 5-5, PageID 385-86.[9]

These punitive transfers combined with the Jail's unnecessary housing of inmates in crowded cells, the court found, reflected the Jail's "deliberate[] indifferen[ce] to the risk of accelerating an outbreak that already exists in the Jail," as well as "deliberate indifference to the individuals being moved by placing them at greater risk of contracting the virus." PI Op., PageID 3042; *see Thaddeus-X v. Blatter*, 175 F.3d 378, 403 (6th Cir. 1999) (transferring an inmate to area of the prison with unhygienic conditions, "thereby *creating* a health risk," constitutes deliberate indifference). The district court's findings are well-supported by the record, and thus are not clear error.

ii. Failure to adopt basic safeguards. The district court also found that the Jail's failure to adopt basic safeguards to protect against the transmission of COVID-19 evinced deliberate indifference to the substantial risk posed by the virus.

For example, the Jail failed to implement an adequate quarantine policy, and had no policy whatsoever "for contact tracing." PI Op., PageID 3041-43. Thus, the Jail housed inmates without COVID-19 alongside those who had—or were exposed

[9] That "housing in East Annex is a privilege" is immaterial. Opening Br. 58. Even if true, it is deliberately indifferent to punish inmates for raising concerns by transferring them (or threatening to transfer them) to the Main Jail, thereby "exposing [them] to COVID-19." PI Op., PageID 3042, 3044 n.44.

to—the illness. *See id.* The Jail claims (at 51) that it *did* implement an adequate quarantine policy, but it cites only the testimony of its witness Nurse Warren. But the district court specifically found Warren's testimony not credible, because she was rarely inside the Jail's housing area. PI Op., PageID 3039; *see* Tr. Vol. 2, R. 60, at 136. She therefore "painted a picture" of the Jail that was "not based on [her] own knowledge and may not even be based on reality." PI Op., PageID 3039. Instead, the district court credited the substantial evidence that the Jail was not in fact adequately quarantining inmates as it claimed. PI Op., PageID 3008, 3010, 3041; Briggs Decl., R. 5-4, PageID 379, Lee Decl., R. 5-5, PageID 386, Arsineau Decl., R. 5-9, PageID 405 (explaining that people with symptoms were being moved from cell to cell without being tested and housed in cells adjacent to presumptively healthy inmates). The district court specifically found that the Jail failed to quarantine a ten-person cell even after the Jail learned that a class member (Mr. Watkins) who had been living in that cell tested positive in early May. PI Op., PageID 3041-42.[10]

[10] The Jail misrepresents the record (at 56-57), claiming that "[t]he cell which Mr. Watkins was removed from" and "the adjoining row of cells was quarantined consistent with OCJ policy." Although the cells adjoining Mr. Watkins' cell in *A-Block* (where he was housed *before* he was tested for the virus) were quarantined, the Jail offered *no* evidence showing that the seven inmates in the *C-Block* cell to which Mr. Watkins was later moved were ever quarantined—even though they were exposed to the virus for (at least) two days. *See* Watkins Decl., R 64-1, PageID 1974; Warren Aff., R. 83-1, PageID 2888.

The district court also found that the Jail failed (1) to disinfect common spaces between each use; (2) to provide class members with sufficient access to soap and cleaning supplies; or (3) to ensure that correctional officers wear masks and gloves while interacting with inmates and inmates' materials. *See* PI Op., PageID 3039-40. The court also credited evidence that inmates who work in the kitchen were required to continue serving food "despite exhibiting COVID-19 symptoms." *Id.*, PageID 3012. The Jail again disputes these findings only by citing its own witnesses' testimony. *See* Opening Br. 50-53. But the district court determined that these witnesses lacked credibility—indeed, they did not personally observe the relevant areas of the Jail—and the Jail provides no reason to question that credibility determination. PI Op., PageID 3038-39.

iii. The Jail's "proactive" measures. The Jail seizes on the district court's statement that "[u]ndoubtedly, Defendants have taken steps to curb the spread of COVID-19." PI Op., PageID 3039. This statement, the Jail argues (at 49), demonstrates that the court "acknowledge[ed]" that the Jail had taken "proactive measures to prevent the spread of C-19." But the court made this statement *after* it had entered a TRO *requiring* the Jail to take measures to combat COVID-19. And the Jail conveniently omits the rest of the sentence: "but the overall record reflects a willingness to continue housing Jail Class members in a manner that increases their risk of infection." *Id.*, PageID 3039. In other words, even *after* the district court

entered a TRO, it found that the Jail *continued* to disregard the substantial risk to inmates' health.

Contrary to the Jail's assertions, there was substantial evidence, credited by the district court, that the measures the Jail adopted were adopted only as a response to this lawsuit—and even then only for show during the court-ordered inspection. For example, evidence credited by the district court showed that corrections officers put on masks for the inspection, but did not ordinarily wear them; the day before the inspection, the Jail removed signs warning that inmates who denied their work detail would be transferred to the Main Jail, where there was a COVID outbreak, and replaced them for the first time with signs about COVID-19; and in the Main Jail, inmates shared bars of soap until the day of the inspection, and after that continued to receive insufficient soap. PI Op., PageID 3009-12. The Jail's *own* evidence shows that its "proactive" measures were not, in fact, proactive at all. For example, the Jail asserts (at 51) that "[a]ll jail staff received training regarding recognizing C-19 symptoms." But the training records the Jail submitted show that none of its staff had any training until *after* the district court entered the TRO. *See* Def. Ex. F, R. 75 (showing that the first day any staff member completed was April 20—three days after the TRO was issued).[11]

[11] The Jail notes (at 50) that it submitted the names of some inmates to state courts in March for consideration for early release. But, as the district court

The Jail emphasizes that Dr. Paredes, the plaintiffs' expert, "did not find any violations of the TRO" when he inspected the Jail. Opening Br. 52. But that says nothing about the Jail's conduct before the court ordered it to implement safeguards. The Jail staff "refused to answer any questions" he had about medical care and testing. Paredes Rpt., R.42, PageID 1371-76. And the Jail ignores the record evidence that it took several measures *only* on the day of inspection, and stopped once Dr. Paredes left. PI Op., PageID 3008-10, 3040; *see also, e.g.*, M. Cameron Decl., R. 31-2, PageID1026; Brinker Decl., R. 31-3, PageID 1030. This itself demonstrates that the Jail knew what measures are necessary to curb the risk of transmission of COVID-19 and intentionally disregarded them—except when an inspector was watching.[12]

The Jail claims (at 53) that the "effectiveness" of its purportedly proactive measures "is demonstrated by the objective results of testing the entire inmate population" between May 1 and May 12. But again, these test results are all but meaningless—especially as a measure of the Jail's pre-suit conduct. The test results

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explained, the Jail's initial list was an small fraction of the medically-vulnerable people at the jail—about 40 among some 200 individuals. *See* PI Op., PageID 3046. Moreover, 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." *Id.*, PageID 3045-46. 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.*

[12] Furthermore, Dr. Paredes' primary finding was that the Jail's "interventions [were] insufficient to interrupt the transmission of COVID-19 infection." Paredes Rpt., R. 42, PageID 1371.

the Jail cites reflect the status of the infection more than two weeks *after* the district court issued its TRO. The Jail's own evidence shows that when this case was filed, more than thirty inmates had tested positive for the virus. *See supra* page 31. In any case, that the Jail may have (partially) complied with the district court's order and that (partial) compliance may have reduced transmission does not undermine the court's determination that the Jail had failed—and absent the TRO, would continue to fail—to act to protect the plaintiffs despite its knowledge of the substantial risk of serious harm presented by COVID-19.

Finally, the Jail claims, again, that there was no evidence showing it "*subjectively believe[d]* the measures [it was] taking are inadequate." Opening Br. 54 (emphasis added).[13] As an initial matter, the district court credited evidence that the Jail did not, in fact, implement the measures it claims to have implemented, even after the TRO. *See supra pages* 39-40. Second, many of the Jails' purported measures occurred only when Dr. Paredes was scheduled for inspection, indicating that the Jail was both aware of the measures needed to ameliorate the risk of COVID-19 and consciously choosing not to implement them (except when the court was watching). *See id*. And finally, the court found that the Jail affirmatively acted in ways that made harm to the inmates more likely—for example, by punitively transferring inmates to areas of

[13] Again, the Jail's *subjective* awareness that the measures it took were inadequate is irrelevant to the Pretrial Class, who under *Kingsley* must only make an objective showing.

the Jail with greater infection and by refusing to consider medical vulnerability in deciding where to house inmates. *See* PI Op., PageID 3042, 3044. The district court did not abuse its discretion in concluding that this evidence supported a finding of subjective deliberate indifference. *See United States v. Wetzel*, 514 F.2d 175, 177 (8th Cir. 1975) ("[I]n common experience circumstantial evidence is most likely to be the only evidence of a subjective state of mind.").

b. Perhaps recognizing that it cannot establish clear error by regurgitating evidence the district court found lacked credibility, the Jail attempts to rely on evidence not before the district court at all: It argues that the district court abused its discretion by not admitting audio recordings of eight inmates, which were surreptitiously taken by jail personnel while they were accompanying these inmates during interviews by the plaintiffs' expert, Dr. Paredes. *See* Opening Br. 59-63. In the Jail's view, these recordings "preclude[]" finding that the plaintiffs have established a likelihood of success on the merits. *Id.* at 60. But this unreliable, unauthenticated, and almost inaudible hearsay—recorded in violation of the district court's inspection order—does not undermine the court's finding of deliberate indifference.

The audio recordings are far from the "credible and untainted evidence" that the Jail portrays. Opening Br. 61. Although district courts need not rigorously adhere to the Federal Rules of Evidence when considering preliminary-injunctive relief, the hearsay recordings that the Jail seeks to admit are particularly unreliable. As an initial

matter, a party seeking to introduce a recording "must authenticate the tape by identifying the speakers on the tape and that the recording fully, fairly, and accurately reflects the taped conversation." *Phipps v. Harrison Radiator*, 787 F.2d 592, 1986 WL 16036 at *2 (6th Cir. 1986); *see* Fed. R. Evid. 901(a), (b)(5). Yet the Jail made no effort to authenticate the completeness or accuracy of these recordings—there's no way to know if the audio files that it has lodged on appeal are even full recordings (as opposed to excerpts) of the inmates' interviews with Dr. Paredes.

Further, the recordings were purportedly taken by a jail deputy using his cellphone—we don't know for sure because they've never been authenticated—without the inspector's or the interviewees' knowledge. Tr. Vol. 3B, R. 62, at 212:1-2. Much of the recordings is difficult to understand, if not entirely unintelligible, presumably because they were made surreptitiously. *See U.S. v. Robinson*, 763 F.2d 778, 781 (6th Cir.1985) (recordings inadmissible where the "incomprehensible portions . . . are so substantial as to render the recordings as a whole untrustworthy"). And all of the inmate interviews were conducted in the presence of the Jail's staff, without any attorneys present. *See* Inspection Order, R. 27, PageID 795 (barring attorneys from attending the inspection). It's unsurprising that inmates would be reluctant to share negative feedback about the Jail in front of the Jail's staff—staff that, as the district court found, had retaliated against inmates for lodging complaints by transferring

them to units with COVID outbreaks. In sum, there is more than enough justification for the district court's finding that the recordings are inadmissible.

The district court also concluded that the recordings violated at least the spirit, if not the letter, of its previous orders. The parties and the judge "spent quite a bit of time carving out an inspection order that was comprehensive," which covered all aspects of Dr. Paredes' inspection. Tr. Vol. 2, R. 60, at 7:15-24. Paragraph 9 of that order provided that: "No attorney for either side shall attend the inspection. The Jail shall assign one or more individuals to accompany the inspector and shall take photographs or videos at the direction of the inspector. No other photographs or videos will be taken during the inspection, nor will any equipment for such recordings be allowed inside the Jail." Inspection Order, R. 27, PageID 795. Although that paragraph does not specifically discuss *audio* recordings, the district court reasonably determined that the Jail's surreptitious recordings of the interviews violated the agreed-upon inspection process. *See* Tr. Vol. 3B, R. 62, at 215:20-216:18.

The district court also rejected the Jail's argument (which the Jail repeats on appeal at 62) that it recorded the interviews to protect itself against Dr. Paredes selectively misrepresenting his findings. *Id.* at 211:11-14. The plaintiffs had proposed

both that the inspection order allow videotaping of the interviews and that a notetaker accompany Dr. Paredes, but the Jail refused both proposals.[14]

Given the district court's "familiarity with the details of the case and its greater experience in evidentiary matters," this Court should not second-guess its considered ruling excluding the Jail's surreptitious recordings. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008).

Finally, even if the recordings should have been admitted, they do not undermine the district court's conclusion that the plaintiffs are likely to succeed in showing deliberate indifference—the record contains overwhelming evidence of the Jail's deliberate indifference. This Court will "reverse a district court's evidentiary decisions only when [it] find[s] that such abuse of discretion has caused more than harmless error." *Perkins v. Rock-Tenn Servs., Inc.*, 700 F. App'x 452, 459 (6th Cir. 2017); *see Taylor v. TECO Barge Line, Inc.*, 517 F.3d 372, 378 (6th Cir. 2008). In fact, the recordings are *consistent* with many of the district court's findings—for example, one

[14] The Jail asserts (at 60) that it sought to introduce these recordings in response to the plaintiffs' filing "a barrage of self procured inmate affidavits prepared and notarized telephonically by Plaintiffs' counsel." But the Jail fails to mention that the plaintiffs filed these declarations because the district court invited the parties—both plaintiffs *and* defendants—to file declarations before the hearing, out of a recognition that it would be impossible to coordinate live testimony from every witness in light of the pandemic. Tr. Vol. 3B, R. 62, at 207:14-208:3; *see* Tr. Vol. 2, R. 60, at 8:23-9:8. The Jail, too, filed declarations. The Jail also omits that, like plaintiffs, its counsel telephonically notarized its witnesses' declarations—even though its witnesses (unlike the inmates who submitted declarations on behalf of the plaintiffs) were easily accessible to counsel.

interviewee says that the jail staff "didn't ever tell" her how to report symptoms; that it "took forever" for the Jail to give her soap; and that she had "no" cleaning supplies. Audio Recording 20200423115002; Tr. Vol. 3B, R. 62, PageID 210:4-216:18. Another interviewee said that it was "disturbing" and "scary" that inmates were "coming and going real fast" between cells without being tested or quarantined, and that "we're just not sure what's going on" with inmates infected with the virus. (At this point, a jail staffer remarked that, "we can answer her questions at another time.") Audio Recording 20200423101118; Tr. Vol. 3B, R. 62, PageID 210:4-216:18.

Even crediting the Jail's (inaccurate) characterization of the recordings, at most all they show is that—*after* the court entered a TRO—*some* inmates received masks and cleaning supplies, and that they knew how to report symptoms; or, at least, that they said they did when in the presence of their jailers. *See* Opening Br. 9-11. The value of such statements in determining the Jail's conduct *before* this lawsuit is limited. Moreover, the statements conflict with the mutually corroborating declarations of almost twenty inmates, as well as extensive live testimony, all of which attested that the Jail was not providing adequate supplies or information. *See* PI Op., PageID 3008-11 (citing declarations); *see, e.g.*, Tr. Vol. 1, R. 56, at 27:7-12, 33:8-34:5, 36:22-38:7, 55:9-19, 62:11-23; Tr. Vol. 3B, R. 62, at 134:14-135:5. The Jail identifies no reason why that testimony—subject to cross-examination and the district court's credibility findings—should be viewed more skeptically than surreptitious recordings

taken by jailhouse deputies, especially in a Jail found to retaliate against inmates who speak up. The Court should reject the Jail's gambit and affirm the district court's evidentiary rulings.

B. The district court correctly determined that the plaintiffs are likely to succeed on their Section 1983 claims.

The Jail argues that, even if it did act with deliberate indifference, the district court's preliminary-injunction order as to the plaintiffs' section 1983 claims should be vacated on three grounds: (1) the plaintiffs failed to exhaust the Jail's administrative remedies; (2) the injunction improperly enjoins the Jail to comply with state law; and (3) the plaintiffs failed to establish that their injuries flow from an official policy or custom. All three arguments are meritless.[15]

1. The district court did not abuse its discretion in finding that there were no available administrative remedies.

The Jail argues that the preliminary injunction should be vacated because the plaintiffs have not exhausted administrative remedies. *See* Opening Br. 34-36. This Court has recognized that the "failure to exhaust administrative remedies under the [Prison Litigation Reform Act] is an affirmative defense that must be established by

[15] The United States asserts that all of the district court's preliminary injunction was entered pursuant to habeas. *See* U.S. Br. 7. It wasn't. Most of the injunction was entered pursuant to § 1983. Only the district court's order requiring that the Jail submit a list of medically-vulnerable inmates was issued pursuant to its habeas jurisdiction.

the defendants." *Napier v. Laurel Cnty.*, 636 F.3d 218, 225 (6th Cir. 2011). In the district court, the Jail did not raise administrative exhaustion in its motion to dismiss or its opposition to the plaintiffs' preliminary-injunction motion. *See generally* Mot. Dismiss, R. 30. The Jail has therefore forfeited any argument against preliminary injunctive relief on this ground. *See McDaniel*, 893 F.3d at 948.

In any case, the Jail's administrative-exhaustion argument is meritless. The PLRA 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); *see* 42 U.S.C. § 1997e(a). This limitation requires courts to examine whether "an administrative remedy, although officially on the books, is not capable of use to obtain relief"—for example, where an administrative process "operates as a simple dead end" for the relief sought, or where "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross,* 136 S. Ct. at 1859-60.

Here, the district court found that the Jail's grievance procedure was unavailable to the plaintiffs to bring their COVID-related claims for that very reason—it determined that the "record evidence reflects that Plaintiffs' affirmative efforts to exhaust have been thwarted by machination and intimidation." PI Op., PageID 3022. As the district court explained, "corrections officers have threatened . . . to transfer inmates who dare to complain to areas infested with a deadly and

highly contagious virus"—and they have "carried out the threat." *Id.* at PageID 3023; *see supra* page 16 (describing examples of inmates transferred or threatened with transfer in retaliation for raising complaints). Corrections officers also "refuse[d] to provide grievance forms to some inmates who request them." PI Op., PageID 3021.

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 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) (holding that a threat of reassignment to a more dangerous housing unit can excuse failure to exhaust).

Yet the Jail does not even mention these findings in its brief. Instead, the Jail offers only a broad statistic—that since January 1, it has received eight grievances "related to the COVID-19 pandemic." Opening Br. at 35-36. That a few grievances have been filed in the Jail 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 simply by pointing to the fact that eight people (out of well over a thousand) filed grievances concerning unsanitary conditions.[16]

Even if the Jail had demonstrated that inmates were not being intimidated and threatened, its grievance process would still be unavailable to remedy COVID claims in light of the immediate risk posed by the pandemic. The Jail's grievance procedure gives administrators an indefinite amount of time to process grievances, and more than a month to investigate and respond. *See* Class Cert. Reply Br., R. 90, PageID 2941-41. Thus, 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" posed by COVID "from becoming an actual harm." *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1173 (7th Cir. 2010); *see also McPherson v. Lamont*, __ F. Supp. 3d __, 2020 WL 2198279, at *10 (D. Conn. May 6, 2020) (finding administrative remedies unavailable because "Plaintiffs risk contracting [COVID-19] while . . . attempting to exhaust the [jail's] administrative grievance procedure"). Since the Jail's grievance process will not provide relief before an inmate faces a serious risk of death, it is "practically speaking, incapable of use" for resolving

[16] The Jail also contends (at 36) that because Mr. Cameron filed a grievance about jail temperatures on May 13, the grievance process is "available." This grievance is not properly before this Court. *See supra* note 4. But in any event, the Jail permitting the lead plaintiff in this case to file a grievance days after testifying at the preliminary-injunction hearing says nothing about the general availability of a grievance process for COVID-19 concerns prior to the filing of this suit.

COVID-19 grievances, and thus "unavailable" for purposes of the PLRA. *Ross*, 136 S. Ct. at 1859; *see also Valentine v. Collier*, 2020 WL 2497541, at *3 (U.S. May 14, 2020) (statement of Sotomayor, J.).

2. The Jail's *Pennhurst* argument is both forfeited and meritless.

For the first time, citing *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Jail argues that the preliminary injunction is improper because it "ordered measures" the Jail claims "were already implemented and being performed." Opening Br. 43-44. Because the Jail "did not raise this argument in the district court," it "has forfeited the right to have it addressed on appeal." *Jackson v. Ford Motor Co.*, 842 F.3d 902, 906 (6th Cir. 2016).[17]

Regardless, *Pennhurst* does not apply here. *Pennhurst* held that federal courts cannot "instruct[] state officials on how to conform their conduct *to state law*." 465 U.S. at 106 (emphasis added); s*ee Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 479 (6th Cir. 2008) (noting that, under *Pennhurst*, a "federal court may not enjoin a state official to follow state law"). Here, the district court issued a preliminary injunction because it found that the plaintiffs were likely to succeed in demonstrating the Jail violated

[17] The plaintiffs, of course, disagree that the injunction's provisions "all reflect measures or policies previously implemented by Defendant," Opening Br. 44. The record shows that the Jail did not fully comply with the court's order, and the district court specifically found that, even after the TRO, the Jail failed to take adequate measures to protect the class members from the virus. *See* PI Op., PageID 3039-3041; Op., R. 121, PageID 3196.

the plaintiffs' Eighth Amendment and Fourteenth Amendment rights—in other words, the court-ordered measures seek to remedy *federal* constitutional violations, not state-law violations. Because the preliminary injunction does not require the Jail to conform to state law, it falls well outside *Pennhurst*'s ambit.

3. The district court properly concluded that the plaintiffs are likely to succeed under *Monell*.

The Jail argues (at 63-65) that the plaintiffs are unlikely to succeed in satisfying *Monell* because, in the Jail's view, the plaintiffs have demonstrated only "one instance" of unconstitutional conduct. This assertion is perplexing. The plaintiffs do not allege an isolated incident by a rogue jailer. The evidence overwhelmingly demonstrates both express policies and repeated, widespread practices that disregard—and worse, exacerbate—the substantial risk posed by COVID.

For example, Captain Childs testified that "it's *the policy* of the Oakland County Sheriff's office to transfer" inmates "to the main jail"—i.e. the part of the Jail where there is a COVID outbreak—"if they're unwilling to perform their detail because [the inmates are] concerned" that doing so would be unsafe. PI Tr. Vol. 3A, R. 61, p. 26:1-14 (emphasis added); *see also id.* at 24:23-24:8. And, as the district court found, in accordance with this policy, there's a widespread practice of the Jail retaliating against inmates by transferring and threatening to transfer them to COVID-infected units. Similarly, there is voluminous evidence in the record, credited by the district court, that the Jail's refusal to implement basic, obvious safeguards to minimize

disease transmission is also widespread. *See, e.g.*, PI Op., PageID 3009 (citing multiple inmate declarations describing insufficient soap); *id.* (citing multiple declarations stating that "common surfaces and items that are touched frequently are not cleaned regularly"); *id.* at PageID 3010 (citing multiple declarations demonstrating that inmates "are moved from cell to cell without consideration of who is symptomatic and who is not").

The Jail does not—and could not—argue that its policies and widespread practices are not attributable to the Jail. Instead, the Jail contends (at 64) that to succeed on *Monell*, we must prove not only that it's acting unconstitutionally now, but that it's acted unconstitutionally in the past as well. This appears to be what the Jail means when it suggests we've shown only "one instance" of misconduct—that we've shown only that the Jail has been deliberately indifferent to one pandemic. *See id.*

But that's all that's required. *Monell* requires only that a plaintiff show "he was injured pursuant to a municipality's custom or policy," *J.H. v. Williamson Cnty.*, 951 F.3d 709, 720 (6th Cir. 2020)—a requirement that can be satisfied either through an official policy or through "persistent and widespread" practices, *Richmond*, 885 F.3d at 948. "[P]roof that the city or county knows that inmates face a substantial risk of serious harm and disregards the risk by failing to take reasonable measures to abate

it" is sufficient. *Id.* As the district court held, and as demonstrated above, the plaintiffs are likely to succeed in making this showing.

Finally, the Jail recycles its misleading assertion that only 1.5% of the inmate population has tested positive for COVID-19, arguing that if that were sufficient for *Monell* liability, "all municipalities with C-19 present in their detention facilities would be subject to preliminary injunctions." Opening Br. 65. But nobody is arguing the mere presence of COVID is sufficient for *Monell* liability. The Jail is liable under *Monell* because it has adopted policies and widespread practices that disregard the risk COVID poses to its inmates—and, worse, exacerbate that risk. *See Duvall v. Dallas Cnty., Tex.*, 631 F.3d 203, 209 (5th Cir. 2011) (evidence "that the County failed to take the well-known steps needed to control [an] infection" outbreak, along with evidence that it knew the outbreak "posed a significant risk of serious disease" is "legally sufficient evidentiary basis for a reasonable jury to find a custom or practice").[18]

[18] The United States argues that the district court's injunction is not "narrowly drawn" and therefore violates the PLRA. *See* United States Br. 20-22. The Jail has not made this argument, and it is therefore forfeited. *Scott v. First S. Nat'l Bank*, 936 F.3d 509, 522 (6th Cir. 2019) ("In this Circuit, an appellant forfeits an argument that he fails to raise in his opening brief."). In any event, the district court's order was narrowly drawn in light of the serious threat posed by COVID-19. *See Graves v. Arpaio*, 623 F.3d 1043, 1050 (9th Cir. 2010). The United States nowhere discusses why any particular injunctive measure is unreasonable when measured against the threat of the disease and the findings of the district court as to the Jail's deliberate indifference to that threat.

C. The district court did not abuse its discretion in ordering the Jail to provide a list of medically-vulnerable inmates.

1. This Court does not have appellate jurisdiction over the list order.

The Jail argues that the district court's order requiring it to provide a list of medically vulnerable inmates "is without any basis or authority." Opening Br. 52. But the Jail's appeal from that aspect of the order is now moot. The Jail has already provided the list. *See* Order, R. 109, PageID 3149; *Bogaert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008) (where "the specific steps required by [a] preliminary injunction have been completed," an appeal regarding those steps becomes moot). "Should the district court enter further orders" that adversely affect the Jail, it "may seek further review in this court as permitted by the normal appellate process." *Id.*

Furthermore, the district court's list order does nothing more than *begin* a process for evaluating alternatives to confinement for the medically-vulnerable subclass. Therefore, as this Court already held in its stay denial, the Court lacks jurisdiction to review it. Stay Denial at 4. The Jail's brief does not even address this jurisdictional deficiency. But this Court has "consistently rejected attempts to obtain review of orders" that constitute only intermediate steps toward relief, such as those "requiring the submission of remedial plans." *Id.* (quoting *Groseclose v. Dutton*, 788 F.2d 356, 359 (6th Cir. 1986)). This is true even where 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. *See Groseclose*, 788 F.2d at 359.

Nor can this lack of appellate jurisdiction be remedied by pendent jurisdiction. Pendent appellate jurisdiction is "sharply restricted." *See 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)). Matters "that ordinarily may not be reviewed on interlocutory appeal" may be reviewed under pendent jurisdiction only if "the resolution of the appealable issue necessarily and unavoidably decides the nonappealable issue." *Wedgewood Ltd. Partnership I*, 610 F.3d at 348.

That is not the case here. "It is not necessary to decide" the propriety of the district court's list order "in order to review" the appealable aspects of the district court's injunction—for instance, the provisions requiring the Jail to provide a more hygienic environment for the inmates. *Summers v. Leis*, 368 F.3d 881, 890 (6th Cir. 2004). 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.). If the district court orders any inmates released, the Jail may appeal that order. But it may not ask this Court to issue an advisory opinion now on a hypothetical release order that hasn't even been issued—let alone appealed to this Court.

2. The plaintiffs appropriately seek release via habeas because they are challenging the fact of their confinement, and they are likely to succeed in showing that state exhaustion does not bar them from doing so.

If, despite the lack of jurisdiction, this Court nonetheless reaches the plaintiffs' habeas claims, it should hold that habeas is the proper vehicle for the medically-vulnerable subclass to seek release—and that the plaintiffs are likely to succeed in showing that state exhaustion does not bar them from doing so. Just yesterday, this Court held that, where a group of medically vulnerable prisoners challenges their confinement as unconstitutionally exposing them to disease and argues "that no set of conditions would be constitutionally sufficient" to remedy the violation, their challenge is appropriately brought via habeas corpus under 28 U.S.C. § 2241. *Wilson v. Williams*, No. 20-3447, at 9-11 (6th Cir. June 9, 2020) (slip op.); *see also Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011). The Jail's arguments (at 30-33) that the medically-vulnerable plaintiffs seeking release are challenging the conditions of their confinement rather than the fact of their confinement thus fail.

So too does the Jail's argument that the plaintiffs' claims are barred by state exhaustion. State remedies need not be exhausted if they are "unavailable," *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48 (1999)—that is, if there is no "standard review process" through which a petitioner can seek relief, *id.* at 844, or if that process is "inadequate or cannot provide the relief requested," *Goar v. Civiletti*, 688 F.2d 27, 28-29 (6th Cir. 1982). The district court found that there is no "standard review

process" here through which the plaintiffs can obtain relief in state court. PI Op., PageID 3018-20. And, in considering the Jail's stay request, this Court agreed. Stay Denial 3.

The Jail does not dispute that state habeas is unavailable. *See* Opening Br. 21-29. Instead, the Jail points to isolated instances in which some Michigan prisoners have been released by some Michigan courts to assert that other state remedies are available. *Id.* at 23. But these isolated instances do not, in fact, demonstrate an available "*standard* review process" *adequate* to provide the plaintiffs relief.

As an initial matter, the Jail is citing most of these state-court orders for the first time—it did not submit the majority of them to the district court. It could have. Most of the orders date from March, April, or early May, and so would have been available to the Jail while district court proceedings were ongoing. But it nevertheless chose not to submit them.

This is not merely a procedural problem. These orders lack almost any factual context, making it impossible to evaluate their relevance here—context that could have been developed had the Jail submitted them as evidence in the district court. *See* A1-A39. Nothing on the face of many of the orders indicates they're even related to the COVID-19 epidemic.[19] Other orders, meanwhile, lack basic information, such as whether the release was precipitated by the prisoner's motion, the Jail's request,

[19] *See* A19, A22, A24, A25, A26, A29-31, A32, A33, A34, A35.

or on the court's own motion;[20] when the proceeding resulting in release was commenced;[21] or the reasoning or factual basis for the court's decision.[22] This Court should decline to consider "for the first time on appeal, documents and transcripts that were not made a part of the record before the district court below." *Barrow v. United States*, 455 Fed. App'x 631, 635 n.1 (6th Cir. 2012); *United States v. O'Dell*, 805 F.2d 637, 643 (6th Cir. 1986).[23]

In any event, even the examples the Jail has provided do not demonstrate a "standard review process" adequate to address the plaintiffs' claims. Most of the cited releases happened because law enforcement officials requested them or state judges acted on their own motion. *See, e.g.*, Brief 23; Addendum A1, A5, A9, A10, A11, A14, A15. The law does not require the plaintiffs to simply wait and hope for a similar act of grace. To the contrary, the Supreme Court has "never interpreted the exhaustion

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[20] *See* A17, A18, A19, A22, A23, A24, A26, A34, A36, A38, A39.

[21] *See* A17, A18, A19, A22, A23, A24, A25, A26, A34, A36, A38, A39.

[22] *See* A22, A24, A25, A26, A29-31, A32, A33, A34, A35.

[23] The Jail argues (at 29-30) that the district court improperly denied its motion to file a supplemental brief, in which it presented "evidence in the form of public records" regarding exhaustion—a smaller list of four decisions. S*ee also* Supp. Br., R. 37. But the Jail itself had previously told the district court it did not need an opportunity to file briefing beyond its opening brief. *See* Tr. (6/5/20) at 78:20-80:4. And furthermore, the Jail had an opportunity to introduce these same public records at the preliminary injunction hearing—and did introduce two of the orders. *See* Ex. D, R. 69; Ex. E, R. 70. The district court then directly addressed the cases the Jail had submitted. PI Op., PageID 3018-19. The Jail cannot now complain the district court did not evaluate cases it chose *not* to submit. And regardless, to the extent it was relevant, the district court *did* evaluate the Jail's evidence. *See* Op., R. 121, PageID 3194 n.2.

requirement" as "requiring a state prisoner to invoke *any possible* avenue of state court review" instead requiring only that state prisoners avail themselves of "the *standard* review process." *O'Sullivan*, 526 U.S. at 844 (emphasis added); *cf. Smith v. State of Miss.*, 478 F.2d 88, 92 n.6 (5th Cir. 1973) (noting that an inmate need not seek "an act of grace" outside the usual procedural channels for review). An inmate can always ask a sheriff, warden, or court to be set free as an act of clemency; the fact that she did not seek such clemency cannot bar her habeas claim. Thus, the fact that *some* jails and judges have, of their own accord, decided to offer grace to *some* medically vulnerable inmates does not mean that the inmates here—who did not receive this grace—are barred from seeking federal habeas relief.

The Jail has pointed to a small number of cases in which the inmates themselves sought release in state court. *See, e.g.*, Opening Br. 23-25. But the Jail admits that the underlying statute, Mich. Comp. Laws § 801.59b, is "permissive in nature," leaving the decision to modify the defendant's sentence "within the Court's discretion." *Id.* (quoting *People v. Comer*, 500 Mich. 278, 295-96 (2017)). The same is true of Mich. Comp. Laws § 771.2(5), another provision cited in the orders, which gives Michigan courts authority to amend "the period and conditions of probation . . . in form or substance at any time." *See also* A16-A18. Neither of these statutes is part of "the standard review process" through which an inmate may assert constitutional claims regarding confinement. *O'Sullivan*, 526 U.S. at 844. And in denying the Jail's

motion to stay, this Court reviewed the cases the Jail submitted below and affirmed the district court's finding that they "establish[ ]" that a standard review process is *not* available for the plaintiffs' claims. Stay Denial 3.

Additionally, even if inmates were, in some instances, required to plead for grace before bringing their legal claims, they could not be required to do so here. Habeas petitioners need not exhaust even standard review processes if "circumstances exist that render" those processes "ineffective to protect the petitioners' rights." *Turner v. Bagley*, 401 F.3d 718, 724 (6th Cir. 2005). The evidence presented at the preliminary injunction hearing demonstrated that plaintiffs who attempted to seek relief through the state court system might have to wait weeks just to get a hearing, after which their request could be summarily denied without a written decision. Tr. Vol. 1, R. 56, p. 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. *See, e.g.*, *McPherson*, 2020 WL 2198279, at *7 (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"). And federal courts are always able to consider unexhausted habeas claims where "unusual" or "exceptional" circumstances exist—a standard that a once-in-a-

century global pandemic certainly satisfies. *Rockwell v. Yukins*, 217 F.3d 421, 423 (6th Cir. 2000); *see* PI Op., PageID 3017-18.[24]

D. The district court's provisional class certification was appropriate.

As the Supreme Court has recognized, civil rights cases like this one are "prime examples" of when class certification is appropriate. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). "Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits." 8 *Newberg on Class Actions* § 25:20 (4th ed. 2002). The district court provisionally certified a class of all inmates at the Jail, as well as subclasses of pre-trial inmates, post-conviction inmates, and medically-vulnerable inmates. This Court's review of that determination is highly deferential: "The district court maintains substantial discretion in determining whether to certify a class, as it possesses the inherent power to manage and control its own pending litigation." *Beattie v.*

[24] The United States argues there's a tension between the district court's finding that the medically-vulnerable subclass cannot safely be confined in the Jail under current conditions and its initiation of a bail process that will not result in the release of all medically-vulnerable inmates. United States Br. 10-11. As explained above, the district court's bail process and release determinations are not currently before this Court. But regardless, the bail determinations are a form of *preliminary* relief *before* the court issues a decision on the merits, and it is required to consider "the interests of justice" as part of those decisions—which includes balancing harm to inmates with other considerations. *See* Standard, R. 112, PageID 3159. And habeas is not always an all-or-nothing remedy. This Court has specifically held that "courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court," saying that such an approach is "rightly favor[ed]" by district courts. *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006).

CenturyTel, Inc., 511 F.3d 554, 559 (6th Cir. 2007). As a result, this Court may reverse the district court's provisional class certification "only if [the Jail] makes a strong showing that the district court's decision amounted to a clear abuse of discretion." *Cole v. City of Memphis*, 839 F.3d 530, 540 (6th Cir. 2016).[25]

The Jail can make no such showing here. The district court correctly determined that the requirements of Rule 23(a) and 23(b)(2) are met in this case. *See* PI Op., PageID 3023-32. The Jail contests the district court's findings only with respect to commonality, the applicability of Rule 23(b)(2), and the ascertainability of the medically vulnerable subclass.[26] *See* Opening Br. 67-75.[27] All three arguments fail.

First, the Jail's arguments regarding commonality and Rule 23(b)(2) rest on the same contention: that "highly individualized determinations" are necessary to provide relief in this litigation. Opening Br. 70-75. But variation among class

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[25] Again, as argued above, this Court does not even have appellate jurisdiction over the medically vulnerable subclass's habeas claims.

[26] The Jail suggests (at 70) that it also disputes the district court's conclusion on 23(a)'s typicality requirement, but its brief contains no arguments regarding typicality. It is therefore waived. *See United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.")

[27] In passing, the Jail (at 69) notes that the Supreme Court has not explicitly blessed habeas class actions. But numerous federal circuits have explicitly held, for decades, that habeas relief may be sought on behalf of a class. *See, e.g.*, *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125-26 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); *U.S. ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973). And this Court has stated that "there is nothing barring a class from seeking a traditional writ of habeas corpus." *Hamama v. Adducci*, 912 F.3d 869, 879 (6th Cir. 2018).

members is common in class litigation, and class actions do not "require identicality." *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997). In arguing otherwise, the Jail misreads *Wal-Mart v. Dukes* as holding that for a class action to be certified, "the validity of Plaintiffs' claims" must be answerable "in 'one stroke.'" Opening Br. 71 (quoting *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011)). But *Dukes* held only that class certification is appropriate where there is "*an issue*" that is "central to the validity" of the class's claims that may be resolved "in one stroke"—not the validity of the plaintiffs' claims in their entirety. *Dukes*, 564 U.S. at 350. Indeed, as this Court has affirmed, "there need be only one common question to certify a class." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013).

Here, there are numerous common questions of both law and fact that are "central to the validity" of the case and whose answers are "apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350. As the district court identified, these common questions include "what are the conditions within the Jail, what has been Defendants' response to COVID-19, and are Defendants' actions and/or inactions reflective of their deliberate indifference to the serious risk of harm the virus poses to all inmates." PI Op., Page ID 3027. Contrary to the Jail's assertion, exhaustion, too, is a common question. The plaintiffs argue that the Jail's grievance procedure is unavailable to the class as a whole. Thus, here, as in other cases brought by detainees, "whether exhaustion should be excused because administrative remedies were

unavailable . . . is a question common to all members of the class." *Butler v. Suffolk County*, 289 F.R.D. 80, 99 (E.D.N.Y. Mar. 19, 2013). Each of these questions, let alone all of them, is sufficient to meet the common-question threshold of Rule 23. *In re Whirlpool*, 722 F.3d at 853.

A similar analysis applies to the Jail's arguments regarding Rule 23(b)(2). The Jail asserts that "[t]his is not a situation where a specific policy is at issue that has allegedly affected all class members." Opening Br. 72. But that's just not true. Multiple common policies affect all class members—the Jail's quarantine policy, for example, or its failure to implement contract tracing, or its policy of punitive transfers to areas of the Jail with active COVID-19 outbreaks. PI Op., PageID 3041-42. The plaintiffs challenge the Jail's refusal to adopt safeguards to reduce the transmission of COVID-19—a refusal that applies generally to the class. *See Parsons v. Ryan*, 754 F.3d 657, 688-89 (9th Cir. 2014). And they seek a declaration that this refusal violates the Constitution and injunctive relief to adopt further safeguards—both of which would constitute classwide relief.

The Jail speculates (at 72) that there might be some differences in how it treated different inmates, and argues that the plaintiffs' claims depend on an evaluation of "the conditions of their particular confinement." But the fact that the Jail might have placed certain inmates at greater risk than others does not defeat class certification under 23(b)(2): Although "the extent of . . . individual injuries" may vary depending

on "individual circumstances, the challenge to the system constitutes a legal claim applicable to the class as a whole." *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 59-64 (3d Cir. 1994). Some "factual differences" are inevitable even within classes that are routinely certified. *Id.* (surveying cases upholding certification "despite the varieties of factual differences that characterize the plaintiffs in each case").

The Jail seems to be trying to import Rule 23(b)(3)'s predominance requirement into this Rule 23(b)(2) class action; but unlike (b)(3) suits, this suit may proceed even if common questions do not predominate over individual ones. *See* Fed. R. Civ. P. 23. Here, the relief sought is "applicable to the class as a whole," making certification under 23(b)(2) appropriate. *Id.* The Jail cannot defeat certification based on speculation that there might possibly be minor differences in the way some inmates were treated. *Cf. Bridging Comtys. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1126 (6th Cir. 2016) ("We are unwilling to allow such speculation and surmise to tip the decisional scales in a class certification ruling."). If factual issues do emerge that render the classwide determination of liability or remedy problematic, the proper remedy is for the district court to decertify the class; not for this court to preemptively reverse the certification ruling. *Cf. Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1088 (6th Cir. 2016).

Similarly, the Jail is wrong to argue that certification is defeated because the district court is individually assessing medically-vulnerable subclass members for bail

pending final adjudication of the classwide habeas petition. Where a class action is aimed at addressing "central and systemic failures," certification is appropriate even where defendants can point to "differing harms requiring individual remedies" among the plaintiff class. *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997). Class actions often require individualized determinations during the relief phase, and that fact does not make certification inappropriate. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) ("[T]he need for some individualized determinations at the liability and damages stage does not defeat class certification.").[28]

The Jail's argument should be rejected here in particular, as the individual determinations that are necessary to make preliminary release decisions for the medical subclass arise in their habeas action, which is only "analogous to the class action provided for in Rule 23" and not strictly governed by Rule 23's provisions. *Bijeol v. Benson*, 513 F.2d 965, 968 (7th Cir. 1975); *see also U.S. ex rel. Morgan v. Sielaff*, 546 F.2d 218, 221 (7th Cir. 1976) (noting that Rule 23 provides "guidance" for representative

[28] *Money v. Pritzker*, which the Jail relies on heavily, is inapposite. In that case, the plaintiff class had revised the relief they sought from the relatively straightforward request of furloughs from confinement to a "process . . . balancing [] public safety and public health needs," in which the court would be required to actively monitor the entire Illinois state prison system, superintending inmate-by-inmate decision-making by state officials across more than 12,000 people. 2020 WL 1820660, at *12-*15 (N.D. Ill. Apr. 10, 2020). In contrast, this lawsuit involves determining the facts on the ground at a single Jail. This case thus does not raise the serious manageability concerns that arose in *Money*.

habeas actions); *U. S. ex rel. Sero v. Preiser*, 506 F.2d 1115, 1125 (2d Cir. 1974) (approving the use of representative habeas actions but declining to permit "full employment of Rule 23"). It will often be the case that for a representative habeas action to proceed, there will be a blanket determination as to the government's liability, followed by some individualized assessments of who must be released.

Finally, the Jail is simply wrong that the medically-vulnerable subclass should not be certified because it is purportedly not "ascertainable." Opening Br. 72-73. This Court has specifically held that the ascertainability requirement does not apply to Rule 23(b)(2) class actions seeking injunctive or declaratory relief. *Cole v. City of Memphis*, 839 F.3d 530, 541-42 (6th Cir. 2016). The Jail never even acknowledges this binding precedent. And, in any event, the ascertainability requirement would not defeat certification here—the general class is easily ascertainable, as it consists of inmates within the Jail; and, as for the medically vulnerable subclass, whether an inmate has been diagnosed with a disease on a list is the kind of objective determination that courts routinely make. *See, e.g.*, *Wilson v. Williams*, __ F. Supp. 3d __, 2020 WL 1940882, at *6 (N.D. Ohio Apr. 22, 2020). This is no less true just because some terms may encompass multiple diseases, such as "serious heart conditions" or "chronic lung disease."[29]

[29] Additionally, the Jail misrepresents the district court's order. The Jail complains that several terms are "subjective and subject to interpretation," including

The district court therefore did not abuse its discretion in preliminarily certifying the classes.

II. The Jail does not dispute that absent a preliminary injunction, the plaintiffs will suffer irreparable harm.

The district court correctly concluded that the plaintiffs will suffer irreparable harm absent a preliminary injunction. For good reason, the Jail does not contest this conclusion. "[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU of Ky. v. McCreary Cnty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003). And being compelled to endure a substantial risk of serious illness or death will always constitute irreparable injury. *See Helling* 509 U.S. at 33. Here, absent a preliminary injunction, the threat of injury or death from COVID-19—a highly communicable and frequently lethal disease—presents a serious risk of irreparable harm. PI Op. PageID 3047-48. Numerous courts around the country have reached the same conclusion.[30]

"other chronic conditions," "endocrine disorders," and "blood disorders," but those terms do not appear in the district court's definition of the medically-vulnerable subclass. *Compare* Opening Br. 73 *with* PI Op. PageID 3024-25.

[30] *See, e.g.*, *Basank v. Decker*, 2020 WL 1481503, at *2 (S.D.N.Y. Mar. 26, 2020); *Malam v. Adducci*, 2020 WL 1672662, at *8 (E.D. Mich. Apr. 5, 2020); *Thakker v. Doll*, 2020 WL 1671563, at *3 (M.D. Pa. Mar. 31, 2020); *Fraihat v. U.S. Immigration & Customs Enf't*, 2020 WL 1932570, at *27 (C.D. Cal. Apr. 20, 2020).

III. The balance of harms and the public interest weigh strongly in favor of the preliminary injunction.

The Jail has demonstrated no harm whatsoever that it will suffer as a result of the preliminary injunction. Without any reference to the record, the Jail asserts that the injunction imposes "significant demands" and requires the Jail to expend resources to "affirmatively enact new measures." Opening Br. 66-67. But "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough" to demonstrate irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). And the Jail never explains how the injunction could possibly be burdensome given that the Jail claims it only requires measures that were "already implemented and being performed by" the Jail. Opening Br. 43, 65-67.

Alluding to federalism and deference to prison officials, the Jail contends that the public interest is on its side because "prison officials are [to be] given wide latitude in the adoption and application of prison policies." *Id.* at 66 (quoting *Hayes v. Tennessee*, 424 Fed. App'x 546, 549 (6th Cir. 2011)). But these generic references could apply to literally any injunction against a state jail. The deliberate-indifference standard itself "strikes a balance between the deference to be accorded to prison officials in their administration of the prison and the constitutional right of prisoners to be free from cruel and unusual punishment." *Nelson v. Overberg*, 999 F.2d 162, 165 (6th Cir. 1993). But when a state government "fails to fulfill [its constitutional] obligation, the courts have a responsibility to remedy the resulting Eighth

Amendment violation," including through injunctive relief. *Brown v. Plata*, 563 U.S. 493, 510 (2011).

On the other side of the scale, for the class members—and particularly the medically vulnerable—the risks of COVID-19 are literally life threatening. And "it is always in the public interest to prevent violation of a party's constitutional rights." *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 929 (6th Cir. 2020). 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.

Like numerous other courts confronting this novel pandemic, the district court found that "[t]he public has a significant interest in avoiding serious illness or death." PI Op., PageID 3049-50. As it explained, "efforts to curb the spread of COVID-19 . . . help[] 'flatten the curve,' limit potential strain on healthcare systems, and reduce the likelihood of death and long-term health complications." *See id.*[31] In sum, the

[31] *See also, e.g.*, *Thakker*, 2020 WL 1671563, at *9 ("Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest."); *Perez-Perez v. Adducci*, 2020 WL 2305276, at *9 (E.D. Mich. May 9, 2020) ("Society benefits by stemming the proliferation of COVID-19, thereby 'flattening the curve,' preventing strain on medical centers and hospitals, and ultimately reducing death or long-term injury from COVID-19-related lung damage."); *Robenson J. v. Decker*, 2020 WL 2611544, at *9 (D.N.J. May 22, 2020) (identifying "significant public interest in releasing Petitioner before he contracts COVID-19 in order to "preserve critical medical resources and prevent further stress on the states' and country's already overburdened healthcare system").

balance of the equities and the public interest favors the injunction's basic interventions, which are aimed at slowing the spread of this contagious and deadly disease—both within and outside the Jail.

CONCLUSION

The district court's preliminary-injunction order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response does not comply with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this Court granted the plaintiffs permission to exceed that limitation and file a brief of up to 18,411 words. This brief complies with that order because it contains 18,367 words. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 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.

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