IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENZO COSTA, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

No. 1:19-cv-3185 (RDM)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

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INTRODUCTION

Reading Defendants' motion to dismiss (ECF 107-1) ("Defs. Mot."), one might think the parties had not just finished litigating—and this Court had not twice ruled on—many of the legal questions at issue. As if on a clean slate, Defendants argue points this Court has squarely rejected in thoroughly-reasoned opinions in this case. Additionally, Defendants assert that Plaintiffs' claims regarding their inadequate crisis management are moot, despite the facts that the Plaintiffs are still confined in Defendants' facility and that the inadequacies of Defendants' crisis management are not just capable of repetition and likely to recur, but have recurred so dramatically since this case was filed that this Court granted a preliminary injunction, which remains in effect. And Defendants make a meritless and premature request for summary judgment even though formal discovery has never occurred and the factual assertions are hotly disputed.

The fundamental issue in this case is whether Defendants have complied with their constitutional and statutory obligations in responding to multiple significant public health crises at Saint Elizabeths' Hospital. Defendants' failures have now endangered patient health and safety for at least the second time in six months, and the third time in three years. At the time Plaintiffs sought leave to file the operative complaint on April 16, Defendants had disclosed four patient deaths and 28 patients were COVID-19 positive. ECF 36. As of this filing, 14 patients have died, and 82 patients and 137 staff have tested positive, and there are reports of a new patient infection earlier this month.[1] Plaintiffs have not only sufficiently stated claims for constitutional violations, but also previously demonstrated to the Court's satisfaction that they are likely to succeed on at

[1] Gov't of the District of Columbia, *Human Services Agency COVID-19 Case Data*, available at https://coronavirus.dc.gov/page/human-services-agency-covid-19-case-data (Aug. 11, 2020).

least some of their claims. The motion to dismiss and the alternative motion for summary judgment should be denied.

BACKGROUND

In October 2019, Plaintiffs filed a Complaint to remedy Defendants' failure to have in place an adequate emergency plan when Defendants discovered that the Saint Elizabeths water supply was contaminated with Legionella and other bacteria — a failure that interrupted the medical care of Plaintiffs and other patients at Saint Elizabeths and placed these patients at risk by forcing them to live in unsanitary conditions without running water for 28 days. ECF 1. Plaintiffs were granted leave to amend their Complaint in April to add new claims relating to Defendants' unconstitutional failure to prevent and manage the spread of COVID-19, which at the time had already resulted in four deaths and 33 patient infections. ECF 36. Plaintiffs sought emergency relief via a temporary restraining order, ECF 39, and a preliminary injunction, ECF 87. In advance of ruling on the preliminary injunction motion, this Court appointed three *amici* to inspect Saint Elizabeths' Hospital and report on the virus management protocols, the hygienic practices, and the mental health treatment provided at that time, ECF 68, and those *amici* submitted their reports with the Court. ECF 78; 81. The Court found in that Plaintiffs were likely to succeed on a portion of their claims and entered preliminary injunctive relief three times: ECF 60 (granting Plaintiff's motion for TRO in part); ECF 83 (extending and expanding the TRO); ECF 96 (granting Plaintiffs' motion for PI in part). In this section, and in opposing Defendants' alternative motion for summary judgment, Plaintiffs rely on record evidence from these motions. In opposing Defendants' Motion to Dismiss, Plaintiffs rely on the allegations in the Amended Complaint.

Saint Elizabeths' Hospital & Its Dismal Response to Public Health Emergencies

Saint Elizabeths Hospital ("Saint Elizabeths" or "the Hospital") is the District's public psychiatric facility and serves individuals with mental illness who need intensive inpatient care to

support their recovery. Amended Compl. (ECF 50) ¶¶ 25, 30. Saint Elizabeths also provides mental health evaluations and care to patients committed by the courts. ECF 50 ¶ 34. Plaintiffs Vinita Smith, Enzo Costa, and William Dunbar are all patients at St. Elizabeths Hospital. ECF 50 ¶¶ 19, 20, 22. They are three of approximately 270 individuals with mental health disabilities at Saint Elizabeths, ECF 50 ¶ 32, and bring class claims, ECF 50 ¶¶ 212 – 216.

Plaintiffs Smith, Costa, and Dunbar all have serious mental illnesses. ECF 50 ¶ 20 (Smith is diagnosed with schizoaffective disorder); ¶ 19 (Costa is diagnosed with schizophrenia, dysthemia, schizoaffective disorder, and anti-social personality disorder); ¶ 22 (Dunbar is diagnosed with paranoid schizophrenia). Each of them has been involuntarily committed to St. Elizabeths Hospital. ECF 50 ¶¶ 19, 20, 22.

In just the last 11 months, the Hospital has experienced two major public health crises or emergencies. ECF 50 ¶¶ 1, 6, 123-129, 189-201. In September and October 2019, there was an outbreak of Legionella and other bacteria in the water supply, causing the Hospital to turn off the water for almost a month. ECF 50 ¶¶ 130-188. During this crisis, patients at Saint Elizabeths lived in squalid conditions, ECF ¶¶ 160-184. and were denied medical and mental health care. ECF 50 ¶¶148-161. And, in March 2020, COVID-19 spread like wildfire through the Hospital, in large part due to the failure of Defendants to properly prevent and control the infectious disease. ECF 50 ¶¶ 4-5. During the COVID crisis, which is ongoing, patients are at risk of contracting a deadly virus, ECF 50 ¶¶ 4-5and critical mental health services are dramatically curtailed. ECF 50 ¶¶ 109 – 116. Plaintiffs are at continual risk of unsanitary, unsafe, and inhumane conditions because of the Defendants mismanagement of public health crises. ECF 50 ¶¶ 1, 6, 123-129, 189-201.

COVID-19

The COVID-19 pandemic is a serious threat to public health, is highly contagious, and spreads rapidly in congregate settings like Saint Elizabeth Hospital. ECF 87-1 at 7-8. By April,

2020 the Hospital was reporting the rapid spread of cases among staff and patients. ECF 50 ¶ 3. When patients are housed in close quarters, unable to maintain six feet of distance, and share objects used by others, the risks of spread are greatly, if not exponentially, increased. *See* ECF 39-1 at 14-18. Defendants have failed to protect Saint Elizabeths residents from contracting the virus and failed to ensure that Saint Elizabeths patients receive the psychiatric care and treatment that is the reason they are confined to the Hospital.

1. *Infection Control &Protection Failures*

The Centers for Disease Control and Prevention ("CDC") has issued guidance to help facilities like Saint Elizabeths mitigate the spread of the virus and 'keep patients and residents safe. ECF 59 at 3. This includes guidance for Long-Term Care Facilities, health care settings, and correctional and detention facilities. *Id.* The CDC guidelines recommend, among other things, that to prevent the virus, long-term care facilities actively screen all residents and anyone entering the building for fever and symptoms; that group activities and communal dining should be canceled; social distancing should be enforced among residents; and residents should wear a cloth face covering whenever they leave their room or are around others. ECF 59 at 4.

To prevent the spread of the virus, facilities should isolate symptomatic patients, and implement appropriate transmission-based precautions including isolating patients who are suspected of having or who have tested positive for COVID-19 in private rooms with the door closed and with private bathrooms (as possible). ECF 59 ("TRO Opinion") at 4. If the patient is COVID-19 positive, the patient should remain in isolation until either the patient symptoms improve and either 3 days have passed since recovery and 7 days have passed since symptoms appeared, or the patient receives 2 negative tests. ECF 59 at 4.

Defendants have substantially departed from CDC guidelines, despite conceding that Saint Elizabeths should be doing what is consistent with CDC guidance. ECF 59 at 9. As this Court has already found, Defendants failed to properly:

- medically isolate and quarantine patients, ECF 95 ("PI Opinion") at 14 -15 ("[b]efore Plaintiffs moved for a TRO, the Hospital was not isolating exposed patients form other patients"; "Defendants' implementation of quarantine does not satisfy CDC standards");
- limit staff cross-contamination, ECF 95 at 17 ("the Hospitals' unexplained failure to implement appropriate restrictions on staff assignments constitute[s] a substantial departure from professional judgment"); and
- screen and test patients and staff for COVID-19, ECF 95 at 20 - 24 ("Defendants have offered no justification sounding in professional judgment for not periodically testing all patients (with the exception of those who refuse to participate) and all staff (who are not on leave or working from home) for the virus—at least while the crisis at the Hospital continues.").

Defendants also failed to prevent and control the COVID-19 infection because they did not implement social distancing and distribute masks and engage in essential hygiene practices. Plaintiffs reported that it is impossible for patients at Saint Elizabeth to maintain six feet of distance between themselves and other people in the Hospital. ECF 39-1 at 20; *see also* ECF 39-6 (Declaration of Enzo Costa) ¶ 4; ECF 39-7, (Declaration of William Dunbar) ¶ 5; Ex. 7, ECF 39-8 (Declaration of Vinita Smith) ¶ 6. Defendants have not provided masks to all patients or instructed or required patients to wear masks in a manner consistent with public health guidelines. ECF 39-1 at 20 (discussing record evidence). Declarations submitted by Defendants on April 21, 2020 state that masks were available to patients upon request (ECF 42-6 ¶ 8), and "some patients

choose to wear masks, others do not" (ECF 42-4 ¶ 13). *See also* ECF 46 at 9 (discussing extensive record evidence that patients were not wearing masks). Hygiene procedures were not followed with fidelity. ECF 81 at 6 (noting hand hygiene audit data showed less than 80% compliance, noting use of non-alcohol sanitizer), 7 (noting face shields were not sufficient and criticizing reuse of masks).

2. *Disruption of Provision of Mental Health Services and Treatment*

There has been severe curtailment of mental health care during the COVID-19 pandemic, and patients are not receiving the same or functionally equivalent mental health care that they received prior. "As Plaintiffs note and Defendants do not dispute, COVID-19 has had a significant impact on patient mental health, causing anxiety and stress to an already susceptible population." ECF 95 at 26. And "[a]ll agree that the Hospital has failed to provide patients with all—or even a fraction—of the psychiatric care that they received prior to the pandemic." ECF 95 at 30. Indeed, as Dr. Canavan notes in his *amicus* report, between February 2020 and April 2020 there has been a dramatic decrease in the provision of mental health services at the hospital." Canavan Report at 15 (noting that hours of reported treatments fell from 6000 in February to less than 100 in April—a 98% drop).

Plaintiffs similarly reported there was severe curtailment of mental health care, including closing the Treatment Mall, suspended group therapy, suspended anger management classes and suspension of most competency restoration classes. Smith Decl. (ECF 39-8) ¶ 10; Costa Decl. (ECF 39-6) ¶ 9; Dunbar Decl. (ECF 39-7) ¶ 7. Plaintiffs have not participated in the therapies ordered by their individual plans, including Dialectic Behavior Therapy, Anger Management, Community Training, or Women's Coping, since the TLC was closed. ECF 87-4 (Second Declaration of Vinita Smith) ¶ 7, ECF 87-5 (Second Declaration of Enzo Costa) ¶¶ 12-13; ECF 87-6 (Second Declaration of William Dunbar) ¶¶ 16-17. *See also* ECF 87-2 (Declaration of I.

Murphy) ¶ 4. As *amici* noted, "Multiple individuals in care …. reported very little, if any, treatment is occurring." ECF 78 at 14.

WATER CRISIS

On September 26, 2019, the D.C. Department of Behavioral Health (DBH) received preliminary lab results for a routine water quality test of Saint Elizabeths showing evidence of pseudomonas and legionella bacteria in the facility's water supply. Legionella bacteria is known for causing Legionnare's disease, which can lead to severe infections in people with weakened immune systems. ECF 50 ¶ 136. At the end of September, Plaintiffs Smith, Costa, and Dunbar, as well as the other patients at the Hospital, were abruptly told by staff that the water would be shut off because there was a water problem. ECF 50 ¶ 140. Between September 26, 2019 and October 23, 2019, the water supply at Saint Elizabeths was either completely turned off or was limited for sewage use only. ECF 50 ¶ 139. During the time the water was off, Saint Elizabeths failed to provide Plaintiffs and other similarly situated patients of the essentials of hospital care. Throughout the water outage, Saint Elizabeths continued to accept new patients, despite the fact that there was no safe, running water. ECF 50 ¶ 11.

1. *Disruption of Provision of Mental Health Services and Treatment*

Patients did not receive mental health services and treatment during the water outage. ECF 50 ¶ 9. Many staff, including behavioral therapists, psychologists and psychiatrists, did not come to work. ECF 50 ¶ 150. As a result, the mental health care – the reason people are sent to Saint Elizabeths – was inconsistent and for many patients was not provided at all. ECF 50 ¶¶ 148, 151; ECF 50 ¶¶ 157 (Mr. Costa unable to access behavioral therapy, anger management classes, group therapy, art therapy, or the exercise area; normally has 40 hours per week of therapy but during the shut off was receiving just two hours per day); ECF 50 ¶¶ 160-161 (Mr. Dunbar unable to go to group therapy, the exercise or recreation area, or Narcotics Anonymous meeting). For

example, Mr. Costa needed to speak to his psychiatrist about changing his medication but was not able to do so. ECF 50 ¶¶ 156. During the crisis, the minimal care that was provided was not individualized or appropriate. ECF 50 ¶¶ 158 (Costa was attending a competency restoration group but is competent).

As a result of the curtailment of basic mental health treatment and services during the water crisis, the named Plaintiffs and other patients showed signs of exacerbated psychiatric needs. Without treatment, they were sleeping in the daytime and unable to sleep at night. ECF 50 ¶ 186. There were many more fights than usual, and the use of seclusion and restraints increased. ECF 50 ¶¶ 187-188.

2. *The Hospital Failed to Maintain Hygienic Conditions During the Water Outage, Endangering Patient Safety*

During the water crisis, Defendants also failed to maintain hygienic conditions, endangering patient safety, and Defendants have provided no assurances or reason to believe that they would provide a more hygienic environment if the hospital were to have another water crisis in the future. ECF 50 ¶ 162.

Patients could not use the toilets regularly. For several weeks, there were no portable toilets, and the toilets in the facility had to be manually flushed. Few toilets were allowed to be used and they were rarely flushed; they rapidly overflowed with human waste. ECF 50 ¶¶ 163. The stench was terrible and attracted mosquitos. ECF 50 ¶¶ 165, 166, 167, 181. Although the hospital eventually brought in portable toilets, they too were dirty. ECF 50 ¶¶ 166. Patients could not wash their hands. ECF 50 ¶ 180. They could brush their teeth only if they have adequate bottled water, which often they did not. ECF 50 ¶ 180. Their clothing was dirty because the access to laundry services was limited. ECF 50 ¶ 9. At least one housing unit smelled of dead rats. ECF 50 ¶ 180. Patients could not shower regularly. ECF 50 ¶ 170. Patients were given only

"sanitary wipes" with which to clean themselves. ECF 50 ¶ 171. Eventually the District brought portable showers to Saint Elizabeths but they were dirty and not provided in sufficient numbers for the patients in the hospital. ECF 50 ¶ 170. Because there were not enough portable showers, patients were unable to shower regularly. ECF 50 ¶¶ 172 - 177. Also, because the showers were outside, patients were unable to use them when it rained. ECF 50 ¶¶ 172.

This is the second time in three years that Saint Elizabeths Hospital has experienced an extended water outage. ECF ¶ 8. And Defendants have acknowledged another subsequent multi-day outage. ECF 107-1 at 4. The fact that Defendants' have had several outages within several years, and their chaotic response to the recent extended water outage, suggest that they do not have an appropriate Emergency Water Protocol or other emergency plan to manage extended water outages at Saint Elizabeths Hospital. ECF 50 ¶ 6, 124 – 126.

ARGUMENT

I. PLAINTIFFS' CLAIMS CONCERNING THE WATER CRISIS ARE NOT MOOT.

Defendants assert that Plaintiffs' claims regarding the unconstitutional conditions resulting from the water crisis are moot because (1) the water outage is over, ECF 107-1 at 13; and (2) Defendants updated their emergency plan in March 2020, ECF 107-1 at 37. Defendants misunderstand the basic thrust of Plaintiffs' claims in the Second Amended Complaint: Defendants' egregious mismanagement of public health emergencies violated and continues to violate Plaintiffs' constitutional and statutory rights; those violations are ongoing; and this Court can grant relief. In fact, the Defendants' mootness argument fails three times over: first, the case is not moot because there is effective relief the Court can grant; second, Defendants' attempts to better prepare themselves for a future crisis fall within the "voluntary cessation" exception to mootness; and third, Plaintiffs' claims are further exempt from mootness because they are capable

of repetition yet evading review—indeed, the failures of Defendants' emergency response have repeated during the pendency of this case.

A. Defendants have not met their burden of proving that Plaintiffs' original claims are moot.

"The initial 'heavy burden' of establishing mootness lies with the party asserting a case is moot[.]" *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010); *accord J.D. v. Azar*, 925 F.3d 1291, 1307 (D.C. Cir. 2019) (quoting *Honeywell*, 628 F.3d at 576). "A case becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party." *Singh v. Carter*, 185 F. Supp.3d 11 (D.D.C. 2016) (quoting *Campbell–Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016)) (emphasis added).

Here, Defendants have failed to establish that Plaintiffs' original claims are moot. As the Amended Complaint alleges, there is an active controversy regarding Defendants' capacity, planning, policies and procedures with regard to the management of emergencies, as is demonstrated by the fact that they made some of the same blunders during both the extended water outage and the COVID-19 crisis, which is ongoing.[2] Defendants' argument rests on the mischaracterization of the water-related claims in the Amended Complaint as solely focused on the water shutoff that occurred in the Fall of 2019. *See* Def. Mot. 4-5. But substantial parts of the Complaint concern Plaintiffs' continued risk of exposure to chaotic, unpredictable, and unsafe conditions as a result of Defendants' failures to exercise professional judgment in the face of public health crises — as exhibited during the water crisis and the pandemic. ECF 50 ¶ 189-201. For

[2] Gov't of the District of Columbia, *Extensions of Public Emergency and Public Health Emergency and Delegations of Authority Authorized During COVID-19*, Mayor's Order 2020-079 (July 22, 2020), available at https://mayor.dc.gov/sites/default/files/dc/sites/mayormb/release_content/attachments/Mayor%27s%20Order%202020-079%20Extension%20of%20the%20Public%20Emergency%20.pdf.

example, the Amended Complaint details that, in both crises, there were extensive staffing shortages, ECF 50 ¶¶ 117, 119 (COVID-19), 185 (water outage); patient mental health care was curtailed, ECF 50 ¶¶ 109-115 (COVID-19), 148-161 (water outage); Defendants failed to maintain appropriate hygienic conditions, ECF 50 ¶¶ 79, 80 (COVID-19), 162-178 (water outage); and Defendants jeopardized patient health by continuing to admit new patients, ECF 50 ¶ 5 (COVID-19), ¶ 11 (water outage). Defendants point to the adoption of a new emergency plan in March 2020, but that hardly establishes (and certainly not without discovery) that no further relief can be granted, particularly because this Court has already found that the March 2020 emergency plan did not prevent the mishandling of the COVID-19 pandemic to such an extent that emergency injunctive relief was required. *See* ECF 95 at 8 ("The Court has already issued two opinions analyzing Defendants' infectious disease control and prevention measures and has concluded that their response has, at least in certain respects, substantially departed from accepted professional judgment"); 15 ("Plaintiffs have demonstrated a likelihood of success on merits with respect to the need for this isolation"); 20 (Plaintiffs have a "likelihood of success on the merits with respect to cross-staffing), and 25 ("Defendants' delay in testing all staff and their lack of a plan to continue testing all patients and staff constitutes a substantial departure from professional judgment."). In the absence of an effective emergency protocol in place, the case or controversy persists.

B. The voluntary cessation exception defeats mootness.

"The voluntary cessation of challenged conduct does not ordinarily render a case moot[.]" *Singh*, 185 F. Supp. 3d at 19 (quoting *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298 (2012)). The voluntary cessation doctrine was created so that courts do "not leave a wily defendant 'free to return to his old ways'" after a lawsuit is terminated. *DL v. District of Columbia*, 187 F. Supp. 3d 1, 5 (D.D.C. 2016) (citation omitted). To avoid the voluntary cessation exception, Defendants must rebut "an evidentiary presumption that the controversy reflected by the violation of alleged rights

continues to exist." *Wills v. U.S. Parole Comm'n,* 882 F. Supp. 2d 60, 70 (D.D.C. 2012), 882 F. Supp. 2d at 70 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 213 (2000)). To do this, Defendants must show that "(1) there is no reasonable expectation that the alleged violation will recur ... and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *DL*, 187 F. Supp. 3d at 5. (citation and quotation marks omitted).

Defendants do not even attempt to carry this burden and therefore their mootness argument can be rejected based on this failure alone. And, in any event, it is obvious that the alleged violations might well recur—indeed, after the filing of the initial complaint regarding the water crisis, the Hospital's failures in its handling of the COVID-19 pandemic justified an injunction, CITE PI, and the fact that the Hospital has experienced multiple water issues in the past several years, ECF 50 at ¶¶ 8, 126, 145, including one as recently as June 2020, ECF 107-1 at 4, shows that further crises of that type are also quite possible.

C. Even if the case were otherwise moot, it is capable of repetition yet evading review.

Even if a case would otherwise be moot, it continues to present a live case or controversy if it is capable of repetition yet evading review, meaning that if "1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and 2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Reid v. Hurwitz*, 920 F.3d 828, 832-33 (D.C. Cir. 2019) (citing *District of Columbia v. Doe*, 611 F.3d 888, 894 (D.C. Cir. 2010)). Plaintiffs' claims regarding the water crisis are capable of repetition yet evading review because the duration of the crisis was too short for Plaintiffs' claims to be fully litigated prior to its cessation and there is a reasonable expectation that Defendants' failures will occur again because there have been two significant water outages (with resulting

harm to patients) in the past three years, and there have been other water outages at the facility, including one in November 2019 and another in June 2020.

As to duration, one year has been held to be "too short to be fully litigated[.]" *Doe*, 611 F.3d at 895 (citing *Jenkins v. Squillacote*, 935 F.2d 303, 307 (D.C. Cir. 1991)). As a result, even if this case were limited to the water shutoff, the fact that the water was turned back on after 27 days falls squarely within the first prong, qualifying as an alleged violation that is too short to be fully litigated prior to its cessation or expiration.

As to a reasonable expectation that Plaintiffs will again be subject to the same injury, there is no requirement that the "very same facts" recur. *See Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 325 (D.C. Cir. 2009). To determine whether there is a reasonable expectation that the Plaintiffs will again be subject to the same injury, the Court looks at the complaint and the undisputed facts to determine just "what must be repeatable in order to save [the] case from mootness." *Id.* at 322-24.

In *Del Monte*, the plaintiff brought action against United States for a declaration that the Office of Foreign Assets Control unlawfully withheld and unreasonably delayed issuance of an export license for food shipments to Iran. That license was eventually granted, and the government argued that the case was moot. The plaintiff argued that its claims were capable of repetition, and the court agreed, explaining that the correct approach focuses on "whether the *legal wrong complained of by the plaintiff* is reasonably likely to recur," and not whether "the *precise historical facts* that spawned the plaintiff's claims are likely to recur[.]" *Id.* at 324 (emphasis added).

In this case, Plaintiffs can reasonably expect that they will be subject to the same injury again when the next crisis hits the hospital. In just the last 10 months, and even after updating their emergency response plan, ECF 44-2 to 44-5, Defendants repeatedly failed to provide patients

at Saint Elizabeths safe and adequate care. ECF 50 ¶¶ 123-129, 189-201; *see also* ECF 95 at 8, 15, 20, 25 *(*finding Plaintiff likely to succeed on their claims at the preliminary injunction stage). There has been a subsequent, multi-day water outage. ECF 107-1 at 4. And, Defendants have withheld information on their efforts to remediate the water crisis (including the specific steps that have been taken that will ensure there are either no future outages or that future outages will not fundamentally interrupt patient care). Defendants have provided no assurance that in the event of a crisis, the response would be any different than what it was in the recent crises that injured Plaintiffs. Thus, Plaintiffs have a reasonable expectation that they will be again subject to the same injury.

II. PLAINTIFFS STATE A SUBSTANTIVE DUE PROCESS CLAIM.

Plaintiffs are all individuals involuntarily committed to the Defendants' care. ECF 50 at 19-23. Defendants thus have "an affirmative duty to ensure [their] safety and general well-being." *Harvey v. District of Columbia*, 798 F.3d 1042, 1050 (D.C. Cir. 2015); *see Youngberg v. Romeo*, 457 U.S. 307 (1982). Involuntarily "committed persons have a constitutional right, protected by the due process clauses of the Fifth and Fourteenth Amendments, in the government meeting that obligation." ECF 59 at 16. Due process standards for civil detainees, like those for pretrial detainees, are more demanding than those under the Eighth Amendment for individuals convicted of crimes: "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 321-22. Among the most basic rights of civil and pretrial detainees are the right to adequate medical care, *Youngberg*, 457 U.S. at 324, and reasonable safety in confinement, *see Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that even convicted individuals may not be subjected to "a condition of confinement that is . . . very

likely to cause serious illness and needless suffering."). The right to medical care includes the right to mental health care. *See Brown v. Plata*, 563 U.S. 493, 506 (2011).

As this Court has found in issuing both the Temporary Restraining Order (ECF 59 at 11-12) and the Preliminary Injunction (ECF 95) in this case, the "operative standard" governing Plaintiff's due process claims is that which the Supreme Court set out in *Youngberg*: "whether [the state] has exercised professional judgment in choosing what action to undertake." 457 U.S. at 321, ECF 59 at 11. Under the *Youngberg* standard, "liability may be imposed only when the decision by the professional [constitutes] such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323.

Defendants' are wrong that Plaintiffs' have failed to state a claim under this standard. Plaintiffs have adequately pled that during each public health crisis, the Defendants failed to provide for "their safety and general well-being," and that doing so was a "substantial departure from accepted professional judgement, practice, or standards." *Youngberg*, 457 U.S. at 323.

Plaintiffs' claims are supported by their allegation that Defendants' emergency plans are insufficient and that they remain at risk of unconstitutional treatment during ongoing and future crisis. ECF 50 ¶ 189-201. The Defendants mischaracterize Plaintiffs' allegations regarding the insufficiency of Defendants' emergency plan. Motion to Dismiss, ECF 107-1 at 36. Plaintiffs are *not* asserting a right to specific items in an emergency plan. Rather, Plaintiffs have an undisputed right to constitutional conditions of confinement and the absence of emergency plans and/or the inadequacy of that plan are part of Plaintiffs' showing that they are at risk of further unconstitutional conditions. ECF 50 ¶¶ 6, 123-26, 145, 189-201.

Additionally, although this Court's findings made in imposing a Temporary Restraining Order and Preliminary Injunction are not binding at this stage, Defendants provide no basis for the Court to conclude that they were mistaken, and it would be incongruous to include that a claim on which Plaintiffs have shown they are likely to succeed fails even to state a claim.

A. Plaintiffs state a claim based on conditions during the pandemic.

When ruling on a motion to dismiss, the Court must accept as true all facts plausibly pleaded in the complaint, drawing all reasonable inferences in plaintiffs' favor. *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). "Plausibility does not mean certainty," only that the claim "rises 'above the speculative level.'" *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 11 (D.D.C. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555(2007)). Plaintiffs are permitted to plead with less specificity, and even "on information and belief," regarding information in defendants' possession to which plaintiffs would not have access prior to discovery, *Kelleher v. Dream Catcher, L.L.C.*, 263 F. Supp. 3d 322, 325–26 (D.D.C. 2017).

The Amended Complaint plausibly alleges that Plaintiffs are facing a "substantial risk" of serious harm that is unconstitutional because Defendants' emergency planning and management failures leave them exposed to a "serious, communicable disease." *Helling*, 509 U.S. at 33, and because Defendants failure to provide adequate mental health care is a substantial departure from accepted professional judgment. *Youngberg*, 457 U.S. at 315, 324; ECF 59 at 11. The Amended Complaint lays out with specificity (1) the failure to prevent and manage the COVID-19 infection at Saint Elizabeth, *see* ECF 50 ¶¶ 78-108; (2) the failure to provide adequate mental health care during the COVID-19 outbreak, *see* ECF 50 ¶¶ 109-116; and (3) the substantial departure from professional judgment that caused these failures, *see* ECF 50 at ¶¶ 66-77, 110-11, 189-201. The rapid and dangerous spread of the virus, and the resulting inadequate mental health care, was the

result of Defendants' substantial departures from guidance from the Centers for Disease Control and any reasonable professional judgment. ECF 50 at ¶¶ 66-77.

Defendants attempt to escape liability by describing every decision to act or to delay in acting as "professional judgment." But when hospital authorities fail to consider, ignore, misinterpret, or misapply applicable guidance to protect the patient population, that departs substantially from the "accepted professional judgment" to which Plaintiffs were entitled under the Constitution. ECF 50 ¶¶ 78-108. Similarly, when the Hospital radically curtails its provision of mental health services without providing anything close to an alternative, that is not an "accepted professional judgment." ECF 50 ¶¶ 109-116.

Plaintiffs have, in fact, done far more than merely plead a plausible claim: with respect to the control and prevention of the COVID-19 crisis, this Court has twice found that Plaintiffs are *likely to succeed* on their due process claims. ECF 59; ECF 95. Defendants have not moved to reconsider these orders; instead, they argue now as if the Court had never addressed these issues after thorough and vigorous litigation. Accordingly, the motion to dismiss should be denied.[3]

B. Plaintiffs state a claim based on conditions during the extended water outage.

Plaintiffs have also plausibly pled that they were unconstitutionally denied adequate care and reasonable safe living conditions during the 28-day water outage and face a risk of further unconstitutional conditions. Defendants' cherry-picking a few examples of where Plaintiffs were treated with an ounce of dignity are misleading. The situation at Saint Elizabeths during the water crisis was more than "discomfort." ECF 107-1 at 2. The inhuman, unsafe, and medically

[3] To the extent Defendants rely on alleged current conditions at St. Elizabeths, those conditions go to their mootness argument, discussed above, and to their motion for summary judgment, discussed below, but not to their motion to dismiss, which tests only whether the Amended Complaint states a claim.

dangerous conditions that patients were forced to endure are stomach-turning. ECF 50 ¶¶ 10 ("Patients could not shower, wash their hands, or use the toilets regularly. Fecal matter, urine, and menstrual blood accumulated in the bathrooms. Patients were only allowed to shower on a limited schedule outside in dirty and portable showers which were inaccessible to the many patients with mobility disabilities."); ECF 50 ¶¶ 162-183 (detailing individual Plaintiff's experiences with Hospital conditions during the water crisis); ECF 50 ¶ 154 (noting denial of routine forms of medical care such as podiatry and dentistry). And, at the same time, these patients, all of whom have serious psychiatric illnesses, were denied mental health care. ECF 50 ¶ 9 (discussing discontinuation of a wide variety of therapy and other forms of psychiatric care on which Plaintiffs and members of the class depend for their mental health); ECF 50 ¶¶ 148-161 (detailing individual Plaintiff's experiences accessing mental health care and medical care during the water crisis).

Further, the Amended Complaint adequately alleges that those conditions and deficiencies in patient care stemmed directly from Defendants' "substantial departure from accepted professional judgement, practice, or standards." *Youngberg*, 457 U.S. at 322. As this Court noted in granting the Preliminary Injunction, while poor conditions are not *prima facie* evidence of a failure to exercise professional judgement, they also cannot be ignored. ECF 95 at 7.

Tthe curtailment of mental health care was a substantial departure from accepted professional judgement. Defendants' unilaterally altered the mental health care patients received. ECF 50 ¶¶ 9, 127, 132, 134-135, 147-161, 189-201. Patients' treatment needs, which had been decided according to the professional judgment of the staff, went unmet as services were suspended or curtailed throughout the hospital. ECF 50 ¶¶ 9, 147-148, 156-161. The Treatment Mall was closed throughout the water shut-off. ECF 50 ¶ 9, 149. Psychologists, psychiatrists and other staff did not come to work. ECF 50 ¶ 150. The failure to provide mental health treatment to

these severely mentally ill patients was not the result of professional judgments about the care they needed, but rather the direct (and predictable) result of inadequate emergency planning. ECF 50 ¶ 189 – 201.

Plaintiffs also plausibly allege that the conditions at the Hospital were so egregious that they demonstrably be the result of a substantial departure from "professional standards of care." ECF 50 ¶¶ 129, 135. *Accord Youngberg*, 457 U.S. at 323 ("liability may be imposed only when the decision by the professional [constitutes] such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."). Defendants failed to even comply with their own regulations which were promulgated to "provide minimum standards for the establishment and maintenance of hospitals in order to protect the public interest by promoting the health, welfare, and safety of individuals in hospitals." D.C. Mun. Regs., tit. 22-B § 2001. The regulations require hospitals to:

- be safe and clean, D.C. Mun. Regs., tit. 22-B §§ 2031.1, 2034;
- dispose of waste properly to avoid attracting bugs and vermin or spreading infectious diseases, D.C. Mun. Regs., tit. 22-B § 2031.2.d;
- have sufficient toilets and showers for patients, D.C. Mun. Regs., tit. 22-B § 2035.8.a. and D.C. Mun. Regs., tit. 22-B § 2035.7.b; and
- provide exhaust and clean air to prevent the concentration of contaminants, D.C. Mun. Regs., tit. 22-B § 2036.15.

Plaintiffs have alleged that they were involuntary confined at Saint Elizabeths' Hospital and forced to endure conditions that fell far below these standards. The Hospital was not safe or clean during the water outage. ECF 50 ¶¶ 148 -188. Waste was overflowing the toilets and was

attracting insects. ECF 50 ¶¶ 163 - 169, 181. Most toilets did not flush, and those that were flushed at all were limited to just one or two per housing unit of approximately twenty-five people. ECF 50 ¶¶ 163, 165, 167, 169. There were approximately 270 patients in Saint Elizabeths Hospital during the water outage but just eight portable showers for the whole facility. ECF 50 ¶¶ 7, 170. While the violation of the regulations is not itself a constitutional violation; the fact that Defendants are so flagrantly violating even its own regulations enhances the plausibility of the claim that Defendants are substantially departing from professional judgment. *See* ECF 95 at 10 ("a failure to comply with significant [ ] guidance raises the question why the guidance was not followed.")

The conditions at the Hospital, to which Plaintiffs were involuntarily confined were the result of a "such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person … did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 321-23. Taking all allegations as true, as the Court must do on a motion to dismiss, there is no question that Plaintiffs have plausibly stated a claim.

III. THE COMPLAINT PLAUSIBLY ALLEGES BOTH MUNICIPAL AND SUPERVISORY LIABILITY.

Plaintiffs seek relief against Defendants in their official capacities, which amounts to an injunction against the District. *Reed v. District of Columbia*, 474 F. Supp. 2d 163, 168 n.5 (D.D.C. 2007). A municipality faces liability under 42 U.S.C. § 1983 where a municipal "custom or policy caused the claimed violations of [the plaintiffs'] constitutional rights." *Jones v. Horne*, 634 F.3d 588, 601 (D.C. Cir. 2011). "There are a number of ways in which a 'policy' can be set by a municipality that causes it to be liable under § 1983," *Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003).

This Court found, in issuing the Preliminary Injunction that "in their amended complaint, Plaintiffs have alleged facts that, if true, plausibly satisfy the *Monell* standard," and "Plaintiffs

have offered sufficient evidence to show 'an affirmative link' such that a municipal policy was the 'moving force' behind the constitutional violations at issue." ECF 95 (preliminary injunction) at 31-32 (quoting *Baker,* 326 F.3d at 1306). Defendants offer nothing to cause the Court to depart from its prior analysis.

Plaintiffs have also plausibly pleaded a basis to enjoin Defendants Bazron and Chastang in their individual capacities.

A. Defendant Bazron, the final policymaker for responding to dangerous conditions at St. Elizabeths, approved the policy that resulted in the unconstitutional conditions.

"[A] single action can represent municipal policy where the acting official has final policymaking authority over the 'particular area, or . . . particular issue.'" *Thompson v. District of Columbia*, 832 F.3d 339, 347–48 (D.C. Cir. 2016) (quoting *McMillian v. Monroe Cty.*, 520 U.S. 781, 785 (1997)((alteration original)). Defendant Bazron serves as director of the Department of Behavioral Health (DBH)[4] and exercises final policymaking authority over the way St. Elizabeths responds to dangerous conditions within the facility. She bears responsibility for "supervis[ing] and direct[ing] the Department." D.C. Code § 7-1141.04(1). She also possesses authority to "[e]xercise any other powers necessary and appropriate to implement the provisions of this chapter." D.C. Code § 7-1141.04(3). One such provision establishes that DBH "shall . . . [d]irectly operate a hospital to provide inpatient mental health services." D.C. Code § 7-1141.06(6). The only inpatient facility maintained by the District of Columbia is St. Elizabeths, DISTRICT OF

[4] DBH, as "the successor-in-interest to the Department of Mental Health," D.C. Code § 7-1141.02(b), oversees St. Elizabeths. DEP'T OF BEHAVIORAL HEALTH FY 18-19 PERFORMANCE OVERSIGHT QUESTIONS, App. 1, https://dccouncil.us/wp-content/uploads/2019/04/dbh.pdf (last visited Oct. 22, 2019) (listing CEO of St. Elizabeths Hospital below Director of Department of Behavioral Health on organizational chart); *see also Banks v. District of Columbia*, 377 F. Supp. 2d 85, 87 (D.D.C. 2005). ("St. Elizabeth's [*sic*] Hospital . . . is run by the District of Columbia Department of Mental Health.").

COLUMBIA OLMSTEAD PLAN 2017–2020 at 8,[5] and "operating" it clearly entails formulating a response to an emergency that severely affects the facility's conditions. Defendant Bazron also promulgates relevant regulations and when DBH promulgates regulations, it does so in the director's name. *See, e.g.*, 63 D.C. Reg. 006936, 006936 (May 6, 2016) ("The Director of The Department of Behavioral Health . . . hereby gives notice of the adoption of a new [chapter of the DCMRs governing] . . . reimbursement rates. . .").

Combined with her duty to "supervise" the agency that operates St. Elizabeths, D.C. Code § 7-1141.04(1), Defendant Bazron's authority to "promulgat[e] [the] rules to run the[] . . . [D]epartment" establish her as a final policymaker for responding to emergencies at Saint Elizabeths, *Banks*, 377 F. Supp. 2d at 91–92 (concluding that power to issue rules qualified director of the Department of Mental Health, the predecessor to DBH, as "a final-policy-maker" for the agency in general and Saint Elizabeths in particular); *see also Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (D.C. Cir. 1997) (relying on same reasoning to identify Director of Department of Corrections as final policymaker for that department).

Water Outage. Defendant Bazron was responsible for St. Elizabeths adherence to the Water Emergency Protocol, and has the authority to change that Protocol. Moreover, she has publicly acknowledged that she oversaw St. Elizabeths response to the crisis, including approving the facility's decision to acquire bottled water but to otherwise keep patients locked in the facility without access to clean water, presumably in accordance with the Water Emergency Protocol. ECF 50 ¶¶ 205-207.[6] Under her oversight, as the Amended Complaint alleges, St. Elizabeths failed to

[5] https://odr.dc.gov/sites/default/files/dc/sites/odr/page_content/attachments/2017%20Olmstead%20Plan%20Draft%20CLEAN%20APPROVED%206-2017.pdf

[6] Bazron's stated to (i) D.C.'s Fox 5 that she and her team were "really . . . very, very involved in making sure that we get the [water] problem solved," "(ii) to WTOP that St. Elizabeths had sought

(*continued on next page*)

take adequate steps to mitigate the resulting unsafe and unsanitary environment, and allowed the facility to operate in a manner where plaintiffs and other patients could not receive the behavioral health services they need rather than transfer them or provide more robust services. ECF 50 at ¶¶ 147-149, 162-163, 200-211.

Moreover, Defendant Bazron's public defense of St. Elizabeths' response to the water crisis demonstrates that, in the alternative, she ratified the policy response that the facility adopted. Such ratification by a final policymaker also suffices to create municipal liability. ECF 50 ¶¶ 205-207. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion).

Plaintiffs have sufficiently alleged "an affirmative link" that a municipal policy was the moving force behind the constitutional violations here. ECF 95 at 32. Because that policy has caused the constitutional violations at issue, Defendant Bazron's adoption of it subjects the District to liability for Plaintiffs' injuries.

COVID-19. The Court has already concluded at the preliminary injunction stage that Plaintiffs have adequately pled a claim for municipality liability as to the pandemic response. ECF 95 at 32. This preliminary finding was amply justified and Defendants offer no reason why it should change. The Amended Complaint plausibly alleges Director Bazron's personal involvement in the Hospital's response to the COVID crisis. Director Bazron directly confirmed

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to address the crisis by importing "an extensive supply of bottled water" but noted that "patients are still being admitted and no patients have been moved." Lindsay Watts, *Saint Elizabeths Confirms Legionella Bacteria Found in Water Sample; Says No One Has Been Sickened*, FOX 5 DC (Oct. 3, 2019).[6]; Megan Cloherty, *Running Water Outage at DC's St. Elizabeths Enters Second Week*, WTOP (Oct. 3, 2019); *see also* Natalie Delgadillo, *St. Elizabeths Has Not Had Clean Water for 25 Days, but It's Still Admitting New Patients*, DCist (Oct. 21, 2019) (stating that Bazron confirmed policy of continuing to admit new patients as recently as Monday, October 21, 2019). She also addressed criticisms of the policy, noting that "no patient and no staff at St. Elizabeths is sick or showing any signs of illness." Cloherty, *supra*.

to Plaintiffs that the Hospital activated this plan on March 12, 2020. ECF 50 ¶ 62 (discussing Defendant Bazron's March 18, 2020 letter to Plaintiffs' counsel).

B. Defendants Bazron and Chastang are subject to personal supervisory liability.

1. Defendants Bazron and Chastang bear responsibility for responding to dangerous and incantational conditions at St. Elizabeths.

The Defendants bear personal responsibility for the constitutional violations at issue and this Court can enjoin them personally to make Saint Elizabeths comply with the law. Supervisors are personally liable for the constitutional torts when they "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." *Barham v. Ramsey*, 434 F.3d 565, 578 (D.C. Cir. 2006) (quoting *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir.1988)). And the liability of individual defendants for injunctive relief follows directly from *Ex parte Young*, which described its exception to sovereign immunity by stating that the official is subject to suit "in his person," 209 U.S. 123, 160 (1908). The modern Court has reiterated *Ex parte Young* to recognize an "exception . . . for certain suits seeking declaratory and injunctive relief against state officers *in their individual capacities*." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (emphasis added). Circuit courts opining on this issue after *Coeur d'Alene* agree. *See Redondo-Borges v. U.S. HUD*, 421 F.3d 1, 7 (1st Cir. 2005); *MCI Telecomm. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 506 (3d Cir. 2001).[7]

[7] A decision in this district reached a contrary conclusion, *see Hatfill v. Gonzales*, 519 F. Supp. 2d 13, 19- 24 (D.D.C. 2007), but it was, respectfully, in error. The rationale of that decision was that a government official can be sued only in an official capacity for an injunction because that is the capacity in which the official injures the plaintiff. That reasoning conflicts not only with *Ex parte Young* itself but also with *Hafer v. Melo*, 502 U.S. 21 (1991). In that case, the Supreme Court held that an individual-capacity defendant is susceptible to liability for conduct taken as a government official because the actions at issue were taken "under color" of law within the meaning of § 1983, regardless of the capacity in which the defendant is named. The Court explained that "[t]he requirement of action under color of state law means that Hafer may be liable for discharging respondents precisely because of her authority as auditor general. We cannot accept the novel
(*continued on next page*)

As to Defendant Bazron, the same personal involvement alleged above in connection with municipal liability also suffices to render her liable individually.

Defendant Chastang is the chief executive officer of Saint Elizabeths and has exercised this authority in ways that have made him "personally involved" in the Hospital's infirm response to the pandemic. *Avila v. Dailey*, 404 F. Supp. 3d 15, 25 (D.D.C. 2019) (internal citation and quotation marks omitted). For example, he signed the Hospital's Administrative Issuance regarding the "Prevention and Management of COVID-19," a guidance document that, as of April 3, among other flaws, envisioned keeping common areas open. *See* ECF 42-3 at 4; see also ECF 59 at 13 (TRO opinion noting that Hospital has taken a less demanding approach [than the CDC recommends] to enforce social distancing [partly as demonstrated by fact] that common areas are open"). He personally reviews admissions decisions, Candillas Decl. (ECF 90-5) ¶ 17, met with *amici* to assist them in their review of the conditions at the facility, ECF 78 at 2; ECF 81-3, and appears to have directly participated in decisions that have deprived patients of mental health care, see ECF 78 at 13 (noting that "there has not been coordinated treatment delivery due to the administrative leadership decision" not to approve a proposed plan for programming during the pandemic).

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proposition that this same official authority insulates Hafer from suit." *Id.* at 27-28. Although *Hafer* was a case about damages, nothing in *Hafer*'s discussion or logic suggests that its invocation of the "under color" principle holds only for damages suits. Indeed, in light of *Ex parte Young* and *Coeur d'Alene*, the opposite assumption is far more justified. Moreover, the alternative rule would leave plaintiffs entirely without a remedy when individual municipal officers threaten to violate a person's rights. Concretely, a D.C. police officer could boldly declare that he intended to beat a person senseless the next day because of his protected speech and his race and for no law enforcement purpose (thereby clearly violating the First, Fourth, and Fifth Amendments) and the threatened victim could not seek an injunction against such threatened conduct absent a municipal policy. That cannot be the law.

This level of involvement establishes the necessary link between Defendant Chastang and the challenged actions and authorizes this Court to order him to improve the facility's response.

IV. PLAINTIFFS AND THE PUTATIVE CLASS HAVE STANDING TO SEEK INJUNCTIVE RELIEF.

Assuming, as is required at this stage, the merits of Plaintiffs' claims, *see Cutler v. U.S. Dep't of Health & Human Servs.*, 797 F.3d 1173, 1179–80 (D.C. Cir. 2015). Plaintiffs have standing to seek relief. In order to establish redressability, a plaintiff is required to show "a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). The Court's power to provide appropriate injunctive is broad and flexible once a constitutional violation has been shown. See ECF 87-1, at 36-37. That includes the power to ensure that relief is "complete." *U.S. Dep't of Justice v. Daniel Chapter One*, 89 F. Supp. 3d 132, 147 (D.D.C. 2015) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946). Contrary to Defendants' assertions, Plaintiffs are not asserting rights on behalf of other patients. Plaintiffs are seeking a change to Defendants' policies and practices, including their emergency planning and their evaluation, development, and implementation of treatment plans during such emergencies, to remedy their failure to provide them with adequate care during emergencies. ECF 50 ¶ 236. Injunctive relief will provide redress to Plaintiffs.

And, Plaintiffs have properly brought this case as a class action, ECF 50 ¶¶ 212 – 216, and Defendants do not dispute that the requested remedy would be appropriate for class-wide relief. ECF 107-1.

V. THE COMPLAINT STATES A CLAIM THAT DEFENDANTS' VIOLATED THE AMERICANS WITH DISABILITIES ACT ("ADA").

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42

U.S.C. § 12132. The obligation of public entities to make reasonable modifications to their services, programs, or activities is an affirmative, not reactive, obligation. Indeed, the ADA seeks to prevent not only intentional discrimination against people with disabilities, but also—primarily—discrimination that results from "thoughtlessness and indifference," that is, from "benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985); *see* H.R. Rep. No. 101-485(II), at 29 (1990). To survive a motion to dismiss under Title II of the ADA a plaintiff must plead three elements: "(1) that the plaintiff is a qualified individual with a disability; (2) that the public entity denied him the benefits of or prohibited him from participating in the entity's services, programs or activities; and (3) that denial or prohibition was 'by reason of' his disability." *Jackson v. District of Columbia*, 826 F. Supp. 2d 109, 125-26 (D.D.C. 2011) (quoting 42 U.S.C. § 12132). An ADA claim often takes one of four forms: disparate treatment, disparate impact, failure to make a reasonable accommodation, or unjustified isolation. *Seth v. District of Columbia*, No. 18-cv-1034 (BAH), 2018 WL 4682023, at *10 (D.D.C. Sept. 28, 2018); *Olmstead v. Zimring*, 527 U.S. 581 (1999).

Plaintiffs have sufficiently pled that they are qualified individuals with a disability, that the public entity denied them the benefits and prohibited them from participating in the entity's services, programs, and activities, and that the discrimination was by reason of the plaintiffs' disabilities. Plaintiffs allege that Defendants' actions (and inactions) during both the water crisis and the ongoing COVID-19 pandemic isolated them without justification. *See Brown v. District of Columbia*, 928 F.3d 1070, 1077 (D.C. Cir. 2019) (citing to *Olmstead*, 527 U.S. 581). Plaintiffs also allege that the methods of administration utilized by Defendants during both crises had a disparate and discriminatory impact on patients at St. Elizabeths. *See Seth*, 2018 WL 4682023, at *12. Defendants' emergency plan fails to protect patients from discrimination under the ADA.

ECF 50 ¶¶ 189 – 201. Accordingly, Defendant's motion to dismiss Plaintiffs' ADA claims should be denied.[8]

A. Unjustified Isolation

The ADA requires that persons with disabilities be provided services in the least restrictive setting consistent with their needs. 28 CFR § 35.130(d). Segregation in an institution is only justified where it is essential to meet the person's treatment needs and there is no appropriate community setting. *Brown*, 928 F.3d at 1077 (citing *Olmstead*, 527 U.S. 581). The D.C. Circuit has held that public entities violate the ADA when they "care for a mentally... disabled individual in [a facility] notwithstanding, with reasonable modifications to its policies and procedures, it could care for that individual in the community." *Id.* at 1073.

Defendants must serve persons with disabilities in community settings where it has been determined that community placement is appropriate and the transfer from institutional care to a less restrictive setting is not opposed by the individual patient. *Id.* at 1077. Defendants must reasonably modify their system to serve individuals with disabilities in the most integrated setting appropriate. *Olmstead*, 527 U.S. at 607. Where an individual is institutionalized in a dangerous environment and essential mental health care is not provided, the balance of considerations must shift in favor of community-based and integrated treatment options. *See, e.g.*, *Youngberg*, 457 U.S. at 317 (person in custody has a constitutional right to treatment); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (confining a person with mental illness who is no longer a threat to himself or others is unconstitutional even if the State seeks to protect the person from less desirable living conditions).

[8] As discussed, *supra*, Defendants' alternative motion for summary judgment on Plaintiffs' ADA claims should also be dismissed.

Plaintiffs allege that they, and similarly situated patients, are individuals with disabilities are unjustifiably isolated, or at risk of being unjustifiably isolated, because of Defendants' failures to make reasonable modifications to their system of services and provide Plaintiffs with services in the most integrated setting during emergencies that threaten the physical and mental health of patients at Saint Elizabeths. ECF 50 ¶¶ 189 – 20, 212-216. It simply cannot be that the Defendants can justify the involuntary confinement of the Plaintiffs because they need treatment for a disability, and then deny that very treatment and argue that they must be confined nevertheless.

Plaintiffs have sufficiently alleged an Olmstead claim for Defendants' actions during the COVID-19 pandemic and the extended water outage.[9] Patients were not receiving the very mental health services that justified their segregation during the COVID-19 crisis, ECF 50 ¶¶ 109–16; 19, or the extended water outage, ECF 50 ¶¶ 151, 192, 200. Plaintiffs sufficiently allege that they, and similarly situated patients, are individuals with disabilities who can receive mental health services in a more integrated setting during emergencies that threaten their physical and mental health and undermine the clinical justification for their confinement. ECF 50 ¶ 199 ("Defendants cannot justify the failure to evaluate and place patients in the community with appropriate supports."); ECF 50 ¶ 201 ("Defendants provide a wide array of services in the community to meet the needs of Plaintiffs … [these services] could be provided to Plaintiffs in the community"); ECF ¶ 198 ("Segregation of individuals with disabilities should be an option of last resort.")

Throughout both crises, Defendants offered a wide array of services *in the community*, including diagnostic/assessment services, counseling, medication, intensive day treatment and

[9] Defendants do not appear to challenge the sufficiency of Plaintiffs' pleading an ADA violation during the COVID-19 pandemic, but are only moving for summary judgment on these claims. ECF 107-1 at TOC; 37. That motion should be dismissed under Rule 56(a) and 56(d), see *supra*, Part VI.

crisis/emergency services, individualized behavioral health services are supported by rehabilitation programs, peer supports, supportive employment opportunities, housing assistance and a range of community housing alternatives to facility-based care. ECF 50 ¶ 201. Yet, Defendants failed to cease intakes, failed to conduct individual assessments of patients to determine whether other options existed in lieu of continued placement at Saint Elizabeths Hospital, and failed to take appropriate action for Plaintiffs and other putitive class members, including relocating within the District's system those patients for whom it was appropriate or providing reasonably modified services for those for whom relocating was not appropriate. ECF 50 ¶¶ 200-201. Defendants were able to "reasonably accommodate" community placement and failed to do so. *Brown*, 928 F.3d at 1077. And, on the allegations, there is nothing to support Defendants' position that it can meet its burden of proving the unreasonableness of these accommodations. *See id*. at 1077 (finding that it is Defendant's burden).

Defendants challenge Plaintiff's eligibility for treatment in less restrictive environments. But Plaintiffs sufficient allege that they could have been served in the community. ECF ¶ 200; 201. While Defendant are correct that they *may* rely on reasonable assessments of their own professionals in determining whether an individual "meets the essential eligibility requirements" for habilitation in a community-based program, *Olmstead,* 527 U.S. at 602, the government treating professional is not the sole gatekeeper of whether a person is in the most integrated setting. *See M.J. v. District of Columbia*, 401 F. Supp. 3d 1, 12 (D.D.C. 2019) (because *Olmstead* "did not state that a determination by a State's own professionals is the only way that a plaintiff may establish" community placement is warranted) (citing *Steimel v. Wernert*, 823 F.3d 902, 915-16 (7th Cir. 2016) (whether community based treatment was appropriate could be demonstrated by

allegations that the state had previously allowed plaintiffs more community interaction). ECF 50 ¶ 200. *See also* ECF 50 ¶ 184 ("Mr. Dunbar is permitted to leave the facility on a day pass.").

Plaintiffs have plausibly alleged that, in light of the conditions caused by the water crisis COVID-19 pandemic, Plaintiffs were unjustifiably isolated due to Defendant's own failure to develop and implement an appropriate emergency plan.

Finally, Defendants' challenge to Plaintiffs' ability to bring class claims is premature. Plaintiffs have sufficiently alleged the class. ECF 50 ¶ 212-216.

B. Defendants' Methods Of Administration During Public Health Crises Deprive Plaintiffs Of Equal Access To Benefits.

Defendants' adopted "criteria or methods" to manage the water crisis and the COVID-19 crisis at Saint Elizabeths had the effect of defeating or substantially impairing the accomplishment of the objectives of Defendants' behavioral health programs with respect to the individual named Plaintiffs and the putative class. 28 C.F.R. § 35.130(b)(3)(ii). To sufficiently state a claim that Defendants discriminated against Plaintiffs by utilizing methods of administration that deprive Plaintiffs of equal access to the benefits of their programs, services, or activities, plaintiffs need only allege that "a specific policy caused a significant disparate effect on a protected group." *Seth*, 2018 WL 4682023, at *12 (internal quotation marks omitted) (quoting *Anderson v. Duncan*, 20 F. Supp. 3d 42, 54 (D.D.C. 2013)). A policy with a disparate impact may be "facially neutral" but "nonetheless ha[ve] a disproportionate adverse effect on a protected class of individuals." *Id.* At the Motion to Dismiss stage, the court must examine the Complaint for "factual allegations describing what these criteria or methods were or how they affected different classes of individuals." *Seth*, 2018 WL 4682023 at *12.

Disparate impact claims are cognizable under Title II even if comparing members of the same protected class. *Amundson ex rel. Amundson v. Wisconsin Dep't of Health Servs.*, 721 F.3d

871, 874-75 (7th Cir. 2013); *Nelson v. Milwaukee Cty.*, No. 04 C 193, 2006 WL 290510, at *5 (E.D. Wis. Feb. 7, 2006) ("[T]o the extent that plaintiffs allege that defendants are treating them worse than persons with less severe disabilities, they may proceed as such claims allege differential treatment by reason of disability."); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir.2003); *C.O. v. Portland Pub. Sch.*, 679 F.3d 1162, 1169 (9th Cir.2012); *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1053–54 (11th Cir.2001); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F.Supp. 1243, 1299 (D.N.M.1990) (stating that "[t]he severity of plaintiffs' [disability] is itself a [disability]" which is protected by the ADA and the RA); *see also Messier v. Southbury Training Sch.*, No. 3:94-CV-1706, 1999 WL 20910 at *10 (D. Conn. Jan. 5, 1999) (listing cases in which courts have held that the ADA and the RA prohibit discrimination based on the severity of a disability).

Plaintiffs plead exactly this in the Complaint: that Defendants have discriminated against class members by repeatedly utilizing methods of administration that deprive Plaintiffs of equal access to the benefits of the mental health services provided by Defendants that other similarly situated individuals in the community are receiving. ECF 50 ¶ 229. Simply stated, Plaintiffs were subject to disparate treatment during the water crisis and ongoing COVID-19 pandemic—inhumane conditions and a deprivation of mental health treatment—because of the severity of their mental illness while other similarly situated individuals deemed by Defendants to have less severe mental illness and who are served in the community were not.

Defendants chose "criteria or methods" of administering their crises responses *see Seth*, 2018 WL 4682023 at *10-14, that defeated objectives of Defendants' behavioral health program because of their disabilities, and treated them Plaintiffs less favorably than people with less severe disabilities who were receiving services in the community. During the water crisis, the methods

of administration included: restricting all access to the Treatment Mall and thereby preventing planning team meetings and suspending art and music therapy, vocational training, exercise, and socialization; providing inappropriate and diminished group therapy sessions; restricting patient movement to the patient's unit; intermittently shutting off the water; inappropriately restricting toilets and shower use, providing inaccessible portable showers; and suspending medically necessary services such as dentistry and podiatry. ECF 50; ECF 36-1 ¶¶ 9, 20, 110-115, 132, 149, 157-161, 185, 189, 194, 199-200, and 229. During the COVID-19 pandemic, the "criteria or methods," include: failed to provide for alternative treatment, such as teletherapy, virtual therapy, telephonic therapy or another remote substitute. ECF 36-1 ¶¶ 109, 111-115, 229.

Defendants contend that Plaintiffs only alleged that they were provided inadequate services during the water outage. ECF 107-1 at 41. But Plaintiffs are not asserting that Defendants had to provide a them with a particular service. Rather, Plaintiffs allege that Defendants' discriminated against them when it subjected them to worse conditions and deprived them of the benefits of Defendants' programs when compared with those with less severe disabilities who are not institutionalized. ECF 50 ¶ 229.

VI. DEFENDANTS' SUMMARY JUDGMENT MOTION IS PREMATURE.

To the extent that Defendants seek summary judgment on Plaintiffs' due process claims or ADA claims arising from the pandemic, ECF 137-1 at 29, that motion is premature. Summary judgement is only appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Moore v. Hartman*, 571 F.3d 62, 66 (D.C. Cir. 2009) (citation omitted). *See generally* Rule 56(a). "All that is required from a nonmoving party is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Moore*, 571 F.3d at 66 (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1965). *See also*

Haynes v. D.C. Water & Sewer Auth., 924 F.3d 519, 530 (D.C. Cir. 2019). Here, Defendants statement of undisputed facts (ECF 107-2) is replete with contested factual assertions that are contradicted by the declarations and *amici* reports that were submitted in conjunction with the emergency injunctive briefing. Pursuant to Local Rule 7(h), Plaintiffs have provided a response to Defendants' statement identifying numerous issues of genuine facts in dispute. *See* Exhibit 1. ("Plaintiffs' Resp.").

For example, with respect to the conditions at the Hospital during the COVID-19 pandemic, there are significant material disputes over:

- What infection control and prevention guidance and trainings Defendants were using, and if they were sufficient, Plaintiffs' Resp. at Fact 4, 5, 8, 11;
- When Defendants activated their Emergency Management Plan, Plaintiffs' Resp. at Fact 10;
- The quarantine, isolation, and testing procedures used by Defendants to manage COVID-19 outbreaks, Plaintiffs' Resp. at Fact 13, 14, 15, 17, 18, 19;
- The assignment of staff cross-units, Plaintiffs' Resp. at Fact 16;
- Whether and when Defendants provided Plaintiffs with masks, hand sanitizer, soap, and other basic hygiene, Plaintiffs' Resp. at Fact 20, 21, 22; and
- The provision of mental health care during the pandemic, Plaintiffs' Resp. at Fact 27, 29, 30, 31, 34, 35.

There are also significant material disputes over whether Defendants are unjustifiably isolating Plaintiffs, or if they can meet their affirmative burden of showing that accommodations are unreasonable. *See Brown*, 928 F.3d at 1077. Plaintiffs' Resp. at Fact 3, 23, 24, 25, 26, 36, 37

Accordingly, summary judgment should be denied under Rule 56(c).

Moreover, these material factual disputes issues cannot be resolved without allowing Plaintiffs fact and expert discovery, and accordingly summary judgment should be denied under Rule 56(d) as well. F.R.C.P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."). Though "[s]ummary judgment usually 'is premature unless all parties have had a full opportunity to conduct discovery,' " *Haynes*, 924 F.3d at 530 (quoting *Convertino v. DOJ*, 684 F.3d 93, 99 (D.C. Cir. 2012)) "a Rule 56(d) motion "must be resolved through 'application of the *Convertino* criteria to the specific facts and circumstances presented in the request,' rather than on the basis of presumptions about a given stage of litigation," *Jeffries v. Barr*, No. 17-5008, 2020 WL 3967833, at *7 (D.C. Cir. July 14, 2020) (internal citation omitted).

To obtain relief, a Rule 56(d) movant must: (1) "outline the particular facts [the party defending against summary judgment] intends to discover and describe why those facts are necessary to the litigation"; (2) explain why the party could not produce those facts in opposition to the pending summary-judgment motion; and (3) "show [that] the information is in fact discoverable." *Jeffries*, 2020 WL 3967833, at *6 (quoting *Convertino*, 684 F.3d at 99-100).

As described in the Declaration of Kaitlin Banner Pursuant to Fed. R. CIV. P 56(d) ("Banner Decl.") (attached as Exhibit 2), Plaintiffs easily meet this standard. Plaintiffs' claims (and Defendants defenses) are quintessential fact-based. Discovery has yet to begin in this case, and although both parties and *amici* submitted evidence at the TRO and PI stage, there are additional, critical facts that are likely to support Plaintiffs' claims and demonstrate the weakness of Defendants' defenses that are solely in Defendants' control. Banner Decl. Indeed, Defendants'

Statement of Undisputed Material Facts, ECF 107-2, is replete with inferences and suppositions that Plaintiffs can only test through discovery. Banner Decl. ¶¶ 13 – 32; 39 – 46.

Discovery will produce "facts essential to justify [Plaintiffs'] opposition," F.R.C.P. 56(d). With regard to Plaintiffs' substantive due process claims, discovery is likely to demonstrate (1) the myriad of ways Plaintiffs were denied reasonable care and safety, Banner Decl, ¶¶ 8 - 9 and (2) Defendants' substantial departures from professional judgment, Banner Decl. ¶¶ 10-11. *See also* Banner Decl. ¶ 13 - 32. This may include facts about who made decisions, how decisions were made, when decisions were made, and how decisions were implemented regarding the reasonable care and safety of Plaintiffs.

With regard to Plaintiffs' ADA claims, discovery is likely to demonstrate that Defendenats failed to make reasonable modifications to its policies and procedures to serve Plaintiffs in a more integrated setting during the COVID-19 crisis. Banner Decl. ¶¶ 33 – 37; 41 - 45. Discovery is likely to yield facts that test Defendants' affirmative defense that the accommodations were not reasonable. See Banner Decl. ¶¶ 38, 46.

The facts Plaintiffs seek in discovery are also discoverable, because it "is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." F.R.C.P. 26(b). *See generally* Banner Decl. Many of these facts are ones Defendants themselves have put at issue. Banner Decl. ¶¶ 12, 39. *See also* ECF 107-1, 107 - 2.

Accordingly, summary judgment should be denied.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Plaintiffs' Amended Complaint under Rule 12(b)(1) and Rule 12(b)(6), or in the Alternative for Summary Judgment under Rule 56, should be denied.

Dated: August 14, 2020

Respectfully submitted,

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