

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE**

Favian Busby, Terric Edwards, Russell Leaks, Saul Molina Martinez, Joseph Nelson, and Mark Phillips, *on their own behalf and on behalf of those similarly situated*;

Petitioners-
Plaintiffs,

v.

Floyd Bonner, Jr., *in his official capacity*,
Shelby County Sheriff, and the Shelby
County Sheriff's Office;

Respondents-
Defendants.

Case No. 2:20-cv-2359-SHL

**[PROPOSED] SECOND
AMENDED PETITION FOR
WRIT OF HABEAS CORPUS
AND CLASS ACTION
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

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been infected with COVID-19, with 7,444 hospitalizations and 1,931 deaths.³ More deaths have occurred in Shelby County than any other county in Tennessee.⁴

4. Governments have declared states of emergency and issued stay-at-home orders for good reason. There is no vaccine or cure for COVID-19. The only known way to mitigate the risk of COVID-19 infections, complications, and death is prevention: social distancing of at least six feet between people to limit exposure, and hygienic measures, such as frequent hand-washing, wearing face masks, and sanitization of high-touch surfaces. Particularly in indoor environments, where COVID-19 can further spread through aerosolized droplets, these measures are essential.⁵

5. It is impossible for people in jail or prison to comply with these critical preventative measures. People in jail live in close, poorly ventilated quarters in small, crowded cells, and cannot “socially distance” by maintaining the recommended six feet of distance from other people. Many people in jail have limited access to soap, personal protective equipment (“PPE”), and hand sanitizer. The pretrial detainees at the Jail are no exception.

6. As a result, prisons and jails have become epicenters of COVID-19.⁶ As of August 28, 2020, 231 people held in Shelby County jails had tested positive for COVID-

³ Tenn. Dep’t of Health, *Coronavirus Disease (COVID-19)*, <https://www.tn.gov/health/cedep/ncov.html> (last visited Sept. 10, 2020); Tenn. Dep’t of Health, *Epidemiology and Surveillance Data*, <https://www.tn.gov/content/tn/health/cedep/ncov/data.html> (last visited Sept. 10, 2020).

⁴ Tenn. Dep’t of Health, *Epidemiology and Surveillance Data*, <https://www.tn.gov/content/tn/health/cedep/ncov/data.html> (last visited Sept. 10, 2020).

⁵ See Linda Morawska & Donald K. Milton, *It Is Time to Address Airborne Transmission of COVID-19*, Accepted Manuscript, Oxford University Press for the Infectious Diseases Society of America (July 6, 2020), <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa939/5867798>.

⁶ See, e.g., Janet Reitman, *‘Something Is Going to Explode’: When Coronavirus Strikes a Prison*, N.Y. TIMES MAGAZINE (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/magazine/oakdale-federal-prison-coronavirus.html>; Timothy Williams and Danielle Ivory, *Chicago’s Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/us/coronavirus-cook-county-jail-chicago.html>; Deanna Paul and

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19, as had 162 people who work at the jails.⁷ One jail employee to date has died from COVID-19.⁸

7. Defendants are inescapably on notice of the numerous respects in which the conditions at the Jail are unsafe and inadequate: Plaintiffs have sent a demand letter, filed two complaints, and submitted declarations and testimony from several detainees outlining the troubling conditions in the Jail during this pandemic. Two expert inspectors—one appointed by the Court—have testified and issued reports expressing alarm at the methodology employed at the Jail to contain the virus. Most recently, on August 7, 2020, the Court itself identified multiple “grave areas of concern” regarding the conditions at the Jail and twice urged the Shelby County Sheriff’s Office to “improv[e]” its current practices. After expressing “doubts . . . as to whether the conditions at the Jail are legally sufficient,” the Court urged the Jail to remedy these “public health lapses” in short order.⁹

8. More than one month has passed since the Court issued its Order. Regrettably, Defendants do not appear to have taken the Court’s forceful admonitions to heart. While the Jail temporarily made improvements to certain conditions, apparently in preparation for the inspections by court-appointed inspector Michael Brady and Plaintiffs’ expert Dr. Homer Venters, most of those improvements lapsed shortly after the inspections occurred. In many respects—despite the fact that Defendants have had every

Ben Chapman, *Rikers Island Jail Guards Are Dying in One of the Worst Coronavirus Outbreaks*, WALL STREET JOURNAL (Apr. 22, 2020), [wsj.com/articles/rikers-island-jail-guards-are-dying-in-one-of-the-worst-coronavirus-outbreaks-11587547801](https://www.wsj.com/articles/rikers-island-jail-guards-are-dying-in-one-of-the-worst-coronavirus-outbreaks-11587547801).

⁷ <https://twitter.com/ShelbyTNSheriff/status/1299421926272761860>.

⁸ Brandon Richard, *Shelby County Sees Big Spike in COVID-19 Cases as Testing Expands*, WMC Action News (Apr. 27, 2020), <https://www.wmcactionnews5.com/2020/04/27/shelby-county-sees-big-spike-covid-cases-testing-expands/>.

⁹ ECF No. 124 at Pg.ID 2818, 2819, 2821.

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opportunity and incentive to provide safe conditions for those in their custody—the Jail is no safer than it was when Plaintiffs first filed their Complaint several months ago.

9. Favian Busby, Russell Leaks, Joseph Nelson, Terric Edwards, Saul Molina Martinez, and Mark Phillips (the “Named Plaintiffs”) are individuals held at the Jail who seek to represent a class of all current and future persons in pretrial custody at the Jail (the “Class”). Mr. Busby, Mr. Leaks, Mr. Nelson, Mr. Edwards, and Mr. Phillips also seek to represent a subclass of all current and future medically vulnerable (as defined below) pretrial detainees held at the Jail who, according to the Centers for Disease Control and Prevention (the “CDC”), are at high risk of severe infection or death from COVID-19 (the “Medically Vulnerable Subclass”). Mr. Busby, Mr. Leaks, Mr. Edwards, Mr. Nelson, and Mr. Phillips also seek to represent a subclass of current and future pretrial detainees who are medically vulnerable and at high risk of severe injury or death from COVID-19 due to disabilities protected under the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (the “Disability Subclass”).

10. Plaintiffs bring this action because the Jail has failed to uphold its constitutional and statutory minimum requirements, putting Plaintiffs—as well as the Jail’s staff and the community at large—at unacceptable risk of infection from COVID-19. People detained at the Jail are forced to live, sleep, and eat in close proximity to each other, are not provided with appropriate sanitary and protective measures, and are unable to access critical medical resources, placing them at extraordinary risk of infection with a potentially fatal disease.

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JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question jurisdiction), § 1343 (civil rights), and § 2201 (Declaratory Judgment Act).

12. Venue lies in the U.S. District Court for the Western District of Tennessee, the judicial district in which Plaintiffs are currently in custody. Venue is proper in the Western District of Tennessee under 28 U.S.C. § 1391, as venue is proper in any district in which a defendant resides.

PARTIES

13. Favian Busby is a pretrial detainee who is being held at the Jail. He has diabetes and takes insulin. Additionally, he has developed hypertension as a result of his diabetes. These conditions put him at high risk of serious illness or death if he contracts COVID-19. Mr. Busby has fully exhausted the remedies available to him regarding the conditions in the Jail. Mr. Busby is a person with a disability for purposes of the ADA and the Rehabilitation Act.

14. Terric Edwards is a pretrial detainee who is being held at the Jail. He has asthma and high blood pressure. He uses an inhaler every day to treat his asthma and takes medication to manage his blood pressure. Mr. Edwards has fully exhausted the remedies available to him regarding the conditions in the Jail. Mr. Edwards is a person with a disability for purposes of the ADA and the Rehabilitation Act.

15. Russell Leaks is a pretrial detainee who is being held at the Jail. He is 65 years old and has chronic liver disease, including hepatitis. Mr. Leaks also has hypertension, an irregular heartbeat, and he previously had a heart attack. He is at high

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risk of serious illness or death if he contracts COVID-19. Mr. Leaks has fully exhausted the remedies available to him regarding the conditions in the Jail. Mr. Leaks is a person with a disability for the purposes of the ADA and the Rehabilitation Act.

16. Saul Martinez is a pretrial detainee who is being held at the Jail.

Mr. Martinez has fully exhausted the remedies available to him regarding the conditions in the Jail.

17. Joseph Nelson is a pretrial detainee who is being held at the Jail. He has diabetes, which he manages with insulin and Metformin. He has also developed hypertension as a result of diabetes. He is at high risk of serious illness or death if he contracts COVID-19. Mr. Nelson has fully exhausted the remedies available to him regarding the conditions in the Jail. Mr. Nelson is a person with a disability for the purposes of the ADA and the Rehabilitation Act.

18. Mark Phillips is a pretrial detainee who is being held at the Jail. He has primary progressive multiple sclerosis and tachycardia. The medication he takes to manage his multiple sclerosis is an immunosuppressant. Mr. Phillips is a person with a disability for the purposes of the ADA and the Rehabilitation Act.

19. Defendant Floyd Bonner, Jr. is the Sheriff of Shelby County, Tennessee and may be served with process at 201 Poplar Avenue, 9th Floor, Memphis, Tennessee 38103. Defendant Bonner is named in this action in his official capacity as the Sheriff of Shelby County.

20. Defendant Shelby County Sheriff's Department is a Tennessee governmental department which, by virtue of its custody of Plaintiffs, is a party

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defendant to this matter. Defendant Shelby County Sheriff's Department may be served with process by serving Sheriff Floyd Bonner, Jr.

FACTUAL ALLEGATIONS

A. COVID-19 Is a Highly Infectious and Deadly Pandemic

21. COVID-19 is an extremely infectious disease that is transmitted from person-to-person. As of September 14, 2020, at least 28,918,900 people worldwide have tested positive for the virus and 922,252 people have died.¹⁰ In the United States, at least 6,467,481 people have contracted the virus, and 193,195 people have died from it.¹¹ Data is still emerging, but as of September 13, 2020, 3% of COVID-19 diagnoses result in death in the United States.¹² In some other countries, the mortality rate has been substantially higher.

22. COVID-19 can cause grave injury to multiple organ systems. In many people, COVID-19 causes fever, cough, and shortness of breath, which can be severe. It can severely, even fatally, damage lung tissue. COVID-19 may also target the heart muscle, causing a life-threatening medical condition called myocarditis, or inflammation of the heart muscle. COVID-19 can further damage tissue in a cytokine-release syndrome that can result in death or widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.

23. When patients experience these severe consequences of COVID-19, they require supportive care, including scarce medical equipment and specialized care

¹⁰ World Health Organization, Coronavirus Disease (Covid-19) Pandemic (2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited Sept. 14, 2020)

¹¹ Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19): Cases and Latest Updates, https://covid.cdc.gov/covid-data-tracker/#cases_totalcases (last visited Sept. 13, 2020).

¹² Johns Hopkins University & Medicine, Coronavirus Research Center, <https://coronavirus.jhu.edu/data/mortality> (last visited Sept. 14, 2020).

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providers, such as nurses, respiratory therapists, and intensive care physicians, to monitor and implement this care. This level of support can exceed local health-care resources.

And even with this advanced support, many still die.

24. Patients who survive severe complications from COVID-19 often require extensive, long-term rehabilitation to mitigate neurologic damage and the loss of respiratory capacity.¹³ Some will likely experience lifelong limitations and disabilities as a result of severe COVID-19.

1. Impact of COVID-19 on Certain Populations

25. Certain groups of people are at higher risk of serious illness and death from COVID-19 than the general population. Age is a significant risk factor for complications and death from COVID-19: The CDC reports that 80% of those who have died of COVID-19 in the United States have been 65 or older.¹⁴

26. In addition, the CDC has recognized considerable evidence that people with the following underlying medical conditions are, or likely are, at an increased risk of severe illness from COVID-19: cancer, chronic kidney disease; chronic lung disease, including chronic obstructive pulmonary disease, emphysema, chronic bronchitis, and pulmonary fibrosis; immunocompromised state from organ, blood, or bone marrow transplant, immune deficiencies, HIV, or use of corticosteroids and other immune weakening medicines; obesity (body mass index of 30 or higher); serious heart conditions, including heart failure, coronary artery disease, cardiomyopathies, and

¹³ See Ed Yong, *Long-Haulers Are Redefining COVID-19*, THE ATLANTIC (Aug. 19, 2020), <https://www.theatlantic.com/health/archive/2020/08/long-haulers-covid-19-recognition-support-groups-symptoms/615382/>.

¹⁴ Centers for Disease Control and Prevention, *Older Adults* (updated Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

hypertension; sickle cell disease; diabetes; moderate-to-severe asthma; cerebrovascular disease; cystic fibrosis; hypertension or high blood pressure; neurologic conditions; liver disease; pulmonary fibrosis; pregnancy; smoking; and thalassemia.¹⁵

27. In addition, it is well-documented that African Americans have experienced significantly worse outcomes following infection with coronavirus than others.¹⁶ Recent analysis of CDC data shows that the COVID-19 mortality rate among African Americans is more than twice that of white Americans.¹⁷ On any given day, the population of the Jail is typically more than 86 percent African American.¹⁸

2. Means of Transmission

28. Experts agree that the virus is primarily spread through person-to-person contact, via respiratory droplets produced when an infected person breathes out, coughs, sneezes, speaks, or even simply clears their throat. Large droplets remain in the air for seconds to minutes before they fall to the ground or land on other surfaces. Smaller droplets, on the other hand, are aerosolized and can remain in the air for as long as three hours.¹⁹

29. Moreover, the fact that COVID-19 droplets are aerosolized means that the droplets travel significantly greater distances—between 7 and 16 feet from infected

¹⁵ Centers for Disease Control and Prevention, *People with Certain Medical Conditions* (updated Sept. 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html.

¹⁶ *E.g.*, Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

¹⁷ APM Research Lab Staff, *Covid-19 Deaths by Races and Ethnicity in the U.S.*, APM Research Lab (Aug. 18, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race>.

¹⁸ See MacArthur Foundation, Safety + Justice Challenge, “Shelby County, TN,” <http://www.safetyandjusticechallenge.org/challenge-site/shelby-county/> (last visited Sept. 2, 2020).

¹⁹ See Linda Morawska & Donald K. Milton, *It Is Time to Address Airborne Transmission of COVID-19*, Accepted Manuscript, Oxford University Press for the Infectious Diseases Society of America (July 6, 2020), <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa939/5867798>.

patients, according to at least one study.²⁰ The potential for infection through this mechanism is even higher when people are indoors, in light of the limited movement and exchange of air.²¹

30. Studies from China found that individuals could be infected simply by being in the same restaurant as a person with COVID-19, despite having had no direct or indirect contact with the COVID-positive patron also eating there, and that air-conditioned ventilation transmitted the virus and infected others in the restaurant.²² Likewise, of the aerosol samples collected in the hospital room of infected patients, 63.2% of in-room air samples and 58.3% of hallway air samples tested positive for the virus—even though patients had not coughed prior to collection of the samples.²³ In short, there is little doubt that the mere exhalation of an infected person indoors can generate aerosolized droplets that travel more than six feet, linger in the air for hours, and have the potential to infect others.

3. The Need for Preventive Measures

31. There is no vaccine against COVID-19, nor is there any known medication to prevent or treat infection from COVID-19. On March 26, 2020, Dr. Anthony Fauci—head of the National Institute of Allergy and Infectious Diseases—estimated that a vaccine could be developed in 18 months. Other experts have cautioned that the 18-month estimate is highly optimistic, as vaccines typically take between 8 and 10 years to

²⁰ Lindsey C. Marr, Ph.D., *Yes, the Coronavirus is in the Air*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/opinion/coronavirus-aerosols.html>.

²¹ Apoorva Mandavilli, *239 Experts with One Big Claim: The Coronavirus is Airborne*, N.Y. TIMES (July 7, 2020), <https://www.nytimes.com/2020/07/04/health/239-experts-with-one-big-claim-the-coronavirus-is-airborne.html>.

²² Lindsey C. Marr, Ph.D., *Yes, the Coronavirus is in the Air*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/opinion/coronavirus-aerosols.html>.

²³ *Id.*

develop. And, in any event, the effectiveness of any vaccine that is developed and the ability to administer it broadly in the United States will remain significant wildcards.

32. In the absence of a vaccine, a treatment, or a cure, the only known measure that vulnerable people can take to reduce the risk of severe illness or death from COVID-19 is to prevent exposure to the virus in the first place. Yet asymptomatic carriers of COVID-19, who show no apparent signs of illness, can also transmit the virus. The only known measure to prevent exposure to the virus is social distancing—remaining physically separated from known or potentially infected individuals—and vigilant hygiene, including washing hands with soap and water and cleaning and disinfecting frequently touched surfaces. In light of the possibility of asymptomatic transmission and in the absence of widely available testing, the only way to protect oneself from contracting the virus is to remain distant from *all other people*.

33. The world, the country, and this state have changed radically in the months since COVID-19 was first observed, and our lives have been altered in ways that would have been unimaginable mere months ago. These changes are the result of attempts to implement widespread social distancing to prevent the spread of the virus. Officials have cancelled public events, closed schools and businesses, and issued stay-at-home orders to the general public.

34. In Tennessee—where, as of August 31, 2020, there were over 153,115 confirmed cases of COVID-19 and over 1,700 deaths from COVID-19—Governor Bill Lee issued Executive Order No. 23 in April 2020, requiring all Tennesseans to stay at home unless they are carrying out essential activities or engaging in essential services. The order also requires individuals who leave their home to adhere to social distancing

measures recommended by the CDC, including “[m]aintaining a distance of at least six (6) feet between themselves and others, except for family or household members.”

35. In his announcement that the state’s stay-at-home order would expire April 30, 2020, Governor Bill Lee stated, “For the good of our state, social distancing must continue.”²⁴ Indeed, the August 28, 2020 Executive Order extending the state of emergency in Tennessee provides that “[s]ocial distancing remains imperative.”

36. Shelby County, too, affirmed on August 24, 2020 in a Public Health Directive that “[i]ndividuals must practice social distancing” and must wear masks in public. Social distancing is not possible in the Shelby County Jail.

B. People Detained in the Jail Face a Heightened Risk of COVID-19 Transmission

37. The conditions at correctional facilities such as the Jail pose a heightened risk for the spread of COVID-19. Other enclosed group environments, such as cruise ships and nursing homes, have also seen extremely high COVID-19 transmission rates.²⁵ In the United States, no environments have suffered more than prisons and jails: More than 186,000 people in jails and prisons have been infected with the coronavirus, and more than 1,100 incarcerated people and correctional officers have died.²⁶ In fact, of the

²⁴ Natalie Allison, *Gov. Bill Lee Won’t Extend Tennessee Stay-at-Home Order Past April 30; Some Businesses Expected to Reopen Next Week*, TENNESSEAN (Apr. 20, 2020), <https://www.tennessean.com/story/news/politics/2020/04/20/tennessee-gov-wont-extend-coronavirus-home-order/5166816002/>.

²⁵ *See, e.g.*, Joshua Rhett Miller, *Coronavirus deaths at US nursing homes, long-term facilities reach over 10,000*, N.Y. POST (Apr. 23, 2020), <https://nypost.com/2020/04/23/coronavirus-deaths-at-us-nursing-homes-reach-over-10000/>; Minyvonne Burke, *10 dead, over 800 test positive in coronavirus outbreaks on Princess cruises, CDC says*, NBC NEWS (Mar. 24, 2020), <https://www.nbcnews.com/health/health-news/10-dead-over-800-test-positive-coronavirus-outbreaks-princess-cruises-n1167716>.

²⁶ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (last visited Sept. 3, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

100 largest known clusters of the disease in the United States, 88 are connected to correctional facilities, as are all of the fifteen largest clusters.²⁷

38. At correctional facilities, such as the Jail, where incarcerated people are required to live and sleep in close proximity, social distancing is typically impossible. People at the Jail are generally confined either in small cells with at least one other person, or in dormitory-style pods with dozens of other people. When they are permitted into communal areas, including to receive meals, take medication, or make phone calls, they are regularly in close proximity to others.

39. The risk from the inability to safely practice social distancing is compounded by the lack of access to hygiene products necessary to prevent the spread of the disease and the poorly ventilated indoor environment. In previous epidemics and pandemics, infection rates in jails and prisons have been higher than in the general population.

40. Notwithstanding the already difficult conditions in the Jail, Defendants have pepper-sprayed detainees on at least two occasions during the coronavirus pandemic. On April 29, 2020, staff at the Jail pepper-sprayed detainees in medical isolation for COVID-19. This exacerbated the difficulty of breathing for many persons already experiencing symptoms, including shortness of breath, nausea, vomiting, coughing up blood, fevers, and chills.

41. On May 19, 2020, staff at the Jail forced detainees who had been in quarantine for having contracted or been exposed to COVID-19 back into the general population. Those being moved from medical isolation were not retested for COVID-19

²⁷ *Id.*

prior to being moved, nor were they screened for symptoms of COVID-19. Many detainees resisted the move because it put other people in the Jail at risk of increased exposure to the virus: as one person in quarantined housing put it, “All we are looking for is to be re-tested before we are re-classified and rehoused. . . [I feel] a moral obligation” not to pass the virus to anyone else.²⁸ Jail staff pepper-sprayed those individuals who refused to move out of quarantine.

C. Defendants Failed to Adopt or Amend Policies in Response to the COVID-19 Pandemic

42. The Jail has in place a number of standard policies and operating procedures relating to medical care for detainees, but *not a single one* of these policies or procedures has been updated to reflect the impact of COVID-19.²⁹

43. One of these policies, Policy 199 (“Exposure Control Plan Communicable Disease), specifically references Tuberculosis, Hepatitis A, B, and C, and HIV, but makes no mention of COVID-19. Several policies have not been revised in years. It is no wonder that the Jail has been caught flat-footed in its response to COVID-19.

D. Defendants Have Utterly Failed to Remediate the Unconstitutional Conditions in the Jail

44. Notwithstanding the myriad ways in which the deficient conditions in the Jail have been brought to Defendants’ attention—Plaintiffs’ demand letter, complaints, declarations, and testimony; the reports and testimony of two expert inspectors; and the

²⁸ Yolanda Jones, *Inmates at 201 Poplar pepper-sprayed over move after COVID quarantine*, DAILY MEMPHIAN (May 19, 2020), <https://dailymemphian.com/article/14169/covid-19-201-poplar-anthony-buckner-shelby-county-sheriffs-office>.

²⁹ See ECF No. 27-1 Ex. A (Inmate Medical and Mental Healthcare Policy; Inmate/Detainee Sick Call Policy; Inmate/Detainee Grievance Process; Inmates Medical Rights Policy; Inmates/Detainees Rights; Exposure Control Plan Communicable Disease Policy; Communicable Disease Response Policy; Infection Control Program; Inmate Medical Screening Policy; and Inmate Clothing, Bedding, Linen Supplies and Hair Care Policy).

Court's August 7, 2020 Order urging Defendants to "improv[e]" the Jail's current practices in light of the Court's "grave areas of concern"—Defendants have taken little or no corrective action.

45. Indeed, the Court found in its Order that the inadequacies in the conditions at the Jail were "remediable in short time" and could be "quickly cure[d]." Nevertheless, Defendants have simply failed to remedy the unconstitutional conditions that the Court identified.

1. Non-Testing Policy and Inadequacy of Isolation and Quarantine

46. Despite concerns raised by the Court about the efficacy of the Jail's so-called "timing-out," non-testing policy in light of blatant failures to quarantine and isolate exposed detainees observed by both expert inspectors, the Jail persists in relying on this flawed practice. As the Court noted, a "timing out" strategy could theoretically be effective if the necessary steps are followed.³⁰ However, the Jail's quarantine and isolation practices are not, and have never been, sufficient to ensure the viability of this strategy.

47. The Jail still does not test for COVID-19 upon the intake of new arrestees. If someone displays symptoms of COVID-19, he is booked into the Jail but is escorted to an isolation pod. Yet so-called isolation pods regularly receive new detainees, and the "timing-out" clock does not restart for detainees previously living in those pods. Thus, when a detainee moves out of the isolation pod after 14 days, it is possible that he has been newly exposed to a detainee who has just moved into the isolation pod. Timing-out

³⁰ ECF No. 124 at Pg.ID 2805.

cannot be an effective strategy against preventing the spread of the virus where, as here, quarantine and isolation practices are not properly adhered to.

48. Further, the individuals in post-booking “isolation” themselves cannot maintain social distancing from others in their unit, as both Mr. Brady and Dr. Venters observed. Individuals housed in the lower-level units for isolation have cellmates in close proximity and have no choice but to be physically near others to use the phone, receive medication, or receive meals. The CDC recommends housing people in individual cells with solid doors, and specifically cautions against the use of cohorting of potential or suspected cases of COVID-19 and the introduction of new people into a quarantine unit at any point during the fourteen-day quarantine period.³¹ The use of the Jail’s “quarantine” practice—which allows for multiple people in a cell within six feet of one another, without solid walls or a solid door—appears nowhere on the list of acceptable quarantine practices in the CDC’s guidance: Transfer to another facility to enable quarantining is preferred.³²

49. In light of these shortcomings, the Jail’s poor testing response is rendered even more damaging. In flagrant disregard of CDC guidelines, which explicitly caution against the use of such a “symptom-based strategy,” the Jail limits its testing to individuals whom staff members determine to be symptomatic.³³ And even when detainees have requested tests because they suspect they have been infected, their

³¹ Centers for Disease Control, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional Detention Facilities* (updated July 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Quarantine_inside.

³² *Id.*

³³ Centers for Disease Control, *Testing in Correctional & Detention Facilities* (updated Aug. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/testing.html> (“Accumulating evidence supports ending isolation and precautions for persons with COVID-19 using a symptom-based strategy.”).

requests have been denied. Infected individuals are not retested before they are moved back into their original pod.

50. Under these circumstances, the timing-out, non-testing policy is fundamentally flawed and puts all detainees in the Jail at grave risk of infection.

2. Lack of Barriers to Circulation of Infected Air

51. Critically, Dr. Venters also observed that cells used for isolation of detainees are open-bar, meaning that air containing potentially infected droplets from within an isolation pod mingles with air outside that cell, resulting in potential exposure for those outside the cell.³⁴ In light of evidence that infected aerosolized droplets can travel between 7 and 16 feet and linger in the air for hours indoors, this “isolation” approach is completely ineffective at preventing infected droplets from being transmitted through the air to people outside the isolation pod or cell. In addition, detainees on other floors confirm based on vents in their cells that air flow circulates among different cells.

52. In light of the reality of airborne transmission of the coronavirus, the open-bar units used for medical isolation of COVID-19 positive detainees on the second floor is profoundly unsafe—even more so given the detention of many medically vulnerable detainees on the second floor near the medical unit. In this respect, too, Defendants are evincing grave disregard to the health and safety of Plaintiffs and the other detainees in their care.

3. Impossibility of Social Distancing

53. Social distancing—the cornerstone of the prevention of the spread of COVID-19—is impossible at the Jail and is in any event not encouraged or enforced by

³⁴ ECF No. 107 ¶ 22.

the staff. Beyond a video about COVID-19 that is played periodically, the Jail provides no instruction on social distancing to detainees. Jail staff does not implement or enforce social distancing practices, nor are there enough staff members to do so.

54. The layout of the Jail is as follows:

- In the annexes on the lower level, where new detainees are confined during their purported isolation, there are a series of open-bar cells with common areas.
- The second floor has the Jail's medical unit and several small open-bar living units where certain medically vulnerable detainees live. There is no common area.
- The third and fourth floors are lined with two-person open-bar cells and feature common areas.
- The fifth and sixth floors are dormitory-style floors, with units that contain 64 beds.³⁵ The pods are accessed through a sally port.

55. Most detainees live in pods with cells lining an open communal area, as on the third and fourth floors. Every cell has at least one person, and most have two people. When more than one person is in a cell, it is impossible to maintain a six-foot distance from one another. Detainees report spending up to 30 to 48 hours at a time in the same cell with another person. Class members sleep in bunk beds, with each bed three to four feet from one another. Each cell also has an open toilet area and a sink that is shared by

³⁵ When asked about housing detainees in dormitory-style pods during the pandemic, Dr. Donna Randolph, medical director at the Jail, testified, "I don't think that would be really a good idea." (ECF No. 99-1, at Pg.ID 1496.) She cited the fact that "all the beds are stacked together a couple of feet apart, and there might be, say, 40 beds in one room." (*Id.*)

both cellmates. Showers are in the communal area of the pod and are shared by all members of the pod.

56. Because of staff shortages in the Jail, detainees are receiving no more than a few hours of “recreation time” per week. During recreation time, all detainees within a pod may enter the communal area of the pod, where they can eat meals, use the phone, shower, sit at a table, or use a touch-screen kiosk to order items from the commissary. This limited recreation time is each detainee’s only opportunity to participate in necessary activities, including communication with family or their lawyer, showering, or ordering commissary items, including supplemental nutrition and hygiene items. Detainees are not staggered in their time to attend to these needs. The jail staff have not moved the phones, tables, or kiosks farther apart, nor have they provided additional phones, tables, or kiosks. As a result, the only way to access showers, phones, meals, and commissary is in close contact with dozens of other incarcerated people. It is not possible for detainees to remain six feet away from other detainees while participating in any of those activities. When people eat, four to five men sit at same table, and they are much closer than six feet from one another.

57. When detainees go to see the medical provider, others who have appointments at the same time stand in line outside the medical unit. Those in line stand less than six feet apart and are not instructed to, nor able to, maintain social distance.

58. The Jail undertook certain meager measures to promote social distancing in anticipation of the inspection by Mr. Brady. These practices have largely lapsed following the inspection, and social distancing remains impossible in the Jail.

59. Some detainees in the dorm-style pods received new bunk assignments prior to Mr. Brady's arrival in the Jail, so that every other bunk would be left empty (though detainees were still not sleeping six feet apart from others). The week after the inspection, detainees were reassigned to their original bunks. Other detainees have not observed any reassignment of bunks in order to increase spacing and have never even received an instruction to sleep head-to-foot with their bunkmates.

60. Tape demarcating six feet of distance was applied to the floor for the pill call line in some pods prior to the inspection, but detainees were never instructed on its meaning and thus did not use it to distance themselves from others. In any case, the tape has come up from the ground and has not been replaced, and social distancing in the pill call line is not possible.

4. Increase in Jail Population and Failure to Consider Individuals for Release

61. In its Order, the Court found that “[r]educing 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.” The Court therefore asked the Jail to consider “alternatives to confinement” and observed that “it does not appear that the unique circumstances of the pandemic are playing the role that they should.”

62. The Court and its independent inspector found that there was “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.” This remains unchanged.

63. Defendants represented in July 2020 that the population in the Jail had declined since the onset of the pandemic. However, since the conclusion of the evidentiary hearing held by the Court that concluded July 13, 2020, the population in the Jail has increased by approximately 100 people and is currently close to 2000. Detainees report that they have observed no reduction in the number of people living in their pod (except for the removal of detainees who test positive for COVID-19).

64. Several Named Plaintiffs who are medically vulnerable and disabled have heard nothing from anyone at the Jail regarding their medical vulnerability to COVID or any precautions that could be taken within the Jail to help prevent infection among this population. They are aware of no housing reassignments intended to protect them from the high risk of severe illness or death if they are infected with COVID-19, nor are they aware of any consideration by the Jail of release or alternatives to incarceration.

65. This inattention is unfortunately consistent with the Jail's stated policy for medically vulnerable people in its custody: Medical director Dr. Donna Randolph testified that she did not treat the medically vulnerable in the Jail differently from others in the population. Rather, she "just tr[ies] to take care of everybody the same and tr[ies] to keep everybody safe, whether they have a chronic condition or they don't."³⁶ Dr. Randolph likewise testified that she has had no discussions with the Jail expediter about the potential release of any medically vulnerable detainees during the COVID-19 pandemic, because she believes her patients "are well cared for."³⁷

³⁶ ECF No. 99-1, at Pg.ID 1509.

³⁷ *Id.* at Pg.ID 1540–41.

66. The rising population at the Jail, coupled with detainees' reports that they are aware of no efforts to consider release of detainees or any alternatives, or even to meaningfully improve conditions inside the jail to limit the spread of infection, indicates that Defendants have ignored the Court's plea.

5. Unavailability of Video-Conferencing for Court Hearings

67. The Court's independent inspector made the disturbing observation that detainees who were supposedly isolated or quarantined as part of the Jail's timing-out policy were routinely being transported to and from court for hearings and kept in holding cells with dozens of other detainees with no ability to social distance. The inspector determined that this practice "completely undermine[d] the integrity and purpose" of the timing-out policy.

68. In response, Defendants presented testimony at the evidentiary hearing that, as of mid-July, they were finalizing the installation of hardware to permit court conferences to be held by video, in order to minimize opportunities for transmission of the virus during transport to and from court.³⁸ While video-conferencing for court hearings has apparently been deployed for arraignments, detainees uniformly report that they have never used a video-conferencing system to attend court dates and do not know any other individual who has done so.

69. Relatedly, detainees—who have not been adjudicated guilty of a crime, and some of whom are medically vulnerable—have waited four to five months between court dates while they remain confined in an environment in which they are unable to take meaningful precautions to avoid exposure to COVID-19.

³⁸ ECF No. 111 at Pg.ID 2237–38.

70. Further, jury trials are currently suspended in Shelby County. For Plaintiffs and Class members, this reduces their avenues for release to only two: raise enough money to post bail from a jail cell, or plead guilty to receive a plea offer without an opportunity to exercise their right to trial or advance available defenses. This suspension of the criminal court process will only continue to cause the population in the jail to balloon.

6. Hygiene and Cleaning Supplies

71. The Jail implemented certain improvements to the availability of hygiene and cleaning supplies in preparation for Mr. Brady's inspection. These improvements were short-lived.

72. For example, filled soap dispensers were placed in bathrooms prior to Mr. Brady's arrival. The soap dispensers sat empty and were not refilled for several weeks. Following the evidentiary hearing before the Court, certain pods were on "lockdown" and had no access to the commissary to purchase soap for a period of two weeks.

73. An "environmental team" likewise began spraying down showers and toilets before Mr. Brady's inspection. That practice ceased approximately one week after the inspection.

74. And, prior to the inspection, bleach tablets were made available to those with janitorial responsibilities in the pod. Since the inspection, they have received Biovex spray alone, with no materials to wipe down showers and toilets.

75. Finally, detainees have never had access to hand sanitizer.

7. *Ineffective and Inconsistent Use of PPE*

76. Detainees do not receive gloves, nor do Jail staff wear gloves. While Jail staff wear masks, consistent with Mr. Brady's findings in his inspection, staff frequently lower their masks below their chins when they speak.

77. People detained in the Jail report having received masks that are several months old, which they wash in the laundry or by hand in the sinks in their cells, using the same bars of soap they use to wash their hands.

E. CLASS ACTION ALLEGATIONS

78. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedures on behalf of themselves and classes of similarly situated individuals consisting of all pre-trial detainees in the custody of the Jail (the "Plaintiff Class") and on behalf of two subclasses (the "Medically Vulnerable Subclass" and the "Disability Subclass").

79. The Plaintiff Class is defined as follows: All current and future persons held at the Jail in pretrial custody during the coronavirus pandemic.

80. The Medically Vulnerable Subclass is defined as follows: All current and future persons held at the Jail in pretrial custody during the coronavirus pandemic who are aged 65 years and older; have cancer; have chronic kidney disease; have chronic lung disease, including chronic obstructive pulmonary disease, emphysema, chronic bronchitis, and pulmonary fibrosis; are in an immunocompromised state from organ, blood, or bone marrow transplant, immune deficiencies, HIV, or use of corticosteroids and other immune weakening medicines; are obese (body mass index of 30 or higher); have serious heart conditions, including heart failure, coronary artery disease, cardiomyopathies, and hypertension; have sickle cell disease; have diabetes; have

moderate-to-severe asthma; have cerebrovascular disease; have cystic fibrosis; have hypertension or high blood pressure; have neurologic conditions; have liver disease; have pulmonary fibrosis; are pregnant; smoke; or have thalassemia

81. The Disability Subclass is defined as follows: All current and future pretrial detainees in custody at the Jail during the coronavirus pandemic who are medically vulnerable because of a disability as defined in the ADA and the Rehabilitation Act. The Disability Subclass includes people with all conditions listed in paragraph 80, except those who are medically vulnerable solely because of age, uncomplicated pregnancy, or BMI.

82. Plaintiffs reserve the right to amend the class or subclass definition or establish additional subclasses as appropriate if discovery or further investigation reveals the class should be expanded or otherwise modified.

83. This action has been brought and may properly be maintained as a class action under Federal law. It satisfies the numerosity, commonality, typicality, and adequacy requirements for maintaining a class action under Fed. R. Civ. P. 23(a).

84. Joinder is impracticable because (1) the classes are numerous; (2) the classes include future members; and (3) the class members are incarcerated, rendering their ability to institute individual lawsuits limited, particularly in light of reduced legal visitation and court closures in Shelby County.

85. Numerosity: On information and belief, there are at least 1900 people in the proposed Plaintiff Class. The proposed subclasses each include at least 400 people. The information regarding the exact size of the Plaintiff Class and the subclasses, as well as the identity of the members of each are in the exclusive control of the Defendants.

86. Commonality: Common questions of law and fact exist as to all members of the proposed classes and subclasses, including (a) whether and to what extent the Jail is failing to provide incarcerated people constitutionally adequate COVID-19 prevention, testing, and treatment; (b) whether Defendants' social distancing, health, and hygiene policies and procedures, and actions taken in response to the COVID-19 pandemic violate the Fourteenth Amendment to the United States Constitution; and (c) whether Defendants' policies and practices discriminate against people with disabilities in violation of federal disability rights laws.

87. Typicality: The claims of Plaintiffs are typical of those of the class as a whole, including because (a) each Plaintiff is currently in Defendants' custody; and (b) Plaintiffs' and all class members' claims arise from the same wrongful acts, omissions, policies and practices of Defendants, and are based on the same legal theories.³⁹

88. Adequacy: Plaintiffs have the requisite personal interest in the outcome of this action and will fairly and adequately protect the interests of the class. Plaintiffs have no interests adverse to the interests of the proposed class. Plaintiffs retained *pro bono* counsel with experience and success in the prosecution of civil rights litigation. Counsel for Plaintiffs know of no conflicts among proposed class members or between counsel and proposed class members.

89. Defendants have acted on grounds generally applicable to all proposed class members, and this action seeks declaratory and injunctive relief. Plaintiffs therefore seek class certification under Rule 23(b)(2).

³⁹ All Named Plaintiffs except for Mr. Martinez are medically vulnerable and disabled. Mr. Martinez does not seek to represent the subclasses or bring claims under § 2241, the Americans with Disabilities Act, or the Rehabilitation Act.

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90. In the alternative, the requirements of Rule 23(b)(1) are satisfied because prosecuting separate actions would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of contact for the party opposing the proposed classes.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Unconstitutional Punishment in Violation of the Fourteenth Amendment to the U.S. Constitution

28 U.S.C. § 2241

The Medically Vulnerable and Disability Subclasses Against All Defendants

91. Plaintiffs repeat and re-allege each and every allegation above, as if set forth in full herein.

92. Under the Fourteenth Amendment, persons in pretrial custody cannot be punished as part of their detention. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Punishment is established if the jailer's conduct is either not rationally related to a legitimate, nonpunitive government purpose or excessive in relation to that purpose.

93. Under general circumstances, Defendants can hold pretrial detainees if, after making individualized findings based on the person's flight risk and danger to the community, and evaluating less restrictive options than jail, it is clear that nothing short of detention will mitigate a credible risk of flight or danger. But and as a condition of holding persons in pretrial custody, the Jail must provide them with health care services and a safe environment, and cannot punish them. Here, Defendants have exposed the Named Plaintiffs and the Medically Vulnerable and Disability Subclass members to high risk of severe infection or death from COVID-19. Continuing to detain the Named

Plaintiffs and the Class members is punitive, not rationally related to a legitimate purpose, and/or excessive in relation to any legitimate purpose.

SECOND CLAIM FOR RELIEF
**Unconstitutional Confinement in Violation of the Fourteenth Amendment to the
U.S. Constitution**
28 U.S.C. § 2241

The Medically Vulnerable and Disability Subclasses Against All Defendants

94. Plaintiffs repeat and re-allege each and every allegation above, as if set forth in full herein.

95. Under the Fourteenth Amendment, corrections officials are required to provide for the reasonable health and safety of persons in pretrial custody. *Youngberg v. Romeo*, 457 U.S. 307, 315–16, 324 (1982) (referencing state’s “unquestioned duty” to provide adequate medical care for detained persons).

96. Corrections officials are required to provide for the reasonable health and safety of persons in pretrial custody, including risks of future harm to their health and safety. *See Helling v. McKinney*, 509 U.S. 25, 33–34 (1993) (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . . [i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them”).

97. The relevant constitutional provision for pretrial detainees is not the Eighth Amendment but is, instead, the Due Process Clause of the Fourteenth Amendment. “[T]he due process rights of a person [in pretrial custody] *are at least as great as* the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (emphasis added). Indeed, in

Kingsley v. Hendrickson, the Supreme Court applied a lower standard to a pretrial detainee's excessive force claim Fourteenth Amendment than that required of convicted prisoners. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (holding that the appropriate standard for a pretrial detainee's excessive force claim is "solely an objective one"). The Sixth Circuit has noted that *Kingsley* "calls into serious doubt" whether a pretrial detainee must make the same showing as a convicted prisoner when raising a Fourteenth Amendment deliberate indifference claim. *See Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (recognizing the "shift in Fourteenth Amendment deliberate indifference jurisprudence [that] calls into serious doubt whether [the plaintiff] need even show that the individual defendant-officials were subjectively aware of her serious medical conditions and nonetheless wantonly disregarded them").

98. If the Court concludes that pretrial detainees must make the same showing as a convicted person, deliberate indifference to the serious risk COVID-19 poses to members of the Class violates this right.

99. The Medically Vulnerable and Disability Subclasses are at high risk of severe infection from COVID-19. The Jail is rife with confirmed cases of COVID-19. Class members, because of their medical conditions and COVID-vulnerability, cannot be safe in the facilities in which they are housed at the Jail. The only way to ensure their safety and protect their constitutional rights is through release. Defendants are aware of the risk to the safety of the Named Plaintiffs and the Subclass members, but they have not taken steps to release them. Defendants are therefore deliberately indifferent to the safety of the Named Plaintiffs and the Subclass members.

THIRD CLAIM FOR RELIEF

Discrimination on the Basis of Disability in Violation of Title II of the ADA

42 U.S.C. § 12131, *et seq.*/28 U.S.C. § 2241
The Disability Subclass Against All Defendants

100. Plaintiffs repeat and re-allege each and every allegation above, as if set forth in full herein.

101. Title II of the ADA requires that public entities refrain from discriminating against qualified individuals on the basis of disability. 42 U.S.C. § 12132. The regulations implementing Title II of the ADA require that public entities avoid policies, practices, criteria, or methods of administration that have the effect of excluding or discriminating against persons with disabilities in the entity's programs, services, or activities. 28 C.F.R. § 35.130(a), (b)(3), (8). Further, a public entity must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

102. Plaintiffs Busby, Edwards, Leaks, Nelson, and Phillips, and members of the Disability Subclass are individuals with disabilities for purposes of the ADA. 42 U.S.C. § 12102. They are "qualified" for the programs, services, and activities being challenged herein. 42 U.S.C. § 12131(2).

103. Defendants are violating Title II of the ADA by failing to make the reasonable modifications necessary to ensure equal access to adjudication, jail services, and release for people with disabilities who face high risk of severe infection or death from COVID-19. Defendants are further violating the ADA by employing methods of administration that tend to discriminate against people with disabilities.

FOURTH CLAIM FOR RELIEF

**Discrimination on the Basis of Disability in Violation of Section 504 of the
Rehabilitation Act**

29 U.S.C. § 794/28 U.S.C. § 2241

The Disability Subclass Against All Defendants

104. Plaintiffs repeat and re-allege each and every allegation above, as if set forth in full herein.

105. Section 504 of the Rehabilitation Act states that “no qualified individual with disability in the United States . . . shall, solely by reason of [] disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). The regulations implementing Section 504 of the Rehabilitation Act require that entities receiving federal financial assistance avoid unnecessary policies, practices, criteria, or methods of administration that have the effect of discriminating against persons with disabilities. 28 C.F.R. § 41.51(b)(3)(i).

106. Defendants receive “Federal financial assistance” within the meaning of 28 U.S.C. § 794(a).

107. Plaintiffs Busby, Leaks, Edwards, Nelson, and Phillips, and members of the Disability Subclass are individuals with disabilities for the purposes of the Rehabilitation Act, 42 U.S.C. § 12012, 29 U.S.C. § 705(20)(B). They are “qualified” for the programs, services, and activities being challenged herein.

108. Defendants are violating Section 504 of the Rehabilitation Act by failing to make the reasonable modifications necessary to ensure equal access to adjudication, jail services, and release for people with disabilities who are at high risk of severe infection or death from COVID-19. Defendants are further violating the Section 504 by

employing methods of administration that tend to discriminate against people with disabilities.

FIFTH CLAIM FOR RELIEF

Unconstitutional Punishment in Violation of the Fourteenth Amendment to the U.S. Constitution

All Plaintiffs Against All Defendants
42 U.S.C. § 1983

109. Plaintiffs repeat and re-allege each and every allegation above, as if set forth in full herein.

110. Under the Fourteenth Amendment, persons in pretrial custody cannot be punished as part of their detention. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Punishment is established if the jailer's conduct is either not rationally related to a legitimate, nonpunitive government purpose or excessive in relation to that purpose.

111. Under normal conditions, pretrial detention may be justified in response to an unmitigable risk of flight or danger to others, and if no less restrictive conditions of release are able to manage said risk. Incarcerating pretrial detainees under circumstances in which they are not reasonably safe from a life-threatening disease is excessive in relationship to these narrow government purposes. The Jail is on notice of the deficient conditions for its detainees but has nevertheless failed to remedy those conditions. Continuing to detain Plaintiff Class members without making the Jail compliant with COVID-19-specific guidance from public health experts is not rationally related to, and is excessive in relation to, that purpose. Because these failures violate Plaintiffs' Fourteenth Amendment rights, Defendants should be enjoined to remedy the failures that cause Plaintiffs' detention to amount to impermissible punishment. To the extent these failures

cannot be remedied, the Medically Vulnerable and Disability Subclass Members seek habeas relief as noted in Claim One.

SIXTH CLAIM FOR RELIEF
**Unconstitutional Conditions of Confinement in Violation of the Fourteenth
Amendment to the U.S. Constitution**
42 U.S.C. § 1983

112. Plaintiffs repeat and re-allege each and every allegation above, as if set forth in full herein.

113. Under the Fourteenth Amendment, corrections officials are required to provide for the reasonable health and safety of persons in pretrial custody. *Youngberg v. Romeo*, 457 U.S. 307, 315–16, 324 (1982) (referencing state’s “unquestioned duty” to provide adequate medical care for detained persons).

114. Corrections officials are required to provide for the reasonable health and safety of persons in pretrial custody, including risks of future harm to their health and safety. *See Helling v. McKinney*, 509 U.S. 25, 33–34 (1993) (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . . [i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them”).

115. The relevant constitutional provision for pretrial detainees is not the Eighth Amendment but is, instead, the Due Process Clause of the Fourteenth Amendment. “[T]he due process rights of a person [in pretrial custody] *are at least as great as* the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (emphasis added). Indeed, in *Kingsley v. Hendrickson*, the Supreme Court applied a lower standard to a pretrial

detainee's excessive force claim under the Fourteenth Amendment than that required of convicted prisoners. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (holding that the appropriate standard for a pretrial detainee's excessive force claim is "solely an objective one"). The Sixth Circuit has noted that *Kingsley* "calls into serious doubt" whether a pretrial detainee must make the same showing as a convicted prisoner when raising a Fourteenth Amendment deliberate indifference claim. *See Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (recognizing the "shift in Fourteenth Amendment deliberate indifference jurisprudence [that] calls into serious doubt whether [the plaintiff] need even show that the individual defendant-officials were subjectively aware of her serious medical conditions and nonetheless wantonly disregarded them").

116. If the Court concludes that pretrial detainees must make the same showing as a convicted person, deliberate indifference to the serious risk COVID-19 poses to members of the Class violates this right.

117. The Jail has failed to act reasonably in response to the risk to the Plaintiff Class posed by COVID-19. It has failed to comply with public health guidelines to manage an outbreak of COVID-19 and cannot provide for the safety of the Plaintiff Class. Defendants' actions and inactions result in the confinement of members of the Plaintiff Class in a jail where they failed to test for, prevent, or treat COVID-19 outbreaks, in violation of Plaintiffs' rights to treatment and adequate medical care. Because these failures violate Plaintiffs' Fourteenth Amendment rights, Defendants should be enjoined to remedy the failures that render Plaintiffs' detention intolerably unsafe. To the extent these failures cannot be remedied, the Medically Vulnerable and Disability Subclass Members seek habeas relief as noted in Claim Two.

REQUEST FOR RELIEF

118. Plaintiffs and Class Members respectfully request that the Court order the following:

- (1) Certification of this Petition and Complaint as a Class Action;
- (2) An injunction requiring the Jail to:
 - (a) Eliminate the “critical system failure of the[] timing-out strategy” by implementing a test-based strategy for detecting and preventing the spread of COVID-19, pursuant to which new detainees are tested for COVID-19 at intake and “periodic testing” is performed throughout the Jail;⁴⁰
 - (b) Address the threat of airborne transmission of COVID-19 to ensure proper quarantine and isolation of detainees who have been exposed;
 - (c) Ensure the consistent availability of cleaning supplies for sanitizing individual and common areas;
 - (d) Provide fresh masks for all detainees on at least a weekly basis;
 - (e) Provide free soap to all detainees;
 - (f) Maximize social distancing, through strategies to be outlined by a qualified expert pursuant to Federal Rule of Evidence 706, by addressing at a minimum:
 - (i) The practices, housing arrangements, and staffing and population levels needed to allow for at least six feet of social distancing at all times, taking into account the dimensions of each living unit; distance between beds; size and location of toilets, showers, tables, and phones; size of day rooms and other commonly used facilities; and staffing levels;
 - (ii) The reconfiguration of sleeping arrangements so that detainees sleep at least six feet from one another, including through use of the previously vacant sixth floor;

⁴⁰ ECF No. 124 at Pg.ID 2816–17.

- (iii) The arrangement of the eating space and/or meal schedules to permit adequate social distancing during mealtimes and, if recommended, the use of tape markers to show six feet of distance along with training and oversight by Jail staff;
 - (iv) Strategies to ensure social distancing in the pill call line to address the “cruel ask” of “[r]equiring medically-vulnerable detainees to receive their medications by waiting in a crowded line”;⁴¹
 - (v) Whether alternate housing arrangements or structural modifications are necessary to address the airborne spread of COVID-19 in the Jail;
 - (vi) Whether alternative practices, housing arrangements, and staffing and population levels are needed to ensure the safety of medically vulnerable and disabled Subclass members during the course of the COVID-19 pandemic;
- (g) Reduce the Jail population by establishing a systematic process by which stakeholders, including the Jail’s expediter, must consider release or other alternatives to detention for each medically vulnerable detainee, and address the Court’s “particular concern” by focusing this analysis on “safety or flight risks in the present,” rather than “repeat offenses in the past”;
- (h) Implement a system to ensure that disabled subclass members have access to reasonable modifications and nondiscriminatory methods of administration to avoid disability discrimination;
- (i) Permit Mr. Brady to conduct ongoing unannounced inspections of the Jail to determine the full extent to which the facility is implementing necessary safety measures;
- (3) If, after issuing the above relief pursuant to § 1983, the ADA and the Rehabilitation Act, the Court concludes that a violation of Plaintiffs’ constitutional and statutory rights persists, or if the Court concludes that issuing the above relief would not adequately

⁴¹ *Id.* at Pg.ID 2819.

remedy a violation of the Subclass members' constitutional and statutory rights;

- (a) An order pursuant to § 2241 or § 1983, the ADA, and the Rehabilitation Act imposing a process—to be determined by the Court—to consider the habeas corpus release and/or enlargement of custody of all Subclass members, considering:
 - (i) the deprivation of the petitioner-plaintiff's federal rights posed by the COVID-19 outbreak (including the disability discrimination for Subclass members and the necessity of providing modifications including release);
 - (ii) any competent evidence that the individual poses a present, serious risk of flight or danger to others;
 - (iii) whether, by clear and convincing evidence, any present risk of flight of danger outweighs the threat to the petitioner's health and safety posed by his exposure to COVID-19 in the Jail, after considering alternative conditions to manage the risk(s) presented;
 - (b) Granting a preliminary injunction, permanent injunction, and/or writ of habeas corpus requiring continued reporting as to the future members of the Class and Subclass, and requiring Defendants to divert Class and Subclass members from incarceration at the Jail, including, but not limited to, by exercising their authority under T.C.A. §§ 8-8-221 and 40-7-120;
- (4) A declaration that the Jail's policies violate the Fourteenth Amendment right against cruel and unusual punishment with respect to the Plaintiff Class;
 - (5) A declaration that the Jail's policies violate the Fourteenth Amendment rights to be free from punishment prior to conviction with respect to the Plaintiff Class;
 - (6) A declaration that the Jail's policies violate the ADA and Rehabilitation Act with respect to the Disability Subclass;
 - (7) An award of Plaintiffs' attorney fees and costs under 42 U.S.C. § 1988 and other applicable law; and

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(8) Any further relief this Court deems appropriate.

Dated: September 15, 2020

Respectfully submitted,
/s/ Brice Timmons
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* = pro hac vice application forthcoming
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