UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*, *Plaintiffs-Petitioners,* v. QUINCY BOOTH, *et al.*, *Defendants-Respondents*.	No. 1:20-cv-00849 (CKK)

REPLY BRIEF IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION

On April 19, this Court held that "Plaintiffs have provided evidence that Defendants are aware of the risk that COVID-19 poses to Plaintiffs' health and have disregarded those risks by failing to take comprehensive, timely, and proper steps to stem the spread of the virus." Dkt. No. 51 ("TRO Op.") at 22. Accordingly, the Court ordered Defendants to implement policies to prevent the spread of COVID-19 in their facilities and to ensure constitutionally adequate medical care. *See* Dkt. No. 50 ("TRO Order"). Defendants resist further relief on the basis that "ongoing efforts are working." Dkt. No. 82 ("Opp.") at 1. That is both legally and factually wrong.

As Judge Moss explained in granting a preliminary injunction last weekend in an analogous case against another District of Columbia facility, "Defendants cannot claim that the need for an injunction is now moot because [their facility] has ceased its wrongful conduct, particularly where it did so following the entry of a TRO." *Costa v. Bazron*, 2020 WL 2735666, at *4 (D.D.C. May 24, 2020) (internal quotation marks and citation omitted). Instead, a "court's power to grant injunctive relief survives discontinuance of the illegal conduct . . . because the purpose . . . is to prevent future violations[.]" *U.S. Dep't of Justice v. Daniel Chapter One*, 89 F. Supp. 3d 132, 143 (D.D.C. 2015) (internal quotation marks and citation omitted).

In any event, the record is clear that Defendants have *not* remedied the unconstitutional conditions in their facilities. Having reviewed *amici*'s oral report from May 11, 2020, Dr. Jaimie Meyer identified "major and pervasive system-level deficits" that continue to threaten Plaintiffs' health and safety. Dkt. No. 70-2 ("Supp. Meyer Decl.") at ¶ 3. Drawing on *amici*'s oral report, declarations from 30 DOC residents, documents from DOC staff members, and Dr. Meyer's supplemental report, Plaintiffs identified seven areas of deficiency: (1) medical care; (2) enforcement of social distancing; (3) sanitation; (4) punitive conditions on isolation units; (5) legal call access; (6) understaffing; and (7) structural problems in the facilities. Dkt. No. 70-1 ("Pls.' Mot.") at 9-28.

Defendants characterize Plaintiffs' evidence as "isolated instances," "isolated failures," "isolated anecdotes," "isolated acts," or "individual problems," Opp. at 30-34, and cite new policies and procedures adopted in recent weeks to improve conditions. *See, e.g.*, *id.* at 12 ("As of May 20, 2020, all inmates are provided fresh bed linens upon entering isolation . . . .").

These responses lack merit. Defendants cannot brush aside systemic failures to enforce basic policies by recharacterizing them as "isolated incidents." Defendants offer no evidence to rebut their record of routine failures that put residents at risk, such as the ongoing problem of releasing residents from their cells while they await their COVID-19 test results. *See* Pls.' Mot. at 15-16. Nor do Defendants acknowledge the routine problems identified by *amici*. *See*, *e.g.*, Dkt. No. 69 ("*Amici* Oral Report") at 41 (reporting that sanitation is "clearly especially deficient at the jail"). Moreover, the Court should reject Defendants' reliance on alleged new policies adopted since *amici*'s last inspection, as the Court did in its opinion granting the TRO. *See* TRO Op. at 5 ("[T]he Court has no record evidence that the updates . . . have been implemented."). Defendants cite a decrease in the number of DOC residents who have tested positive for COVID-19, but the

data in Defendants' opposition show that this decrease has accompanied a stark decrease in the number of COVID-19 *tests* administered, and so that decrease does not prove anything, as Plaintiffs' expert explains, and in any event does not undermine the mountain of evidence that conditions at the Jail remain dangerous in terms of infection prevention. In light of Defendants' striking and ongoing failures to provide constitutionally adequate conditions for DOC residents, the Court should order greater relief to remedy Defendants' constitutional violations.

Additionally, this Court should join other federal courts in adopting a process to transition some DOC residents safely to community supervision. The federal government's arguments that the Prison Litigation Reform Act ("PLRA") and federal and D.C. Bail Reform Acts prevent this Court from transitioning DOC residents to home confinement or other forms of community supervision, Dkt. No. 80 ("U.S. Opp."), are wrong. By its own terms, the PLRA does not apply to *habeas* petitions that challenge the "fact . . . of confinement in prison," 18 U.S.C. § 3626(g)(2), which (as other federal courts have recognized in analogous cases) Plaintiffs do here. And the D.C. Circuit has held that release *is* an appropriate remedy in a *habeas* matter like this one. Even if the PLRA did apply, the strictures cited by the government do not apply here because Plaintiffs' requested relief is not a "prisoner release order" as defined by the PLRA. Finally, the argument that the Bail Reform Act requires abstention is foreclosed by *Campbell v. McGruder*, 580 F.2d 521, 526 (D.C. Cir. 1978) (doctrine of abstention did not preclude federal court from making rulings concerning rights of detainees at District of Columbia jail).

A. Plaintiffs are Likely To Prevail on the Merits of Their Constitutional Claims.

In its April Order, the Court found that Plaintiffs were likely to succeed in showing that Defendants had acted with deliberate indifference in responding to the pandemic. TRO Op. at 22.

That holding — which Defendants evidently seek to relitigate[1] — is relevant in this proceeding, as Judge Moss explained. *See Costa*, 2020 WL 2735666, at *4 (analyzing the defendant's history of constitutional violations in deciding whether to extend TRO relief in a preliminary injunction). Moreover, the record before the Court today shows, as it showed in April, that Defendants continue to act with deliberate indifference towards Plaintiffs' health and safety.

1. The Court has already rejected Defendants' position on the legal standards.

This Court has already held that "a pre-trial detainee need only show that prison conditions are objectively unreasonable in order to state a claim under the due process clause" and that pre-trial detainees "do not need to show deliberate indifference in order to state a due process claim for inadequate conditions of confinement." TRO Op. 11-12. It is puzzling, then, that Defendants — who did not seek reconsideration of the Court's TRO opinion — now contest the very standard this Court applied. Defendants provide no intervening precedential authority to dispel the Court's prior recitation of the Fifth Amendment standard. *Cf. LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) ("[T]he same issue presented a second time in the same case in the same court should lead to the same result.").

2. Conditions at the Jail remain abysmal.

Even though conditions at the jail are different now than they were when the Court issued its TRO in April, the conditions at the jail continue to pose a grave risk to Plaintiffs' health. As Dr. Meyer warns, there are still "major and pervasive system-level deficits" that pose a "risk of serious harm" to DOC residents and staff. Dkt. No. 70-2, Supp. Meyer Decl. ¶ 3.

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[1] Defendants recount at length their policies from February 28 to April 17, but do not refute the Court's finding in its April order that "numerous declarations from inmates and DOC staff rebut[] that Defendants' policies are being fully implemented." TRO Op. at 17.

Relying on declarations from 30 DOC residents, documents from DOC staff, and *amici*'s reports, Plaintiffs have identified seven areas of systemic concern: medical care, social distancing, sanitation, punitive conditions on isolation units, legal calls, understaffing, and structural problems. Defendants mostly do not engage with these specific deficits. They argue instead that Plaintiffs' evidence amounts to no more than isolated errors; that the decreasing number of positive tests shows that conditions are improving; and that Defendants have adopted new policies and procedures to correct previous problems. Each argument fails.

First, Defendants' argument that Plaintiffs show only isolated problems ignores large parts of the record. In each of seven categories of constitutional violations, Plaintiffs rely on *amici*'s report, 30 DOC resident declarations, and DOC staff documents to highlight system-wide failings. For each category, Plaintiffs cite evidence of widespread deficiencies:

Issue	**Record**
Medical care	· Residents on non-quarantine face barriers to care, including not being able to obtain sick call forms, delays in the receipt of forms by medical staff, and delays in obtaining care. *Amici* Oral Report at 17-19. · Multiple residents of different housing units report that they are not let out of their cells for even an hour a day. Dkt. Nos. 70-3 (Thomas Decl., South 2) ¶ 16; 70-4 (Jenkins Decl., C3B) ¶ 10; 70-8 (Hightower Decl., NE1) ¶ 9. · Residents from two different units report that there are no sick call slips on their units whatsoever. Dkt. Nos. 70-5 (Perry Decl., NW2) ¶ 8; 70-31 (Knight Decl., NW2) ¶ 5; 70-6 (Stankavage Decl., C2B) ¶ 15. · Multiple residents report that staff do not pick up sick call slips. Dkt. Nos. 70-5 (Perry Decl., NW2) ¶ 7; 70-7 (Jaggers Decl., C2A) ¶ 13.
Social distancing	· "There still isn't a prevalence of social distancing." *Amici* Oral Report at 43. · Multiple residents report being let out of their cells while awaiting COVID-19 test results, in contravention of DOC policy: Dkt. Nos. 70-14 (Robertson Decl., NW2) ¶ 6; 70-34 (Swint Decl., SW3) ¶ 11. · Multiple residents report groups of residents regularly congregating in different areas of DOC facilities. Dkt. Nos. 70-6 (Stankavage Decl., C2B) ¶ 6; 70-15 (Ingraham Decl., D2B) ¶¶ 40-43; 70-7 (Jaggers Decl., C2A) ¶ 9; 70-19 (Toran Decl., NE1) ¶ 29.

Issue	Record
	▪ Pictures from housing units at both CTF and CDF from April 29 and May 11 confirm that staff are not enforcing social distancing. Dkt. No. 73; *see also* Ex. B, Pictures of Jail.[2]
Sanitation	▪ "[A]ppropriate sanitation is . . . a continuing issue at both facilities, and clearly especially deficient at the jail." *Amici* Oral Report at 41. ▪ Multiple residents report horrendous conditions on different housing units. Dkt. Nos. 70-17 (Burl Decl., North 2) ¶ 6; 70-28 (Moseley Decl., NW1) ¶ 3; 70-36 (A. Jackson Decl., South 1) ¶ 4. ▪ Multiple residents report not having access to cleaning supplies. Dkt. Nos. 70-23 (Phillip Decl., SW2) ¶ 9; 70-7 (Jaggers Decl., C2A) ¶ 6; 70-11 (Cooper Decl., NW2) ¶ 14. ▪ One resident on the detail unit reports that he is cleaning cells of residents who have tested positive with a room freshener product lacking disinfectant properties. Dkt. No. 70-22 (Warren Decl., NE2) ¶ 21.
Conditions on Isolation Units	▪ Multiple residents report filthy conditions on the recently opened North 2 isolation unit. Dkt. Nos. 70-17 (Burl Decl., North 2) ¶¶ 6-8; 70-34 (Swint Decl., North 2) ¶¶ 13m 21, 26; 70-12 (Horne Decl., North 2) ¶ 3. ▪ Multiple residents of isolation units at CTF and CDF report that they were allowed to shower very infrequently while in isolation. Dkt. Nos. 70-10 (K. Johnson Decl., C4A) ¶ 10; 70-12 (Horne Decl., North 2) ¶ 3.
Legal Calls	▪ "[L]egal calls . . . are being conducted in the offices of case managers with the case manager present." *Amici* Oral Report at 33; accord Dkt. Nos. 70-10 (K. Johnson Decl., C2B) ¶¶ 15, 17.
Understaffing	▪ Amici note "significant correctional officer staffing shortages" at CDF. *Amici* Oral Report at 17; *accord id.* at 23. ▪ DOC staff members themselves reported the harrowing levels of understaffing. Dkt. No. 70-16 (DOC Docs.) at 10 (only one officer working on housing unit at CDF on May 3); *id.* at 14 (staff member worked 22-hour shift on May 4 and collapsed on floor of unit); *id.* at 5-6 (six officers worked over 24-hour shifts on April 26). ▪ Multiple residents report difficulty obtaining services from staff. Dkt. Nos. 70-12 (Horne Decl., SW2) ¶ 3(h); 70-27 (Lucas Decl., NW2) ¶ 10.
Structural Problems	▪ Dr. Meyer's first expert report observes the poor air flow as a factor in spreading the virus. Dkt. No. 5-2 (First Meyer Decl.) ¶ 28(c). Defendants have offered no evidence that they have taken steps to address this issue.

[2] The photos filed under seal with this brief show a resident without a mask on preparing food trays for other residents, residents without masks in close proximity, and trash strewn on the floors of housing units.

In sum, as the record makes clear, the evidence regarding the unsafe conditions in DOC facilities reflects a pattern of DOC failing to follow its own guidance and this Court's Order, in several different categories. This evidence cannot be dismissed as "isolated": the sheer volume of incidents, together with the comprehensive reports of *amici*, reveal *systemic* failings.

Second, Defendants' argument that conditions must have improved because the number of positive tests has decreased suffers from conceptual flaws. Defendants' declarant on this point, Dr. Chakraborty, focuses on recent trends in the number of residents testing positive, Dkt. No. 82-3 ("Chakraborty Decl.") ¶¶ 8-9 — information which, presented in isolation, is uninformative and potentially misleading. Bafflingly, and in defiance of good epidemiological practice, DOC chose to *decrease* testing as the number of positive cases rose in early May. *See* Chakraborty Decl. ¶ 8; Ex. A, ("May 29 Meyer Decl.") ¶ 9. Unsurprisingly, with fewer tests, there were fewer reported cases. But Dr. Chakraborty has not reported the positivity rate, *i.e.*, the number of positive tests as a percentage of the total number of COVID-19 tests performed on DOC residents. Ex. A, May 29 Meyer Decl. ¶¶ 4, 6. As epidemiology experts recognize, knowledge of the positivity rate is essential to assessing the spread of the virus. *Id.* A high positivity rate "almost certainly means that the [community at issue] is not testing everyone who has been infected with the pathogen, because it implies that doctors are testing only people with a very high probability of having the infection. People with milder symptoms, to say nothing of those with none at all, are going undercounted."[3] Dr. Meyer further explains: "To stop the spread of the virus the DOC needs facility-wide surveillance and needs to test all residents and staff at least once. Surveillance testing—and, in the absence of highly effective contact tracing, retesting—enables a clinical and

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[3] Robinson Meyer et al., *A New Statistic Reveals Why America's COVID-19 Numbers are Flat*, ATLANTIC (April 16, 2020), https://www.theatlantic.com/technology/archive/2020/04/us-coronavirus-outbreak-out-control-test-positivity-rate/610132/.

public health response that is informed by real data." Ex. A, May 29 Meyer Decl. ¶ 14. Because of the "relatively high rate of false negative results," particularly on Abbott ID NOW machines, Dr. Meyer recommends that "residents should be retested." *Id.* Her conclusion is clear: "Failure to test all residents and all staff means that the virus will continue to move among the unmonitored population." *Id.*

Third, Defendants' appeal to recently revised policies is both familiar and flawed. Defendants have been revising policies since the start of the pandemic. But as this Court has made clear, "[h]aving a written policy in place but not fully implemented cannot protect Defendants from a finding of deliberate indifference." TRO Op. at 17 (citing *Daskalea v. District of Columbia*, 227 F.3d 433, 442 (D.C. Cir. 2000)). The Court should continue to judge Defendants' constitutional compliance by the actual conditions in their facilities.

To illustrate the disconnect between Defendants' stated policies and the conditions as described by *amici* and DOC residents, consider the process for requesting medical assistance. At the TRO stage, numerous DOC residents submitted declarations describing their fruitless efforts to request medical attention. *See, e.g.*, Dkt. No. 26-2 (Guillory Decl.) ¶ 9 ("I put in a sick call slip 3 weeks ago, on a weekday. It took 2 weeks to get seen by sick call."). The Court ordered Defendants to "ensure that the triage process associated with sick call requests on the non-quarantine units is expedited." TRO Op. at 27. Four weeks later, however, *amici* reported a host of problems with requesting medical assistance, including the unavailability of sick-call forms and significant delays in response to sick call requests. *Amici* Oral Rep. 16-19. In response, Defendants have promulgated a policy as of May 18 to "provide residents care within 24 hours of submitting a sick call slip." Opp. at 11. But as *amici* write, even on paper, these new measures "do not address the barriers accessing sick call that are identified in this report." Dkt. No. 77

("*Amici* Written Report"), at 11. Nor can this new policy, even if implemented, erase from the record the constitutional violations observed by *amici* and vividly described by DOC residents — weeks *after* this Court ordered them fixed. Similarly, it took until May 20, a month after the Court's order, for Defendants to adopt a policy of offering residents "clean bed linens upon release from isolation" so they do not carry linens from an infected housing unit back into the general population. Opp. at 12. The record shows that Defendants waited until the eve of the deadline for opposing this motion to adopt commonsense policies, and even now, months into the pandemic, have yet to fully implement them. Accordingly, constitutional violations persist.

Finally, Defendants have not addressed structural problems in DOC facilities that have enabled the spread of the virus. The District's own auditor reports show that the "current HVAC system has significant design problems that inhibit proper airflow," Dkt. No. 5-2 (First Meyer Decl.) ¶ 28(c) — a condition cited by the Court in April in concluding that Plaintiffs were likely to succeed on the merits. *See* TRO Op. 21.

3. The Court's continued involvement is necessary.

To the extent that Defendants have improved conditions, those improvements have come as a direct result of this litigation and the Court's ongoing involvement. Where there is no evidence that "the measures that [Defendants] attest[] are now in place were being taken or even considered prior to this litigation," solidifying TRO measures in a preliminary injunction is appropriate. *Costa*, 2020 WL 2735666, at *9.

Defendants acknowledge that "reducing the inmate population" will help "control and contain the spread of the virus and keep DOC residents safe." Opp. at 1-2. But it was not until after this lawsuit was filed that DOC began acting in earnest on its authority to release inmates serving misdemeanor sentences. On March 17, 2020, the DOC was vested with the power to award

unlimited good time credits in order to "effectuate the immediate release of persons sentenced to misdemeanors[.]" D.C. Code § 24-221.01c(c); D.C. Act 23-247 (Mar. 17, 2020). But the number of sentenced misdemeanants did not substantially decrease for weeks. *See* Ex. C ("Anderson Decl.") ¶ 11. From March 17 to March 30 (the date on which Plaintiffs filed this case), the number of sentenced misdemeanants in DOC facilities dropped slowly from 102 to 79. *Id.* ¶ 11. It took nearly a month from when Defendants received the authority to effectuate immediate release — and this lawsuit, along with a number of cases in Superior Court — for the number to be reduced significantly, from 79 on March 30 to 10 on April 13.

The United States also tacitly acknowledges the importance of reducing the inmate population. *See* U.S. Opp. at 13-14. Yet, like the DOC, the United States has largely opposed efforts to release inmates. A review of the cases litigated in *In re Sentenced Misdemeanants*, Case No. 2020 CNC 000120 (D.C. Super. Ct. filed Mar. 26, 2020), reveals that the government opposed release in more than 81 percent of the relevant misdemeanor cases (those that were not moot and required the government's position), even when the defendants were particularly vulnerable to COVID-19. Ex. C (Anderson Decl.) ¶¶ 5-9.[4] The United States' staunch opposition to release extended to pre-trial cases as well. A review of bond review motions in Superior Court decided between March 26 and April 22 revealed that, out of 153 motions, the United States opposed release in an extraordinary 93 percent. Ex. D ("Bhatt Decl.") ¶ 6; Anderson Decl. ¶ 6.

[4] For example, in *United States v. Henderson*, 2019 CF3 000166, the United States opposed relief in the case of one 52-year-old woman who was serving a sentence for misdemeanor theft and unlawful entry of a commercial establishment — a case in which it had not asked for incarceration in its original victim impact statement. Another set of cases for which the United States opposed Rule 35 relief — involving misdemeanor thefts of items from a Home Depot and Harris Teeter, *United States v. Cooper*, 2017 CMD 016011 & 2019 CMD 012948 — were delayed long enough that defense counsel felt compelled to file an Emergency Mandamus Petition in the D.C. Court of Appeals before the Rule 35 motion was finally granted by the Superior Court.

Finally, with respect to people incarcerated at the jail for violations (or alleged violations) of parole or supervised release, the vast majority of the releases occurred after the Complaint was filed in this case. *See* Ex. C (Anderson Decl.) Attchs. A-D. As of March 17, there were 279 parole violators at the Jail and CTF. *Id.* ¶ 13. On March 30, when the complaint was filed, there were 231. *Id.* ¶ 7. By May 14, the number had reached its nadir at 113. *Id.* It has since increased again, up to 121 on May 29, and there are still many more who should be released. *Id.* at Attch. B.

Of the approximately 74 people under the Parole Commission's jurisdiction who are represented by the Public Defender Service, 11 are being held solely for technical parole violations — while their hearings are being continued indefinitely. Ex. E ("Edmonson Decl.") ¶ 4. Another 20 are serving USPC-imposed sentences for technical violations of parole, and their requests for release due to the pandemic have all been denied. *Id.* ¶ 5. Some of these individuals are incarcerated only for a failure to report to supervision. *Id.* ¶ 4. Another 18 people are still awaiting a hearing for incurring a new arrest in a matter that has been determined in their favor — for example, they have been acquitted or the case has been dismissed — or in which a judge has already determined that they pose no danger to any person or the community. *Id.* ¶ 6. If subjected to this same harsh approach, a large number of the 90 individuals who currently have USPC detainers coming under review, *see* Dkt. No. 80-3 at ¶ 13, will also be held, significantly increasing the number of individuals confined under USPC jurisdiction. Further, the USPC's continued practice of re-arresting released individuals for technical violations, such as a failure to report, ensures that a population of people who present no danger to society continue to cycle in and out of the jail, furthering the spread of COVID-19 both in the jail and in the community at large.[5]

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[5] To effectuate further releases, the BOP claims to have implemented a system where they will rapidly test D.C. jail residents "the morning of the anticipated transfer" to ensure that they are not transferring residents who are positive. Dkt. No. 80-2 ¶ 7. The BOP reports that "D.C. Jail staff

Defendants actions have made it quite clear that absent court intervention, they will not take critical steps to decrease the spread of COVID-19 and to ensure the health and safety of Plaintiffs and the community at large. The Court should not withdraw its supervision by denying a preliminary injunction.

B. Plaintiffs Have Satisfied the Exhaustion Requirement Under the PLRA.

Plaintiffs Banks and Jackson submitted emergency grievances to Director Booth on March 24. Defendants' Inmate Grievance Policy requires DOC to respond within 72 hours of receipt. *See* Ex. G at 17. Plaintiffs Banks and Jackson did not receive responses before filing suit in this Court six days later — well after the 72-hour period elapsed — and thus satisfied their burden under the PLRA. *See* Ex. H (Murphy Decl.); Ex. I (Epps Decl.). Because exhaustion applies only when administrative remedies are "available," circuit courts have uniformly held "that a prison's failure to timely respond to an inmate's properly filed grievance renders its remedies 'unavailable' under the PLRA." *Robinson v. Superintendent*, 831 F.3d 148, 153 (3d Cir. 2016) (citing cases); *see also Lineberry v. Fed. Bureau of Prisons*, 923 F. Supp. 2d 284, 293 (D.D.C. 2013) ("If . . . prison officials . . . ignore such a request . . . exhaustion may be excused."). And, so long as one member of the class has pursued available administrative remedies, "the plaintiff class has met the filing prerequisite." *Jackson v. District of Columbia*, 254 F.3d 262, 269 (D.C. Cir. 2001).[6]

C. The District Bears Responsibility for the Constitutional Violations at its Jail.

Contrary to Defendants' assertions, the District bears liability for Plaintiffs' claims under 42 U.S.C.§ 1983. The District is liable under § 1983 when its "policies are the moving force

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are responsible for testing the BOP inmates" in this manner, *id.*, but a DOC resident who was supposed to be transferred today reports that those tests were not done on a group of residents who were transferred into custody today, *see* Ex. F (Guillory Decl.) ¶¶ 3-4.

[6] Plaintiffs' Complaint need not have pled exhaustion. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

[behind] the constitutional violation." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (cleaned up). Defendants' argument that Plaintiffs have not shown a custom, Opp. at 34, is irrelevant because Plaintiffs satisfy two different and independent conditions for establishing municipal liability: the policies in question are the action of a final policymaker, and the District's response to COVID-19 reflects deliberate indifference.

First, the District is liable because Plaintiffs challenge policies and procedures approved by Defendant Booth, the final policymaker at the D.C. jail. "[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) (cleaned up). Here, the final policymaker for DOC is Defendant Booth, as the D.C. Circuit and this Court have held. *See Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (D.C. Cir. 1997); *Laureys v. District of Columbia*, 2019 WL 4673492, at *3 (D.D.C. Sept. 25, 2019).

Defendant Booth has exercised his final policymaking authority to manage DOC's constitutionally deficient response to the crisis. He approved the Department's most recent plan for addressing COVID-19, *see* Dkt. No. 40-2 at 1, and he was responsible for subsequent policy updates. *See, e.g.*, Dkt. No. 82-8, Attch. 2, at 1 (letter from Booth to employees).

These circumstances are similar to those giving rise to municipal liability in *Costa*. There, the final policymaker's "personal involvement in [Saint Elizabeths] Hospital's response to [the] COVID[-19] crisis" made the District liable for its constitutionally inadequate response to the pandemic. 2020 WL 2735666, at *14; *see also id.* at *2 (discussing the specific actions that plaintiffs contended were actionable). The court recognized that when final policymakers are involved in resolving matters within their authority, they, and therefore the municipality, bear responsibility for the result. *See id.*; *accord O'Callaghan v. District of Columbia*, 741 F. Supp.

273, 277 (D.D.C. 1990). That logic applies here. This case is not about "the isolated acts of a handful of correctional officers," Opp. at 34, but rather a systemically flawed crisis response approved by the official with final policymaking authority over conditions at DOC facilities.

Second, deliberate indifference is an independent basis for holding the District liable. Liability arises where the government failed "to respond to a need (for example, training of employees) in such a manner as to show 'deliberate indifference' to the risk that not addressing the need will result in constitutional violations." *Baker v. District of Columbia*, 326 F. 3d 1302, 1306-07 (D.C. Cir. 2003) (quoting *Harris*, 489 U.S. at 390). In this context, deliberate indifference is a lower bar than is required under the Eighth Amendment: unlike the Eighth Amendment, municipal liability does not require a showing of "subjective indifference." *Id.* at 1307. Rather, a plaintiff need only establish that the government "knew or should have known of the risk of constitutional violations, an objective standard." *Id.* at 1307 (internal citation omitted).

The Court has already held that Defendants' conduct satisfies this condition. In analyzing Plaintiffs' due process claims in its TRO opinion, the Court found Plaintiffs likely to show that "Defendants *knew or should have known that the jail conditions posed an excessive risk to their health*," TRO Op. at 12 (emphasis added), and held that Defendants, through their response to COVID-19, exposed Plaintiffs to such a risk. *Id.* at 15.[7] For the reasons discussed above, Defendants' actions since the TRO have remained "inadequate." *Harris*, 489 U.S. at 388.

Defendants' response is not a series of "honest mistakes." Opp. at 35. To the contrary, Defendants' failure to remove barriers to sick calls, *see Amici* Written Report at 10-11, and failure to ensure inmates in isolation receive daily showers, *Amici* Oral Report at 34, along with their

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[7] Even if Eighth Amendment deliberate indifference were required, the Court has found that standard satisfied also. *See* TRO Op. at 22.

other deficiencies discussed, run afoul of the Court's TRO. *See* TRO Order at 1 (ordering Defendants to ensure that "medical staff are promptly informed about inmates who present with COVID-19 symptoms"); *id.* at 2 (requiring Defendants to take "immediate steps to provide . . . daily showers . . . to all inmates on isolation status"). Through t failures to correct patent deficiencies, Defendants have allowed the obvious risks of COVID-19 to persist. *See* Dkt. 70-2 (Supp. Meyer. Decl.) ¶ 3; *see also Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 407 (1997) ("[C]ontinued adherence to an approach that [Defendants] know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action — the 'deliberate indifference' — necessary to trigger municipal liability.").

Defendants are wrong to suggest that having *some* policies insulates them from liability. Opp. at 35. First, they cite Eighth Amendment law, *id.* (quoting *Helling v. McKinney,* 509 U.S. 25, 36 (1993)), even though that standard is stricter. Second, as this Court has recognized, the existence of a policy does not shield defendants when it is inadequate or not implemented. TRO Op. at 17. That is equally true as to municipal liability. *See Daskalea*, 227 F.3d at 442 (holding that "a 'paper' policy cannot insulate a municipality from liability").

Finally, Defendants appeal generally to the difficulties in responding to the pandemic, Opp. 35, but courts around the country have held that inadequate responses to COVID-19 conditions can reflect deliberate indifference sufficient to justify municipal liability. *See, e.g.*, *Cameron v. Bouchard*, 2020 WL 2569868, at *20 (E.D. Mich. May 21, 2020); *Carranza v. Reams*, 2020 WL 2320174, at *7 (D. Colo. May 11, 2020).

D. Plaintiffs Have Met the Balance of the Preliminary Injunction Factors.

Plaintiffs have shown that they face irreparable harm and that the balance of equities and the public interest favor granting a preliminary injunction. Again, Defendants rehash arguments

previously rejected by the Court and make no effort to distinguish the Court's prior reasoning.

Regarding irreparable harm, Defendants argue that the three named plaintiffs have not shown that "they are facing any risk of imminent harm *themselves*," Opp. at 37 (emphasis added) — a defense that this Court rejected in April: "The fact that many other inmates face this same risk does not diminish the risk faced by Plaintiffs." TRO Op. at 24. "No man's health is an island," this Court observed, *id.*; accordingly, "steps taken to reduce the risk of infection among any inmates, such as reducing the inmate population or providing adequate cleaning supplies, would also reduce the named Plaintiffs' risk of contracting COVID-19." *Id.* at 8. Moreover, Dr. Meyer's supplemental declaration confirms that "people living and working in DC DOC facilities remain at risk of serious harm due to COVID-19 infection." Dkt. No. 70-2 (Supp. Meyer Decl.) ¶ 3.

Because Plaintiffs are likely to succeed on the merits of their constitutional claims, the remaining factors are easily satisfied. In a suit against the government, the balance of the equities and the public interest factors merge, and "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." TRO Op. 25 (quoting *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012)).

As they did in their TRO opposition, Defendants cite the burden of operating a correctional institution, baldly asserting that the Court "must defer to the policies and practices of correctional administrators." Opp. at 27; *see also* Opp. at 38 (arguing that Defendants are "required deference"). But the Supreme Court has instructed otherwise: "[C]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata* (*Plata I*), 563 U.S. 493, 511 (2011). Equally unpersuasive is Defendants' assertion that the requested relief would "disrupt the extensive efforts already underway to address the crisis." Opp. at 38. Defendants offer no evidence whatsoever

that any particular form of requested relief that would disrupt their efforts, and, in any event, Plaintiffs are not asking Defendants to take steps that are significantly beyond the steps they claim to be taking already. As the Court observed in rejecting this same argument at the TRO stage, "DOC officials claim that Defendants are already complying with much of the requested relief." TRO Op. at 25.[8]

Nor do Defendants identify any particular forms of requested relief that are not "narrowly tailored to remedy the specific harm shown." Opp. at 40. Each of Plaintiffs' proposed forms of relief is narrowly tailored to a constitutional violation, *see, e.g.*, Proposed Order at 2 (requiring Defendants to "implement a system for medical staff to visit each non-quarantine unit in DOC facilities to assess residents' health" — an order that responds to *amici*'s findings regarding the barriers to medical care), and Defendants make no specific argument to the contrary.

Moreover, courts facing constitutional claims based on the COVID-19 pandemic have granted relief of the type Plaintiffs propose, or even more extensive relief, and found it consistent with the PLRA's requirement that relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A).[9] Defendants' lone authority on this

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[8] For instance, Plaintiffs ask the Court to order the Defendants to engage a sanitarian and professional cleaners, Dkt. No. 70-38 ("Proposed Order") at 2 — steps Defendants claim already to be taking.

[9] *See Seth v. McDonough*, 2020 WL 2571168, at *14 (D. Md. May 21, 2020) (ordering defendants to address testing, PPE, training and supervision of medical staff, and protections for high-risk detainees, as "narrowly drawn injunctive relief" consistent with the PLRA); *Cameron v. Bouchard*, 2020 WL 2569868, at *29 & *id.*, Order at 3-6, Dkt. No. 94 (E.D. Mich. May 21, 2020) (finding "narrowly drawn" requirement satisfied where court ordered provision of soap, disinfectant wipes, and cleaning supplies; cleaning and hand-sanitizing regime; access to showers, laundry and PPE; protocol for symptom reporting by detainees and testing; staff training; limits on multi-person cells; improved access to counsel; and process for release of detainees); *Swain v. Junior*, 2020 WL 2078580, at *21-22 (S.D. Fla. Apr. 29, 2020) (imposing requirements regarding detainee education, social distancing, soap, cleaning supplies, toilet paper, showers, laundry, PPE,

point is distinguishable. *See Valentine v. Collier*, 956 F.3d 797, 806 (5th Cir. 2020) (per curiam) (staying injunction because of its level of "micromanagement" "down to the half-hour interval").

E. The PLRA Does Not Bar This Court from Transferring DOC Residents To Cure DOC's Constitutional Violations.

The United States contends that the PLRA governs Plaintiffs' request for *habeas* relief and bars this Court from ordering the transfer of any prisoners, including by enlarging their sentences so that they can serve their sentences outside of DOC facilities. The United States is wrong on both counts. First, the PLRA does not apply to Plaintiffs' *habeas* petition, which is a challenge to the *fact* of confinement, explicitly excluded from the PLRA's coverage. Second, even if this Court were to find that Plaintiffs' *habeas* petition challenges the conditions of their confinement, the requested relief would not be precluded; because this Court would not be issuing a "prisoner release order" within the meaning of the statute. The PLRA thus does not apply.

1. The PLRA does not apply to Plaintiffs' petition for a writ of habeas corpus, which challenges the fact of their confinement.

As the United States recognizes, U.S. Opp. at 5, the PLRA's statutory scheme applies only to "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, *but does not include habeas corpus proceedings* challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2) (emphasis added).

Because Plaintiffs' Petition for a Writ of *Habeas Corpus* challenges the fact of Plaintiffs' confinement, the PLRA, by its own terms, has no relevance. As the Sixth Circuit recently held,

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handwashing, testing, timely medical attention, and weekly reports to the Court as consistent with PLRA's narrowness requirement), *stayed on other grounds*, 958 F.3d 1081 (11th Cir. 2020); *Mays v. Dart*, 2020 WL 1987007, at *36-37 (N.D. Ill. Apr. 27, 2020) (imposing requirements regarding testing, social distancing, soap, hand sanitizer, PPE, limitations on double-celling and group housing, and a compliance report as "narrowly tailored relief" under the PLRA).

"[w]here a petition claims no set of conditions would be constitutionally sufficient, [the court] construes the petitioner's claim as challenging the fact of the confinement." *Wilson*, 2020 U.S. App. LEXIS 14291, at *4, *stay denied*, 590 U.S. —, 2020 WL 2644305 (May 26, 2020); *see also, e.g.*, Order Denying Stay, *Cameron v. Bouchard*, No. 20-1469 (6th Cir. May 26, 2020) (same); *Malam v. Adducci*, 2020 WL 1672662, at *3 (E.D. Mich. Apr. 5, 2020) (holding § 2241 is a proper avenue for the plaintiff to seek "immediate release from confinement as a result of there being no conditions of confinement sufficient to prevent irreparable constitutional injury under the facts of her case"); *Cameron*, 2020 WL 2569868, at *13; *Martinez-Brooks v. Easter*, 2020 WL 2405350, at *16 (D. Conn. May 12, 2020); *Prieto Refunjol v. Adducci*, 2020 WL 2487119, at *17 (S.D. Ohio May 14, 2020); *Bent v. Barr*, 2020 WL 1812850, at *2 (N.D. Cal. Apr. 9, 2020). As in these cases, Plaintiffs' *habeas* petition challenges the fact of their confinement. Although Plaintiffs' § 1983 claims seek relief from specific conditions in DOC facilities, Plaintiffs' *habeas* petition alleges that the "*only* strategy to ensure the reasonable health and safety of Plaintiffs and proposed class members" is to "[d]ownsiz[e] the population in Defendants' custody." Compl. ¶ 133 (emphasis added). Accordingly, the PLRA does not apply to that petition.

The law of this Circuit likewise supports this characterization. As the United States acknowledges, *see* U.S. Opp. at 7, binding precedent in this Circuit holds that if a conditions-of-confinement claim is successful, "a court may simply order the prisoner released unless the unlawful conditions are rectified, leaving it up to the government whether to respond by transferring the petitioner to a place where the unlawful conditions are absent or by eliminating the unlawful conditions in the petitioner's current place of confinement." *Aamer v. Obama*, 742 F.3d 1023, 1035 (D.C. Cir. 2014). Further, "[w]here the specific detention abridges federally protected interests — by placing petitioner in the wrong prison, denying him treatment, imposing

cruel and unusual punishment, impeding his access to the courts, and so on — it is an unlawful detention *and habeas lies to release the petitioner therefrom*." *Id.* at 1036. The United States asserts that even success on their constitutional claims "would not entitle [Plaintiffs] to outright release from custody" under *Aamer*. U.S. Opp. at 7. But that is precisely what *Aamer* requires.

The governments' authorities, U.S. Opp. at 10, are inapposite as they do not address whether Plaintiffs' *habeas* petition challenges the fact of their confinement. In *Money v. Pritzker*, 2020 WL 1820660, at *22 (N.D. Ill. Apr. 10, 2020), the court applied the PLRA to Plaintiffs' § 1983 claims, but it found their *habeas* claims under § 2254 (not the same provision Plaintiffs invoked here) unexhausted and therefore did not reach them. *Plata v. Newsom*, 2020 WL 1908776 (N.D. Cal. Apr. 17, 2020), was not a *habeas* case, but an emergency motion in an ongoing remedial case. And in *Alvarez v. Larose*, 2020 WL 2315807 (S.D. Cal. May 9, 2020), Plaintiffs' "fail[ed] to argue there are no set of conditions of confinement that would be constitutionally sufficient," *id*. at *3, whereas Plaintiffs in this case have argued that only release or enlargement can fully cure the Eighth Amendment harm. None of these cases refutes that Plaintiffs' *habeas* petition challenges the fact of their confinement.

2. *However the Court characterizes the requested relief, Plaintiffs' requested remedy is not a "prisoner release order" under the PLRA.*

The United States' argument fails for another reason: it relies on the PLRA's restrictions on "prisoner release orders," 18 U.S.C. § 3626(a)(3), but the relief Plaintiffs request does not meet the statutory definition of that term.

The PLRA defines a "prisoner release order" as any order "that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4). As several courts have found, that language is not

as broad as it appears. Rather, it applies only to orders reducing prison populations because they exceed a facility's or system's *capacity,* which is not a claim in this case.

As one court explained, "looking at the statute as a whole requires reading the definition of 'prisoner release order' in conjunction with the requirements for entering one. One such requirement is that a three-judge court must determine, by clear and convincing evidence, that 'crowding is the primary cause of the violation of a Federal right,' before it can enter a prisoner release order." *Plata v. Brown*, 427 F. Supp. 3d 1211, 1223 (N.D. Cal. 2013) (*Plata II*) (quoting 18 U.S.C. § 3626(a)(3)(E)(i)). If courts did not understand that the term "prisoner release order" means only an order focused on overcrowding, then "if any other reason caused the violation of an inmate's constitutional rights, judges could not provide relief by releasing the inmate. There is no evidence to support that this was Congress' intent when crafting this section of the statute." *Cameron*, 2020 WL 2569868, at *27.

To prevent this nonsensical result, these cases and others have held that the PLRA's requirements apply only where the reason for the order of release or transfer is to relieve overcrowding. *See id.* at *27; *Plata II*, 427 F. Supp. 3d at 1222-24; *Reaves v. Dep't of Corr.*, 404 F. Supp. 3d 520, 522-24 (D. Mass. 2019); *Mays*, 2020 WL 1987007, at *31 (indicating that this "conclusion seems correct"); *Money*, 2020 WL 1820660, at *12 n.11 (suggesting that single-judge courts can order prisoner transfers for reasons other than overcrowding). This reading accords with the PLRA's purpose, as the "[s]ponsors of the PLRA were especially concerned with courts setting 'population caps' and ordering the release of inmates as a sanction for prison administrators' failure to comply with the terms of consent decrees designed to eliminate overcrowding." *Gilmore v. California*, 220 F.3d 987, 998 n.14 (9th Cir. 2000).

While the PLRA does not define "crowding," courts applying it have held that it "refers to the presence in a facility or prison system of a prisoner population exceeding that facility or system's capacity." *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 920 (N.D. Cal. 2009) (citing cases); *accord Jensen v. Gunter*, 807 F. Supp. 1463, 1469 (D. Neb. 1992). *Plata I* reflects that these understandings are correct, as the Court there focused on the design capacity of California's prisons in comparison to the actual inmate population. 563 U.S. at 502-06.

Properly understood, then, the relief Plaintiffs seek is not a "prisoner release order." They do not claim that CDF or CTF exceeds its capacity. They allege (and this Court has found) that the DOC is not allowing for necessary social distancing. But "[t]he inability to socially distance in the jail setting has nothing to do with the capacity of the facility." *Cameron*, 2020 WL 2569868, at *28. Moreover, in sharp contrast to an overcrowding claim, Plaintiffs do not ask for a percentage-based reduction in the number of individuals detained by Defendants. And Plaintiffs' specific complaints are far different from those in an overcrowding case; they allege (and the Court has found) that due to COVID-19, sick call responses, sanitation, conditions in the units, and access to legal calls are all constitutionally deficient. As described above, these conditions persist. They do not involve overcrowding. Therefore, the PLRA's requirements for "prisoner release orders" do not apply to the writ of *habeas corpus* that Plaintiffs seek.

If this Court were to issue an order enlarging Plaintiffs' custody, that would not be a "prisoner release order" under the PLRA, either, because it would not order their release. *Wilson*, 2020 WL 1940882, at *10 ("[T]he Court is not ordering the release of the prisoners. Instead, the inmates will remain in BOP custody, but the conditions of their confinement will be enlarged."). The United States disagrees, contending that under *Plata I*, any transfer to a different form of custody is still a "prisoner release order." U.S. Opp. At 8. But *Plata I* was not a *habeas* action

and did not address the issue of enlargement. Moreover, the Supreme Court explained, the transfer order there qualified as a prisoner release order "[b]ecause the order limits the prison population as a percentage of design capacity." 563 U.S. at 511. Plaintiffs' request for enlargement does no such thing — it does not address design capacity, let alone ask the Court to limit population in reference to design capacity. Instead, Plaintiffs request transfers as necessary to alleviate the risk of medical harm caused by Defendants' constitutional violations. *See Reaves*, 404 F. Supp. 3d at 522 (differentiating between release and transfer). Nothing in *Plata I* prevents enlargement here.

Significantly, neither the District nor the United States asserts that the test for enlargement, *see* Pls.' Mot. 26, is not met. Because the PLRA does not bar enlargement, neither the District nor the United States has offered any reason why this Court should not employ that remedy.

F. The Bail Reform Act Is Not a Substitute for this Court's Review of Plaintiffs' Constitutional Claims, for which Release and Enlargement Are Proper Remedies.

The Defendants and the United States contend that Plaintiffs who are pretrial detainees should pursue release through the federal and D.C. Bail Reform Acts ("BRA"). But although the United States labels the BRA as the "correct vehicle," U.S. Opp. at 14, it does not contend that Plaintiffs are *required* to pursue such relief before filing a *habeas* petition. Therefore, even on the government's own terms, its argument does not bar relief.

Apparently, Defendants and the United States are contending only that this Court should *abstain* from providing relief in light of the BRA. That highly impractical contention is foreclosed by circuit precedent. When a class of pretrial detainees alleged that their confinement in D.C. Jail violated the Eighth Amendment, the D.C. Circuit held that their claims were properly addressed in a civil action for equitable relief and specifically rejected the government's abstention argument. *Campbell v. McGruder*, 580 F.2d 521, 524-27 (D.C. Cir. 1978). *See also United States v. Rojas-Yepes*, 630 F. Supp. 2d 18, 20-24 (D.D.C. 2009) (construing conditions claim as *habeas* petition,

not BRA motion, and adjudicating it on the merits); *Al Odah v. United States*, 406 F. Supp. 2d 37, 43 (D.D.C. 2005) (explaining that where jail conditions "violated pretrial detainees constitutional rights," "federal courts have a duty to protect the constitutional rights of pretrial detainees from being infringed by prison regulations or practice.").[10]

Indeed, courts could not even consider Plaintiffs' substantive claims under the BRA. The BRA addresses whether an individual should be detained prior to trial or sentencing based on only two considerations: risk of non-appearance and danger to a person or to the community. *See* 18 U.S.C. §§ 3142, 3143. Conditions of confinement are no part of the analysis, and there is no mechanism to assert pretrial detainees' due process rights. "[T]he inability of the D.C. system to grant [Plaintiffs] the full relief requested in connection with [their] federal claims" makes abstention improper. *Bridges v. Kelly*, 84 F.3d 470, 477 (D.C. Cir. 1996); *see also Campbell*, 580 F.2d at 527; *United States v. Rojas-Yepes*, 630 F. Supp. 2d 18, 20-24 (D.D.C. 2009).

Even if a court hearing a BRA motion would consider COVID-19, such motions could not possibly timely address DOC's largescale constitutional violations, which necessitate a systemic remedy. The idea that dozens of judges should adjudicate hundreds of due process claims in BRA motions even as the courts operate under the burdens of the pandemic is not a serious proposal.

The United States places heavy weight on the Attorney General's April 6, 2020 memorandum regarding the Department of Justice's public stance on detention issues during the ongoing pandemic. U.S. Opp. at 13-14. But while the Attorney General's recommendation that

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[10] The government's largely out-of-circuit cases are not to the contrary; they address situations in which pretrial detainees attempted to use *habeas* proceedings either to litigate aspects of their criminal cases, *see Medina v. Choate*, 875 F.3d 1025, 1026 (10th Cir. 2017); *Reese v. Warden Philadelphia FDC*, 904 F.3d 244, 245 (3d Cir. 2018); *Falcon v. U.S. Bureau of Prisons*, 52 F.3d 137, 139 (7th Cir. 1995); *Fassler v. United States*, 858 F.2d 1016, 1018 (5th Cir. 1988), or to relitigate out-of-time issues already addressed in the normal course, *Gon v. Gonzales*, 534 F. Supp. 2d 118, 120 (D.D.C. 2008).

prosecutors consider COVID-19 vulnerability is laudable, pretrial detainees are not required to rely on the good will of prosecutors to secure their constitutional rights. And despite the Attorney General's statement that a "defendant's risk from COVID-19 should be a significant factor in [a prosecutor's] analysis," *id.*, prosecutors in this district have taken a decidedly different tack, overwhelmingly arguing for continued detention in response to BRA motions. Although the United States is currently litigating hundreds of such motions, U.S. Opp. at 14, it points to only *three* in which it has not opposed release. *Id*. at 16. As discussed above, the United States has opposed 93 percent of BRA motions in Superior Court. *See* Ex. D (Bhatt Decl.) ¶ 6.

To be sure, Defendants' and the federal government's concerns regarding public safety and flight risk in releasing DOC residents must be taken into account. That is why Plaintiffs propose that the Court appoint an expert to "focus[] on the critical issues of inmate and public safety." Pls.' Mot. 38 (quoting *Martinez-Brooks*, 2020 WL 2405350, at *27). With the expert's aid, this Court can ensure that DOC residents safely transition to community supervision, while also weighing inmate safety from DOC's constitutional violations.

CONCLUSION

Plaintiffs' overwhelming evidence shows the conditions they face are dire and the risk is acute. The District is responsible, and this Court has more than adequate authority to order a remedy. The Court should grant Plaintiffs' Motion for Preliminary Injunction.

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Respectfully submitted,

/s/ Steven Marcus

Steven Marcus (D.C. Bar # 1630882)
Jonathan Anderson (D.C. Bar # 475306)
Jenna Cobb (D.C. Bar # 979506)
Public Defender Service for the District of Columbia
633 Indiana Avenue N.W. | Washington, D.C. 20004
Tel: 202-824-2524; *smarcus@pdsdc.org*

/s/ Scott Michelman
Scott Michelman (D.C. Bar # 1006945)
Arthur B. Spitzer (D.C. Bar # 235960)
Michael Perloff (D.C. Bar # 1601047)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
Tel.: 202-457-0800
smichelman@acludc.org

/s/ Jacob S. Kreilkamp
Jacob S. Kreilkamp (Pro Hac Vice Pending)
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
50th Floor
Los Angeles, CA 90071-3426
Tel.: 213.683.9260
Fax: 213.593.2960
jacob.kreilkamp@mto.com

Jonathan S. Meltzer (D.C. Bar # 888166546)
Jeremy S. Kreisberg (D.C. Bar # 1048346)
Rachel G. Miller-Ziegler (D.C. Bar # 229956)
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW
Seventh Floor
Washington DC, 20004
Tel.: 202.220.1100
Fax: 202.220.2300
jonathan.meltzer@mto.com