IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FAVIAN BUSBY and MICHAEL EDGINGTON, on their own behalf and on behalf of those similarly situated, Plaintiffs, v. FLOYD BONNER, JR., in his official capacity, and SHELBY COUNTY SHERIFF'S OFFICE, Defendants.	)	No. 20-cv-2359-SHL

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Before the Court are Plaintiffs' Motion for Temporary Restraining Order ("Motion for Preliminary Injunction"[1]), (ECF No. 2), filed May 20, 2020, Defendants' Response, (ECF No. 27), filed May 26, 2020, Defendants' Proposed Findings of Fact and Conclusions of Law, (ECF No. 112), filed July 15, 2020, Plaintiffs' Proposed Findings of Fact, (ECF No. 114), also filed July 15, 2020, Defendants' Response to Plaintiffs' Findings of Fact, (ECF No. 120), filed July 20, 2020 and Plaintiffs' Response to Defendants' Proposed Findings of Fact and Conclusions of Law, (ECF No. 121), filed July 20, 2020. For the following reasons, the Motion for Preliminary Injunction is **DENIED**.

[1] The Court treats Plaintiffs' emergency motion as one for preliminary injunction given Plaintiffs' request for such a construal, and because an evidentiary hearing has taken place. (ECF No. 111 at PageID 2261) ("The Court now, having heard all this evidence, should treat Plaintiffs' motion as one for preliminary injunction rather than one for a temporary restraining order"); see 2 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY Rule 65 ("It is important to remember that the purpose of a TRO is to prevent any irreparable harm that might occur before the court is able to hold a properly noticed hearing on whether to grant a preliminary injunction").

BACKGROUND

In their Motion for Preliminary Injunction, Plaintiffs seek urgent habeas and injunctive relief to protect medically vulnerable people and people with disabilities detained before trial[2] at the Shelby County Jail ("Jail"), given the coronavirus pandemic currently devastating our community and the world. Plaintiffs allege that their constitutional rights, under the Fourteenth Amendment, and their statutory rights, under Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Rehab Act"), are being violated because of their detention in the Jail during this pandemic. (ECF No. 2 at PageID 53-59.)

Specifically, Plaintiffs argue that the Defendants' non-test-based strategy for preventing the spread of COVID-19 at the Jail is reckless, particularly in light of the potential of asymptomatic transmission. (ECF No. 121, PageID 2754, 2772.) This situation is further complicated, according to Plaintiffs, by inadequate screening procedures for both new detainees and jail staff. (ECF No. 114, PageID 2371-72.) Additionally, Plaintiffs aver that it is not physically possible to maintain the CDC recommended six feet distance from other people while detained, due to the congregant nature and small spaces of the Jail. (Id. at PageID 2349-56.) Furthermore, Plaintiffs contend that, because the medical isolation unit is enclosed by bars rather than solid walls and doors, there is no actual physical separation between those with the virus and other adjacent housing units, and the virus may freely spread through common areas and infect those who have not yet been exposed. (ECF No. 114, PageID 2365-66.) Insufficient hygiene supplies and practices also add to the risks faced by Plaintiffs. (ECF No. 2, PageID 49.)

[2] The Court sometimes refers to "detainees," which describes individuals who are being housed at the Jail with a pending criminal matter, meaning they have not been adjudged guilty of a crime.

According to Plaintiffs, the confinement of medically vulnerable people in a congregate setting like the Jail is itself unconstitutional. (ECF No. 2, PageID 47.) In addition, they allege that, given all of the issues described above, the way in which this particular Jail houses pre-trial detainees is unconstitutional and cannot be remedied, or cannot be remedied in a timely manner. Plaintiffs aver that the only available sufficient remedy is release from the Jail's confines. Defendants contend in response that they are following all applicable standards, and acting reasonably under the circumstances. (ECF No. 27.) Moreover, Defendants argue that any deficiencies are capable of being remedied, thus defeating relief pursuant to a writ of habeas.

On June 10, 2020, the Court conditionally certified those detainees at high-risk for an adverse reaction should they contract COVID-19 as class members, and disabled detainees as subclass members. (ECF No. 40.) On June 16, 2020, Plaintiffs filed an Amended Petition, adding two Named Plaintiffs and related factual allegations. Otherwise, the Amended Petition appears to be the same as the original.

FINDINGS OF FACT[3]

For many months now, we have all operated in a world dominated by the novel coronavirus known as COVID-19. The resulting pandemic has changed the way we all live our lives. It is highly contagious and potentially deadly. Those deemed to be "medically vulnerable" are particularly at risk for serious complications or death if they contract the virus.[4] Amid this pandemic, "[o]perating a large county jail such as the Shelby County Jail is

[3] For purposes of clarity, the Court finds it most helpful to group its findings into areas of focus related to containing the virus within the Jail. The Court understands there is overlap between the focus areas and notes the overlap when it is particularly important.

[4] People Who Are at Increased Risk for Severe Illness, CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html (updated June 25, 2020).

challenging, complex, and labor intensive." (ECF No. 80, PageID 1173.) Plaintiffs argue that the Jail's continued confinement of them violates the Constitution and laws of this country.

Because of the dramatically different descriptions of the way in which detainees were being confined at the Jail when this matter was filed, the Court allowed the factual record related to this Motion to be further developed. (ECF No. 45.) As this record has been developed, conditions at the Jail have changed, to some degree as a result of an inspection ordered by the Court. After receiving a list of proposed names, the Court appointed an expert as the Court's Independent Inspector, Mr. Mike Brady. Mr. Brady's report was filed on June 30, 2020, (ECF No. 80), and he testified about those findings at a hearing on July 1, 2020, (ECF No. 84). In addition, the Court permitted Plaintiffs to conduct some expedited discovery. (ECF Nos. 48, 49, 56.) Then, on July 10 and 13, the Court held an evidentiary hearing, with proof presented by both Parties. The Parties' briefing followed.

Based on the Independent Inspector's findings, the testimony offered at the evidentiary hearing and the documents offered into evidence, the Court finds the following facts as accurate descriptions of the way in which people are being detained at the Jail. The issues addressed herein are those highlighted by Plaintiffs as problematic.

I. Efforts to Prevent Virus Entry into the Facility

The first line of defense to protect the medically-vulnerable from COVID-19 is to prevent the virus's entry into the Jail. When new detainees are brought into the Jail, they are asked a series of screening questions and their temperatures are taken. (ECF No. 80.) If a detainee shows symptoms of COVID-19, he is escorted to a tent area on the far end of the Jail's sally port. There, healthcare staff in hazmat suits examine the arrestee to see if he requires a hospital stay. The detainee is also tested, and, if hospitalization is unnecessary, he is isolated at the Jail for 21

days with other detainees who have tested positive. (ECF No. 80; ECF No. 84 at PageID 1242-44.)

If an incoming detainee exhibits no symptoms of COVID-19, he is given a mask, placed in a holding cell and booked. The arrestee is supposed to be quarantined for 21 days, held with others without symptoms who were arrested on the same day. (ECF No. 84 at PageID 1242-44.) This is a decidedly non-testing ("timing out") strategy to prevent entry of the virus into the facility, but is a viable approach. If the necessary steps are strictly followed, this timing-out strategy can prevent entry of the virus into the Jail. (ECF No. 80.)

The screening of Jail staff coming to work each day includes filling out a questionnaire and having their temperatures taken. (ECF No. 107-1.) These staff screening measures appear "to be fully compliant with CDC recommendations," according to Plaintiffs' expert, Dr. Homer D. Venters. (Id.)

If all incoming staff and detainees are screened, and the new detainees are truly quarantined for 21 days, then the Jail's preventative measures against entry of the virus into the Jail would be adequate. Yet, there was a gap. According to the Independent Inspector, during their initial quarantine, detainees were often summoned to the General Sessions Courts and the Criminal Courts of Shelby County for in-person hearings. (ECF No. 80 at PageID 1181.) Thus, the detainees would walk from their isolation units through a tunnel (connecting the Jail to the state courts) to holding cells, to wait for their appearance before the state courts. (Id.) As many as 25 detainees were packed in a holding cell, for up to 4 hours, without everyone donning a mask or social distancing. (Id.) Much of the time, these transfers were needless as detainees were "handed a piece of paper and told their case has been reset for another date." (Id.)

Through this shuffling back and forth to the state courts, the "quarantined" new detainees mingled with the general population detainees. As the Independent Inspector found:

> The newly booked detainee movement from medical isolation to the General Session and Criminal Courts and then back to the medical isolation unit completely undermines the integrity and purpose of the 21-day medical isolation that is designed to prevent the introduction of the Covid-19 virus into the jail population.

(ECF No. 80.) Because of these back and forth transfers, incoming detainees were not effectively quarantined. The comingling of incoming detainees with the general population rendered the Defendants' timing out strategy futile.

After the Independent Inspector highlighted this glaring gap in the Jail's timing-out strategy (calling it "ineffective and useless") on June 29, Defendants apparently took steps to correct the gap. (ECF No. 11 at PageID 2236-38.) At the July 13th hearing, the Administrative Judge for the County's Criminal Court, Judge John W. Campbell, testified that the number of detainees being transferred to court has been "cut dramatically" since the prior week due to certain procedural changes on the state courts' part. (Id.) According to Judge Campbell, not only are detainees now summoned to the state courts only when they will be seen that day, they are summoned just when the state court judges are ready for them. (Id.) Judge Campbell also testified that, by the end of that week, the County Criminal Court would have five videoconferencing rooms so even fewer pretrial hearings would require in-person appearances. (Id.) Moreover, Defendants appear to have placed chairs along with six-foot markings within the tunnel so detainees being transported to the state courts are socially distanced from one another. (ECF No. 101-1.) While it remains unclear whether these measures allow the Jail to fully maintain the integrity of the quarantining of new detainees, they are significant steps in the right direction and indicate that the issue is capable of being addressed successfully.

II. Efforts to Identify and Isolate COVID-19 within the Jail

Even with the best of efforts, entry of the virus into the Jail is inevitable, so there must also be efforts to address those who are exposed to it and those who contract it. As for isolating detainees who are COVID-19 positive, Defendants use Housing Unit 2A as a medical isolation unit and 5A as the quarantine unit. (ECF No. 107-1 at PageID 1856-58.) Isolation refers to the practice of secluding infected or symptomatic people; quarantine refers to the practice of secluding people who have been exposed to others with the virus but who display no symptoms themselves. (ECF No. 107-1 at PageID 1856.) Like other housing units in the Jail, the units used for isolation and quarantine are unsealed, meaning that the entryway into the unit has bars, not solid doors. Plaintiffs' expert expressed concerns that, due to the open nature of isolation unit, staff and detainees are dangerously exposed to COVID-19:

> Despite being called a medical isolation unit, 2A is open to the hallway and the mental health unit across the hall, where patients with serious mental illness and those with mental health emergencies are being held. All cells in 2A are comprised of open bar windows on the doors, meaning that there is free flow of air (and virus) from people inside 2A to anyone in the hallway and across the hall, which is approximately 10 feet across. There is no closed door anywhere to separate patients with COVID-19 from staff or other detainees on this floor.

(ECF No. 107-1 at PageID 1856.)

Notably, the Court was not presented with any proof as to how far COVID-19 can spread through the air in an indoor facility. In addition, there is no evidence in the record related to the way in which the spread of the virus is impacted by a building's air flow system, or a description of the airflow within the Jail. Given the CDC's recommendation of a 6 foot distance between people (see infra n.5), the general compliance with wearing masks in the Jail (id.), and the lack of testimony as to the impact of the air flow in the Jail, the Court cannot conclude as a factual matter that the open bars create a risk of transmission of the virus to neighboring housing units or others outside 2A.

III. Efforts to Prevent Unknowing Viral Spread from Asymptomatic Carriers

One of the core principles of a COVID-19 operational response model is social distancing. (Brady Report, ECF No. 80, Pg.ID 1173.) The CDC defines "social distancing" as "the practice of increasing the space between individuals and decreasing their frequency of contact to reduce the risk of spreading a disease (ideally to maintain at least 6 feet between all individuals, even those who are asymptomatic)."[5] Plaintiffs' allegations related to social distancing raise two concerns: the ability of detainees to maintain an adequate distance from one another within the facility and the efforts by Defendants to reduce the overall population so that there are fewer detainees and thus more space between them.

As to questions related to detainees' ability to maintain distance among themselves, Plaintiffs presented testimony showing social distancing lacking in the following areas: sleeping arrangements (ECF No. 114, PageID 2350-52), eating (ECF No. 114, PageID 2352), use of the phones (ECF No. 114, PageID 2353), pill call (ECF No. 114, PageID 2353), movement from one part of the jail to another (ECF No. 2, PageID 48) and restrooms (ECF No. 2, PageID 171). As one example, Mr. Russell Leaks testified that, during pill call, while detainees walk up to the bars one at a time to receive their pills, 16-20 of the detainees in the pod line up in close proximity to wait their turn, rendering the social distancing strategy useless. (ECF No. 108, PageID 1943-44.)

Defendants maintain that, while detainees are not always able to maintain six feet of separation from others, they have taken adequate measures to mitigate the risks posed by close

[5] Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last reviewed July 27, 2020).)

proximity. Defendants placed markings six feet apart in housing units and near telephones and other high use areas, to encourage detainees to maintain their distance from each other. (ECF No. 111, PageID 2153.) When serving meals, only three cells are let out at a time and Defendants have relaxed regulations which now allow detainees to eat inside their own cells. (ECF No. 111, PageID 2153, 2163.) Pill calls, as described by Mr. Leaks, are performed one at a time. In general, Jail staff members also regularly encourage detainees to practice social distancing throughout the Jail. (ECF No. 111, PageID 2153.)

Though the logistics of detainees' sleeping arrangements differ depending on their assigned pod, the evidence suggests that many detainees sleep close to one another. For instance, Mr. Leaks testified that the double bunks in unit 5B are only about 3.5 feet apart horizontally and 2 feet apart vertically. (ECF No. 108 at PageID 1927-29.) Mr. Robert Pigram, a detainee in unit 4A, testified that, though there is only one bunk bed per cell in his unit, the distance between the top and bottom bunks is about 2.5 feet. (ECF No. 108 at PageID 1979.) The Independent Inspector also observed that social distancing is not adhered to in relation to sleeping arrangements. (ECF No. 80 at PageID 1183-84.) Defendants offered no evidence to mitigate these deficiencies.

However, as noted earlier, Defendants have coordinated with the Shelby County Criminal Courts to reduce the number of court appearances to minimize movement throughout the Jail. (ECF No. 111, PageID 2156, 2235-37.) When detainees must be brought to court, Defendants now separate detainees in the tunnel leading to the courts in chairs which are separated six feet apart. (ECF No. 111, PageID 2156-57; see ECF No. 101-1.) Plaintiffs do not substantially controvert these facts.

As for the issue of increasing the ability to social distance by reducing the jail population, the Jail population has decreased from 2,150 to 1,826 from the period of March 12, 2020 to June 24, 2020. (ECF No. 114-5, PageID 2612-15.) Defendants provided proof of their coordination with law enforcement to attempt to reduce the number of arrests and new detainees during the pandemic. (ECF No. 111, PageID 2213.) Additionally, Defendants have coordinated with the District Attorney's Office, Public Defender's Office and other agencies through weekly Shelby County Criminal Justice Partners' meetings to expedite the release of those accused of misdemeanors and low-level felonies. (ECF No. 111, PageID 2205, 2208; ECF No. 100-1 at PageID 1601.)

However, there was no proof that the medically vulnerable status of detainees has been routinely taken into account in the decisions related to reducing the jail population. In fact, the Jail's Medical Director, Dr. Donna Randolph, stated that she had not coordinated with the Jail's expediter regarding the release of any detainees in relation to COVID-19. (ECF No. 114-2, PageID 2486.) Dr. Randolph maintains that her patients, including the medically vulnerable, "are well cared for," so there is no one about whom she "was concerned with." (Id.) The Independent Inspector found that "there is no concentrated and coordinated effort to assemble and present information to the courts regarding an inmate's medical conditions that may make him vulnerable to serious illness or death while housed in the jail." (ECF No. 76, PageID 1099.) As to the named Plaintiffs, the testimony offered at the July 13th hearing focused on allegations of repeated drug sales during previous stints on bond, not threats to safety or flight risks which are the traditional measures of whether a detainee should be released on bond. (ECF No. 111 at PageID 2213-17.) There was no proof offered, by any party, of the consideration of unique alternatives to pretrial detention in the Jail, in an effort to reduce the jail population.

Plaintiffs also raise concerns related to cleanliness and hygiene, two other ways in which the spread of the virus can be contained. (ECF No. 2 at PageID 49.) As for these issues, the evidence showed that detainees are provided cleaning supplies for their individual areas and common areas. (ECF No. 111, PageID 2146-47.) Additional cleaning supplies are located near high use areas such as the phones and showers. (ECF No. 111, PageID 2152-53.) In addition to the cleaning performed by detainees, officers disinfect surfaces around the Jail regularly and have recently purchased additional mops, presumably based on a recommendation from the Independent Inspector. (ECF No. 111, PageID 2148.) The Jail also now provides all detainees with two free bars of soap per week. (ECF No. 111, PageID 2144.)

It is also the Jail's policy to provide at least one mask to detainees. (ECF No. 80 at PageID 1192; ECF No. 107-1 at PageID 1854-55.) Detainees and Jail staff must wear masks at all times. These protective policies are largely being followed. (ECF No. 107-1.)

One final factual matter raised by Plaintiffs—the housing of medically-vulnerable detainees. It is uncontroverted that the Jail does not separate all medically-vulnerable detainees from the general population. (See, e.g. ECF No. 80 at PageID 1180, 1183, 1187.) While some medically "fragile" detainees are housed in designated-medical units on the second floor, the rest of the medically-vulnerable population is scattered throughout the Jail. (Id. at PageID 1183.) The Independent Inspector and Plaintiffs' Expert raise questions as to whether such housing arrangements make sense, wondering instead whether the better course of action is to keep the medically-vulnerable together with even greater protections against the virus. (ECF No. 80 at PageID 1188; ECF No. 107-1 at PageID 1858.) However, there was no testimony offered that such a housing arrangement must be done under applicable standards or that it could not be accomplished within the Jail.

ANALYSIS

Courts balance four factors in determining whether to grant a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction. Am. Civil Liberties Union Fund of Mich. v. Livingston County, 796 F.3d 636, 642 (6th Cir. 2015.) The final two factors "merge when the Government is the opposing party." Gun Owners of Am., Inc. v. Barr, 2019 WL 1395502, at *1 (6th Cir. Mar. 25, 2019). "These factors are not prerequisites, but are factors that are to be balanced against each other." Overstreet v. Lexington-Fayette Urban Cty. Gov't, 305 F.3d 566, 573 (6th Cir. 2002). However, "the likelihood of success on the merits often will be the determinative factor." Liberty Coins, LLC v. Goodman, 748 F.3d 682, 689 (6th Cir. 2014). The Court begins with this factor.

Detainees enduring harsh jail conditions often come to federal courts for help. See Bell v. Wolfish, 441 U.S. 520, 562 (1979) ("The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems"). Pre-trial detainees can, as here, accuse jail administrators of violating their Fourteenth Amendment right to be free from punishment, their Eighth Amendment right to medical care and their rights under the ADA and Rehab Act to be reasonably accommodated for their disabilities. Yet, before coming to court with these constitutional or statutory claims, a detainee must decide on the relief he seeks for that will determine his legal vehicle. See McCarthy v. Bronson, 500 U.S. 136, 140 (1991) (noting the "two broad categories of prisoner petitions"). Does he want money damages and a stop to the

jail's misconduct? If so, his claims can be filed as a lawsuit under 42 U.S.C. § 1983. Or, does he seek release from custody? Then only through a petition for a writ of habeas corpus (under 28 U.S.C. § 2241) can his claims come before the court.

Plaintiffs here opted to assert their constitutional and statutory claims through a petition for a writ of habeas corpus. As this Great Writ confers release of a detainee, issuance of it does not come lightly. Notably, the writ "does not exist to ferret out every constitutional violation." In re Campbell, 874 F.3d 454, 463 (6th Cir. 2017). For this writ to be issued for a detainee, he must show that his confinement is unlawful, no matter what. See Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (noting that a writ of habeas corpus is apt only "when a state prisoner is challenging the very fact . . . of his physical imprisonment"). "The Great Writ is not concerned with the piecemeal reformation of an imperfect criminal justice system." Campbell, 874 F.3d at 463. ("In contrast, § 1983 is engineered to accomplish this lofty goal.").

Where a detainee alleges that the incurable horror of his jail's conditions merit injunctive habeas relief, courts effectively evaluate the allegations twice to assess their propriety as a habeas petition before analyzing the claims under their relevant constitutional and statutory standards to assess likelihood of success. Although these two steps are not outlined in applicable case law, courts engage in this process, nonetheless. See Wilson v. Williams, 2020 WL 1940882, at *1 (N.D. Ohio Apr. 22, 2020) (noting a detention facility's "limited available testing and [its] inability to distance inmates" amid the pandemic, before finding habeas relief appropriate).

First, courts examine whether the detainee really seeks release, as opposed to an improvement in conditions which is properly raised under § 1983. When complaining about conditions, a detainee passes this hurdle only if he contends that no legally sufficient conditions

are possible at the jail. See Wilson v. Williams, 961 F.3d 829, 838 ("[W]here a petitioner claims that no set of conditions would be constitutionally sufficient the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement"). Second, as a court examines "likelihood of success" when faced with a request for an injunction, it must independently confirm that there are indeed no legally sufficient conditions possible at the jail. This second step prevents detainees from filing § 1983 lawsuits under the guise of habeas petitions solely by alleging that no legally sufficient conditions are possible at the jail.[6]

Only after a detainee clears these two hurdles—by alleging, then actually showing, that the conditions at the jail are incurable—should a court analyze whether those conditions violate the relevant constitutional and statutory standards. Here, Plaintiffs easily clear their first hurdle. They expressly allege that the conditions at the Jail are so deplorable that their constitutional and statutory grievances can only be remedied by release from the Jail's confines. That gets them past the Motion to Dismiss stage.

[6] Here, Plaintiffs propose that the Court grant a "conditional writ of habeas corpus," contingent on a detainee's risk of flight, dangerousness and medical vulnerability. Yet, that is not how conditional habeas writs are granted. They are granted with the condition imposed on the state, with an absolute writ being issued if the state fails to meet the condition. See Hilton v. Braunskill, 481 U.S. 770, 775 (1987) ("[C]ourts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court"); Gentry v. Deuth, 456 F.3d 687, 692 (6th Cir. 2006) ("[T]he sole distinction between a conditional and an absolute grant of the writ of habeas corpus is that the former lies latent unless and until the state fails to perform the established condition, at which time the writ springs to life"). Plaintiffs would have it the other way around. Against the backdrop of the traditional definition of a conditional writ, recall that this atypical habeas petition is legally sound as a "fact of confinement" challenge (rather than a "conditions of confinement" claim) solely because it alleges that the Jail conditions are incurably dire. To grant a conditional writ here, allowing Defendants to cure what is supposedly incurable, would improperly be converting this habeas action into essentially a § 1983 lawsuit. See Wilkinson v. Dotson, 544 U.S. 74, 87 (2005) (Scalia, J., concurring) ("Conditional writs are not an all-purpose weapon with which federal habeas courts can extort from the respondent custodian forms of relief short of release, whether a new parole hearing or a new mattress in the applicant's cell.")

At their second hurdle, Plaintiffs' challenge is tougher. They argue both that their detention is per se unconstitutional because of the congregant nature of jails and that aspects of confinement at this particular Jail are unconstitutional. And the proof before the Court certainly shows failures with how the Jail is detaining medically vulnerable detainees amid this pandemic. Yet, the proof also shows that these failures can likely be remedied quickly, and that the Jail can confine medically-vulnerable detainees without violating the Constitution, the ADA and the Rehab Act. Indeed, many complaints by Plaintiffs have already been addressed. Ultimately, Plaintiffs' likelihood of success on the merits is not strong. What follows is an analysis of the issues raised by Plaintiffs which, they argue, are of constitutional and statutory concern.

Plaintiffs' first argument—that their detention in a jail is per se unconstitutional—fails because the Sixth Circuit recently upheld the detention of medically-vulnerable people in a Michigan jail. See Cameron v. Bouchard, 2020 U.S. App. LEXIS 16741, *5 (6th Cir. May 26, 2020). In Cameron, the Sixth Circuit found that, because jail officials' preventative actions against COVID-19's spread were "reasonable," the pretrial detainees' constitutional allegations were unlikely to succeed. Implied in that result was the holding that confinement of medically-vulnerable detainees in a jail amid the pandemic is not necessarily unconstitutional. Of note, the CDC interim guidance on management of COVID-19 in detention facilities, on which Plaintiffs rely, is explicitly conditioned on the "need to adapt[] based on individual facilities' physical space, staffing, population, operations, and other resources and conditions."[7] Thus, the CDC

[7] Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last reviewed July 27, 2020).)

itself also recognizes that certain precautions should be molded to fit particular facilities, again defeating the notion of per se violations.

However, we must still consider the second aspect of Plaintiffs' argument—that the conditions at this particular Jail are incurably deplorable. For starters, consider that the Jail does not house all medically-vulnerable detainees separately. Yet, given that Plaintiffs did not present any public health evidence that medically-vulnerable people in a confined facility must be segregated, this fact alone does not carry the day in Plaintiffs' favor. Rather, that the medically vulnerable are scattered throughout the general population simply means that the conditions endured by the entire population must be considered.

First, Plaintiffs criticize the lack of testing in the facility. Defendants acknowledge the use of a non-test-based, timing-out approach to prevent the entry of COVID-19 into the facility. (ECF No. 80, PageID 1176.) New detainees are quarantined for 21 days and are not tested unless they exhibit symptoms of COVID-19. (Id. at PageID 1176, 1181.) The logic behind this strategy is that should a detainee be COVID-19 positive, yet asymptomatic, the virus will run its course during the 21-day quarantine. The Independent Inspector found that, at the time of his inspection, this strategy was "inadequate" due to detainee movement to court hearings during the initial 21-day quarantine. (Id. at PageID 1187.) While awaiting these court hearings, detainees were placed in holding cells, comingled with others who were not part of their cohorted 21-day quarantine group. (Id.) This practice presented an unreasonable risk of exposure to all detainees, including medically-vulnerable ones, but the Jail has since remedied this concern, including coordinating with the courts to limit the number of detainees being brought to court, increasing the availability and use of videoconference access, insuring all detainees wear masks and imposing social distancing. (ECF No. 111, PageID 2235-38.)

Although all details related to these new procedures were not fully outlined in the proof offered to the Court, the fact that significant changes were made demonstrates that the deficiency was capable of being remedied. And the most egregious of the issues raised, the violation of the quarantine itself, appears to be cured. Without proof to the contrary presented by Plaintiffs, who bear the burden of proof, this issue appears to have been adequately addressed.

With these changes and the other screening procedures for detainees and staff, Defendants' current protocols for those entering the Jail adequately protect (albeit, barely) against the entry of COVID-19 into the Jail. Ideally, Defendants—as they recently contemplated—would test incoming detainees and perform periodic testing throughout the facility, but it is their prerogative to opt for a timing-out strategy, if one is effective. Given that the Jail to court transfer problem, a critical system failure of their timing-out strategy, has largely been remedied, and incoming detainees' quarantines are now respected, habeas relief is not merited on this basis.

We next turn to how Defendants segregate detainees who have been exposed to or infected with COVID-19. COVID-19 positive detainees are housed in the medical isolation unit, which is 2A, while those detainees who have been exposed to infected detainees are housed in the quarantine unit, which is 5A. (ECF No. 107-1 at PageID 1856-57.) Plaintiffs' expert raises the concern that these units are "open", and, because the virus can be transmitted through the air, medically-vulnerable detainees in neighboring units are at high-risk of contraction. (Id.)

If the virus can easily be transmitted to medically-vulnerable detainees neighboring the isolation and quarantine units, that is a grave problem, and one which may be difficult, if not impossible, to remedy. Plaintiffs' expert appears to base his position on issues with airflow and the closeness of the entryways of the various units. However, there was no proof for the Court to

conclude that the estimated 10 feet distance (between the isolation unit and the adjacent hallway) was too close, or that the infected COVID-19 patients should be housed farther away. Moreover, there was no proof offered as to the air flow within the Jail. The CDC recommended safe distance is 6 feet but the Court takes judicial notice of the fact that air flow issues are of concern among medical professionals. However, without an expert opinion on how far this virus typically transmits in indoor settings without barriers, the Court cannot say that the isolation and quarantine practices at the Jail are so deplorable that they merit habeas relief. If there is an airflow issue, which has not been shown to date, perhaps that can be remedied through filtering the air flow or adding acrylic glass. The proof offered by Plaintiffs to date fails to demonstrate likelihood of success on the merits on this issue.

Finally, we turn to Defendants' efforts to prevent unknowing spread from asymptomatic detainees. Defendants' steps in providing cleaning supplies for sanitizing individual and common areas are signs of progress. Detainees also appear to have been provided masks as well as soap, although perhaps not until after this lawsuit was brought. Usually, staff and detainees apparently properly don their masks. Defendants' protective measures are reasonable in this area, and improvement is possible and encouraged. As an aside, the Independent Inspector noted that soap is not given freely if a detainee has money in his commissary account. If this is still true, that is worrying, but it is a problem easily curable.

As for social distancing, Defendants have taken measures to mitigate the risks which come from detainees being in close proximity to each other. Defendants placed markings six feet apart in housing units and near telephones and other high use areas, (ECF No. 111, PageID 2153), reduced potential exposure in congregant areas during mealtimes, (ECF No. 111, PageID 2153, 2163), and regularly encourage detainees to practice social distancing throughout the Jail.

(ECF No. 111, PageID 2153.) Importantly, Defendants have coordinated with the Shelby County Criminal Courts to reduce the number of court appearances to reduce movement throughout the Jail and have made efforts to reduce potential exposure for those detainees who must go to court. (ECF No. 111, PageID 2156, 2235-37.) These measures include maximizing distancing in the tunnel between the Jail and courts and adding video teleconference terminals, to reduce in person appearances.

However, despite these efforts, grave areas of concern persist. As for sleeping arrangements, the facts found by the Court indicate that detainees do sleep within less than 6 feet of each other, contrary to the CDC guidelines. This fact is concerning, particularly if the Independent Inspector's observation that the sixth floor is empty is still accurate. The Court likewise heard testimony that detainees do not socially distance during mealtimes. (ECF No. 111, PageID 2153, 2163.) Also, while detainees are given their medications one-by-one during pill call, they are lined together without social distancing. (ECF No. 108, PageID 1943-44.) Requiring medically-vulnerable detainees to receive their medications by waiting in a crowded line is a cruel ask. But to the extent these public health failures persist, they too can be easily remedied. While the Court ultimately concludes that maximizing social distancing is possible, thus calling into question likelihood of success as to habeas relief, it behooves the Jail to work creatively toward improving these conditions.

Additionally, the Jail's efforts to reduce its population are a mixed bag. Reducing the Jail's overall population, particularly those who are medically-vulnerable, better protects those individuals from any spread of the virus within the Jail and allows for more social distancing among those who remain detained. While the Jail has reduced the overall population from 2,150 to 1,826 from the period of March 12, 2020 to June 24, 2020, (ECF No. 114-5, PageID 2612-15),

the Jail's own Medical Director testified that she has not made any recommendations for potential release to the expediter based on the medically-vulnerable status of any detainee because she believes all detainees "are well cared for." (ECF No. 114-2, 2486.) This testimony supports the Independent Inspector's finding that "there is no concentrated and coordinated effort to assemble and present information to the courts regarding an inmate's medical conditions that may make him vulnerable to serious illness or death while housed in the jail." (ECF No. 80, PageID 1193.)

Of particular concern to the Court is the proof which showed that, not only is the medical vulnerability of detainees not being considered, the reasons offered for continued detention focus on repeat offenses in the past, not safety or flight risks in the present. While the Court does not suggest that repetitive drug dealing should not factor in a bond decision, it does not appear that the unique circumstances of the pandemic are playing the role that they should. Given these unusual circumstances, the Court wonders whether there are alternatives to confinement in the Jail, not typically used, that could serve the same goals, particularly where the alternative is exposing a medically-vulnerable detainee to the possibility of death. Again, however, this is an issue that can be remedied if addressed by the Jail, and thus is an inappropriate basis for habeas relief.

Defendants have made significant strides in its practices at the Jail, yet doubts persist as to whether the conditions at the Jail are legally sufficient. However, to the extent the measures may be legally insufficient, they are remediable in short time. That Defendants can quickly cure their public health lapses renders it unlikely that Plaintiffs will succeed on the merits of their habeas claim. Given that Plaintiffs show little chance of succeeding on the merits, analysis of the other preliminary injunction factors is needless. See Wilson v. Williams, 961 F.3d 829, 844

(6th Cir. 2020) ("Our cases warn that a court must not issue a preliminary injunction where the movant presents no likelihood of merits success.") (quoting Daunt v. Benson, 956 F.3d 396, 421–22 (6th Cir. 2020)). Therefore, Plaintiffs' Motion for Preliminary Injunction is **DENIED.**

* * *

Today, the Court declines to reach the question of whether Defendants' protections of medically-vulnerable detainees violate the Constitution or federal disability laws because it finds that any shortcomings are remediable. This Order does not conclude that Defendants' actions are legally sufficient. Concerns persist as to the lack of testing, social distancing, and isolation and quarantine measures at the Jail, not to mention the persistent failure to consider detainees' medical conditions when making bond decisions. Yet these issues can likely be fixed promptly, so a writ of habeas corpus is not merited at this time.

CONCLUSION

For these reasons, the Motion for a Preliminary Injunction is **DENIED WITHOUT PREJUDICE.**

IT IS SO ORDERED, this 7th day of August, 2020.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE