UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, *Plaintiffs-Petitioners* v. QUINCY BOOTH, in their official capacity as Director of the District of Columbia Department of Corrections, *et al.*, *Defendants-Respondents*.	No. 1:20-cv-00849 (CKK)

REPLY BRIEF IN SUPPORT OF APPLICATION
FOR TEMPORARY RESTRAINING ORDER

Plaintiffs' Application for Temporary Restraining Order has only gained in urgency since filing. In just a matter of days, the number of positive cases in DOC custody has more than doubled, and the rate of infection in the DOC now stands over seven times as high as the rate of infection in the District of Columbia generally. In prisons and jails across the country, outbreaks that started only two weeks ago are already killing residents; in one federal facility, for instance, four residents have already died, 18 residents are hospitalized, and several are in the ICU.[1] Defendants, having failed both to follow their own policies and to heed the warnings about COVID-19 that began in January, admit that they have inadequate supplies of items like hand sanitizer, masks, and "other PPE," necessary to follow established guidelines for stopping the spread of the virus, *see* Dkt. No. 25 ("Defs.' Br."), at 18, 33. It is against this backdrop that Plaintiffs seek a temporary restraining

[1] *See* 7KPLC, *Death Toll Rising at Federal Prison in Oakdale* (April 3, 2020, 10:32 PM), https://www.kplctv.com/2020/04/03/death-toll-rising-federal-prison-oakdale/.

order that provides, among other forms of relief, rapid downsizing of the DOC's population — relief that Plaintiffs' expert Dr. Marc Stern advises should urgently be implemented. *See* Dkt. No. 5-2, Ex. 2 ("Stern Decl."), at ¶¶ 10-13.

In this emergency, Defendants assure the Court they have the situation under control. Relying on policies and procedures they have disclosed to the Court, *see* Dkt. Nos. 19-21, Defendants aver that the "DOC has taken and continues to take extensive measures" to protect those in their custody. Defs.' Br. 2.

Defendants' reliance on their written policies and procedures runs headlong into Plaintiffs' direct evidence that those policies and procedures are not being implemented. While Defendants produce no evidence from personal knowledge that their policies have even been made known to staff, let alone that they have been put into practice, Plaintiffs supply evidence from DOC staff members themselves who have been utterly unaware of these policies and who confirm that they are not being followed. These staff members confirm the reports of Plaintiffs and of Public Defender Service ("PDS") attorneys, who have also witnessed firsthand the failure of DOC to implement their policies. Moreover, even if Defendants' written policies were followed to a T, Defendants have offered no evidence that the many deficiencies identified by Plaintiffs' expert Dr. Meyer — including a failing ventilation system and grossly insufficient medical equipment, *see* Dkt. No. 5-2, Ex. 1 ("Meyer Decl."), ¶ 28(d) — will be corrected in time to save DOC residents' lives.

This emergency calls for immediate and urgent relief to protect the constitutional rights of Plaintiffs and proposed class members. It is clear from the record before the Court that DOC cannot, and is not, meeting its constitutional obligations. The Court should act swiftly and decisively in vindicating those rights by granting the requested relief, and most importantly, by

granting writs of *habeas corpus* to effectuate the rapid downsizing of the DOC to a level at which Defendants can reasonably ensure the constitutional rights of its residents.

I. Plaintiffs' Evidence Regarding the Nature of COVID-19 and the Facilities at Issue Shows They Have Standing to Seek Each Form of Relief They Request.

Defendants' attack on Plaintiffs' standing, *see* Defs.' Br. 20-21, is not only misguided, but also emblematic of a bigger problem inherent in Defendants' arguments: their failure to appreciate how the COVID-19 pandemic poses particular risks in the jail setting that make a comprehensive set of precautions necessary for the protection of everyone in a given facility. Defendants' argument boils down to the claim that if a proposed aspect of relief does not result in the named Plaintiffs' release or address a condition they have personally encountered, then they do not have standing to seek it. That contention is both legally and factually wrong.

Plaintiffs' theory of standing is straightforward: Their injury is the risk of contracting COVID-19, which is a legally cognizable injury under the Eighth Amendment *before* Plaintiffs themselves are infected. *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Each of the Plaintiffs is suffering that injury today. This injury is caused by Defendants' failure to take basic precautionary measures consistent with the D.C. government's own recommendations for the general public and the guidance of public health experts. And that injury would be redressed by the relief Plaintiffs seek. Plaintiffs need not establish that granting the requested relief would *completely* obviate the risk that they contract COVID-19; as the Supreme Court has explained, a plaintiff "need not show that a favorable decision will relieve his *every* injury." *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) (quoting *Larson v. Valente*, 456 U.S. 228, 244 n. 15 (1982)).

At the outset, Defendants' attempt to avoid grappling with Plaintiffs' extensive evidence by limiting the standing analysis to the face of Plaintiffs' complaint is unavailing. Defendants argue that materials outside the pleadings are irrelevant here, based on a portion of a case analyzing

a motion to dismiss *for failure to state a claim*. *See Kingman Park Civic Ass'n v. Gray*, 27 F. Supp. 3d 142, 160 n.7 (D.D.C. 2014). But standing is a question of subject-matter jurisdiction, which unlike the failure to state a claim may be analyzed based on evidence outside the pleadings. *See Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

In any event, Plaintiffs have both pled and proved, via expert declarations that stand entirely unrebutted, that the requested relief would redress their injuries (*i.e.*, mitigate their risk of contracting COVID-19). As Plaintiffs' complaint explains, they are in custody at DOC correctional facilities, Dkt. No. 1 (Compl.) ¶¶ 14-17; such facilities "are highly susceptible to rapid person-to-person transmission of the virus because cramped conditions place residents and staff in close proximity," *id.* ¶ 37; and "COVID-19 will spread rapidly in Defendants' facilities because of the belated and inadequate policies discussed above and the failures to take other policies that are recommended and required by the CDC and other experts," *id.* ¶ 127 (emphasis added) (referring to the inadequacies and failures "discussed above" at ¶¶ 67-95, 115-16). These policies, the Complaint explains, "systemically affect all proposed class members," *id.* ¶ 150, because absent proper precautions, COVID-19 can "spread like wildfire" among a detained population in close quarters, *id.* ¶ 2. The plausibility of these allegations is underscored by the fact that such rapid transmission has occurred in carceral facilities during previous epidemics and already during this one. *See id.* ¶¶ 39-44.

The declarations of Drs. Meyer and Stern support each of the allegations in detail: how easily COVID-19 is transmitted, *see* Meyer Decl. ¶¶ 22, 25; why detention facilities in general are dangerously susceptible to the spread of viruses, *see* Meyer Decl. ¶¶ 9-21; Stern Decl. ¶ 13, and how DOC facilities are particularly dangerous to all who reside there in light of the characteristics and practices documented in Plaintiffs' evidence, *see* Meyer Decl. ¶¶ 27-30, 33, 37; Stern Decl.

¶¶ 9, 10. It logically follows that Plaintiffs are placed at risk equally by precautionary lapses that they have experienced personally and those that they have not: both determine how quickly and widely the disease will spread within the facility. *See* Meyer Decl. ¶¶ 12, 25, 28(a)(i)-(iii), 28(d), 28(d)(ii) (discussing the importance of various precautionary measures, including ones that Defendants claim Plaintiffs do not have standing to seek — cleaning supplies, personal hygiene implements, personal protective equipment, nonpunitive quarantine, and prompt medical care); Stern Decl. ¶¶ 9, 10, 16(c), 16(e), 16(f) (same). Further, Drs. Meyer and Stern make clear that proximity of detainees to one another is a critical factor that makes jails so dangerous to their inhabitants during a pandemic. *See* Meyer Decl. ¶ 11; Stern Decl. ¶ 13. Accordingly, downsizing is the experts' primary recommendation; releasing individuals in custody other than Plaintiffs themselves would diminish the risk *to Plaintiffs* by enabling Defendants to better implement precautionary measures for those who remain in custody. *See* Meyer Decl. ¶¶ 34-35; Stern Decl. ¶¶ 10-14. In particular, downsizing will enable individuals in custody to practice appropriate social distancing, a critical precautionary measure. *See* Meyer Decl. ¶¶ 11, 28(c); Stern Decl. ¶ 13. Defendants provide no rebuttal, logical or evidentiary, to any of this record evidence showing that Plaintiffs' present injury (the risk of contracting COVID-19) would be redressed by the release of a suitable number of residents, all of whom are members of the putative class of which Plaintiffs are part.

The Supreme Court has recognized that detained persons' health does not exist in a vacuum but instead can be dramatically affected by the size of the institution's population. Specifically, in *Brown v. Plata*, 563 U.S. 493 (2011), the Supreme Court considered whether a district court had erred in ordering the release of tens of thousands of inmates in California prisons that were so overcrowded they could not provide the minimum medical or mental health services required by

the Eighth Amendment. The Court observed that "[e]ven prisoners with no present physical or mental illness may become afflicted, and all prisoners in California are at risk so long as the State continues to provide inadequate care. . . . Prisoners who are not sick or mentally ill . . . are that system's next potential victims." *Id.* at 531-32.

Defendants' failure to grasp the basis of Plaintiffs' standing is part and parcel of Defendants' failure — both in practice and even now before this Court — to appreciate the interconnected nature of the health of each individual in Defendants' custody and the precautionary measures required to protect them. This failure is reflected in the Defendants' sorely deficient response to the crisis, which for the reasons that follow violate Plaintiffs' Fifth and Eighth Amendment rights.

II. Plaintiffs Have Demonstrated That They are Entitled to a TRO.

To prevail in seeking a TRO, Plaintiffs must show that they are "likely to succeed on the merits," that they are "likely to suffer irreparable harm in the absence of preliminary relief," that "the balance of equities tips in [their] favor," and that "an injunction is in the public interest." *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011).

As an initial matter, Defendants wrongly urge the Court to hold Plaintiffs to a stricter standard for a "mandatory injunction," but the D.C. Circuit has "has rejected any distinction between a mandatory and prohibitory injunction." *League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016). Nevertheless, Plaintiffs have met their burden as to each factor, and the Court should enter the requested Order.

a. Plaintiffs are likely to succeed on the merits.

Plaintiffs have established through declarations from DOC residents, DOC staff, PDS staff and attorneys, and expert reports, that they are exposed to an unreasonable risk of serious — even

deadly — harm to their health, and that Defendants acted with deliberate indifference in exposing them to that risk. Accordingly, Plaintiffs are likely to succeed on their Fifth and Eighth Amendment claims.

Defendants' argument begins by misstating the law, characterizing the Fifth and Eighth Amendment standards as the same. Defs.' Br. 14-15. In fact, "pretrial detainees (unlike convicted prisoners) cannot be punished at all." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015); *accord Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Pretrial detainees can demonstrate that they have been "punished" if the actions taken against them are *either* motivated by an intent to punish, *Kingsley*, 135 S. Ct. at 2473, *or* are objectively unreasonable, *see id.* If the Court finds here that the conditions are objectively unreasonable, then the non-convicted Plaintiffs and class members have made out a Fifth Amendment claim regardless of Defendants' subjective intent. *See id.*; *accord Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) ("[T]he Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm."). In any event, Defendants prevail under both the Fifth and Eighth Amendment standards.

i. Plaintiffs have been exposed to an unreasonable risk of serious damage to their health.

Defendants recognize "the seriousness of the COVID-19 pandemic." Defs.' Br. 15, and do not deny that exposure to a life-threatening substance poses a "risk of serious damage" to health. *Helling v. McKinney*, 509 U.S. 25, 35 (1993). Nevertheless, they argue that Plaintiffs, who live in confined housing units with upwards of 100 people at a time, are no more likely to be affected by COVID-19 than any other people who "share[] a living space with others," Defs.' Br. 15-16, and they claim that DOC residents are able to take the same precautions to prevent the risk of infection

as anyone else in society and that the risks Plaintiffs face in DOC facilities "are comparable to the general risks faced by everyone." *Id.*

It does not pass the laugh test to compare the living arrangements of D.C. Jail residents, most of whom share cells and live on housing units with upwards of 100 people, with people who share a house or apartment with their families or roommates. And even a cursory glance at District of Columbia's data disproves Defendants' arguments on an empirical level: The rate of infection in DOC facilities is over seven times higher than the rate of infection in the District of Columbia community.[2]

That gross statistical disparity is explained in the expert reports of Drs. Meyer and Stern, which go conspicuously unmentioned in Defendants' opposition. Dr. Meyer, who reviewed D.C. government reports on the conditions of DOC facilities, concluded in no uncertain terms:

> It is my professional judgment that individuals placed in [CDF and CTF] are at a significantly higher risk of infection with COVID-19 as compared to the population in the community and that they are at significantly higher risk of harm if they do become infected.

Meyer Decl. ¶ 33. Dr. Stern reaches a similar conclusion: "Institutional settings such as jails, prisons, shelters, and inpatient treatment programs are congregate environments where . . . infections like COVID-19 can spread more rapidly." Stern Decl. ¶ 13. Both Dr. Meyer and Dr. Stern conclude, contrary to Defendants' unsupported contrary assertion, that people in DOC are at

[2] The government's data of April 2, 2020, reported 757 positive COVID-19 tests in the District, and 12 positive COVID-19 tests among DOC residents. *See* District of Columbia, *Coronavirus* Data (last accessed Apr. 4, 2020), https://coronavirus.dc.gov/page/coronavirus-data. According to Defendants, there were 1580 people in DOC custody as of April 2, 2020, *see* Dkt. No. 25-3, and the most recent Census Bureau population estimate for the District of Columbia was 705,749, *see* U.S. CENSUS BUREAU, *QuickFacts – District of Columbia* (last accessed Apr. 4, 2020), https://www.census.gov/quickfacts/DC. Therefore, the rate of infection in the District of Columbia was .10 percent, while the rate of infection in the DOC was .76 percent.

significantly higher risk of contracting COVID-19, and of developing serious injuries as a result, than people in the community.

The reasons why Plaintiffs are at elevated risk should be familiar to Defendants: They are the same reasons identified by Attorney General Racine just two weeks ago: that people detained in jails are forced "together in close quarters, without access to proper hygiene or medical care . . . breathing the same recycled air for up to 23 hours per day." Karl Racine et al., *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody* 1 ("*Joint Statement*") (March 25, 2020), *available at* https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf. Dr. Meyer identified those same conditions as factors that elevate the risk of serious injury to Plaintiffs. *See* Meyer Decl. ¶ 28(c) (crowding in congregate settings increases transmission of infection from person to person); *id.* ("[v]entilation conditions [in DOC facilities] ... will increase the rate of spread of the virus"); *id.* ¶ 28(a)(ii) (lack of sufficient hand soap and alcohol-based sanitizers for residents and staff).

Defendants' second argument — that the DOC has "implemented the same risk-reduction practices among the inmates that are recommended for the community at large," Defs.' Br. 15 — is disproven by the record. Defendants provide a list of policies, but as discussed below, those policies exist in name only (if at all). And it is glaring that Defendants omit the single biggest risk-reduction practice for mitigating the spread of COVID-19: social distancing. The importance of social distancing is highlighted in both Dr. Meyer's expert report, *see* Meyer Decl. ¶ 11 ("[T]he best initial strategy is to practice social distancing."), and Dr. Stern's expert report, *see* Stern Decl. ¶¶ 11-13. The extreme importance of social distancing is also the reason why schools, theaters, sports events, and restaurants are closed, and why the Court's hearing on this motion will take place by videoconference. Defendants claim blithely that DOC residents have "limited interaction

with other residents and staff." Defs.' Br. 16. But they ignore the evidence in the record, including from DOC residents themselves, who are still "sit[ting] in plastic chairs in a big group of around 30 people" for hours a day, Jackson Decl. ¶¶ 3, 7, and from DOC staff, including a woman who works on the age-50-and-over unit, who writes that "[s]ocial distancing is not happening in my unit," Nesbitt Decl. ¶ 14. Because Defendants' current policies prevent Plaintiffs from practicing one of the preventative measures most strenuously urged by professionals, including Plaintiffs' experts, they have shown that "the risk of which [they] complain[] is not one that today's society chooses to tolerate." *Helling*, 509 U.S. at 35.

At bottom, Defendants' conclusion that the risks "faced by those inside DOC facilities are comparable to the general risks faced by everyone," Defs.' Br. 16, is belied by commonsense, by Plaintiffs' experts, and by empirical data. Accordingly, Plaintiffs have shown that they are exposed to an unreasonable risk of serious harm to their health.

ii. Defendants acted with deliberate indifference towards Plaintiffs' risk.

Subjective deliberate indifference (required only for the Eighth Amendment claim, as noted) occurs where Defendants "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering." *Helling*, 509 U.S. at 33.

Defendants do not contend that they were unaware of COVID-19. *See* Defs.' Br. 5. Instead, their central contention — upon which their entire argument rests — is that they have adopted policies appropriate to mitigating the risk. Even assuming that those policies are sufficient, Defendants fail to supply any evidence to contradict Plaintiffs' extensive documentation that the policies are simply not being implemented, followed, or enforced. Defendants cannot insulate themselves from liability by showing that they have policies on the books when the record overwhelmingly demonstrates that these policies exist in name only.

First, Plaintiffs' unrebutted evidence strongly suggests that Defendants have not communicated their policies to staff and that key DOC officials were not even aware of these policies. Ms. Deterville — a DOC staff member for over three years, Deterville Decl. ¶ 2 — had never seen any of the policies provided by Defendants until this litigation. Instead, she took it upon herself to locate a policy and provide it to DOC leadership, who were previously unaware of it. *See* Deterville Decl. ¶¶ 5-8. Further, as discussed in Plaintiffs' Emergency Motion (Dkt. No. 24), Defendants seem to be navigating COVID-19 based on DOC's 2009 Flu Pandemic Plan, without having updated (or finished updating) it since the crisis began, and without looking to the more recent 2010 version.

Second, whatever the state of Defendants' policies and staff's awareness of them, the record evidence shows undeniably that these policies and procedures are not being implemented:

- Providing soap for hand washing: This is rebutted by three residents, who declare that "[t]he jail gave us a single bar of soap a couple of weeks ago," Dkt. No. 5-2, Ex. 4, Banks Decl. ¶ 8; that "March 21st was the first time CTF gave me a free bar of soap, and I have been on my unit since February 25th," Dkt. No. 5-2, Ex. 5, Jackson Decl. ¶ 10; and that "CTF gave us one bar of soap, once," Dkt. No. 5-2, Ex. 6, Smith Decl. ¶ 8.

- Frequently disinfecting high-touch areas: This is rebutted by members of DOC's staff, who declare that daily, all staff members "must place their hands on a biometric scanning device"—by definition, a high-touch area—that "is not wiped between uses." Dkt. No. 24-1, Deterville Decl. ¶ 16; *see also* Dkt. No. 24-2, Nesbitt Decl. ¶ 13 (describing the lack of cleaning supplies to wipe down a phone used by successive residents without disinfecting between uses). That residents do not have supplies themselves to clean high-touch areas in their own housing units and cells is also reflected in declarations of both DOC residents and staff. *See* Jackson Decl. ¶ 12 (describing "watered down" cleaning supplies").

- Quarantining individuals who may be exposed: This is rebutted by DOC staff, who declare that "at least one of the inmates whose test results are pending is in general population." Dkt. No. 23-11, Hannon Decl. ¶ 56.

- Restricting large gathering[s] of inmates: This is rebutted by DOC residents, who recount gathering in mandatory large groups, *see* Jackson Decl. ¶ 3, as well as DOC

staff, who declare that they witness residents "crowded in" a small room to watch television, Nesbitt Decl. ¶ 14.

- Limiting inmates' exposure to members of the community: This is rebutted by DOC residents, who describe that they "have many people from outside CTF coming every day," including "clinicians, people from Narcotics Anonymous, [and] other people who lead programs," Jackson Decl. ¶ 7.

- Screening individuals who enter the facilities for COVID-19 symptoms: This is rebutted by PDS staff who have been through the screenings and describe the broken thermometer, Naini Decl. ¶ 5(c), as well as DOC staff, who "as recently as April 2, 2020" personally witnessed that the "thermometer is not being used properly." Hannon Decl. ¶ 52. This is also rebutted by a 12-year-veteran DOC staff member who works in DOC's "Receiving and Discharge" unit, where DOC "receive[s] new intakes." *Id.* ¶ 38. Corporal Reddick claims that Defendants are "not being truthful on how inmates coming into the facilities are processed. Inmates are having their temperatures taken only. No other procedures are in place to screen incoming inmates." *Id.*

- Contact tracing to record who may have COVID-19: There have been "at least three DOC staff members who have tested positive and alerted DOC," but "[n]o contact training has been done for at least one of it not all of these staff members" to determine who they came in contact with. Hannon Decl. ¶ 59.

The record evidence, from DOC residents, DOC staff, and PDS attorneys, all points in one direction: No matter the policies that Defendants claim are in place, the truth is that those policies are not being disseminated, followed, or enforced. This conclusion should be as concerning for the Court as it is for the nearly 1,600 residents who depend on Defendants to keep them safe.

Defendants' attempt to deflect liability on the basis of unimplemented policies flies in the face of binding authority. *Daskalea v. District of Columbia*, 227 F.3d 433 (D.C. Cir. 2000), rejected DOC's position that its "harassment policy" insulated it from liability: "[A] 'paper' policy cannot insulate a municipality from liability where there is evidence, as there was here, that the municipality was deliberately indifferent to the policy's violation." *See also Ware v. Jackson Cty.*, 150 F.3d 873, 882 (8th Cir. 1998) ("[W]ritten policies of a defendant are of no moment in the face of evidence that such policies are neither followed nor enforced."). In *Daskalea*, the Court found

liability where evidence included "not only the continued blatant violation of the policy, but also the fact that the policy was never posted, that some guards did not recall receiving it, that inmates never received it, and that there was no evidence of the training that was supposed to accompany it." 277 F.3d at 271. That same evidence is before the Court here, and liability should likewise follow. *See also Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 929 (7th Cir. 2004) ("[I]gnoring a policy is the same as having no policy in place in the first place.").

When confronted with this chasm between Defendants' policies and Plaintiffs' declarations showing that COVID-19 procedures are not being followed, Defendants claim that Plaintiffs' many sworn declarations from DOC residents and staff are "anecdotes" that may not be an "accurate representation" of the current policies. Defs.' Br. 32. But Defendants offer *no* evidence, let alone evidence based on personal knowledge, to demonstrate that their current policies are actually being enforced.

Defendants' sources of evidence for their alleged policies and practices are Warden Lennard Johnson and Medical Director Beth Jordan. But, unlike the many declarants who attest to the lack of implementation, neither Johnson nor Jordan claims to have *any* personal knowledge of the implementation of their policies. Indeed, neither Dr. Jordan nor Warden Johnson even states the last time they were in the jail or what they observed when they were there. Defendants simply lack any evidence at all that they have made any actual changes to the procedures in their facilities in light of this global pandemic. It is little wonder, then, that DOC staff say that "[v]ery few changes to the daily operations have been implemented in preparation for and in response to COVID-19." Hannon Decl. ¶ 45.

Defendants suggest that the systematic disconnect between their stated policies and the facts in the record is due to the "rapidly changing nature of public health recommendations." Defs.'

Br. 19. This excuse falls flat. Defendants cannot seriously claim that requiring residents to gather in groups of 30, passing papers and pens amongst each other, was consistent with (some uncited) public health recommendation on March 24, but is now verboten pursuant to updated recommendations. *See* Jackson Decl. ¶¶ 3, 7. Nor can Defendants say with a straight face that telling staff that "using personal protective equipment . . . could increase [the] risk of contracting the virus," Deterville Decl. ¶ 10, is consistent with the rapidly changing recommendations from public health bodies, as Defendants claim, Defs.' Br. 19. More generally, if Defendants' claim is that Plaintiffs' evidence from the last two weeks showing non-implementation is now out of date, Defendants must provide evidence documenting the change, rather than airy generalities about the rapidly evolving nature of the crisis.

Defendants' claim to be rapidly updating their policies is also not reflected in practice. In light of Defendants' representations that Plaintiffs' evidence are not an "accurate representation of the COVID-19 response practices currently being implemented (Defs.' Br. 32), Plaintiffs submit additional declarations from Kamal Dorchy, James Guillory, David Randolph, and Micheal Cohen, III, four DOC residents who all reside on different units, with two at CTF and two at CDF. These declarations, which are current as of today, are attached as Exhibits 1-4, respectively. They collectively cast great doubt on Defendants' representations about the "practices currently being implemented at the DOC." They should call the Court to immediate action.

- While Warden Johnson claims that units are cleaned "every two hours," Johnson Decl. ¶ 6, Mr. Dorchy attests that "[a]s of April 4, 2020, my unit [D4A] has not been cleaned and sanitized in *approximately one week*." Dorchy Decl. ¶ 4, Mr. Guillory says that on his unit, D2A, cleaning does not take place, Guillory Decl. ¶ 4, and Mr. Cohen says that even yesterday, the "cleaners had no cleaning solution," Cohen Decl. ¶ 28.

- While Defendants represented yesterday, without citation, that "professional cleaners *now* clean the common areas daily," Defs.' Br. 33 (emphasis added), Mr. Dorchy says that, as of April 4, 2020, "[n]o professional cleaning staff have come in to clean," Dorchy Decl. ¶ 20, Mr. Guillory also has "never seen professional cleaners come to clean the unit,"

Guillory Decl. ¶ 6, and Mr. Cohen says he has "never seen professional cleaners who were not inmates cleaning," Cohen Decl. ¶ 39.

- While Warden Johnson claims that "[e]ach resident receives a new bar of soap and a roll of toilet paper every week," Mr. Guillory says that "[n]o DOC staff has ever offered me soap," Guillory Decl. ¶ 19, Mr. Randolph says "[t]he DOC has never given me soap," Randolph Decl. ¶ 14.

- While Dr. Jordan claims that "DOC's medical staff meets regularly with staff and residents to discuss COVID-19 preventative measures," Dkt. No. 20-2, Jordan Decl. ¶ 8, Mr. Dorchy says that "[m]edical staff have never come to my unit to discuss coronavirus," Mr. Guillory says the same, Guillory Decl. ¶ 11, Mr. Randolph says that "[s]ince I got here, the staff tell us nothing about the coronavirus," Randolph Decl. ¶ 9, and Mr. Cohen says "[n]o one from DOC has ever met with me or my unit to discuss coronavirus," Cohen Decl. ¶ 4.

- While Warden Johnson claims that "[r]esidents have access to cleaning materials to clean their cells," Mr. Dorchy says that as of March 20, 2020 cleaning supplies "stopped coming," Dorchy Decl. ¶ 11, Mr. Guillory says that two days ago, he "asked for a rag to clean [his] cell" but "there were no rags either on our unit or in the supply closet," Guillory Decl. ¶ 20, and Mr. Cohen says that "COs frequently deny access to the closet when an inmate asks for cleaning supplies," Cohen Decl. ¶ 32.

- While Warden Johnson claims that "[e]very resident in DOC custody has access to a sink," Johnson Decl. ¶ 8, Mr. Dorchy says that "[t]here is no sink in my cell and no toilet in my cell. I cannot wash my hands when locked down," Dorchy Decl. ¶ 18, and Mr. Guillory says that "[t]here is no sink in my cell" and "no soap provided at the unit sinks," Guillory Decl. ¶ 21.

- While Dr. Jordan claims that "all new residents entering a DOC facility are quarantined for 14 days before they are assigned to their permanent housing unit," Jordan Decl. ¶ 7, David Randolph, who arrived at CDF on March 19, 2020, was held in intake for only five days. Randolph Decl. ¶ 2.

These four independent accounts, from just today, are shocking. Because of Defendants' inactions, DOC residents "think [they] are going to die." Cohen Decl. ¶ 56. Mr. Dorchy writes: "I believe that I am going to die in here if I do not get help." Dorchy Decl. ¶ 28. These accounts, and others of DOC staff, strongly support Plaintiffs' request that the Court appoint an expert to ensure compliance with any injunctive relief that the Court orders. Defendants have demonstrated the need for such outside accountability. *See, e.g., Crawford v. Greater Cleveland Reg'l Transit Auth.*,

No. 86-cv-2490 (AA), 1991 WL 328037, at *1 (N.D. Ohio July 26, 1991) (appointing outside expert under Rule 706 to ensure compliance with injunctive relief).

Additional evidence also sheds light on DOC staff representations made in their declarations about access to legal calls. (Dkt. No. 21-1). While a system has been put in place, the "limited telephone conversations have not been sufficient to accomplish" the need for "substantive, confidential communications." Ex. 5, Winters Decl., at ¶ 17. Whether due to facilities constraints or other reasons, the reality is that ensuring the right to counsel is greatly compromised by residents' continued detention. For Mr. Randolph, this means that he has been unable to talk about his case and his never seen the police report in his case, Randolph Decl. ¶ 16, and he has been detained for over two weeks.

Defendants cite the "constraints facing the official[s]" as important context under this prong. Courts have held that constraints are relevant under this prong, although the case law is clear that budgetary constraints do not absolve prison officials from liability for deliberate indifference. *See, e.g.*, *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (*en banc*). Defendants' conclusion, however, that they cannot be liable on account of such constraints, is foreclosed by the Supreme Court's decision in *Brown v. Plata*, affirming a downsizing remedy where the state's resources disabled it from meeting its constitutional obligations regarding prison medical care. See 563 U.S. at 527-30.

In any event, certain of the "constraints" cited by Defendants as justification for their actions do not add up. Defendants cite a "shortage of hand sanitizer" as a reason why they cannot provide any for DOC residents. Yet the "Current COVID-19 Supply List" produced by Defendants shows that Defendants have ample hand sanitizer, which they have refused to distribute. That list shows Defendants in possession of 864 bottles of foam hand sanitizer (648 liters worth), and 80

cases of assorted size Purell. Dkt. No. 25-2. Further, that list shows that Defendants have not used any of those supplies, as the "Original Quantity" and "Quantity as of March 24, 2020" for all of their hand sanitizer is identical. Further, to the extent Defendants are under-resourced, it is because of their own apparent failure to comply with their own 2009 Pandemic Flu Plan, which called on the DOC to stockpile N95 masks and alcohol-based hand sanitizer sufficient for both staff and inmates. *See* Dkt. No. 22-2. Similarly, Defendants claim to "not have the legal authority to unilaterally release individuals from its custody," Defs.' Br. 9, while recognizing at the same time the emergency legislation that gives them the authority to do just that with at least some residents, *see* D.C. Act 23-247, March 17, 2020.[3] Despite the emergency nature of both the pandemic and that legislation, Defendants have released only around 25 percent of the roughly 100 detainees who qualify.

Finally, Defendants also contend that they cannot have acted with deliberate indifference because a doctor from Emory University was "'highly satisfied' with what DOC is doing." Jordan Decl. ¶ 10. But that offers the Court little assurance, as Defendants provide no information as to what information they shared with the Emory University doctor or that they themselves know "what DOC is doing." Far more persuasive is the analysis offered by Dr. Meyer, who reviewed DOC's facility specifications, and opined that the capacity of the medical unit to handle the COVID-19 outbreak was grossly insufficient. *See* Meyer Decl. ¶ 28(d).

[3] Defendants do not explain why they understand the emergency legislation to bind their discretion to effectuate unilateral release. They claim that this discretion "only be exercised 'consistent with public safety,'" Defs.' Br. 10 (citing D.C. Code § 24-221.01c(c)), but that caveat itself does not require DOC to engage in binding consultation with other agencies. Rather, the emergency nature of the legislation should suggest to DOC that it can and should act quickly in effectuating the powers granted to it "on an emergency basis."

In addition to all of the evidence that Defendants policies are largely illusory, Plaintiffs' evidence also highlights problems that Defendants' paper policies do not address, even in theory. Defendants say not one word about the DOC's documented problems regarding ventilation, the lack of compliance checks in of DOC medical facilities, the serious shortage of medical equipment, and the delays in receiving medical care. Dr. Meyer's expert report stresses these problems:

- "The ventilation conditions described in the District of Columbia's Auditor's report is also concerning and will increase the rate of spread of the virus." Dr. Meyer also noted "DOC's own conclusion that the 'current HVAC system has significant design problems that inhibit proper airflow.'" That same Auditor's Report also notes that DOC's HVAC system is out of compliance with DOH regulations. As such, Dr. Meyer concludes that the virus will spread "in an airborne state." Meyer Decl. ¶ 28(c). This concern is highly acute for Plaintiff Smith, who attests that air flows back and forth between his unit and the quarantine unit at CTF. Smith Decl. ¶ 3.

- DOH does not check DOC medical facilities for compliance. Meyer Decl. ¶ 28(d).

- The "single medical isolation space in CTF with negative pressure capacity," about which Dr. Meyer does not mince words: "To say this is unacceptable is an understatement." Meyer Decl. ¶ 28(d)(i).

- The multi-day delay to receive medical care, as attested to by four DOC residents, *see* Eric Smith Decl. ¶ 5; Dkt. No. 5-2, Ex. 7, Phillips Decl. ¶ 4; Ex. 2, Guillory Decl. ¶ 9; Ex 4, Randolph Decl. ¶ 4 ("I have sent about seven medical slips . . . . I have not seen a doctor.") is evidence that "DOC is seriously ill-equipped and under-prepared." Meyer Decl. ¶ 28(d)(ii).

In addition to Plaintiffs' own fears that Defendants' failings put them at risk, see Smith Decl. ¶ 9; Phillips Decl. ¶ 2, it is telling that a ten-year veteran of the DOC would be "afraid to come to work — so much so that [she] would have to sit in [her] car for about thirty minutes every day so [she] could calm [her]self down before entering the building," because the "nature of our facility, the lack of protective gear, [her] inability to obtain adequate cleaning supplies" all put her at risk. Nesbitt Decl. ¶ 3. It speaks volumes that Defendants' own employees, like Jean Johnson, who is "scared about [her] ability to afford basic necessit[ies]," would choose to go on unpaid

leave than take "the risks to [her] life and health that come from continued work" in DOC facilities. Ex. 3, Jean Johnson Decl. ¶ 3. These extraordinary circumstances — where DOC residents and DOC staff both describe life-threatening conditions that Defendants fail even to mention — comprise deliberate indifference.

b. Plaintiffs meet the remaining TRO factors.

Defendants do not contest that the risk of contracting COVID-19 constitutes irreparable harm. They recycle their standing argument, claiming that "[P]laintiffs have not pled facts sufficient to show that granting injunctive relief would remedy any purported individualized injuries they are suffering," Defs.' Br. 22, but a motion for a TRO is not a motion to dismiss, and looks to evidence, not pleading. As discussed, Plaintiffs have adduced plentiful evidence showing that Defendants' failure to implement basic precautions in their facilities places Plaintiffs irreparably "at a significantly higher risk of infection with COVID-19 as compared to the population in the community" and "at a significant higher risk of harm if they do become infected." Meyer Decl. ¶ 33.

Defendants also do not dispute that the benefits to public health and of remedying unconstitutional violations run in favor of Plaintiffs. And Defendants share Plaintiffs' concerns about "the gravity of COVID-19." Defs.' Br. 23. Instead, Defendants claim that Plaintiffs fail to meet the combined third and fourth prongs of the preliminary injunction standards because, in their view, an injunction "would impose a remarkable level of intrusion on DOC's day-to-day operations that is simply not warranted under these circumstances." Defs.' Br. 23. Defendants essentially ask the Court to trust them to continue along the same path that has led them to boast an infection rate over seven times higher than the District of Columbia community.

Along similar lines, Defendants assert that there is a "public interest in permitting the government to carry out its authorized functions," *id.* at 24. The Supreme Court has recognized that Defendants' concerns about "intrusion" do not warrant judicial abdication: "Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown*, 563 U.S. at 511. In fact, this Court, affirmed by the D.C. Circuit, has previously entered an injunction similar to that requested here, rejecting the same argument advanced again by Defendants. In *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978), the Court affirmed a broad injunction imposing a set of conditions with similar particularity (including requiring daily recreation, a regular change of linen and outer clothing, and a minimum amount of space for each prisoner). *Id.* at 551-52. The Court rejected the position that the injunction's provisions were unduly intrusive, explaining, "we cannot conceive how they could ever be considered unwarranted intrusions" because the court saw "no alternative if the rights of pretrial detainees are to be respected." *Id.* at 552.

III. The Court should appoint an expert to assist it in decreasing the prison population.

The uncontested expert opinions in this case demonstrate—as do the defendants' admissions about inadequate safety supplies—that the inmate population of the Jail must be swiftly and drastically reduced in order to stem the spread of COVID-19 amongst a vulnerable and helpless population. *See* Stern Decl. ¶ 13-14; Meyers Decl. ¶ 34-37. Plaintiffs request that the Court appoint an expert who can suggest to the Court—after obtaining input from the relevant stakeholders—the best approaches to quickly reduce incarceration levels, in order to protect the health and safety of the inmates, the correctional and medical staff, and the broader community.

The COVID-19 pandemic is the very type of compelling circumstance that Federal Rule of Evidence 706 is designed to address. Federal Rule of Evidence 706 authorizes courts, within

their discretion, to appoint a neutral, independent expert witness. *See* Fed. R. Evid. 706(a) ("On a party's motion or its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing."); *Walker v. Am Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1071 (9th Cir. 1999).

Defendants do not dispute the Court's authority to appoint the requested Rule 706 expert. Instead, Defendants' argument hinges entirely on a faulty premise: that the viral pandemic sweeping the world, which has interrupted the operations of schools, businesses, and houses of worship, and has mobilized the spending of trillions of government dollars, is simply not compelling. Defendants' suggestion that these are not the "unusual" or "extraordinary" circumstances justifying the appointment of an expert under Rule 706 is indicative of their dangerous underestimation of this crisis.

Here, Plaintiffs have "present[ed] compelling circumstances warranting the appointment of an expert." *See Carranza v. Fraas*, 471 F.Supp. 2d 8, 10 (D.D.C. 2007) (internal citation and quotation marks omitted). Plaintiffs have documented the inability of DOC to effectively take the measures necessary to stem the spread of the virus in its facilities and have shown the need for a drastic reduction in inmate population; and the Defendants have now admitted that they do not have adequate supply levels to protect the health and safety of the large number of inmates they hold within their walls. In other cases requiring inmate population downsizing courts have employed special masters to fill a similar role. *See Brown*, 563 U.S. at 511. While some courts are now engaging special masters to aid in emergency reductions of inmate populations in response to the COVID-19 pandemic, *e.g. Office of the Pub. Def. v. Connor*, SCPW-0000200, at 3, 4 (Haw. Apr. 2, 2020) (appointing special master to achieve "a reduction of inmates held within

correctional centers and facilities"); *Comm. for Pub. Counsel Servs v. Chief Justice of the Trial Ct.*, SJC-12926, at 7, 26 (Mass. Apr. 3, 2020) (special master appointed to carry out "urgent…reduction in the number of people who are held in custody"), Plaintiffs believe that an expert can fill a similar but more efficient role by aiding the Court with a necessarily rapid reduction of the Jail's inmate population.

IV. Abstention does not bar relief.

The government (wisely) has not invoked the doctrine of equitable restraint established by *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny. This omission may preclude the Court from considering dismissal based on those authorities. *Ford v. Tait*, 163 F. Supp. 2d 57, 63–64 (D.D.C. 2001) (noting that courts "cannot invoke [*Younger*] . . . *sua sponte*"). Nonetheless, because members of the plaintiff-class face ongoing criminal proceedings, Plaintiffs address this issue briefly to assure the court that *Younger* does not apply.

When a federal court has jurisdiction over an action, its "obligation to hear and decide a case is virtually unflagging." *Sprint Comm'n, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (internal citation and quotation marks omitted). *Younger* marks an exception to this rule and, accordingly, is only properly invoked in "exceptional circumstances." *Bridges v. Kelly*, 84 F.3d 470, 476 (D.C. Cir. 1996) (citation and internal quotation marks omitted). For the doctrine to apply, (1) there must be "ongoing state proceedings that are judicial in nature," (2) "the state proceedings must implicate important state interests," and (3) "the proceedings must afford an adequate opportunity in which to raise the federal claims." *Hoai v. Sun Ref. & Mktg. Co.*, 866 F.2d 1515, 1518 (D.C. Cir. 1989) (citation and internal quotation marks omitted).

The third prong dooms any abstention claim here. That component of the test requires the ongoing state proceedings to provide the plaintiffs with the ability to obtain "the full relief

requested in connection with [their] federal claims," *Bridges*, 84 F.3d at 477. Here, individual class members are involved in Superior Court proceedings such as emergency motions or criminal trials (or appeals therefrom) that could result in their release. But this individualized relief differs markedly from the comprehensive remedies sought by the class — relief that includes the release of a large number of prisoners, the appointment of an independent monitor, and drastic improvements to cleaning protocols at DOC facilities. *See* Compl., Relief Requested ¶ B. Plaintiffs' pending Superior Court proceedings are not well-suited to providing such broad remedies, as the D.C. Circuit made clear in *Campbell v. McGruder*, 580 F.2d 521, 524 (D.C. Cir. 1978)—which rejected the government's abstention argument in a case involving a class of pretrial detainees challenging overcrowding at the D.C. jail and seeking, among other remedies, the release of prisoners. *Id.* at 524. As in *McGruder*, the class relief sought here transcends securing an individual defendant's release from ongoing or threatened incarceration; a criminal tribunal cannot provide the comprehensive relief they have requested.

Some class members may have filed motions for emergency release with the Superior Court; however, the proceedings on those motions cannot provide full relief either. *See* Super. Ct. Crim. R. P. 35 (providing authority to "reduce a sentence," not modify conditions); *see also* D.C. Code § 23-1321 et seq. (authority regarding to decide whether to detain, not conditions of detention).

The Superior Court's order governing emergency release motions further demonstrates that such motions are not a proper vehicle for demanding broad reforms. Through that order, the court required "any motion seeking relief from detention based upon the COVID-19 Pandemic" to address seven questions about issues such as the health of the defendant and the likelihood of the defendant causing harm if released. *See* Order Establishing Procedures, Effective Immediately,

For Filing Emergency Motions for Release from Custody Due to the Covid-19 Pandemic (Super. Ct. March 22, 2020) (as amended March 25, 2020) at 1 (hereinafter "Emergency Release Order").[4] None of the questions concerns conditions at the CTF or CDF, and the order does not invite defendants to provide information beyond what it specifically requests. *See id.* This text indicates that the Superior Court envisions its emergency release proceedings as creating a forum for individualized relief, as opposed to the comprehensive remedy sought here.

Abstention is also improper for an additional reason: The Superior Court is under siege. The COVID-19 crisis has forced the court to drastically curtail its capacities. Only four court rooms remain active. Order at 2 (D.C. Super. Ct. Mar. 18, 2020) (as amended Mar. 19, 2020).[5] Only one is reserved for criminal emergencies, *id.*, and it has two judges responsible for adjudicating over 300 applications for emergency release. Ex. 5, Fowler Decl. at ¶¶ 5, 8. If, somehow, a criminal defendant raised the claims at issue here in his or her ongoing proceeding, the burden for resolving them would fall on that single emergency judge. For the Superior Court, this development would add the challenge of managing a complex constitutional case to its already nearly impossible task of adjudicating individual motions.

These burdens mean delays and those delays further demonstrate that Superior Court is not an adequate forum for the claims at issue. A state proceeding is only adequate if it can "timely" adjudicate "the federal issues involved." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). Because even small delays could be the difference between life and death, *see* Dkt. No. 24 at 2–3 (noting 71% increase in covid-19 positive tests at DOC facilities over three days), this Court must act where the Superior Court cannot.

[4]https://www.dccourts.gov/sites/default/files/Order-Attachment-PDFs/Standing-order-amended.pdf
[5] https://www.dccourts.gov/sites/default/files/Order-Attachment-PDFs/Order-3-19-20.pdf

CONCLUSION

These extraordinary circumstances cry out for extraordinary relief, forthwith. Plaintiffs' overwhelming evidence shows that the conditions they face are dire and the risk is acute. The time to act is now. Plaintiffs' TRO should be granted.

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Washington, D.C.

Respectfully submitted,

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